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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

231, 232, 233, 234, U. S.

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BY

THE PUBLISHERS' EDITORIAL STAFF

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1926.

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OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

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HON. EDWARD DOUGLASS WHITE.

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HON. OLIVER WENDELL HOLMES,
HON. WILLIAM R. DAY,
HON. HORACE H. LURTON,
HON. CHARLES EVANS HUGHES,
HON. WILLIS VAN DEVANTER,
HON. JOSEPH RUCKER LAMAR,
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JAMES HALL MCKENNEY, ESQ.[2]
JAMES D. MAHER, ESQ.[3]

REPORTER,

HON. CHARLES HENRY BUTLER.

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JOHN MONTGOMERY WRIGHT, ESQ.

[1] Commission ordered recorded October 13, 1913.
[2] Died October 13, 1913.
[3] Appointed October 20, 1913.

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JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

March 18, 1912.

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

For Order of Court Making Allotment, see 56 L. ed. Appendix XL., p. 1208.

Names of Justices, and Whence Appointed.	By Whom Appointed.	Circuits. 1902–1903.	Commissioned.	Sworn in.
Associate Justice OLIVER WENDELL HOLMES, Massachusetts.	President Roosevelt.	First. Me., N. H., Mass., R. I.	1902. (Dec. 4.)	1902. (Dec. 8.)
Associate Justice CHARLES E. HUGHES, New York.	President Taft.	Second. Vermont, Conn., New York.	1910. (May 2.)	1910. (Oct. 10.)
Associate Justice MAHLON PITNEY, New Jersey.	President Taft.	Third. New Jersey, Pa., Del.	1912. (Mar. 13.)	1912. (Mar. 18.)
Chief Justice EDWARD D. WHITE, Louisiana.	President Taft.	Fourth. Md., Va., N. C., W. Va., S. C.	1910. (Dec. 12.)	1910. (Dec. 19.)
Associate Justice JOSEPH R. LAMAR, Georgia.	President Taft.	Fifth. Ga., Ala., Fla., Miss., La., Tex.	1910. (Dec. 17.)	1911. (Jan. 3.)
Associate Justice WILLIAM R. DAY, Ohio.	President Roosevelt.	Sixth. Ky., Tenn., Ohio, Mich.	1903. (Feb. 23.)	1903. (Mar. 2.)
Associate Justice HORACE H. LURTON, Tennessee.	President Taft.	Seventh. Ind., Ill., Wis.	1909. (Dec. 20.)	1910. (Jan. 3.)
Associate Justice WILLIS VAN DEVANTER, Wyoming.	President Taft.	Eighth. Minn., Iowa, Mo., Kan., Ark., Neb., Colo., N. D., S. D., Utah, Wyo., Oklahoma, New Mex.	1910. (Dec. 16.)	1911. (Jan. 3.)
Associate Justice JOSEPH McKENNA, California.	President McKinley.	Ninth. Cal., Or., Nev., Mont., Wash., Idaho, Alaska,* Arizona, Hawaii.*	1898. (Jan. 21.)	1898. (Jan. 26.)

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OF THE

UNITED STATES

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1913.

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[1] WILLIAM J. WOOD, John F. McClure, Frank E. Payne, et al., Appts.,
v.
VANDALIA RAILROAD COMPANY.

(See S. C. Reporter's ed. 1–8.)

Carriers — rate regulation — reasonableness — cost of operation.

The ratio of the total operating expenses of a railroad or of a railroad division to the entire receipts of such railroad or division affords in itself no sufficient basis, when testing the reasonableness of rates prescribed under state authority, for determining the cost of transportation of intrastate freight traffic moving on class rates between two points of such division. Before such ratio can properly be used for this purpose there must be evidence justifying the conclusion that the cost of transportation in proportion to revenue is substantially the same for the particular traffic in question as for the total business of the road or division, or, if there is a material difference, satisfactorily showing its nature and extent.

[For other cases, see Carriers, III. d. in Digest Sup. Ct. 1908.]

[No. 11.]

Argued December 17, 1912. Decided October 20, 1913.

APPEAL from the Circuit Court of the United States for the District of Indiana to review a decree enjoining the enforcement of an order of the Indiana Railroad Commission, prescribing maximum freight rates. Reversed and remanded, with directions to dismiss the bill without prejudice.

The facts are stated in the opinion.

Mr. James E. McCullough argued the cause, and, with Mr. Thomas M. Honan, Attorney General of Indiana, and Messrs. Bernard Korbly and Willard New, filed a brief for appellants:

The special master's report shows upon its face that the finding therein, touching material and controlling facts in the cause, is based upon an erroneous view of the law, and that in reality there is no evidence in the cause to support the finding as to such facts.

Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Willcox v. Consolidated Gas Co. 212 U. S.

NOTE.—On state regulation generally of tolls, rates, and prices—see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 183.

On elements entering into a determination of reasonableness of railroad rates prescribed by state for local traffic—see notes to Pennsylvania R. Co. v. Philadelphia County, 15 L.R.A.(N.S.) 108, and State ex rel. McCue v. Northern P. R. Co. 25 L.R.A.(N.S.) 1001.

On the reasonableness generally of state limitation of railroad rates—see note to Chicago, M. & St. P. R. Co. v. Tompkins, 44 L. ed. U. S. 417.

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19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

In cases of the character of the one in hand, the ordinary rule, that the findings of the master and court below are conclusive upon appeal, unless unsupported by the evidence, or made under an erroneous view of the law, does not obtain.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

Mr. Charles W. Smith also argued the cause, and, with Messrs. Henry H. Hornbrook and Albert P. Smith, filed a brief for appellants:

Every presumption of fact stands for the validity of the order of the railroad commission. One who asserts the invalidity of the order must establish the alleged invalidity with certainty and precision by competent testimony.

Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 173, 44 L. ed. 420, 20 Sup. Ct. Rep. 336; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 264, 46 L. ed. 1156, 22 Sup. Ct. Rep. 900.

The general equity rule that the finding of the master, approved by the trial court, will not be reversed on appeal, does not apply to rate cases.

Minneapolis & St. L. R. Co. v. Minnesota, supra; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 173, 44 L. ed. 420, 20 Sup. Ct. Rep. 336.

No decision in a rate case determines the reasonableness or unreasonableness of the rate except for the particular case.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, 171 U. S. 361, 43 L. ed. 197, 18 Sup. Ct. Rep. 888.

The case for appellee is not made out, even if it has established—which these appellants deny—that the classified freight carried under the order could only be carried at a loss. It must go further and show—the burden of proof is upon it to show— that the entire business of its transportation of all persons, freight, and commodities, where such business is domestic or intrastate, under the rates prescribed by the state, cannot as a total, including the classified freight covered by the order of the commission, be transacted at a fair profit.

Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 267, 46 L. ed. 1151, 1157, 22 Sup. Ct. Rep. 900; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398.

Mr. John G. Williams argued the cause, and, with Messrs. Frederic D. McKenney, D. P. Williams, and S. O. Pickens, filed a brief for appellee:

The decree as rendered is right in every respect, and should be in all things affirmed.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

Mr. Justice Hughes delivered the opinion of the court:

The bill in this suit was filed by the Vandalia Railroad Company, appellee, to restrain the enforcement of an order made by the Railroad Commission of Indiana, on December 14, 1906, prescribing maximum freight rates for certain intrastate traffic. The ground of attack was that the rates so fixed would not yield sufficient revenue to pay the actual cost of the transportation covered by the order, and, hence, that the order violated the 14th Amendment of the Constitution of the United States. The case was referred to a special master, who made a report, sustaining the contention of the railroad company, which was confirmed by the circuit court. Decree was entered accordingly, setting aside the order, and permanently enjoining proceedings to enforce it. Members of the commission, and the shippers on whose petition this action was taken (who were made defendants below), prosecute this appeal.

The assignments of error are addressed to the single point that the evidence failed to warrant the conclusion that the prescribed rates were so unreasonably low that, if they were maintained, the company would be deprived of its property without due process of law.

The Vandalia Railroad Company is a consolidated corporation, organized on January 1, 1905, under the [3] laws of Indiana and Illinois, pursuant to an agreement made by five railroad companies. Of these the Terre Haute & Indianapolis Company owned a railroad extending from Indianapolis westward to the boundary between the states of Indiana and Illinois, and the St. Louis, Vandalia, & Terre Haute Company owned a railroad extending from that point to East St. Louis, Illinois. These two lines, forming a continuous route between In-

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dianapolis and East St. Louis, constituted what was called the St. Louis division of the new company. The other lines entering into the consolidation were the Terre Haute & Logansport, from Terre Haute to Logansport and South Bend, Indiana; the Logansport and Toledo, from Logansport to Butler, Indiana; and the Indianapolis & Vincennes, from Indianapolis to Vincennes, Indiana.

The order applied to that portion of the Vandalia Company's road which lay between Indianapolis and the western boundary of Indiana, a distance of about 80 miles, which originally belonged to the Terre Haute & Indianapolis Company. The order was further limited to the freight traffic moving on "class rates;" that is, to the traffic, having its origin and destination on this part of the company's line, which was embraced in the six classes of the "official classification" as theretofore established by the company. The existing class rates were found by the commission to be unreasonably high, and the maximum rates in question were ordered to be substituted as just and reasonable.

There was no proof of the value of the complainant's property within the state of Indiana, or of the return it received from its entire intrastate business. Nor was there proof of the value of that portion of its road which was affected by the order, or of the return from all of its intrastate business upon that part of its lines. No attempt was made to supply proof of that sort. For all that appears, [4] the Vandalia Company might enjoy, notwithstanding the enforcement of the rates in question, ample revenue from its intrastate operations to give it a fair return both as to all its lines within the state and also as to that portion to which the order referred.

The total tonnage of all kinds of freight on the 80 miles of railroad from Indianapolis to the Illinois boundary cannot be ascertained from the evidence. The amount of traffic moving on commodity rates is not shown. It was found by the master, and it is undisputed, that the gross revenue from the transportation of that portion of the traffic which constituted the classified intrastate freight, on the described 80 miles of road, during the three years prior to the making of the order, was as follows: 1904, $79,803.80; 1905, $91,067.56; 1906, $102,241.15; and that the gross revenue from the same traffic, under the rates prescribed by the commission, would have been in 1904, $52,222.12; in 1905, $60,079.13; in 1906, $66,936.99. This would have been a large reduction in the gross revenue from that particular traffic, but it must not be overlooked that the commission found that the former rates were excessive; and the effect of this reduction upon the company's net return was to be satisfactorily proved, and could not be assumed.

The conclusion in the court below was reached in the following manner: The complainant showed, and the master found, that for the year 1904 the operating expenses upon the line between Indianapolis and the Illinois boundary were 74.50 per cent of the whole earnings upon that line from every source, and that after consolidation, in the years 1905 and 1906, the operating expenses of the entire St. Louis division were respectively 73.03 and 73.64 per cent of the entire earnings of that division. These ratios were then applied for the purpose of determining the expense of transporting that part of the freight which moved under class rates between stations on the road from [5] Indianapolis to the Illinois boundary. Thus, it was assumed that, as the gross revenue from this classified freight was $79,803.80 in 1904, the expense of transporting it was 74.50 per cent of that amount, or $59,453.83; that, in 1905, with a gross revenue of $91,067.56, the expense was 73.03 per cent thereof, or $66,506.64; and that in 1906, with a gross revenue of $102,241.15, the expense was 72.64 per cent, or $74,267.97. According to this method of calculation, the revenue which would have been received under the order of the commission would have been less than the expense of transportation.

It is plain, however, that it does not follow from the mere fact that the total operating expenses of a railroad, or of a division of a railroad, bear a given relation to the entire receipts of that road or division, that the cost of transportation in the case of a particular class of traffic bears the same relation to the revenue derived from that class. The ratio, in the first case, is found by bringing together a great variety of operations involving various rates and different outlays for different sorts of traffic. It is predicated of the whole volume of business considered as such, and may be far from true of some part of it considered separately. It does not purport to be an expression of the relative cost of any specified part, but simply of that of the entire traffic to which it applies.

How hazardous may be the use of such a ratio to determine the relative cost of a fragment of the business is apparent in this case. Thus it appeared that the total gross earnings of the complainant's St. Louis division in the year 1905 was $4,750,811.13. Of this, the entire gross receipts from the classified freight here in question were only $91,067.56, or less than two per

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cent. The expenses of the division for that year were $3,469,544.81, or 73.03 per cent of the total earnings as stated. In 1906, the earnings of the St. Louis division were $5,480,094.77, and the expenses were $3,980,906.90, or 72.64 per cent. These [6] amounts embrace interstate and intrastate traffic, freight and passenger, and all freight, whether moving on class or commodity rates. A large increase or reduction in the class rates on the particular intrastate freight in question, the volume of business being the same (as is the assumption), would have had a very slight effect upon the ratio of cost to earnings based on the entire operations. To illustrate: Had the rates on the small portion of freight here under consideration been 50 per cent higher than they actually were in 1905 and 1906, and had the gross revenue on this traffic been increased accordingly, the total receipts of the division would have been so little enlarged that the ratio of expenses to earnings for the entire division would still have been about 72.33 per cent and 71.97 per cent in those years, respectively. If, on the same amount of traffic, the gross revenue from this classified freight in 1905 had thus been $136,601.34 instead of $91,067.56, and the above ratio were applied to determine the cost of its transportation, that cost would be made to appear to be $98,803.74. On such a calculation, it would follow, of course, that a reduction of 30 per cent even in such rates would bring the revenue on the same amount of business below its cost. Again, it is to be observed that had the rates prescribed by the commission been in force in 1905 and 1906, and had other conditions been the same, the expense ratios for the whole volume of business of the St. Louis division would have been only 73.51 and 73.11 per cent, respectively.

In these circumstances, the ratio of total expense to total earnings affords, in itself, no sufficient basis for determining the cost of the transportation of the particular traffic covered by the order under review. It alone furnishes no ground for invalidating the finding of the commission that the existing rates were exorbitant and that the substituted rates would be fair. Before such a ratio could properly be used in setting forth the cost of a specified [7] portion of the traffic, it would be necessary to have evidence either justifying the conclusion that the cost in proportion to the revenue was substantially the same for that part of the traffic as for the whole, or, if there were a material difference, satisfactorily showing its nature and extent.

In defending the use of the method adopted below, appellee relies upon the case of Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418. There, the legislature of Nebraska had established a classification for all intrastate freight carried by railroad, and had fixed the maximum rates to be charged therefor. With other evidence, the court had before it the testimony and exhibits furnished by one of the defendants in that case, a secretary of the state board of transportation, and a principal witness for that board, who gave the results of his investigations with respect to the traffic of each company within the state. The ratio of expense to earnings on all business done within the state was thus shown, but reliance was not placed upon that alone. This witness also testified that upon the local business the percentage of expense to earnings would be at least 10 per cent more. We need not follow the elaborate analysis of the exhibits in Smyth v. Ames, supra, by which the appellants undertake to elucidate the differences between the traffic conditions there disclosed and those here involved. It is sufficient to say that the case cited cannot be regarded as affording basis for a contention that a ratio of expense to earnings on the entire business of a railroad, or of a division, can be taken to show the cost of some particular item or class of traffic, in the absence of evidence with respect to that traffic which would warrant the conclusion that its cost in proportion to the revenue therefrom could properly be expressed.

Each case, as was pointed out in Smyth v. Ames, must depend upon its special facts; and the record in the present case is barren of the necessary proof. Attention is [8] called to the expense ratio for the former Terre Haute & Indianapolis Company in the year 1904, that is, prior to the consolidation. But this was based on the total business of the road, and no details are furnished showing that this ratio could rightly be applied to that part of it which made up the classified freight in question. There are certain statements with respect to the heavier cost of the operation of local as compared with through trains, but these statements are clearly inadequate. Local traffic may cost more per unit of freight movement than through traffic, but whether it costs more in proportion to revenue is another matter. That, of course, depends upon the rates charged, and is a fact to be proved. Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 462–465, 57 L. ed. 1511, 1567, 1568, 33 Sup. Ct. Rep. 729; Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 505, 506, 57 L ed. 1571, 1593, 1594, 33 Sup. Ct. Rep. 975. There was testimony with respect to the cost of handling freight over

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the platform at the Indianapolis terminal, but this fell far short of the showing required, and it appeared that of the six classes of freight, to which the order applied, the fifth and sixth classes, constituting much more than one half in tonnage of the classified freight, always moved in carload lots loaded by the shipper.

The evidence showed that the class rates on local traffic on the line between Indianapolis and the Illinois boundary, which were maintained by the Vandalia Company, and condemned by the commission as unreasonable, were higher than the class rates for corresponding distances to local stations in Indiana on other lines (including one of the Vandalia Company's divisions) running out of Indianapolis to the east and south. It wholly failed to sustain the contention that the action of the commission in ordering the reduction complained of transcended the limits imposed by the 14th Amendment.

The decree is reversed and the case remanded, with direction to dismiss the bill without prejudice.

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[9] GEORGE A. LURIA, Appt., v. UNITED STATES.

(See S. C. Reporter's ed. 9–28.)

Appeal — question not raised below.

1. The sufficiency of the petition, in a proceeding under the act of June 29, 1906 (34 Stat. at L. 596, chap. 3592, U. S. Comp. Stat. Supp. 1911, pp. 124, 537), § 15, to cancel a naturalization certificate, to tender the issue of fraud on which the case was heard and determined below, cannot be raised for the first time on appeal.

[For other cases, see Appeal and Error, VIII. j, 4, in Digest Sup. Ct. 1908.]

Aliens — naturalization — impeaching certificate.

2. The express declaration in the act of June 29, 1906, § 15, making naturalization certificates impeachable when fraudulently or illegally procured, that the provisions of that section shall apply to certificates issued under prior laws as well as those issued under that act, makes applicable to certificates theretofore issued the provisions of the second paragraph of that section, dealing with the evidential effect of taking up a permanent residence in a foreign country within five years after securing the certificate, although this paragraph was inserted by way of amendment while the section was under consideration in the House of Representatives.

[For other cases, see Aliens, VII., in Digest Sup. Ct. 1908.]

Aliens — naturalization — future residence.

3. The right to naturalization under U. S. Rev. Stat. §§ 2165–2170, U. S. Comp. Stat. 1901, pp. 1329–1333, was by necessary implication conferred upon such aliens only as contemplated the continuance of a residence already established in the United States.

[For other cases, see Aliens, VII., in Digest Sup. Ct. 1908.]

Aliens — naturalization — congressional control — impeaching certificate.

4. Congress did not exceed its power over the naturalization of aliens by providing in the act of June 29, 1906, § 15, for the orderly cancelation, after full notice and hearing, of naturalization certificates which have been procured fraudulently or illegally.

[For other cases, see Aliens, VII., in Digest Sup. Ct. 1908.]

Constitutional law — legislative presumption — impeaching naturalization certificate — subsequent residence.

5. Constitutional rights are not invaded by the declaration in § 15 of the naturalization act of June 29, 1906, that taking up a permanent residence in a foreign country within five years after the issuance of a certificate of citizenship shall be considered prima facie evidence of the lack of intention to become a permanent citizen of the United States at the time of the application for citizenship, which, in the absence of countervailing evidence, shall be sufficient to warrant the cancelation of the certificate as fraudulent, since this provision prescribes a rule of evidence, not of substantive right.

[For other cases, see Constitutional Law, 774–778, 799–803, in Digest Sup. Ct. 1908.]

Constitutional law — retrospective laws — impeaching naturalization certificate — legislative presumption.

6. The retrospective feature of § 15 of the naturalization act of June 29, 1906, for the impeachment of certificates of citizenship fraudulently or illegally procured, which makes applicable to certificates issued under prior laws the declaration of that section that taking up permanent residence in a foreign country within five years after the issuance of the certificate shall be prima facie evidence of a lack of intention to become a permanent citizen of the United States at the time of the application for citizenship, which, in the absence of countervailing evidence, shall be sufficient to warrant the cancelation of the certificate as fraudulent, does not render such legislation invalid.

[For other cases, see Constitutional Law, 948–1006, in Digest Sup. Ct. 1908.]

NOTE.—On the right to trial by jury, generally—see notes to Justices of Supreme Ct. v. United States, 19 L. ed. U. S. 658; Eilenbecker v. District Ct. 33 L. ed. U. S. 801; Gulf, C. & S. F. R. Co. v. Shane, 39 L. ed. U. S. 727; and Perego v. Dodge, 41 L. ed. U. S. 113.

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Jury — right to trial by — impeaching naturalization certificate.

7. The proceeding under the act of June 29, 1906, § 15, for the cancelation of a naturalization certificate fraudulently or illegally procured, is a suit in equity, and not one at common law, within the meaning of U. S. Const. 7th Amend., preserving the right to trial by jury.

[For other cases, see Jury, I. b, in Digest Sup. Ct. 1908.]

[No. 27.]

Argued April 23, 1913. Decided October 20, 1913.

APPEAL from the District Court of the United States for the Southern District of New York to review a decree setting aside and canceling a naturalization certificate as fraudulently and illegally procured. Affirmed.

See same case below, 184 Fed. 643.

The facts are stated in the opinion.

Mr. Louis Marshall argued the cause, and, with Mr. A. M. Friedenberg, filed a brief for appellant:

For purposes of citizenship, persons born and persons naturalized in the United States are placed on an exact equality by the Constitution.

Minor v. Happersett, 21 Wall. 162, 165, 22 L. ed. 627; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Lynch v. Clarke, 1 Sandf. Ch. 642; Boyd v. Nebraska, 143 U. S. 162, 36 L. ed. 109, 12 Sup. Ct. Rep. 375; Scott v. Sandford, 19 How. 393, 15 L. ed. 691; Elk v. Wilkins, 112 U. S. 94, 101, 28 L. ed. 643, 645, 5 Sup. Ct. Rep. 41; Osborn v. Bank of United States, 9 Wheat. 825, 6 L. ed. 224; United States v. Wong Kim Ark, 169 U. S. 702, 703, 42 L. ed. 909, 910, 18 Sup. Ct. Rep. 456.

While it is true that it is within the province of a legislature to enact that proof of one fact shall be prima facie evidence of another which is the main fact in issue, the inference must not be arbitrary, but there must be a rational relation between the two facts.

Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145; People v. Cannon, 139 N. Y. 43, 36 Am. St. Rep. 668, 34 N. E. 759.

The law is invalid if construed to apply to persons naturalized under the prior act.

Woart v. Winnick, 3 N. H. 473, 14 Am. Dec. 384; Society for Propagation of Gospel v. Wheeler, 2 Gall. 139, Fed. Cas. No. 13,156; Conrad v. Smith, 6 N. D. 337, 70 N. W. 816.

A court may refer to the public history of the times, and to legislative documents, to ascertain the reason of an enactment as well as the meaning of particular provisions therein; and to that end may consider the evil which it is designed to remedy, contemporaneous events, and the existing situation with regard to the subject-matter of the legislation as it was pressed upon the attention of the legislative body.

United States v. Union P. R. Co. 91 U. S. 72, 79, 23 L. ed. 224, 228; Platt v. Union P. R. Co. 99 U. S. 60, 25 L. ed. 428; Church of the Holy Trinity v. United States, 143 U. S. 463, 36 L. ed. 229, 12 Sup. Ct. Rep. 511; The Delaware, 161 U. S. 472, 40 L. ed. 776, 16 Sup. Ct. Rep. 516; Shaw v. Kellogg, 170 U. S. 331, 42 L. ed. 1057, 18 Sup. Ct. Rep. 632; Binns v. United States, 194 U. S. 495, 48 L. ed. 1090, 24 Sup. Ct. Rep. 816; Johnson v. Southern P. Co. 196 U. S. 19, 49 L. ed. 370, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Wadsworth v. Boysen, 78 C. C. A. 437, 148 Fed. 775; Tenement House Dept. v. Moeschen, 179 N. Y. 325, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, 1 Ann. Cas. 439; Musco v. United Surety Co. 196 N. Y. 465, 134 Am. St. Rep. 851, 90 N. E. 171.

The appellant did not take up a permanent residence at Johannesburg, but continued to be a legal resident of the United States.

Dupuy v. Wurtz, 53 N. Y. 556; Moorhouse v. Lord, 10 H. L. Cas. 272, 1 New Reports, 555, 32 L. J. Ch. N. S. 295, 9 Jur. N. S. 677, 8 L. T. N. S. 212, 11 Week. Rep. 637; Huntly v. Gaskell [1906] A. C. 56, 75 L. J. P. C. N. S. 1, 94 L. T. N. S. 33, 22 Times L. R. 144; Re Newcomb, 192 N. Y. 238, 84 N. E. 950.

A bill of attainder is a legislative act which inflicts punishment without judicial trial.

Cummings v. Missouri, 4 Wall. 323, 18 L. ed. 363; Re Yung Sing Hee, 36 Fed. 437.

A statute belongs to the class of *ex post facto* laws which, by its necessary operation, and in its relation to the offense, or its consequences, alters the situation of the accused to his disadvantage.

Cummings v. Missouri, 4 Wall. 277, 18 L. ed. 356; Ex parte Garland, 4 Wall. 333, 18 L. ed. 366; Thompson v. Utah, 170 U. S. 351, 42 L. ed. 1066, 18 Sup. Ct. Rep. 620; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Green v. Shumway, 39 N. Y. 418.

The appellant was entitled to a trial by jury of the issues presented in the pleadings.

Parsons v. Bedford, 3 Pet. 433, 446, 7 L. ed. 732, 736; Knickerbocker Ins. Co. v. Comstock, 16 Wall. 258, 21 L. ed. 493; Garnhart v. United States, 16 Wall. 162, 21 L. ed. 275; The Sarah, 8 Wheat. 391, 5 L. ed. 644; Morris's Cotton, 8 Wall. 507, 19 L. ed.

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481; Elliott v. Toeppner, 187 U. S. 327, 47 L. ed. 200, 23 Sup. Ct. Rep. 133.

Assistant Attorney General Harr argued the cause and filed a brief for appellee:

Section 15 of the naturalization act of June 29, 1906, is constitutional, even as applied to certificates of naturalization procured under prior statutes.

Johannessen v. United States, 225 U. S. 227, 56 L. ed. 1066, 32 Sup. Ct. Rep. 613.

The provisions of the second paragraph of the act of 1906, making the taking up of a permanent residence abroad within five years after an alien's naturalization prima facie evidence of a lack of intention on his part to become a permanent resident of the United States at the time of filing his application for citizenship, are valid and constitutional.

Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 42, 55 L. ed. 78, 80, 32 L.R.A. (N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243; Bailey v. Alabama, 219 U. S. 219, 238, 55 L. ed. 191, 200, 31 Sup. Ct. Rep. 145.

The fact that the presumption applies to the trial of an issue to be determined by facts which occurred before the presumption existed is immaterial.

Webb v. Den, 17 How. 576, 15 L. ed. 35; Howard v. Moot, 64 N. Y. 262; Rich v. Flanders, 39 N. H. 304.

This is only a species of the general regulation of procedure which the legislature may always change, even when, as in the case of criminal statutes passed by the states, it is subject to the prohibition against *ex post facto* legislation.

Hopt v. Utah, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; Thompson v. Missouri, 171 U. S. 380, 43 L. ed. 204, 18 Sup. Ct. Rep. 922.

The evidence shows that Luria took up his permanent residence in South Africa under such circumstances as to justify the presumption that he had no intention of residing permanently in the United States at the time of his naturalization.

Ennis v. Smith, 14 How. 422, 423, 14 L. ed. 482, 483; Morris v. Gilmer, 129 U. S. 328, 32 L. ed. 694, 9 Sup. Ct. Rep. 289; Anderson v. Watt, 138 U. S. 706, 34 L. ed. 1082, 11 Sup. Ct. Rep. 449.

A suit to cancel a certificate of naturalization on the ground of fraud in no wise differs from a suit to cancel a patent, and is clearly an equitable proceeding.

United States v. Mansour, 170 Fed. 671.

Mr. Justice Van Devanter delivered the opinion of the court:

This appeal brings under review a decree setting aside and canceling, under § 15 of the act of June 29, 1906, 34 Stat. at L. 596, 601, chap. 3592, U. S. Comp. Stat. Supp. 1911, pp. 124, 537, as fraudulently and illegally procured, a certificate of citizenship theretofore issued to George A. Luria by the court of common pleas of the city and county of New York. 184 Fed. 643.

The petition was not carefully prepared, and yet it doubtless was designed to charge that the certificate was fraudulently and illegally procured, in that Luria did not at the time intend to become a permanent citizen of the United States, but only to obtain the indicia of such citizenship in order that he might enjoy its advantages and protection, and yet take up and maintain a permanent residence in a foreign country. There was a prayer that the certificate be set aside and canceled because "procured illegally." The sufficiency of the petition was not challenged, and the case was heard and determined as if the issue just described were adequately tendered. In the opinion rendered by the district court it was said, after observing that the petition was subject to criticism: "That point, however, was not raised, and I suppose the defendant does not mean to raise it." This view of his attitude passed unquestioned then, and it is too late to question it now.

The case was heard upon an agreed statement and some accompanying papers, from all of which it indubitably appeared that Luria was born in Wilna, Russia, in 1865 or 1868, and came to New York in 1888; that he entered a medical college of that city the next year and was graduated therefrom in 1893; that he applied for and procured [18] the certificate of citizenship in July, 1894; that in the following month he sought and obtained a passport from the Department of State, and in November left the United States for the Transvaal, South Africa, arriving in December; that from that time to the date of the hearing, in December, 1910, he resided and practised his profession in South Africa; that he joined the South African Medical Association and served in the Boer war; that his only return to the United States was for four or five months in 1907, for the temporary purpose of taking a postgraduate course in a medical school in New York; and that when entering that school he gave as his address, Johannesburg, South Africa. From the facts so appearing the district court found and held that within a few months after securing the certificate of citizenship Luria went to and took up a permanent residence in South Africa, and that this, under § 15 of the act of 1906, constituted prima facie evidence of a lack

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of intention on his part to become a permanent citizen of the United States at the time he applied for the certificate. In the papers accompanying the agreed statement there were some declarations which, if separately considered, would tend to engender the belief that he had not taken up a permanent residence in South Africa, and was only a temporary sojourner therein; but the district court, upon weighing and considering those declarations in connection with all the facts disclosed, as was necessary, concluded that the declarations could not be taken at their face value, and that the residence in South Africa was intended to be, and was, permanent in character. We concur in that conclusion.

In his answer, Luria interposed the defense that his presence in the Transvaal was solely for the purpose of promoting his health, the implication being that when he went there his health was impaired in such a way that a residence in that country was necessary or advisable, [19] and therefore that taking up such a residence ought not to be accepted as indicating that when he was naturalized it was not his intention to become a permanent citizen of the United States. He does not appear to have been present at the hearing, and although there was ample time (ten months after filing his answer) to take his deposition, it was not taken, and there was substantially no attempt to sustain this defense, or to explain his permanent removal to the Transvaal so soon after he procured the certificate of citizenship. True, it appeared that in 1909 he filed at the United States Consulate in Johannesburg, in support of an application for registration as a citizen of the United States, two certificates from medical practitioners, stating, in effect, that his residence in the Transvaal was for purposes of health; but those certificates did not rise to the dignity of proof in the present case. Besides being *ex parte*, they were meager, not under oath, and not accepted by the consular officers as adequate or satisfactory. Thus, we think the district court rightly held that there was no countervailing evidence sufficient to overcome the evidential effect of taking up a permanent residence in the Transvaal so shortly following the naturalization.

Section 15 of the act of 1906, under which this suit was conducted, is as follows:

"Sec. 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship *on the ground of fraud, or on the ground that such certificate of citizenship was illegally procured.* In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have [20] sixty days' personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication, or upon absentees by the laws of the state or the place where such suit is brought.

"*If any alien who shall have secured a certificate of citizenship under the provisions of this act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancelation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective juirsdictions who have such certificates of citizenship, and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship.*

"Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship, and shall send a certified copy of such order to the Bureau of Immigration and Naturalization; and in case such certificate was not originally issued by the court making such order, it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate [21] of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record, and to cancel such original certificate of citizenship upon the records, and to notify

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the Bureau of Immigration and Naturalization of such cancelation.

"*The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws.*"

One of the questions arising under this section is, whether the second paragraph, dealing with the evidential effect of taking up a permanent residence in a foreign country within five years after securing a certificate of citizenship, is confined to certificates issued under the act of 1906, or applies also to those issued under prior laws, as was Luria's. If that paragraph were alone examined, the answer undoubtedly would be that on v certificates under the act of 1906 are included. But the last paragraph also must be considered. It expressly declares that "the provisions of this section" shall apply not only to certificates issued under the act of 1906, but also to all certificates theretofore issued under prior laws. The words "the provisions of this section" naturally mean every part of it, one paragraph as much as another, and that meaning cannot well be rejected without leaving it uncertain as to what those words embrace. Counsel refer to the Congressional Record, which shows that the second paragraph was inserted by way of amendment while the section was being considered in the House of Representatives. But as the section was in its present form when it was finally adopted by that body, as also when it was adopted by the Senate and approved by the President, it would seem that the last paragraph, in view of its plain and unambiguous [22] language, must be accepted as extending the preceding paragraphs to all certificates whether issued theretofore under prior laws, or thereafter, under that act.

But it is said that it was not essential to naturalization under prior laws (Rev. Stat. §§ 2165–2170, U. S. Comp. Stat. 1901, pp. 1329–1333) that the applicant should intend thereafter to reside in the United States; that, if he otherwise met the statutory requirements, it was no objection that he intended presently to take up a permanent residence in a foreign country; that the act of 1906, differing from prior laws, requires the applicant to declare "that it is his intention to reside permanently within the United States;" and therefore that Congress, when enacting the second paragraph of § 15, must have intended that it should apply to certificates issued under that act, and not to those issued under prior laws. It is true that § 4 of the act of 1906 exacts from the applicant a declaration of his intention to reside in the United States, and it is also true that the prior laws did not expressly call for such a declaration. But we think it is not true that under the prior laws it was immaterial whether the applicant intended to reside in this country, or presently to take up a permanent residence in a foreign country. On the contrary, by necessary implication, as we think, the prior laws conferred the right to naturalization upon such aliens only as contemplated the continuance of a residence already established in the United States.

Citizenship is membership in a political society, and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other. Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency. Minor v. Happersett, 21 Wall. 162, 165, 22 L. ed. 627; Elk v. Wilkins, 112 U. S. 94, 101, 28 L. ed. 643, 645, 5 Sup. Ct. Rep. 41; Osborn v. Bank of United States, 9 Wheat. 738, 827, 6 L. ed. 204, 225. Turning to the naturalization laws preceding the act of 1906, being [23] those under which Luria obtained his certificate, we find that they required, first, that the alien, after coming to this country, should declare on oath, before a court or its clerk, that it was bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign sovereignty; second, that at least two years should elapse between the making of that declaration and his application for admission to citizenship; third, that as a condition to his admission the court should be satisfied, through the testimony of citizens, that he had resided within the United States five years at least, and that during that time he had behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; and, fourth, that at the time of his admission he should declare on oath that he would support the Constitution of the United States, and that he absolutely and entirely renounced and abjured all allegiance and fidelity to every foreign sovereignty. These requirements plainly contemplated that the applicant, if admitted, should be a citizen in fact as well as in name,—that he should assume and bear the obligations and duties of that status as well as enjoy its rights and privileges. In other words, it was contemplated that his admission should be mutually beneficial to the government and

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himself, the proof in respect of his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than for what they told of the past.

By the clearest implication those laws show that it was not intended that naturalization could be secured thereunder by an alien whose purpose was to escape the duties of his native allegiance without taking upon himself those of citizenship here, or by one whose purpose was to reside permanently in a foreign country, and to use his naturalization [24] as a shield against the imposition of duties there, while by his absence he was avoiding his duties here. Naturalization secured with such a purpose was wanting in one of its most essential elements,—good faith on the part of the applicant. It involved a wrongful use of a beneficent law. True, it was not expressly forbidden; neither was it authorized. But, being contrary to the plain implication of the statute, it was unlawful, for what is clearly implied is as much a part of a law as what is expressed. United States v. Babbit, 1 Black, 55, 61, 17 L. ed. 94, 96; McHenry v. Alford, 168 U. S. 651, 672, 42 L. ed. 614, 621, 18 Sup. Ct. Rep. 242; South Carolina v. United States, 199 U. S. 437, 451, 50 L. ed. 261, 265, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737.

Perceiving nothing in the prior laws which shows that Congress could not have intended that the last paragraph of § 15 of the act of 1906 should be taken according to the natural meaning and import of its words, we think, as before indicated, that it must be regarded as extending the preceding paragraphs of that section to all certificates of naturalization, whether secured theretofore under prior laws, or thereafter under that act.

Several contentions questioning the constitutional validity of § 15 are advanced, but all, save the one next to be mentioned, are sufficiently answered by observing that the section makes no discrimination between the rights of naturalized and native citizens, and does not in anywise affect or disturb rights acquired through lawful naturalization, but only provides for the orderly cancelation, after full notice and hearing, of certificates of naturalization which have been procured fraudulently or illegally. It does not make any act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship, to which their possessors never were lawfully entitled. Johannessen v. United States, 225 U. S. 227, 56 L. ed. 1066, 32 Sup. Ct. Rep. 613. See also Wallace v. Adams, 204 U. S. 415, 51 L. ed. 547, 27 Sup. Ct. Rep. 363.

[25] Objection is specially directed to the provision which declares that taking up a permanent residence in a foreign country within five years after the issuance of the certificate shall be considered prima facie evidence of a lack of intention to become a permanent citizen of the United States at the time of the application for citizenship, and that in the absence of countervailing evidence the same shall be sufficient to warrant the cancelation of the certificate as fraudulent. It will be observed that this provision prescribes a rule of evidence, not of substantive right. It goes no farther than to establish a rebuttable presumption which the possessor of the certificate is free to overcome. If, in truth, it was his intention at the time of his application to reside permanently in the United States, and his subsequent residence in a foreign country was prompted by considerations which were consistent with that intention, he is at liberty to show it. Not only so, but these are matters of which he possesses full, if not special, knowledge. The controlling rule respecting the power of the legislature in establishing such presumptions is comprehensively stated in Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 42, 43, 55 L. ed. 78, 32 L.R.A.(N.S.) 1026, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912 A, 463, 2 N. C. C. A. 243, as follows:

"Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases, abound, and the decisions upholding them are numerous. . . .

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law, or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary [26] mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

"If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the

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issue, there is no ground for holding that due process of law has been denied him."

Of like import are Fong Yue Ting v. United States, 149 U. S. 698, 729, 37 L. ed. 905, 918, 13 Sup. Ct. Rep. 1016; Adams v. New York, 192 U. S. 585, 599, 48 L. ed. 575, 581, 24 Sup. Ct. Rep. 372; Bailey v. Alabama, 219 U. S. 218, 238, 55 L. ed. 191, 200, 31 Sup. Ct. Rep. 145; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 81, 55 L. ed. 369, 378, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912 C, 160; Reitler v. Harris, 223 U. S. 437, 441, 56 L. ed. 497, 499, 32 Sup. Ct. Rep. 248.

Nor is it a valid objection to such legislation that it is made applicable to existing causes of action, as is the case here, the true rule in that regard being well stated in Cooley's Constitutional Limitations, 7th ed. 524, in these words:

"It must also be evident that *a right to have one's controversies determined by existing rules of evidence is not a vested right.* These rules pertain to the remedies which the state provides for its citizens; and generally in legal contemplation they neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the legislature; and the changes which are enacted may lawfully be made applicable to existing causes of action, even in those states in which retrospective laws are forbidden. For the law as changed would only prescribe rules for presenting the evidence in legal controversies in the future; and it could not therefore be called retrospective, [27] even though some of the controversies upon which it may act were in progress before."

This court applied that rule in Webb v. Den, 17 How. 576, 578, 15 L. ed. 35, 36; Hopt v. Utah, 110 U. S. 574, 590, 28 L. ed. 262, 268, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; Thompson v. Missouri, 171 U. S. 380, 43 L. ed. 204, 18 Sup. Ct. Rep. 922, and Reitler v. Harris, 223 U. S. 437, 441, 56 L. ed. 497, 499, 32 Sup. Ct. Rep. 248.

That the taking up of a permanent residence in a foreign country shortly following naturalization has a bearing upon the purpose with which the latter was sought, and affords some reason for presuming that there was an absence of intention at the time to reside permanently in the United States, is not debatable. No doubt, the reason for the presumption lessens as the period of time between the two events is lengthened. But it is difficult to say at what point the reason so far disappears as to afford no reasonable basis for the presumption. Congress has indicated its opinion that the intervening period may be as much as five years without rendering the presumption baseless. That period seems long, and yet we are not prepared to pronounce it certainly excessive or unreasonable. But we are of opinion that as the intervening time approaches five years, the presumption necessarily must weaken to such a degree as to require but slight countervailing evidence to overcome it. On the other hand, when the intervening time is so short as it is shown to have been in the present case, the presumption cannot be regarded as yielding to anything short of a substantial and convincing explanation. So construed, we think the provision is not in excess of the power of Congress.

Lastly, it is urged that the district court erred in not according to the defendant a trial by jury. The claim is predicated upon the 7th Amendment to the Constitution, which declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This, however, was not a suit at common law. The right asserted and the remedy sought were essentially equitable, [28] not legal, and this, according to the prescribed tests, made it a suit in equity. Parsons v. Bedford, 3 Pet. 433, 447, 7 L. ed. 732, 737; Irvine v. Marshall, 20 How. 558, 565, 15 L. ed. 994, 998; Root v. Lake Shore & M. S. R. Co. 105 U. S. 189, 207, 26 L. ed. 975, 981. In this respect it does not differ from a suit to cancel a patent for public land or letters patent for an invention. See United States v. Stone, 2 Wall. 525, 17 L. ed. 765; United States v. San Jacinto Tin Co. 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850; United States v. American Bell Teleph. Co. 128 U. S. 315, 32 L. ed. 450, 9 Sup. Ct. Rep. 90.

Finding no error in the record, the decree is affirmed.

UNITED STATES, Plff. in Err.,
v.
FELIPE SANDOVAL.

(See S. C. Reporter's ed. 28-49.)

States — effect of admission on congressional regulation.

1. Congressional regulations in an enabling act which a state is required to and does assent to as a condition to admission into the Union remain in force after such admission if, and only if, the subject is one within the regulating power of Congress.

[For other cases, see States, XI., in Digest Sup. Ct. 1908.]

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Courts — relation to other departments — political questions — Indian tribes.

2. Whether, to what extent, and for what length of time, distinctly Indian communities within the borders of the United States shall be recognized and dealt with as dependent tribes, requiring the guardianship and protection of the United States, are questions to be determined by Congress, and not by the courts.

[For other cases, see Courts, I. e, 2, a, in Digest Sup. Ct. 1908.]

Indians — congressional control — effect of citizenship.

3. Citizenship is not in itself an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Indians as a dependent people.

[For other cases, see Indians, II., in Digest Sup. Ct. 1908.]

Indians — congressional control — communal lands.

4. The lands of the Pueblo Indians in New Mexico, although held in communal fee-simple ownership by the Indians of each pueblo, are subject to the legislation of Congress, enacted in the exercise of the government's guardianship over such Indian communities and their affairs.

[For other cases, see Indians, II., in Digest Sup. Ct. 1908.]

Indians — congressional control — intoxicating liquors — pueblo lands.

5. Congress, in the exercise of its control over the Indian tribes, could validly prohibit, as it did by the act of January 30, 1897 (29 Stat. at L. 506, chap. 109), as supplemented by § 2 of the New Mexico enabling act of June 20, 1910 (36 Stat. at L. 557, chap. 310), the introduction of intoxicating liquors into the Indian pueblos in the state of New Mexico, the legislative and executive branches of the Federal government having by a uniform course of action long regarded and treated such pueblos as dependent communities, entitled to the aid and protection of the government like other Indian tribes.

[For other cases, see Indians, II., in Digest Sup. Ct. 1908.]

[No. 352.]

Argued February 27, 1913. Decided October 20, 1913.

IN ERROR to the District Court of the United States for the District of New Mexico to review a judgment sustaining a demurrer to and dismissing an indictment in a criminal prosecution for introducing intoxicating liquor into the Santa Clara pueblo. Reversed.

See same case below, 198 Fed. 539.

The facts are stated in the opinion.

Solicitor General **Bullitt** argued the cause, and, with Mr. Louis G. Bissell, filed a brief for plaintiff in error:

Conditions imposed by Congress upon new states through their enabling acts are valid when they result from the exercise of powers conferred upon the Federal government.

Coyle v. Smith, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688.

The Federal power over Indians is of this character.

Ibid.; United States v. 43 Gallons of Whiskey (United States v. Lariviere) 93 U. S. 188, 23 L. ed. 846; Ex parte Webb, 225 U. S. 663, 56 L. ed. 1248, 32 Sup. Ct. Rep. 769.

This power permits prohibition against the sale of intoxicants to the Indian wards of the United States, their introduction upon Indian lands, and the exemption of such lands from state taxation.

Choate v. Trapp, 224 U. S. 665, 56 L. ed. 941, 32 Sup. Ct. Rep. 565; Kansas Indians (Blue Jacket v. Johnson County) 5 Wall. 737, 18 L. ed. 667; Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399; United States v. Holliday, 3 Wall. 407, 18 L. ed. 182; United States v. 43 Gallons of Whiskey (United States v. Lariviere) 93 U. S. 188, 23 L. ed. 846; United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478.

The presumption is strong in favor of the original existence of Federal jurisdiction over all Indians, and against its subsequent voluntary relinquishment. The surrender of authority and control over the Indian which resides in the United States is not lightly to be presumed; and positive and unmistakable evidence is required to establish it.

United States v. Celestine, 215 U. S. 278, 54 L. ed. 195, 30 Sup. Ct. Rep. 93; Hallowell v. United States, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587.

The Pueblo Indians are plainly "Indian tribes" within the meaning of the Constitution.

Papers, Archæological Inst. of America, Am. ser. 3–4 (1890–2); Report of Bandelier, pt. 1, pp. 50, 118, 130, 139, 140, 198, 201, 206, 228, 275, 276; Twenty-third Report, Bureau of American Ethnology (1901–2), Stevenson, 289.

A general supervisory and governmental authority over the Indians arises and is vested in the United States by necessary implication from their very weakness and dependence and need of protection.

United States v. Kagama, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; United States v. Celestine, 215 U. S. 278, 54 L. ed. 195, 30 Sup. Ct. Rep. 93; Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578; Heckman v. United States, 224 U. S. 413, 56 L. ed. 820, 32 Sup. Ct. Rep. 424.

Pueblo Indians require protection.

Sunol v. Hepburn, 1 Cal. 254; United

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States v. Pico, 5 Wall. 536, 18 L. ed. 695; United States v. Ritchie, 17 How. 525, 15 L. ed. 236.

Authorities in opposition to Federal jurisdiction (United States v. Joseph, 94 U. S. 614, 24 L. ed. 295; United States v. Lucero, 1 N. M. 422; United States v. Santistevan, 1 N. M. 583) involved construction of a statute only, and did not involve the present paramount reason for the exercise of Federal jurisdiction over Indians; *i. e.*, protection of Indians (Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483; Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; Jones v. Meehan, 175 U. S. 10, 44 L. ed. 53, 20 Sup. Ct. Rep. 1; Rainbow v. Young, 88 C. C. A. 653, 161 Fed. 835; United States v. Kagama, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478).

Their civilization is not inconsistent with their wardship.

Bandelier, Report to Archæological Inst. pt. 1.

Their citizenship is consistent with their wardship.

(a) The Pueblo Indians were citizens of New Mexico.

United States v. Ritchie, 17 How. 525, 15 L. ed. 236.

(b) Citizens may well be wards of the government.

Bowling v. United States, 111 C. C. A. 561, 191 Fed. 22; Hallowell v. United States, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587; Rainbow v. Young, 88 C. C. A. 653, 161 Fed. 835; United States v. Celestine, 215 U. S. 278, 54 L. ed. 195, 30 Sup. Ct. Rep. 93; United States v. Logan, 105 Fed. 240; United States v. Sutton, 215 U. S. 291, 54 L. ed. 200, 30 Sup. Ct. Rep. 116.

(c) Relinquishment of Federal jurisdiction is a political question.

Hallowell v. United States, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587; Heckman v. United States, 224 U. S. 413, 56 L. ed. 820, 32 Sup. Ct. Rep. 424; Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; Lone Wolf v. Hitchcock, 187 U. S. 555, 47 L. ed. 300, 23 Sup. Ct. Rep. 216; Marchie Tiger v. Western Invest. Co. 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 578; United States v. Celestine, 215 U. S. 278, 54 L. ed. 195, 30 Sup. Ct. Rep. 93; United States v. Holliday, 3 Wall. 407, 18 L. ed. 182.

Ownership of lands in fee by Indian pueblos is consistent with wardship.

(a) Pueblo ownership in fee is ownership in common.

United States v. Joseph, 94 U. S. 614, 24 L. ed. 295.

(b) Federal governmental power over Indians does not depend upon property rights or title.

Heckman v. United States, 224 U. S. 413, 56 L. ed. 820, 32 Sup. Ct. Rep. 424; Peters v. Malin, 111 Fed. 244; United States v. Allen, 103 C. C. A. 1, 179 Fed. 13; United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478.

The presumption against pure gratuities implies the wardship of the Indian beneficiaries.

Allen v. Smith, 173 U. S. 389, 43 L. ed. 741, 19 Sup. Ct. Rep. 446; United States v. Realty Co. 163 U. S. 427, 41 L. ed. 215, 16 Sup. Ct. Rep. 1120.

Decisions by the territorial courts for New Mexico, denying the wardship of the Pueblo Indians, have immediately been nullified by Congress.

Territory v. Delinquent Taxpayers, 12 N. M. 139, 76 Pac. 307; United States v. Mares, 14 N. M. 1, 88 Pac. 1128.

There could have been no irrevocable abandonment by the government of its paternal powers prior to the statehood of New Mexico.

Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; Wiggan v. Conolly, 163 U. S. 56, 41 L. ed. 69, 16 Sup. Ct. Rep. 914; United States v. Sutton, 215 U. S. 291, 54 L. ed. 200, 30 Sup. Ct. Rep. 116.

Mr. A. B. Renehan argued the cause and filed a brief for defendant in error:

Under the Spanish rule the Pueblo Indians were on an equality with European Spaniards and entitled to all the rights of European Spaniards, subject, however, to certain restrictions upon their rights of alienation of property. Under the Mexican government the Pueblo Indians were full-fledged citizens, upon an equality with all other citizens of the Mexican Republic. Being citizens of the Mexican Republic at the date of the treaty of Guadalupe Hidalgo, they became citizens of the United States, with all the rights, privileges, and immunities of such citizenship.

United States v. Ritchie, 17 How. 525, 15 L. ed. 236; United States v. Joseph, 94 U. S. 614, 24 L. ed. 295; United States v. Lucero, 1 N. M. 422; United States v. Santistevan, 1 N. M. 583; United States v. Mares, 14 N. M. 1, 88 Pac. 1128; Territory v. Delinquent Taxpayers, 12 N. M. 139; United States v. Joseph, 1 N. M. 593; De La O v. Acoma, 1 N. M. 226.

The lands of the Pueblo Indians are not such lands as are known as "Indian Country," but are held by them in fee simple, segregated from the public domain, free from all conditions.

United States v. Joseph, 94 U. S. 614,

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24 L. ed. 295; Territory v. Delinquent Taxpayers, 12 N. M. 139.

The provisions of the enabling act (act of June 20, 1910), and of the Constitution of the state of New Mexico, attempting to bring the Pueblo Indians and their lands within the term of the "intercourse act," are a nullity.

Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; United States Exp. Co. v. Friedman, 112 C. C. A. 219, 191 Fed. 673; Mosier v. United States, 117 C. C. A. 162, 198 Fed. 54; Keller v. United States, 213 U. S. 147, 53 L. ed. 740, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076; Coyle v. Smith, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688; Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399; Bates v. Clark, 95 U. S. 204, 24 L. ed. 471; Ex parte Crow Dog (Ex parte Kang-Gi-Shin-Ca) 109 U. S. 556, 561, 27 L. ed. 1030, 1032, 3 Sup. Ct. Rep. 396.

If Congress had no power to impose these restrictions upon New Mexico, the state of New Mexico had no right to surrender any of the powers which are expressly reserved to the states by the Federal Constitution.

Coyle v. Smith, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688; Permoli v. New Orleans, 3 How. 589, 11 L. ed. 739; Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; Texas v. White, 7 Wall. 700, 19 L. ed. 227; Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076.

Mr. Justice Van Devanter delivered the opinion of the court:

This is a criminal prosecution for introducing intoxicating liquor into the Indian country; to wit, the Santa Clara pueblo, in the state of New Mexico. In the district court a demurrer to the indictment was sustained and the indictment dismissed upon the theory that the statute upon which it is founded is invalid, as applied to Indian pueblos in New Mexico, because usurping a part of the police power of the state, and encroaching upon its equal footing with the other states. 198 Fed. 539.

The indictment is founded upon the act of January 30, 1897, 29 Stat. at L. 506, chap. 109, as supplemented by § 2 of the act of June 20, 1910, 36 Stat. at L. 557, chap. 310, being the New Mexico enabling act. The first act makes it a punishable offense to introduce intoxicating liquor into the Indian country, and the second, in naming the conditions upon which New Mexico should be admitted into the Union, [37] prescribed,† in substance, that the lands then owned or occupied by the Pueblo Indians should be deemed and treated as Indian country within the meaning of the first act and of kindred legislation by Congress.

[38] Whether without this legislative interpretation the first act would have included the pueblo lands we need not consider. The territorial supreme court had but recently

†The pertinent portions of the enabling act are:

"Sec. 2. That . . . the said convention shall be, and is hereby, authorized to form a constitution and provide for a state government for said proposed state, all in the manner and under the conditions contained in this act. . . .

"And said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said state—

"First. That . . . the sale, barter, or giving of intoxicating liquors to Indians and *the introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico, are forever prohibited.*

"Second. That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title . . . to all lands lying within said boundaries, owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States *or any prior sovereignty*, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; . . . but nothing herein, or in the ordinance herein provided for, shall preclude the said state from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation, owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid, or as may be granted or confirmed to any Indian or Indians under any act of Congress; but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as Congress has prescribed or may hereafter prescribe. . . .

"Eighth. That whenever hereafter any of the lands contained within Indian reservations or allotments in said proposed state shall be allotted, sold, reserved, or otherwise disposed of, they shall be subject for a period of twenty-five years after such allotment, sale, reservation, or other disposal to *all the laws of the United States prohibiting the introduction of liquor into the Indian country; and the terms 'Indian' and 'Indian country' shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them.*"

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held that it did not include them (United States v. Mares, 14 N. M. 1, 88 Pac. 1128), and Congress, evidently wishing to make sure of a different result in the future, expressly declared that it should include them. That this was done in the enabling act, and that the state was required to, and did, assent to it, as a condition to admission into the Union, in no wise affects the force of the congressional declaration, if only the subject be within the regulating power of Congress. As was said by this court in Coyle v. Smith, 221 U. S. 559, 574, 55 L. ed. 853, 860, 31 Sup. Ct. Rep. 688: "It may well happen that Congress should embrace in an enactment introducing a new state into the Union, legislation intended as a regulation of commerce among the states, or with Indian tribes situated within the limits of such new state, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and therefore would not operate to restrict the state's legislative power in respect of any matter which was not plainly within the regulating power of Congress." To the same effect are Pollard v. Hagan, 3 How. 212, 224, 225, 229, 11 L. ed. 565, 571-574; Ex parte Webb, 225 U. S. 663, 683, 690, 691, 56 L. ed. 1248, 1256, 1259, 1260, 32 Sup. Ct. Rep. 769.

The question to be considered, then, is whether the status of the Pueblo Indians and their lands is such that Congress competently can prohibit the introduction of intoxicating liquor into those lands notwithstanding the admission of New Mexico to statehood.

There are as many as twenty Indian pueblos scattered [39] over the state, having an aggregate population of over 8,000. The lands belonging to the several pueblos vary in quantity, but usually embrace about 17,000 acres, held in communal, fee-simple ownership under grants from the King of Spain, made during the Spanish sovereignty, and confirmed by Congress since the acquisition of that territory by the United States. 10 Stat. at L. 309, chap. 103, § 8; 11 Stat. at L. 374, chap. 5. As respects six of the pueblos, one being the Santa Clara, adjacent public lands have been reserved by Executive orders for the use and occupancy of the Indians.

The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government. Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed, and inferior people. Upon the termination of the Spanish sovereignty they were given enlarged political and civil rights by Mexico, but it remains an open question whether they have become citizens of the United States. See treaty of Guadalupe Hidalgo, arts. 8 and 9, 9 Stat. at L. 922, 929; United States v. Joseph, 94 U. S. 614, 618, 24 L. ed. 295, 297; Elk v. Wilkins, 112 U. S. 94, 28 L. ed. 643, 5 Sup. Ct. Rep. 41. Be this as it may, they have been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities. Thus,† public moneys have been expended in presenting them with farming implements and utensils, [40] and in their civilization and instruction; agents and superintendents have been provided to guard their interests; central training schools and day schools at the pueblos have been established and maintained for the education of their children; dams and irrigation works have been constructed to encourage and enable them to cultivate their lands and sustain themselves; public lands, as before indicated, have been reserved for their use and occupancy where their own lands were deemed inadequate; a special attorney has been employed since 1898, at an annual cost of $2,000, to represent them and maintain their rights; and when latterly the territory undertook to tax their lands and other property, Congress forbade such taxation, saying: "That the lands now held by the various villages or pueblos of Pueblo Indians, or by individual members thereof, within Pueblo reservations or lands, in the territory of New Mexico, and all personal property furnished said Indians by the United States, or used in cultivating said lands, and any cattle and sheep now possessed or that may hereafter be acquired

†See, *inter alia*, 10 Stat. at L. 330, chap. 167; 17 Stat. at L. 165, chap. 233; 18 Stat. at L. 147, chap. 389; 21 Stat. at L. 130, chap. 85; 22 Stat. at L. 83, chap. 163; 26 Stat. at L. 337, 353, chap. 807; 30 Stat. at L. 594, chap. 545; 36 Stat. at L. 278, chap. 140; Reports Comr. Indian Affairs 1907, p. 58; 1908, p. 55; 1909, p. 48; 1 Kappler, 878, 880; Executive Orders relating to Indian Reservations (1912), 124-127, 129, 130.

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by said Indians, shall be free and exempt from taxation of any sort whatsoever, including taxes heretofore levied, if any, until Congress shall otherwise provide." 33 Stat. at L. 1048, 1069, chap. 1479. An exempting provision was also inserted in § 2 of the enabling act.

The local estimate of this people is reflected by a New Mexico statute adopted in 1854, and carried into subsequent compilations, whereby they were "excluded from the privilege of voting at the popular elections of the territory" other than the election of overseers of ditches in which they were interested, and the election of the officers of their pueblos "according to their ancient customs." Laws 1853–4, p. 142, § 3; Comp. Laws 1897, § 1678.

With one accord the reports of the superintendents charged with guarding their interests show that they are [41] dependent upon the fostering care and protection of the government, like reservation Indians in general; that, although industrially superior, they are intellectually and morally inferior to many of them; and that they are easy victims to the evils and debasing influence of intoxicants. We extract the following from published reports of the superintendents:

Albuquerque, 1904: "While a few of these Pueblo Indians are ready for citizenship and have indicated the same by their energy and willingness to accept service from the railroad companies and elsewhere, and by accepting the benefits of schools and churches, a large per cent of them are unable, and not yet enough advanced along the lines of civilization, to take upon themselves the burden of citizenship. It is my opinion that in the event taxation is imposed, it will be but a short time before the masses of the New Mexico Pueblo Indians will become paupers. Their lands will be sold for taxes, the whites and Mexicans will have possession of their ancient grants, and the government will be compelled to support them or witness their extermination."

Sante Fe, 1904: "The Pueblo have little or no money, and they cannot understand why they should be singled out from all other Indians and be compelled to bear burdens [territorial taxes] which they are not able to assume. . . . They will not vote, nor are they sufficiently well informed to do so intelligently."

Zuni, 1904: "Last November when they had their Shaleco dance I determined to put a stop to the drunkenness. I wrote to the Indian Office asking for a detachment from Fort Wingate. I soon received a reply that my request had been granted. I said nothing to anyone. The afternoon the Shaleco arrived the detachment rode in, the Indians thinking they were passing through, and were making preparations to have a good time. When they were notified that a Navaho was celebrating, they [42] promptly arrested him and brought him over to the guardhouse, and during the evening two others were arrested with whisky in their possession, and also a Pueblo Indian. The detachment remained until the dance was over and the visiting Indians had left for their homes."

Sante Fe, 1905: "Until the old customs and Indian practices are broken among this people we cannot hope for a great amount of progress. The secret dance, from which all whites are excluded, is perhaps one of the greatest evils. What goes on at this time I will not attempt to say, but I firmly believe that it is little less than a ribald system of debauchery. The Catholic clergy is unable to put a stop to this evil, and know as little of same as others. The United States mails are not permitted to pass through the streets of the pueblos when one of these dances is in session; travelers are met on the outskirts of the pueblo and escorted at a safe distance around. The time must come when the Pueblos must give up these old pagan customs and become citizens in fact."

Santa Fe, 1906: "There is a greater desire among the Pueblo to live apart and be independent and have nothing to do with the white race than among any other Indians with whom I have worked. They really care nothing for schools, and only patronize them to please their agent and incidentally to get the issues given out by the teacher. The children, however, make desirable pupils, and if they could be retained in school long enough more might be accomplished. The return student going back to the pueblo has a harder task before him than any other class of returned students I know. It is easier to go back to the Sioux tepee and lead a white man's life than to go back to the pueblo and retain the customs and manners taught in the school.

"In pueblo life the one-man domination—the fear of the wrath of the governor of the pueblo—is what holds this people down. The rules of the pueblo are so strict that [43] the individual cannot sow his wheat, plant his corn, or harvest same in the autumn without the permission of the pueblo authorities. The pueblos under my jurisdiction that adhere religiously to old customs and rules are Taos, Picuris, Santo Domingo, and Jemez, tho there are none of them that have made much progress away from the ancient and pagan rites.

"Intemperance is the besetting sin of the Pueblo. . . . If the law against selling

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intoxicants to this simple and ignorant people is allowed to stand as now interpreted [act of 1897, as construed by territorial court], it simply means the ultimate extermination of the Pueblo and the survival of the fittest."

Santa Fe, 1909: "While apparently the Pueblo Indians are law-abiding, it has come to my notice during the past year that in the practice of the Pueblo form of government cruel and inhuman punishment is often inflicted. I have strongly advised the Indians against this, and your office has, through me, done likewise. The Pueblos, however, are very insistent upon retaining their ancient form of government. As long as they are permitted to live a communal life and exercise their ancient form of government, just so long will there be ignorant and wild Indians to civilize. The Pueblo form of government recognizes no other form of government and no other authority. While apparently they submit to the laws of the territory and the government, they do so simply because they are compelled to acquiesce. The returned student who has been five years at the boarding school is compelled to adopt the Indian dress upon his return to the pueblo; he is compelled to submit to all the ancient and heathen customs of his people. If he rebels, he is punished. He therefore lapses back and becomes like one who has never seen the inside of a school."

Zuni, 1909: "The Zunis, especially the old people, are very much opposed to sending their children to school, and [44] to every influence that tends to draw them away from their old ways and habits of living; but by persistent effort, and by appealing to their reason, we succeeded in filling the school with children. The children are happy and contented while at school, but when they go home for a visit, their mothers and older sisters talk with them and make them dissatisfied and they do not wish to return. This is especially true of the girls. . . . Immorality and a general laxness in regard to their family relations, together with their pagan practices, are the great curse of this tribe. They have no marriage ceremony that is binding, and a man will often live with two or three different women during one year. This custom is very demoralizing. In some cases the father will sell his daughters and the husband his wife for the purpose of prostitution. If marriage and divorce laws could be enforced, it would be a great blessing to these people. . . . We have had very little trouble with liquor on the reservation during the past year, and the Pueblo officers co-operate with me in trying to keep it from being brought on the reservation."

This view of Pueblo customs, government, and civilization finds strong corroboration in the writings of ethnologists, such as Bandelier and Stevenson, who, in prosecuting their work, have lived among the Pueblos and closely observed them. Papers Arch. Inst. Am. ser. vol. 3, pt. 1 (1890); Bureau Am. Ethn. Reports, vols. 11 (1889-'90) and 23 (1901-'02).

During the Spanish dominion the Indians of the pueblos were treated as wards requiring special protection, were subjected to restraints and official supervision in the alienation of their property, and were the beneficiaries of a law declaring "that in the places and pueblos of the Indians no wine shall enter, nor shall it be sold to them." Chouteau v. Molony, 16 How. 203, 237, 14 L. ed. 905, 919; Laws of the Indies, Bk. 6, title 1, laws 27 and 36, title 2, law 1; Bk. 5, [45] title 2, law 7; Bk. 4, title 12, laws 7, 9, 16-20; Cedulas and Decrees shown in Hall's Mexican Law, §§ 162-171. After the Mexican succession they were elevated to citizenship and civil rights not before enjoyed, but whether the prior tutelage and restrictions were wholly terminated has been the subject of differing opinions. United States v. Pico, 5 Wall. 536, 540, 18 L. ed. 695, 696; Suñol v. Hepburn, 1 Cal. 254, 279, 280, 291, 292; 1 Nuevo Febrero Mexicano, pp. 24, 25; Hall's Mexican Laws, § 161; United States v. Ritchie, 17 How. 525, 540, 15 L. ed. 236, 240. In the last case this court observed: "The improvement of the Indians, under the influence of the missionary establishments in New Spain, which had been specially encouraged and protected by the mother country, had, doubtless, qualified them in a measure for the enjoyment of the benefits of the new institutions. In some parts of the country very considerable advancement had been made in civilizing and christianizing the race. From their degraded condition, however, and ignorance generally, the privileges extended to them in the administration of the government must have been limited; and they still, doubtless, required its fostering care and protection." And in the Pico Case the court, referring to the status of an Indian pueblo and its inhabitants during the Mexican *régime*, said: "The disposition of the lands assigned was subject at all times to the control of the government of the country. The pueblo of Las Flores was an Indian pueblo, and over the inhabitants the government extended a special guardianship."

But it is not necessary to dwell specially upon the legal status of this people under either Spanish or Mexican rule, for whether Indian communities within the limits of the United States may be subjected to its guar-

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dianship and protection as dependent wards turns upon other considerations. See Pollard v. Hagan, 3 How. 212, 225, 11 L. ed. 565, 571. Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but [46] long-continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state. As was said by this court in United States v. Kagama, 118 U. S. 375, 384, 30 L. ed. 228, 230, 6 Sup. Ct. Rep. 1109: "The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes." In Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 315, 55 L. ed. 738, 749, 31 Sup. Ct. Rep. 575, prior decisions were carefully reviewed and it was further said: "Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage."

Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts. United States v. Holliday, 3 Wall. 407, 419, 18 L. ed. 182, 186; [47] United States v. Rickert, 188 U. S. 432, 443, 445, 47 L. ed. 522, 538, 539, 23 Sup. Ct. Rep. 478; Re Heff, 197 U. S. 488, 499, 49 L. ed. 848, 853, 25 Sup. Ct. Rep. 506; Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 315, 55 L. ed. 738, 749, 31 Sup. Ct. Rep. 578.

As before indicated, by an uniform course of action beginning as early as 1854 and continued up to the present time, the legislative and executive branches of the government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes, and, considering their Indian lineage, isolated and communal life, primitive customs and limited civilization, this assertion of guardianship over them cannot be said to be arbitrary, but must be regarded as both authorized and controlling. As was said in United States v. Holliday, 3 Wall. 407, 419, 18 L. ed. 182, 186: "In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress. This control extends, as we have already shown, to the subject of regulating the liquor traffic with them. This power residing in Congress, that body is necessarily supreme in its exercise." In that case the congressional enactment prohibiting the sale of liquor to Indian wards, and forbidding its introduction into the Indian country, was applied to a sale in the state of Michigan to an Indian who had and exercised the right to vote under the laws of the state, and other applications of the statute to Indians and Indian lands in other states are shown in United States v. 43 Gallons of Whiskey (United States v. Lariviere) 93 U. S. 188, 197, 23 L. ed. 846, 848; Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399; United States v. Sutton, 215 U. S. 291, 54 L. ed. 200, 30 Sup. Ct. Rep. 116; Hallowell v. United States, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587; United States v. Wright, 229 U. S. 226, 57 L. ed. 1160, 33 Sup. Ct. Rep. 630.

It is said that such legislation cannot be made to embrace [48] the Pueblos, because they are citizens. As before stated, whether they are citizens is an open question, and we need not determine it now, because citizenship is not in itself an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Indians as a dependent people. Cherokee Nation v. Hitchcock, 187 U. S. 294, 308, 47 L. ed. 183, 190, 23 Sup. Ct. Rep. 115; United States v. Rickert, 188 U. S. 432, 445, 47 L. ed. 532, 539, 23 Sup. Ct. Rep. 478; United States v. Celestine, 215

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U. S. 278, 290, 54 L. ed. 195, 199, 30 Sup. Ct. Rep. 93; Hallowell v. United States, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587.

It also is said that such legislation cannot be made to include the lands of the Pueblos, because the Indians have a fee-simple title. It is true that the Indians of each pueblo do have such a title to all the lands connected therewith, excepting such as are occupied under Executive orders, but it is a communal title, no individual owning any separate tract. In other words, the lands are public lands of the pueblo, and so the situation is essentially the same as it was with the Five Civilized Tribes, whose lands, although owned in fee under patents from the United States, were adjudged subject to the legislation of Congress enacted in the exercise of the government's guardianship over those tribes and their affairs. Stephens v. Cherokee Nation, 174 U. S. 445, 488, 43 L. ed. 1041, 1056, 19 Sup. Ct. Rep. 722; Cherokee Nation v. Hitchcock, 187 U. S. 294, 308, 47 L. ed. 183, 190, 23 Sup. Ct. Rep. 115; Heckman v. United States, 224 U. S. 413, 56 L. ed. 820, 32 Sup. Ct. Rep. 424; Gritts v. Fisher, 224 U. S. 640, 56 L. ed. 928, 32 Sup. Ct. Rep. 580; United States v. Wright, 229 U. S. 226, 57 L. ed. 1160, 33 Sup. Ct. Rep. 630. Considering the reasons which underlie the authority of Congress to prohibit the introduction of liquor into the Indian country at all, it seems plain that this authority is sufficiently comprehensive to enable Congress to apply the prohibition to the lands of the Pueblos.

We are not unmindful that in United States v. Joseph, 94 U. S. 614, 24 L. ed. 295, there are some observations not in accord with what is here said of these Indians, but as that case did not turn upon the power of Congress over them or their property, but upon the interpretation and purpose of a statute not nearly so comprehensive as the legislation [49] now before us, and as the observations there made respecting the Pueblos were evidently based upon statements in the opinion of the territorial court, then under review, which are at variance with other recognized sources of information, now available, and with the long-continued action of the legislative and executive departments, that case cannot be regarded as holding that these Indians or their lands are beyond the range of congressional power under the Constitution.

Being a legitimate exercise of that power, the legislation in question does not encroach upon the police power of the state, or disturb the principle of equality among the states. United States v. Holliday, 3 Wall. 407, 419, 18 L. ed. 182, 186; United States v. 43 Gallons of Whiskey (United States v. Lariviere) 93 U. S. 188, 197, 23 L. ed. 846, 848; United States v. Kagama, 118 U. S. 375, 384, 30 L. ed. 228, 230, 6 Sup. Ct. Rep. 1109; Hallowell v. United States, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587, and Ex parte Webb, 225 U. S. 663, 683, 690, 691, 56 L. ed. 1248, 1256, 1259, 1260, 32 Sup. Ct. Rep. 769.

The judgment is accordingly reversed, with directions to overrule the demurrer to the indictment, and to proceed to the disposition of the case in regular course.

Reversed.

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[50] NATIONAL CITY BANK OF NEW YORK, Appt.,
v.
HENRY D. HOTCHKISS, as Trustee in Bankruptcy of Henry S. Haskins et al. (No. 459.)

HENRY D. HOTCHKISS, as Trustee in Bankruptcy of Henry S. Haskins et al., Appt.,
v.
NATIONAL CITY BANK OF NEW YORK. (No. 460.)

(See S. C. Reporter's ed. 50-59.)

Bankruptcy — voidable preference.

1. A bank which credits to the general deposit account of a firm of stock brokers the amount of a clearance loan made with the understanding that it was to be used solely to clear securities, and was to be repaid later in the day, and which does not require the securities released to be kept separate, or that any separate account be kept of money received from deliveries of stock so released, obtains a preference voidable by the brokers' trustee in bankruptcy, where, after the brokers' suspension, it demanded and received from them securities without regard to their source, to make good the brokers' obligation to the bank, with notice in terms that it was thereby receiving a preference, and that the brokers were going into bankruptcy.

[For other cases, see Bankruptcy, 147-222, in Digest Sup. Ct. 1908.]

Estoppel — inconsistent claims in judicial proceeding.

2. A trustee in bankruptcy who has sued in equity to recover certain securities alleged to have been transferred to the defendant by way of preference cannot claim the right to elect damages instead of a return of such securities, where they have depreciated in value, because defendant, who was authorized by a stipulation between the parties to sell the securities in its discretion, at the best price obtainable,

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and hold the proceeds in lieu thereof, exercised its judgment not to sell.

[For other cases, see Estoppel, 276–286, in Digest Sup. Ct. 1908.]

[Nos. 459 and 460.]

Argued October 17 and 20, 1913. Decided November 3, 1913.

CROSS APPEALS from the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the District Court for the Southern District of New York, in favor of a trustee in bankruptcy in a suit to recover an alleged preference. Affirmed.

See same case below, 120 C. C. A. 92, 201 Fed. 664.

The facts are stated in the opinion.

Mr. John A. Garver argued the cause and filed a brief for the National City Bank:

It must be presumed that everyone has conformed to the law, unless the contrary is affirmatively shown.

Jones, Ev. 2d ed. § 85; Rex v. Hawkins, 10 East, 211; Curtis v. Gokey, 68 N. Y. 304; Ormes v. Dauchy, 82 N. Y. 443, 37 Am. Rep. 583; Getts v. Janesville Wholesale Grocery Co. 163 Fed. 417; Re Neill-Pinckney-Maxwell Co. 170 Fed. 484; Re Leech, 96 C. C. A. 424, 171 Fed. 622; Sexton v. Kessler, 40 L.R.A.(N.S.) 639, 97 C. C. A. 161, 172 Fed. 535.

The right to recover a preference is exclusively statutory.

Tompkins v. Hunter, 149 N. Y. 122, 43 N. E. 532; Dodge v. McKechnie, 156 N. Y. 520, 51 N. E. 268; Huntley v. Kingman, 152 U. S. 527, 532, 38 L. ed. 540, 542, 14 Sup. Ct. Rep. 688; Townsend's Case, 1 Plowd. 113; Sutherland, Stat. Constr. § 371; Atkins v. Kinnan, 20 Wend. 250, 32 Am. Dec. 534; East Tennessee, V. & G. R. Co. v. Southern Teleg. Co. 112 U. S. 306, 310, 28 L. ed. 746, 747, 5 Sup. Ct. Rep. 168; Campbellsville Lumber Co. v. Hubbert, 50 C. C. A. 435, 112 Fed. 724, affirmed in 191 U. S. 70, 48 L. ed. 101, 24 Sup. Ct. Rep. 28; Re Bryce, 16 Daly, 443, 12 N. Y. Supp. 284; Metcalf v. Watertown, 128 U. S. 586, 588, 32 L. ed. 543, 544, 9 Sup. Ct. Rep. 173; Florida C. & P. R. Co. v. Bell, 176 U. S. 321, 327, 44 L. ed. 486, 489, 20 Sup. Ct. Rep. 399; North American Transp. & Trading Co. v. Morrison, 178 U. S. 267, 44 L. ed. 1063, 20 Sup. Ct. Rep. 869; Riggs v. Cragg, 89 N. Y. 479.

A transaction which does not have the effect of diminishing the fund that is distributable among the creditors is not repugnant to the statute.

New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199; National Bank v. Herkimer County Bank, 225 U. S. 178, 184, 56 L. ed. 1042, 1046, 32 Sup. Ct. Rep. 633; Gorman v. Littlefield, 229 U. S. 19, 25, 57 L. ed. 1047, 1050, 33 Sup. Ct. Rep. 690; Continental & C. Trust & Sav. Bank v. Chicago Title & T. Co. 229 U. S. 435, 57 L. ed. 1268, 33 Sup. Ct. Rep. 829; Re Sagor, 57 C. C. A. 412, 121 Fed. 658; Jaquith v. Alden, 189 U. S. 78, 47 L. ed. 717, 23 Sup. Ct. Rep. 649; Yaple v. Dahl-Millikan Grocery Co. 193 U. S. 526, 48 L. ed. 776, 24 Sup. Ct. Rep. 552; Wild v. Provident Life & Trust Co. 214 U. S. 292, 296, 53 L. ed. 1003, 1004, 29 Sup. Ct. Rep. 619.

A payment is objectionable under § 60 of the bankrupt act only when it has the effect of enabling one creditor to obtain a greater percentage of his claim than other creditors of the same class.

Swarts v. Fourth Nat. Bank, 54 C. C. A. 387, 117 Fed. 1; Crooks v. People's Nat. Bank, 46 App. Div. 335, 61 N. Y. Supp. 604; Re Harpke, 54 C. C. A. 97, 116 Fed. 297; Re Denning, 114 Fed. 221; Gomila v. Wilcombe, 81 C. C. A. 268, 151 Fed. 470.

Prior to the amendment of 1910, the trustee in bankruptcy was required to prove, in a suit of this kind, that the creditor knew that the bankrupt actually intended to give a preference.

Hardy v. Gray, 75 C. C. A. 562, 144 Fed. 922; Re First Nat. Bank, 84 C. C. A. 16, 155 Fed. 100; Rutland County Nat. Bank v. Graves, 156 Fed. 168; Tumlin v. Bryan, 21 L.R.A.(N.S.) 960, 91 C. C. A. 200, 165 Fed. 166; Re Leech, 96 C. C. A. 424, 171 Fed. 622; Re Sayed, 185 Fed. 962; Kimmerle v. Farr, 111 C. C. A. 27, 189 Fed. 295; Debus v. Yates, 193 Fed. 435.

Defendant did not have reasonable cause to believe it was obtaining a preference.

Irish v. Citizens' Trust Co. 163 Fed. 880.

The tendency of the courts has been to extend the doctrine of subrogation to every possible case for the protection of one who has advanced money which is used in the discharge of an obligation carrying with it some form of security. Formerly, the courts declined to recognize this right unless the money was paid under a definite agreement, or for the purpose of protecting a junior interest in the security held by the principal creditor; but that limitation is no longer recognized, because the true basis of the doctrine is "the natural justice of placing the burden where it ought to rest."

Matthews v. Fidelity Title & T. Co. 52 Fed. 689.

The courts, and especially those of New York, now apply the doctrine in every instance in which one party pays a debt for which another party is primarily liable, and

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which, in equity and good conscience, should have been discharged by the latter.

Stevens v. King, 84 Me. 291, 24 Atl. 850; Dunlop v. James, 174 N. Y. 416, 67 N. E. 69; Atlantic Trust Co. v. Kinderhook & H. R. Co. 17 App. Div. 212, 45 N. Y. Supp. 492; Louis v. Bauer, 33 App. Div. 293, 53 N. Y. Supp. 985; Peters v. Meyer, 72 App. Div. 587, 76 N. Y. Supp. 1028; Gans v. Thieme, 93 N. Y. 225; Pease v. Egan, 131 N. Y. 273, 30 N. E. 102; Morehouse v. Brooklyn Heights R. Co. 185 N. Y. 524, 78 N. E. 179, 7 Ann. Cas. 377; Title Guarantee & T. Co. v. Haven, 196 N. Y. 487, 25 L.R.A. (N.S.) 1308, 89 N. E. 1082, 1085, 17 Ann. Cas. 1131; Lidderdale v. Robinson, 2 Brock. 168, Fed. Cas. No. 8,337.

The only exception to the liberal rule recognized by the New York courts is that it will not be applied to defeat the superior or equal equities of third persons.

4 Pom. Eq. Jur. 3d ed. § 1419, note; Union Trust Co. v. Monticello & P. J. R. Co. 63 N. Y. 314, 20 Am. Rep. 541.

The bankruptcy courts should apply the doctrine recognized in the state courts.

Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Humphrey v. Tatman, 198 U. S. 93, 49 L. ed. 958, 25 Sup. Ct. Rep. 567; Sabin v. Camp, 98 Fed. 974, 2 N. B. N. Rep. 375.

Courts of equity will not permit technicalities or even serious obstacles to stand in the way of the enforcement of the principle of subrogation; and they will, if necessary to do justice, even revive a mortgage that has been discharged of record.

Peters v. Meyer, 72 App. Div. 585, 76 N. Y. Supp. 1028; Gans v. Thieme, 93 N. Y. 225; Pease v. Egan, 131 N. Y. 262, 30 N. E. 102; Cobb v. Dyer, 69 Me. 494.

It is not necessary that the person to be subrogated should pay the creditor directly. It is sufficient if he advances the money for the purpose of enabling the debtor to pay the debt.

Tradesmen's Bldg. & L. Asso. v. Thompson, 32 N. J. Eq. 133; Merchants' & M. Bank v. Tillman, 106 Ga. 55, 31 S. E. 794; Sgobel v. Cappadonia, 8 App. Div. 303, 40 N. Y. Supp. 946; Peters v. Meyer, 72 App. Div. 585, 76 N. Y. Supp. 1028.

The exercise of a pre-existing right, well founded in equity, is not a preference.

Sexton v. Kessler, 40 L.R.A. (N.S.) 639, 97 C. C. A. 161, 172 Fed. 535.

Where the transaction is valid under the state law, as between the parties, and could not have been attacked by the other creditors, the trustee in bankruptcy will not be permitted to question it.

Sexton v. Kessler, 225 U. S. 90, 56 L. ed. 995, 32 Sup. Ct. Rep. 657; Hurley v. Atchison, T. & S. F. R. Co. 213 U. S. 126, 53 L. ed. 729, 29 Sup. Ct. Rep. 466; Mills v. Virginia-Carolina Lumber Co. 21 L.R.A. (N.S.) 901, 90 C. C. A. 154, 164 Fed. 168.

A general custom is the common law itself, or a part of it; and even written contracts will yield to such custom.

Walls v. Bailey, 49 N. Y. 471, 10 Am. Rep. 407; Elkus, Secret Liens, 83, § 150.

Counsel for the appellee has laid emphasis on the fact that the proceeds of the clearance loan were placed to the credit of the borrowers in their general deposit account, and that there was thus a mingling of credits; but that made no difference in the equities (Fourth Street Bank v. Yardley, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439), and it was well understood that no part of the deposit account represented by the clearance loan was to be used for any except clearance purposes.

There was thus a special fund held by the bankrupts for a specific purpose, to be used in protecting and enhancing the value of the general assets, and having, consequently, such character that no general creditor could claim any right to share in it.

Gorman v. Littlefield, 229 U. S. 19, 25, 57 L. ed. 1047, 1050, 33 Sup. Ct. Rep. 690.

Mr. Abram I. Elkus argued the cause, and, with Messrs. Wesley S. Sawyer and William A. Barber, filed a brief for Hotchkiss:

The transfer of securities by Lathrop, Haskins, & Company to defendant was within four months of the filing of the petition in bankruptcy, and was without a present fair and valuable consideration. The defendant thus obtained a greater percentage of its claim than any other general creditor of Lathrop, Haskins, & Company.

Crooks v. People's Nat. Bank, 46 App. Div. 335, 61 N. Y. Supp. 604.

The bank had actual knowledge that Lathrop, Haskins, & Company were insolvent, yet the statute does not require actual knowledge, but only that the creditor shall have reasonable cause to believe that a preference was intended.

Loveland, Bankr. 3d ed. p. 561; Remington, Bankr. §§ 1398, 1399; Bardes v. First Nat. Bank, 122 Iowa, 443, 98 N. W. 284, 12 Am. Bankr. Rep. 771; Sundheim v. Ridge Ave. Bank, 138 Fed. 951, 15 Am. Bankr. Rep. 132; Parker v. Black, 143 Fed. 560, 16 Am. Bankr. Rep. 202; Re Hines, 144 Fed. 543, 16 Am. Bankr. Rep. 495; Wetstein v. Franciscus, 67 C. C. A. 62, 133 Fed. 900, 13 Am. Bankr. Rep. 326; Pratt v. Columbia Bank, 157 Fed. 137, 18 Am. Bankr. Rep. 406.

The existence of a general financial crisis

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should put a prudent man upon inquiry with reference to doubtful debtors.

Re Clarke, 10 Nat. Bankr. Reg. 21.

Intent on the part of the debtor to give a preference need not be shown by affirmative proof, but flows from the knowledge of insolvency on the part of the debtor.

Pirie v. Chicago Title & T. Co. 182 U. S. 438, 454, 45 L. ed. 1171, 1179, 21 Sup. Ct. Rep. 906; Benedict v. Deshel, 177 N. Y. 1, 68 N. E. 999; Alexander v. Redmond, 103 C. C. A. 446, 180 Fed. 92, 24 Am. Bankr. Rep. 623.

A custom or usage must be proved by facts and instances, and not by opinion and understanding.

Home Ins. Co. v. Weide, 11 Wall. 438, 20 L. ed. 197; The John H. Cannon, 51 Fed. 46; Ames Mercantile Co. v. Kimball S. S. Co. 125 Fed. 332; Allen v. Merchants' Bank, 22 Wend. 223, 34 Am. Dec, 289; Mills v. Hallock, 2 Edw. Ch. 652.

It is clear that no two banks consider the custom or usage the same. Each bank has a different agreement, and beyond the hope and belief that the money loaned is to be repaid from some source, each bank has a different expectation.

Adams v. Otterback, 15 How. 539, 14 L. ed. 805.

The law is clear that he who desires security must have possession, constructive or actual, of the securities. A vague agreement to secure is never enforced where bankruptcy intervenes. No reason is shown here why the rule of law should not apply.

Corn Exch. Bank v. Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655.

Any custom or usage for the bank to have a lien on securities in the possession of Lathrop, Haskins, & Company is inadmissible and incompetent, as tending to change and vary the terms of the written agreement between the parties (the demand notes).

The Reeside, 2 Sumn. 567, Fed. Cas. No. 11,657; Hopper v. Sage, 112 N. Y. 530, 8 Am. St. Rep. 771, 20 N. E. 350; Covington v. Kanawha Coal & Coke Co. 121 Ky. 681, 3 L.R.A.(N.S.) 248, 123 Am. St. Rep. 219, 89 S. W. 1126, 12 Ann. Cas. 311; Boruszweski v. Middlesex Mut. Assur. Co. 186 Mass. 589, 72 N. E. 250; O'Donohue v. Leggett, 134 N. Y. 40, 31 N. E. 269; Oelricks v. Ford, 23 How. 49, 16 L. ed. 534; Barnard v. Kellogg, 10 Wall. 383, 19 L. ed. 987; Selchow v. Stymus, 26 Hun, 145; Coleman v. First Nat. Bank, 53 N. Y. 388; 4 Wigmore, Ev. § 2446.

The securities were not separated or marked, but were mixed with the general mass of securities in the bankrupt's possession. There was no agreement to separate or distinguish them in any way. The bankrupts drew from the mass indiscriminately. When the securities were delivered they were withdrawn from the mass without any reference to their source or to any substitution. Part of the mass had been cleared from loans and part had not, and those that had been so cleared were cleared by checks drawn against an account representing moneys from all sources.

Casey v. Cavaroc, 96 U. S. 467, 24 L. ed. 779; Torrance v. Winfield Nat. Bank, 66 Kan. 177, 71 Pac. 235, 11 Am. Bankr. Rep. 185; Long v. Farmers' State Bank, 9 L.R.A. (N.S.) 585, 77 C. C. A. 538, 147 Fed. 360; Johnston v. Hoff, A. & M. Co. 66 C. C. A. 534, 133 Fed. 704; Pollock v. Jones, 61 C. C. A. 555, 124 Fed. 163, 10 Am. Bankr. Rep. 616; First Nat. Bank v. Johnson, 10 Am. Bankr. Rep. 208; Ryttenberg v. Schefer, 131 Fed. 313; Mathews v. Hardt, 79 App. Div. 570, 80 N. Y. Supp. 462.

Where a lien on goods sold and delivered as security for the purchase price is expressly contracted for, and fails for want of possession or separation, or because the purchaser was permitted to consume or sell the goods, the seller is entitled to no equitable lien upon the goods remaining in the hands of the buyer, or upon proceeds thereof. And where in such case possession or separation comes within the four months' period, the transfer takes place as of that date.

Re Liberty Silk Co. 152 Fed. 844; Sexton v. Kessler, 40 L.R.A.(N.S.) 639, 97 C. C. A. 161, 172 Fed. 535; Pontiac Buggy Co. v. Skinner, 158 Fed. 858; Fourth Street Nat. Bank v. Millbourne Mills Co's Trustee, 30 L.R.A.(N.S.) 552, 96 C. C. A. 629, 172 Fed. 177; Re Faulhaber Stable Co. 95 C. C. A. 344, 170 Fed. 68; Skilton v. Codington, 185 N. Y. 80, 113 Am. St. Rep. 885, 77 N. E. 790; Re Dismal Swamp Contracting Co. 135 Fed. 415; Re Klingaman, 101 Fed. 691, 4 Am. Bankr. Rep. 254.

An express promise to pay out of a given fund is not an equitable assignment of that fund, and is not effective against the trustee in bankruptcy of the promisor.

Christmas v. Russell (Christmas v. Gaines) 14 Wall. 69, 20 L. ed. 762; Williams v. Ingersoll, 89 N. Y. 508; Dillon v. Barnard, 21 Wall. 430, 22 L. ed. 673; Smedley v. Speckman, 85 C. C. A. 179, 157 Fed. 815.

The doctrine of subrogation requires: First. That the person seeking its benefit must have paid a debt to a third party before he can be substituted to another's rights. Second. That in doing this he must not act as a volunteer, but on compulsion to save himself from loss by reason of a superior lien or claim on the part of the per-

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son to whom he pays the debt, as in the case of a surety or a prior mortgagee.

Ætna L. Ins. Co. v. Middleport, 124 U. S. 534, 31 L. ed. 537, 8 Sup. Ct. Rep. 625; Shinn v. Budd, 14 N. J. Eq. 234; Sandford v. McLean, 3 Paige, 117, 23 Am. Dec. 773.

In order that one having no interest to protect, who pays the debt of another or advances money for the purpose, may be entitled to succeed to the rights of the creditor in respect to the debts so paid, there must be a convention or agreement to that effect.

Browder v. Hill, 69 C. C. A. 499, 136 Fed. 821.

The statute gives the trustee the right to recover the value of the securities or the securities themselves, at his election.

Collier, Bankr. 8th ed. 1910, p. 675; Re Phelps, 3 Am. Bankr. Rep. 396.

The complainant cannot be made to suffer, nor can the creditors of the bankrupt's estate be made to suffer because the defendant wrongfully took securities to which it had no right or claim.

Ommen v. Talcott, 175 Fed. 261; Houghton v. Stiner, 92 App. Div. 171, 87 N. Y. Supp. 10; Crampton v. Valido Marble Co. 60 Vt. 291, 1 L.R.A. 120, 15 Atl. 153.

The bankruptcy act of 1867, § 35, was, as to the point involved, substantially identical; and therefore the decisions under that act are applicable here.

First Nat. Bank v. Jones, 21 Wall. 325, 22 L. ed. 542; Shuman v. Fleckenstein, 4 Sawy. 174, Fed. Cas. No. 12,826.

Where the trustee sues the preferred creditor at law for conversion it is well settled that the measure of damages is the value of the property at the time of taking.

Stern v. Mayer, 99 App. Div. 427, 91 N. Y. Supp. 292; Merritt v. Halliday, 107 App. Div. 596, 95 N. Y. Supp. 331.

The value of the securities should be taken as of the date of the taking.

Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 524, 51 L. ed. 596, 598, 27 Sup. Ct. Rep. 391.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit by a trustee in bankruptcy to recover certain securities alleged to have been transferred to the [55] defendant bank by way of preference. The plaintiff had a judgment in the district court (200 Fed. 287, 299) and in the circuit court of appeals (120 C. C. A. 92, 201 Fed. 664). Both parties appeal; the plaintiff, upon a subordinate question as to its right to elect damages instead of a return of the securities.

The case arose upon what is known in New York as a clearance loan. Brokers need large sums to clear or pay for the stocks that they receive in the course of the day, and as the stocks must be paid for before they are received and can be pledged to raise the necessary funds, these sums are advanced by the banks. They are returned later on the same day by making deposits to the borrower's account and drawing a check to the order of the bank. Perhaps such a general course of dealing might be arranged so as to give a lien on the loan or its proceeds until payment, but the question whether such a lien has been created rarely, if ever, has arisen, the whole business being finished in a few hours. It is, however, the main issue in this case.

The bankrupts were brokers in partnership, and at 10 o'clock on January 19, 1910, had assets exceeding their liabilities by nearly half a million dollars. These assets consisted largely in the stock of a coal and iron company in which there was a pool. Before 12, there was a break in the market, the stock went down, and at about noon the suspension of the firm was announced. A petition in involuntary bankruptcy was filed at 10 minutes after 4 on the same day. At about 10, the bank made a clearance loan to the bankrupts of $500,000 in the usual way, to enable them to meet their current obligations and to get the stocks deliverable on that day, the bank receiving demand notes, and both parties acting in good faith. The sum was credited in the deposit account of the firm, in addition to $54,319.98 already there, and soon after the bank certified and subsequently paid checks amounting [56] to $535,920.74. During the day the firm made deposits which are not in question, but there remained due upon the loan $166,166.69. Officers of the bank, noticing the drop in the stock, went to the firm, demanded payment or securities to make good the obligations to the bank, and were told of the suspension and that a petition in bankruptcy would be filed. After two hours' discussion the securities in question were delivered between 2 and 3 P. M., but the officers were told that the delivery was a preference. Some of the securities bore no relation to the loan; others, and it may be assumed for purposes of argument, most, had been released by the money thus obtained.

In dealing with transactions of this kind we may go far in giving them any form that will carry out the mutually understood intent. Sexton v. Kessler, 225 U. S. 90, 96, 97, 56 L. ed. 995, 999, 1000, 32 Sup. Ct. Rep. 657. But if the intent was doubtful or inconsistent with the legal effect of dominant facts, it must fail. For instance, apart from possible exceptions, a man cannot retain a domicil in one place when he

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has moved to another, and intends to reside there for the rest of his life, by any wish, declaration, or intent inconsistent with the dominant facts of where he actually lives and what he actually means to do. Dickinson v. Brookline, 181 Mass. 195, 92 Am. St. Rep. 407, 63 N. E. 331. In the present case it is agreed that it was expected and understood that no portion of the clearance loan was to be used for any purpose other than to clear securities. But, on the other hand, by consent of the bank, as it seems, the loan was put into the general deposit account, which was drawn upon for general purposes; at least, to the extent of the balance above the loan; the securities released were not kept separate, but were used like any other; and no separate account was kept of money received from deliveries of stock so released. What happened as between these parties was simply that all moneys received in the course of the day, from whatever source, went into the firm's [57] deposit account with the bank. So that, even if we take it, as a corollary of what was understood, that the use of the clearance loan was expected to enable the firm to repay the loan, it does not appear to have been expected that the proceeds should be appropriated specifically to that end, but simply that the addition of such proceeds to the general funds of the firm would enable the latter to pay within the time allowed. This is the view of the facts taken by the master and both of the courts below. They also found that an attempt to give the matter a different complexion by custom had failed; and if we went behind their findings we should take the same view.

A trust cannot be established in an aliquot share of a man's whole property, as distinguished from a particular fund, by showing that trust moneys have gone into it. On similar principles a lien cannot be asserted upon a fund in a borrower's hands, which, at an earlier stage, might have been subject to it, if, by consent of the claimant, it has become a part of the borrower's general estate. But that was the result of the dealings between these parties, and it cannot be done away with by a wish or intention, if such there was, that alongside of this permitted freedom of dealing on the part of the bankrupts, the security of the bank should persist. It is not like the case of property wrongfully mingled with general funds and afterwards traced. All that the parties agreed, either expressly or by implication, was that the debt incurred at 10 o'clock should be paid by 3. Some banks seem to have required the dealing to be conducted on the footing of a fund identified and subject to a trust at every step; but between these parties there was no attempt to follow a specific fund through a series of changes until it was returned. See Dillon v. Barnard, 21 Wall. 430, 22 L. ed. 673.

As all trace of the bank's money was lost when it entered the stream of the firm's general property, there can be no right of subrogation. Neither can a claim be upheld on [58] the ground that there was no diminution of the bankrupt's assets, or that the transaction should be regarded as instantaneous and one. The consent to become a general creditor for an hour, that was imported, even if not intended to have that effect, by the liberty allowed to the firm, broke the continuity and established the loan as part of the assets. No doubt many general creditors have increased a bankrupt's estate by their advances, but they have lost the right to take them back. Time sometimes can be disregarded when it is insignificant. But in this case half the time between the loan and the transfer of securities sufficed to change the position of the borrowers from a fortune of half a million to a deficit of double that amount.

In both Gorman v. Littlefield, 229 U. S. 19, 57 L. ed. 1047, 33 Sup. Ct. Rep. 690, and Richardson v. Shaw, 209 U. S. 365, 52 L. ed. 835, 28 Sup. Ct. Rep. 512, 14 Ann. Cas. 981, in addition to the personalty of the holder there was also a specific stock, which identified the fund relied upon and separated it from the general mass of the estate. Hurley v. Atchison, T. & S. F. R. Co. 213 U. S. 126, 53 L. ed. 729, 29 Sup. Ct. Rep. 466, stood on the peculiar facts of the case, which were held to point to an identified *res* and give an immediate claim against it. The case established no general proposition contrary to what we now decide.

The suggestions that it does not appear that the bankrupts intended to give a preference, or that the bank had reasonable cause to believe that it was obtaining one, hardly need answer. The bank did not confine its demand to proceeds of the loan, but asked for and obtained securities without regard to their source. It was notified in terms that it was receiving a preference and that the firm was going into bankruptcy. If this was not sufficient notice, it is hard to imagine what would be enough.

The cross appeal depends upon the frame of the bill and effect of an agreement between the parties. On April 5, 1910, it was agreed that the securities in question might be sold by the bank "at the best price obtainable, at such [59] times as may seem best to the officers of" the bank; that the rights of both parties "shall attach to the proceeds realized from the sale," and "the amount realized from the sale of the said securities shall stand in lieu of the securities,

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and shall represent the amount of the liability" of the bank to the trustee in bankruptcy in case of judgment against it. "The making of this stipulation shall not alter the rights or claims of any of the parties, nor change the jurisdiction of any court . . . it being the intention of the stipulation that the securities in the possession of the National City Bank shall be converted into money at the best prices obtainable, and that all rights of the parties shall remain as against the proceeds of the sale of the said securities the same as they existed against the securities themselves at the time of making this stipulation."

It seems that no sale took place. The decree was for a delivery of the securities with all interest and dividends thereon received, and in default thereof for $161,740.62, with interest from the date of the master's report. But as the securities have declined a good deal below their value at the time of conversion, and again below their value at the date of the foregoing agreement, the trustee claims the right to take the sum named, with corrections. This was answered sufficiently by Judge Hand in the district court. As he observed, the suit was in equity to recover the securities *in specie*. After the agreement the bank was authorized to hold them until it thought it wise to sell. If it had sold, there can be no doubt that the plaintiff's claim would have been limited to the proceeds, by the words of the contract. Its judgment not to sell, exercised for the benefit of both parties, cannot have been intended to put it in a worse position. Such an understanding would have deprived the plaintiff of the judgment of the bank.

Decree affirmed.

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[60] MECHANICS' & METALS NATIONAL BANK OF THE CITY OF NEW YORK, Appt.,

v.

IRVING L. ERNST, Lindsay Russell, and Harper T. Marshall, as Trustees in Bankruptcy of Dudley P. Humphrey, et al.

(See S. C. Reporter's ed. 60–67.)

Bankruptcy — preference — deposit by insolvent — set-off.

Deposits made by an insolvent customer after the bank cashier has forbidden the payment of checks against the deposit account, and but a few hours before an involuntary petition in bankruptcy was filed against the customer, constitute a voidable preference, and cannot be allowed to the bank by way of set-off against the customer's indebtedness to the bank.

[For other cases, see Bankruptcy, VI. b, 2; X. a, in Digest Sup. Ct. 1908.]

[No. 446.]

Argued October 20, 1913. Decided November 3, 1913.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the District Court for the Southern District of New York in favor of trustees in bankruptcy in a suit to recover an alleged voidable preference. Affirmed.

See same case below, 120 C. C. A. 92, 201 Fed. 664.

The facts are stated in the opinion.

Mr. Lewis H. Freedman argued the cause, and, with Messrs. Adrian H. Larkin and Leland B. Garretson, filed a brief for appellant:

The contract must be construed in the light of the law of New York.

Richardson v. Shaw, 209 U. S. 365, 52 L. ed. 835, 28 Sup. Ct. Rep. 512, 14 Ann. Cas. 981; Hiscock v. Varick Bank, 206 U. S. 28, 51 L. ed. 945, 27 Sup. Ct. Rep. 681; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Skiff v. Stoddard, 63 Conn. 198, 21 L.R.A. 102, 26 Atl. 874, 28 Atl. 104.

The only contracts which are void against creditors in New York are contracts which are (1) in fraud of creditors: Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 Ann. Cas. 789; Zartman v. First Nat. Bank, 189 N. Y. 267, 12 L.R.A.(N.S.) 1083, 82 N. E. 127; (2) void under the statute: Skilton v. Codington, 185 N. Y. 80, 113 Am. St. Rep. 885, 77 N. E. 790.

A general custom is the common law itself, or a part of it. And written contracts, by implication, incorporate custom into them.

Underwood v. Greenwich Ins. Co. 161 N. Y. 423, 55 N. E. 936; Newhall v. Appleton, 114 N. Y. 140, 3 L.R.A. 859, 21 N. E. 105; Walls v. Bailey, 49 N. Y. 471, 10 Am. Rep. 407; Botany Worsted Works v. Wendt, 22 Misc. 156, 48 N. Y. Supp. 1024; Hostetter v. Park, 137 U. S. 30, 40, 34 L. ed. 568, 572, 11 Sup. Ct. Rep. 1.

Persons engaged in a particular trade or business are bound to inform themselves as to the customs and usages of such business; hence knowledge on their part will be presumed.

NOTE.—On set-off by bank against bankrupt's deposit as preference within bankruptcy law—see note to Booth v. Prete, 20 L.R.A.(N.S.) 863.

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Robinson v. United States, 13 Wall. 363, 366, 20 L. ed. 653, 654; Hazard v. New England M. Ins. Co. 8 Pet. 557, 8 L. ed. 1043; Hartshorne v. Union Mut. Ins. Co. 36 N. Y. 172.

The proof of custom was competent.

Megowan v. Peterson, 173 N. Y. 5, 65 N. E. 738; Nightingale v. J. H. & C. K. Eagle, 141 App. Div. 386, 126 N. Y. Supp. 339; Juilliard v. Chaffee, 92 N. Y. 535; Grierson v. Mason, 60 N. Y. 394; Oelricks v. Ford, 23 How. 49, 16 L. ed. 534.

The doctrine of equitable liens is now thoroughly established.

Pom. Eq. Jur. 3d ed. § 1235; Walker v. Brown, 165 U. S. 654, 664, 665, 41 L. ed. 865, 870, 871, 17 Sup. Ct. Rep. 453; Goodnough Mercantile & Stock Co. v. Galloway, 156 Fed. 504; Howard v. Delgado, 57 C. C. A. 270, 121 Fed. 26; Chattanooga Nat. Bank v. Rome Iron Co. 102 Fed. 755; Ingersoll v. Coram, 211 U. S. 335, 368, 53 L. ed. 208, 229, 29 Sup. Ct. Rep. 92; Hovey v. Elliott, 118 N. Y. 124, 23 N. E. 475; Holroyd v. Marshall, 10 H. L. Cas. 191, 33 L. J. Ch. N. S. 193, 9 Jur. N. S. 213, 7 L. T. N. S. 172, 11 Week. Rep. 171, 10 Eng. Rul. Cas. 420.

A party may, by express agreement, create a charge or claim in the nature of a lien on property of which he is the owner or possessor, and equity will establish and enforce such charge or claim not only against the party who stipulated to give it, but also against third persons, who are either volunteers, or who take the estate on which the lien is agreed to be given, with notice of the stipulations.

Ketchum v. St. Louis, 101 U. S. 306, 25 L. ed. 999; Hauselt v. Harrison, 105 U. S. 401, 26 L. ed. 1075; Carr v. Hamilton, 129 U. S. 252, 32 L. ed. 669, 9 Sup. Ct. Rep. 295; Fourth Street Nat. Bank v. Yardley, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439; Walker v. Brown, 165 U. S. 654, 41 L. ed. 865, 17 Sup. Ct. Rep. 453; Ingersoll v. Coram, 211 U. S. 335, 53 L. ed. 208, 29 Sup. Ct. Rep. 92; Hurley v. Atchison, T. & S. F. R. Co. 213 U. S. 126, 53 L. ed. 729, 29 Sup. Ct. Rep. 466; Sexton v. Kessler & Co. 225 U. S. 90, 56 L. ed. 995, 32 Sup. Ct. Rep. 657; Dressel v. North State Lumber Co. 119 Fed. 531; First Nat. Bank v. Pennsylvania Trust Co. 60 C. C. A. 100, 124 Fed. 968; Fisher v. Zollinger, 79 C. C. A. 76, 149 Fed. 54; Union Trust Co. v. Bulkeley, 80 C. C. A. 328, 150 Fed. 510; Mills v. Virginia-Carolina Lumber Co. 21 L.R.A. (N.S.) 901, 90 C. C. A. 154, 164 Fed. 168; Re Farmers' Supply Co. 170 Fed. 502; Goodnough Mercantile & Stock Co. v. Galloway, 171 Fed. 940; Re National Cash Register Co. 98 C. C. A. 425, 174 Fed. 579.

If such a contract is shown to exist, payments made in pursuance thereof will not be invalidated as preferences by the operation of the bankruptcy act.

Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Re Perlhefter, 177 Fed. 299.

The agreement creating the lien may be either verbal or in writing.

Riddle v. Hudgins, 7 C. C. A. 335, 19 U. S. App. 144, 58 Fed. 490.

The doctrine of equitable lien has been uniformly declared and adopted by the New York courts, and lately approved by this court (Sexton v. Kessler & Co. 225 U. S. 90, 56 L. ed. 995, 32 Sup. Ct. Rep. 657), and enforced as against all subsequent claimants except purchasers for value, without notice.

National Bank v. Rogers, 166 N. Y. 380, 59 N. E. 922; Hamilton Trust Co. v. Clemes, 163 N. Y. 423, 57 N. E. 614; American Sugar Ref. Co. v. Fancher, 145 N. Y. 552, 27 L.R.A. 757, 40 N. E. 206; Hovey v. Elliott, 118 N. Y. 124, 23 N. E. 475; Spring v. Short, 90 N. Y. 538; Coats v. Donnell, 94 N. Y. 168; Husted v. Ingraham, 75 N. Y. 251; Payne v. Wilson, 74 N. Y. 348; Parshall v. Eggert, 54 N. Y. 18; Bank of Rochester v. Jones, 4 N. Y. 497, 85 Am. Dec. 290; McCaffrey v. Woodin, 65 N. Y. 459, 22 Am. Rep. 644.

The bankruptcy courts could recognize and enforce the equitable principle even if an ordinary court of equity could not.

Hurley v. Atchison, T. & S. F. R. Co. 213 U. S. 126, 53 L. ed. 729, 29 Sup. Ct. Rep. 466; Goodnough Mercantile & Stock Co. v. Galloway, 171 Fed. 940; Hauselt v. Harrison, 105 U. S. 401, 26 L. ed. 1075; Dressel v. North State Lumber Co. 119 Fed. 531; Mills v. Virginia-Carolina Lumber Co. 21 L.R.A. (N.S.) 901, 90 C. C. A. 154, 164 Fed. 169.

The right of a broker to substitute one kind of security for another does not alter the rights of the parties.

Gorman v. Littlefield, 229 U. S. 19, 57 L. ed. 1047, 33 Sup. Ct. Rep. 690; Richardson v. Shaw, 209 U. S. 365, 52 L. ed. 835, 28 Sup. Ct. Rep. 512, 14 Ann. Cas. 981.

The moment the checks composing the deposit of $54,048.18 were received by the appellant, and passed to the credit of the brokers, the funds became the appellant's property, and the relation of debtor and creditor was created.

New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199; First Nat. Bank v. Burkhardt, 100 U. S. 686, 25 L. ed. 766; Cassidy v. Uhlmann, 170 N. Y. 515, 63 N. E. 554.

The relation of debtor and creditor having

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been created, the right of set-off was also established.

New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199; Joyce v. Auten, 179 U. S. 591, 45 L. ed. 332, 21 Sup. Ct. Rep. 227; Scott v. Armstrong, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148; Straus v. Tradesmen's Nat. Bank, 122 N. Y. 379, 25 N. E. 372.

The case involves no question of actual fraud.

Van Iderstine v. National Discount Co. 227 U. S. 575, 582, 57 L. ed. 652, 654, 33 Sup. Ct. Rep. 343; Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008; Githens v. Shiffler, 112 Fed. 505; Re Maher, 144 Fed. 503; Keppel v. Tiffin Sav. Bank, 197 U. S. 356, 49 L. ed. 790, 25 Sup. Ct. Rep. 443; Jones v. Simpson, 116 U. S. 609, 615, 29 L. ed. 742, 744, 6 Sup. Ct. Rep. 538.

The insolvent's estate must have been diminished as a result of the transaction.

Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008, affirming 15 L.R.A.(N.S.) 372, 82 C. C. A. 91, 152 Fed. 949: Hardy v. Gray, 75 C. C. A. 562, 144 Fed. 922; Calhoun County Bank v. Cain, 82 C. C. A. 114, 152 Fed. 983; Tumlin v. Bryan, 21 L.R.A.(N.S.) 960, 91 C. C. A. 200, 165 Fed. 166; Re Neill-Pinckney-Maxwell Co. 176 Fed. 481; Sparks v. Marsh, 177 Fed. 739; Kimmerle v. Farr, 111 C. C. A. 27, 189 Fed. 295; Collier, Bankr. 9th ed. pp. 790, 791, 802, 803; Remington, Bankr. §§ 1276, 1296; Pirie v. Chicago Title & T. Co. 182 U. S. 438, 449, 45 L. ed. 1171, 1178, 21 Sup. Ct. Rep. 906; New York County Nat. Bank v. Massey, 192 U. S. 138, 147, 48 L. ed. 380, 384, 24 Sup. Ct. Rep. 199; Continental & C. Trust & Sav. Bank v. Chicago Title & T. Co. 229 U. S. 435, 57 L. ed. 1268, 33 Sup. Ct. Rep. 829; Wild v. Provident Life & T. Co. 214 U. S. 292, 53 L. ed. 1003, 29 Sup. Ct. Rep. 619; National Bank v. National Herkimer County Bank, 225 U. S. 178, 56 L. ed. 1042, 32 Sup. Ct. Rep. 633; Jaquith v. Alden, 189 U. S. 78, 47 L. ed. 717, 23 Sup. Ct. Rep. 649; Re Sagor, 57 C. C. A. 412, 121 Fed. 658; Gans v. Ellison, 52 C. C. A. 366, 114 Fed. 734; Dressel v. North State Lumber Co. 107 Fed. 255.

The debtor must have been insolvent within the meaning of the statute.

Pirie v. Chicago Title & T. Co. 182 U. S. 438, 451, 45 L. ed. 1171, 1178, 21 Sup. Ct. Rep. 906; McDonald v. Clearwater Shortline R. Co. 164 Fed. 1007; Hardy v. Gray, 75 C. C. A. 562, 144 Fed. 922; Remington, Bankr. § 1343, pp. 786, 787; Collier, Bankr. 9th ed. pp. 8, 9; Re Klein, 116 C. C. A. 603, 197 Fed. 241; J. W. Butler Paper Co. v. Goembel, 74 C. C. A. 433, 143 Fed. 295.

The law recognizes the possibility of such an occurrence as is shown at bar, and declines to recognize it as a fair criterion in determining the "fair valuation" required by the statute.

People ex rel. Knickerbocker F. Ins. Co. v. Coleman, 107 N. Y. 544, 14 N. E. 431; Collier, Bankr. 9th ed. p. 792; Rutland County Nat. Bank v. Graves, 156 Fed. 168; J. W. Butler Paper Co. v. Goembel, 74 C. C. A. 433, 143 Fed. 295; Chicago Motor Vehicle Co. v. American Oak Leather Co. 74 C. C. A. 576, 141 Fed. 518; Galigher v. Jones, 129 U. S. 193, 32 L. ed. 658, 9 Sup. Ct. Rep. 335; Re Swift, 114 Fed. 947; Wright v. Bank of Metropolis, 110 N. Y. 237, 1 L.R.A. 289, 6 Am. St. Rep. 356, 18 N. E. 79; Gruman v. Smith, 81 N. Y. 25; Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507, 66 N. Y. 518, 23 Am. Rep. 80; Chicago Title & T. Co. v. John A. Roebling's Sons Co. 107 Fed. 71.

Furthermore, the bankrupt firm being a partnership, it must also be shown that each of the partners was also individually insolvent.

Francis v. McNeal, 108 C. C. A. 459, 186 Fed. 481; Tumlin v. Bryan, 21 L.R.A.(N.S.) 966, 91 C. C. A. 200, 165 Fed. 166.

The payment must have been in satisfaction of, or on account of, an antecedent debt.

Coder v. Arts, 15 L.R.A.(N.S.) 372, 82 C. C. A. 91, 152 Fed. 943, affirmed in 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008.

Insolvency must have existed at the time when the payment was made.

Tumlin v. Bryan, 21 L.R.A.(N.S.) 960, 91 C. C. A. 200, 165 Fed. 168; Rutland County Nat. Bank v. Graves, 156 Fed. 168; J. W. Butler Paper Co. v. Goembel, 74 C. C. A. 433, 143 Fed. 295; Re Rome Planing Mill, 96 Fed. 812; Troy Wagon Works v. Vastbinder, 130 Fed. 232; Re Wittenberg Veneer & Panel Co. 108 Fed. 593; McDonald v. Daskam, 53 C. C. A. 554, 116 Fed. 276.

It is a well-known fact that on the stock exchange quotations vary enormously in a few moments, and this is especially so in "panicky" times. Such was the case in the suit at bar; and in such a case, the law will recognize the fraction of a day, and the rule that the law takes no notice of the fraction of a day is inapplicable.

Upson v. Mt. Morris Bank, 103 App. Div. 367, 92 N. Y. Supp. 1101.

The adjudication of bankruptcy on March 12, 1910, did not relate back to the filing of the petition, and is not evidence of insolvency prior to such filing.

Tumlin v. Bryan, 21 L.R.A.(N.S.) 960,

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91 C. C. A. 200, 165 Fed. 166; Re Chappell, 113 Fed. 545; Re Alexander, 102 Fed. 464; Re Rome Planing Mill, 96 Fed. 812.

There being no other creditor of this class, there could be no violation of the statute.

Swarts v. Fourth Nat. Bank, 54 C. C. A. 387, 117 Fed. 1; Crooks v. People's Nat. Bank, 46 App. Div. 335, 61 N. Y. Supp. 604.

A landlord is a creditor of a different class from other creditors under § 60a, but he would not be entitled to priority under § 64.

Re Belknap, 129 Fed. 646; Re Barrett, 6 Am. Bankr. Rep. 199.

The holder of a note indorsed by third persons is in a different class from other creditors under § 60a.

Re Harpke, 54 C. C. A. 97, 116 Fed. 295.

Almost any distinction is sufficient to constitute a separate class under § 60a (Re Denning, 114 Fed. 219; Gomila v. Wilcombe, 81 C. C. A. 268, 151 Fed. 476), but the classification under § 64 is definite and fixed.

The debtor making such payment must have intended to give such a preference.

Hardy v. Gray, 75 C. C. A. 562, 144 Fed. 922; Re First Nat. Bank, 84 C. C. A. 16, 155 Fed. 100; Kimmerle v. Farr, 111 C. C. A. 27, 189 Fed. 295; Re Leech, 96 C. C. A. 424, 171 Fed. 622; Tumlin v. Bryan, 21 L.R.A.(N.S.) 960, 91 C. C. A. 200, 165 Fed. 166; Debus v. Yates, 193 Fed. 427.

The question in the Pirie Case, 182 U. S. 438, 451, 45 L. ed. 1171, 1178, 21 Sup. Ct. Rep. 906, was whether, under § 57g, a person who had received a preference of any nature had to surrender it in order to prove a claim in bankruptcy.

Re Fixen, 50 L.R.A. 605, 42 C. C. A. 354, 102 Fed. 295; Re Henry C. King Co. 113 Fed. 110; Re Dickson, 55 L.R.A. 349, 49 C. C. A. 574, 111 Fed. 726; Jaquith v. Alden, 189 U. S. 78, 47 L. ed. 717, 23 Sup. Ct. Rep. 649; Re Wolf, 122 Fed. 127.

The creditor receiving such payment must have had knowledge, or have had reasonable cause to believe, that he was receiving a preference.

Collett v. Bronx Nat. Bank, 200 Fed. 111; Re Klein, 116 C. C. A. 603, 197 Fed. 241; Re The Leader, 190 Fed. 624; Re Pfaffinger, 154 Fed. 523; Collier, Bankr. 9th ed. pp. 816, 817; Grant v. First Nat. Bank, 97 U. S. 80, 24 L. ed. 971; Powell v. Gate City Bank, 102 C. C. A. 55, 178 Fed. 609; Stucky v. Masonic Sav. Bank, 108 U. S. 74, 27 L. ed. 640, 2 Sup. Ct. Rep. 219; Barbour v. Priest, 103 U. S. 293, 26 L. ed. 478; Sparks v. Marsh, 177 Fed. 739; First Nat. Bank v. Abbott, 91 C. C. A. 538, 165 Fed. 852; Off v. Hakes, 73 C. C. A. 464, 142 Fed. 364; Re Eggert, 43 C. C. A. 1, 102 Fed. 735.

If the real status of the bankrupts could have been obtained only from their books, a creditor who has no right of access to those books cannot be charged with knowledge of the facts which they would reveal.

Re Wolf Co. 164 Fed. 448; Sharpe v. Allender, 96 C. C. A. 104, 170 Fed. 589.

The extent of the transactions in the financial district in New York city is so great, and the manner in which they are conducted so generally known, that the courts will take judicial notice of it.

Louisville Trust Co. v. Louisville, N. A. & C. R. Co. 174 U. S. 674, 683, 43 L. ed. 1130, 1134, 19 Sup. Ct. Rep. 827; Hutchinson v. Manhattan Co. 150 N. Y. 256, 44 N. E. 775; Merchants' Nat. Bank v. Hall, 83 N. Y. 345, 38 Am. Rep. 434; Swinnerton v. Columbian Ins. Co. 37 N. Y. 174, 93 Am. Dec. 560; Agawam Bank v. Strever, 18 N. Y. 512.

Under the provisions of the bankruptcy act as it existed in January, 1910, it was well settled that a trustee in bankruptcy did not stand in the position of a bona fide purchaser for value. He took such title only as the bankrupt had.

Zartman v. First Nat. Bank, 216 U. S. 134, 138, 54 L. ed. 418, 419, 30 Sup. Ct. Rep. 368; Hurley v. Atchison, T. & S. F. R. Co. 213 U. S. 126, 53 L. ed. 729, 29 Sup. Ct. Rep. 466; Thomas v. Taggart, 209 U. S. 385, 52 L. ed. 845, 28 Sup. Ct. Rep. 519; Richardson v. Shaw, 209 U. S. 365, 52 L. ed. 835, 28 Sup. Ct. Rep. 512, 14 Ann. Cas. 981; Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 Ann. Cas. 789; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306.

Mr. Daniel P. Hays argued the cause, and, with Mr. Edwin D. Hays, filed a brief for appellees:

The intention to give a lien is a necessary element to the existence of an equitable lien.

Pom. Eq. Jur. pp. 38, 39.

Possession is necessary for the existence of a legal lien.

Re Faulhaber Stable Co. 95 C. C. A. 343, 170 Fed. 68; Sexton v. Kessler & Co. 40 L.R.A.(N.S.) 639, 97 C. C. A. 161, 172 Fed. 535; Casey v. Cavaroc, 96 U. S. 467, 24 L. ed. 779.

A mere agreement to give security when called upon does not create an equitable lien, or prevent the transfer of property under such an agreement, if the transfer

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would otherwise be voidable, from being a voidable preference.

Re Smith, 176 Fed. 426; Re Faulhaber Stable Co. 95 C. C. A. 344, 170 Fed. 68; Smedley v. Speckman, 85 C. C. A. 179, 157 Fed. 815; Torrance v. Winfield Nat. Bank, 66 Kan. 177, 71 Pac. 235, 11 Am. Bank. Rep. 185; Mathews v. Hardt, 79 App. Div. 570, 80 N. Y. Supp. 462; Ryttenberg v. Schefer, 131 Fed. 313.

Assuming that the evidence as to the alleged custom herein was admissible in this case to add to the written contract, the appellant failed to prove any general custom from which an agreement that the bankers were to have a lien on the securities and moneys transferred to it can be implied.

Willis v. Tibbals, 1 Jones & S. 228; Allen v. Merchants' Bank, 22 Wend. 222, 34 Am. Dec. 289; Mills v. Hallock, 2 Edw. Ch. 656; Gallup v. Lederer, 1 Hun, 286; Ames Mercantile Co. v. Kimball S. S. Co. 125 Fed. 335; Oelricks v. Ford, 23 How. 49, 16 L. ed. 534; The John H. Cannon, 51 Fed. 48.

The method in which business is transacted by the appellant and other Wall street banks with stockbrokers is inconsistent with the existence of the mutual intention that the bank was to have a lien on securities obtained with the proceeds of the loan.

Douglas v. Carpenter, 17 App. Div. 329, 45 N. Y. Supp. 219; Rothschild v. Allen, 90 App. Div. 233, 86 N. Y. Supp. 42; Tompkins v. Morton Trust Co. 91 App. Div. 274, 86 N. Y. Supp. 520; Strickland v. Magoun, 119 App. Div. 113, 104 N. Y. Supp. 425.

Proof of custom is not admissible to vary a contract, or to make a different or additional contract, or change the legal rights and liabilities of the parties as established by law.

The Delaware, 14 Wall. 579, 20 L. ed. 779; Barnard v. Kellogg, 10 Wall. 383, 19 L. ed. 987; First Nat. Bank v. Burkhardt, 100 U. S. 686, 25 L. ed. 766; Thompson v. Riggs, 5 Wall. 669, 18 L. ed. 705; Oelricks v. Ford, 23 How. 49, 16 L. ed. 534; Hopper v. Sage, 112 N. Y. 530, 8 Am. St. Rep. 771, 20 N. E. 350; Markham v. Jaudon, 41 N. Y. 235; Minnesota C. R. Co. v. Morgan, 52 Barb. 217.

In order for a valid, equitable lien to exist, there must be not only a clear, mutual intention that one party shall have a lien on the property of another, not delivered to him, but it must be the present intention to create a lien. An agreement to give a lien or security in the future is not enough. The transaction must be judged as of the time the lien is actually created.

Re Dismal Swamp Contracting Co. 135 Fed. 415; Mathews v. Hardt, 79 App. Div. 570, 80 N. Y. Supp. 462; Re Faulhaber Stable Co. 95 C. C. A. 344, 170 Fed. 68; Zartman v. First Nat. Bank, 189 N. Y. 267, 12 L.R.A. (N.S.) 1083, 82 N. E. 127; Ryttenberg v. Schefer, 131 Fed. 313; Re Klingaman, 101 Fed. 691.

In the case at bar, if there were any intention that the bank should have any lien on the securities obtained by Fiske & Company with the use of the money borrowed, it is clear that such lien was only to exist and be effective if Fiske & Company failed to pay the loan in cash. The distinct understanding was that the loan was to be paid in cash, and that the securities were not to be forced on the bank. Therefore, it was without present consideration, and voidable as against the trustee.

Johnston v. Huff, A. & M. Co. 66 C. C. A. 534, 133 Fed. 704.

There cannot be an equitable lien unless the property which is to be subject to such lien is designated and identified, and appropriated to the use of the lienor.

Adams v. Citizens' Bank, 28 C. C. A. 329, 55 U. S. App. 513, 84 Fed. 270; Re Dismal Swamp Contracting Co. 135 Fed. 415; First Nat. Bank v. Johnson, 10 Am. Bankr. Rep. 208; Lighthouse v. Third Nat. Bank, 162 N. Y. 336, 56 N. E. 738; Hazenwinkle Grain Co. v. McComb, 116 Ill. App. 541.

Even if there had been a promise on the part of Fiske & Company to pay the bank out of the proceeds of the securities obtained by them during the day, this would not constitute an appropriation of the money to the use of the bank, such as is necessary for the creation of an equitable assignment or right, such as was claimed by the bank.

Christmas v. Russell (Christmas v. Gaines) 14 Wall. 69, 20 L. ed. 762; Re Faulhaber Stable Co. 95 C. C. A. 344, 170 Fed. 68; Wright v. Ellison, 1 Wall. 16, 17 L. ed. 555; Trist v. Child (Burke v. Child) 21 Wall. 441, 22 L. ed. 623; Torrance v. Winfield Nat. Bank, 66 Kan. 177, 71 Pac. 235, 11 Am. Bankr. Rep. 185; Smedley v. Speckman, 85 C. C. A. 179, 157 Fed. 815; Pettibone v. Thomson, 72 Misc. 486, 130 N. Y. Supp. 284.

Even if the intention was to create a lien, such lien was fraudulent as against creditors, and voidable by the trustee, for the reason that Fiske & Company were to retain possession of the property, which was to be subject to the lien, together with the right to sell and dispose of the same, and to treat it as their own. This is shown by the general method in which the business is done. A lien created under such circumstances is fraudulent at law and voidable by the trustee.

Skilton v. Codington, 185 N. Y. 80, 113 Am. St. Rep. 885, 77 N. E. 790; Re Liberty Silk Co. 152 Fed. 844; Re Garcewich, 53 C. C. A. 510, 115 Fed. 87.

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The case of Adams v. Citizens' Bank, 28 C. C. A. 329, 55 U. S. App. 513, 84 Fed. 270, is directly in point, and is a complete answer to the appellant's contention.

The test of whether two creditors are in the same clas. within the meaning of § 60a of the bankruptcy act depends solely on whether they should be classified alike in a distribution of the estate.

Remington, Bankr. § 1387; Swarts v. Fourth Nat. Bank, 54 C. C. A. 387, 117 Fed. 1.

The intent of the debtor to give a preference was clearly established in the case at bar. It is unnecessary, therefore, to decide whether such intent is a necessary element of a voidable preference.

Toof v. Martin, 13 Wall. 40, 48, 20 L. ed. 481, 483; Western Tie & Timber Co. v. Brown, 196 U. S. 502, 508, 49 L. ed. 571, 574, 25 Sup. Ct. Rep. 339; Wilson v. City Bank, 17 Wall. 473, 486, 21 L. ed. 723, 727.

The appellant had reasonable cause to believe that it was receiving a preference.

Pratt v. Columbia Bank, 157 Fed. 137; Re Eggert, 43 C. C. A. 1, 102 Fed. 735; Wager v. Hall, 16 Wall. 584, 21 L. ed. 504; Dutcher v. Wright, 94 U. S. 553, 24 L. ed. 130; Schmidt v. Bank of Commerce, 25 Am. Bankr. Rep. 904; McElvain v. Hardesty, 94 C. C. A. 399, 169 Fed. 31; Alexander v. Redmond, 103 C. C. A. 446, 180 Fed. 92; Coder v. McPherson, 82 C. C. A. 99, 152 Fed. 951; Wright v. Sampter, 152 Fed. 196; Stevens v. Oscar Holway Co. 156 Fed. 90; Re Tindal, 155 Fed. 456; Stern v. Paper, 183 Fed. 228; Re Virginia Hardwood Mfg. Co. 139 Fed. 209; Bardes v. First Nat. Bank, 122 Iowa, 443, 98 N. W. 284; Crittenden v. Barton, 59 App. Div. 555, 69 N. Y. Supp. 559; Huttig Mfg. Co. v. Edwards, 87 C. C. A. 521, 160 Fed. 619; Brewster v. Goff Lumber Co. 164 Fed. 124; Re Coffey, 19 Am. Bankr. Rep. 165; Wright v. William Skinner Mfg. Co. 89 C. C. A. 23, 162 Fed. 315.

We must judge the transaction not only by what it was proved the transferee knew as to the insolvency, but we must take into consideration and can infer a belief that a preference was intended from unusual actions and methods on the part of the transferee in relation to the bankruptcy act.

Hardy v. Gray, 75 C. C. A. 562, 144 Fed. 922; McElvain v. Hardesty, 94 C. C. A. 399, 169 Fed. 31.

The resort to unusual method of payment or securing of payment will raise an inference of belief that a preference was intended.

Remington, Bankr. § 1399; Re Andrews, 135 Fed. 599; McElvain v. Hardesty, 94 C. C. A. 399, 169 Fed. 31.

The appellant has no right to set off the sum of $54,048.18, delivered to it by Fiske & Company, but the delivery of such sum to the appellant constituted a preferential transfer which is voidable by the trustee.

Schmidt v. Bank of Commerce, 25 Am. Bankr. Rep. 904; Ridge Ave. Bank v. Studheim, 76 C. C. A. 362, 145 Fed. 798.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal from a decree of the circuit court of appeals, reached upon the same opinion that disposed of National City Bank v. Hotchkiss, just decided. [231 U. S. 50, ante, 115, 34 Sup. Ct. Rep. 20.] (The judgment of the district court will be found [66] in 200 Fed. 295.) This case arose at the same time and differs but little from that in its facts, as to which, as in the other case, the master, the district court, and the circuit court of appeals all agree.

The advance in this case was made at about 10 on the following note, to the firm signing it, "Please loan us to-day $400,000. Crediting this amount to our account, and oblige. J. M. Fiske & Company." This sum was credited on the firm's deposit account, on which there was already $36,239.47. Before noon the bank certified and afterwards paid checks for $276,679.67. Between 11 and 12 the cashier, hearing that there was trouble in the stock market and with J. M. Fiske & Company, ordered that no more checks should be paid or certified. He then went to the brokers' office, saw Mr. Sherwood, a member of the firm, at about 12, and after getting an evasive answer to an inquiry as to the rumor, said that the firm had made no deposits on that day, and was told that one was on its way. ($54,048.08 were in fact paid in after the cashier's order to stop payment.) He then told Mr. Sherwood that he had better give him some securities, that he ought to give additional securities on the bank's loans, and after consultation Mr. Sherwood did so, and the cashier returned to the bank. We may assume for purposes of decision that the securities, with a small exception, were obtained by the use of the clearance loan.

At 40 minutes after 12 the brokers gave notice to the stock exchange that they were unable to meet their obligations, and an involuntary petition in bankruptcy was filed against them at 25 minutes past 3. This suit is for the proceeds of the securities (which were sold by the bank), and for the sum deposited as we have stated. In view of our decision in the other case, only one or two matters need mention. It is somewhat more pressed that the bank had not reasonable ground to believe that the brokers' property at a fair valuation would be insufficient [67] to pay their debts, and therefore had not ground to believe that the

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brokers were insolvent within the meaning of the bankruptcy act, § 1 (15). We think it too plain to need argument that the findings below that the firm was insolvent, knew that it was insolvent, and intended a preference, were correct. These brokers were ruined by the collapse of the pool mentioned in the other case, and apart from any knowledge that the bank may have had as to their interest in the stock concerned, the entirely unusual course of the cashier in leaving his bank to get additional security (not merely proceeds of the clearance loan upon a claim of lien) and the circumstances are sufficient to prevent our going behind the finding below. Really no other conclusion could have been reached.

On the question of lien the evidence does not differ enough from that in the other case to need further discussion. The bankrupts were under an agreement with the bank, of the usual sort, giving the bank a general lien on all securities in its hands for all liabilities of the firm, and a right to require additional approved securities to be lodged with it, etc. But a general promise to give security on demand puts the creditor in no better position than an agreement to pay money. Sexton v. Kessler & Co. 225 U. S. 90, 98, 56 L. ed. 995, 1000, 32 Sup. Ct. Rep. 657.

The so-called deposit of $54,048.08 was paid in after the cashier had forbidden the payment of checks against the deposit account, and therefore rightly was held to be a payment and a preference. A set-off properly was denied.

Decree affirmed.

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[68] BALTIC MINING COMPANY, Plff. in Err.,
v.
COMMONWEALTH OF MASSACHUSETTS. (No. 30.)

S. S. WHITE DENTAL MANUFACTURING COMPANY, Plff. in Err.,
v.
COMMONWEALTH OF MASSACHUSETTS. (No. 353.)

(See S. C. Reporter's ed. 68–88.)

Foreign corporations — state tax for doing local business — commerce — due process of law.

1. The excise tax exacted from foreign corporations under Mass. Pub. Stat. 1909, chap. 490, for the privilege of doing business in the state, as applied to corporations which were incorporated to carry on a business not of itself interstate commerce, though their products are sold and shipped in such commerce, and which are carrying on a purely local and domestic business, quite separate from their interstate transactions, is not invalid under the commerce and due process of law clauses of the Federal Constitution, as necessarily amounting to a burden and tax upon the interstate business of such corporations and on their property outside the state, although the tax is imposed by taking a percentage of the entire authorized capital stock, where the facts that such authorized capital is but a part of the entire property and assets of the corporations, and that the maximum yearly tax is $2,000, compel the conclusion that the authorized capital is used only as the measure of the tax.

[For other cases, see Corporations, XII. b, 2; Commerce, III. d, 5; IV. b, 1; Constitutional Law, 536–540, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — foreign corporations — excise tax.

2. A foreign corporation which has paid all the local taxes theretofore assessed against it, and has a leasehold for storerooms in the state, is not denied the equal protection of the laws by the exaction under the authority of Mass. Pub. Stat. 1909, chap. 490, of an excise tax upon the privilege of doing business within the state, although domestic corporations may be favored under this statute.

[For other cases, see Constitutional Law, 254–265, in Digest Sup. Ct. 1908.]

[Nos. 30 and 353.]

Argued April 29 and 30, 1913. Decided November 3, 1913.

TWO WRITS of Error to the Supreme Judicial Court of the State of Massachusetts to review decrees dismissing the petitions of foreign corporations to recover back the amount of an excise tax. Affirmed.

See same case below, in No. 30, 207 Mass. 381, 93 N. E. 831; No. 353, 212 Mass. 35, 98 N. E. 1056, Ann. Cas. 1913C, 805.

The facts are stated in the opinion.

NOTE.—State licenses or taxes, as affecting interstate commerce—see notes to Rothermel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburgh & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

On corporate taxation and the commerce clause—see note to Sandford v. Poe, 60 L.R.A. 641.

On the taxation of corporate capital stock generally—see note to State Bd. of Equalization v. People, 58 L.R.A. 513.

On constitutional equality in United States in relation to corporate taxation—see note to Bacon v. State Tax Comrs. 60 L.R.A. 321.

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Messrs. Charles A. Snow and William P. Everts argued the cause and filed a brief for plaintiffs in error:

A state statute which imposes an excise measured by the entire capital stock of a foreign corporation engaged, to a substantial extent, in interstate commerce, is unconstitutional and void, because repugnant to the commerce clause, even though professedly exacted for the privilege of transacting domestic commerce; and an excise measured by the entire capital stock of a foreign corporation having property outside of the taxing state is unconstitutional because it conflicts with the due process clause.

Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232.

That these decisions rest upon both grounds is fully shown in:—

Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; Western U. Teleg. Co. v. Andrews, 216 U. S. 165, 54 L. ed. 430, 30 Sup. Ct. Rep. 286; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; Flint v. Stone Tracy Co. 220 U. S. 107, 163, 55 L. ed. 389, 418, 31 Sup. Ct. Rep. 342; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 285, 56 L. ed. 436, 438, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050.

The Western Union and Pullman Cases, and decisions following them, conclusively settle the proposition that the necessary effect of an excise based on the entire capital of an interstate commerce corporation is to burden directly and substantially the interstate portion of its business, even though professedly imposed for the privilege of transacting domestic business.

Neither in these decisions nor in the later cases has this court ever alluded to any of the factors deemed vital by the court below.

Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; Western U. Teleg. Co. v. Andrews, 216 U. S. 165, 54 L. ed. 430, 30 Sup. Ct. Rep. 286; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050.

H. K. Mulford Co. v. Curry, 163 Cal. 276, 125 Pac. 236, directly decides that the principles of the Western Union and Pullman decisions are not confined to quasi public corporations, but cover all kinds of ordinary trading corporations engaged partly in interstate and partly in domestic commerce.

The theory of the Massachusetts court that the principles of the Pullman and Western Union Cases have no application where the company is free to renounce or abandon its domestic business, and only apply where the interstate and domestic business are inextricably interwoven, has no support in reason or upon the authorities. This theory is not supported by any of the cases cited by the court below, because in none of them was interstate commerce involved.

Pullman Co. v. Adams, 189 U. S. 420, 189 L. ed. 877, 23 Sup. Ct. Rep. 494; Allen v. Pullman's Palace Car Co. 191 U. S. 171, 48 L. ed. 134, 24 Sup. Ct. Rep. 39; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; McCall v. California, 136 U. S. 104, 112, 34 L. ed. 392, 393, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958.

The separability of interstate and domestic receipts has been considered an important reason for holding an excise to be unconstitutional, where the interstate and domestic receipts are taxed indiscriminately and without attempt at apportionment.

Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851.

A tax upon goods sold in another state, delivered to a common carrier, and consigned to the purchaser in the state of Georgia, was an illegal interference with interstate commerce.

Kehrer v. Stewart, 197 U. S. 60, 65, 49 L. ed. 663, 666, 25 Sup. Ct. Rep. 403.

Interstate commerce may exist wholly independent of any transportation, and without the intervention of common carriers.

Gibbons v. Ogden, 9 Wheat. 1, 189, 6 L. ed. 23, 68; Brown v. Maryland, 12 Wheat. 419, 446, 6 L. ed. 678, 688; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 270, 23 L. ed. 543, 548; United States v. Holliday, 3 Wall. 407, 417, 18 L. ed. 182, 185; Mobile County v. Kimball, 102 U. S. 691, 702, 26 L. ed. 238, 241; Lottery Case (Champion v. Ames) 188 U. S. 321, 352, 353, 47 L. ed. 492, 499, 500, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; McCall v. California, 136 U. S. 104, 108, 34 L. ed. 391, 392, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Pom. Const. Law, § 378; Robbins v. Taxing Dist. 120 U. S. 489, 497, 30 L. ed. 694, 697, 1 Inters. Com. Rep. 45,

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7 Sup. Ct. Rep. 592; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 218, 38 L. ed. 962, 968, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; International Text-Book Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A. (N.S.) 493, 30 Sup. Ct. Rep. 481.

Many decisions prior to Western Union and Pullman Cases decided that interstate sales of goods, the companies and agents making them, their business, and the place where the business is conducted, are all protected by the commerce clause against state excises, and that the protection of that clause is not limited to railroads and quasi public corporations.

Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Corson v. Maryland, 120 U. S. 502, 30 L. ed. 699, 1 Inters. Com. Rep. 50, 7 Sup. Ct. Rep. 655; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Stockard v. Morgan, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576.

A state cannot tax people representing the owners of property outside of the state for the privilege of soliciting orders within it, as agents of such owners, for property to be shipped to persons within the state.

Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649.

Various other excises or license fees have been held unconstitutional, where exacted for the privilege of maintaining an office within the state, used for purposes of interstate commerce.

McCall v. California, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; Parsons-Willis Lumber Co. v. Stuart, 105 C. C. A. 211, 182 Fed. 779; United States v. Standard Sanitary Mfg. Co. 191 Fed. 172.

It is immaterial that the company might equally well manage and direct interstate business by removing its office to another state.

Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958.

The protection of the commerce clause is extended to ordinary trading corporations engaged in interstate sales, and is not confined to quasi public corporations.

Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; Parsons-Willis Lumber Co. v. Stuart, 105 C. C. A. 211, 182 Fed. 779; International Text-Book Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; International Text Book Co. v. Lynch, 218 U. S. 664, 54 L. ed. 1201, 31 Sup. Ct. Rep. 225; Buck Stove & Range Co. v. Vickers, 226 U. S. 205, 57 L. ed. 189, 33 Sup. Ct. Rep. 41.

The Massachusetts court holds that this very excise is void as applied to ordinary trading companies, where they are engaged exclusively in interstate commerce. In such cases they come within the protection of the commerce clause.

Atty.-Gen. ex rel. Corporation Comrs. v. Electric Storage Battery Co. 188 Mass. 239, 74 N. E. 467, 3 Ann. Cas. 631; Baltic Min. Co. v. Com. 207 Mass. 381, 93 N. E. 831.

The Massachusetts excise is unconstitutional and void, because it is also repugnant to the equal protection of the laws clause.

Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247.

Mr. James M. Swift, Attorney General of Massachusetts, and Mr. Andrew Marshall, argued the cause and filed a brief for the state of Massachusetts:

In general, a state has power to exclude or condition the entrance of foreign corporations within its limits.

Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 246, 249, 50 L. ed. 1013, 1014, 26 Sup. Ct. Rep. 619, 6 Ann. Cas. 317; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; Osborne v. Florida, 164 U. S. 650, 655, 41 L. ed. 586, 587, 17 Sup. Ct. Rep. 214; Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; Hammond Pack-

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ing Co. v. Arkansas, 212 U. S. 322, 343, 53 L. ed. 530, 541, 29 Sup. Ct. Rep. 370.

Full recognition is, however, given by the defendant in error to the principle that a state, in exercising its general right to exclude or condition foreign corporations, may not restrict or regulate interstate commerce. The argument of the defendant in error gives full effect to the limitation which forbids imposing upon corporations engaged in interstate commerce conditions so directly affecting the interstate commerce as to amount to a restriction of that commerce or to a regulation of it, within the meaning of the Constitution of the United States.

Com. v. Petranich, 183 Mass. 217, 66 N. E. 807; Atty. Gen. ex rel. Corporation Comrs. v. Electric Storage Battery Co. 188 Mass. 239, 74 N. E. 467, 3 Ann. Cas. 631; Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Postal Teleg. Cable Co. v. Charleston, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; International Text-Book Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A. (N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; Baltic Min. Co. v. Com. 207 Mass. 381, 93 N. E. 831; S. S. White Dental Mfg. Co. v. Com. 212 Mass. 35, 98 N. E. 1056, Ann. Cas. 1913C, 805.

If the excise, reasonable in its amount, as imposed upon the privileges enjoyed by the plaintiffs in error, is, in its actual operation and effect, nothing but an excise tax; if it does not impose upon any interstate business in which the plaintiffs in error are directly engaged, and upon the property employed in that business, such a direct burden as to make what is denominated as an excise in reality a tax upon interstate commerce and a tax upon property, —the mode of its measure, however arbitrary and capricious, is wholly immaterial in this court.

Delaware Railroad Tax, 18 Wall. 206, 231, 21 L. ed. 888, 896.

Whether the excise regulates interstate commerce is a practical question, to be determined by analyzing its effect in operation.

Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; Western U. Teleg. Co. v. Andrews, 216 U. S. 165, 54 L. ed. 430, 30 Sup. Ct. Rep. 286; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050.

In determining the question the whole scheme of taxation of Massachusetts must be taken into account.

Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 225, 52 L. ed. 1031, 1036, 28 Sup. Ct. Rep. 638.

The interpretation and construction of the provision of law in question by the highest court of Massachusetts must also be taken into account.

Stockard v. Morgan, 185 U. S. 27, 30, 46 L. ed. 785, 788, 22 Sup. Ct. Rep. 576; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 572, 54 L. ed. 883, 886, 30 Sup. Ct. Rep. 578; Osborne v. Florida, 164 U. S. 650, 654, 41 L. ed. 586, 587, 17 Sup. Ct. Rep. 214.

The "establishment of principles" by Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190, and Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232, does not in itself determine whether the Massachusetts excise is constitutional or unconstitutional under the commerce clause. That question may be determined only by the application of those principles to the special facts of the cases in which the Massachusetts excise is under discussion.

New York v. Roberts, 171 U. S. 658, 664, 665, 43 L. ed. 323, 326, 19 Sup. Ct. Rep. 58; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958.

The exaction in question, considered with reference to the whole taxation system of Massachusetts, and as construed by the courts and as applied to the facts in these cases, does not, as a practical matter, regulate interstate commerce in which either plaintiff in error is engaged.

Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; Gibbons v. Ogden, 9 Wheat. 1, 7, 6 L. ed. 23, 24; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; McCall v. California, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup.

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Ct. Rep. 881; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 44, 54 L. ed. 355, 373, 30 Sup. Ct. Rep. 190; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 736, 28 L. ed. 1137, 1139, 5 Sup. Ct. Rep. 739; Reymann Brewing Co. v. Brister, 179 U. S. 445, 45 L. ed. 269, 21 Sup. Ct. Rep. 201; Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; Allen v. Pullman's Palace Car Co. 191 U. S. 171, 48 L. ed. 134, 24 Sup. Ct. Rep. 39; The Daniel Ball, 10 Wall. 565, 19 L. ed. 1002; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Interstate Commerce Commission v. Detroit, G. H. & M. R. Co. 167 U. S. 633, 42 L. ed. 306, 17 Sup. Ct. Rep. 986; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266; Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494.

A tax is not a regulation of interstate commerce merely because it is assessed upon and paid by a corporation which is engaged in interstate commerce.

Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; State Tax on R. Gross Receipts, 15 Wall. 284, 21 L. ed. 164; Delaware Railroad Tax, 18 Wall. 206, 21 L. ed. 888.

The decisions of the Massachusetts court do not deny to ordinary business corporations engaged to some extent in interstate commerce the protection of the commerce clause of the Constitution.

Atty. Gen. ex rel. Corporation Comrs. v. Electric Storage Battery Co. 188 Mass. 239, 74 N. E. 467, 3 Ann. Cas. 631; Baltic Min. Co. v. Com. 207 Mass. 381, 93 N. E. 831; S. S. White Dental Mfg. Co. v. Com. 212 Mass. 35, 98 N. E. 1056, Ann. Cas. 1913C, 805.

The exaction, if true to its history, its nature, its name, and its purpose as an excise, did not tax property outside the commonwealth of Massachusetts.

Flint v. Stone Tracy Co. 220 U. S. 107, 152, 55 L. ed. 389, 413, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312.

The exaction in operation and effect does not tax property or business outside the commonwealth.

Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 220, 41 L. ed. 683, 695, 17 Sup. Ct. Rep. 305.

If the exaction in question does not tax property and does not regulate interstate commerce, it is not unconstitutional merely on account of the mode of its measurement.

Delaware Railroad Tax, 18 Wall. 206, 231, 21 L. ed. 888, 896; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 151, 55 L. ed. 137, 153, 31 Sup. Ct. Rep. 171; Horn Silver Min. Co. v. New York, 143 U. S. 305, 317, 36 L. ed. 164, 169, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; Flint v. Stone Tracy Co. 220 U. S. 107, 167, 55 L. ed. 389, 419, 31 Sup. Ct. Rep. 342; McCray v. United States, 195 U. S. 27, 58, 49 L. ed. 78, 96, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561.

The statute in question does not deny the plaintiffs in error the equal protection of the laws.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 572, 54 L. ed. 883, 886, 30 Sup. Ct. Rep. 578; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 228, 41 L. ed. 683, 697, 17 Sup. Ct. Rep. 305.

Mr. Justice Day delivered the opinion of the court:

These cases present the question of the constitutional validity of an act of the commonwealth of Massachusetts (Stat. 1909, chap. 490, pt. 3, §§ 54 et seq.), undertaking to impose a tax on foreign corporations within the commonwealth. While the cases are not in all respects parallel, [79] they were argued together, and present the same questions, and we shall accordingly dispose of them as one.

The cases were heard upon agreed statements of fact, which show:

The Baltic Mining Company, a Michigan corporation, organized for the purpose of mining, producing, and selling copper, with a total authorized capital stock of $2,500,000, consisting of 100,000 shares of the par value of $25 each, all of which have been issued and are outstanding, $18 having been paid on each share, owns a copper mine with equipment in Michigan, and has its principal place of business in that state. It has an office in the city of Boston, for the use of its president and treasurer, residing in Boston, for the general financial management and direction of its affairs, and for the meetings of its board of directors and the transfer of its stock. The Copper Range Consolidated Company, a New Jersey corporation, owns and holds 99,659 shares of its stock, and also has an office and place of business in Boston. The Baltic Mining Company was admitted to do business in Massachusetts, and complied with the foreign corporation laws of that state. Its total property and assets amount

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to $10,776,000, but none of the property is in Massachusetts except current bank deposits and a certificate for $80,000 of stock in another Michigan corporation. It is engaged in the mining and refining of copper in Michigan, which is sold for delivery in the several states of the United States and in foreign countries. The United Metals Selling Company, a New Jersey corporation, with its principal office in New York city, and with no office in Massachusetts, has the exclusive agency for marketing the Baltic Mining Company's copper, it making no sales directly itself. Considerable quantities of the copper are sold for delivery in Massachusetts, as well as in other states, and transported from the Michigan smelter to the purchaser. In exceptional instances sales are made in Massachusetts [80] for delivery there, but this is out of the usual course of business, not more than 5 per cent of the total sales being made, the larger part being regularly consummated in New York city. The petition was brought to recover an excise tax of $500 imposed by the commonwealth, pursuant to § 56 of the act, and paid by the company, and was dismissed by the supreme judicial court of Massachusetts. 207 Mass. 381, 93 N. E. 831.

The S. S. White Dental Manufacturing Company is a Pennsylvania corporation, engaged in manufacturing and buying and selling artificial teeth and dental supplies, with an authorized capital stock of $1,000,000, and with its principal office in Philadelphia. Its assets aggregate $5,711,718.29. It has a usual place of business in Boston, consisting of large salesrooms, stockrooms, offices, and storerooms, occupied under lease, where it keeps a supply of goods displayed for sale and in stock. Books are kept here, a New England sales agent is in charge, and fifty-four persons are employed, twelve being salesmen who travel through the New England states, except Connecticut and the maritime provinces; but no manufacturing is done in Massachusetts. It sells goods over the counter from its Boston store and also for delivery in Massachusetts by messenger, mail, and express, 50 per cent of the sales made at that store being to persons residing in Massachusetts, and 50 per cent for delivery to persons residing outside of the state. Goods sold from the Boston stock for delivery other than over the counter or by mail or messenger are billed from the Boston salesrooms directly to the purchaser as consignee, from the company as consignor. Orders are also accepted at the Boston salesroom for delivery from the New York and Pennsylvania factories, such orders being sent to the principal office in Pennsylvania, and filled either in New York or in Pennsylvania, and the goods being billed directly to the purchaser. Except in intrastate deliveries by messenger, [81] the company uses public carriers in the transportation of the goods, and a large percentage of the total sales require transportation from the New York or Pennsylvania factories into other states. The stock on hand in the Boston store, the fixtures and the current bank deposits, represent the tangible property in Massachusetts, and amount to about $100,000. The company maintains fourteen places of business other than the ones in Pennsylvania and Massachusetts, located in New York and other states. Ten per cent of the sales are made in Massachusetts, of which approximately one half are for delivery in that state. The company complied with the requirement of the laws relating to foreign corporations for ten years, and seeks to recover an excise tax of $200, levied pursuant to the statute, and paid by it. The supreme judicial court of Massachusetts held that the act was valid, and dismissed the petition. 212 Mass. 35, 98 N. E. 1056, Ann. Cas. 1913 C, 805.

The act provides (§ 54) for the filing of a certificate annually by foreign corporations, showing their authorized capital stock and assets and liabilities, and (§ 55) that such certificate shall be accompanied by an auditor's sworn statement, and shall be submitted to the commissioner of corporations, who shall assess an excise tax upon the corporation, in accordance with the provisions of § 56 of the act, and that the certificate shall not be filed until approved by him and the tax paid.

Section 56 reads:

"Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax, to be assessed by the tax commissioner, of 1/50 of 1 per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of $2,000."

[82] It is further provided (§ 58) for notice to foreign corporations failing to file their proper certificates, and thereafter for the forfeiture and collection of penalties, and for the issuance of injunctions until the payment of such penalties and the filing of such certificates.

The specific objections of the plaintiffs in error to the imposition of this tax under the facts shown in the records are threefold: First, the tax is a regulation of interstate commerce, in that it imposes a

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direct burden upon that portion of the business and capital of the plaintiffs in error which is devoted to interstate commerce; second, the tax is in violation of the due process of law clause, because it attempts to impose taxes upon property beyond the jurisdiction of the commonwealth of Massachusetts; and third, the tax denies to the plaintiffs in error the equal protection of the law.

It is well settled and requires no review of the decisions of this court to that effect that the power of Congress over interstate commerce is supreme under the Federal Constitution, and that the states may not burden such commerce, it being the purpose of the Constitution of the United States to bring commerce of this character under one supreme control, and to vest the exercise of authority over it in the general government. It is equally well settled that forms of regulation prohibited to the state by the Constitution may consist of efforts to tax the carrying on of such commerce, and of attempted levies of taxes upon the receipts of interstate commerce as such. Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 21 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 400, 57 L. ed. 1511, 1541, 33 Sup. Ct. Rep. 729, and previous cases in this court therein cited.

While this is true, other equally well-established principles must be borne in mind in considering the validity of a state tax attacked upon grounds of unconstitutionality. The mere fact that a corporation is engaged in [83] interstate commerce does not exempt its property from state taxation. United States Exp. Co. v. Minnesota, 223 U. S. 335, 344, 56 L. ed. 459, 464, 32 Sup. Ct. Rep. 211. It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive Federal authority over it. A resort to the receipts of property or capital employed, in part at least, in interstate commerce, when such receipts or capital are not taxed as such, but are taken as a mere measure of a tax of lawful authority within the state, has been sustained. Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904; Flint v. Stone Tracy Co. 220 U. S. 107, 162-165, 55 L. ed. 389, 417-419, 31 Sup. Ct. Rep. 342, 58 L. ed. Ann. Cas. 1912B, 1312; United States Exp. Co. v. Minnesota, supra.

The right of a state to exclude a foreign corporation from its borders, so long as no principle of the Federal Constitution is violated in such exclusion, has been repeatedly recognized in the decisions of this court, and the right to prescribe conditions upon which a corporation of that character may continue to do business in the state, unless some contract right in favor of the corporation prevents, or some constitutional right is denied in the exclusion of such corporation, is but the correlative of the power to exclude. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 343, 53 L. ed. 530, 541, 29 Sup. Ct. Rep. 370, 15 Ann. Cas. 645; Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44; Barron v. Burnside, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365; Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. Rep. 633. For example, a state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law; or you may transact business in interstate commerce subject to the regulatory power of the state. To allow a state to exercise such authority would permit it to deprive of fundamental rights those entitled to the protection of the Constitution in every part of the Union. Having these general principles [84] in mind, we will proceed to a consideration of the statute of Massachusetts directly involved in these cases.

The supreme judicial court of Massachusetts, in considering the character of the tax assessed under the statute of 1909, said (207 Mass. 388):

"The required payment is strictly of an excise tax, and not of a tax upon property. . . . This excise tax is for the commodity or privilege of having an establishment for business in Massachusetts, with the protection of our laws and the financial and other advantages of a situation here."

We have no fault to find with the conclusion that this is an excise tax. See also Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904, in which this court had occasion to consider the taxing system of Massachusetts. That the state may impose a tax upon a corporation, foreign or domestic, for the privilege of doing business within its borders, is undoubted; and such has long been the legislative policy of the commonwealth of Massachusetts, as appears from the his-

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tory of legislation set forth in the opinions in the cases last cited. Construing the act in question, the supreme judicial court of Massachusetts has held that it does not apply to corporations engaged in railroad, telegraph, telephone, etc., business, which are taxed on another plan under the provisions of the statute. It is held not to apply to corporations whose business is interstate commerce, or who carry on interstate and intrastate business in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate business of the corporation. And the statute, it is held, does not apply to corporations which have places of business for the transaction solely of interstate commerce. Atty. Gen. ex rel. Commissioner of Corporations v. Electric Storage Battery Co. 188 Mass. 239, 74 N. E. 467, 3 Ann. Cas. 631. The tax is levied upon the privilege of carrying on business within [85] the state, and not upon property therein which is otherwise taxed.

It is said, notwithstanding, that this tax is a direct burden upon interstate commerce, and an attempt to tax property beyond the jurisdiction of the state, within the authority of the Kansas cases, Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232. These cases have been followed by others similar in character. Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; Western U. Teleg. Co. v. Andrews, 216 U. S. 165, 54 L. ed. 430, 30 Sup. Ct. Rep. 286; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913 C, 1050; Meyer v. Wells, F. & Co. 223 U. S. 298, 56 L. ed. 445, 32 Sup. Ct. Rep. 218.

In Western U. Teleg. Co. v. Kansas, and Pullman Co. v. Kansas, the statute under which the state of Kansas undertook to levy a charter fee of 1/10 of 1 per cent of their authorized capital upon the first $100,000 of the capital stock of foreign corporations, and 1/20 of 1 per cent upon the next $400,000, and for each million or major part thereof, $200, making a tax of $20,100 against the Western Union Telegraph Company, and $14,800 against the Pullman Company, was declared to be unconstitutional, as having the effect not simply to exert the lawful power of taxing a foreign corporation for the privilege of doing local business, but to burden interstate commerce, and to reach property represented by the capital stock of the companies, which was duly paid in and invested in property in many states, and therefore beyond the taxing jurisdiction of Kansas. Every case involving the validity of a tax must be decided upon its own facts, and having no disposition to limit the authority of those cases, the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases. In the Kansas cases the business of both complaining companies was commerce, the same instrumentalities and the same agencies carrying on in the same places the business of the companies of state and interstate [86] character. In the Western U. Teleg. Co. Case, the company had a large amount of property permanently located within the state, and between 800 and 900 offices constantly carrying on both state and interstate business. The Pullman Company had been running a large number of cars within the state, in state and interstate business, for many years. There was no attempt to separate the intrastate business from the interstate business by the limitations of state lines in its prosecution.

An examination of the previous decisions in this court shows that they have been decided upon the application to the facts of each case of the principles which we have undertaken to state, and a tax has only been invalidated where its necessary effect was to burden interstate commerce, or to tax property beyond the jurisdiction of the state. In the cases at bar the business for which the companies are chartered is not, of itself, commerce. True it is that their products are sold and shipped in interstate commerce, and to that extent they are engaged in the business of carrying on interstate commerce, and are entitled to the protection of the Federal Constitution against laws burdening commerce of that character. Interstate commerce of all kinds is within the protection of the Constitution of the United States, and it is not within the authority of a state to tax it by burdensome laws. From the statement of facts it is apparent, however, that each of the corporations in question is carrying on a purely local and domestic business, quite separate from its interstate transactions. That local and domestic business, for the privilege of doing which the state has imposed a tax, is real and substantial, and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved. In these cases the ultimate contention is not that the receipts from interstate commerce are taxed as such, but that the property of the corporations, including [87] that used in such commerce, represented by the authorized capital of the corporations, is taxed, and therefore interstate commerce is unlawfully burdened

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by a state statute. While the tax is imposed by taking a percentage of the authorized capital, the agreed facts show that the authorized capital is only a part of the capital of the corporations, respectively. In the Baltic Mining Company Case, the authorized capital is $2,500,000, while the entire property and assets are $10,776,000; and in the White Dental Company Case the authorized capital is $1,000,000, while the assets aggregate $5,711,718.29. Further, the Massachusetts statute limits the tax to a maximum of $2,000. The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the state. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the state's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock, it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable.

It is further contended that the imposition of the tax denies the equal protection of the laws, and this upon the authority of Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247. In that case the railway company had gone into the state of Alabama, and, under authority of the state, acquired a large amount of railroad property upon which it paid taxes as well as a license tax imposed by the state. After the payment of all such taxes, and in this condition of affairs, the state undertook to levy upon the railroad company a privilege tax because it was a foreign corporation, not imposing the same tax upon domestic corporations doing precisely the same business. This court held that the railroad company was a person within the meaning [88] of the Constitution, and entitled to the equal protection of the laws, and that by the taxation of its railroad property under such circumstances it was denied the equal protection of the law, no like tax being levied upon domestic corporations. It was said in that case (p. 416):

"We have here a foreign corporation within a state, in compliance with the laws of the state, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method not employed as to domestic corporations of the same kind, carrying on a precisely similar business."

The conditions existing in the Southern R. Co. v. Greene Case are not presented here. It is true that the plaintiffs in error paid taxes assessed against foreign corporations before the passage of the law of 1909, and that the White Dental Company had a leasehold for storerooms in the state; but we do not find in this situation an acquisition of permanent property, such as was shown in the Greene Case. And there is no question of the continued authority of the state to tax a foreign corporation for the privilege of doing business within its borders, which authority the state possesses so long as it does not violate rights secured by the Federal Constitution. Even if, as plaintiffs in error contend, under the statute, domestic corporations are favored, the statute is not invalid, for no limitation upon the power of a state to exclude foreign corporations requires identical taxes in all cases upon domestic and foreign corporations.

As this statute has been construed by the Supreme Judicial Court of Massachusetts, and applied in these cases, we are unable to find that the tax imposed violates the constitutional rights of the plaintiffs in error.

Judgments affirmed.

Dissenting: The CHIEF JUSTICE, Mr. Justice Van Devanter, and Mr. Justice Pitney.

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[89] COMMONWEALTH OF VIRGINIA v. STATE OF WEST VIRGINIA.

(See S. C. Reporter's ed. 89-91.)

Federal Supreme Court — original jurisdiction — suit between states — motion for final decree.

The assurance by the attorney general of West Virginia, on behalf of that state, that a commission appointed under a joint resolution of the state legislature is endeavoring to effect a settlement of the controversy, and needs further time to complete its labors, requires the denial of a motion by the commonwealth of Virginia that the Federal Supreme Court proceed at once to settle and determine all the questions left open by it when determining the amount which West Virginia should pay as its equitable share of Virginia's public debt, which was assumed by West Virginia at the time of its creation as a state.

[Original jurisdiction of Federal Court, see Supreme Court of the United States, in Digest Sup. Ct. 1908.]

[No. 2, Original.]

Submitted October 14, 1913. Decided November 10, 1913.

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ON MOTION of the Commonwealth of Virginia that the court proceed to a final hearing of the questions left open by its decision when determining the amount which West Virginia should pay as its equitable share of the Virginia public debt, which was assumed by West Virginia at the time of its creation as a state. Overruled and case assigned for final hearing on April 13, 1914.

The facts are stated in the opinion.

Mr. **Samuel W. Williams**, Attorney General of Virginia, and Messrs. **Randolph Harrison** and **William A. Anderson** submitted the cause for the Commonwealth of Virginia. Mr. John B. Moon was on the brief.

Messrs. **Holmes Conrad** and **Sanford Robinson** submitted the cause for the bondholding creditors.

Mr. **A. A. Lilly**, Attorney General of West Virginia, and Messrs. **V. B. Archer**, **Charles E. Hogg**, and **John H. Holt** submitted the cause for the state of West Virginia.

Mr. Chief Justice **White** delivered the opinion of the court:

In March, 1911 (Virginia v. West Virginia, 220 U. S. 1, 55 L. ed. 353, 31 Sup. Ct. Rep. 330), our decision was given "with respect to the basis of liability and the share of the principal of the debt of Virginia that West Virginia assumed." In view, however, of the [90] nature of the controversy, of the consideration due the respective states, and the hope that by agreement between them further judicial action might be unnecessary, we postponed proceeding to a final decree, and left open the question of what, if any, interest was due, and the rate thereof, as well as the right to suggest any mere clerical error which it was deemed might have been committed in fixing the sum found to be due upon the basis of liability which was settled. In October, 1911, we overruled without prejudice a motion made by Virginia to proceed at once to a final determination of the cause on the ground that there was no reasonable hope of an amicable adjustment. Virginia v. West Virginia, 222 U. S. 17, 56 L. ed. 71, 32 Sup. Ct. Rep. 4.

The motion on behalf of the state of Virginia now before us is virtually a reiteration of the former motion to proceed, and is based upon the ground that certain negotiations which have taken place between the Virginia Debt Commission representing Virginia, and a commission representing West Virginia, appointed in virtue of a joint resolution of the legislature of that state, adopted in 1913, make it indubitably certain that no hope of an adjustment exists. But without reviewing the course of the negotiations relied upon, we think it suffices to say that, in resisting the motion, the attorney general of West Virginia, on behalf of that state, insists that the view taken by Virginia of the negotiations is a misapprehension of the purposes of West Virginia, as that state, since the appointment of the commission on its behalf, has been relying upon that commission "to consummate such an adjustment and settlement of said controversy as to commend the result of its negotiations to the favorable consideration of the governor and the legislative branch of its government, and thus terminate said controversy, to the satisfaction of her people and the commonwealth of Virginia, and upon the principles of honor and justice to both states, and in fairness to the holders of the debt [91] for whose benefit this controversy is still pending." The attorney general further stating that, in order to accomplish the results just mentioned, a subcommittee of the Commission of West Virginia has been and is engaged in investigating the whole subject with the purpose of preparing a proposition to be submitted to the Virginia Debt Commission, to finally settle the whole matter, and that a period of six months' time is necessary to enable the committee to complete its labors.

Having regard to these representations, we think we ought not to grant the motion to proceed at once to consider and determine the cause, but should, as near as we can do so consistently with justice, comply with the request made for further time to enable the commissioners of West Virginia to complete the work which we are assured they are now engaged in performing for the purpose of effecting a settlement of the controversy. As, however, the granting of six months' delay would necessitate carrying the case possibly over to the next term, and therefore be in all probability an extension of time of more than a year, we shall reduce somewhat the time asked, and direct that the case be assigned for final hearing on the 13th day of April next, at the head of the call for that day.

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[92] C. M. SUMMERS, Petitioner,
v.
UNITED STATES.

(See S. C. Reporter's ed. 92–106.)

Indictment — joinder of counts — application of Revised Statutes to Alaska.

1. Crimes against the United States committed within the district of Alaska, thought not included in the enumeration of offenses contained in the Alaskan Penal Code, such as violations of U. S. Rev. Stat. § 5209, U. S. Comp. Stat. 1901, p. 3497, relating to national banks, are governed by the requirement of Alaska Code Crim. Proc. § 43, that the indictment must charge but one crime and in one form only, rather than by the provisions of U. S. Rev. Stat. § 1024, U. S. Comp. Stat. 1901, p. 720, which permit the joinder in one indictment in separate counts of charges arising out of the same or connected acts or transactions, or of offenses or crimes of the same class.

[Joinder of counts in indictment, see Indictment, Information, and Complaint, III., in Digest Sup. Ct. 1908.]

Indictment — joinder of counts — amendment to Alaska Code — retrospective effect.

2. A retrospective operation which would validate indictments found before its enactment will not be given to Alaska act of April 26, 1913, amending Alaska Code Crim. Proc. § 43, so as to permit the joinder of two or more offenses or crimes of the same class in one indictment in separate counts.

[For other cases, see Indictment, Information, and Complaint, III.; Statutes, II. v, in Digest Sup. Ct. 1908.]

[No. 502.]

Argued October 22, 23, 1913. Decided November 10, 1913.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a conviction in the District Court for the District of Alaska of violations of the national banking law. Reversed and remanded to the District Court, with directions to sustain the demurrer to the indictment.

See same case below, 120 C. C. A. 563, 202 Fed. 457.

The facts are stated in the opinion.

Mr. **Albert Fink** argued the cause, and, with Messrs. Lewis P. Shackleford, Aldis B. Browne, Alexander Britton, Evans Browne, and Kurnal R. Babbitt, filed a brief for petitioner:

The local practice adopted as the law of a territory controls the procedure of the territorial courts.

Cochran v. United States, 77 C. C. A. 432, 147 Fed. 206; Reynolds v. United States, 98 U. S. 145, 154, 25 L. ed. 244, 246; Miles v. United States, 103 U. S. 304, 310, 26 L. ed. 481, 483; Clinton v. Englebrecht, 13 Wall. 434, 447, 20 L. ed. 659, 662; Hornbuckle v. Toombs, 18 Wall. 648, 21 L. ed. 966; Good v. Martin, 95 U. S. 90, 98, 24 L. ed. 341, 344; Welty v. United States, 14 Okla. 7, 76 Pac. 121; United States v. Haskell, 169 Fed. 449; Endleman v. United States, 30 C. C. A. 186, 57 U. S. App. 1, 86 Fed. 456; Jackson v. United States, 42 C. C. A. 452, 102 Fed. 473; Corbus v. Leonhardt, 51 C. C. A. 636, 114 Fed. 10; Ball v. United States, 78 C. C. A. 126, 147 Fed. 32; United States v. Pridgeon, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746; Fitzpatrick v. United States, 178 U. S. 304, 44 L. ed. 1078, 20 Sup. Ct. Rep. 944; Thiede v. Utah, 159 U. S. 510, 40 L. ed. 237, 16 Sup. Ct. Rep. 62.

Alaska stands on exactly the same footing as all of the other territories of the United States.

Interstate Commerce Commission v. United States, 224 U. S. 474, 56 L. ed. 849, 32 Sup. Ct. Rep. 556; The Coquitlam v. United States, 163 U. S. 346, 41 L. ed. 184, 16 Sup. Ct. Rep. 1117; Rassmussen v. United States, 197 U. S. 516, 49 L. ed. 862, 25 Sup. Ct. Rep. 514; Binns v. United States, 194 U. S. 486, 48 L. ed. 1087, 24 Sup. Ct. Rep. 816.

The district court for the district of Alaska is not a circuit or district court of the United States.

McAllister v. United States, 141 U. S. 174, 35 L. ed. 693, 11 Sup. Ct. Rep. 949; The Coquitlam v. United States, 163 U. S. 346, 41 L. ed. 184, 16 Sup. Ct. Rep. 1117.

Messrs. Aldis B. Browne and Albert Fink filed a separate brief for petitioner:

Will an indictment invalid on demurrer for that it charges more than one crime become valid through a change in the statute law, made subsequent to the filing of the demurrer?

Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443; Thompson v. Utah, 170 U. S. 351, 42 L. ed. 1066, 18 Sup. Ct. Rep. 620.

Assistant Attorney General **Adkins** argued the cause, and, with Messrs. John Rustgard and Karl W. Kirchwey, filed a brief for respondent:

This court will decide the case on the present law; that law authorizes the joinder of several offenses, and the judgment below

NOTE.—On joinder of offenses of same general character in one indictment—see note to Herman v. People, 9 L.R.A. 182.

As to retrospective statutes generally—see notes to Otoe County v. Baldwin, 28 L. ed. U. S. 331, and Barnitz v. Beverly, 41 L. ed. U. S. 94.

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will not be reversed if, upon rehearing, the same order must be entered.

United States v. The Peggy, 1 Cranch, 103, 2 L. ed. 49; Pugh v. McCormick, 14 Wall. 361, 20 L. ed. 789; Dinsmore v. Southern Exp. Co. 183 U. S. 115, 46 L. ed. 111, 22 Sup. Ct. Rep. 45; Keller v. State, 12 Md. 322, 71 Am. Dec. 596; Muskogee Nat. Teleph. Co. v. Hall, 4 Ind. Terr. 18, 64 S. W. 600; Hubbard v. Gilpin, 57 Mo. 444; Wayne Co. v. St. Louis & I. M. R. Co. 66 Mo. 77; Myers v. Hollingsworth, 26 N. J. L. 186; Wade v. St. Mary's Industrial School, 43 Md. 178; Simpson v. Stoddard County, 173 Mo. 476, 73 S. W. 700; St. Louis, I. M. & S. R. Co. v. Berry, 42 Tex. Civ. App. 470, 93 S. W. 1107; Perry v. Minneapolis Street R. Co. 69 Minn. 165, 72 N. W. 55; People v. Syracuse, 128 App. Div. 702, 113 N. Y. Supp. 707; Rawlings Co. v. Miller, 199 U. S. 353, 369, 50 L. ed. 226, 233, 26 Sup. Ct. Rep. 46.

Nor can there be any claim that the amended statute is *ex post facto* as applied to offenses committed before its passage. It is a mere change in the rules of procedure, which dispenses with none of the substantial protections with which the law surrounds the accused.

Cooley, Const. Lim. 7th ed. 326; Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; Hopt v. Utah, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; Gibson v. Mississippi, 162 U. S. 565, 590, 40 L. ed. 1075, 1081, 16 Sup. Ct. Rep. 904; Thompson v. Missouri, 171 U. S. 380, 386, 43 L. ed. 204, 207, 18 Sup. Ct. Rep. 922; Hallock v. United States, 107 C. C. A. 487, 185 Fed. 417; Walston v. Com. 16 B. Mon. 15; State v. Ryan, 13 Minn. 376, Gil. 343; State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89; South v. State, 86 Ala. 617, 6 So. 52; Mathis v. State, 31 Fla. 291, 12 So. 681; Com. v. Brown, 121 Mass. 69; State v. Pell, 140 Iowa, 655, 119 N. W. 154; Marion v. State, 20 Neb. 233, 57 Am. Rep. 825, 29 N. W. 911.

The alleged error was immaterial.

(a) Petitioner received no greater sentence than must have been imposed on a conviction of one crime only.

Claassen v. United States, 142 U. S. 140, 35 L. ed. 966, 12 Sup. Ct. Rep. 169.

(b) Prejudice cannot be shown because the error might have been cured had petitioner gone to trial.

Myers v. State, 92 Ind. 394; Com. v. Packard, 5 Gray, 101; Com. v. Adams, 127 Mass. 15; Pointer v. United States, 151 U. S. 396, 38 L. ed. 208, 14 Sup. Ct. Rep. 410; State v. Buck, 59 Iowa, 382, 13 N. W. 342; Mills v. State, 52 Ind. 187.

(c) The error was one of form, cured by U. S. Rev. Stat. § 1025, U. S. Comp. Stat. 1901, p. 720; United States v. Nye, 4 Fed. 888; United States v. Durland, 65 Fed. 408; Connors v. United States, 158 U. S. 408, 39 L. ed. 1033, 15 Sup. Ct. Rep. 951.

The Penal and Criminal Procedure Codes of Alaska apply only to the crimes therein mentioned, and not to crimes defined in the Revised Statutes or other general laws of the United States.

The general laws of the United States not locally inapplicable, including § 1024 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 720, are in force in Alaska.

Interstate Commerce Commission v. United States, 224 U. S. 474, 481, 56 L. ed. 849, 852, 32 Sup. Ct. Rep. 556; Nagle v. United States, 111 C. C. A. 621, 191 Fed. 141; Kie v. United States, 27 Fed. 351; Fitzpatrick v. United States, 178 U. S. 304, 44 L. ed. 1078, 20 Sup. Ct. Rep. 944.

The character of the district court for Alaska has been many times considered by this court, and the effect of those decisions seems to be that whenever it is exercising the jurisdiction of a district court of the United States the Federal rules apply.

McAllister v. United States, 141 U. S. 174, 35 L. ed. 693, 11 Sup. Ct. Rep. 949; The Coquitlam v. United States, 163 U. S. 346, 41 L. ed. 184, 16 Sup. Ct. Rep. 1117; Re Cooper, 138 U. S. 404, 34 L. ed. 993, 11 Sup. Ct. Rep. 289; Re Cooper, 143 U. S. 472, 494, 510, 36 L. ed. 232, 239, 244, 12 Sup. Ct. Rep. 453; United States v. Pacific & A. R. & Nav. Co. 228 U. S. 87, 57 L. ed. 742, 33 Sup. Ct. Rep. 443. See also Embry v. Palmer, 107 U. S. 3, 9, 27 L. ed. 346, 348, 2 Sup. Ct. Rep. 25; Benson v. Henkel, 198 U. S. 1, 13, 49 L. ed. 919, 923, 25 Sup. Ct. Rep. 569; Hyde v. Shine, 199 U. S. 62, 75, 50 L. ed. 90, 94, 25 Sup. Ct. Rep. 766; United States v. Haskins, 3 Sawy. 262, Fed. Cas. No. 15,322; Moss v. United States, 23 App. D. C. 475.

A dual system of procedure does exist in Alaska.

Ex parte Crow Dog (Ex parte Kang Gi Shun Ca) 109 U. S. 556, 560, 27 L. ed. 1030, 1032, 3 Sup. Ct. Rep. 396; United States v. Folsom, 7 N. M. 532, 38 Pac. 70.

[98] Mr. Justice McKenna delivered the opinion of the court:

Petitioner was indicted under § 5209 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3.97) relating to national banks, and was charged with fifty-six separate violations of the section. He demurred to the indictment on the ground, among others, that it violated § 43 of the Criminal Code

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of Alaska, known as Carter's Code, in that more than one crime was charged.

The demurrer was overruled, to which ruling petitioner excepted. He then gave written notice "of election to stand upon the said demurrer and not further plead, and to take advantage of the provisions of § 97 of the Alaskan Code of Criminal Procedure, and to submit to judgment thereunder, and forthwith take his appeal to the circuit court of appeals for the ninth circuit."

The government objected to the entry of judgment until the cause had been submitted to a jury for trial and a verdict rendered, urging that § 97 of the Code of Alaska did not apply, but that §§ 1026 and 1032† of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 720 and 722) governed the procedure. After argument, the court ruled that the Federal procedure prevailed in all proceedings in the cause, but that the defendant [99] (petitioner) might waive trial by jury, if he so elected, and have judgment entered against him pursuant to the provisions of § 97.‡

The court then asked petitioner if he was guilty or not guilty of the crime. Petitioner stood mute, refused to plead, elected to stand on his demurrer and have judgment rendered against him in accordance with § 97. He was then adjudged guilty and sentenced to imprisonment for five years for each of the offenses, to run concurrently, the entire sentence to be completed at the end of five years.

Judgment was affirmed by the circuit court of appeals. 120 C. C. A. 563, 202 Fed. 457.

The first question in the case is whether § 43 of the Alaskan Criminal Code applies, or § 1024 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 720). They read, respectively, as follows:

"Sec. 43. That the indictment must charge but one crime, and in one form only; except that where the crime may be committed by use of different means, the indictment may allege the means in the alternative." 30 Stat. at L. 1290, chap. 429.

"Sec. 1024. When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

The trial court and the circuit court of appeals held, as we have seen, that § 1024 (U. S. Comp. Stat. 1901, p. 720) applied, and this is the contention [100] of the government. Petitioner asserts the applicability of § 43 of the Alaskan Code.

The trial court expressed its recognition of the difference between a district and circuit court of the United States and a territorial court, such as the district court of Alaska was expressed to be, but was of opinion that when the latter court exercises jurisdiction to enforce the laws of the United States, "not only the substantive law, but the machinery, the procedure which enables the court to enforce the substantive law," applied. The circuit court of appeals, in a circumstantial opinion, reached the same general result and considered that the Alaskan Code, by its title and some of its provisions, explicitly specialized the crimes relating to Alaska and the procedure applicable to them. The title of the act is, it was said, "An Act to Define and Punish Crimes in the District of Alaska, and to Provide a Code of Criminal Procedure for Said District;" the enacting clause is, "That the penal and criminal laws of the United States of America, and the procedure thereunder relating to the District of Alaska, shall be as follows:" and § 2, chapter 1, title 1, provides: "That the crimes and offenses defined in this act, committed within the District of Alaska, shall be punished as herein provided." It was hence concluded that as the offense charged in the indictment was not one mentioned in the Alaskan Code, it was not one to be governed by the local procedure, but was left under the procedure prescribed in § 1024 of the Revised Statutes (U. S. Comp Stat. 1901, p. 720). The

†Sec. 1026. In every case in any court of the United States, where a demurrer is interposed to an indictment, or to any count or counts thereof, or to any information, and the demurrer is overruled, the judgment shall be *respondeat ouster;* and thereupon a trial may be ordered at the same term, or a continuance may be ordered as justice may require.

Sec. 1032. When any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury.

‡Sec. 97. That if the demurrer be disallowed, the court must permit the defendant, at his election, to plead, which he must do forthwith, or at such time as the court may allow; but if he do not plead, judgment must be given against him. 30 Stat. at L. 1295, chap. 429.

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conclusion was fortified by a consideration of the genesis of the respective provisions. The result of the conclusion will be the existence of a dual procedure in the prosecution of different crimes committed within the same territorial jurisdiction. The result may have examples, but it is certainly undesirable, and the systematic character of the Alaskan Code indicates a contrary intention.

Section 43 is a continuation of the procedure that had [101] been prescribed for Alaska. The act providing a civil government for that territory, passed in 1884 (23 Stat. at L. 25 and 26, chap. 53), made the general laws of Oregon applicable to it, and those laws require "that the indictment must charge but one crime and in one form only." It is contended, however, that the laws of Oregon were declared to be the law of Alaska only in so far as they were applicable and not in conflict with the laws of the United States, and that necessarily the provision above-quoted in regard to the indictment was in conflict with § 1024 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 720). And it is further contended that the conflict is not reconciled, or rather, that the difference in procedure is not removed, by § 43 of the Alaskan Code. We concede strength to these considerations, but there are countervailing ones.

The Alaskan Code is quite an elaborate code of substantive and adjective law, the former containing twelve chapters of definitions of offenses against the person and property, the public safety and the public peace; the other containing elaborate and circumstantial provisions for the indictment and trial of offenders, their sentence and punishment, and a provision for appellate review. It seems to omit nothing of circumstance or detail necessary to a careful and advanced procedure. But its enumeration of offenses does not include all crimes against the United States, does not include the one under review, and it is hence contended that the procedure prescribed does not apply to the crimes not enumerated, and therefore does not apply to the crime under review. In other words, it is contended that the procedure prescribed is complementary only to the crimes defined and has no broader application, leaving all other crimes to be governed by § 1024 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 720).

It is established that the courts of the territories may have such jurisdiction of cases arising under the Constitution and laws of the United States as is vested in the circuit [102] and district courts, but this does not make them circuit and district courts of the United States. It has been hence decided that the manner of impaneling grand juries prescribed for the circuit and district courts does not apply to the territorial courts. Reynolds v. United States, 98 U. S. 145, 154, 25 L. ed. 244, 246. See, as to trial juries, Clinton v. Englebrecht, 13 Wall. 434, 20 L. ed. 659. In the latter case it was said "that the whole subject-matter of jurors in the territories is committed to territorial regulation." (p. 445.)

This principle was applied to the mode of challenging petit jurors (Miles v. United States, 103 U. S. 304, 26 L. ed. 481); to give defendants the right to separate trials and for the regulation of peremptory challenges to jurors (Cochran v. United States [circuit court of appeals, eighth circuit], 77 C. C. A. 432, 147 Fed. 206, 207). In Fitzpatrick v. United States, 178 U. S. 304, 307, 308, 44 L. ed. 1078, 1080, 1081, 20 Sup. Ct. Rep. 944, it was said that the laws of Oregon must be looked to for the requisites of an indictment for murder, rather than the rules of the common law. And this by virtue of the act providing a civil government for Alaska, presently referred to. See also Thiede v. Utah, 159 U. S. 510, 40 L. ed. 237, 16 Sup. Ct. Rep. 62.

In the case at bar there is direct legislation by Congress. Does the principle apply in such case? The first legislation for Alaska was an act of May 17, 1884, entitled, "An Act Providing a Civil Government for Alaska," § 7 of which was as follows: "That the general laws of the state of Oregon now in force are hereby declared to be the law in said district so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States." 23 Stat. at L. 25, 26, chap. 53. But what constitutes conflict? Mere difference, the court of appeals decided, citing Kie v. United States, 27 Fed. 351, 356. That, however, depends upon the purpose. Congress was legislating directly for Alaska; manifestly intended to distinguish it, and intended the laws of Oregon to be its laws, regarding them as more suitable to its conditions [103] than general laws determined by or addressed to different conditions. See United States v. Pridgeon, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746. And this appears to have been the view taken by the court in other cases.

In Endleman v. United States, 30 C. C. A. 186, 57 U. S. App. 1, 86 Fed. 456, the laws of Oregon were referred to to sustain an indictment to which a demurrer had been filed on the ground that it contained only one count, and that several distinct offenses were charged in that count. The case, however, may be said to have only negative value in the discussion. It referred to the Criminal Code as constituting the law of

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the district, but did not refer to or base the decision on that provision which required an indictment to charge "one crime and in one form only." The law of Oregon necessarily was decided to be controlling.

In Jackson v. United States, 42 C. C. A. 452, 102 Fed. 473, 477, the court resorted to the laws of Oregon to determine the qualifications of grand jurors, considering them as applicable under the organic act providing a civil government for the territory.

In Corbus v. Leonhardt, 51 C. C. A. 636, 114 Fed. 10, the court refused to apply § 858 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 659), which provides that in actions by or against executors and administrators neither party shall be allowed to testify against the other, and applied instead the law of Oregon permitting such testimony. And this by virtue of the provision of the act already cited, making the laws of Oregon the laws of Alaska.

In Ball v. United States, 77 C. C. A. 308, 147 Fed. 32, 36, it was assigned as error that the trial court overruled the motion of Ball to require the district attorney to furnish him a list of all of the witnesses to be produced against him on the trial, in accordance with § 1033 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 722). It was held that the section applied only to the trial of treason and capital cases in the courts of the United States. The court said: "The present case was [104] tried in a territorial court under the Penal Code and Code of Criminal Procedure of Alaska. Those Codes contain no requirement that a list of witnesses be furnished the accused upon demand or otherwise." Thiede v. Utah, 159 U. S. 510, 515, 40 L. ed. 237, 241, 16 Sup. Ct. Rep. 62, was cited as holding that § 1033 (U. S. Comp. Stat. 1901, p. 722) does not control practice and procedure in territorial courts.

These cases in the court of appeals apply the principle of the cases in this court, which we have cited, that Congress by its legislation intends always special regulations for the territories, to be exercised, it may be, through territorial legislatures, or, as in the case of Alaska, by making the laws of Oregon the ws of Alaska, and subsequently by the Code enacted for that territory.

It is, however, the contention, as we have seen, that the limitations of the title of the Alaskan Codes, and the omission from them of the crime under review, make § 1024 (U. S. Comp. Stat. 1901, p. 720) applicable; or, to state it differently, make § 43 of the Code, which provides that "the indictment must charge but one crime and in one form only," applicable only to the crimes and offenses specifically defined in the act. If it be true that there is such limitation, it would follow that if the laws of Oregon were, before the enactment of the Codes, applicable to other offenses in Alaska, they are still applicable. But we are not disposed so to limit the procedure in Alaska. It is, as we have said, very complete and circumstantial. It covers every step in a criminal proceeding, the first accusation, arrest, preliminary inquiry of guilt, duties of officers and magistrates, formation of grand juries, the indictment, trial, and its conduct, verdict, sentence, and judgment. The reason given for denying its application seems to us not adequate. It is said that § 1024 (U. S. Comp. Stat. 1901, p. 720) was originally contained in the act of February 26, 1853, (10 Stat. at L. 161, chap. 80), to regulate the fees of clerks, marshals, and attorneys of the courts of the United States, and finally became § 823 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 632), and by it made applicable to all of the states and [105] territories. And it is said that the purpose of the act of 1853 and its continuance was to prevent the officers of the United States from increasing their fees by filing separate indictments when the offenses might be properly charged in one. But such a general purpose might easily be considered as yielding to the special provisions for Alaska expressed in the laws of Oregon and declared to be the law of Alaska, and in the repetition of the provisions of those laws in the Code of Alaska, that but one offense shall be charged in the indictment. We cannot suppose that the purpose of regulating the fees of officers was more essential and dominant than that special provision, to have no effect as to the great body of crimes of ordinary and everyday commission defined in the Code, and yet apply to offenses less frequent.

By an act of the territorial legislature, approved April 26, 1913, § 43 was amended so as to permit the joinder of two or more offenses or crimes of the same class in one indictment in separate counts, and it is hence contended by the government that the act makes valid the indictment in the case at bar. It is therefore insisted that "the only result of a reversal will therefore be that petitioner will be retried under the present indictment, or under a new indictment identical in form." If the trial court erred, it is further insisted, the error has become immaterial.

We are not disposed to give the act retrospective operation, so as to give validity to indictments found before its enactment, assuming for the argument's sake that it could have been given such operation. The evil of so considering it is manifest. Petitioner stood on his demurrer in

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reliance upon the then-existing law, and fault cannot be imputed to him for doing so. Had the law been different his pleading might have been different, and instead of submitting to judgment he might have contested the charges against him. This is certainly a substantial right. The government [106] seems to urge that he was in fault for not contesting the charges, and by not doing so took all chances of the change of the law, and that besides, it is urged, he received no greater sentence than must have been imposed on a conviction of one crime only, as the minimum sentence under § 5209 (U. S. Comp. Stat. 1901, p. 3497) is five years. It is contended that the principle that one good count will support a judgment is applicable. But this overlooks the right of petitioner to have defended against the indictment,—the right which, we repeat, he did not lose by pleading its defects under the then-existing law.

It is contended by petitioner that the trial court, in imposing sentence and judgment upon him, denied him the constitutional right of trial by jury, and that, the offenses charged against him being felonies, he was without power to waive a jury trial. Of this contention, we are not required to express opinion, having found the indictment against him insufficient.

Judgment reversed and cause remanded to the District Court for the District of Alaska, Division No. 1, with directions to sustain the demurrer to the indictment.

EMILIA ALZUA and Ignacio Arnalot, Plffs. in Err.,
v.
E. FINLEY JOHNSON.

(See S. C. Reporter's ed. 106-112.)

Judges — liability for acts — Philippine supreme court.

1. The American doctrine of immunity of judges from suit because of their judicial acts protects a justice of the supreme court of the Philippine Islands against a suit to recover damages upon the alleged grounds that, without jurisdiction, he entered a judgment against the plaintiff, contrary to an order of the full court, and made a false statement of fact in the opinion by which the full court ratified the change, and inserted in the opinion of the full court in a second suit various false statements, including one attributing to the first judgment an effect that it could not have in the circumstances,—all with full knowledge and intent to injure the plaintiff, as appears from an inspection of the opinions,—and that the plaintiff had to pay the second judgment at a sacrifice.

[For other cases, see Judges, V., in Digest Sup. Ct. 1908.]

Judges — liability for acts — Philippine supreme court.

2. No implication that a justice of the supreme court of the Philippine Islands shall be liable for a judgment rendered in bad faith can be deduced from the provisions of § 9 of act No. 190 of the Philippine Commission, that "no judge, justice of the peace, or assessor shall be liable to a civil action for the recovery of damages by reason of any judicial action or judgment rendered by him in good faith and within the limits of his legal powers and jurisdiction."

[For other cases, see Judges, V., in Digest Sup. Ct. 1908.]

[No. 306.]

Submitted October 27, 1913. Decided November 10, 1913.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which affirmed a judgment of the Court of First Instance of Manila, sustaining a demurrer to and dismissing a suit against a justice of the Supreme Court. On motion to affirm, affirmed.

See same case below, 21 Philippine, 309.

The facts are stated in the opinion.

Messrs. **Henry W. Van Dyke, Charles A. Douglas, and Hugh H. Obear** submitted the cause for plaintiffs in error. Mr. Thomas Ruffin was on the brief.

Messrs. **A. B. Browne, Alexander Britton, W. A. Kincaid, and Evans Browne** submitted the cause for defendant in error.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a suit brought by the plaintiffs in error against a justice of the supreme court of the Philippine Islands. Its allegations, much abridged, are as follows: The plaintiff Alzua had a judgment, in cause No. 3274, declared to be a first lien upon two stores, among other things, of Martinez, widow of Soler, and Riu, the judgment debtors; the sheriff levied; two Solers, sons of Martinez, demanded that the sheriff dismiss the levy as they were owners of the stock levied upon; the plaintiff Alzua gave the sheriff a bond, on October 14, 1905, and thereupon the sheriff proceeded to advertise

NOTE.—On liability of judicial officer to civil action for acts of judicial nature—see notes to Austin v. Vrooman, 14 L.R.A. 138; Thompson v. Jackson, 27 L.R.A. 92; and Broom v. Douglass, 44 L.R.A. (N.S.) 164.

On effect of bad motive to make actionable the acts of a judge without, or in excess of, jurisdiction—see note to State ex rel. Durner v. Huegin, 62 L.R.A. 721.

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and sell the property concerned. On the same October 14 the above-mentioned Solers brought [108] suit (No. 4017) against the sheriff and the present plaintiff, Alzua, alleging that the Solers owned and were entitled to possession of the property, and praying for an injunction and damages. The trial court decided for the sheriff and Alzua and the Solers appealed to the supreme court. On March 27, 1907, that court, including the defendant, affirmed the decision, postponing a statement of the grounds, and ordered judgment in twenty days and a return of the record ten days thereafter. The term ended on March 31. In vacation, on April 8, the defendant, without consulting the other judges, changed the judgment of affirmance to one of reversal, and gave orders accordingly; so that on July 29 the record was returned to the court below with judgment reversed. The defendant then prepared a decision, filed September 14, which was signed by five justices, including the defendant, and with intent to injure Alzua falsely stated therein that the Solers were preferred creditors of Martinez and Riu, well knowing that they alleged themselves to be owners, and that Martinez and Riu were not parties to the suit, and could not be bound by the decision. No final judgment has been rendered in the cause.

On August 22, 1907, the Solers brought another suit, No. 5719, against the sheriff, Alzua, her husband, and the other obligors on the bond given to the sheriff, to which Martinez and Riu afterwards were made parties, alleging that the Solers had a preferred credit in the previously mentioned property. On November 29, the court dismissed the suit as to all but Martinez, who confessed liability, and entered judgment against her. The Solers appealed to the supreme court and the case was submitted to six judges, including the defendant. The defendant prepared a decision, and, with intent to injure the plaintiff, set forth further false statements, *viz.:* that in the demand on the sheriff that he dismiss the levy, the guardian *ad litem* of the Solers alleged that their claim was a [109] preferred claim, whereas they claimed as owners and partners; that the supreme court had decided in the former suit, No. 4017, that the Solers had a preferred credit for P. 9,868.29, whereas the defendant knew that the decision in 4017 had not been pleaded or put in evidence; that the cause No. 5719 was brought upon the bond for the above sum together with damages, etc., P. 11,068; the defendant, knowing that the sheriff, acting sheriff, Martinez, and Riu were also defendants, and that the first named sum alone was in issue and no damages proved; that the cause No. 5719 was instituted on October 1, 1907, well knowing that it was begun on August 22, before, not after, the last decision (of September 14) in the former case; that the record in No. 5719 shows that the bond was given to the sheriff after issue of an injunction in No. 4017, whereas it does not; and finally that the sureties on the bond had bound themselves thereby to respond to the Solers for the amount of the claim that the Solers had against Martinez and Riu, whereas the bond was given to the sheriff, and the Solers were not parties to it.

The declaration goes on to allege that with the same intent the defendant did not discuss the actual questions or evidence; that he obtained the signatures of the other judges upon his representation that the decision set forth an impartial and fair statement of the case, he knowing the contrary; and further, that Justice Elliott, who sat at the hearing, did not sign the decision, and was not informed of it. It further alleges that defendant omitted the names of Martinez and Riu, and directed the clerk to enter judgment against the other defendants only, knowing who were parties and what had been the judgment below. Thereafter, on February 8, 1910, pursuant to the decision and defendant's orders, judgment was entered against Alzua and three others for P. 11,068, with interest, on the ground that the Solers were creditors of Martinez and Riu, and preferred to Alzua; although, it is said, Martinez [110] and Riu were absolved by the judgment. Averments are reiterated that the defendant performed all the acts alleged in relation to Nos. 4017 and 5719 wrongfully, with intent to injure the plaintiff, with knowledge of the facts set forth, and that such knowledge appears from inspection of the decisions in Nos. 4017 and 5719. Execution issued, and the present plaintiffs paid the judgment in 5719, but to do so had to sell their property at a great sacrifice. The plaintiffs therefore seek judgment for the actual value of the property sold, the income that would have been realized, and punitive damages; P. 115,000 in all. A demurrer to the declaration was sustained by both courts below, and the plaintiffs being unable to better their case by amendment, judgment was entered and the complaint dismissed.

Abridged once more, this complaint is that the defendant, without jurisdiction, entered a judgment against the plaintiff, contrary to an order of the full court; and, in the opinion by which the full court ratified the change, made a false statement of fact; that in the opinion of the full court in a second suit he inserted various false statements, including one attributing to the first judgment an effect that it could not have

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in the circumstances, all with full knowledge and intent to injure the plaintiff, which knowledge appears from inspection of the opinions, and that the plaintiff had to pay the second judgment at a sacrifice.

It is apparent that there are other difficulties beside the immunity of the judge in the way of such a suit. In the first place the supreme court of the Philippines decides that the judge had jurisdiction to make the change,—a matter of local administration on which we should be very slow to revise the judgment. Gray v. Taylor, 227 U. S. 51, 57 L. ed. 413, 33 Sup. Ct. Rep. 199; Fox v. Haarstick, 156 U. S. 674, 679, 39 L. ed. 576, 578, 15 Sup. Ct. Rep. 457. Next, the judges, on inspection of the opinions and records which they regard as incorporated in the complaint, and for which they were responsible by their assent, are of opinion that the statements in the former opinions were [111] correct and that the decisions were right, and of course reject the suggestion that they were deceived when they rendered the judgments. It might be added that the complaint hardly makes it clear that any of the alleged misstatements, some of which, at least, were irrelevant to the result, were the determining causes of the judgment of which the plaintiff complains.

But, however it may be as to the matters that we have stated, we regard it as fundamental that the immunity of the defendant from this suit is the same as that of judges in the United States, which is established beyond dispute. Bradley v. Fisher, 13 Wall. 335, 20 L. ed. 646; Randall v. Brigham, 7 Wall. 523, 19 L. ed. 285. Whatever may have been the Spanish law, this is a principle so deep seated in our system that we should regard it as carried into the Philippines by implication as soon as we established courts in those islands. Acts of Philippine Commission Nos. 136, 222. Act of Congress of July 1, 1902, chap. 1369, §§ 1, 5, 32 Stat. at L. 691, 693. Reasons somewhat analogous to those adverted to in Carrington v. United States, 208 U. S. 1, 7, 52 L. ed. 367, 368, 28 Sup. Ct. Rep. 203, make the rule perhaps more important in the Philippines than it is here. It is true that in act No. 190, § 9, of the Philippine Commission (1901), it is provided that "no judge, justice of the peace, or assessor shall be liable to a civil action for the recovery of damages by reason of any judicial action or judgment rendered by him in good faith, and within the limits of his legal powers and jurisdiction;" and it is argued that this imports that any judge shall be liable for a judgment rendered in bad faith. But, without considering the question of power, we are of opinion, for the reasons to which we have referred, that this should not be construed to convey such an implication, at least, as to judges of the supreme court. The section is shown to have had in mind inferior judges and the like by its mention of justices of the peace and assessors, as to whom a different rule has been held to prevail.

[112] We think it manifest that the question on which the decision of this cause depends needs no further argument, and that the judgment should be affirmed.

Judgment affirmed.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY OF TEXAS and American Surety Company of New York, Petitioners,

v.

UNITED STATES.

(See S. C. Reporter's ed. 112-120.)

Master and servant — Federal regulation of carriers — hours of service — number of penalties.

1. A separate penalty is incurred for each railway employee kept on duty for more than sixteen consecutive hours, contrary to the hours of service act of March 4, 1907 (34 Stat. at L. 1415, chap. 2939, U. S. Comp. Stat. Supp. 1911, p. 1321), by reason of the same delay of a train, such statute making the carrier which permits "any employee" to remain on duty in violation of its terms liable to a penalty "for each and every violation."

[For other cases, see Master and Servant I, b, in Digest Sup. Ct. 1908.]

Master and servant — Federal regulation of carriers — hours of service — when employees are on duty.

2. Employees, though inactive, are none the less on duty within the meaning of the hours of service act of March 4, 1907, penalizing carriers for keeping their employees on duty for more than sixteen consecutive hours, where they are under orders, liable to be called upon at any moment, and not at liberty to go away.

[For other cases, see Master and Servant I, b, in Digest Sup. Ct. 1908.]

Certiorari — to circuit courts of appeals — question not raised below.

3. A carrier sued under the hours of service act of March 4, 1907, for keeping employees on duty for more than sixteen consecutive hours, cannot urge upon certiorari that the delay of the train which kept the employees beyond the proper time was caused by a defective injector that was not known to the carrier, and could not have been foreseen when the employees left a

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Note.—On certiorari from Federal Supreme Court to circuit courts of appeals—see note to United States v. Dickinson, 53 L. ed. U. S. 711.

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terminal, and that therefore, by the proviso in § 3, the act does not apply, where the question was raised only by a request to direct a verdict for the defendant, and the trouble might have been found to be due to the scarcity and bad quality of the water, which was well known.

[For other cases, see Certiorari, II., in Digest Sup. Ct. 1908.]

Trial — province of court and jury — amount of penalty.

4. The judge, not the jury, is to determine the amount of the penalty to be imposed under the hours of service act of March 4, 1907, when a carrier keeps employees on duty for more than sixteen consecutive hours.

[For other cases, see Trial, VI. c, in Digest Sup. Ct. 1908.]

[No. 439.]

Submitted October 24, 1913. Decided November 10, 1913.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of Texas, in favor of the United States in two suits to recover penalties for violation of the hours of service act. Affirmed.

The facts are stated in the opinion.

Messrs. **Joseph M. Bryson** and **Cecil H. Smith** submitted the cause for petitioners. Messrs. Alexander S. Coke and A. H. McKnight were on the brief:

The act of requiring or permitting members of a train crew, who go on duty at the same time and off duty at the same time, to work overtime, is single, and but one penalty can be recovered for it. The authorities on analogous questions clearly sustain this contention.

Baltimore & O. S. W. R. Co. v. United States, 220 U. S. 94, 55 L. ed. 384, 31 Sup. Ct. Rep. 368; Missouri, K. & T. R. Co. v. State, — Tex. Civ. App. —, 97 S. W. 724; Porter v. Dawson Bridge Co. 157 Pa. 367, 27 Atl. 730; Central R. Co. v. Green, 86 Pa. 427, 27 Am. Rep. 718; Hill v. Williams, 14 Serg. & R. 287; People v. Spencer, 201 N. Y. 105, 94 N. E. 614, Ann. Cas. 1912A, 818; Sturgis v. Spofford, 45 N. Y. 446; Fisher v. New York C. & H. R. R. Co. 46 N. Y. 644; Cox v. Paul, 175 N. Y. 328, 67 N. E. 586; Griffin v. Interurban Street R. Co. 179 N. Y. 438, 72 N. E. 513; State Bd. of Pharmacy v. Bellinger, 138 App. Div. 12, 122 N. Y. Supp. 651; Apothecaries Co. v. Jones [1893] 1 Q. B. 89, 5 Reports, 101, 67 L. T. N. S. 677, 41 Week. Rep. 267, 17 Cox C. C. 588, 57 J. P. 56; Parks v. Nashville, C. & St. L. R. Co. 13 Lea, 1, 49 Am. Rep. 655; Washburn v. M'Inroy, 7 Johns. 134; State v. Wisconsin C. R. Co. 133 Wis. 478, 113 N. W. 952, 14 Ann. Cas. 1061; Central R. Co. v. Green, 86 Pa. 427, 27 Am. Rep. 718; 12 Cyc. 289; 22 Cyc. 383; 25 Cyc. 61; 1 Bishop, New Crim. Law, § 793, p. 479, § 1061; Bishop, Statutory Crimes, § 1121.

This principle has been applied in the following cases, among others, in each of which the act, though involving two or more persons or things, was held to constitute a single offense:

Crepps v. Durden, Cowp. pt. 2, p. 640; Reg. v. Giddins, Car. & M. 634; Clem v. State, 42 Ind. 420, 13 Am. Rep. 369; Hoiles v. United States, 3 MacArth. 370, 36 Am. Rep. 106; United States v. Patty, 2 Fed. 664; United States v. Scott, 74 Fed. 213; Hurst v. State, 86 Ala. 604, 11 Am. St. Rep. 79, 6 So. 120; Ben v. State, 22 Ala. 9, 58 Am. Dec. 234; Westfall v. State, 4 Ga. App. 834, 62 S. E. 558; Peck v. State, 54 Tex. Crim. Rep. 81, 111 S. W. 1019, 16 Ann. Cas. 583; Scott v. State, 46 Tex. Crim. Rep. 305, 81 S. W. 950; State v. Warren, 77 Md. 121, 39 Am. St. Rep. 401, 26 Atl. 500; State v. Nelson, 29 Me. 329; Woodford v. People, 62 N. Y. 117, 20 Am. Rep. 464; Gordon v. State, 46 Ohio St. 607, 6 L.R.A. 749, 23 N. E. 63. See also Muckenfuss v. State, 55 Tex. Crim. Rep. 229, 20 L.R.A. (N.S.) 783, 131 Am. St. Rep. 813, 116 S. W. 51, 16 Ann. Cas. 768; State v. Hennessey, 23 Ohio St. 339, 13 Am. Rep. 253; Smith v. State, 59 Ohio St. 350, 52 N. E. 826; State v. Egglesht, 41 Iowa, 574, 20 Am. Rep. 612; Com. v. Crowell, 22 Ky. L. Rep. 1182, 60 S. W. 179; State v. Batson, 108 La. 479, 32 So. 478; Ward v. State, 90 Miss. 249, 43 So. 466; State v. Douglas, 26 Nev. 196, 99 Am. St. Rep. 688, 65 Pac. 802; People v. Adams, 17 Wend. 475; State v. Clark, 46 Or. 140, 80 Pac. 101; Cornell v. State, 104 Wis. 527, 80 N. W. 745; State v. Stevens, 81 Vt. 454, 70 Atl. 1060.

A member of a train crew while not actually engaged in, or having a duty to perform in connection with, the movement of his train, his time being at his disposal, is off duty within the meaning of the hours of service act.

United States v. Denver & R. G. R. Co. 197 Fed. 629; Atchison, T. & S. F. R. Co. v. United States, 100 C. C. A. 534, 177 Fed. 118; United States v. Illinois C. R. Co. 180 Fed. 630; United States v. Chicago, M. & P. S. R. Co. 195 Fed. 783; United States v. Kansas City Southern R. Co. 189 Fed. 471; United States v. Chicago, M. & P. S. R. Co. 197 Fed. 624.

The failure of an injector, caused by impure water, where, owing to a protracted drouth, water cannot be procured that will not foam and thus cause injector failures, is an unavoidable accident within the meaning of the hours of service act.

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United States v. Kansas City Southern R. Co. 189 Fed. 471; United States v. Kansas City Southern R. Co. 121 C. C. A. 136, 202 Fed. 828.

Suits by the government for penalties under the hours of service act are actions at law for debt, and, as such, are civil suits.

Hepner v. United States, 213 U. S. 103, 53 L. ed. 720, 27 L.R.A.(N.S.) 739, 29 Sup. Ct. Rep. 474, 16 Ann. Cas. 960; United States v. Atlantic Coast Line R. Co. 182 Fed. 285; United States v. St. Louis Southwestern R. Co. 184 Fed. 32; United States v. Sioux City Stock Yards Co. 92 C. C. A. 578, 167 Fed. 126; United States v. Kansas City Southern R. Co. 121 C. C. A. 136, 202 Fed. 828.

In a civil suit, where the damages or penalties are not made certain and fixed by the terms of a contract or statute, the court, upon request, should submit to the jury the question of assessing the damages o: penalties.

Renner v. Marshall, 1 Wheat. 215, 4 L. ed. 74; Aurora v. West, 7 Wall. 104, 19 L. ed. 50; Armstrong v. Carson, 2 Dall. 302, 1 L. ed. 391, Fed. Cas. No. 543; Kennon v. Gilmer, 131 U. S. 22, 33 L. ed. 110, 9 Sup. Ct. Rep. 696; Haines v. Darling, 99 Mich. 47, 57 N. W. 1081; McDaniel v. Gate City Gaslight Co. 79 Ga. 58, 3 S. E. 693.

Assistant Attorney General Denison submitted the cause for respondent:

The question whether separate penalties are to be imposed for every employee who is worked over hours is exclusively a question of construction of the statute involved, and this statute clearly so intends.

Baltimore & O. S. W. R. Co. v. United States, 220 U. S. 94, 55 L. ed. 384, 31 Sup. Ct. Rep. 368; Chicago & A. R. Co. v. People, 82 Ill. App. 679; Com. v. Cooke, 50 Pa. 201; O'Neil v. Vermont, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693; People v. Spencer, 201 N. Y. 105, 94 N. E. 614, Ann. Cas. 1912A, 818; People v. New York C. R. Co. 13 N. Y. 78; Southern R. Co. v. State, 165 Ind. 613, 75 N. E. 272; United States v. Chicago, M. & P. S. R. Co. 197 Fed. 624; United States v. Denver & R. G. R. Co. 197 Fed. 629; United States v. St. Louis Southwestern R. Co. 106 C. C. A. 230, 184 Fed. 28; United States v. Chicago G. W. R. Co. 162 Fed. 775.

The crew of train No. 622 were "on duty," within the meaning of the act, nineteen hours and forty minutes.

United States v. Chicago, M. & P. S. R. Co. 197 Fed. 625; United States v. Denver & R. G. R. Co. 197 Fed. 629; United States v. Chicago, M. & P. S. R. Co. 195 Fed. 783; United States v. Kansas City Southern R. Co. 189 Fed. 471; United States v. St. Louis Southwestern R. Co. 189 Fed. 954; United States v. Illinois C. R. Co. 180 Fed. 630.

The cause of the delay to train No. 404 was not within the exception.

Gleeson v. Virginia Midland R. Co. 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859; The Majestic, 166 U. S. 375, 41 L. ed. 1039, 17 Sup. Ct. Rep. 597, 2 Am. Neg. Rep. 282; United States v. Garbish, 222 U. S. 257, 56 L. ed. 190, 32 Sup. Ct. Rep. 77.

The size of the penalty (within the maximum) was a question for the court, and not for the jury.

Atchison, T. & S. F. R. Co. v. United States, 101 C. C. A. 140, 178 Fed. 12; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612; Hepner v. United States, 213 U. S. 103, 53 L. ed. 720, 27 L.R.A.(N.S.) 739, 29 Sup. Ct. Rep. 474, 16 Ann. Cas. 960; Haines v. Darling, 99 Mich. 47, 57 N. W. 1081; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Lees v. United States, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163; Missouri, K. & T. R. Co. v. United States, 101 C. C. A. 143, 178 Fed. 15; McDaniel v. Gate City Gaslight Co. 79 Ga. 58, 3 S. E. 693; O'Connell v. O'Leary, 145 Mass. 311, 14 N. E. 143; United States v. Zucker, 161 U. S. 475, 40 L. ed. 777, 16 Sup. Ct. Rep. 641; United States v. Atlantic Coast Line R. Co. 98 C. C. A. 110, 173 Fed. 764; United States v. Southern P. Co. 162 Fed. 412, 157 Fed. 459; United States v. Boston & A. R. Co. 15 Fed. 209.

Mr. Justice Holmes delivered the opinion of the court:

This case brings up two suits that were consolidated and tried together, both being suits for penalties under the hours of service act of March 4, 1907, chap. 2939, 34 Stat. at L. 1415, U. S. Comp. Stat. Supp. 1911, p. 1321, for keeping employees on duty for more than sixteen consecutive hours. The main question is whether, when several persons thus are kept beyond the proper time by reason of the same delay of a train, a separate penalty is incurred for each, or only one for all. The circuit court of appeals decided for the government without discussion.

The petitioner cites many cases in favor of the proposition that generally, when one act has several consequences that the law seeks to prevent, the liability is attached to the act, and is but one. It argues that the delay of the train was such an act, and that the principle, which is a very old one, applies. Baltimore & O. S. W. R. Co. v.

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United States, 220 U. S. 94, 55 L. ed. 384, 31 Sup. Ct. Rep. 368. But unless the statute requires a different view, to call the delay of the train the act that produced the wrong is to beg the question. See Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 19 L. ed. 909; Denny v. New York C. R. Co. 13 Gray, 481, 74 Am. Dec. 645. The statute was not violated by the delay. That may have made keeping the men overtime more likely, but was not in itself wrongful conduct *quoad hoc*. The wrongful act was keeping an employee at work overtime, and that act was distinct as to each employee so kept. Without stopping to consider whether this argument would be met by the proviso declaring a "delay" in certain cases not to be within the statute, it is enough to observe that there is nothing to hinder making each consequence a separate cause of action or offense, if by its proper construction the law does so; see Flemister v. United States, 207 U. S. 372, 375, 52 L. ed. 252, 254, 28 Sup. Ct. Rep. 129; [119] so that the real question is simply what the statute means. The statute makes the carrier who permits "any employee" to remain on duty in violation of its terms, liable to a penalty "for each and every violation." The implication of these words cannot be made much plainer by argument. But it may be observed, as was said by the government, that as towards the public, every overworked man presents a distinct danger, and as towards the employees, each case, of course, is distinct. United States v. St. Louis Southwestern R. Co. 106 C. C. A. 230, 184 Fed. 28; People v. Spencer, 201 N. Y. 105, 111, 94 N. E. 614, Ann. Cas. 1912 A, 818.

One of the delays was while the engine was sent off for water and repairs. In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period, and that if it be deducted, they were not kept more than sixteen hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were none the less on duty when inactive. Their duty was to stand and wait. United States v. Chicago, M. & P. S. R. Co. 197 Fed. 624, 628; United States v. Denver & R. G. R. Co. 197 Fed. 629.

It is urged that in one case the delay was the result of a cause, a defective injector, that was not known to the carrier, and could not have been foreseen when the employees left a terminal, and that therefore, by the proviso in § 3, the act does not apply. But the question was raised only by a request to direct a verdict for the defendant, and the trouble might have been found to be due to the scarcity and bad quality of the water, which was well known. See Gleeson v. Virginia Midland R. Co. 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859; The Majestic, 166 U. S. 375, 386, 41 L. ed. 1039, 1043, 17 Sup. Ct. Rep. 597, 2 Am. Neg. Rep. 282.

The statute provides for a penalty not to exceed $500. It is argued that the amount of the penalty was for the jury, the proceeding being a civil suit. But the penalty is a deterrent, not compensation. The [120] amount is not measured by the harm to the employees, but by the fault of the carrier, and, being punitive, rightly was determined by the judge. United States v. Atlantic Coast Line R. Co. 98 C. C. A. 110, 173 Fed. 764, 771; Atchison, T. & S. F. R. Co. v. United States, 101 C. C. A. 140, 178 Fed. 12, 15.

Judgment affirmed.

CLEMENT NATIONAL BANK, Plff. in Err.,
v.
STATE OF VERMONT.

(See S. C. Reporter's ed. 120-143.)

Error to state court — questions reviewable.

1. The ruling of the highest court of the state that the tax imposed under Vt. Pub. Stat. chap. 37, upon interest-bearing deposits in national banks, which the bank may pay and charge to the depositors, is laid upon the depositor, and not upon the bank, is conclusive upon the Federal Supreme Court when testing, on writ of error to the state court, the validity of such statute under the Federal Constitution.

[For other cases, see Appeal and Error, 2124-2151, in Digest Sup. Ct. 1908.]

Taxes — deposits in national banks — discrimination.

2. The semiannual tax imposed under Vt. Pub. Stat. chap. 37, upon interest-bearing

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NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On writs of error to state court in cases involving questions under the national bankrupt law, see note to Rankin v. Barton, 50 L. ed. U. S. 163.

On state taxation of bank deposits—see note to State v. Duluth Gas & Water Co. 57 L.R.A. 72.

On state taxation of national banks generally—see notes to McHenry v. Downer, 45 L.R.A. 737; Old Nat. Bank v. County Ct. 3 L.R.A.(N.S.) 584; and Providence Bank v. Billings, 7 L. ed. U. S. 939.

On notice and hearing required generally to constitute due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194; and Ulman v. Baltimore, 11 L.R.A. 225.

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deposits in national banks, which the bank itself may pay upon the basis of average deposits, charging the same to the depositors, and thereby relieving the latter from the necessity of making any return, does not unfairly discriminate against national banks, where, under the state laws, state banking institutions pay a franchise tax at substantially the same rate upon the average amount of deposits, after deducting deposits in excess of $2,000, upon which the depositors are taxable locally, depositors being exempted from taxation upon those deposits which enter into the calculation of the average.

[For other cases, see Taxes, I. b, 2, in Digest Sup. Ct. 1908.]

National banks — powers — agreement to pay tax on deposits.

3. An agreement between a national bank and the state, by which the former agrees to pay upon the basis of average deposits, the tax imposed under Vt. Pub. Stat. chap. 37, upon interest-bearing deposits, and thereby relieve its depositors from the necessity of making any returns, is not *ultra vires* of the bank because the average amount upon which the bank agrees to pay may not precisely correspond to the amount upon which the depositors would be taxed, or because the agreement does not contemplate a charge against the depositors' accounts of the amounts paid by the bank.

[For other cases, see Banks, IV. g, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — taxation of bank deposits.

4. Depositors in national banks are not denied the equal protection of the laws by the tax imposed under Vt. Pub. Stat. chap. 37, upon interest-bearing deposits in such banks, because depositors in state banking institutions are exempted from taxation on their deposits up to $2,000, such institutions paying a franchise tax upon the average amount of deposits after deducting deposits in excess of $2,000, upon which the depositors are taxable locally, nor because of the exemptions which such statute makes in favor of municipalities, corporations organized solely for charitable, educational, or religious purposes, and various corporations otherwise taxed, nor because persons whose deposits do not bear interest in excess of 2 per cent per annum are also exempted.

[For other cases, see Constitutional Law, IV. a, 4, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — notice and hearing.

5. The lack of any assessment other than that made by the statute itself, or of any other notice to the depositor than that thus given by law, does not invalidate, as denying due process of law, the semiannual tax laid at a specified rate by Vt. Pub. Stat. chap. 37, upon interest-bearing deposits in national banks, where the tax was recoverable by suit in which the depositor would have full opportunity to resist any illegal demand.

[For other cases, see Constitutional Law, 725-744, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — taxation of bank deposits.

6. The obligation of existing contracts between a national bank and its depositors was not unconstitutionally impaired by the tax imposed under Vt. Pub. Stat. chap. 37, upon interest-bearing deposits which the bank itself may pay upon the basis of average deposits, charging the same to the depositors.

[For other cases, see Constitutional Law, 1450-1474, in Digest Sup. Ct. 1908.]

[No. 29.]

Argued April 28, 29, 1913. Decided November 10, 1913.

IN ERROR to the Supreme Court of the State of Vermont to review a judgment which, reversing in part a judgment of the Rutland County Court in favor of the state, enforced an agreement by a national bank to pay the taxes assessed upon interest-bearing deposits. Affirmed.

See same case below, 84 Vt. 167, 78 Atl. 944, Ann. Cas. 1912D, 22.

The facts are stated in the opinion.

Messrs. **Marvelle C. Webber** and **Maxwell Evarts** argued the cause and filed a brief for plaintiff in error:

The title of the statute indicates the purpose to tax the bank, and the statutory designation, while not absolutely controlling, is generally an important element in determining what kind of a tax the state imposes.

Gray, Limitations of Taxing Power, p. 42 § 55, note 49; Church of the Holy Trinity v. United States, 143 U. S. 457, 462, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511; United States v. Fisher, 2 Cranch, 358, 386, 2 L. ed. 304, 313; United States v. Palmer, 3 Wheat. 610, 631, 4 L. ed. 471, 477; Machen Fed. Corp. Tax Law 1909.

The deposits become the property of the bank, not of the depositor, while the depositor becomes a creditor of the bank to the amount of the deposit.

National Bank v. Millard, 10 Wall. 152, 19 L. ed. 897; Scammon v. Kimball, 92 U. S. 362, 369, 23 L. ed. 483, 485; Morse, Bkg. § 289; State v. Franklin County Sav. Bank & T. Co. 74 Vt. 246, 52 Atl. 1069; Manhattan Co. v. Blake, 148 U. S. 412, 424, 37 L. ed. 504, 508, 13 Sup. Ct. Rep. 640.

They are assessable to the depositor only, and as debts owing by the bank.

People v. National Bank, 123 Cal. 53, 45 L.R.A. 747, 69 Am. St. Rep. 32, 55 Pac. 685; Yuba County v. Adams, 7 Cal. 35.

The statute, being an attempt to tax national banks, is absolutely void.

Davis v. Elmira Sav. Bank, 161 U. S. 275, 283, 40 L. ed. 700, 701, 16 Sup. Ct. Rep. 502;

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Mercantile Nat. Bank v. New York, 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. Rep. 826; Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Hawley v. Hurd, 72 Vt. 122, 52 L.R.A. 195, 82 Am. St. Rep. 922, 47 Atl. 401; Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537.

The sum the bank is called upon to pay is based on the average of the deposits for the period. This measures the amount to be paid by the bank. Taxes on banks and savings banks, measured by the amount of their deposits, have generally been held to be privilege or franchise taxes, imposed on the privilege of doing business as a banking corporation.

Gray, Limitations of Taxing Power, pp. 43, 44, § 56; Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897; Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907; Com. v. People's Five Cents Sav. Bank, 5 Allen, 428; State v. Bradford Sav. Bank & T. Co. 71 Vt. 238, 44 Atl. 349; Com. v. Lancaster Sav. Bank, 123 Mass. 493; Jones v. Winthrop Sav. Bank, 66 Me. 242; State v. Franklin County Sav. Bank & T. Co. 74 Vt. 246, 52 Atl. 1069; New Orleans v. Houston, 119 U. S. 265, 30 L. ed. 411, 7 Sup. Ct. Rep. 198.

When a bank is required to collect a tax levied by the state against the owners of shares of stock in said bank upon said shares, but it appears that the bank cannot reimburse itself from assets of such shareholders in its hands, the tax becomes, under these circumstances, a tax upon the bank itself, and therefore invalid. It cannot be made necessary for the bank to institute and maintain a collection suit in order to be reimbursed.

Gray, Limitations of Taxing Power, § 801a; 1 Cooley, Taxn. 3d ed. p. 717, note 1; Farmers' & T. Nat. Bank v. Hoffmann, 93 Iowa, 119, 61 N. W. 418; New Orleans v. Houston, 119 U. S. 265, 30 L. ed. 411, 7 Sup. Ct. Rep. 198; Boston v. Beal, 51 Fed. 306; First Nat. Bank v. Chehalis County, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629; Stapylton v. Thaggard, 33 C. C. A. 353, 62 U. S. App. 638, 91 Fed. 93.

The statute is by design and in effect and reality a duress upon national banks, compelling them to execute the stipulation to pay the tax in order to retain their depositors.

Swift & C. & B. Co. v. United States, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244; Maxwell v. Griswold, 10 How. 242, 13 L. ed. 405; Robertson v. Frank Bros. Co. 132 U. S. 17, 33 L. ed. 236, 10 Sup. Ct. Rep. 5; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050; Gaar, S. & Co. v. Shannon, 223 U. S. 468, 471, 56 L. ed. 510, 512, 32 Sup. Ct. Rep. 236.

The bank was without power to enter into the stipulation, and its act in so doirg is *ultra vires*, and not enforceable.

McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; Bowen v. Needles Nat. Bank, 36 C. C. A. 553, 94 Fed. 925; Metropolitan Stock Exch. v. Lyndonville Nat. Bank, 76 Vt. 303, 57 Atl. 101; First Nat. Bank v. National Exch. Bank, 92 U. S. 122, 23 L. ed. 679; First Nat. Bank v. Hawkins, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; McCormick v. Market Nat. Bank, 165 U. S. 538, 550, 41 L. ed. 817, 821, 17 Sup. Ct. Rep. 433, 21 Am. & Eng. Enc. Law, 2d ed. 376; Commercial Nat. Bank v. Pirie, 27 C. C. A. 171, 49 U. S. App. 596, 82 Fed. 799; Norton v. Derry Nat. Bank, 61 N. H. 589, 60 Am. Rep. 334; Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365; Barron v. Burnside, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148; Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44; First Nat. Bank v. Converse, 200 U. S. 425, 440, 50 L. ed. 537, 543, 26 Sup. Ct. Rep. 306; Merchants' Nat. Bank v. Wehrmann, 202 U. S. 295, 50 L. ed. 1036, 26 Sup. Ct. Rep. 613; Dolley v. Abilene Nat. Bank, 32 L.R.A. (N.S.) 1065, 102 C. C. A. 607, 179 Fed. 461.

The taxes levied in pursuance of the act, if enforced, constitute a denial of the equal protection of the laws.

Kentucky R. Tax Cases, 115 U. S. 321, 337, 29 L. ed. 414, 419, 6 Sup. Ct. Rep. 57; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; Nicol v. Ames, 173 U. S. 509, 521, 43 L. ed. 786, 793, 19 Sup. Ct. Rep. 522; Keeney v. New York, 222 U. S. 525, 56 L. ed. 299, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105; Mutual Loan Co. v. Martell, 222 U. S. 225, 235, 56 L. ed. 175, 179, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 165, 41 L. ed. 666, 671, 17 Sup. Ct. Rep. 255; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 294, 42 L. ed. 1037, 1042, 1043, 18 Sup. Ct. Rep. 594; State v. Hoyt, 71 Vt. 59, 42 Atl. 973; Aluminum Co. v. Ramsey, 222 U. S. 251, 56 L. ed. 185, 32 Sup. Ct. Rep. 76, 1 N. C. C. A. 184; Opinion of Justices, 76 N. H. 588, 79 Atl. 31.

The taxes, if enforced, constitute in effect

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a taking of the property of the depositors without due process of law.

(1) There was no valid assessment, and none provided for.

27 Am. & Eng. Enc. Law, 2d ed. 660; Cooley, Const. Lim. 259; Com. v. Delaware Div. Canal Co. 123 Pa. 600, 2 L.R.A. 798, 16 Atl. 584; Com. v. Lehigh Valley R. Co. 104 Pa. 91; Jones v. Winthrop Sav. Bank, 66 Me. 245; State v. Bradford Sav. Bank & T. Co. 71 Vt. 238, 44 Atl. 349; 1 Cooley, Taxn. pp. 600, 753, 754; People v. Hastings, 29 Cal. 449.

(2) The tax is assessed, if assessed at all, without proper notice to the depositors.

Turpin v. Lemon, 187 U. S. 51, 57, 47 L. ed. 70, 73, 23 Sup. Ct. Rep. 20; State R. Tax Cases, 92 U. S. 575, 610, 23 L. ed. 663, 672; Kentucky R. Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Com. v. Lehigh Valley R. Co. 104 Pa. 101; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

Messrs. **Hale K. Darling** and **Clarke C. Fitts** argued the cause and filed a brief for defendant in error:

The construction given by a state court to the laws of that state is final.

Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Martin v. West, 222 U. S. 191, 196, 56 L. ed. 159, 161, 36 L.R.A.(N.S.) 592, 32 Sup. Ct. Rep. 42; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 456, 33 L. ed. 970, 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Howe Mach. Co. v. Gage, 100 U. S. 676, 25 L. ed. 754; Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; Grand Trunk R. Co. v. Ives, 144 U. S. 408, 423, 36 L. ed. 485, 491, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; New York ex rel. Schurz v. Cook, 148 U. S. 397, 411, 37 L. ed. 498, 503, 13 Sup. Ct. Rep. 645; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 462, 42 L. ed. 237, 17 Sup. Ct. Rep. 829; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; Lewis v. Monson, 151 U. S. 545, 38 L. ed. 265, 14 Sup. Ct. Rep. 424; Illinois C. R. Co. v. Illinois, 163 U. S. 142, 152, 41 L. ed. 107, 110, 16 Sup. Ct. Rep. 1096.

The bank had the right to enter into the stipulation.

Western Nat. Bank v. Armstrong, 152 U. S. 346, 38 L. ed. 470, 14 Sup. Ct. Rep. 572; First Nat. Bank v. National Exch. Bank, 92 U. S. 127, 23 L. ed. 681; Pattison v. Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582; Logan County Nat. Bank v. Townsend, 139 U. S. 67, 73, 35 L. ed. 107, 110, 11 Sup. Ct. Rep. 496; Sykes v. First Nat. Bank, 2 S. D. 259, 49 N. W. 1058; Interstate Nat. Bank v. Ferguson, 48 Kan. 732, 30 Pac. 237; First Nat. Bank v. Graham, 100 U. S. 699, 25 L. ed. 750, 1 Am. Neg. Cas. 588; First Nat. Bank v. Strang, 138 Ill. 347, 27 N. E. 903; George v. Wallace, 68 C. C. A. 40, 135 Fed. 286; Schofield v. State Nat. Bank, 38 C. C. A. 179, 97 Fed. 282; Lull v. Anamosa Nat. Bank, 110 Iowa, 542, 81 N. W. 784; Kerfoot v. Farmers' & M. Bank, 218 U. S. 286, 54 L. ed. 1043, 31 Sup. Ct. Rep. 14; Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188.

There was a legally adequate consideration for the stipulation.

Ballard v. Burton, 64 Vt. 393, 16 L.R.A. 664, 24 Atl. 769; Bellows v. Sowles, 55 Vt. 391, 45 Am. Rep. 621; Blake v. Peck, 11 Vt. 483; Churchill v. Bradley, 58 Vt. 403, 56 Am. Rep. 563, 5 Atl. 189; Giddings v. Giddings, 51 Vt. 236, 31 Am. Rep. 682; Dorwin v. Smith, 35 Vt. 69.

No interference with a Federal agency is involved.

Mercantile Nat. Bank v. New York, 121 U. S. 138, 154, 30 L. ed. 895, 901, 7 Sup. Ct. Rep. 826; Dolley v. Abilene Nat. Bank, 32 L.R.A.(N.S.) 1065, 102 C. C. A. 607, 179 Fed. 461; First Nat. Bank v. Kentucky, 9 Wall. 353, 362, 19 L. ed. 701, 703; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961.

Contracts made under duress are not void, but voidable merely; and one who, after its execution, has ratified a contract by accepting its benefits, cannot afterward avoid it on the ground of duress; and ratification may be shown by subsequent conduct.

Carver v. United States, 111 U. S. 609, 28 L. ed. 540, 4 Sup. Ct. Rep. 561; Connolly v. Bouck, 98 C. C. A. 184, 174 Fed. 312; Schee v. McQuilken, 59 Ind. 269.

Again, what constitutes duress is a question of law; but whether duress has been actually exercised is a question of fact.

Clement v. Buckley Mercantile Co. 172 Mich. 243, 137 N. W. 657; Galusha v. Sherman, 105 Wis. 263, 47 L.R.A. 417, 81 N. W. 495.

Duress is but a species of fraud (Brainard v. Van Dyke, 71 Vt. 365, 45 Atl. 758); and it is fundamental that fraud in fact must be found by the trier of fact; it will not be presumed.

A statute can be assailed only by those whose rights are injuriously affected thereby.

Collins v. Texas, 223 U. S. 288, 56 L. ed. 439, 32 Sup. Ct. Rep. 286; Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; Red River Valley Nat. Bank v. Craig, 181 U. S. 548, 45 L. ed. 994, 21 Sup. Ct. Rep. 703; Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044.

The state has a right to enact tax laws

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that may incidentally affect the profit arising from a contract; but this does not unlawfully impair the contract, because it was made subject to just that kind of impairment.

Rutland R. Co. v. Central Vermont R. Co. 63 Vt. 23, 10 L.R.A. 562, 3 Inters. Com. Rep. 488, 21 Atl. 262, 731.

It is not entirely clear whether the bank is complaining in its own behalf, or for its depositors. We do not consider the relation between the bank and its depositors to be such that it can interpose for them, though the case might perhaps be otherwise were the bank a savings institution (Provident Inst. for Sav. v. Malone, 221 U. S. 660, 55 L. ed. 899, 34 L.R.A.(N.S.) 1129, 31 Sup. Ct. Rep. 661). The relation between this bank and its depositors differs from that existing between savings banks and their depositors. In this case, the relation is that of debtor and creditor. But the depositor in a savings bank does not loan the money deposited. He intrusts it to the bank as his trustee; if there is a profit, he receives it; if there is a loss, he shares it (State v. People's Nat. Bank, 75 N. H. 27, 70 Atl. 542, 21 Ann. Cas. 1204).

A voluntary course of action often subjects a party to liabilities that would not be incurred had he not volunteered.

Consumers' Co. v. Hatch, 224 U. S. 148, 56 L. ed. 703, 32 Sup. Ct. Rep. 465.

The state might compel the bank to pay each resident depositor's tax, in the first instance.

First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; Lionberger v. Rouse, 9 Wall. 468, 19 L. ed. 721; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Waite v. Dowley, 94 U. S. 527, 24 L. ed. 181; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Haight v. Pittsburg, Ft. W. & C. R. Co. 6 Wall. 15, 18 L. ed. 818; Carstairs v. Cochran, 193 U. S. 10, 16, 48 L. ed. 596, 597, 24 Sup. Ct. Rep. 318; St. Albans v. National Car Co. 57 Vt. 68; Assaria State Bank v. Dolley, 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. Rep. 189.

In view of the state court's conclusion that the case affords indications that "national banks are benefited by the act," it would seem that no further inquiry as to the fact of a sufficient consideration is needful.

9 Cyc. 311.

There is no imperative requirement that taxation shall be equal. If there were, the operations of the government would come to a stop, from the absolute impossibility of fulfilling it.

Com. v. People's Five Cents Sav. Bank, 5 Allen, 436; Allen v. Drew, 44 Vt. 186; Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 504, 22 L. ed. 189, 195; First Nat. Bank v. Chapman, 173 U. S. 205, 216, 43 L. ed. 669, 673, 19 Sup. Ct. Rep. 407; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Kentucky R. Tax Cases, 115 U. S. 321, 337, 29 L. ed. 414, 419, 6 Sup. Ct. Rep. 57.

The 14th Amendment was never intended wholly to forbid "class legislation," and discriminations are not prohibited provided they are reasonable, and the law applies alike to all of the particular class affected.

Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Savings & L. Soc. v. Multnomah County, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533.

Is the selection of depositors in national banks to form a class for the purpose of assessing a state tax an arbitrary classification?

Michigan C. R. Co. v. Powers, 201 U. S. 292, 293, 50 L. ed. 761, 762, 26 Sup. Ct. Rep. 459.

Unless restrained by constitutional provisions, the legislature of a state has full power to exempt any persons or corporations or classes of property from taxation, according to its views of public policy or expediency.

37 Cyc. 885.

There was a valid assessment.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Dollar Sav. Bank v. United States, 19 Wall. 227, 22 L. ed. 80; King v. United States, 99 U. S. 229, 25 L. ed. 373; United States v. Erie R. Co. 107 U. S. 1, 27 L. ed. 385, 2 Sup. Ct. Rep. 83; United States v. Philadelphia & R. R. Co. 123 U. S. 113, 31 L. ed. 138, 8 Sup. Ct. Rep. 77; Faust v. Twenty-Third German American Bldg. Asso. 84 Md. 186, 35 Atl. 890.

The state does not distrain for these taxes. The only way it can compel a depositor to pay the tax is by means of a suit against him, and so an opportunity for hearing before assessment is not required. In such suit, the taxpayer would have ample opportunity to contest the validity of the tax on all of the grounds here urged.

Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 537, 40 L. ed. 247, 251, 16 Sup. Ct. Rep. 83; Hagar v. Reclamation Dist.

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111 U. S. 701, 711, 28 L. ed. 569, 573, 4 Sup. Ct. Rep. 663; Kentucky R. Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57.

This court is concerned only with the constitutionality of the law in view of the applicable provision of the Federal Constitution. The state is left to choose its own methods of taxation, and its form and manner of enforcing the payment of the public revenues, subject, so far as the Federal power is concerned, to the restricting regulations of the Constitution of the United States.

Kentucky Union Co. v. Kentucky, 219 U. S. 151, 55 L. ed. 153, 31 Sup. Ct. Rep. 171.

Mr. Justice **Hughes** delivered the opinion of the court:

The judgment under review awarded a recovery in favor of the state of Vermont against the plaintiff in error, the Clement National Bank, upon an agreement which the bank had made pursuant to § 815 of chapter 37 of the Public Statutes of Vermont, entitled, "Taxation of National Bank Deposits," originally enacted as No. 41 of the Acts of 1906. The chapter is set forth in the margin.† The Federal questions relate to the validity of the [127] bank's stipulation in view of the scheme of taxation which induced the making of it.

The plaintiff in error was organized under the Federal [128] statutes, and does business at Rutland, Vermont. For several years it has maintained a "savings department," allowing depositors therein interest at a rate exceeding 2 [129] per cent per annum, payable on the first days of January and July in each year on deposits remaining in bank on those days. Certain other depositors have received certificates of deposit with interest at the rate of 3 per cent per annum for each calendar month that the deposit continued. Prior to the year 1906, depositors in national banks in Vermont, whether or not their deposits bore interest, were taxable at the local tax rate, in the districts in which they resided, in common with other owners of credits (or debts due from solvent debtors) under the general plan of local taxation. Pub. Stat. (Vt.) 1894 ed. §§ 374, 398, 399. Depositors in savings banks and trust companies, organized under the laws of the state, had long been exempt from all taxation upon their deposits to a specified extent (at first $1,500, and later

†CHAPTER 37.

Taxation of National Bank Deposits.

Sec. 804. Depositors' report to commissioner.—Every person having, on the 1st day of April and October, an interest-bearing deposit in a national bank in this state, shall, except as otherwise provided by this chapter, within twenty days thereafter, report the amount thereof and the name of such bank to the commissioner of state taxes, on blanks prepared and furnished by him to such depositor on application therefor.

Sec. 805. Depositors' report to listers.—Every resident of this state so having an interest-bearing deposit in a national bank in this state shall annually, except as otherwise provided in this chapter, report to the listers of the town wherein he resides, the names of all banks located in this state wherein he then has or has had any such deposits during the year next preceding the 1st day of April in the year wherein such report is made, and the amount of such deposits.

Sec. 806. Interrogatories in inventories.—The secretary of state shall incorporate into the tax inventory interrogatories so framed as to require the person subscribing to the same to state in writing and under oath whether or not he then has or has had during the year next preceding the 1st day of such April, any such deposits; and, if such interrogatories are answered in the affirmative, he shall also state the name of such bank and the amount of such deposit, with all accrued interest.

Sec. 807. Reports by listers.—The listers in every town shall, on or before the 10th day of May, upon blanks to be furnished by the commissioner of state taxes, report the names of all persons whose inventories show that they had in a national bank in this state, on the 1st day of the preceding April, deposits of the character and kind described in the third preceding section, together with the amount of each individual deposit so held on such 1st day of April, and the name of the bank holding such deposit.

Sec. 808. Reports filed; inspection.—Such reports shall be kept on file by said commissioner for three years from and after the dates on which the taxes based thereon became due and payable to the state. Such reports shall not be subject to the inspection of any person other than said commissioner and the employees in his office, the attorney general and the state's attorney of the county wherein such bank has its principal place of business, or said depositor, if a resident of this state, has his domicil. Any information contained in such reports shall not be disclosed by any person authorized to examine the same, except by the direction of a court of competent jurisdiction.

Sec. 809. Assessment of tax; payment.—Every person so having a deposit in a national bank as aforesaid shall semiannually, except as otherwise provided by this chapter, pay a tax to the state, which is hereby assessed at the rate of 7/20 of 1 per cent semiannually upon the amount of such deposit so held by such national bank on the 1st day of April and October; and no deduction therefrom shall be made on account of any exemption. The taxes imposed by this section shall be paid to the state treasurer semiannually on or before

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$2,000 in any one institution), these organizations being subject to a state tax of $\frac{7}{20}$ of 1 per [130] cent per annum, computed upon the average amount of deposits; in this computation, deposits in excess of the above-stated limit were deducted, and upon these the depositors were taxable locally. Pub. Stat. (Vt.) 1894 ed. §§ 582-584; Acts of 1902, No. 20, § 41; Acts of 1906, No. 28, § 1; Pub. Stat. 1906 ed. §§ 744-746.

This system being continued as to the state institutions and the depositors therein, the general assembly passed the statute in question which provides for a state tax on interest-bearing deposits in national banks (where the interest exceeds 2 per cent per annum) of $\frac{7}{20}$ of 1 per cent semi-annually. Persons having deposits of this sort, unless specially excepted (§ 819), are required to report them at specified periods (§§ 804-806), and to pay the tax without deduction on account of any exemption (§ 809). No other tax is to "be assessed on such deposits in national banks, nor against the depositors on account thereof" (§ 810).

It is further provided that, if a national bank so elects, it may pay to the state all the prescribed taxes, and deduct them from the interest or deposits of the persons from whom they became due (§ 814). On such election, the bank is, semiannually, to file with the state commissioner a stipulation to that effect; no depositor is required to make returns for the period covered by the stipulation (§ 815); the state commissioner is to issue to the bank a certificate showing that it has been filed (§ 816); and the statute provides that upon such filing the bank shall "become liable to the state for the amount of such tax of $\frac{7}{20}$ of 1 per cent of the average amount of such deposits" held by the bank during the six months to which the stipulation refers (§ 817).

This suit was brought by the state upon the following stipulation, which was filed by the plaintiff in error, on October 1, 1908, the returns and payment therein specified not having been made:

[131] State of Vermont:

The Clement National Bank, whose banking house is located at Rutland, in the state of Vermont, for the consideration hereinafter named, hereby stipulates and agrees with the state of Vermont that on or before the 30th day of April, 1909, it will make

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the last day of May and November next following the dates whereon the reports provided for in the fourth preceding section are required to be made.

Sec. 810. Exempt from other taxes.—No other tax shall be assessed on such deposits in national banks, nor against the depositors on account thereof.

Sec. 811. Penalty.—A depositor who wilfully fails to make returns or pay the taxes provided by this chapter shall forfeit 10 per cent of such deposit to the use of the state for each month's delay in filing such return. Such tax and forfeiture may be recovered in an action on this statute, commenced by the commissioner of state taxes in the name of the state, in any county, municipal, or city court.

Sec. 812. Trustee process.—A person having any of the moneys, goods, chattels, effects, rights, or credits of said depositor in his possession may be summoned as trustee in any action instituted under the preceding section, notwithstanding that the amount of such tax or the amount in his hands may be less than $10.

Sec. 813. Waiver of penalty.—If the commissioner of state taxes or the court wherein such action is pending for the recovery of such tax or forfeiture becomes satisfied that such failure was not wilful on the part of the depositor, said commissioner or said court may, in its discretion, waive any part or all of such penalty.

Sec. 814. Bank may elect to pay.—If a national bank in this state so elects, it may pay to the state all taxes provided by this chapter; and it shall be lawful for such bank to deduct such taxes so paid from the interest or deposits then or thereafter held by it, belonging to the person from whom such tax became due.

Sec. 815. Same; stipulation.—If a national bank elects to so pay such taxes to the state, and, to make returns as hereinafter provided, it shall semiannually, on or before the 1st day of April and October, file with the commissioner of state taxes a stipulation setting forth such fact; and thereupon such bank shall become liable to the state for such tax for the six months named in such stipulation, and to make returns as hereinafter provided; and no depositor in such bank shall be required to make the returns hereinbefore specified, covering the six months' period for which such stipulation was filed.

Sec. 816. Commissioner's certificate to bank.—Upon such stipulation being filed, said commissioner shall issue in duplicate to such bank a certificate showing that it has filed such stipulation.

Sec. 817. Bank's liability.—Every bank filing such stipulation shall thereupon become liable to the state for the amount of such tax of $\frac{7}{20}$ of 1 per cent of the average amount of such deposits held by such bank during the six months beginning with the 1st day of April and October respectively, for which such stipulation was filed.

Sec. 818. Bank's return.—If such bank, on or before the 1st day of April, files a stipulation as hereinbefore provided, it shall, on or before the 31st day of the following October, file a return with the state treasurer and commissioner of state taxes, verified by the oath of its president, cashier, or one of its directors, showing the average amount of such deposits for the six months ending the 30th day of September in that

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sworn returns to the state treasurer and commissioner of state taxes, showing the average amount of all deposits held by it during the six months beginning with the 1st day of October, 1908, whereon the rate of interest paid or allowed by said bank to the depositors thereof exceeds 2 per cent per annum: and that on or before the 30th day of April, 1909, it will pay to the state treasurer a tax of 7/20 of 1 per cent of the average amount of all such deposits so held by it.

This stipulation is made and is to be filed with said commissioner in consideration and for the purpose of carrying out the provisions of the statutes of Vermont which provide that upon the making and filing hereof, as aforesaid, no depositor having an interest-bearing deposit or deposits in said bank, whereon the rate of interest paid or allowed by said bank exceeds 2 per cent per annum, shall be required, on or before the 20th day of October, 1908, to make returns to the state treasurer and commissioner of state taxes, showing the amount of such deposit or deposits in said bank on the 1st day of October, 1908; and that no such depositor shall be required to pay to the state treasurer, on or before the 30th day of November, 1908, a tax of 7/20 of 1 per cent of the amount of such interest-bearing deposit or deposits so held by said bank on the 1st day of October, 1908.

This stipulation is also made and is to be filed as aforesaid for the purpose of obtaining from said commissioner, as the law provides, a certificate in duplicate, setting forth that the same has been filed, and of showing that said bank has elected to pay and will pay to the state treasurer [132] on or before the 30th day of April, 1909, a tax of 7/20 of 1 per cent of the average amount of all such deposits held by said bank during the six months beginning with the 1st day of October, 1908, on account of which the depositors thereof shall be by said bank paid or allowed interest exceeding the rate of 2 per cent per annum.

In witness whereof said bank has, on this 30th day of September, 1908, at Rutland, in the state of Vermont, caused its corporate name to be hereunto affixed by its cashier, duly empowered so to do by vote of said bank.

Clement National Bank,
Rutland, Vermont,
by C. H. Harrison, Cashier

Indorsed: Received October 1, 1908, J. E. Cushman, Commissioner of State Taxes.

The case was tried upon an agreed statement of facts. It appeared that the state commissioner issued to the bank his certificate, which was conspicuously posted in its banking room, that the stipulation had been filed, and that therefore depositors having deposits upon which the rate of interest exceeded 2 per cent per annum would not be required to make returns. In consequence, none of the depositors' reports was made, and there was no valuation of the individual deposits by any official during the period covered by the stipulation.

It was also set forth that, under the bank's method of allowing interest on deposits, it was impossible for it to determine, at the time it was required to make its semiannual returns under the stipulation, upon what deposits interest exceeding 2 per cent per annum would actually be allowed. Thus, deposits might be withdrawn prior to January 1st or July 1st, the dates on which interest was credited on amounts then in bank. In practice, in former periods for which the plaintiff in error had made payments under similar stipulations, it had included all [133] deposits belonging to the class upon which interest was allowable in excess of 2 per cent per annum, in arriving at the average amount of deposits, whether or not interest was in fact paid. The monthly averages were ascertained by averaging the aggregate deposits held at the close of each day, and the average for the six months was taken by averaging the monthly averages. Thus computed, the average amount

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year, and shall pay to the state treasurer the amount of such semiannual tax. In case such bank, on or before the 1st day of October, filed a like stipulation, it shall, on or before the 30th day of the following April, file a like return with the first-named officers, showing the average amount of such deposits for the six months ending with the 31st day of March next preceding the making of such return, and shall, in like manner, pay such taxes.

Sec. 819. Exemptions.—The provisions of this chapter shall not apply to municipalities; nor to corporations organized solely for charitable, educational, or religious purposes; nor to railroad, insurance, guaranty, express, telegraph, telephone, steamboat, car, transportation, sleeping car, parlor car, mortgage, loan, or investment companies; nor to savings banks, trust companies, and savings bank and trust companies which have interest-bearing deposits in national banks; nor to national banks having an interest-bearing deposit in another national bank; nor to any person having any sum of money on deposit in a national bank whereon interest not exceeding the rate of 2 per cent per annum is paid or allowed him by such national bank.

Sec. 820. Exemptions restricted.—Nothing in this chapter shall be construed as exempting from taxation any deposit in any national bank, except as hereinbefore provided.

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of deposits of the class above described (including those of nonresidents) for the six months beginning October 1, 1908, was $594,357.74. The average deposits exempted for the period in question, under § 819, were $15,688.15, and the net average for the six months was $578,669.19, upon which the state sought to recover $2,025.33.

The state also declared upon a similar stipulation filed by the bank on April 1, 1909, covering the ensuing six months. The court of first instance rendered judgment in favor of the state for the full amount demanded. This was reversed by the supreme court of the state, which held that the statute did not apply to nonresidents, and that the amount of recovery should be determined by a computation based on the credits of resident depositors. Final judgment was then entered against the bank, covering the two periods, in the sum of $3,989.85. 84 Vt. 167, 78 Atl. 944, Ann. Cas. 1912D, 22.

1. It is contended that the statute imposed a tax upon the franchises of national banks, and hence exceeded the state power. Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 667, 668, 43 L. ed. 850, 852, 19 Sup. Ct. Rep. 537, and cases there cited.

But it is apparent that, whatever other objections may lie, the tax complained of is not laid upon the national bank itself, its property or franchises. It is imposed upon the depositors; they alone are required to pay it. If they fail to make returns, as provided by the statute, they are subject to penalty; and both tax and penalty are recoverable by suit against them in the name of the state. If [134] they escape the tax, it is because of the bank's stipulation. If the bank becomes liable, it is by virtue of its agreement, and not otherwise. The statute was so interpreted by the supreme court of the state, which said: "The transaction which makes the money the property of the bank gives the depositor a credit of equal amount, and the term 'deposit' may be used to indicate the money deposited or the credit which the depositor receives for it. The last must be taken to be the meaning here, for the statute lays the tax upon the depositor in so many words." 84 Vt. 167, 181, 78 Atl. 944, Ann. Cas. 1912D, 22. There is no difficulty in the interpretation of the statute as to the prescribed incidence of the tax, and, aside from that, the decision of the state court is controlling as to the persons upon whom the statute fixed responsibility. It was the province of that court to determine what the terms of the statute authorized, commanded, or forbade and it is for this court to say whether, in view of its operation, thus delimited, it conflicts with the Federal law. New York v. Weaver, 100 U. S. 539, 541, 542, 25 L. ed. 705, 706; First Nat. Bank v. Ayers, 160 U. S. 660, 664, 40 L. ed. 573, 574, 16 Sup. Ct. Rep. 412; First Nat. Bank v. Chehalis County, 166 U. S. 440, 444, 41 L. ed. 1069, 1072, 17 Sup. Ct. Rep. 629; Commercial Nat. Bank v. Chambers, 182 U. S. 556, 560, 46 L. ed. 1227, 1229, 21 Sup. Ct. Rep. 363.

2. It is not urged that the legislation of Congress relating to national banks, either expressly or by implication, withdraws from the reach of the taxing power of the state the credits belonging to depositors, whether or not interest-bearing. "No one contends," says the plaintiff in error, that a state "has not the right to include in its taxation of a person's property the amount which he may have on deposit in the savings department of a national bank." It must also be recognized that in exercising its authority to tax property within its jurisdiction, the state is not limited to one method. It has a broad range of discretion in classifying subjects of taxation and in employing different methods for different sorts of property. [135] Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; Home Ins. Co. v. New York, 134 U. S. 594, 606, 33 L. ed. 1025, 1031, 10 Sup. Ct. Rep. 593; Citizens' Teleph. Co. v. Fuller, 229 U. S. 322, 329-331, 57 L. ed. 1206, 1213, 33 Sup. Ct. Rep. 833. The objection made by the bank to the state's plan must rest not upon the mere fact that the depositors in national banks are taxed upon their credits, or that they are taken out of the system of local taxation, but upon the ground that the measure adopted is essentially inimical to national banks, frustrating the purpose of the national legislation, or impairing their efficiency as Federal agencies. Davis v. Elmira Sav. Bank, 161 U. S. 275, 283, 40 L. ed. 700, 701, 16 Sup. Ct. Rep. 502; McClellan v. Chipman, 164 U. S. 347, 357, 41 L. ed. 461, 465, 17 Sup. Ct. Rep. 85. And that, in substance, is the position taken.

To be open to such an objection, it must appear that the scheme of taxation constitutes an injurious discrimination. Even in the case of shares of the capital stock of national banks, which cannot be taxed save with the consent of Congress (New York v Weaver, 100 U. S. 539, 543, 25 L. ed. 705, 706), taxation by the state is expressly permitted if it is not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens. Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502. The object is to prevent hostile discrimination, and for this purpose a standard is fixed. Mercantile Nat. Bank v. New York, 121 U. S. 138, 154, 155, 30 L. ed. 895, 901, 902, 7 Sup. Ct. Rep. 826. With respect to the taxation of depositors' credits, the Federal statute does not prescribe a rule;

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and, the property being normally subject to the state's taxing power, there is no warrant for implying a restriction which would extend beyond the requirements of protection from the prejudicial effect of such exactions as would be unjustly discriminatory.

It follows that the comparison must have regard to business and property which may be deemed to have, generally speaking, a similar character; and, in the present case, there is no basis for the contention that the statute unfairly discriminates against national banks unless it may be found in the method of dealing with deposits in [136] banking institutions organized under the state law. The institutions thus brought to our attention are savings banks and trust companies. Formerly there were also state banks of circulation, discount, and deposit; but these, shortly after the passage of the national banking act, ceased to exist and were succeeded by trust companies or "savings banks and trust companies." The latter were organized under special charters and had, except as to the issuance of notes of circulation, very nearly the same powers as those possessed by the earlier state banks. State v. Franklin County Sav. Bank & T. Co. 74 Vt. 246, 257, 258, 52 Atl. 1069.

These state organizations, as it has already been observed, for many years had been subject to a special state tax upon the average amount of deposits, after certain deductions. This has been held to be a franchise tax (State v. Bradford Sav. Bank & T. Co. 71 Vt. 254, 44 Atl. 349; State v. Franklin County Sav. Bank & T. Co. supra). Having laid this tax, the state exempted the depositors in these savings banks and trust companies from taxation upon their respective credits not exceeding $2,000 in any one institution. Individual deposits over this amount, as we have seen, were to be deducted in computing the tax to be paid by the state banks and trust companies, and were to be listed by the depositors for local taxation at their places of residence. The situation then was, with respect to the state institutions, that they paid the tax of $\frac{7}{10}$ of 1 per cent per annum upon average deposits, and the deposits were exempted from taxation upon those deposits which entered into the calculation of this average. National banks did not pay, and could not be compelled to pay, a franchise tax, or other tax upon their deposits, and their depositors having credits bearing interest at a rate exceeding 2 per cent per annum were required by the statute in question to pay upon such credits a tax of $\frac{7}{20}$ of 1 per cent semi-[137] annually. Or, if any national bank desired to do so, it could agree to pay an amount computed at the same rate upon the average amount of deposits of the described class, and thus save its depositors both from the tax and the inconvenience of making returns.

With respect to those interest-bearing deposits of the described class which did not exceed severally the sum of $2,000, it is evident that there was no hostile discrimination against the national banks by reason of the rate of the tax imposed upon their depositors. True, in the one case the depositor was exempted to the specified amount, and in the other the depositor was taxed. But the depositor in the state bank was relieved because the bank paid. The amount received by the state was substantially the same in each case, that is, at the rate of $\frac{7}{10}$ of 1 per cent a year. The state banks transacted their business under this charge. As to national banks, the state could not follow the course taken with the state institutions, and lay a tax upon the bank, computed upon the amount of its deposits, with a corresponding exemption to the depositors. Nor was the state bound to extend its exemption to cases where the reason for it did not exist. But the national bank, not being subject to the tax which the state banks had to pay, had the opportunity to give its depositors, if it chose, an equivalent benefit in interest rates. So far as the amount of the tax upon these deposits was concerned, the national bank was not put at a disadvantage as compared with the state banks.

Then, as to deposits in excess of $2,000, for which depositors in the state institutions were taxable locally, it does not appear that the difference in method was to the prejudice of national banks. The depositors in the latter, with respect to the interest-bearing deposits in question, had a low, flat rate, and were free from what the state court properly called "the greater burden and uncertain demands of local taxation." The agreed statement of [138] facts sets forth that the average local rate throughout the state for the year beginning April 1, 1908, was $16.70 per $1,000 of taxable property set in the grand list; the minimum being $7.50 per $1,000, and the maximum being $39.80 per $1,000. While deduction for debts was allowed in the ascertainment of the amount of personal estate subject to the local tax, and this was laid only once a year, the allowance of a much lower rate on deposits to any amount in a national bank might well be regarded as a compensatory, if not a greater, advantage in its general operation. It is said that no such publicity was required of the other taxpayers regarding their personal property as was demanded of depositors in national banks. This argument refers to the requirement that the latter should report the

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amount of their deposits and the names of the banks in which they were kept. But, in the case of local taxes, a "full statement of all taxable property" was required from each taxpayer, who was obliged to make oath that his inventory was "a full, true, and correct list and description." Pub. Stat. (Vt.) §§ 536-540. What difference there may be in the form of the two statements is plainly not important. The requirements in the case of the depositors in national banks went no further than to secure the payment of the tax, and the returns were subject to official inspection only. Pub. Stat. (Vt.) § 808, supra.

It was in these circumstances that the legislature adopted the provision that, if the national bank agreed to pay an amount which might fairly be regarded as equivalent to the sum demanded of the depositors, the latter should be free from the necessity of making any returns. In no proper sense could this be deemed to place the bank under duress. It may well be that the state desired, by substituting the flat exclusive rate in place of local taxation, to facilitate the appearance in larger amount of a class of property which easily escapes [139] taxation. 84 Vt. 167, 195, 78 Atl. 944, Ann. Cas. 1912D, 22. But the exaction it imposed upon the depositors was not relatively unfair, and in providing that the bank might, if it saw fit, make the returns and payment stipulated, the state left no possible ground for objection on the score of inconvenience in practical administration. That the plaintiff in error, in the conduct of its savings department, did not fail to perceive the business advantages of the state's plan, is apparent from the excerpts from the advertisements it published during the period covered by the stipulation in suit and prior thereto. The following are illustrative:

"We pay 4 per cent on savings accounts, in any amount from 1 dollar upwards. All taxes are paid by the bank, and you do not need to report deposits in this bank to the listers."

"Be sure and take advantage of the law governing taxes on deposits in national banks. Our depositors do not make any report of their deposits to the listers."

"Under the law governing saving deposits in national banks, we pay all taxes on any amount. There is no $2,000 limit. You can carry any amount tax free, and no report of your deposit is made by the bank to the listers."

We find no basis for the charge of injurious discrimination.

3. With this view of the scheme of the statute, we come to the question of the validity of the stipulation in suit. The bank contends that it was *ultra vires*. There is no suggestion that the bank did not have the power to allow interest upon deposits, or to conduct its savings department. Neither party questions the bank's authority in that respect. The practice of maintaining savings departments seems to have become extensive in recent years, without challenge by the government. (Report of the Comptroller of the Currency; Treasury Reports, 1912, p. 361.) The position of the plaintiff in error is that, assuming [140] its right to transact business of this sort, still it could not lawfully enter into the agreement which the state seeks to enforce.

The applicable principles are not in dispute. The Federal statutes relative to national banks constitute the measure of the authority of such corporations, and they cannot rightfully exercise any powers except those expressly granted or which are incidental to carrying on the business for which they are established. California Nat. Bank v. Kennedy, 167 U. S. 362, 366, 42 L. ed. 198, 200, 17 Sup. Ct. Rep. 831; Logan County Nat. Bank v. Townsend, 139 U. S. 67, 73, 35 L. ed. 107, 110, 11 Sup. Ct. Rep. 496. These incidental powers are such "as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently." First Nat. Bank v. National Exch. Bank, 92 U. S. 122, 127, 23 L. ed. 679, 681; Western Nat. Bank v. Armstrong, 152 U. S. 346, 351, 38 L. ed. 470, 472, 14 Sup. Ct. Rep. 572. The bank was authorized to receive deposits. Arising from these deposits were credits to the depositors, forming part of their property, and subject to the taxing power of the state. It cannot be doubted that the property being taxable, the state could provide, in order to secure the collection of a valid tax upon such credits, for garnishment or trustee process against the bank, or in effect constitute the bank its agent to collect the tax from the individual depositors. First Nat. Bank v. Kentucky, 9 Wall. 353, 361-363, 19 L. ed. 701, 703, 704; Merchants' & Mfrs' Nat. Bank v. Pennsylvania, 167 U. S. 461, 465, 466, 41 L. ed. 236, 238, 17 Sup. Ct. Rep. 829. Further, it would seem to be highly appropriate that, the credits of depositors being taxable by the state, the bank should be free to make reasonable agreements, and thus promote the convenience of its business, with respect to the making of returns and the payment of such amounts as the state might lawfully require of its depositors. Provision for such agreements, instead of constituting an interference with a Federal instrumentality, would aid it in performing its functions, [141] and would remove un-

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necessary obstacles to the successful prosecution of its business.

The contention, however, is that in this case the bank, under the statute, stipulated to pay at the specified rate upon an average amount of deposits, and it is insisted that this amount did not correspond precisely to the amounts upon which interest was actually paid to the depositors, and upon which accordingly they would have been taxable. That is, as already stated, certain deposits being withdrawn between the interest dates fixed by the bank, there would be deposits belonging to the interest-bearing class upon which interest would not in fact be paid. The facts in regard to the fluctuations in deposits during the period in question are shown in the excerpts from the agreed statement set forth in the margin.† But we are of the [142] opinion that this lack of an exact correspondence between the amount upon which the depositors would have been taxed and the average amount upon which the bank agreed to pay cannot be said to furnish a ground for holding the agreement to be invalid. There was, and in the ordinary course of business there naturally would be, a substantial equivalency. The arrangement to make the computation upon the average amount of deposits of the class was a simple and convenient method which could fairly be said to offset in its advantages such risks as might be incident to the fluctuations. It is further said that the agreement did not contemplate a charge against the depositors' accounts of the amount paid by the bank. The bank, however, was free to adjust its interest rates accordingly. We find no ground for sustaining the contention that the agreement was beyond the bank's power.

4. But it is also insisted that the agreement cannot be enforced for the reason that it was without valid consideration. The proposition is that the tax, considered as one upon the depositors, would, if enforced, constitute a denial of the equal protection of the laws, and would take the property of the depositors without due process of law.

What has already been said with respect to the charge of discrimination as against the bank is applicable here, and need not be repeated. Reference is also made to the exemptions granted by § 819 of the statute (*ante*) which makes its provision for the tax inapplicable to municipalities; to corporations organized solely for charitable, educational, or religious purposes; and to various corporations which were otherwise taxed. All these exemptions it was manifestly within the power of the state to allow. Similarly, with respect to persons whose deposits did not bear interest exceeding 2 per cent per annum, the legislature took this method of recognizing a practical difference between deposit accounts of the ordinary commercial sort and those which partook, generally speaking, [143] of the character of savings accounts. It cannot be said that the classification adopted was purely arbitrary or beyond the power of the state. Citizens' Teleph. Co. v. Fuller, 229 U. S. 322, 329-331, 57 L. ed. 1206, 1213, 33 Sup. Ct. Rep. 837.

In support of the contention that the tax would deprive the depositors of their property without due process of law, it is said, (1), that there was no valid assessment, and none was provided for; and (2), that the tax was assessed, if at all, without proper notice to the depositors. The statute laid the tax at a specified rate upon bank credits; no other assessment than that made by the statute itself was necessary; and no other notice to the depositor than that thus given by law was required. The tax was recoverable by suit in which the depositor would have full opportunity to resist any illegal demand. Dollar Sav. Bank v. United States, 19 Wall. 227, 240, 22 L. ed. 80, 82; King v. United States, 99 U. S. 229, 233, 25 L. ed. 373, 374; United

†"Deposits to the amount of $4,514, were made subsequent to July 1, 1908, and were withdrawn prior to January 1, 1909; and deposits to the amount of $3,002.12 were made subsequent to January 1, 1909, and withdrawn, prior to July 1, 1909, some being withdrawn prior to April 1, and some subsequent thereto. No interest was paid by the defendant on any of the deposits mentioned in this article.

"Deposits to the amount of $7,069.24, were made after October 1, 1908, and were withdrawn prior to April 1, 1909, of which $5,723.29 were in the bank January 1, 1909, and drew interest at the aforesaid rate; deposits in said bank on October 1, 1908, to the amount of $20,726.28, whereon interest at said rate was then allowed by the defendant, were withdrawn prior to March 31, 1909. Eleven of the individual depositors having interest-bearing deposits, not exceeding in the aggregate $4,561.95, became such after October 1, 1908, and ceased to be depositors before March 31, 1909; and forty-eight depositors of this class having deposits on October 1, 1908, not exceeding in the aggregate $22,530.54, ceased to be depositors before March 31, 1909."

It also appeared that the aggregate of such interest-bearing deposits on October 1, 1908, was $569,393.75, of which $36,424.27 were deposited by nonresidents; and on April 1, 1909, such aggregate was $623,242.75, of which $39,361.98 were deposited by nonresidents. The aggregate on the last-named date was $28,885.01 in excess of the average for the semiannual period ending March 31, 1909.

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States v. Erie R. Co. 107 U. S. 1, 2, 27 L. ed. 385, 386, 2 Sup. Ct. Rep. 83; United States v. Chamberlin, 219 U. S. 250, 263, 264, 55 L. ed. 204, 210, 211, 31 Sup. Ct. Rep. 155.

5. Further objection is made that the statute interfered with existing contracts between the bank and its depositors, impairing their obligation. But this is clearly untenable. The statute did not act upon such contracts; it imposed a tax upon the property of depositors in the exercise of a power subject to which the deposits were made. North Missouri R. Co. v. Maguire, 20 Wall. 46, 61, 22 L. ed. 287, 293.

The judgment is affirmed.

Affirmed.

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[144] UNITED STATES, Petitioner,
v.
FREDERICK W. WHITRIDGE, as Receiver of the Third Avenue Railroad Company et al. (No. 466.)

UNITED STATES, Petitioner,
v.
ADRIAN H. JOLINE and Douglas Robinson, as Receivers of the Metropolitan Street Railway Company et al. (No. 467.)

(See S. C. Reporter's ed. 144–149.)

Internal revenue — Federal corporation tax — effect of receivership.

The income derived from the management of street railway lines by receivers authorized and required by the order for their appointment to manage and operate such railways, and to discharge their public duties subject to the supervision of the court, is not subject to the excise tax imposed by the act of August 5, 1909 (36 Stat. at L. 11, 112–117, chap. 6, U. S. Comp. Stat. Supp. 1911, pp. 741, 946), § 38, upon the doing or carrying on of business in a corporate capacity.

[For other cases, see Internal Revenue, III., in Digest Sup. Ct. 1908.]

[Nos. 466 and 467.]

Argued October 21, 1913. Decided November 10, 1913.

TWO WRITS of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review decrees which affirmed decrees of the District Court for the Southern District of New York in favor of the receivers of street railway companies in suits to require them to make returns of the net income comformably to the Federal corporation tax law. Affirmed.

See same case below, 117 C. C. A. 556, 198 Fed. 774.

The facts are stated in the opinion.

Assistant Attorney General **Graham** argued the cause and filed a brief for the United States:

When a corporation is brought into a court of equity at the suit of a creditor or mortgagee, and that court, in the exercise of the jurisdiction so acquired, appoints a receiver of all its assets, including its franchises, and authorizes the receiver to carry on all its business, which is done, is that corporation, while thus in the hands of a receiver, doing business "with the advantages which inhere in the peculiarities of corporate or joint-stock organizations of the character described?"

Flint v. Stone Tracy Co. 220 U. S. 107, 145, 146, 55 L. ed. 389, 411, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312.

If the corporations themselves are not doing business under such circumstances, how could such a suit as that of Morrison v. Forman, 177 Ill. 427, 53 N. E. 73, be sustained where a corporation by its receiver was permitted to condemn property?

In every substantial sense the income received and disbursements made by the receiver are those of the corporation itself. The receiver takes the income as a trustee, applies it first to the debts of the corporation, and holds the surplus for the corporation. Any net income over and above the expenses, debts, etc., is the equitable property of the latter.

Philadelphia & R. R. Co. v. Com. 104 Pa. 82.

The court of appeals of New York has, in three cases, expressly construed a taxing statute in substantially all respects similar to the corporation-tax act as covering corporations in the hands of receivers.

Central Trust Co. v. New York City & N. R. Co. 110 N. Y. 250, 1 L.R.A. 260, 18 N. E. 92; People ex rel. Joline v. Williams, 200 N. Y. 528, 94 N. E. 1097; New York Terminal Co. v. Gaus, 204 N. Y. 515, 98 N. E. 11.

Mr. **Joseph H. Choate, Jr.**, argued the cause, and, with Mr. **Matthew C. Fleming**, filed a brief for Whitridge:

The decisions construing the act hold that it imposes a tax upon the doing of business by corporations in their corporate capacity.

Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Zonne v. Minneapolis Syndicate, 220 U. S. 187, 55 L. ed. 428, 31 Sup. Ct. Rep. 361; McCoach v. Minehill & S. H. R. Co. 228 U. S. 295, 57 L. ed. 842, 33 Sup. Ct. Rep. 419.

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Receivers cannot be brought by construction within any of the provisions of this act.

United States v. Harris, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; Pennsylvania Steel Co. v. New York City R. Co. 176 Fed. 477.

It is not the intent of the act to impose a tax upon the doing of business by a receiver. If this were its intent, it would be unconstitutional so far as it relates to business done by receivers appointed by state courts or under state laws, and therefore it cannot be inferred that Congress intended to tax the business done by receivers.

Flint v. Stone Tracy Co. 220 U. S. 157, 158, 55 L. ed. 415, 416, 31 Sup. Ct. Rep. 342; The Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; Porter v. Sabin, 149 U. S. 473, 37 L. ed. 815, 13 Sup. Ct. Rep. 1008; Re Tyler, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579.

The only franchise the exercise of which is taxable is the corporate franchise. The right to do business in a corporate capacity has many advantages, and is a valuable right. It is only the exercise of this right that Congress intended to tax.

McCoach v. Minehill & S. H. R. Co. 228 U. S. 295, 57 L. ed. 842, 33 Sup. Ct. Rep. 419.

Chancery receivers do not represent the corporation in its individual or personal character, nor supersede it in the exercise of its corporate powers, except so far as the property intrusted to their care is concerned. Notwithstanding their appointment, the corporations were clothed with their franchises and still existed. They could still exercise their powers if thereby they did not interfere with the management of the railroads. They could do many corporate acts and could do all things necessary to preserve their legal existence; could sue and be sued, and were liable for their acts and upon their contracts and covenants the same as if the receivers had not been appointed.

Decker v. Gardner, 124 N. Y. 334, 11 L.R.A. 480, 26 N. E. 814.

The court could, in a foreclosure or general creditor's suit, take possession of the secondary franchises, and the receivers could exercise them.

Memphis & L. R. R. Co. v. Railroad Comrs. (Memphis & L. R. R. Co. v. Berry) 112 U. S. 609, 619, 28 L. ed. 837, 841, 5 Sup. Ct. Rep. 299.

The possession of the railroads by the receivers gave them the power to operate them and exercise the secondary franchises which were inseparable from them. To do this they did not require and did not exercise any corporate franchises. They merely did, in their capacity as receivers, what individuals might do.

People ex rel. Third Ave. R. Co. v. Public Service Commission, 203 N. Y. 308, 96 N. E. 1011.

The receiver did not take the place of the corporation or its officers, and was not its agent.

White v. Ewing, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018; Decker v. Gardner, supra.

Mr. Arthur H. Masten argued the cause, and, with Mr. Ellis W. Leavenworth, filed a brief for Joline et al.:

The tax imposed by the act is a tax, not upon business *per se*, but upon the right to do business in a particular manner and with particular advantages; to wit, in a corporate capacity, and with the advantages which inhere in corporate organizations. If business is not done in a corporate capacity, no tax is payable in respect thereto. It is not a tax upon property or franchises or income. Where income is actually received, but no corporate business is done, the tax is not payable.

Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Zonne v. Minneapolis Syndicate, 220 U. S. 187, 55 L. ed. 528, 31 Sup. Ct. Rep. 361; McCoach v. Minehill & S. H. R. Co. 228 U. S. 295, 57 L. ed. 842, 33 Sup. Ct. Rep. 419.

The receivers acquired no interest in the right of the Metropolitan Street Railway Company to be a corporation. The corporation continued to exist. It could hold corporate meetings and elect officers. It retained title to its property, the receivers being vested with no interest therein, but acting merely as its custodians for the court.

Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 36 L. ed. 632, 12 Sup. Ct. Rep. 787.

A corporate existence is not an absolute prerequisite to lawful operation of a railway.

Memphis & L. R. R. Co. v. Railroad Comrs. (Memphis & L. R. R. Co. v. Berry) 112 U. S. 609, 619, 28 L. ed. 837, 841, 5 Sup. Ct. Rep. 299; New York ex rel. Schurz v. Cook, 148 U. S. 397, 409, 37 L. ed. 498, 502, 13 Sup. Ct. Rep. 645; Phœnix v. Gannon, 195 N. Y. 471, 88 N. E. 1066.

The receiver represents none of the parties to the cause, but acts under the sole direction of the court.

Atlantic Trust Co. v. Chapman, 208 U. S. 360, 375, 52 L. ed. 528, 535, 28 Sup. Ct. Rep. 406, 13 Ann. Cas. 1155.

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Mr. Justice Pitney delivered the opinion of the court:

These cases were heard together in the district court and in the circuit court of appeals (sub. nom. Pennsylvania Steel Co. v. New York City R. Co. 193 Fed. 286, 117 C. C. A. 556, 198 Fed. 774). They were argued together in this court, and may be disposed of in a single opinion.

In the years 1909 and 1910 certain lines of street railway in the city of New York, that may be conveniently designated as the Third Avenue system, were in the hands of the respondent Whitridge, as receiver, under orders made in the year 1908 by the circuit court of the United States for the southern district of New York in actions pending therein against the several proprietary companies. One of these actions was a foreclosure suit; the others were creditors' actions based upon the insolvency of the respective companies. The powers conferred upon the receiver did not vary in any respect now [146] material, and so a recital of the substance of one of the orders will suffice as an example. This order constituted Whitridge receiver of all the railroads and other property of the company, including tracks, cars, and other rolling stock and equipment, easements, privileges, and franchises, and the tolls, earnings, income, rents, issues, and profits thereof, with authority "to run, manage, and operate the said railroads and properties, to collect the rents, income, tolls, issues, and profits of said railroads and property, to exercise the authority and franchises of said defendant, and discharge its public duties, acting in all things subject to the supervision of this court." By the same order the officers, agents, and employees of the company were required to turn over and deliver to the receiver all of the said property in their hands or under their control, and the company was enjoined from interfering in any way with his possession or management.

In the same years (1909 and 1910) certain other lines of street railway in the city of New York, which may be described as the Metropolitan system, were in the possession of the respondents Joline and Robinson as receivers, appointed in the year 1907 by the circuit court of the United States for the same district, in several actions therein pending against the corporations which were owners of these lines. The orders appointing these receivers contain provisions substantially similar to those already recited. (See Re Metropolitan R. Receivership [Re Reisenberg] 208 U. S. 90, 93-96, 52 L. ed. 403-405, 28 Sup. Ct. Rep. 219.)

In the year 1911, petitions were filed in the circuit court in behalf of the United States, praying for orders directing the receivers to make returns of the net income of the respective railway corporations for the years 1909 and 1910, to the collector of internal revenue, in the manner required by the provisions of the corporation tax law (act of August 5, 1909, § 38, 36 Stat. at L. chap. 6, pp. 11, 112-117, U. S. Comp. Stat. Supp. 1911, pp. 741, 946).

[147] The applications were resisted by the receivers on the ground that the respective corporations did not, during the years 1909 and 1910, carry on any business in respect of the property that was in their hands as such receivers; that they as such receivers managed, controlled, and operated the same, and carried on all the business in respect thereto, and received all the income arising therefrom, not acting in place of the directors and officers of the respective companies, but as officers of the court; and that they were therefore not subject to the provisions of the act.

Jurisdiction of the controversy having been transferred to the district court by virtue of the new Judicial Code, § 290 [36 Stat. at L. 1167, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 243], that court sustained the contention of the receivers (193 Fed. 286) and the circuit court of appeals affirmed this decision (117 C. C. A. 556, 198 Fed. 774). The cases are brought here by writs of certiorari.

As repeatedly pointed out by this court, the corporation tax law of 1909 —enacted, as it was, after Congress had proposed to the legislatures of the several states the adoption of the 16th Amendment to the Constitution, but before the ratification of that Amendment—imposed an excise or privilege tax, and not in any sense a tax upon property or upon income merely as income. It was enacted in view of the decision of this court in Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. St. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912, which held the income tax provisions of a previous law (act of August 27, 1894, 28 Stat. at L. chap. 349, pp. 509, 553, §§ 27 etc. U. S. Comp. Stat. 1901, p. 2260) to be unconstitutional because amounting in effect to a direct tax upon property within the meaning of the Constitution, and because not apportioned in the manner required by that instrument.

As was said in Flint v. Stone-Tracy Co. 220 U. S. 107, 145, 55 L. ed. 389, 411, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912 B, 1312, respecting the act of August 5, 1909: "The tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate

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or insurance [148] business, and with respect to the carrying on thereof, in a sum equivalent to 1 per centum upon the entire net income over and above $5,000 received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint-stock organizations of the character described. As the latter organizations share many benefits of corporate organization, it may be described generally as a tax upon the doing of business in a corporate capacity." This interpretation was adhered to and made the basis of decision in Zonne v. Minneapolis Syndicate, 220 U. S. 187, 55 L. ed. 428, 31 Sup. Ct. Rep. 361 and McCoach v. Minehill & S. H. R. Co. 228 U. S. 295, 300, 57 L. ed. 842, 844, 33 Sup. Ct. Rep. 419.

A reference to the language of the act† is sufficient to [149] show that it does not in terms impose a tax upon corporate property or franchises as such, nor upon the income arising from the conduct of business unless it be carried on by the corporation. Nor does it in terms impose any duty upon the receivers of corporations or of corporate property, with respect to paying taxes upon the income arising from their management of the corporate assets, or with respect to making any return of such income.

And we are unable to perceive that such receivers are within the spirit and purpose of the act, any more than they are within its letter. True, they may hold, for the time, all the franchises and property of the corporation, excepting its primary franchise of corporate existence. In the present cases, the receivers were authorized and required to manage and operate the railroads, and to discharge the public obligations of the corporations in this behalf. But they did this as officers of the court, and subject to the orders of the court; not as officers of the respective corporations, nor with the advantages that inhere in corporate organization as such. The possession and control of the receivers constituted, on the contrary, an ouster of corporate management and control, with the accompanying advantages and privileges.

Without amplifying the discussion, we content ourselves with saying that, having regard to the genesis of the legislation, the constitutional limitation in view of which it was evidently framed, the language employed by the lawmaker, and the reason and spirit of the enactment, all considerations alike lead to the conclusion that the act of 1909 did not impose a tax upon the income derived from the management of corporate property by receivers, under such conditions as are here presented.

Decrees affirmed.

†Sec. 38. That every corporation . . . organized for profit and having a capital stock represented by shares . . . organized under the laws of the United States or of any state . . . and engaged in business in any state . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation . . . equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations . . . subject to the tax hereby imposed. . . .

Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation . . . received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties. . . .

And on or before the first day of March, nineteen hundred and ten, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice president, or other principal officers, and its treasurer or assistant treasurer, shall be made by each of the coroprations . . . subject to the tax imposed by this section, to the collector of internal revenue for the district in which such corporation . . . has its principal place of business.

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[150] FRANK A. MUNSEY, Plff. in Err.,
v.
WESLEY WEBB, Administrator of the Estate of Samuel T. Pennington.

(See S. C. Reporter's ed. 150-157.)

Elevators — negligence — guarding opening.

1. The duty to keep an elevator door shut while the car is in motion, or to guard the open space with the extended arm of the boy in charge, cannot, as a matter of law, be said not to exist in favor of all passengers, whether the car is crowded or not, where the floors of the building project at right angles into the elevator well for several inches, and there are no flanges or pieces of metal inclining from the projecting floors to the shaft wall.

Proximate cause — elevator accident — failure to guard opening.

2. Failure to close the elevator door or to guard the open space with the extended

NOTE.—On liability for injury to elevator passenger—see notes to Mitchell v. Marker, 25 L.R.A. 33, and Edwards v. Manufacturers' Bldg. Co. 2 L.R.A.(N.S.) 744.

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arm of the boy in charge cannot, as a matter of law, be said not to be the proximate cause of the death of a passenger who fell into the opening while the car was ascending, and had his head crushed between the floor of the elevator car and the floor of the building, which projected several inches into the elevator well at right angles, with no flange or piece of metal inclining from the projecting floor to the shaft wall.

[Matters as to proximate cause, see Proximate Cause, in Digest Sup. Ct. 1908.]

[No. 40.]

Argued November 4, 5, 1913. Decided November 17, 1913.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District in favor of plaintiff in an action for death. Affirmed.

See same case below, 37 App. D. C. 185.

The facts are stated in the opinion.

Messrs. Charles A. Douglas and John W. Price argued the cause, and, with Messrs. Hugh H. Obear, Wilton J. Lambert, C. K. Mount, J. Norment Powell, H. H. Shelton, and Thomas Ruffin, filed a brief for plaintiff in error:

Where there is an intervening efficient cause, such intervening cause is the proximate cause of an injury, and therefore the responsible one.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. 44, 19 L. ed. 65; Howard F. Ins. Co. v. Norwich & N. Y. Transp. Co. 12 Wall. 194, 20 L. ed. 378; Scheffer v. Washington City, V. M. & G. S. R. Co. 105 U. S. 249, 26 L. ed. 1070; Atchison, T. & S. F. R. Co. v. Calhoun, 213 U. S. 1, 53 L. ed. 671, 29 Sup. Ct. Rep. 321; 1 Cooley, Torts, 3d ed. pp. 99, 101; Wharton, Neg. 134; Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113, 14 Am. Neg. Rep. 676; Zopfi v. Postal Teleg. Cable Co. 9 C. C. A. 308, 22 U. S. App. 136, 60 Fed. 987; Teis v. Smuggler Min. Co. 15 L.R.A.(N.S.) 893, 85 C. C. A. 478, 158 Fed. 260; Empire State Cattle Co. v. Atchison, T. & S. F. R. Co. 135 Fed. 135; Butts v. Cleveland, C. C. & St. L. R. Co. 49 C. C. A. 69, 110 Fed. 329, 10 Am. Neg. Rep. 455; Chicago, St. P. M. & O. R. Co. v. Elliott, 20 L.R.A. 582, 5 C. C. A. 347, 12 U. S. App. 381, 55 Fed. 949, 7 Am. Neg. Cas. 478; Goodlander Mill Co. v. Standard Oil Co. 27 L.R.A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 400; American Bridge Co. v. Seeds, 11 L.R.A. (N.S.) 1041, 75 C. C. A. 407, 144 Fed. 609; St. Louis & S. F. R. Co. v. Bennett, 16 C. C. A. 680, 32 U. S. App. 632, 69 Fed. 528; Cleghorn v. Thompson, 62 Kan. 727, 54 L.R.A. 402, 64 Pac. 605; Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1, 4 Am. Neg. Rep. 490; Huber v. LaCrosse City R. Co. 92 Wis. 636, 31 L.R.A. 583, 53 Am. St. Rep. 940, 66 N. W. 708; Herr v. Lebanon, 149 Pa. 222, 16 L.R.A. 106, 34 Am. St. Rep. 603, 24 Atl. 207; Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379; Glassey v. Worcester Consol. Street R. Co. 185 Mass. 315, 70 N. E. 199, 16 Am. Neg. Rep. 86; Hoag v. Lake Shore & M. S. R. Co. 85 Pa. 293, 27 Am. Rep. 653; Board of Trade Bldg. Corp. v. Cralle, 109 Va. 246, 22 L.R.A. (N.S.) 297, 132 Am. St. Rep. 917, 63 S. E. 995; West Mahaney Twp. v. Watson, 116 Pa. 344, 2 Am. St. Rep. 604, 9 Atl. 430; Texas & P. R. Co. v. Beckworth, 11 Tex. Civ. App. 153, 32 S. W. 347, 6 Am. Neg. Rep. 723; Schaeffer v. Jackson Twp. 150 Pa. 145, 18 L.R.A. 100, 30 Am. St. Rep. 792, 24 Atl. 629; Galveston, H. & S. A. R. Co. v. Chambers, 73 Tex. 296, 11 S. W. 279; Nelson v. Narragansett Electric Lighting Co. 26 R. I. 258, 67 L.R.A. 116, 58 Atl. 802; South Side Pass. R. Co. v. Trich, 117 Pa. 390, 2 Am. St. Rep. 672, 11 Atl. 627; Atchison, T. & S. F. R. Co. v. Dickens, 7 Ind. Terr. 16, 103 S. W. 750; McClain v. Garden Grove, 83 Iowa, 235, 12 L.R.A. 482, 48 N. W. 1031; Hunter v. Wanamaker, 1 Sadler (Pa.) 383, 2 Atl. 507; Hershey v. Mill Creek Twp. 6 Sadler (Pa.) 459, 9 Atl. 452; McGahan v. Indianapolis Natural Gas Co. 140 Ind. 335, 29 L.R.A. 355, 49 Am. St. Rep. 199, 37 N. E. 601; Russo v. Morris Bldg. & Land Improv. Asso. 104 La. 438, 29 So. 46; O'Connor v. Brucker, 117 Ga. 451, 43 S. E. 731, 13 Am. Neg. Rep. 500; Beall v. Athens Twp. 81 Mich. 536, 45 N. W. 1014; Lewis v. Flint & P. M. R. Co. 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744; Claypool v. Wigmore, 34 Ind. App. 35, 71 N. E. 509; Missouri P. R. Co. v. Columbia, 65 Kan. 390, 58 L.R.A. 399, 69 Pac. 338; Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 19 L. ed. 909; Morrison v. Davis, 20 Pa. 171, 57 Am. Dec. 695; Cuff v. Newark & N. Y. R. Co. 35 N. J. L. 18, 10 Am. Rep. 205; Smith v. County Ct. 33 W. Va. 713, 8 L.R.A. 82, 11 S. E. 1; Moulton v. Sanford, 51 Me. 127; Brown v. Wabash, St. L. & P. R. Co. 20 Mo. App. 222; Connell v. Chesapeake & O. R. Co. 93 Va. 44, 32 L.R.A. 792, 57 Am. St. Rep. 786, 24 S. E. 467; Fowlkes v. Southern R. Co. 96 Va. 742, 32 S. E. 464; Winfree v. Jones, 104 Va. 39, 1 L.R.A.(N.S.) 201, 51 S. E. 153.

In order to recover, plaintiff must show some negligent act on the part of the defendant, and also, that the accident and injury complained of were not only the natural and probable consequence of such

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act claimed to be negligent, but, also, that the accident and injury were, in fact, occasioned by such act, and, in addition, that the accident and injury so suffered should have been foreseen and anticipated, and therefore guarded against, by a man of ordinary care and prudence.

McGrell v. Buffalo Office Bldg. Co. 153 N. Y. 265, 47 N. E. 305, 2 Am. Neg. Rep. 598; Dougan v. Champlain Transp. Co. 56 N. Y. 1; Cleveland v. New Jersey S. B. Co. 68 N. Y. 306; Loftus v. Union Ferry Co. 84 N. Y. 455, 38 Am. Rep. 533, 5 Am. Neg. Cas. 234; Lafflin v. Buffalo & S. W. R. Co. 106 N. Y. 136, 60 Am. Rep. 433, 12 N. E. 599, 5 Am. Neg. Cas. 268; Frobisher v. Fifth Ave. Transp. Co. 151 N. Y. 431, 45 N. E. 839, 1 Am. Neg. Rep. 148.

Whether the defendant could reasonably have anticipated the happening of the accident must be measured by the circumstances before the accident, not afterwards.

American Exp. Co. v. Smith, 33 Ohio St. 511, 31 Am. Rep. 561; Libby v. Maine C. R. Co. 85 Me. 34, 20 L.R.A. 812, 26 Atl. 943; Cornman v. Eastern Counties R. Co. 4 Hurlst. & N. 781, 29 L. J. Exch. N. S. 94, 4 Jur. N. S. 657; American Brewing Asso. v. Talbot, 141 Mo. 674, 64 Am. St. Rep. 538, 42 S. W. 679; Nashville & C. R. Co. v. David, 6 Heisk. 261, 19 Am. Rep. 594; Cooley, Torts, 15.

If this defendant shall be held to respond in damage for failure to use the preventive measures that would, under every possibility, have avoided this accident, then he is held to a higher degree of care than the law imposes, and is made the absolute insurer of the lives of passengers while engaged in transportation.

McGrell v. Buffalo Office Bldg. Co. 153 N. Y. 265, 47 N. E. 305, 2 Am. Neg. Rep. 598; Empire State Cattle Co. v. Atchison, T. & S. F. R. Co. 135 Fed. 135; Smith v. Western R. Co. 91 Ala. 455, 11 L.R.A. 619, 24 Am. St. Rep. 929, 8 So. 754.

It is undoubtedly true that what is the proximate cause of an injury is ordinarily a question for the jury; but where the whole evidence offers no substantial dispute on material points, and is of such conclusive character that the court, in an exercise of sound judicial discretion, would be compelled to set a verdict aside which was returned in opposition to it, it is not only the province but the duty of the court to direct a verdict.

Guenther v. Metropolitan R. Co. 23 App. D. C. 493; Scheffer v. Washington City, V. M. & G. S. R. Co. 105 U. S. 249, 26 L. ed. 1070; Chicago, St. P. M. & O. R. Co. v. Elliott, 20 L.R.A. 582, 5 C. C. A. 347, 12 U. S. App. 381, 55 Fed. 949, 7 Am. Neg. Cas. 478; Empire State Cattle Co. v. Atchison, T. & S. F. R. Co. 135 Fed. 135; Butts v. Cleveland, C. C. & St. L. R. Co. 49 C. C. A. 69, 110 Fed. 329, 10 Am. Neg. Rep. 455; Goodlander Mill Co. v. Standard Oil Co. 27 L.R.A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 400; Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113, 14 Am. Neg. Rep. 676; Cleghorn v. Thompson, 62 Kan. 727, 54 L.R.A. 402, 64 Pac. 605; Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1, 4 Am. Neg. Rep. 490; Huber v. La Crosse City R. Co. 92 Wis. 636, 31 L.R.A. 583, 53 Am. St. Rep. 940, 66 N. W. 708; Nelson v. Narragansett Electric Lighting Co. 26 R. I. 258, 67 L.R.A. 116, 106 Am. St. Rep. 711, 58 Atl. 802; Hoag v. Lake Shore & M. S. R. Co. 85 Pa. 293, 27 Am. Rep. 653; South Side Pass. R. Co. v. Trich, 117 Pa. 390, 2 Am. St. Rep. 672, 11 Atl. 627; McClain v. Garden Grove, 83 Iowa, 235, 12 L.R.A. 482, 48 N. W. 1031; McGrell v. Buffalo Office Bldg. Co. 153 N. Y. 265, 47 N. E. 305, 2 Am. Neg. Rep. 598.

Mr. Arthur Peter argued the cause, and, with Messrs. Preston B. Ray and Julian W. Whiting, filed a brief for defendant in error:

Whether the defendant was negligent must be determined in the light of the care demanded of him. The defendant, in constructing and operating the elevator, was required to exercise the highest degree of care, anything short of which was absolute negligence. If Pennington's death might have been avoided in the exercise by the defendant of extraordinary vigilance, aided by the highest skill, extending to all the agencies or means employed in his transportation, the defendant is responsible for his death.

Webb, Elevators, § 7; 10 Am. & Eng. Enc. Law, 946.

The defendant was guilty of negligence in failing to keep closed the inside collapsible door.

Thomp. Neg. § 3528; Augusta R. Co. v. Glover, 92 Ga. 145, 18 S. E. 406, 2 Am. Neg. Cas. 466; Adams v. Washington & G. R. Co. 9 App. D. C. 26, 9 Am. Neg. Cas. 163; Crandall v. Minneapolis, St. P. & S. Ste. M. R. Co. 96 Minn. 434, 2 L.R.A.(N.S.) 645, 113 Am. St. Rep. 653, 105 N. W. 185, 19 Am. Neg. Rep. 348; Bronson v. Oakes, 22 C. C. A. 520, 40 U. S. App. 413, 76 Fed. 734.

The failure of the elevator boy to obey the rule of the defendant and keep his arm across the open door was negligence.

Warner v. Baltimore & O. R. Co. 168 U. S. 339, 42 L. ed. 491, 18 Sup. Ct. Rep. 68; Stevens v. Boston Elev. R. Co. 184 Mass. 478, 69 N. E. 338, 15 Am. Neg. Rep. 338; Chicago, M. & St. P. R. Co. v. Lowell, 151

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U. S. 209, 38 L. ed. 131, 14 Sup. Ct. Rep. 281, 7 Am. Neg. Cas. 373.

Proximate cause is not a question of science, but is ordinarily a question of fact for the jury.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 474, 24 L. ed. 258; Donegan v. Baltimore & N. Y. R. Co. 91 C. C. A. 555, 105 Fed. 87; Chicago G. W. R. Co. v. Price, 38 C. C. A. 239, 97 Fed. 429; Southern P. Co. v. Yeargin, 48 C. C. A. 497, 109 Fed. 439; Union P. R. Co. v. Callaghan, 6 C. C. A. 205, 12 U. S. App. 541, 56 Fed. 991.

The defendant's negligence was a *causa sine qua non* of the accident.

Hayes v. Michigan C. R. Co. 111 U. S. 241, 28 L. ed. 415, 4 Sup. Ct. Rep. 369; Choctaw, O. & G. R. Co. v. Holloway, 191 U. S. 334, 48 L. ed. 207, 24 Sup. Ct. Rep. 102, 15 Am. Neg. Rep. 235; McDonald v. Toledo Consol. Street R. Co. 20 C. C. A. 322, 43 U. S. App. 79, 74 Fed. 104; Shugart v. Atlanta, K. & N. R. Co. 66 C. C. A. 379, 133 Fed. 505; Patton v. Southern R. Co. 27 C. C. A. 287, 42 U. S. App. 567, 82 Fed. 984; Thomp. Neg. ¶ 68.

Injury to passengers was a probable consequence of defendant's negligence.

25 Harvard L. Rev. 117; 33 Can. L. J. 717, 9 Columbia L. Rev. 139; Atchison, T. & S. F. R. Co. v. Calhoun, 213 U. S. 9, 53 L. ed. 674, 29 Sup. Ct. Rep. 321; Washington & G. R. Co. v. Hickey, 166 U. S. 526, 41 L. ed. 1102, 17 Sup. Ct. Rep. 661, 1 Am. Neg. Rep. 758; Hill v. Winsor, 118 Mass. 251.

The facts in this case present no opportunity for the application of the nearest wrongdoer rule.

Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113, 14 Am. Neg. Rep. 676; Teis v. Smuggler Min. Co. 15 L.R.A.(N.S.) 893, 85 C. C. A. 478, 158 Fed. 260; Atchison, T. & S. F. R. Co. v. Calhoun, 213 U. S. 1, 53 L. ed. 671, 29 Sup. Ct. Rep. 321; Thomp. Neg. ¶ 68; McDonald v. Toledo Consol. R. Co. 20 C. C. A. 322, 43 U. S. App. 79, 74 Fed. 106; Choctaw, O. & G. R. Co. v. Holloway, 191 U. S. 339, 48 L. ed. 210, 24 Sup. Ct. Rep. 102, 15 Am. Neg. Rep. 235; Patton v. Southern R. Co. 27 C. C. A. 287, 42 U. S. App. 567, 82 Fed. 984; Washington & G. R. Co. v. Hickey, 166 U. S. 521, 41 L. ed. 1101, 17 Sup. Ct. Rep. 661, 1 Am. Neg. Rep. 758; Shugart v. Atlanta, K. & N. R. Co. 66 C. C. A. 379, 133 Fed. 505.

Mr. Justice Holmes delivered the opinion of the court:

This is an action brought against the owner of a building for causing the death of the plaintiff's intestate in an elevator in which the deceased was being carried to his place of employment. Negligent construction and negligent management of the elevator are alleged. The plaintiff had a verdict against a request by the defendant that one be directed for him, the judgment was affirmed by the court of appeals (37 App. D. C. 185), and the defendant brought the case here.

The elevator car did not quite fill the well, or shaft, and the bottom of the floor that it was approaching projected at right angles into the well about 3½ inches. The car was equipped with a collapsible door, [155] which was open at the time of the accident, and the boy in charge did not have his arm across the space as he had been instructed to do. Between the fourth and fifth floors the deceased fell, and his head was caught between the projecting bottom of the fifth floor and the floor of the car and was crushed. The negligence relied upon is the leaving of the door open and failure to guard the space; the not having a flange or piece of metal inclining from the projecting floor to the shaft wall, and the failure to use an emergency switch, the quickest means of stopping the car, the boy in charge not having been instructed in the use of it.

The plaintiff in error argued at some length that there was no negligence, because the fall of deceased was something wholly out of the ordinary course, and not to be foreseen; or that, if there was negligence in any sense, it was not the proximate cause of the death, but merely a passive condition made harmful by the fall. Neither argument can be maintained. It is true that it was not to be anticipated specifically that a man should drop from internal causes into the open door of the car. But the possibility and the danger that in some way one in the car should get some part of his person outside the car while it was in motion was obvious, and was shown to have been anticipated by the door being there. In some circumstances, at least, it was a danger that ought to be and was guarded against. It is said that the danger was manifest only when the car was crowded, and that the door was needed only for that. If the duty to have the car shut on all sides had been created with reference only to conditions different in kind from those of the accident, it may be that the plaintiff could not avail himself of a requirement imposed *alio intuitu*. The Eugene F. Moran, 212 U. S. 466, 476, 53 L. ed. 600, 604, 29 Sup. Ct. Rep. 339. But the accident was similar in kind to those against which the door was provided, and we are not prepared to say, contrary to the finding of the jury, that [156] the duty to keep it shut or to guard the space with the arm did not exist in favor of all travelers in an elevator having

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the structure that we have described. It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye. Washington & G. R. Co. v. Hickey, 166 U. S. 521, 526, 527, 41 L. ed. 1101–1103, 17 Sup. Ct. Rep. 661, 1 Am. Neg. Rep. 758.

If there was negligence, it very properly could be found to have been the proximate cause of the death. See Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256. Even if it were true that the neglect was merely a passive omission, the deceased was invited into the elevator, and the principle of the trap cases would apply. Corby v. Hill, 4 C. B. N. S. 556, 563, 27 L. J. C. P. N. S. 318, 4 Jur. N. S. 512, 6 Week. Rep. 575; Sweeny v. Old Colony & N. R. Co. 10 Allen, 368, 374, 87 Am. Dec. 644. But that is not the case. The defendant is sued for having crushed the head of the deceased by forces that he put in motion. He replies that it would not have happened but for the unforeseen fall of the deceased without the defendant's fault, and to this the plaintiff rejoins and the jury has found that the defendant was bound to take the easy precaution which he had provided against any and all ways by which a passenger's body could get outside the car while it was going up. Hayes v. Michigan C. R. Co. 111 U. S. 228, 241, 28 L. ed. 410, 415, 4 Sup. Ct. Rep. 369; Choctaw, O. & G. R. Co. v. Holloway, 191 U. S. 334, 339, 48 L. ed. 207, 210, 24 Sup. Ct. Rep. 102. The whole question comes down to whether we are prepared to say as matter of law, against the finding of the jury, that, in an elevator constructed as this was, with a special source of danger in the shaft outside the car, to require the defendant to guard the door space *in transitu*, at his peril, is too strict a rule. We cannot go so far. McDonald v. Toledo Consol. Street R. Co. 20 C. C. A. 322, 43 U. S. App. 79, 74 Fed. 104, 109.

There was, perhaps, evidence sufficient to warrant a finding that there was negligence in not stopping the car [157] after the fall and before the harm was done, and a finding on that ground would not open the questions that have been discussed; but we have preferred to deal with the case on the matters principally argued, as they seem to offer the most obvious reasons for the verdict, and therefore have assumed that the jury found the facts and standard of conduct to be as we have supposed.

Judgment affirmed.

JOHN R. BUCHSER, Appt.,
v.
ANNIE BUCHSER and W. W. Zent, as Guardian *ad Litem* for Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser, Minors.

(See S. C. Reporter's ed. 157–162.)

Public lands — rights on death of entryman — community property.

There is nothing in the Federal laws which prevents the application, where a patent has been issued to a homestead entryman, of the rule of the local law that land in the state acquired by a husband under the homestead laws is the community property of the entryman and his wife.

[For other cases, see Public Lands, I. e. 8; States, IV. c, in Digest Sup. Ct. 1908.]

[No. 641.]

Submitted November 3, 1913. Decided November 17, 1913.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the District Court for the Eastern District of Washington, sustaining a de-

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Note.—Rights in lands entered or acquired under the Federal homestead laws as affected by state community property laws.

The decision in Buchser v. Buchser, when considered in connection with McCune v. Essig, 199 U. S. 382, 50 L. ed. 237, 26 Sup. Ct. Rep. 78, covers this question in about all of its phases, and renders unnecessary a review of the decisions of the state and lower Federal courts.

McCune v. Essig, supra, definitely established the doctrine that so long as the title to the homestead is incomplete, the Federal laws apply to the exclusion of any state community property laws; and, further, that, should the homestead entryman die before patent has issued, the doctrine of relation cannot successfully be invoked to confer any right or interest in the land under the operation of such state laws upon the heirs of a deceased member of the community as against the survivor to whom, under the Federal laws, the patent has issued.

Now comes the complementary ruling in Buchser v. Buchser that, where the title of the homestead entryman has been perfected by the issuance of a patent from the United States during coverture, it becomes subject to the community laws of the state where the land is located.

The cases which present the views of other courts are to be found in the notes to Cunningham v. Krutz, 7 L.R.A.(N.S.) 967, and Krieg v. Lewis, 26 L.R.A.(N.S.) 1117.

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murrer to and dismissing the bill in a suit to quiet title. Affirmed.

See same case below, 121 C. C. A. 212, 202 Fed. 854.

The facts are stated in the opinion.

Messrs. Fred M. Dudley and W. E. Cullen submitted the cause for appellant. Mr. David Herman was on the brief:

The circuit court of appeals erred in its opinion that the state of Washington has uniformly held grants of the Federal government under the homestead laws to be the community property of the entryman and his wife.

Bolton v. La Camas Water Power Co. 10 Wash. 246, 38 Pac. 1043; Hall v. Hall, 41 Wash. 186, 111 Am. St. Rep. 1016, 83 Pac. 108; Cunningham v. Krutz, 41 Wash. 190, 7 L.R.A.(N.S.) 967, 83 Pac. 109; Teynor v. Heible, 74 Wash. 222, 46 L.R.A.(N.S.) 1033, 133 Pac. 1.

To allow the states to ignore Federal land laws, to interpret the grants made by the Federal government and designate the persons who are the beneficiaries thereof according to their own local laws, brings about the anomalous situation of citizens of the United States holding different rights under grants issued by the Federal government in pursuance of the same and identical laws, simply because one happens to live in California and the other in the state of Washington. Thus California, also possessing the community property law, has uniformly held that the homestead becomes the sole and separate property of the entryman.

Noe v. Card, 14 Cal. 577; Wilson v. Castro, 31 Cal. 421; Hood v. Hamilton, 33 Cal. 698; Lake v. Lake, 52 Cal. 428; Harris v. Harris, 71 Cal. 314, 12 Pac. 274; Morgan v. Lones, 80 Cal. 317, 22 Pac. 253.

The rights of a grantee from the Federal government present a Federal question on which the decisions of the Federal courts are controlling, and in the administration of the Federal land laws the community system is unknown.

Phœnix Min. & Mill Co. v. Scott, 20 Wash. 48, 54 Pac. 777; Cunningham v. Krutz, 41 Wash. 190, 7 L.R.A.(N.S.) 967, 83 Pac. 109; McCune v. Essig, 199 U. S. 382, 50 L. ed. 237, 26 Sup. Ct. Rep. 78; Hall v. Hall, 41 Wash. 186, 111 Am. St. Rep. 1016, 83 Pac. 108.

Congress alone has the power to enact laws for the disposition of the lands belonging to the United States. No state can abridge that right nor interfere with the grantee's enjoyment or possession of the lands granted by the Federal government.

Irvine v. Marshall, 20 How. 558, 15 L. ed. 994; Gibson v. Chouteau, 13 Wall. 92, 20 L. ed. 534.

A homestead acquired under the laws of the United States is the sole and separate property of the entryman. Any other conclusion is inconsistent with the clear and explicit provisions of the United States statutes applicable to homestead entries.

Gibson v. Chouteau, supra; McCune v. Essig, 199 U. S. 382, 50 L. ed. 237, 26 Sup. Ct. Rep. 78.

Messrs. Frank T. Post and B. B. Adams submitted the cause for appellees. Messrs. John Salisbury and W. W. Zent were on the brief:

It is the settled law of the state of Washington, where the property in controversy is situated, that the same is community property.

Kromer v. Friday, 10 Wash. 621, 32 L.R.A. 671, 39 Pac. 229; Ahern v. Ahern, 31 Wash. 334, 96 Am. St. Rep. 912, 71 Pac. 1023; Cox v. Tompkinson, 39 Wash. 70, 80 Pac. 1005; Hall v. Hall, 41 Wash. 186, 111 Am. St. Rep. 1016, 83 Pac. 108; Krieg v. Lewis, 56 Wash. 196, 26 L.R.A.(N.S.) 1117, 105 Pac. 483; Cunningham v. Krutz, 41 Wash. 190, 7 L.R.A.(N.S.) 967, 83 Pac. 109; Teynor v. Heible, 74 Wash. 222, 46 L.R.A. (N.S.) 1033, 133 Pac. 1.

The question has been settled in our favor by the decisions of the United States Supreme Court.

Wilcox v. Jackson, 13 Pet. 516, 10 L. ed. 273; McCune v. Essig, 199 U. S. 382, 50 L. ed. 237, 26 Sup. Ct. Rep. 78; Bernier v. Bernier, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244.

[161] Mr. Justice Holmes delivered the opinion of the court:

This is a bill to quiet title, alleging that the plaintiff, a married man, made entry and acquired title to the land in question under the homestead laws of the United States by patent issued December 17, 1903; that thereafter his wife died, and that the defendants, the children of the marriage, claim an interest in the land. By the laws of the state of Washington, in which the property is situated, it became community property unless the statutes of the United States forbid. Teynor v. Heible, 74 Wash. 222, 46 L.R.A.(N.S.) 1033, 133 Pac. 1. On that point we follow the Washington decisions. There was a demurrer, which was sustained by the district court (sub nom. Buchser v. Morse, 196 Fed. 577), and by the circuit court of appeals (121 C. C. A. 212, 202 Fed. 854).

There is no doubt, of course, that until

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the title is completed the laws of the United States control. Wadkins v. Producers Oil Co. 227 U. S. 368, 57 L. ed. 551, 33 Sup. Ct. Rep. 380; Bernier v. Bernier, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244; Hall v. Russell, 101 U. S. 503, 25 L. ed. 829; Gibson v. Chouteau, 13 Wall. 92, 20 L. ed. 534. But when the title has passed, then the land "like all other property in the state is subject to state legislation." Wilcox v. Jackson, 13 Pet. 498, 517, 10 L. ed. 264, 273; Irvine v. Marshall, 20 How. 558, 564, 15 L. ed. 994, 997; McCune v. Essig, 199 U. S. 382, 390, 50 L. ed. 237, 241, 26 Sup. Ct. Rep. 78. If the United States could impress a peculiar character upon land within a state after parting with all title to it, at least the clearest expression would be necessary before such a result could be reached. Wright v. Morgan, 191 U. S. 55, 58, 48 L. ed. 89, 93, 24 Sup. Ct. Rep. 6. But it has not tried to do anything of the sort.

No one would doubt that this title was subject to the same incidents as any other so far as events subsequent to its acquisition were concerned. See Wright v. Morgan, supra. It could be lost by adverse occupation for the time prescribed by state law, and in a state that adopted the common law as to dower, it would be subject to dower [162] if the settler subsequently married. The only semblance of difficulty is due to the coincidence in time of the acquisition of a separate right by the settler and the beginning of a community right in the wife. But this is by no means an extreme illustration of the division of an indivisible instant that is practised by the law whenever it is necessary. A statute may give a man a right of action against another for causing his death, that accrues to him at the instant that he is *vivus et mortuus*. Higgins v. Central New England & W. R. Co. 155 Mass. 176, 179, 31 Am. St. Rep. 544, 29 N. E. 534. In the present case the acquisition under the United States law is complete, and that law has released its control before the state law lays hold, and, upon grounds in no way connected or interfering with the policy of Congress, brings the community *régime* into play. The special family relations thus created are not like contracts with third persons impliedly forbidden by the act of March 3, 1891, chap. 561, § 5, 26 Stat. at L. 1097, amending Rev. Stat. § 2290, U. S. Comp. Stat. 1901, p. 1389. They are consistent with the policy of the statute, which is to enable the settler and his family to secure a home. See § 2291, U. S. Comp. Stat. 1901, p. 1390.

Decree affirmed.

A. STRAUS, Appt.,
v.
W. L. FOXWORTH.

(See S. C. Reporter's ed. 162–171.)

Pleading — admission by demurrer — conclusion of law.

1. An allegation in a complaint attacking the validity of certain tax deeds, that the tax sales upon which they are based were "not sufficiently advertised," is a conclusion of law which is not admitted on demurrer, where no facts are set forth in the complaint to sustain it.

[For other cases, see Pleading, 908–924, in Digest Sup. Ct. 1908.]

Appeal — from territorial supreme court — following decision below — statutory construction.

2. The construction given by the territorial supreme court to the words "in accordance with this act," contained in N. M. Laws 1899, chap. 22, § 25, restricting the grounds on which "the title to any property sold at tax sale in accordance with this act" may be attacked, as meaning "under this act," is not so clearly erroneous as to justify the Federal Supreme Court on appeal in rejecting such interpretation.

[For other cases, see Appeal and Error, VIII. m, 1; Courts, VII. d, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — tax titles.

3. Restricting the grounds for attacking the title to property sold at tax sales under N. M. Laws 1899, chap. 22, as is done by § 25 of that act, does not take property without due process of law because its effect is to prevent assailing the validity of tax deeds for noncompliance with the local statutory provisions respecting the making and preserving of proofs of the publication and posting of the notice of sale.

[For other cases, see Constitutional Law, 523–533, in Digest Sup. Ct. 1908.]

Statutes — when validity may be assailed.

4. A territorial statute governing tax sales cannot be attacked on the ground that it may be so construed as to deny due process of law, but the plaintiff must show that in the case he presents, the effect of applying the statute is to deprive him of his property without due process of law.

[For other cases, see Statutes, I. d, 2, in Digest Sup. Ct. 1908.]

[No. 191.]

Submitted October 20, 1913. Decided November 17, 1913.

NOTE.—As to review by the United States Supreme Court of territorial decisions—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

As to who may raise objection that a statute contains an unconstitutional discrimination—see note to Pugh v. Pugh, 32 L.R.A.(N.S.) 954.

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APPEAL from the Supreme Court of the Territory of New Mexico to review a decree which affirmed a decree of the District Court for the County of Quay, in that territory, sustaining a demurrer to and dismissing the complaint in a suit to quiet title. Affirmed.

See same case below, 16 N. M. 442, — L.R.A.(N.S.) —, 117 Pac. 881.

The facts are stated in the opinion.

Mr. William C. Reid submitted the cause for appellant. Mr. James M. Hervey was on the brief:

A tax deed cannot be made conclusive evidence of the grantee's title to the land.

Marx v. Hanthorn, 148 U. S. 172, 37 L. ed. 410, 13 Sup. Ct. Rep. 508, 30 Fed. 579; 1 Cooley, Taxn. 3d ed. pp. 518, 519; Taylor v. Deveaux, 100 Mich. 581, 59 N. W. 250; McKinnon v. Meston, 104 Mich. 642, 62 N. W. 1014; Weeks v. Merkle, 6 Okla. 714, 52 Pac. 929; Wilson v. Wood, 10 Okla. 284, 61 Pac. 1045; Kelly v. Herrall, 10 Sawy. 161, 20 Fed. 364; Bannon v. Burnes, 39 Fed. 895; McCready v. Sexton, 29 Iowa, 356, 4 Am. Rep. 214; Northern P. R. Co. v. Galvin, 85 Fed. 811; Cairo & F. R. Co. v. Parks, 32 Ark. 131; Little Rock & Ft. S. R. Co. v. Payne, 33 Ark. 816, 34 Am. Rep. 55; Wambole v. Foote, 2 Dak. 1, 2 N. W. 239; Dickerson v. Acosta, 15 Fla. 614; White v. Flynn, 23 Ind. 46; Corbin v. Hill, 21 Iowa, 70; Powers v. Fuller, 30 Iowa, 476; Taylor v. Miles, 5 Kan. 498, 7 Am. Rep. 558; Baumgardner v. Fowler, 82 Md. 631, 34 Atl. 538; Groesbeck v. Seeley, 13 Mich. 329; Case v. Dean, 16 Mich. 12; Dawson v. Peter, 119 Mich. 274, 77 N. W. 997; Abbott v. Lindenbower, 42 Mo. 162, 46 Mo. 291; Roth v. Gabbert, 123 Mo. 29, 27 S. W. 528; Wright v. Cradlebaugh, 3 Nev. 349; Young v. Beardsley, 11 Paige, 93; East Kingston v. Towle, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174; Sheets v. Paine, 10 N. D. 103, 86 N. W. 117; Strode v. Washer, 17 Or. 50, 16 Pac. 926; Mather v. Darst, 13 S. D. 75, 82 N. W. 407; Harness v. Cravens, 126 Mo. 233, 28 S. W. 971; Bettison v. Budd, 21 Ark. 578; Watt v. Gilmore, 2 Yeates, 330; Shimmin v. Inman, 26 Me. 233; Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; Alvord v. Collin, 20 Pick. 418; Workingmen's Bank v. Lannes, 30 La. Ann. 871; Martin v. Barbour, 34 Fed. 701; Tracy v. Reed, 2 L.R.A. 773, 13 Sawy. 622, 38 Fed. 69; Doe ex dem. Davis v. Minge, 56 Ala. 121; Oliver v. Robinson, 58 Ala. 46; Radcliffe v. Scruggs, 46 Ark. 96; Townsend v. Martin, 55 Ark. 192, 17 S. W. 875; Cooper v. Freeman Lumber Co. 61 Ark. 36, 31 S. W. 981, 32 S. W. 494; Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920; Maguiar v. Henry, 84 Ky. 1, 4 Am. St. Rep. 182; Larson v. Dickey, 39 Neb. 463, 42 Am. St. Rep. 595, 58 N. W. 167; Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049; Dever v. Cornwell, 10 N. D. 123, 86 N. W. 227; Simpson v. Meyers, 197 Pa. 522, 47 Atl. 868; Salmer v. Lathrop, 10 S. D. 216, 72 N. W. 570; Virginia Coal Co. v. Thomas, 97 Va. 527, 34 S. E. 486; Clarke v. Mead, 102 Cal. 519, 36 Pac. 863; State v. Dugan, 105 Tenn. 245; Bennett v. Davis, 90 Me. 107, 37 Atl. 866; Soper v. Lawrence Bros. Co. 201 U. S. 370, 50 L. ed. 788, 26 Sup. Ct. Rep. 473; Meyer v. Kuhn, 13 C. C. A. 298, 25 U. S. App. 174, 65 Fed. 705; Lufkin v. Galveston, 73 Tex. 340, 11 S. W. 340.

The essential or jurisdictional steps provided by statute were not complied with.

2 Cooley, Taxn, 3d ed. p. 918; Games v. Stiles, 14 Pet. 322, 10 L. ed. 476; Martin v. Barbour, 34 Fed. 701, 140 U. S. 634, 644, 35 L. ed. 546, 549, 11 Sup. Ct. Rep. 944; Rustin v. Merchants' & M. Tunnel Co. 23 Colo. 351, 47 Pac. 300; Salinger v. Gunn, 61 Ark. 414, 33 S. W. 959; Martin v. Allard, 55 Ark. 218, 17 S. W. 878; Coit v. Wells, 2 Vt. 318; 1 Cooley, Taxn. 3d ed. pp. 518, 519.

Where property is sold for more than is due, whether the excess is due to an illegal levy or illegal penalties and costs, the officer has no jurisdiction to sell, and it is void, notwithstanding curative statutes.

Lufkin v. Galveston, 73 Tex. 340, 11 S. W. 340; Treadwell v. Patterson, 51 Cal. 637; Huse v. Merriam, 2 Me. 375; Case v. Dean, 16 Mich. 12; Eustis v. Henrietta, 91 Tex. 325, 43 S. W. 259; Alexander v. Gordon, 41 C. C. A. 228, 101 Fed. 91; Ensign v. Barse, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401; Harper v. Rowe, 53 Cal. 233; Warden v. Broome, 9 Cal. App. 172, 98 Pac. 252; Dever v. Cornwell, 10 N. D. 123, 86 N. W. 227.

Illustrative of the principle that a curative statute does not aid a tax deed or certificate which, on the face thereof, shows a violation or noncompliance with the statute relative to sale, are the cases which hold that, notwithstanding the curative statute, tax certificates or deeds which show upon their face that the county was a competitive bidder, or that the property was struck off to the county on a day when it was not authorized to purchase it, contrary to the statute, are void.

Reckitt v. Knight, 16 S. D. 395, 92 N. W. 1077; Rush v. Lewis & Clark County, 37 Mont. 240, 95 Pac. 836; Hanenkratt v. Hamil, 10 Okla. 219, 61 Pac. 1050; Magill v. Martin, 14 Kan. 67; Dyke v. Whyte, 17 Colo. 296, 29 Pac. 128.

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Mr. **Harry H. McElroy** submitted the cause for appellee. Mr. Harry M. Dougherty was on the brief:

It is not even necessary, in order to constitute due process of law, to have had any sale whatsoever. The state could, if it saw fit, have forfeited the property to the state immediately upon the failure to pay the taxes.

King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925; King v. West Virginia, 216 U. S. 92, 54 L. ed. 396, 30 Sup. Ct. Rep. 225; Fay v. Crozer, 217 U. S. 456, 54 L. ed. 837, 30 Sup. Ct. Rep. 568.

The construction of the statute as to the steps required by law are for the state courts, provided they do not encroach upon constitutional provisions.

Turpin v. Lemon, 187 U. S. 51–57, 47 L. ed. 70–73, 23 Sup. Ct. Rep. 20.

The owner of property is bound to take notice of the time and place provided for tax proceedings. He knows that his property is subject to tax.

Ontario Land Co. v. Yordy, 212 U. S. 152–157, 53 L. ed. 449–452, 29 Sup. Ct. Rep. 152.

It is not the province of this court to interfere with the policy of the revenue laws of the states, nor with the interpretation given to them by the courts.

Castillo v. McConnico, 168 U. S. 684, 42 L. ed. 626, 18 Sup. Ct. Rep. 229; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Huling v. Kaw Valley R. & Improv. Co. 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603; Hagar v. Reclamation Dist. 111 U. S. 710, 28 L. ed. 572, 4 Sup. Ct. Rep. 663; Witherspoon v. Duncan, 4 Wall. 210, 18 L. ed. 339; Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750.

The laws for the assessment and collection of general taxes are construed with the utmost liberality, sometimes even to the extent of holding that no notice is required.

Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20.

If this case is only appealable under § 2 of the act of March 3, 1885, no question as to the construction of the statute will be considered, but only whether the statute, as construed by the supreme court of New Mexico, was within the power of the legislature to pass, in view of the requirements of the Constitution of the United States.

New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38–48, 51 L. ed. 78–85, 27 Sup. Ct. Rep. 1.

The court will not consider, as has been suggested, what are the "essentials under the territorial statute."

Castillo v. McConnico, 168 U. S. 674, 683, 42 L. ed. 622, 625, 18 Sup. Ct. Rep. 229; Ontario Land Co. v. Wilfong, 223 U. S. 543, 56 L. ed. 544, 32 Sup. Ct. Rep. 328.

The plaintiff has no interest to assert that the statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether, in the case which he presents, the effect of applying the statute is to deprive him of his property without due process of law.

Castillo v. McConnico, 168 U. S. 674–680, 42 L. ed. 622–624, 18 Sup. Ct. Rep. 229.

Where directions upon the subject might originally have been dispensed with, or executed at another time, irregularities arising from neglect to follow them may be remedied by the legislature, unless its action in this respect is restrained by constitutional provisions, prohibiting retrospective legislation.

Williams v. Albany County, 122 U. S. 154–164, 30 L. ed. 1088–1090, 7 Sup. Ct. Rep. 1244; Castillo v. McConnico, 168 U. S. 674–682, 42 L. ed. 622–625, 18 Sup. Ct. Rep. 229.

Laws which undertake to provide that in future proceedings, errors or irregularities shall not be fatal, come also under the same restrictions upon legislative authority; they cannot, for instance, cure a total want of power to tax, nor can they relieve against jurisdictional defects. But such laws would seem entitled to liberal consideration, since the parties concerned would be apprised in advance that they were not to rely upon an exact compliance with the law, and would be under greater obligation to watch the proceedings.

Cooley, Taxn. 521, 522.

It may not be altogether easy in a particular case to determine whether the defects are jurisdictional or not, but certain irregularities in the personal conduct of the officers in making the sale would not be so regarded; and it is at least exceptionally doubtful whether the failure to preserve the auditor's list of delinquent lands, or the evidence of publication and posting of the statutory notice, would vitiate a deed made by the clerk after a lapse of twelve years.

Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20.

If this was an original question before this court for construction, and not a statute which has already been charged with a construction by the state of New Mexico, still we feel that the Supreme Court of the United States has made an original construction of a similar statute in the case of DeTreville v. Smalls, 98 U. S. 517, 25 L. ed. 174.

See also Keely v. Sanders, 99 U. S. 441, 25 L. ed. 327; Sherry v. McKinley, 99 U. S. 497, 25 L. ed. 330; Springer v. United States, 102 U. S. 586, 26 L. ed. 253.

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Mr. Justice Van Devanter delivered the opinion of the court:

This was a suit to quiet the title to three tracts of land in Quay county, in the territory of New Mexico. In the court of first instance a demurrer to the complaint was sustained, and the plaintiff declining to amend, a decree of dismissal was entered, which subsequently was affirmed by the supreme court of the territory. 16 N. M. 442, —L.R.A.(N.S.) —, 117 Pac. 831. An appeal from the decree of affirmance brings the case here, under the act of March 3, 1885, 23 Stat. at L. 443, chap. 355, U. S. Comp. Stat. 1901, p. 572.

The complaint purported to state four causes of action. In the first, embracing all the tracts, it was alleged that the plaintiff was the owner in fee simple, and that the defendant was making some adverse claim, not described. In the others, each embracing a single tract, the plaintiff's ownership was reiterated, and it was alleged that the defendant was claiming title under tax deeds issued in consummation of tax sales which were characterized as void for designated reasons. But, notwithstanding its form, the complaint, as the record discloses, was treated in both of the territorial courts, with the acquiescence of the parties, as intended to challenge the validity of the tax deeds only upon the grounds designated in the last [168] three causes of action; that is, as if the general charge in the first cause of action was intended to be restrained and limited by the more specific charges in the others. We therefore treat the complaint in the same way.

It was not alleged that the lands were not subject to taxation, or that the taxes on account of which the sales were had were in any wise invalid, or that the taxes or any part of them had been paid or tendered, or that they had not been delinquent for such a period as justified their enforcement by a sale of the lands, or that the sales were in any wise tainted with fraud, or that there had been any attempt to redeem the lands, or any of them, within the three years allowed therefor, or that that period had not elapsed after the sales and before the deeds were issued. On the contrary, the sole grounds on which the complaint assailed the tax title were (a) that the sales were "not sufficiently advertised;" (b) that proof of publication of the notice of sale was not transmitted by the printer to the county collector "immediately after the last publication;" (c) that the collector did not cause to be made an affidavit of the public posting of the notice of sale, and did not cause proof of publication or of posting to be deposited with the probate clerk; (d) that the probate clerk did not "carefully preserve" any such proofs; and (e) that the amount of the delinquency sought to be satisfied by the sales was in one instance 16 cents, and in another 24 cents, more than the taxes levied on the particular tract.

Plainly, the allegation that the sales were "not sufficiently advertised" was purely a conclusion of law, and must be disregarded. No facts being set forth to sustain it, the statement of the conclusion was merely an empty assertion, and, under the rule that a demurrer admits only facts well pleaded, the conclusion was not admitted.

The charge that the delinquency sought to be satisfied by the sales was in excess of the taxes levied must be read in connection with the fact, otherwise appearing in [169] the complaint, that the taxes were delinquent, and in connection with the statutory provisions augmenting the delinquency by designated penalties and costs. When this is done it is quite evident that the amount sought to be collected was not excessive.

The remaining objections advanced in the complaint are founded upon a failure to comply with local statutory provisions directing the making and preserving of proofs of the publication and posting of the notice of sale. The supreme court of the territory held, in effect, that compliance with these statutory provisions was not essential in a constitutional sense to the validity of tax sales, and therefore that the territorial legislature was free to declare that noncompliance should not render the sales invalid; and with this as a premise the court further held that the objections could not prevail, because the statute under which the sales were had contained a provision that "no bill of review or other action attacking the title to any property sold at tax sale in accordance with this act shall be entertained by any court, nor shall such sale or title be invalidated by any proceedings, except upon the ground that the taxes, penalties, interest, and costs had been paid before the sale, or that the property was not subject to taxation." Laws New Mexico, 1899, chap. 22, § 25.

The appellant assigns error upon this ruling, and insists that the provision just quoted (a) is in terms restricted to sales made "in accordance with this act," and so cannot be applied to any sale wherein some requirements of the act were not followed, and (b) is epugnant to the due process of law clause of the 14th Amendment as applied to the territory by the organic act.

The supreme court of the territory construed the words "in accordance with this act" as meaning "under this act," and we think this was right. At least, we cannot

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say that it was manifestly wrong, as must be done [170] to justify us in rejecting the local interpretation of a territorial statute. Fox v. Haarstick, 156 U. S. 674, 679, 39 L. ed. 576, 578, 15 Sup. Ct. Rep. 457; Treat v. Grand Canyon R. Co. 222 U. S. 448, 452, 56 L. ed. 265, 266, 32 Sup. Ct. Rep. 125. Of course, the provision was intended to have some operation and effect, and it hardly could have any if restricted to sales made in accordance with the act, in the stricter sense, for such sales would be as valid without the provision as with it.

While statutes authorizing tax sales often provide for making and preserving some designated form of record evidence of compliance with the requirements respecting notice of the sale, the subject is one which rests in legislative discretion, being quite apart from those fundamental rights which are embraced in a right conception of due process of law. And if there be legislative provision upon the subject, it does not assume the dignity of an essential element of due process of law in the constitutional sense (Castillo v. McConnico, 168 U. S. 674, 683, 42 L. ed. 622, 625, 18 Sup. Ct. Rep. 229), but belongs to that class of regulations of which it is said in Williams v. Albany County, 122 U. S. 154, 164, 30 L. ed. 1088, 1089, 7 Sup. Ct. Rep. 1244: "Where directions upon the subject might originally have been dispensed with, or executed at another time, irregularities arising from neglect to follow them may be remedied by the legislature, unless its action in this respect is restrained by constitutional provisions prohibiting retrospective legislation." We are not here concerned with retrospective legislation or with any prohibition of it; for, as before shown, the remedial or relieving provision was embodied in the act under which the sales were had.

It is contended, however, that the remedial or relieving provision is so broad in its terms as to give effect to a sale not founded upon a prior assessment, or where no opportunity was afforded for a hearing in opposition to the tax, and therefore that it is violative of due process. To this it is a sufficient answer to repeat what was said in Castillo v. McConnico, 168 U. S. 680, 42 L. ed. 624, 18 Sup. Ct. Rep. 229, in disposing of a like contention: [171] "But, as thus stated, the proposition presents a purely moot question. The plaintiff in error has no interest to assert that the statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether, in the case which he presents, the effect of applying the statute is to deprive him of his property without due process of law."

As none of the objections advanced in the complaint against the defendant's tax title appears to have been well taken, we think the demurrer was rightly sustained.

Decree affirmed.

MARCELINO TORRES ZAYAS, Appt. and Plff. in Err.,
v.
LOTHROP, LUCE, & COMPANY, Pedro Juan Rosaly y Capo,† and Alice Lothrop.

(See S. C. Reporter's ed. 171-181.)

Appeal — from Porto Rico supreme court — mode of review.

1. Appeal, and not writ of error, is the proper method of obtaining a review in the Federal Supreme Court of a decree of the supreme court of Porto Rico, which affirmed a decree of a district court in a suit tried without a jury, to set aside a judicial sale in proceedings to foreclose a mortgage.

[For other cases, see Appeal and Error, II. b, in Digest Sup. Ct. 1908.]

Appeal — scope of review — questions not raised below.

2. A contention that the summary or executory process provided by the Porto Rico mortgage law for the foreclosure of a mortgage was so deficient in notice, or so wanting in opportunity to defend, as to cause such law to be repugnant to the due process of law clause of U. S. Const., 5th Amend., cannot be considered by the Federal Supreme Court on an appeal from the supreme court of Porto Rico, where that question was not and could not have been considered by the latter court, because it was not raised in the trial court.

[For other cases, see Appeal and Error, VIII. j, in Digest Sup. Ct. 1908.]

Mortgage — construction — prohibiting future advances.

3. A clause in a mortgage by which it was agreed that the crops made by the mortgagor should be shipped to the mortgagees, who should sell them, applying the proceeds first to the interest, and then to the principal of the debt, did not prevent the mortgagees from advancing to the mortgagor, at his request, sums to aid him in making a crop, and thus to enable him to carry out, instead of disregarding, the letter and spirit of the contract.

[Rights and liabilities of parties to mortgage, see Mortgage, II., in Digest Sup. Ct. 1908.]

†Appearance of the heirs of Pedro Juan Rosaly y Capo, one of the defendants in error herein, filed and entered October 20, 1913.

Note.—On the appellate jurisdiction of the Federal Supreme Court over Porto Rico courts—see note to Garrozi v. Dastas, 51 L. ed. U. S. 369.

On mortgages for future advances—see note to Lawrence v. Tucker, 16 L. ed. U. S. 474.

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Appeal — from Porto Rico supreme court — question reviewable — statutory construction.

4. The conclusion of the Porto Rico supreme court that the Code of Civil Procedure in force at the time of bringing a suit to foreclose a mortgage, to the extent that it directed service of citation and summons in ordinary cases, was not cumulative nor applicable to proceedings under the mortgage law, will be followed by the Federal Supreme Court on appeal, in the absence of a clear conviction that error was committed in so ruling.

[For other cases, see Appeal and Error, VIII. m, 1; Courts, VII. d, in Digest Sup. Ct. 1908.]

Judicial sale — collateral attack.

5. A mortgagor who, so far as the public record was concerned, had parted with his title, although by a fictitious and simulated sale, has no standing to challenge the regularity of the proceedings by which the mortgage was enforced against the record owner, and the property judicially sold.

[For other cases, see Judicial Sale, VI., in Digest Sup. Ct. 1908.]

[No. 17.]

Argued October 31, 1913. Decided December 1, 1913.

APPEAL from and in error to the Supreme Court of Porto Rico to review a decree which affirmed a decree of the District Court for the Judicial District of Ponce, dismissing a suit to set aside a judicial sale in proceedings to foreclose a mortgage. Writ of error dismissed. Judgment affirmed on appeal.

See same case below, 16 P. R. R. 172.

The facts are stated in the opinion.

Mr. **Charles M. Boerman** argued the cause and filed a brief for plaintiff in error and appellant.

Mr. **Malcolm Donald** argued the cause and filed a brief for defendants in error and appellees.

Mr. Chief Justice **White** delivered the opinion of the court:

The plaintiff in error, Marcelino Torres, in January, 1908, brought this suit to set aside a sale of real estate, made in judicial proceedings of a summary or executory character, for the foreclosure of a mortgage and to recover the property with fruits, revenues, and damages. The right to the relief sought was based, broadly speaking, upon the following grounds: (a) the prematurity of the suit to foreclose because there was nothing due when the proceedings were commenced; (b) the absence of a necessary party; (c) vices in the proceedings, of such a character as to cause them to be absolutely void. The trial court dismissed the suit. On appeal, the supreme court of Porto Rico [174] affirmed, and it is to reverse such judgment that the writ of error and the appeal in this record were prosecuted. Having the power to review only by appeal (Garzot v. Rios de Rubio, 209 U. S. 283, 52 L. ed. 794, 28 Sup. Ct. Rep. 548), the writ of error is dismissed and we consider the case on the appeal.

The court below directed attention to the slovenly and ill-arranged record, but despite its admonition nothing seems to have been done to rearrange the record for the purposes of review by this court. We are not authorized to re-examine the evidence, but a statement of facts made by the court below; and in a case where there was no such statement our duty would be to affirm, because it would be impossible to decide that error had been committed. There is a statement of facts in the record, but it is unsatisfactory in many respects, since in matters which are important it is silent where it should speak, and in negligible matters speaks with unnecessary prolixity, being confusedly arranged, and in important particulars but states evidentiary facts, without any attempt to find the ultimate fact properly to be deduced from the stated evidence. We mention these subjects in order to direct the attention of the court below to them, and to avoid the making of like statements of fact in the future. As the court delivered a full opinion which throws light on the statement, and as in substance our conclusion will be rested upon documents which are uncontroverted and facts which are clearly found by the court below and are undisputed, we come to dispose of the case, giving, as a prelude, a statement which we deem necessary to an understanding of the matters for decision.

Torres owed a debt of $47,000 to W. S. H. Lothrop, which Torres had assumed in 1898 on the purchase of certain real estate upon which the debt was secured by a conventional mortgage. The firm of De Ford & Company had acquired this debt from Lothrop, and in February, 1901, gave Torres an extension of four years to [175] February, 1905, new notes being furnished as evidence of the debt, bearing 10 per cent interest, payable annually, and the notes being secured by a conventional mortgage on two pieces of property belonging to Torres, and upon a third piece belonging to a commercial firm who intervened in the act and mortgaged its property to secure the debt of Torres. By the ninth clause of the act of mortgage it was agreed that the crops made by Torres on the property mortgaged by him should be shipped to De Ford & Company, who should sell them, applying the proceeds first to the in-

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terest and then to the principal of the debt. The mortgage, while indivisible as between the parties, was as to third persons made divisible, a specific portion of the debt being assigned to each of the three properties. The original mortgage due by Torres was canceled and erased on the execution of the new one. The crops were shipped to De Ford & Company in 1902 and 1903, and were sufficient to pay the interest. In the crop year 1904, Torres solicited advances from De Ford & Company to enable him to make his crop, and acceding to his request the firm either directly advanced or paid off advances made by others, charging the same to Torres. When the crops came in and were sold, their proceeds were inadequate to pay these advances and the interest. They were imputed primarily to the advances, leaving the interest unpaid, this being done with the assent of Torres, who had monthly accounts rendered him, and made no objection whatever to the debiting of advances or the imputation of payment. The interest for 1904 remained unpaid, and a suit to foreclose the mortgage was commenced by a summary, or executory process, in accordance with the local mortgage law. There was filed with this suit a certificate reciting that the mortgaged property stood upon the public records in the name of Torres, this certificate having been issued by the registering office a day or two before the commencement of the suit. On the day the foreclosure suit was filed, [176] whether before or after does not appear, Torres sold the property to Alvarado for a small sum in cash and a large amount secured by mortgage, and this deed of sale was put upon the registry before any cautionary notice of the suit was, or could have been, recorded. Conformably to law, the court ordered a demand made upon Torres, notifying him of the suit, and calling upon him to pay the debt within thirty days, in default of which the property would be sold. Although he was served with this notice, Torres ostensibly took no heed of the proceedings, but Alvarado, as the registered owner of the property, filed a petition to enjoin the foreclosure proceedings on grounds which, although they are not fully set out in the record, it is conceded were substantially identical with those here relied upon. No injunction was granted, and the suit, having been twice called for hearing, was dismissed for want of prosecution. An order for the seizure of the property was in due season awarded by the court, as was also another order stating the amount of the debt and directing the sale of the property. It was seized, advertised, and sold by the marshal, and bought in by one Rosaly, who assumed the mortgage sued upon in the foreclosure proceedings, and paid a small cash price. It then developed that the deed to Alvarado which was on the records was an insurmountable obstacle to the completion of the purchase made by Rosaly under the foreclosure, and in those proceedings he began what was tantamount to an hypothecary action against Alvarado as a third possessor, to compel him to pay the mortgage debt or cancel the inscription of his deed of purchase. Alvarado appeared in these proceedings, admitted that he could not pay the mortgage debt and could not hold the property unless he did, that he had brought his suit to enjoin and had intentionally abandoned the same, and consented to the erasure of the inscription of his deed of sale. This being done, the marshal made a deed to Rosaly in confirmation of the [177] foreclosure sale, which was duly inscribed. Subsequently, Rosaly having given a mortgage in favor of the firm of De Ford, Luce, & Company, who were the successors in right of De Ford & Company, by legal proceedings obtained an erasure of the inscription of the Torres mortgage which he, Rosaly, had assumed at the foreclosure sale, on the ground that the same had been discharged.

A little more than a year after, that is, on the 20th of April, 1907, Torres and Alvarado, in a notarial act, rescinded the sale which had apparently taken place between them, it being recited in the act that the rescission was the result of an agreement which had taken place between the parties in 1905, and that it was caused by the refusal of the wife of Alvarado to join in the mortgage which was given by him in the deed of sale.

Eight months afterwards, as we have seen, in January, 1908, Torres commenced this suit upon the general grounds which we have at the outset outlined. The assignments of error which are relied upon to reverse the judgment, affirming the action of the trial court, in dismissing the suit, are nineteen in number. While we think their inherent weakness is apparent from the facts which we have just stated, we briefly notice them.

1st. The summary or executory process provided by the mortgage law, which was followed in foreclosing the Torres mortgage, it is insisted was so deficient in notice, or so wanting in opportunity to defend, as to cause that law to be repugnant to the due process clause of the Constitution of the United States. Without pausing to apply the elementary doctrine that the due process clause does not control the mere forms of procedure provided only the

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fundamental requirements of notice and opportunity to defend are afforded (Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 620), and without stopping to indicate how clearly these fundamental rights were provided for, as demonstrated by the facts which we have enumerated, we [178] think it suffices to say that it does not appear that the contention of want of due process was urged either upon the trial court, or was assigned as error in the court below, or was passed upon by that court. And as in its opinion in this case concerning another subject, the court below pointed out that it was without authority to consider errors complained of which were not presented to the trial court, it follows that, in any view, it could not be held that the court below erred in deciding a matter which it did not decide, and which it had no authority to pass upon.

2d. It is contended that the ninth clause of the act of mortgage of 1901 was mandatory, and prohibited the firm of De Ford & Company from advancing to Torres, at his request, money to make his crop for the year 1904, and therefore such advances were not properly chargeable against the proceeds of the crop, and hence the interest was paid because the whole proceeds of the crop, if so imputed, disregarding the advances, would have been adequate to have paid the interest. But we think the court below was right in refusing to sustain this fictitious payment of interest, or to uphold the construction of the contract upon which it was based. We concur with the court below that the contract did not exclude the right of the firm to advance to Torres at his request, sums to aid him in making a crop, and thus to enable him to carry out, instead of disregarding, the letter and the spirit of the contract. This view, of course, disposes of the contention that error was committed in admitting proof of the agreement to make the advances and of their receipt by Torres, and his acquiescence in and approval of the accounts which were rendered him on the subject.

3d. It is urged, although Torres was fully informed of the institution of the foreclosure proceedings by the demand made upon him under the order of court, conformably to the mortgage law, and had the opportunity to defend afforded by that law, nevertheless the proceedings [179] were void because no copy of the petition of foreclosure and citation, as provided by the Code of Civil Procedure in ordinary cases, was issued and served. The contention is based upon the proposition that the Code of Procedure in force at the time the suit to foreclose was brought, to the extent that it directed service of citation and summons in ordinary cases, was cumulative and applicable to proceedings under the mortgage law, because not incompatible with such law. But, construing and applying the local law, the court below held that this contention was without merit,—a conclusion which we follow in the absence of a clear conviction that error was committed, which is far from being the case, and because in any event, for reasons which we shall hereafter state, the contention was additionally without merit.

4th. We group under this paragraph all the other errors relied upon, specifying only those which we consider of importance: (a) That the wife of Torres, as a widow in community, was not made a party defendant in the foreclosure suit; (b) that the notes secured by the mortgage were not annexed to the petition to foreclose, or filed therewith; (c) that the order of the court directing the notice of demand was signed only by two out of the three judges composing the court, and by an attorney at law who was then acting as judge because of the recusation of a member of the court; (d) because the act of mortgage did not contain a specification of value or appraisement for the purposes of foreclosure: (e) because of an asserted defect in the advertisement which preceded the sale; (f) because of the absence from the foreclosure record of the order finding the amount due, and directing its payment. The court disposed of all these objections separately upon considerations of local law, which we see no reason to reverse, but which we do not refer to in detail, because, in addition it held them all untenable upon a general, and we think, conclusive, ground to which we refer.

[180] It is not challenged, as pointed out by the court, that under the law of Porto Rico the state of the public record as to title is the dominant factor controlling proceedings for the foreclosure of a mortgage, and therefore that the one in whose name a property stands recorded upon the public records is the essential party to a proceeding to foreclose. Nothing could better illustrate the correctness of these propositions than do the proceedings in this case, since in consequence of the existence of the registry of the title in Alvarado, resulting from the sale made to him by Torres, the foreclosure proceedings against

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Torres and the judicial sale thereunder were inefficacious to transmute the title, and it became essential for Rosaly, the purchaser at such sale, to commence proceedings to enforce the mortgage as against Alvarado as a third possessor. Applying these principles the court held, in view of the existence of the record title in Alvarado, of his suit to restrain the foreclosure proceeding, and its dismissal for want of prosecution, of the steps taken against him as a third possessor, and his admissions on the subject, and consent to the erasure of the inscription of his title, that the foreclosure proceedings were binding, and it was not open to Torres, who, so far as the record was concerned, had parted with his title, to assail them on the grounds which we have stated. The correctness of the premise and of the conclusion itself, abstractly considered, is not denied, but it is insisted that they are here inapplicable because the sale made by Torres to Alvarado was a mere fiction or simulation; and one of the matters complained of which we have not specified is that error was committed in refusing to permit proof of the simulation.

The court below, however, considered and disposed of the alleged distinction in so conclusive and succinct a manner that we adopt and place our own conclusion upon it:

"Alvarado was the record owner and the ostensible [181] owner. He not only had a duly recorded public document in his favor, but he had begun a suit similar to the present one, and this course of action was inconsistent with the possession by anyone else.

"The appellant complains that the court erred in not permitting him to show that the conveyance made from Torres Zayas to Alvarado was fictitious or simulated, and that the real party in interest was always Torres Zayas. We cannot see that the court committed an error in refusing to admit such testimony; at most Alvarado would have to be considered as the agent or representative of Torres Zayas, and the maxim, *Qui facit per alium facit per se*, may be held to apply. The registry system in Porto Rico exists to apprise purchasers and others who are the true owners of property; and if a man, after treating with the apparent owner, may still have his title impugned by a secret agreement existing between such record owner and the alleged true owner, there would be no security in the acquisition of property." [16 P. R. R. 181.]

Affirmed.

NORTHERN PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.
JOSEPH A. HOUSTON.

(See S. C. Reporter's ed. 181–183.)

Public lands — railroad land grant — indemnity selections — approval.

Lands lawfully embraced in a list of indemnity selections filed by the Northern Pacific Railroad Company with the Land Department, and subsequently approved by the Secretary of the Interior, were not subject to entry or purchase under the Federal Land laws during the interim between the date of filing and the date of such approval.

[For other cases, see Public Lands, 125–131, in Digest Sup. Ct. 1908.]

[No. 57.]

Submitted November 11, 1913. Decided December 1, 1913.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the District Court of Morrison County, in that state, in favor of plaintiff in a suit to cancel a sale of land lying within the indemnity limits of a railroad land grant. Reversed and remanded for further proceedings.

See same case below, 109 Minn. 273, 123 N. W. 922, 18 Ann. Cas. 325.

Mr. Charles W. Bunn submitted the cause for plaintiff in error.

No appearance for defendant in error.

Memorandum opinion by Mr. Chief Justice White, by direction of the court:

In Northern P. R. Co. v. Wass, 104 Minn. 411, 116 N. W. 937, it was decided that lands claimed under an indemnity grant, and described in lists of indemnity selections filed in the appropriate United States Land Office, and which were rightfully pending for action by the proper officer, were nevertheless subject to entry by others, to the destruction of the right to select, and to the frustration of the governmental power to approve the selections and award the land under the granting law. The judgment below, which is now under review, was expressly rested by the court on the ruling in the Wass Case. Houston v. Northern P. R. Co. 109 Minn. 273, 123 N. W. 922, 18 Ann. Cas. 325. The identity between the controversies here presented and the one which was passed on

Note.—As to land grants to railroads, generally, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

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in the Wass Case is additionally shown by the fact that it is stated in the printed argument on behalf of the railroad company, the plaintiff in error, there being no argument on behalf of the defendant in error, that the land involved in this case was covered by selections made at the same time the selections which were involved in the Wass Case were made, and were embraced in the identical lists which were the subject of contest in that case. But since this case was decided by the court below, its ruling in the Wass Case was reviewed by this court and it was reversed, thereby destroying the only foundation upon which the judgment in this case could possibly rest. Northern Pacific R. Co. v. Wass, 219 U. S. 426, 55 L. ed. 280, 31 Sup. Ct. Rep. 321. It follows, for the reasons stated in the Wass Case, and upon the authority of that case, the judgment below must be [183] reversed and the case be remanded to the court below for further proceedings not inconsistent with the opinion in the Wass Case, and the action which we now take in applying the decision in that case.

Reversed.

UNITED STATES, Plff. in Err.,
v.
JOHN A. DAVIS and William B. Davis.

(See S. C. Reporter's ed. 183–190.)

Public lands — use of false or fraudulent documents — soldier's additional homestead right.

False and fraudulent documents made and used in support of a fraudulent claim under U. S. Rev. Stat. §§ 2304, 2307, U. S. Comp. Stat. 1901, pp. 1413, 1417, to a soldier's additional homestead right, whether forged or counterfeited or not, are embraced within the provision of § 5421 (U. S. Comp. Stat. 1901, p. 3667), which makes criminal the transmission to, or presentation at, or the causing or procuring to be transmitted to, or presented at, any office or officer of the government of the United States, of any deed, power of attorney, order, certificate, receipt, or other writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited.

[No. 395.]

Argued October 17, 1913. Decided December 1, 1913.

IN ERROR to the District Court of the United States for the Western District of Missouri to review a judgment quashing an indictment charging a conspiracy to commit an offense against the United States. Reversed.

The facts are stated in the opinion.

Assistant Attorney General Knaebel argued the cause and filed a brief for plaintiff in error:

The false writings intended by the third clause of U. S. Rev. Stat. § 5421, U. S. Comp. Stat. 1901, p. 3667, are not confined to forgeries, but include also writings genuine as to execution, but false and fraudulent in substance.

United States v. Staats, 8 How. 41, 12 L. ed. 979; United States v. Barney, 5 Blatchf. 294, Fed. Cas. No. 14,524; United States v. Bickford, 4 Blatchf. 337, Fed. Cas. No. 14,591; United States v. Spaulding, 3 Dak. 85, 13 N. W. 357, 538; United States v. Hansee, 79 Fed. 303; Dolan v. United States, 69 C. C. A. 274, 133 Fed. 450; United States v. Gowdy, 37 Fed. 332.

Mr. Thomas M. Seawell argued the cause, and, with Mr. Oscar T. Hamlin, filed a brief for defendants in error:

The construction of this indictment and each count thereof by the lower court was in effect that the instruments alleged to have been uttered for which the conspiracy was formed were not forged, but, when all the allegations of the indictment were considered, they appeared to be genuine in execution, and only false in their statements. This construction is without doubt correct; but if it is not, still this court cannot review that question in this proceeding, because the construction of the indictment, made by the lower court, is final in this court.

United States v. Biggs, 211 U. S. 507, 53 L. ed. 305, 29 Sup. Ct. Rep. 181; United States v. Keitel, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123.

Sections 28 and 29 of the Penal Code, namely, the act of Congress approved March 4th, 1909, relate and refer solely to forged, false, and counterfeited instruments, public records, affidavits, and other writings, and not to instruments, public records, affidavits, and other writings containing false statements; therefore, the indictment does not state facts sufficient to constitute an offense under § 57 of the Penal Code; namely, a conspiracy to commit an offense prohibited by §§ 28 and 29 of the Penal Code.

United States v. Staats, 8 How. 41, 12 L. ed. 979; United States v. Howell, 11 Wall. 432, 20 L. ed. 195; United States v. Moore, 60 Fed. 738; United States v. Glasener, 81 Fed. 566; United States v. Albert, 45 Fed. 552; United States v. Wentworth, 11 Fed. 52; United States v. Barney, 5 Blatchf. 294, Fed. Cas. No. 14,524; United States v. Reese, 4 Sawy. 629, Fed. Cas. No. 16,138;

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State v. Willson, 28 Minn. 52, 9 N. W. 28; Mann v. People, 15 Hun, 155; State v. Young, 46 N. H. 266, 88 Am. Dec. 212; Com. v. Baldwin, 11 Gray, 197, 71 Am. Dec. 703; Barbour, Crim. Law, 97; Wharton Crim. Law, § 653.

The affidavit of the claimant is unofficial in character, and initiated no right to any tract of land; being mere *ex parte* declarations under oath by persons having no official relation to the government.

Barnes v. Poirier, 12 C. C. A. 9, 27 U. S. App. 500, 64 Fed. 14; Webster v. Luther, 163 U. S. 331, 41 L. ed. 179, 16 Sup. Ct. Rep. 963.

If no affidavits are required in such matters, then there can be no criminal offense based either upon the fact that said instruments were forged, or were genuine and contained false statements. The instruments, being unknown to the law, cannot be made the basis of a criminal offense, and therefore a proper construction of §§ 28 and 29 of the Penal Code does not include the instruments contained in the indictment.

United States v. Dupont, 176 Fed. 823.

Even if there were rules and regulations of the Land Department providing for such instruments, still, as they are not authorized by any law of the United States, such requirements cannot be made the basis of a criminal offense.

Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; Webster v. Luther, 163 U. S. 331, 41 L. ed. 179, 16 Sup. Ct. Rep. 963; United States v. Eaton, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764.

If there be any fraudulent purpose disclosed in the indictments, it is not to defraud the government, but individuals who may be allured into the purchase of such rights. The statute does not include such conduct towards individuals.

Pettibone v. United States, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542; United States v. Thompson, 29 Fed. 86; United States v. Fout, 123 Fed. 625.

Mr. Chief Justice White delivered the opinion of the court:

The indictment charged the defendants under Penal Code, § 37 (Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676), with a conspiracy to commit offenses against the United States; that is, to violate §§ 28 and 29 of the Penal Code (act March 4, 1909, chap. 321, 35 Stat. at L. 1094, U. S. Comp. Stat. Supp. 1911, p. 1597). These sections, leaving [187] aside additions, irrelevant to this case, are reproductions of §§ 5421 and 5479, Revised Statutes (U. S. Comp. Stat. 1901, pp. 3667, 3696), in force in 1909 when the acts charged were committed. All the overt acts concerned the making or use of false affidavits and documents, in support of a fraudulent claim for land under Rev. Stat. §§ 2304 and 2307 (U. S. Comp. Stat. 1901, pp. 1413, 1417), giving honorably discharged soldiers of the Civil War the right to make an additional entry under the circumstances stated in the statutes, and the privilege also conferred upon the widow of such honorably discharged soldier to make a claim for land as therein provided. In passing on demurrers, the court treating all the counts as relating solely to the making and use of documents which were merely false and fraudulent, but not forged, and construing §§ 5421 and 5479, Rev. Stat. (U. S. Comp. Stat. 1901, pp. 3667, 3696), and Penal Code, §§ 28 and 29, as embracing only documents which were forged and counterfeited, held that none of the counts charged acts embraced by the provisions in question, and therefore the indictment was quashed because it stated no offense against the United States. On this direct appeal we assume the correctness of the meaning affixed to the indictment by the court below, and come only to determine whether the statute was correctly construed. This duty is narrowed by a concession made in argument by the government to the effect that the construction given by the court to the statute was correct except as to the last paragraph of § 5421, and that even if, as to that paragraph, it be held that the court below was wrong, and that the terms of the paragraph include affidavits, documents, etc., which were merely fraudulent, and not forged, only the fourth count would in that contingency be within the section. This consequently confines the issue to a consideration of the third paragraph of the section. For convenience of reference the entire section is in the margin.†

[188] Coming to the text of the third paragraph, we think it is at once apparent that its provisions are so comprehensive as to prevent us from holding that they include only documents which are forged or counterfeited, and hence exclude all other documents, however fraudulent they may be.

†Sec. 5421. Every person who falsely makes, alters, forges, or counterfeits, or causes or procures to be falsely made, altered, forged, or counterfeited, or willingly aids or assists in the false making, altering, forging, or counterfeiting, any deed, power of attorney, order, certificate, receipt, or other writing for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money;

or who utters or publishes as true, or causes to be uttered or published as true, any such false, forged, altered, or counterfeited deed, power of attorney, order, cer-

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The all-embracing words "any deed, power of attorney, order, certificate, receipt, or other writing in support of or in relation to any account or claim with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited," leave room for no other conclusion. The context of the section reinforces this view, since the contrast between the narrow scope of the first two paragraphs and the enlarged grasp of the third shows the legislative intent, after fully providing in the first two paragraphs for forged and counterfeited documents, instruments, etc., to reach by the provisions of the third paragraph, any and all fraudulent documents, whether forged or not forged, and thus efficiently to deter [189] from committing the wrong which it was the purpose of the section to prohibit. It is not, however, necessary to fix the true meaning of the provision by a resort, as an original question, to its text, since its significance has been authoritatively determined contrary to the construction adopted by the court below. The section represents the 1st section of the act of March 3, 1823, 3 Stat. at L. 771, chap. 38, U. S. Comp. Stat. 1901, p. 3667, the title of which, "An Act for the Punishment of Frauds Committed on the Government of the United States," manifests the purpose which Congress had in mind in enacting it. As long ago as 1850, in United States v. Staats, 8 How. 41, 12 L. ed. 979, the court was called upon to determine whether an indictment charging the transmission of a false (but not forged) affidavit touching a claim for pension was sustainable under the third clause of the section. The court fully analyzed the statute, and while conceding that other clauses of the act dealt with forged instruments in a technical sense, concluded that the case was within both the letter and the spirit of the act, and therefore that the acts charged in the indictment constituted an offense within the provisions of the law. When, then, the question before us is determined in the light of the text of the third paragraph and the context of the section, especially as elucidated by the ruling in the Staats Case, we think it clearly results that the court below was wrong in the construction which it gave the statute, and therefore its judgment must be reversed. In saying this we do not overlook the fact that in the argument for the defendant in error it is insisted that even although it be found that the construction which the court below gave was an erroneous one, nevertheless its judgment should be affirmed because from other points of view, the statute, if rightly construed, would exclude the possibility of holding that the facts charged in the indictment were within its terms. But without going into detail on this subject, we content ourselves with saying that, in our opinion, all the propositions [190] relied upon to sustain this result are so obviously unsound, or so plainly concern the construction of the indictment, as not to call for particular notice.

Reversed.

UNION PACIFIC RAILROAD COMPANY,
Plff. in Err.,
v.
LARAMIE STOCK YARDS COMPANY.

(See S. C. Reporter's ed. 190–204.)

Adverse possession — railroad right of way — retrospective operation of statute.

1. A retrospective operation will not be given to the provision of the act of June 24, 1912 (37 Stat. at L. 138, chap. 181), that the adverse possession of any part of the railroad right of way granted by the act of July 1, 1862 (12 Stat. at L. 489, chap. 120), shall have the same effect, when of the character and duration prescribed by the laws of the state in which the land is situated, as though the land embraced within the lines of said right of way had been granted by the United States absolutely or in fee.

[For other cases, see Adverse Possession, I. h; Statutes, II. v, in Digest Sup. Ct. 1908.]

Corporations — charter — amendment.

2. Congress cannot be deemed to have

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tificate, receipt, or other writing with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited;

or who transmits to, or presents at, or causes or procures to be transmitted to or presented at any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing in support of or in relation to any account or claim with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, shall be imprisoned at hard labor for a period of not less than one year nor more than ten years; or shall be imprisoned not more than five years, and fined not more than one thousand dollars.

NOTE.—On adverse possession of railroad right of way—see note to Roberts v. Sioux City & P. R. Co. 2 L.R.A.(N.S.) 272.

As to retrospective statutes generally—see notes to Otoe County v. Baldwin, 28 L. ed. U. S. 331, and Barnitz v. Beverly, 41 L. ed. U. S. 94.

On power to alter, amend, or repeal corporate charters—see note to Greenwood v. Union Freight R. Co. 26 L. ed. U. S. 961.

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exercised its right to alter, amend, or repeal, reserved in the acts of July 1, 1862, and of July 2, 1864 (13 Stat. at L. 356, chap. 216), incorporating the Union Pacific Railroad Company, and making land grants in aid of railway construction, by the enactment of the act of June 24, 1912, legalizing conveyances of land forming a part of the railroad right of way, theretofore made by the railway company, and providing that adverse possession of any part of such right of way shall have the same effect, when of the character and duration prescribed by the laws of the state in which the land is situated, as though the land embraced within the lines of said right of way had been granted by the United States absolutely or in fee.

[For other cases, see Corporations, IV., in Digest Sup. Ct. 1908.]

[No. 570.]

Submitted October 14, 1913. Decided December 1, 1913.

IN ERROR to the District Court of the United States for the District of Wyoming to review a judgment in favor of defendant in an action of ejectment. Reversed and remanded, with directions to sustain the demurrer to the answer.

The facts are stated in the opinion.

Messrs. John W. Lacey and N. H. Loomis submitted the cause for plaintiff in error. Mr. Herbert V. Lacey was on the brief:

Prior to the act of June 24, 1912, title to the right of way could not have been acquired by adverse possession.

Northern P. R. Co. v. Townsend, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671; Kindred v. Union P. R. Co. 225 U. S. 582, 597, 56 L. ed. 1216, 1220, 32 Sup. Ct. Rep. 780; Northern P. R. Co. v. Smith, 171 U. S. 260, 275, 43 L. ed. 157, 163, 18 Sup. Ct. Rep. 794; Northern P. R. Co. v. Ely, 197 U. S. 1, 5, 49 L. ed. 639, 640, 25 Sup. Ct. Rep. 302; Stuart v. Union P. R. Co. 227 U. S. 342, 353, 57 L. ed. 535, 543, 33 Sup. Ct. Rep. 338.

The act, in so far as it attempts to convey title by adverse possession, is not retroactive.

United States v. Burr, 159 U. S. 78, 82, 40 L. ed. 82, 83, 15 Sup. Ct. Rep. 1002; United States v. American Sugar Ref. Co. 202 U. S. 563, 577, 50 L. ed. 1149, 1152, 26 Sup. Ct. Rep. 717; Twenty Per Cent Cases, 20 Wall. 179, 187, 22 L. ed. 339, 341; United States v. Heth, 3 Cranch, 413, 2 L. ed. 483; Black, Const. Law, 2d ed. p. 627, § 286; Reynolds v. M'Arthur, 2 Pet. 417, 7 L. ed. 470; Dash v. Van Kleeck, 7 Johns. 503, 5 Am. Dec. 291; Society for Propagation of Gospel v. Wheeler, 2 Gall. 105, Fed. Cas. No. 13,156; Calder v. Bull, 3 Dall. 386, 388, 1 L. ed. 648, 649; Winfree v. Northern P. R. Co. 227 U. S. 296, 57 L. ed. 518, 33 Sup. Ct. Rep. 273.

If construed as retroactive, the act of June 24, 1912, operates immediately, and by virtue of itself alone, to take from the plaintiff its vested right and title to the property in controversy, and transfer the same to the defendant without due process of law, and is therefore unconstitutional.

Sinking Fund Cases, 99 U. S. 700, 718, 25 L. ed. 496, 501; United States v. Union P. R. Co. 160 U. S. 1, 40 L. ed. 319, 16 Sup. Ct. Rep. 190; Walbridge v. Russell County, 74 Kan. 341, 86 Pac. 473; Proprietors of Kennebec Purchase v. Laboree, 2 Me. 275, 11 Am. Dec. 79; Webster v. Cooper, 14 How. 488, 14 L. ed. 510; Thistle v. Frostburg Coal Co. 10 Md. 144; Osborn v. Jaines, 17 Wis. 573; Fletcher v. Peck, 6 Cranch, 87, 135, 3 L. ed. 162, 177; Sturges v. Crowninshield, 4 Wheat. 122, 206, 4 L. ed. 529, 551; Sohn v. Waterson, 17 Wall. 596, 599, 21 L. ed. 737, 738; Herrick v. Boquillas Land & Cattle Co. 200 U. S. 96, 102, 50 L. ed. 388, 391, 26 Sup. Ct. Rep. 192.

Messrs. Roderick N. Matson and T. Blake Kennedy submitted the cause for defendant in error:

The act in controversy is an alteration or an amendment of the original grants to the Pacific Railroad Companies, and as such violates no constitutional provision.

Miller v. New York, 15 Wall. 478–498, 21 L. ed. 98–104; Holyoke Water Power Co. v. Lyman, 15 Wall. 500, 519, 21 L. ed. 133, 139; Tomlinson v. Jessup, 15 Wall. 454, 459, 21 L. ed. 204, 206; Maine C. R. Co. v. Maine, 96 U. S. 499–510, 24 L. ed. 836–840; Shields v. Ohio, 95 U. S. 319, 324, 24 L. ed. 357, 359; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Looker v. Maynard, 179 U. S. 46, 52, 45 L. ed. 79, 81, 21 Sup. Ct. Rep. 21; Calder v. Michigan, 218 U. S. 591, 54 L. ed. 1163, 31 Sup. Ct. Rep. 122.

A retrospective law is not in itself unconstitutional.

Satterlee v. Matthewson, 2 Pet. 380, 413, 7 L. ed. 458, 469; Curtis v. Whitney, 13 Wall. 68, 70, 20 L. ed. 513, 514; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 540, 9 L. ed. 773, 821; Watson v. Mercer, 8 Pet. 88, 110, 8 L. ed. 876, 884; Baltimore & S. R. Co. v. Nesbit, 10 How. 395, 401, 13 L. ed. 469, 472; Blount v. Windley, 95 U. S. 173, 180, 24 L. ed. 424, 426; Calder v. Bull, 3 Dall. 386, 391, 1 L. ed. 648, 650.

Legislatures may pass laws regulating the conduct and operation of corporations then in existence, and such statutes do not devest vested rights or impair contract obligations.

Munn v. Illinois, 94 U. S. 113, 134, 24 L. ed. 77, 87.

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The question of vested rights is closely associated with the question of the enjoyment of contracts which are guaranteed by constitutional provision, and as to what may be considered within the scope of legislative powers, so far as impairing contract obligations under constitutional restriction is concerned, the field is very broad.

Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; Curtis v. Whitney, 13 Wall. 68, 20 L. ed. 513; Pearsall v. Great Northern R. Co. 161 U. S. 646, 673, 676, 40 L. ed. 838, 847, 848, 16 Sup. Ct. Rep. 705.

Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state, and within legislative control; and in the exertion of such power the legislature is vested with a large discretion, which, if exercised bona fide for the protection of the public, is beyond the reach of judicial inquiry.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 700, 40 L. ed. 849, 859, 16 Sup. Ct. Rep. 714.

Mr. Justice McKenna delivered the opinion of the court:

Ejectment to recover certain described lands alleged to constitute part of the right of way of plaintiff (being such in the court below, we will so call it).

The allegations of the complaint are that plaintiff and defendant are corporations, and that plaintiff is engaged in the operation of a railroad from Ogden, in Utah, easterly through certain states to Council Bluffs, Iowa, and over the lands in controversy, they being portions of its right of way made by the act of Congress of July 1, 1862 [12 Stat. at L. 489, chap. 120], of the width of 400 feet. The right of way was acquired under said act of Congress, which is entitled, "An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to Secure to the Government the Use of the Same for Postal, Military, and Other Purposes." Section 2 of the act provides as follows: "That the right of way through the public lands be and the same is hereby granted to said company [the Union Pacific Railroad Company] for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations."

[197] By virtue of said act of Congress and amendatory acts, certain railroad companies, which are enumerated, theretofore organized and existing in pursuance of said acts, and subject to and enjoying the rights created thereby, were consolidated into a new corporation known as "The Union Pacific Railway Company," and the corporation thus created became vested with all the rights of the said constituent corporations, and the plaintiff has become the successor of the Union Pacific Railway Company and is entitled to the possession of the land in controversy, and that defendant wrongfully keeps it out of the possession thereof. The ground of the asserted right of defendant is alleged to be an act of Congress entitled, "An Act Legalizing Certain Conveyances Heretofore Made by the Union Pacific Railroad Company," approved June 24, 1912 [37 Stat. at L. 138, chap. 181], which act, it is alleged, is unconstitutional in that it seeks to deprive plaintiff of its vested rights and titles in and to the lands, and to deprive it of its lands and property without due process of law.

The answer of defendant admits all of the allegations of the complaint except the possession of the legal title to the lands in plaintiff, and that they are unlawfully held from it, and alleges that defendant and its immediate grantors have been for more than ten years prior to the filing of the complaint in the adverse possession thereof under the act of Congress of June 24, 1912, and that such possession constitutes a bar to the action.

Plaintiff demurred to the answer as not constituting a defense. The demurrer was overruled, and, plaintiff declining to plead further, judgment was entered that it "take nothing in said action," and that the defendant have and recover costs. This appeal was then prosecuted.

The crux of the controversy is the act of June 24, 1912. There is no question of the grant of the right of way and its extent, or that the lands in suit are within it.

The act provides that all conveyances and agreements [198] heretofore made by the enumerated railway or railroad companies "of certain land forming part of the right of way" under the act of Congress of July 1, 1862, "and all conveyances or agreements confining the limits of said right of way, or restricting the same, are hereby legalized, validated, and confirmed to the

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extent that the same would have been legal or valid if the land involved therein had been held by the corporation making such conveyance or agreement under absolute or fee-simple title.

"That in all instances in which title or ownership of any part of said right of way heretofore mentioned is claimed as against said corporations or either of them, or the successors or assigns of any of them, by or through adverse possession of the character and duration prescribed by the laws of the state in which the land is situated, such adverse possession shall have the same effect as though the land embraced within the lines of said right of way had been granted by the United States absolutely or in fee instead of being granted as a right of way."

Two contentions are made by plaintiff: (1) The act is not retroactive; (2) if it be so construed, it is unconstitutional because it takes plaintiff's vested right and title to the property, and transfers the same to defendant without due process of law.

It is established that the right of way to the several railroads was a present, absolute grant, subject to no conditions except those necessarily implied, such as that the roads should be constructed and used. And it has been decided that the right of way was a very important aid given to the roads (St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578; Stuart v. Union P. R. Co. 227 U. S. 342, 57 L. ed. 535, 33 Sup. Ct. Rep. 338), and that it could not be voluntarily transferred by the companies, nor acquired against them by adverse possession (Northern P. R. Co. v. Townsend, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671; Northern P. R. Co. v. Smith, 171 U. S. 260, 275, 43 L. ed. 157, 163, 18 Sup. Ct. Rep. 794; [199] Northern P. R. Co. v. Ely, 197 U. S. 1, 5, 49 L. ed. 639, 640, 25 Sup. Ct. Rep. 302). Of this defect of power in the companies and the defect of right in the possessors of the right of way, the act of June 24th was intended to be corrective. But of what time was it intended to speak—to the past or future?—to apply to that which was done, or that which was to be done? There is no doubt as to the answer in the case of agreements or conveyances by the company. The act is explicit that they are those "heretofore made" by the enumerated companies. There is no such qualifying word of the "title or ownership" "claimed as against" the corporation by adverse possession. Construction, therefore, becomes necessary, and the first rule of construction is that legislation must be considered as addressed to the future, not to the past. The rule is one of obvious justice, and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed. The rule has been expressed in varying degrees of strength, but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights, or by which human action is regulated, unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." United States v. Heth, 3 Cranch, 413, 2 L. ed. 483; Reynolds v. M'Arthur, 2 Pet. 417, 7 L. ed. 470; United States v. American Sugar Ref. Co. 202 U. S. 563, 577, 50 L. ed. 1149, 1152, 26 Sup. Ct. Rep. 717; Winfree v. Northern P. R. Co. 227 U. S. 296, 57 L. ed. 518, 33 Sup. Ct. Rep. 273. Surely such imperative character cannot be assigned to the words of the act of June 24; and the intention is not so manifest as to strengthen the insufficiency of the words. Indeed, all reasonable considerations determine the other way.

We have seen that the conveyances and agreements which were legalized were those theretofore made; that is, consummated acts of the company deliberately done to transfer its right. Can it be said that the adverse [200] possession which was to transfer the right was to be less complete, not fully adverse in fact and law, at once assertive of title and concessive of it? It is to be remembered that there was no sanction of a right to the possession of the defendant, or possibility of a right by the railroad company's nonaction. There was not a moment of time in which the railroad was called upon to act or lose its right; there was not a moment of time when the possession of defendant initiated an adverse right or constituted an adverse right. This being the situation, it is difficult to believe—or certainly a belief is not compelled—that Congress intended to give to the past conduct of the railroad company a consequence it was not intended to have and did not have. A statute having such a result may incur the opposition of the Constitution. When such may be the result, a different construction of the statute is determined. United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 408, 53 L. ed. 836, 849, 29 Sup. Ct. Rep. 527; Harriman v. Interstate Commerce Commission, 211 U. S. 407, 53 L. ed. 253, 29 Sup. Ct. Rep. 115.

In Sohn v. Waterson, 17 Wall. 596, 21 L. ed. 737, the questions we are now discussing came up for consideration. We there expressed, in considering a statute

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of limitations whose literal interpretation would have had the effect of making it applicable to actions which had accrued prior to its passage, the rule against retrospective operation,—the injustice and unconstitutionality of it. We said that a statute of limitations may affect actions which have accrued as well as those to accrue, and "whether it does or not will depend upon the language of the act and the apparent intent of the legislature to be gathered therefrom." But it was said that, even against a literal interpretation of the terms of the statute, "it will be presumed that such was not the intent of the legislature. Such an intent would be unconstitutional. To avoid such a result, and to give the statute a construction that will enable it to stand, courts have given it a prospective [201] operation." And three modes were pointed out as having been adopted by the courts: (1) to make the statute apply only to causes of action arising after its passage; (2) to construe the statute as applying to such actions only as have run out a portion of the time, but which still have a reasonable time left for the prosecution of the action before the statutory time expires,—which reasonable time is to be estimated by the court,—leaving all other actions accruing prior to the statute unaffected by it; and (3) the rule announced in Ross v. Duval, 13 Pet. 62, 10 L. ed. 59, and Lewis v. Lewis, 7 How. 778, 12 L. ed. 910.

Of the first two modes there was condemnation. The third was approved. It was said of the first that it left "all actions existing at the passage of the act, without any limitation." Which would not be presumed as intended. The second was said to be founded on no better principle than the first, and was a more arbitrary rule than that, as it left "a large class of actions entirely unprovided with any limitation whatever, or, as to them, unconstitutional."

Speaking of the rule announced in the cited cases, it was said: "In those cases certain statutes of limitation—one in Virginia and the other in Illinois—had originally excepted from their operation nonresidents of the state, but this exception had been afterwards repealed; and this court held that the nonresident parties had the full statutory time to bring their actions after the repealing acts were passed, although such actions may have accrued at an earlier period. 'The question is,' says Chief Justice Taney (speaking in the latter of the cases just cited), 'from what time is this limitation to be calculated? Upon principle, it would seem to be clear that it must commence when the cause of action is first subjected to the operation of the statute, unless the legislature has otherwise provided.'"

Sohn v. Waterson was cited and its principle applied in Herrick v. Boquillas Land & Cattle Co. 200 U. S. 97, 50 L. ed. 389, 26 Sup. Ct. Rep. 192. A paragraph [202] in the statutes of Arizona prescribed a limitation of actions as follows: "Any person who has a right of action for recovery of any lands, tenements, or hereditaments against another having peaceable and adverse possession thereof, cultivating, using, and enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward."

It will be observed that the language of the paragraph, as of the statute passed on in Sohn v. Waterson, or, it may be, the act of June 24th under review, literally interpreted, would apply to causes of action which have accrued. The supreme court of the territory refused to give that effect to the provision, and "decided," as this court said, "that under no canon of construction or rule giving a retroactive effect to a new statute of limitations could paragraph 2938 be made to apply to the case." And, after considering all possible constructions of the statute expressed by the supreme court of the territory, among others, that if it be construed as absolutely barring causes of action existing at the time of its passage, it was unconstitutional, citing Sohn v. Waterson, this court approved the views expressed, and said that the court committed no error in determining that under no possible hypothesis could the limitation prescribed operate to bar the plaintiff's action.

The principle of these cases forbids a retrospective operation to be given to the statute under consideration. To do so would cause in a high degree the evil and injustice of retroactive legislation. As said by plaintiff's counsel, the possession of defendant prior to the statute "had no effect on the title, and was not, as between the parties, even a threat against it." And we are loath to believe that Congress intended by an imperative declaration of law, immediately operating, to give defendant's possession another character,—one hostile to the title.

Defendant does not combat plaintiff's contentions based [203] on considering the act of June 24th as one of limitation. Indeed, the admission is "that prior to the passage of the act in controversy, title by adverse possession could not be acquired as against the plaintiff in error in its original right-of-way grant, and it is further admitted that title could not have

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been acquired by adverse possession subsequent to the passage of the act." Defendant does not regard the act as a limitation of the remedy, but as amendatory of the charter of the company,—an exercise of a right reserved in the acts of 1862† and 1864.‡ The argument is, disregarding its involutions, that the right of way was not a right in fee, but only a right to use, which was forfeited by nonuse, and that the right which thereby reverted to the United States was, by the act of June 24th, conveyed to those in possession of the land. And the exercise of the right reserved, it is contended, neither impairs any contract with the railroad nor devests its property. Nor does it come under the condemnation of being retroactive legislation, it is further contended. We need not follow the discussion by which these contentions are attempted to be supported. We meet them all by the declaration that Congress, by the act of June 24th, did not intend to exercise the power over the charters of the companies reserved to it. The exercise of such power would naturally only find an impulse in some large national purpose, and would hardly be provoked by a desire to legalize the encroachments here and there on the right of way of a transcontinental railroad.

We are constrained to believe that when Congress intends to forfeit or limit any of the rights conveyed to aid that great enterprise, it will do so explicitly and directly [204] by a measure proportionate to the purpose, and not leave it to be accomplished in a piecemeal and precarious way, —not by confirming a few conveyances which may have been made, or legalizing trespasses which may be made.

But if it could be conceded that the act of June 24th was intended as an amendment of the charters of the companies, the question would still occur as to its effect, —as to what time it should be considered as applying, whether to the past or the future. That question we have decided.

Judgment reversed and cause remanded, with directions to sustain the demurrer to the answer.

Mr. Justice Hughes dissents.

Mr. Justice Holmes, Mr. Justice Lurton, and Mr. Justice Pitney took no part in the decision.

†"Congress may at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act." 12 Stat. at L. 497, chap. 120.

‡"And be it further enacted, that Congress may at any time after, amend, or repeal this act." 13 Stat. at L. 365, chap. 216.

UNION PACIFIC RAILROAD COMPANY, Plff. in Err.,
v.
GEORGE A. SNOW and Robert W. Burton (Said Burton Doing Business as an Individual under the Name and Style of Byers Mercantile Company).

(See S. C. Reporter's ed. 204–213.)

Adverse possession — railroad right of way — retrospective operation of statute.

1. A restrospective operation will not be given to the provisions of the act of June 24, 1912 (37 Stat. at L. 138, chap. 181), that adverse possession of any part of the railroad right of way granted by the act of July 1, 1862 (12 Stat. at L. 489, chap. 120), shall have the same effect when of the character and duration prescribed by the laws of the state in which the land is situated as though the land embraced within the lines of said right of way had been granted by the United States absolutely or in fee.

[For other cases, see Adverse Possession, I. h; Statutes, II. v, in Digest Sup. Ct. 1908.]

Public lands — railway right of way — forfeiture.

2. Some act of the United States is necessary to effect a forfeiture of the right of way in aid of railway construction, granted by the act of July 1, 1862, and to reinvest the United States with complete title to the land granted.

[For other cases, see Public Lands, 271–298, 320–329, in Digest Sup. Ct. 1908.]

[No. 682.]

Submitted October 14, 1913. Decided December 1, 1913.

IN ERROR to the Supreme Court of the State of Colorado to review a judgment which reversed a judgment of the District Court of Arapahoe County, in that state, in favor of plaintiff in an action of ejectment. Reversed and remanded for further proceedings.

See same case below, 1 Colo. 1, 137 Pac. 1037.

The facts are stated in the opinion.

Messrs. N. H. Loomis and C. C. Dorsey submitted the cause for plaintiff in error. Mr. E. I. Thayer was on the brief:

The act of June 24, 1912, correctly construed, is not retrospective in its operation,

NOTE.—On adverse possession of railroad right of way—see note to Roberts v. Sioux City & P. R. Co. 2 L.R.A.(N.S.) 272.

As to retrospective statutes generally—see notes to Otoe County v. Baldwin, 28 L. ed. U. S. 331, and Barnitz v. Beverly, 41 L. ed. U. S. 94.

As to land grants to railroads, generally —see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

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and therefore is inapplicable to the cases in hand.

United States v. Burr, 159 U. S. 78, 82, 40 L. ed. 82, 83, 15 Sup. Ct. Rep. 1002; United States v. American Sugar Ref. Co. 202 U. S. 563, 577, 50 L. ed. 1149, 1152, 26 Sup. Ct. Rep. 717; Twenty Per Cent Cases, 20 Wall. 179, 187, 22 L. ed. 339, 341; United States v. Heth, 3 Cranch, 413, 2 L. ed. 483; Black, Const. Law, 2d ed. p. 627, § 286; Winfree v. Northern P. R. Co. 227 U. S. 296, 301, 57 L. ed. 518, 520, 33 Sup. Ct. Rep. 273; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

Unconstitutionality will be avoided, if possible, by putting such a construction on the statute as will make it conform to the Constitution.

Black's Const. Law, 2d ed. p. 60, § 37; Miller v. United States (Page v. United States) 11 Wall. 268, 309, 20 L. ed. 135, 145; United States v. Coombs, 12 Pet. 72, 9 L. ed. 1004; Grenada County v. Brogden (Grenada County v. Brown) 112 U. S. 261, 268, 28 L. ed. 704, 706, 5 Sup. Ct. Rep. 125; Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388, 394, 45 L. ed. 244, 247, 21 Sup. Ct. Rep. 101; Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 101, 47 L. ed. 721, 726, 23 Sup. Ct. Rep. 611; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 408, 53 L. ed. 836, 849, 29 Sup. Ct. Rep. 527; Harriman v. Interstate Commerce Commission, 211 U. S. 407, 53 L. ed. 253, 29 Sup. Ct. Rep. 115; Knights Templars' & M. Life Indemnity Co. v. Jarman, 187 U. S. 197, 204, 47 L. ed. 139, 145, 23 Sup. Ct. Rep. 108.

If the act of June 24, 1912, requires the retrospective construction, and is to be given the retrospective effect attributed to it by the Colorado supreme court, it is unconstitutional and beyond the power of Congress to enact.

Sinking Fund Cases, 99 U. S. 700, 718, 25 L. ed. 496, 501; United States v. Union P. R. Co. 160 U. S. 1, 40 L. ed. 319, 16 Sup. Ct. Rep. 190; Walbridge v. Russell County, 74 Kan. 341, 86 Pac. 473; Wilkinson v. Leland, 2 Pet. 627, 657, 7 L. ed. 542, 553; Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; Society for Propagation of Gospel v. New Haven, 8 Wheat. 464, 5 L. ed. 662; Proprietors of Kennebec Purchase v. Laboree, 2 Me. 295, 11 Am. Dec. 79; Webster v. Cooper, 14 How. 488, 502, 503, 14 L. ed. 510, 516, 517; Thistle v. Frosburg Coal Co. 10 Md. 145; Wilson v. Iseminger, 185 U. S. 55, 62, 46 L. ed. 804, 807, 22 Sup. Ct. Rep. 573; Price v. Hopkin, 13 Mich. 324; Cooley, Const. Lim. 7th ed. p. 523; Ochoa v. Hernandez y Morales, 230 U. S. 139, 161, 57 L. ed. 1427, 1437, 33 Sup. Ct. Rep. 1033.

Congress could not, under the reserved power to alter or amend, by such alteration or amendment destroy rights actually vested, nor disturb transactions fully consummated, nor take away property already acquired under the operation of the charter.

United States v. Union P. R. Co. 160 U. S. 1, 33, 40 L. ed. 319, 330, 16 Sup. Ct. Rep. 190.

A well-settled and universally accepted canon of construction forbids us to apply the words "heretofore made," used in the first portion of the act in respect to conveyances and agreements, to the second portion of the act, wherein adverse possession under the state statute is separately and specifically dealt with.

United States v. Chase, 135 U. S. 255, 260, 34 L. ed. 117, 119, 10 Sup. Ct. Rep. 756, 8 Am. Crim. Rep. 649; Kepner v. United States, 195 U. S. 100, 125, 49 L. ed. 114, 122, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655; Townsend v. Little, 109 U. S. 504, 512, 27 L. ed. 1012, 1015, 3 Sup. Ct. Rep. 357; Endlich Interpretation of Statutes, § 399, pp. 559, 560.

Messrs. Milton Smith and Charles R. Brock submitted the cause for defendant in error. Mr. W. H. Ferguson was on the brief:

Any title which plaintiff in error or its predecessors ever had in or to the premises in controversy emanated from the act of Congress of July 1, 1862, and was a limited or determinable fee, conditioned upon the continued use of the right of way for railroad purposes.

Stuart v. Union P. R. Co. 227 U. S. 342, 57 L. ed. 535, 33 Sup. Ct. Rep. 338; Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 494, 24 L. ed. 1095, 1096; United States v. Kansas P. R. Co. 99 U. S. 455, 25 L. ed. 289; Northern P. R. Co. v. Smith, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 794; Northern P. R. Co. v. Townsend, 190 U. S. 267, 271, 47 L. ed. 1044, 1046, 23 Sup. Ct. Rep. 671; Northern P. R. Co. v. Ely, 197 U. S. 1, 49 L. ed. 639, 25 Sup. Ct. Rep. 302; Oregon Short Line R. Co. v. Quigley, 10 Idaho, 770, 80 Pac. 405; First Universalist Soc. v. Boland, 155 Mass. 174, 15 L.R.A. 231, 29 N. E. 524; Greenleaf's Cruise, Real Prop. title 13, chap. 2, § 64; 2 Bl. Com. 155; 4 Kent. Com. 13th ed. p. 134; Denver & S. F. R. Co. v. School Dist. 14 Colo. 332, 23 Pac. 978; Atlantic & P. R. Co. v. Mingus, 165 U. S. 413, 430, 41 L. ed. 770, 777, 17 Sup. Ct. Rep. 348; Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551.

Under the allegations contained in the second defense of the answers, the title or

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ownership of the land in controversy was claimed by or through adverse possession of the character and duration prescribed by the laws of the state of Colorado, and the supreme court of Colorado in these cases conclusively held that the allegations of the second defense were sufficient, under the state statutes, to establish title by adverse possession.

Snow v. Union P. R. Co. — Colo. —, 133 Pac. 1037; Sides v. Union P. R. Co. — Colo. —, 133 Pac. 1040; Laws v. Newkirk, 39 Colo. 78, 88 Pac. 861; Hurd v. McClellan, 1 Colo. App. 330, 29 Pac. 181; Latta v. Clifford, 47 Fed. 619; Elder v. McClaskey, 17 C. C. A. 251, 37 U. S. App. 1, 199, 70 Fed. 529; Scott v. Mineral Development Co. 64 C. C. A. 659, 130 Fed. 497, 196 U. S. 640, 49 L. ed. 631, 25 Sup. Ct. Rep. 796; Harpending v. Reformed Protestant Dutch Church, 16 Pet. 455, 10 L. ed. 1029; Santee River Cypress Lumber Co. v. James, 50 Fed. 360; United States v. One Lot of Land, 178 Fed. 334; Green v. Neal, 6 Pet. 291, 8 L. ed. 402.

The title acquired by the defendants in error under the adverse possession statutes of Colorado was precisely equivalent in contemplation of law to such title as they would have acquired had the railroad company expressly granted to them all its right, title, and interest in the premises in controversy.

Northern P. R. Co. v. Ely, 197 U. S. 1, 49 L. ed. 639, 25 Sup. Ct. Rep. 302; Sharon v. Tucker, 144 U. S. 533, 543, 36 L. ed. 532, 535, 12 Sup. Ct. Rep. 720; Toltec Ranch Co. v. Cook, 191 U. S. 532, 538, 48 L. ed. 291, 292, 24 Sup. Ct. Rep. 166; 3 Washb. Real. Prop. 5th ed. p. 176.

The implication of a grant from the railroad company arising out of the adverse possession of the defendants in error is conclusive evidence of a voluntary abandonment on the part of the railroad company of the premises in question.

Stevens v. Norfolk, 42 Conn. 377; Livermore v. White, 74 Me. 452, 43 Am. Rep. 600; Myers v. Spooner, 55 Cal. 257, 9 Mor. Min. Rep. 519; Davis v. Perley, 30 Cal. 630; North American Exploration Co. v. Adams, 45 C. C. A. 185, 104 Fed. 404, 21 Mor. Min. Rep. 65.

The act of Congress of June 24, 1912, was equivalent to a re-entry or declaration of forfeiture or reverter upon the part of the United States of the land in controversy, because of its abandonment and non-user as a railroad right of way, and had the effect of confirming in the defendants in error the title acquired by them by adverse possession and under the patent issued by the United States to their predecessor in title on November 5, 1878.

Northern P. R. Co. v. Ely, 197 U. S. 1, 49 L. ed. 639, 25 Sup. Ct. Rep. 302; Atlantic & P. R. Co. v. Mingus, 165 U. S. 413, 430, 41 L. ed. 770, 777, 17 Sup. Ct. Rep. 348; Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551; Spokane & B. C. R. Co. v. Washington & G. N. R. Co. 219 U. S. 166, 55 L. ed. 159, 31 Sup. Ct. Rep. 182.

Mr. Justice McKenna delivered the opinion of the court:

This case was submitted at the same time as No. 570, just decided [231 U. S. 190, ante, 179, 34 Sup. Ct. Rep. 101]. It is ejectment for lands, part of the right of way granted to the Leavenworth, Pawnee, & Western Railroad Company by the act of 1862 [12 Stat. at L. 489, chap. 120], to which right of way plaintiff in error (designated herein as plaintiff) is the successor. The action was brought in the district court of Arapahoe county, state of Colorado.

The sufficiency of the complaint is not questioned, and it is enough to say that it is, in legal effect, the same as in case No. 570, with only such differences as are necessary.

The answer of defendants in error (called herein defendants) set up three defenses and a counterclaim. The first answer admits the incorporation of plaintiff, and denies all other allegations of the complaint. The second defense alleges that under certain acts of Congress, subsequent to the act of 1862, and prior to the incorporation of the companies, the right of way of the companies was made 200 feet wide instead of 400 feet; that is, 100 feet from the center line of the railroad track. That the land sued for, which is in possession of the defendants, is more than 100 feet from such center line; that neither plaintiff nor any of its predecessors have been in possession of any portion thereof, and have not used the same, nor has it needed to use the same for railroad purposes. That defendants, and those under and through whom they claim title, acquired the title under and by virtue of a patent from the [208] United States, issued November 5, 1878, and various mesne conveyances, and have been in the adverse possession of all of the property described continuously since the patent was issued, which is more than the full period of seven years next before the institution of the action; have paid and caused to be paid taxes thereon, and that defendants now plead and rely upon the statute of limitations of the state of Colorado.

The third defense alleges that the right received by the corporation which was created by the act of Congress of 1862, or by its successors or assigns, was, at most, the grant of a limited fee, and made on the

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condition that the property should revert to the United States if it should not be appropriated and used for a railroad within a reasonable time, or should cease to be used for railroad purposes. That thereafter, before the land was used for such purposes, the right of reverter which was retained by the United States was conveyed by the United States to defendants and their grantors by a patent which was issued by the United States to the vendor of defendants in 1878. That neither plaintiff nor any of its predecessors used or occupied the land for railroad purposes or for any purposes whatever; and on account thereof lost any and all right thereto, and the property reverted to the United States and to defendants; that neither plaintiff nor any of its predecessors ever needed the property or any part thereof for railroad purposes, and can never use the same for such purposes. That on account of failure to use or occupy the land for a period which now approximates fifty years next ensuing after the approval of the act of 1862, the limited fee which may have been granted to plaintiff ceased and determined, and the property reverted to the United States and its grantees.

The counterclaim repeats some of the allegations in regard to the width of the right of way and defendants' adverse possession of the land outside of the 100 feet on [209] either side of the center of the railroad track, alleges the value of improvements made thereon by defendants at $1,500, and claims the reimbursement thereof in case of recovery by plaintiff.

Plaintiff demurred to the second and third defenses and to the counterclaim. The demurrer was sustained. The case was subsequently tried on the issues made by the complaint and the first answer thereto.

At the trial the defendants objected to any testimony being introduced, and moved to dismiss the complaint on the ground that no right of way was granted to plaintiff "at the place in dispute," or no grant of right of way in excess of 100 feet on either side of the center line of plaintiff's track. The objection was overruled and defendants excepted.

It was then stipulated that witnesses would testify to the various steps in the title of plaintiff, that the railroad was constructed over the right of way described in the complaint, and that the railroad and the main track thereof are now in the same location in which they were at the time of the original construction; that the predecessors in title of plaintiff complied with all of the requirements of the various acts of Congress in the complaint mentioned, and that plaintiff is the owner of the lands, if any, conveyed to its predecessor companies under and by virtue of the said acts of Congress; that the land described in the complaint lies within 200 feet of the center of the main track of the railroad, but outside of a line of 100 feet; that the railroad is part of the railroad constructed from the Missouri river at the mouth of the Kansas river, westward to a connection with the main line of the Union Pacific, as authorized by the acts of Congress, and has been, since its construction, continuously operated as a railroad in connection with the main line of the Union Pacific at Cheyenne, Wyoming. That defendants withhold possession of the lands from plaintiff, [210] and that possession was demanded before the commencement of the action.

Judgment of nonsuit was moved on the grounds stated in the motion to dismiss; also judgment for defendants. Both motions were denied, and plaintiff was adjudged owner in fee of the lands, and that defendants had no right, title, or interest therein. Judgment was entered accordingly. The judgment was reversed by the supreme court of the state. 133 Pac. 1037.

The supreme court decided that the Kansas Pacific became vested by the acts of 1862 and 1864 [13 Stat. at L. 356, chap. 216] with title to a right of way 400 feet wide through the land, and that the Union Pacific, its successor in title, is the owner of the right of way. The court rested this conclusion on Stuart v. Union P. R. Co. 227 U. S. 342, 57 L. ed. 535, 33 Sup. Ct. Rep. 338. It hence decided that "the determination of the court of the facts found upon the issue raised by the first defense was . . . in conformity with the decision of the Supreme Court of the United States." And the supreme court also decided that the district court, in sustaining the demurrer to the second defense which pleaded the statute of limitations, followed the decision of this court, and cited Kindred v. Union P. R. Co. 94 C. C. A. 112, 168 Fed. 653, 225 U. S. 582, 56 L. ed. 1216, 32 Sup. Ct. Rep. 780; Northern P. R. Co. v. Smith, 171 U. S. 267, 43 L. ed. 160, 18 Sup. Ct. Rep. 794; Northern P. R. Co. v. Ely, 197 U. S. 1, 49 L. ed. 639, 25 Sup. Ct. Rep. 302; Northern P. R. Co. v. Townsend, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671, to the effect that individuals could not for private purposes acquire by adverse possession, under state statutes, any portion of a right of way granted by the United States to a railroad company. "So," the court said, "it is plain that prior to June 24, 1912, an individual could not acquire title to any por-

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tion of the 400-foot right of way by the statute of limitations or adverse possession, and the judgment of the lower court on this issue was correct." But it was remarked that the act of June 24th [37 Stat. at L. 138, chap. 181], [211] though passed while the case was pending on appeal, nevertheless applied to the case, on the authority of certain cases which were cited.

The cited cases express the principle that a judgment, though not erroneous when rendered, may become so by a subsequent law. Or if an event occurs after an appeal which makes it impossible for the appellate court to enforce its decision, the case will be dismissed. United States v. The Peggy, 1 Cranch, 103, 2 L. ed. 49; New Orleans Flour Inspectors v. Glover, 160 U. S. 170, 40 L. ed. 382, 16 Sup. Ct. Rep. 321, 161 U. S. 101, 40 L. ed. 632, 16 Sup. Ct. Rep. 492; Dinsmore v. Southern Exp. Co. 183 U. S. 115, 46 L. ed. 111, 22 Sup. Ct. Rep. 45. Two of the members of the court dissented and expressed the view that as the judgment of the lower court was "in strict conformity with the decisions of the Supreme Court of the United States, and therefore when rendered was not erroneous," it was the duty of the court to affirm it.

In deciding that the act of June 24th was controlling, the supreme court of Colorado necessarily gave retrospective operation to the act. This was error. Union P. R. Co. v. Laramie Stock Yards Co. [213 U. S. 190, ante, 179, 34 Sup. Ct. Rep. 101].

It was contended in that case that the grant of the right of way was only a grant of the right to use; and that whenever and if not so used, or for any reason became forfeited, it would revert to the grantor. It was recognized that to enforce the forfeiture and convey the right which had reverted, some act of the United States was necessary. This condition, it was contended, was satisfied by the act of June 24th, enacted, it was further contended, under the power reserved to Congress by the acts of 1862 and 1864, to alter or amend the charters of the companies. We rejected the contention, and we said, besides, that even if the act be so regarded, its effect was to be determined by the time it was intended to operate, whether retrospectively or prospectively. What we said is applicable here. It is contended here that the [212] right of way was derived through the act of July, 1862, and that the title granted to the companies "was a fee upon limitation, and that the estate continued *so long as*, or while, the railroad companies continued to use the land granted for railroad purposes, and terminated *ipso facto* by the cessation of such use." And it is further contended that no act was necessary upon the part of the United States to work the forfeiture, or reinvest the United States with complete title to the land granted.

The bearing of the first contention we shall presently consider; the other has no foundation in the granting acts nor in the decisions interpreting them, some of which are cited above. It is opposed by the act of June 24th, which leaves the right of way as originally granted and to the extent granted in the railroad companies, except where they had *theretofore* conveyed parts of the same, and where parts of it shall be held by adverse possession.

It is, however, contended that if some act of the United States was necessary to effect a forfeiture of the right of way, the act of June 24, 1912, was sufficient for that purpose. If this be conceded, *arguendo*, and if it be also conceded that the grant of the right of way was of a limited fee, we are brought to a consideration of the effect of the act,—whether it applies to a past or a future possession; and we have decided that it applies to the latter. Union P. R. Co. v. Laramie Stock Yards Co.

This conclusion is, of course, contested by defendants in an argument which it is, however, unnecessary to answer in detail. It is asserted that the act "operates *in præsenti* in so far as it conveys the reversionary interest of the United States to the persons entitled to the benefit of the act, or confirms their pre-existing titles." Special emphasis is put upon the words "is claimed" of the act as necessarily intended to apply to titles claimed at the time of the passage of the act by adverse possession. "Such [213] titles," it is said, "must have been initiated prior to the enactment of the act." For that reason, it is further said, "the act cannot be said to be retrospective, because the language used simply designates the classes of persons to whom confirmatory grants are made." But these considerations are simply the result of dwelling upon the literal terms of the act. But this is obnoxious to the rule of the cases. Courts will not, as we have seen, enforce a literal interpretation when by doing so antecedent rights are affected or human conduct given a consequence it did not intend. Such a purpose the courts refuse to assign to the legislature unless compelled by language explicit and imperative. And we have pointed out that we are repelled from so doing by grave doubts of its legality as well as of its justice. These considerations need not be further expanded. Their strength has been pointed out and their sufficiency to prevail over a literal interpretation of a statute.

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Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Hughes dissents.

Mr. Justice Holmes and Mr. Justice Pitney took no part in the decision.

UNION PACIFIC RAILROAD COMPANY, Plff. in Err.,
v.
MARTIN V. SIDES and Walter W. Scherrer.

(See S. C. Reporter's ed. 213, 214.)

This case is governed by the decision in Union P. R. Co. v. Snow, ante, 184.

[No. 683.]

Submitted October 14, 1913. Decided December 1, 1913.

IN ERROR to the Supreme Court of the State of Colorado to review a judgment which reversed a judgment of the District Court of Arapahoe County, in that state, in favor of plaintiff in an action of ejectment. Reversed and remanded for further proceedings.

See same case below, 55 Colo. 174, 133 Pac. 1040.

The facts are stated in the opinion.

Messrs. N. H. Loomis and C. C. Dorsey submitted the cause for plaintiff in error. Mr. E. I. Thayer was on the brief.

Messrs. Milton Smith and Charles R. Brock submitted the cause for defendant in error. Mr. W. H. Ferguson was on the brief.

For contentions of counsel, see their brief as reported in Union P. R. Co. v. Snow, ante, 184.

Mr. Justice McKenna delivered the opinion of the court:

Action in ejectment, brought by plaintiff in error, called here plaintiff, against defendants in error, here called defendants, in the district court of Arapahoe county, state of Colorado.

Except as to the description of the land the complaint is substantially the same as that in No. 682 [231 U. S. 204. ante, 184, 34 Sup. Ct. Rep. 104], and presents the same legal rights and tities. Defendant Sides demurred to the complaint; Scherrer denied being in possession of the land and disclaimed any claim to it. The demurrer was overruled and Scherrer answered, setting up defenses which are in substance the same as in No. 682. To the defenses plaintiff filed demurrers, which were sustained. Sides elected to plead no further, and the case coming on for trial and certain facts being agreed upon as testified to, objection to the materiality of which was made, motions to dismiss and for judgment were also made and overruled. Judgment was entered for plaintiff. It was reversed by the supreme court of the state, for the reasons stated in its opinion in Snow v. Union P. R. Co. 55 Colo. 175, 133 Pac. 1037; that is, No. 682. 55 Colo. 174, 133 Pac. 1040.

This case was submitted with No. 682, involves the same questions, and is determined by its decision.

Judgment reversed and cause remanded for further proceedings not inconsistent herewith.

Mr. Justice Hughes dissents.

Mr. Justice Holmes and Mr. Justice Pitney took no part in the decision.

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[215] THOMAS M. KENER, Administrator of Edwin Kener, Deceased, Plff. in Err.,
v.
LA GRANGE MILLS.

(See S. C. Reporter's ed. 215-218.)

Constitutional law — impairing contract obligations — exemption laws — congressional adoption — bankruptcy.

Real property was not, and could not be, exempted from the existing lien a judgment by the adoption of the Georgia Constitution of 1868, with its provisions with respect to homestead exemptions, nor by the act of March 3, 1873 (17 Stat. at L. 577, chap. 235, Rev. Stat. § 5045), amendatory of the bankrupt act of March 2, 1867 (14 Stat. at L. 517, chap. 176), preserving exemptions under state laws, and providing that such exemptions should be valid against debts contracted before those laws, and against liens by judgment of any state court.

[For other cases, see Constitutional Law, 1543-1548; Congress, 17; Bankruptcy, 102-104, in Digest Sup. Ct. 1908.]

[No. 63.]

Argued and submitted November 13, 1913. Decided December 1, 1913.

NOTE.—On the application to existing judgments of statute abolishing or diminishing exemptions—see note to Laird v. Carton, 25 L.R.A.(N.S.) 189.

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IN ERROR to the Supreme Court of the State of Georgia to review a judgment which affirmed a judgment of the Troup Superior Court in favor of defendant in a suit to recover an interest in real property sold under execution. Affirmed.

See same case below, 135 Ga. 730, 70 S. E. 245.

The facts are stated in the opinion.

Messrs. Daniel W. Rountree and Clifford L. Anderson submittted the cause for plaintiff in error. Mr. W. H. Terrell was on the brief:

The impairment clause is only a restriction upon the states. No provision of the Constitution prohibits Congress from passing laws impairing the obligation of contracts. On the contrary, the power to enact bankrupt laws plainly authorizes it to annul or impair the obligations of contracts. Indeed, this is the prime purpose of such laws.

Re Smith, 2 Woods, 458, 14 Nat. Bankr. Reg. 295, Fed. Cas. No. 12,996; Re Jordan, 10 Nat. Bankr. Reg. 427, Fed. Cas. No. 7,515; Re Beckerford, 1 Dill. 45, 4 Nat. Bankr. Reg. 203, Fed. Cas. No. 1,209; Re Jordan, 8 Nat. Bankr. Reg. 180, Fed. Cas. No. 7,514; Re Kean, 2 Hughes, 322, 8 Nat. Bankr. Reg. 367, Fed. Cas. No. 7,630; Re Smith, 8 Nat. Bankr. Reg. 401, Fed. Cas. No. 12,986; Windley v. Tankard, 88 N. C. 223; Lamb v. Chamness, 84 N. C. 379; Simpson v. Houston, 97 N. C. 344, 2 Am. St. Rep. 297, 2 S. E. 651; Darling v. Berry, 4 McCrary, 470, 13 Fed. 659; Satterlee v. Matthewson, 2 Pet. 380, 416, 7 L. ed. 458, 470; Hepburn v. Griswold, 8 Wall. 603, 19 L. ed. 513; Legal Tender Cases, 12 Wall. 457, 550, 20 L. ed. 287, 311, 110 U. S. 421, 449, 28 L. ed. 204, 215, 4 Sup. Ct. Rep. 122; Mitchell v. Clark, 110 U. S. 633, 28 L. ed. 279, 4 Sup. Ct. Rep. 170, 312.

Nor was the act of March 3, 1873, inconsistent with a uniform system of bankruptcy. As against debts contracted before the adoption of the laws authorizing it, the exemption was valid; and this was true in every state, and therefore uniform.

Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 L. ed. 1113, 22 Sup. Ct. Rep. 857; Holden v. Stratton, 198 U. S. 202, 214, 49 L. ed. 1018, 1022, 25 Sup. Ct. Rep. 656; Thomas v. Woods, 26 L.R.A.(N.S.) 1180, 97 C. C. A. 535, 173 Fed. 585, 19 Ann. Cas. 1080; Re Rouse H. & Co. 33 C. C. A. 356, 63 U. S. App. 570, 91 Fed. 96.

Mr. Louis Marshall argued the cause and filed a brief for defendant in error:

If the bankrupt act as amended in 1873 had undertaken to destroy the vested lien of the Tharp judgment, it would have violated the 5th Amendment.

Gilman v. Tucker, 128 N. Y. 190, 13 L.R.A. 304, 26 Am. St. Rep. 464, 28 N. E. 1040; Germania Sav. Bank v. Suspension Bridge, 159 N. Y. 362, 54 N. E. 33; Re Greene, 166 N. Y. 485, 60 N. E. 183; Merchants' Bank v. Ballou, 98 Va. 112, 44 L.R.A. 306, 81 Am. St. Rep. 715, 32 S. E. 481; Cooley, Const. Lim. 5th ed. p. 440.

Prior to the passage of the act of March 3, 1873, this court had decided that the homestead exemption provision of the Georgia Constitution of 1868, and the laws passed thereunder, was unconstitutional as to judgments circumstanced as was the Tharp judgment, and its interpretation was accepted by the Georgia courts.

Gunn v. Barry, 15 Wall. 610, 21 L. ed. 212; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Jones v. Brandon, 48 Ga. 593; Wilson v. Brochon, 95 Fed. 82; White v. Hart, 13 Wall. 654, 20 L. ed. 688; Osborn v. Nicholson, 13 Wall. 654, 20 L. ed. 689; Chambliss v. Jordan, 50 Ga. 81; Grant v. Cosby, 51 Ga. 460; Wofford v. Gaines, 53 Ga. 485; Bush v. Lester, 55 Ga. 579; Hiley v. Bridges, 60 Ga. 375; Dixon v. Lawson, 65 Ga. 661; Shipp v. Smith, 76 Ga. 1; Dozier v. McWhorter, 113 Ga. 584, 39 S. E. 106. See also Homestead Cases, 22 Gratt. 266, 12 Am. Rep. 507.

There is no merit in the contention that the Georgia decisions to which we have referred are in contravention and disregard of the bankruptcy act in force at the time of the sale of Kener's property under the Tharp judgment and execution.

Re Dillard, 2 Hughes, 190, Fed. Cas. No. 3,912; Re Deckert, 2 Hughes, 183, Fed. Cas. No. 3,728; Re Shipman, 2 Hughes, 227, Fed. Cas. No. 12,791; Re Duerson, 13 Nat. Bankr. Reg. 183, Fed. Cas. No. 4,117; Re Kerr, 9 Nat. Bankr. Reg. 566, Fed. Cas. No. 7,729.

The lien of a judgment before bankrupt proceedings are commenced upon land set apart as exempt therein is not affected by the discharge in bankruptcy, where the judgment creditor did not prove his debt or submit it to the jurisdiction of the bankruptcy court, and the land is subject to salel on execution thereunder.

Jackson v. Allen, 30 Ark. 110; Ward v. Huhn, 16 Minn. 159, Gil. 142; Fehley v. Barr, 66 Pa. 196.

It is no defense to an action to foreclose a mortgage that the mortgaged premises were allotted to the mortgagor as a homestead by proceedings in the bankrupt court.

Brady v. Brady, 71 Ga. 71; Brown v. Hoover, 77 N. C. 40.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit to recover an interest in

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land sold on execution against Godfred Kener, and held by the defendant in error under that sale. The plaintiff is the representative of one of Kener's heirs. The facts are these. A judgment was recovered upon a bill of exchange against Godfred Kener in 1858, and execution issued in 1873; in 1878 he was adjudged a bankrupt, and returned the holders of the judgment among his creditors, but they did not prove their claim. In the same year this land was set aside in due form to Kener as his homestead exempted by the state Constitution of 1868 and the bankruptcy act then in force. Rev. Stat. § 5045. In June, 1879, he died, and in December, 1879, the execution was levied and this land was sold. The sale was valid unless the bankruptcy act interfered. The trial court entered judgment for the defendant, and the judgment was affirmed by the supreme court of the state. 135 Ga. 730, 70 S. E. 245.

The bankruptcy act of 1867 [14 Stat. at L. 517, chap. 176], as amended by the act of March 3, 1873, chap. 235, 17 Stat. at L. 577, Rev. Stat. § 5045, preserved, within a limit, exemptions under state laws, and provided that such exemptions should be valid against debts contracted before those laws, and against liens by judgment of any state court. The plaintiff bases his claim upon this act. But in Gunn v. Barry, 15 Wall. 610, 21 L. ed. 212, argued and decided (March 31, 1873) just after the amendment of March 3, it was held that the Georgia Constitution could not exempt property from existing liens, and that Congress could not give that Constitution greater effect. See also Re Deckert, 2 Hughes, 183, Fed. Cas. No. 3,728; Re [218] Rahrer, 140 U. S. 545, 560, 36 L. ed. 572, 576, 11 Sup. Ct. Rep. 865. In Re Shipman, 2 Hughes, 227, Fed. Cas. No. 12,791, it seems to have been supposed that the act of 1873, wrongly called of 1874, was passed to meet Gunn v. Barry, in the teeth of the declaration that such an attempt would be invalid. But that was a mistake.

Of course, if the Constitution of 1868, and statutes based upon it, should be construed as not attempting to disturb then-existing liens, the act of Congress hardly would be read as purporting to give a greater scope to the state laws. The Georgia decisions since Gunn v. Barry agree that in cases like the present the lien remained. Bush v. Lester, 55 Ga. 579. Whether the result be reached by construction of the state laws, by construction of the former bankruptcy act, or on constitutional grounds, it comes to the same thing, and the judgment below was right.

Judgment affirmed.

UNITED STATES OF AMERICA, EX RELATIONE A. GOLDBERG, Plff. in Err.,

v.

JOSEPHUS DANIELS, Secretary of the Navy.

(See S. C. Reporter's ed. 218–222.)

United States — immunity from suit — suit against officer.

The inability to make the United States a party precludes the maintenance of an action in mandamus to require the Secretary of the Navy to deliver to the highest bidder a cruiser which, after survey, condemnation, and appraisal, had been stricken from the naval register under the act of August 5, 1882 (22 Stat. at L. 296, chap. 391, U. S. Comp. Stat. 1901, p. 1058), § 2, and for proposals for the purchase of which the Secretary of the Navy, acting under the act of March 3, 1883 (22 Stat. at L. 599, chap. 141, U. S. Comp. Stat. 1901, p. 1059), had advertised.

[For other cases, see United States, IV. b, in Digest Sup. Ct. 1908.]

[No. 79.]

Argued November 14, 1913. Decided December 1, 1913.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, dismissing a petition for mandamus to compel the Secretary of the Navy to deliver a government cruiser to the highest bidder. Affirmed.

See same case below, 37 App. D. C. 282.

The facts are stated in the opinion.

Messrs. **Albert N. Eastman** and **Charles Poe** argued the cause and filed a brief for plaintiff in error.

Mr. **Morgan H. Beach** argued the cause, and, with Solicitor General Davis, filed a brief for defendant in error.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a petition for a mandamus directing the Secretary of the Navy to deliver the United States cruiser Boston to the petitioner. The petition alleges that after survey, condemnation, and appraisal the cruiser was stricken from the Naval Register under the act of August 5, 1882,

NOTE.—On suit against Federal officers or agents as suit against United States—see note to Louisiana v. Garfield, 53 L. ed. U. S. 92.

As to when action against officers is deemed to be action against state—see note to Louisville & N. R. Co. v. Burr, 44 L.R.A. (N.S.) 189.

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chap. 391, § 2, 22 Stat. at L. 296, U. S. Comp. Stat. 1901, p. 1058; that thereafter the Secretary of the Navy advertised for proposals of purchase under the act of March 3, 1883, chap. 141, 22 Stat. at L. 599, U. S. Comp. Stat. 1901, p. 1059; that the petitioner bid more than the appraised value, sending a certified check for the whole sum bid; that when the bids were opened on the day fixed, the petitioner's was the highest, but that the Secretary refused to deliver the vessel, and sent back the check, which the petitioner holds subject to the Secretary's order. The answer admits the facts, but sets up that the bid is not an acceptance of an offer, but is itself only an offer, subject to be accepted or not, at the discretion of the Secretary, and that the Secretary never accepted the petitioner's bid, the government having decided to lend the cruiser to the governor of Oregon for use by the naval militia of that state. The petitioner demurred, but the petition was dismissed on the ground that the discretion of the Secretary was not ended by the receipt and opening of the bids, even though they satisfied all the conditions prescribed. 37 App. D. C. 282.

We see no sufficient reason for throwing doubt upon this premise for the decision, but there is another that comes earlier in point of logic. The United States is the [222] owner, in possession of the vessel. It cannot be interfered with behind its back, and as it cannot be made a party, this suit must fail. Belknap v. Schild, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443; International Postal Supply Co. v. Bruce, 194 U. S. 601, 606, 48 L. ed. 1134, 1137, 24 Sup. Ct. Rep. 820; Oregon v. Hitchcock, 202 U. S. 60, 69, 50 L. ed. 935, 938, 26 Sup. Ct. Rep. 568; Naganab v. Hitchcock, 202 U. S. 473, 476, 50 L. ed. 1113, 1114, 26 Sup. Ct. Rep. 667.

Judgment affirmed.

ISIDOR STRAUS and Nathan Straus, Composing the Firm of R. H. Macy & Company, Plffs. in Err.,

v.

AMERICAN PUBLISHERS' ASSOCIATION et al.

(See S. C. Reporter's ed. 222-237.)

Error to state court — Federal question — claim under Federal statute.

1. Plaintiff's contention at the trial in a state court that an agreement between publishers and booksellers to maintain retail prices on copyrighted books not only went beyond the authority conferred in the copyright laws relied upon by defendant, but was in violation of the terms of the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), making illegal combinations in restraint of trade and tending to monopoly, presents a claim of Federal right which is necessarily denied when the highest state court affirms a judgment below in favor of defendant, so as to sustain the appellate jurisdiction of the Federal Supreme Court, under U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, governing writs of error to a state court.

[For other cases, see Appeal and Error, 1168-1911, 1436-1445, in Digest Sup. Ct. 1908.]

Monopoly — publishers and sellers — copyrighted books.

2. The copyright monopoly conferred by the Federal laws does not protect, as against condemnation under the Sherman anti-trust act of July 2, 1890, agreements between associations embracing probably 75 per cent of the book publishers and a majority of the booksellers in the United States, which operate to restrict the sale of copyrighted books to those only who will maintain the fixed net retail price, and result in almost completely destroying competition in such books at retail.

[For other cases, see Monopoly, II. b, in Digest Sup. Ct. 1908.]

[No. 19.]

Argued March 7, 1913. Decided December 1, 1913.

IN ERROR to the Supreme Court of the State of New York in and for the County of New York to review a judgment rendered pursuant to the mandate of the

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NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On validity of contract provision seeking to control price at which an article shall be resold—see note to Grogan v. Chaffee, 27 L.R.A.(N.S.) 395.

As to illegal trusts under modern anti-trust laws—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

On the legality under modern anti-trust acts of combinations or agreements which restrict the class of persons to whom commodities shall be sold or from whom they shall be bought—see note to Cleland v. Anderson, 5 L.R.A.(N.S.) 136.

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Court of Appeals of that state, which, on a third appeal, affirmed a judgment of the Appellate Division of the Supreme Court, First Department, which had in turn affirmed a judgment of the Supreme Court at Special Term, refusing to restrain any interference with the purchase and sale of copyrighted books. Reversed and remanded for further proceedings.

See same case below in court of appeals, first appeal, 177 N. Y. 473, 64 L.R.A. 701, 101 Am. St. Rep. 819, 69 N. E. 1107; second appeal, 193 N. Y. 496, 86 N. E. 525; third appeal, 199 N. Y. 548, 93 N. E. 1133.

The facts are stated in the opinion.

Mr. Wallace Macfarlane argued the cause, and, with Mr. Edmond E. Wise, filed a brief for plaintiffs in error:

It is quite immaterial that the court of appeals in its several opinions does not expressly overrule plaintiff's claim under the Federal anti-trust act of July 2, 1890, or refer to that act, if by necessary implication its decision denies the asserted right of the plaintiffs in error.

Dewey v. Des Moines, 173 U. S. 193, 199, 43 L. ed. 665, 666, 19 Sup. Ct. Rep. 379; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 580, 50 L. ed. 596, 604, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 519, 520, 50 L. ed. 845, 850, 851, 26 Sup. Ct. Rep. 518; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 68, 43 L. ed. 364, 368, 19 Sup. Ct. Rep. 97; Harding v. Illinois, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176.

The plaintiffs' position is in principle quite similar to that of the plaintiff in the case of McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433.

That these agreements restrained trade is obvious. That they have been entered into by 75 per cent of the publishers of the United States and by a large majority of the booksellers of the United States is established. That they affected interstate commerce as well as intrastate trade, and operated to restrain trade or commerce among the several states, necessarily follows from the trial court's findings of fact.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

The court of appeals (177 N. Y. 473, 64 L.R.A. 701, 101 Am. St. Rep. 819, 69 N. E. 1107) in fact held that in so far as uncopyrighted books were concerned, the combination was in restraint of trade; and it requires little reasoning to show that it contains every element of illegality as to effect, intent, and method of execution condemned by this court in the latest, as well as many of the previous, decisions.

American Tobacco Co. v. United States, 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 57 L. ed. 107, 33 Sup. Ct. Rep. 9; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436.

The same condemnation has been passed upon similar combinations by the courts in most of the states.

Cohen v. Berlin & J. Envelope Co. 166 N. Y. 292, 59 N. E. 906; Cummings v. Union Blue Stone Co. 164 N. Y. 401, 52 L.R.A. 262, 79 Am. St. Rep. 655, 58 N. E. 525; People v. Milk Exch. 145 N. Y. 267, 27 L.R.A. 437, 45 Am. St. Rep. 609, 39 N. E. 1062; Judd v. Harrington, 139 N. Y. 105, 34 N. E. 790; People v. Sheldon, 139 N. Y. 251, 23 L.R.A. 221, 36 Am. St. Rep. 690, 34 N. E. 785; Arnot v. Pittston & E. Coal Co. 68 N. Y. 558, 23 Am. Rep. 190; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Brown v. Jacobs' Pharmacy Co. 115 Ga. 429, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; More v. Bennett, 140 Ill. 69, 15 L.R.A. 361, 33 Am. St. Rep. 216, 29 N. E. 888; People ex rel. McIlhany v. Chicago Live Stock Exch. 170 Ill. 556, 39 L.R.A. 373, 62 Am. St. Rep. 404, 48 N. E. 1062; Richardson v. Buhl, 77 Mich. 632, 6 L.R.A. 457, 43 N. W. 1102; State v. Nebraska Distilling Co. 29 Neb. 700, 46 N. W. 155; Hawarden v. Youghisgheny & L. Coal Co. 111 Wis. 545, 55 L.R.A. 828, 87 N. W. 472; Morris Run Coal Co. v. Barclay Coal Co. 68 Pa. 173, 8 Am. Rep. 159; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Jackson v. Stanfield, 137 Ind. 592, 23 L.R.A. 588, 36 N. E. 345, 37 N. E. 14.

The state court erred in deciding that the owners of several separate copyrights are empowered to enter, by virtue of the

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copyright laws, into contracts or agreements or combinations between themselves concerning the supply and price of books published under their separate copyrights, which would be unlawful and contrary to the statute of the United States passed on the 2d day of July, 1890, known as "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," if such books were not copyrighted.

E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 57 L. ed. 107, 33 Sup. Ct. Rep. 9.

The court of appeals erroneously held that the owner of a copyright has the power, by virtue of the copyright statutes, to control the ultimate retail price, and erred in deciding that the owner or proprietor of a copyright can, by virtue of the copyright statutes of the United States, after he has parted with the title to the copyrighted book, continue to control the sale or resale of such books by reason of the copyright law, in violation of the aforementioned statute of the United States, known as "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies."

Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722; Charles Scribner's Sons v. Straus, 210 U. S. 352, 52 L. ed. 1094, 28 Sup. Ct. Rep. 735.

Mr. **Stephen H. Olin** argued the cause and filed a brief for defendants in error:

The court has no jurisdiction to review the decision of the state courts concerning the effect of the copyright act. The plaintiffs in error claimed no title, right, privilege, or immunity under the copyright act. The defendants claimed such a right, privilege, or immunity, and the decision was in favor of their claim. The right or privilege must be personal to the plaintiff in error, and he is not entitled to a review when the right or privilege was asserted by the other party, and the decision was in favor of that party, and adverse to himself.

Missouri ex rel. Carey v. Andriano, 138 U. S. 496, 34 L. ed. 1012, 11 Sup. Ct. Rep. 385; De Lamar's Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 523, 528, 44 L. ed. 872, 874, 20 Sup. Ct. Rep. 715; Jersey City & B. R. Co. v. Morgan, 160 U. S. 288, 40 L. ed. 430, 16 Sup. Ct. Rep. 276; Ryan v. Thomas, 4 Wall. 603, 18 L. ed. 460; Commonwealth Bank v. Griffith, 14 Pet. 56, 10 L. ed. 352.

That a Federal statute was construed unfavorably to one of the parties to the suit is no ground for jurisdiction by this court unless such construction was not only unfavorable, but was against the right, etc., specially set up and claimed under the statute. In that case the party setting up and claiming the right under the statute, which has been denied, can obtain a review here.

Kizer v. Texarkana & Ft. S. R. Co. 179 U. S. 199, 201, 45 L. ed. 152, 153, 21 Sup. Ct. Rep. 100; Lynde v. Lynde, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555; Baker v. Baldwin, 187 U. S. 61, 47 L. ed. 75, 23 Sup. Ct. Rep. 19; Rae v. Homestead Loan & G. Co. 176 U. S. 121, 44 L. ed. 398, 20 Sup. Ct. Rep. 341; Fulton v. M'Affee, 16 Pet. 149, 10 L. ed. 918; Linton v. Stanton, 12 How. 423, 13 L. ed. 1050; Strader v. Baldwin, 9 How. 261, 13 L. ed. 130; Burke v. Gaines, 19 How. 388, 15 L. ed. 655.

The plaintiffs in error did not specially set up or claim any right, privilege, or immunity under the Federal anti-trust act, as to which there was a decision adverse to the right or privilege claimed. The complaint claimed that the agreement therein recited was unlawful under the state laws and the Federal statute. The decision was that the agreement was unlawful under the state statute. Hence, the decision was not against the right claimed, although the court did not rest it upon the Federal statute. Furthermore, the right claimed under the Federal statute was not specially set up or claimed, since in the claim as made was involved a non-Federal claim made under the public policy and statutes of New York.

Pierce v. Somerset R. Co. 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; Allen v. Arguimbau, 198 U. S. 149, 49 L. ed. 990, 25 Sup. Ct. Rep. 622; Dibble v. Bellingham Bay Land Co. 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939; Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635; Eustis v. Bolles, 150 U. S. 361, 366, 37 L. ed. 1111, 1112, 14 Sup. Ct. Rep. 131; Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111.

The court may examine the opinions rendered in the state courts in order to ascertain the ground of the judgment of the state court.

Dibble v. Bellingham Bay Land Co. 163 U. S. 63, 69, 41 L. ed. 72, 74, 16 Sup. Ct. Rep. 939; Kreiger v. Shelby R. Co. 125 U. S. 39, 44, 31 L. ed. 675, 677, 8 Sup. Ct. Rep. 752.

As the record shows that no Federal question was at any time specially presented to the appellate courts by the plaintiffs, so the opinions show that no such question as is raised by the assignments of error was in fact considered or decided on either of the appeals.

Straus v. American Publishers' Asso. 177 N. Y. 473, 64 L.R.A. 701, 101 Am. St. Rep.

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819, 69 N. E. 1107, 193 N. Y. 496, 86 N. E. 525, 194 N. Y. 538, 87 N. E. 1127, 199 N. Y. 548, 93 N. E. 1133.

This court has therefore no jurisdiction to examine the alleged errors assigned.

Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635; De Saussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; Bachtel v. Wilson, 204 U. S. 36, 41, 51 L. ed. 357, 359, 27 Sup. Ct. Rep. 243; Arkansas Southern R. Co. v. German Nat. Bank, 207 U. S. 271, 52 L. ed. 201, 28 Sup. Ct. Rep. 78; Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; Rogers v. Jones, 214 U. S. 196, 53 L. ed. 965, 29 Sup. Ct. Rep. 635; Sauer v. New York, 206 U. S. 536, 546, 51 L. ed. 1176, 1181, 27 Sup. Ct. Rep. 686; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Hale v. Akers, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 431, 29 Sup. Ct. Rep. 227; Pierce v. Somerset R. Co. 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; Appleby v. Buffalo, 221 U. S. 524, 55 L. ed. 838, 31 Sup. Ct. Rep. 699.

The claim set up in the assignments of error was not by adequate specification presented to the appellate division or the court of appeals, and therefore this court has no jurisdiction. Assignments of error in this court cannot enlarge the right of review.

Chesapeake & O. R. Co. v. McDonald, 214 U. S. 191, 193, 53 L. ed. 963, 964, 29 Sup. Ct. Rep. 546.

The Federal question must have been brought before the highest state court "specially," that is, unmistakably; and the right of this court to examine the judgment must arise from averments so distinct and positive as to place it beyond question that the party bringing a case here intended to assert a Federal right.

F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 655, 41 L. ed. 1149, 1151, 17 Sup. Ct. Rep. 709; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 248, 46 L. ed. 171, 176, 22 Sup. Ct. Rep. 120.

So far as the record discloses, there was neither authority cited nor argument made in the court of appeals in support of the right now claimed. Hence there is no jurisdiction in this court.

Harding v. Illinois, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176.

Where the question has been treated as one of local law, the mere fact that suit was brought under a Federal statute does not necessarily involve a Federal question so as to authorize a writ of error from this court.

McMillen v. Ferrum Min. Co. 197 U. S. 343, 49 L. ed. 784, 25 Sup. Ct. Rep. 533.

No inference of the denial of the Federal question raised in the assignments of error can be based upon the decision itself, because it might have rested upon other grounds broad enough to sustain it. For example: The state courts might have disclaimed jurisdiction to enforce the Federal anti-monopoly act. For such a course authority may be found.

Locker v. American Tobacco Co. 121 App. Div. 443, 106 N. Y. Supp. 115, affirmed in 195 N. Y. 565, 88 N. E. 289; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 51 L.R.A. 170, 81 Am. St. Rep. 368, 60 S. W. 91.

Or the state courts might have refused to enforce the Federal anti-monopoly act in a suit in equity for an injunction, not brought by the United States. For this there is authority.

Minnesota v. Northern Securities Co. 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. Rep. 598; Houston Coal & Coke Co. v. Norfolk & W. R. Co. 171 Fed. 723; Blindell v. Hagan, 54 Fed. 40; Gulf, C. & S. F. R. Co. v. Miami S. S. Co. 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407; Southern Indiana Exp. Co. v. United States Exp. Co. 88 Fed. 659, 35 C. C. A. 172, 92 Fed. 1022; National Fireproofing Co. v. Mason Builders' Asso. 26 L.R.A.(N.S.) 148, 94 C. C. A. 535, 169 Fed. 259.

Or the state courts, having granted an injunction and damages under the state law, might have refused, in the same action, to apply the Federal statute, which has different provisions, relates to different subject-matter, and awards different relief, and especially when the claim under it was merely cumulative. For such a refusal there would be abundant and obvious argument of convenience. Or the state courts might have refused to make a finding that the defendants' acts restrained interstate commerce because the complaint contained no allegation to that effect, unless such an allegation could be inferentially deduced from allegations framed to bring the case within the state statute.

Unless a decision upon a Federal question was necessary to the judgment, or in fact was made the ground of it, the writ of error must be dismissed. And even when an erroneous decision upon a Federal question is made a ground, if the judgment also is supported upon another which is adequate by itself, and which contains no Federal question, the same result must follow as a general rule.

Arkansas Southern R. Co. v. German Nat.

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Bank, 207 U. S. 270, 275, 52 L. ed. 201, 203, 28 Sup. Ct. Rep. 78; Bachtel v. Wilson, 204 U. S. 36, 41, 51 L. ed. 357, 359, 27 Sup. Ct. Rep. 243; Western U. Teleg. Co. v. Wilson, 213 U. S. 52, 53, 53 L. ed. 693, 694, 29 Sup. Ct. Rep. 403; Bonner v. Gorman, 213 U. S. 86, 53 L. ed. 709, 29 Sup. Ct. Rep. 483; California Powder Works v. Davis, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350.

Mr. John G. Milburn also argued the cause, and, with Mr. Stephen H. Olin, filed a brief for defendants in error:

It is not enough that there may be somewhere, hidden in the record, a question which, if raised, would be of a Federal nature.

Dewey v. Des Moines, 173 U. S. 193, 199, 43 L. ed. 665, 666, 19 Sup. Ct. Rep. 379; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904.

There is nothing to prevent a party from waiving a Federal right of this character if he chooses to do so, either in express terms or as a necessary implication from his manner of proceeding in the cause.

Harding v. Illinois, 196 U. S. 78, 88, 49 L. ed. 394, 397, 25 Sup. Ct. Rep. 176.

It was not error to dismiss the complaint as to copyrighted books because—

(a) The plaintiffs have not come into a court of equity with clean hands.

Michigan Pipe Co. v. Fremont Ditch, P. L. & Reservoir Co. 49 C. C. A. 324, 111 Fed. 284; 1 Pom. Eq. Jur. §§ 398, 404; Manhattan Medicine Co. v. Wood, 108 U. S. 218, 227, 27 L. ed. 706, 709, 2 Sup. Ct. Rep. 436; Comstock v. Johnson, 46 N. Y. 615; Fetridge v. Wells, 4 Abb. Pr. 144, 13 How. Pr. 388; Toledo Computing Scale Co. v. Computing Scale Co. 74 C. C. A. 89, 142 Fed. 919; 1 Eddy, Combinations, § 329; Message of the President to Congress, Dec. 5th 1911; Straus v. American Publishers' Asso. 177 N. Y. 473, 64 L.R.A. 701, 101 Am. St. Rep. 819, 69 N. E. 1107; John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 175 N. Y. 14, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136; Clinton E. Worden & Co. v. California Fig Syrup Co. 187 U. S. 516, 528, 530, 47 L. ed. 282, 288, 289, 23 Sup. Ct. Rep. 161; Uri v. Hirsch, 123 Fed. 578.

(b) It appears that the plaintiffs have suffered no actionable damage from the acts complained of.

Verplanck v. Van Buren, 76 N. Y. 249; Central Coal & Coke Co. v. Hartman, 49 C. C. A. 244, 111 Fed. 96; The Conqueror, 166 U. S. 110, 41 L. ed. 937, 17 Sup. Ct. Rep. 510; 1 Sedgw. Damages, §§ 143, 202; Authors & Newspapers Asso. v. O'Gorman Co. 147 Fed. 616; Warren v. Stoddart, 105 U. S. 224, 26 L. ed. 1117; Parsons v. Sutton, 66 N. Y. 92; Lawrence v. Porter, 26 L.R.A. 167, 11 C. C. A. 27, 22 U. S. App. 483, 63 Fed. 62; Hamilton v. McPherson, 28 N. Y. 76, 84 Am. Dec. 330; Rochester Lantern Co. v. Stiles & P. Press Co. 135 N. Y. 217, 31 N. E. 1018; Brown v. Weir, 95 App. Div. 78, 88 N. Y. Supp. 479; Milton v. Hudson River S. B. Co. 37 N. Y. 214; Ashley v. Rocky Mountain Bell Teleph. Co. 25 Mont. 286, 64 Pac. 765; Louisville & N. R. Co. v. Sullivan Timber Co. 138 Ala. 379, 35 So. 327; Scherrer v. Baltzer, 84 Ill. App. 126; French v. Vining, 102 Mass. 132, 3 Am. Rep. 440; Rudell v. Grand Rapids Cold-Storage Co. 136 Mich. 528, 99 N. W. 756, 16 Am. Neg. Rep. 380; Vencill v. Quincey, P. & K. C. R. Co. 132 Mo. App. 722, 112 S. W. 1030; Dobbins v. Duquid, 65 Ill. 464; Joseph v. Sulzberger, 136 App. Div. 508, 121 N. Y. Supp. 73; Swift & Co. v. Johnson, 1 L.R.A.(N.S.) 1161, 71 C. C. A. 619, 138 Fed. 867.

Notwithstanding the Federal anti-trust act, it is lawful for a publisher when selling, at wholesale, books copyrighted by him, to fix, by agreement with the purchasing bookseller, the retail price at which such copyrighted books shall be sold during a period of one year.

E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 91–93, 46 L. ed. 1058, 1068–1070, 22 Sup. Ct. Rep. 747; Henry v. A. B. Dick Co. 224 U. S. 1, 31, 39, 43–47, 56 L. ed. 645, 657, 660, 662, 663, 32 Sup. Ct. Rep. 364, Ann. Cas. 1913D, 880; Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 58, 123 Fed. 424; National Phonograph Co. v. Schlegel, 64 C. C. A. 594, 128 Fed. 733; Robinson, Patents, § 824; Edison Phonograph Co. v. Kaufmann, 105 Fed. 960; John D. Park & Sons Co. v. Hartmann, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24; Edison Phonograph Co. v. Pike, 116 Fed. 863; Drone, Copyright, 365, 383, 387–399, 433, 467; Story v. Holcombe, 4 McLean, 306, Fed. Cas. No. 13,497; Macgillivray, Copyright, 281, 282; Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. Rep. 177; Reed v. Holliday, 19 Fed. 325; List Pub. Co. v. Keller, 30 Fed. 772; Gilmore v. Anderson, 38 Fed. 846; Harper & Bros. v. Donohue, 144 Fed. 491; West Pub. Co. v. Lawyers' Co-op. Pub. Co. 25 L.R.A. 441, 64 Fed. 360; Harper v. Ranous, 67 Fed. 904; Daly v. Webster, 4 C. C. A. 10, 1 U. S. App. 573, 56 Fed. 483; Ogilvie v. G. & C. Merriam Co. 149 Fed. 858; Doan v. American Book Co. 45 C. C. A. 42, 105 Fed. 772; Murphy v. Christian Press Asso. Pub. Co. 38 App. Div. 430, 56 N. Y. Supp. 597; Parton v. Prang, 3 Cliff. 537, Fed. Cas. No. 10,784; Hudson v. Patten, 1 Root, 133; Aronson v. Baker, 43 N. J. Eq.

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369, 12 Atl. 177; John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 175 N. Y. 19, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136; Cooper v. Stephens [1895] 1 Ch. 567, 64 L. J. Ch. N. S. 403, 43 Week. Rep. 444, 72 L. T. N. S. 390, 13 Reports, 444; Marshall v. Bull, 85 L. T. N. S. 77, 17 Times L. R. 684; Patterson v. J. S. Ogilvie Pub. Co. 119 Fed. 453; Stevens v. Gladding, 17 How. 447, 15 L. ed. 155; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 405, 55 L. ed. 502, 517, 31 Sup. Ct. Rep. 376.

The agreement of the American Publishers' Association was not in violation of the Sherman act.

Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Standard Oil Co. v. United States, 221 U. S. 1, 58, 55 L. ed. 619, 644, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Straus v. American Publishers' Asso. 177 N. Y. 477, 64 L.R.A. 701, 101 Am. St. Rep. 819, 69 N. E. 1107; John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136; United States v. John Reardon & Sons Co. 191 Fed. 454; Fonotipia Limited v. Bradley, 171 Fed. 951; Heim v. New York Stock Exch. 64 Misc. 531, 118 N. Y. Supp. 591; American Live Stock Commission Co. v. Chicago Live Stock Exch. 143 Ill. 210, 18 L.R.A. 190, 36 Am. St. Rep. 385, 32 N. E. 274.

[229] Mr. Justice Day delivered the opinion of the court:

This is a writ of error to review a judgment of the supreme court of the state of New York, rendered on remittitur from the court of appeals, refusing to grant to the plaintiffs in error an injunction restraining any interference with their purchase and sale of copyrighted books, and damages, the defendants acting under an agreement alleged to be violative of the laws of New York and the Sherman anti-trust act (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200).

The suit originated in a bill filed in the supreme court of the state of New York for New York county, in which the plaintiffs in error alleged that they conducted a department store in New York city, a large department of which was devoted to books, magazines, and pamphlets; that, because of their methods of business, they had been able to undersell other retail book stores; that the defendants in error, through the American Publishers' Association and the American Booksellers' Association, and by means of resolutions and agreements, with the co-operation of the Associations and their members, and by the use of various practices and methods, to the end that books should be sold to the booksellers only who would maintain the retail price upon net copyrighted books for one year, and who would not sell books to anyone who would cut such prices, had restrained and prevented competition in the state of New York and throughout all of the United States in the supply and price of books, and that the business of the plaintiffs in error had been seriously affected; and they prayed that the combination and agreements be declared unlawful, and that defendants be enjoined from acting thereunder or accomplishing the purposes thereof, and for damages. A demurrer having been interposed to the complaint and sustained by the court at special term, and the interlocutory judgment [230] there entered having been reversed upon appeal to the appellate division of the first department, the court of appeals, permission having been granted to appeal and the question certified, affirmed the decision, and held that, so far as the bill related to copyrighted books, the demurrer was good; but that as to uncopyrighted books, the complaint stated facts sufficient to constitute a cause of action. 177 N. Y. 473, 64 L.R.A. 701, 101 Am. St. Rep. 819, 69 N. E. 1107.

Amended answers having been filed, upon trial to the court without a jury, the court made findings of fact from which it appears that the material allegations of the complaint are true, as above set forth, and further, that about April 1, 1904, and after the decision of the court of appeals reported in 177 N. Y., the Associations amended their resolutions and agreements so as to restrict the application and operation thereof to copyrighted books only; that about January 19, 1907, the Publishers' Association revoked all its former resolutions and adopted a new resolution, but that the Associations had continued the same course as to copyrighted books as was followed before the passage of such resolution. The court concluded that the resolutions and agreements, so far as they related to uncopyrighted books, were unlawful and contrary to the laws of New York, and to that extent granted relief by way of injunction and damages; but held that as to copyrighted books, the agreements, resolutions, and acts of the defendants were not unlawful, and entered an interlocutory judgment accordingly; and in its opinion the court stated that the former decision of the court of appeals in the case (177 N. Y. 473) was controlling. Plaintiffs in error excepted to the conclusions of law made by the court, restrict-

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ing the illegality of the combinations to uncopyrighted books, and requested that certain conclusions be made, and excepted to the refusal to find the conclusions submitted by them.

From that part of the interlocutory judgment denying [231] relief as to copyrighted books, the plaintiffs in error appealed to the appellate division, which, also upon the authority of 177 N. Y. 473, affirmed the interlocutory judgment, and judgment of affirmance was entered in the supreme court; and, with permission, an appeal was taken to the court of appeals, which answered in the negative the question certified by the appellate division as to whether plaintiffs in error, in so far as copyrighted books were concerned, were entitled to relief, adhering to its previous decision (177 N. Y. 473). 193 N. Y. 496, 86 N. E. 525. Judgment was so entered on remittitur to the supreme court. The report of the referee appointed to ascertain the amount of the damages sustained by the plaintiffs in error in the sale of uncopyrighted books having been filed and approved, final judgment was entered in the supreme court, granting an injunction and damages as to uncopyrighted books only, and upon appeal to the court of appeals that court affirmed the final judgment (199 N. Y. 548, 93 N. E. 1133) and remitted the case to the supreme court. Judgment on remittitur was accordingly entered, and this writ of error sued out to review that judgment.

In this court a motion was made to dismiss the writ of error upon the ground that it presents no Federal question so saved and brought here as to permit a review of such question. When the case was before the court of appeals, upon demurrer to the complaint (177 N. Y. 473), that court held that the agreement, as to copyrighted books, was not illegal, because of the monopoly granted to the holder of a copyright under the statutes of the United States. The court held that the agreement, as to uncopyrighted books, however, was in violation of the so-called anti-trust law of New York, chapter 690, Laws of 1899, making contracts, agreements, etc., creating monopoly, or restraining or preventing competition in the supply or price of articles or commodities void as against public policy. Subsequently the agreement was modified so as [232] to apply to copyrighted books only, and findings of fact were specifically made upon which the case again went to the court of appeals of New York upon the certified question: "Are the plaintiffs, under the findings of fact contained in the decision in this case, entitled, in so far as copyrighted books are concerned, to the relief demanded in the complaint, or to any relief as against the defendants in this case?" Upon the record the court of appeals by a majority adhered to its former decision, notwithstanding the decision of Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722, which had in the meantime been decided by this court, and held that, as the object of the copyright and patent statutes was to give monopolies, contracts made by the owners of copyrights to secure the fullest protection in the enjoyment of their monopolies would not be condemned by the courts as being in unlawful restraint of trade; at least, not until the Supreme Court of the United States had pronounced differently (193 N. Y. 496). Three of the justices dissented upon the ground that the agreement was clearly one in restraint of trade, as they had theretofore held, and that the decision of this court in Bobbs-Merrill Co. v. Straus, supra, had so construed the copyright act as to limit the right of a copyright holder to the sale of copyrighted works, and did not have the effect to protect such monopolistic agreements as were shown in the present case. As to uncopyrighted books, the views theretofore expressed were maintained by the court, and upon remittitur judgment was entered granting injunction and damages as to such books.

An inspection of the record shows that before the case went to the court of appeals for decision the second time upon the facts found in the lower court, the following conclusions of law were specifically requested, covering the effect of the Sherman anti-trust act as to copyrighted books dealt with in interstate commerce, as was found to be established by the facts in the present case:

[233] "VII. That such resolutions and agreements purporting to restrict the effect of the combination, arrangement, or contracts to copyrighted books likewise affect an article of interstate commerce, and was unlawful and contrary to the aforementioned statute [the Sherman anti-trust act] of the United States as being in restraint to interstate commerce and tending to create a monopoly."

"IX. That the owners of several separate copyrights are not empowered to enter into any contract or agreement or combination between themselves concerning the supply and price of books published under their separate copyrights which would be unlawful and contrary to the statutes of the United States against combinations in restraint of trade or for the purpose of creating a monopoly, if entered into with reference to the supply or price of uncopyrighted books."

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It is thus apparent that, when the defendants below set up the copyright statute of the United States as an authority for the agreement of the character here in question, the plaintiffs contended that such agreement was not only beyond the authority conferred in the copyright act, but was in violation of the terms of the Sherman anti-trust law, making illegal combinations in restraint of trade and tending to monopoly. This contention was in terms denied by the lower court, and the decision upon the facts found went to the court of appeals with the result which we have stated. The contention thus made as to the effect of the Sherman anti-trust act when read in connection with the copyright act of the United States presented a question of a Federal character to the state courts, which claim of Federal right was necessarily denied in the decision of the court of appeals, affirming the judgment of the court below. One who sets up a Federal statute as giving immunity from a judgment against him, which claim is denied by the decision of a state court, may bring the case here for review under § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), [234] now § 237 of the Judicial Code [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227]. Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858. The motion to dismiss for want of jurisdiction must therefore be overruled.

This court, in the case of Bobbs-Merrill Co. v. Straus, supra, held that the copyright act did not grant the right to fix a limitation upon prices of books at subsequent sales to purchasers from retailers by notice of price limitation inscribed upon the book, and, construing the copyright act, held that, in conferring the right to vend a book, it did not intend to confer upon the holder of the copyright any further right after he had exercised the right to vend secured to him by the act.

In the case of Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 57 L. ed. 107, 33 Sup. Ct. Rep. 9, this court had under consideration the effect of the patent statute upon agreements found to be unlawful under the Sherman law, and the agreements condemned were held not to be protected as within the patent monopoly conferred by the statute. Replying to the contention as to the protection which the patent law gave to enter into such agreements, this court said (p. 49):

"Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, —rights which may be pushed to evil consequences, and therefore restrained."

So, in the present case, it cannot be successfully contended that the monopoly of a copyright is in this respect any more extensive than that secured under the patent law. No more than the patent statute was the copyright act intended to authorize agreements in unlawful restraint of trade and tending to monopoly, in violation of the specific terms of the Sherman law, which is broadly designed [235] to reach all combinations in unlawful restraint of trade, and tending, because of the agreements or combinations entered into, to build up and perpetuate monopolies.

From the finding of facts upon which the court certified the question decided to the court of appeals, after the attempted reformation in view of the first decision of that court, it appears that the Publishers' Association was composed of probably 75 per cent of the publishers of copyrighted and uncopyrighted books in the United States, and that the Booksellers' Association included a majority of the booksellers throughout the United States; that the Associations adopted resolutions and made agreements obligating their members to sell copyrighted books only to those who would maintain the retail price of such net copyrighted books, and, to that end, that the Associations combined and co-operated with the effect that competition in such books at retail was almost completely destroyed. The findings further show that the Associations employed various methods of ascertaining whether prices of net copyrighted books were cut and whether there was competition in the sale thereof at retail, and issued cut-off lists, so-called, directing the discontinuance of the sale of such books to offenders, and that the plaintiffs in error, who had failed to maintain net prices upon copyrighted books, had been put upon the cut-off lists, and were unable to secure a supply of such books in the ordinary course of business. It further appears that in some instances dealers who had supplied the plaintiffs in error were wholly ruined and driven out of business; that the Booksellers' Association widely circulated the names of such dealers, and warned others to avoid their fate, and that various circulars were issued to the trade at large by both Associations, warning all persons against dealing with the plaintiffs in error or other so-called price-cutters; that after the reformation of the resolutions and agreements in 1904, the

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Associations and [236] their members continued the same methods as to ascertaining the supply of copyrighted books of the plaintiffs in error, as to cut-off lists and circulars to the trade, and that, although in 1907 the resolution of the Publishers' Association was modified so that the "agreement" became a "recommendation," the cut-off lists were still issued, with plaintiff's name thereon, and that the dealers still refused to supply plaintiffs in error with books of any kind. And it also appears from the finding of facts that the members of the Associations resided in and carried on the business of selling books in many different states, and purchased books from persons in many states other than the one in which they resided and did business; and that the rules, regulations, and agreements of the Associations were enforced against all publishers and dealers in books throughout the United States, whether they were members of either Association or not, and whether they purchased books in one state for transportation and delivery in another, or for delivery in the state where purchased.

We agree with the court of appeals in its characterization of the agreement involved in this case, about which there seems to have been no difference of opinion, except as to the supposed protection of the copyright act. It manifestly went beyond any fair and legal agreement to protect prices and trade as among the parties thereto, and prevented, as the court of appeals said, when dealing with uncopyrighted books, the sale of books of any kind, at any price, to those who were condemned by the terms of the agreement, and with whom dealings were practically prohibited. We conclude, therefore, that the court of appeals erred in holding that the agreement was justified by the copyright act, and was not within the denunciation of the Sherman act, and in denying, for that reason alone, the right of the plaintiffs in error to recover under the state act as to copyrighted books.

[237] This view of the case renders it unnecessary to decide whether an original action can be maintained in the state courts, seeking an injunction, and to recover damages under the Sherman law.

As the Federal question, made in the manner which we have stated, was, in our view, wrongly decided, and such decision was the basis of the judgment in the state court, the judgment of that court must be reversed. Murdock v. Memphis, 20 Wall. 590, 634, 22 L. ed. 429, 443.

Judgment reversed and case remanded to the state court whence it came for further proceedings not inconsistent with this opinion.

UNITED STATES FIDELITY & GUARANTY COMPANY, Plff. in Err.,
v.
UNITED STATES FOR THE BENEFIT OF FRANK P. BARTLETT.

(See S. C. Reporter's ed. 237-244.)

Bonds — of public contractor — extent of obligation — labor and materials.

1. The work of quarrying the stone and transporting it to the place of building a breakwater for the Federal government is within the obligations of the bond of the contractor for the construction of the breakwater, executed pursuant to the act of August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), conditioned for the prompt payment by him to all persons supplying him with labor or materials in the prosecution of the work provided for in his contract.

[For other cases, see Bonds, I., in Digest Sup. Ct. 1908.]

Assignment — what constitutes.

2. The practice of an employer, consented to by the employees, to deduct from their wages and credit the superintendent's account with the amount of advances made by him to such workmen, amounts, to the extent of such deductions as are approved by the employees, to an assignment to the superintendent of their wage claims.

[For other cases, see Assignment, II., in Digest Sup. Ct. 1908.]

Bond — of public contractor — excessive demands.

3. Claiming an excessive amount under the bond of a public contractor, given conformably to the act of August 13, 1894, to protect laborers and materialmen, does not defeat the right to enforce the bond for the amount fairly due, where the excessive demand was not wilfully or intentionally made.

[For other cases, see Bonds, I., in Digest Sup. Ct. 1908.]

Laches — suit on bond of public contractor.

4. A delay of upwards of five years in bringing suit on the bond of a public contractor, given conformably to the act of August 13, 1894, for the protection of laborers and materialmen, during which time the contractor became insolvent, is not such laches as will defeat the suit, although

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Note.—On the nature of labor or materials which will support an action upon a contractor's bond—see note to Standard Boiler Works v. National Surety Co. 43 L.R.A.(N.S.) 162.

As to laches as a defense—see notes to Middletown v. Newport Hospital, 1 L.R.A. 191; Calhoun v. Delhi & M. R. Co. 8 L.R.A. 248; Coffey v. Emigh, 10 L.R.A. 125; Pratt v. Carroll, 3 L. ed. U. S. 627; Hammond v. Hopkins, 36 L. ed. U. S. 135; Felix v. Patrick, 36 L. ed. U. S. 720; and Abraham v. Ordway, 39 L. ed. U. S. 1037.

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coupled with want of previous demand or notice to the surety.

[For other cases, see Limitation of Actions, I. b, 2, in Digest Sup. Ct. 1908.]

[No. 50.]

Argued November 6 and 7, 1913. Decided December 1, 1913.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of New York, in favor of plaintiff in an action upon the bond of a public contractor. Affirmed.

See same case below, 111 C. C. A. 71, 189 Fed. 339.

Statement by Mr. Justice Day:

The United States, for the benefit of Frank P. Bartlett, brought suit in the circuit court of the United States for the southern district of New York against the plaintiff in error, as surety upon a bond given pursuant to the provisions of an act of Congress (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), to the effect that any person or persons contracting with the government for the prosecution of public work should be required to furnish a bond conditioned that the contractor or contractors would "promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract." Upon trial a verdict was rendered in his favor, and judgment entered accordingly. The circuit court of appeals for the second circuit affirmed the judgment (111 C. C. A. 71, 189 Fed. 339), and this writ of error is brought to review its judgment.

The record shows: The United States government contracted with one Donovan on February 18, 1903, for the construction of a breakwater off Point Judith, Rhode Island, it being provided in the contract that he should be "responsible for and pay all liabilities incurred in the prosecution of the work for labor and material." Donovan executed a bond containing the obligation required by the act, with the plaintiff in error as surety. Donovan was associated with Hughes & Bangs, and it was agreed that they should perform the contract, and that he would turn over the government's estimates to them, this fact being known to the plaintiff in error.

An arrangement was made between Hughes Brothers & [239] Bangs and Bartlett that he should engage the labor, open the quarry of the former, located at Sachems Head, Connecticut, about 50 miles from the breakwater, and superintend the furnishing of stone for the construction of the breakwater. Bartlett was also to maintain a commissary at the quarry from which the men might be supplied with provisions and merchandise, an account to be kept of the articles purchased, and, after approval by the men, forwarded to the office of Hughes Brothers & Bangs, who would deduct the amount from the wages of the laborers, this practice being with their consent, and credit Bartlett's account.

The quarry was operated, labor being employed in various ways, from clearing the surface preparatory to blasting to loading the stone on scows, and the stone was transported to the breakwater and there deposited according to the direction of a government inspector. All, save the inspector and a few of the more skilled workmen, were provided for at the commissary, and, under the arrangement described, the amount of their purchases was deducted from their wages by Hughes Brothers & Bangs. Separate account was kept of the men who were actually employed at the breakwater, for the reason that Bartlett had to wait for them to come back to procure their approval of his charges, before he could send in his statement to Hughes Brothers & Bangs.

The contract was completed November 8, 1903, and on December 22, 1903, the last retained percentage of $8,956.44 was paid by the United States. Hughes Brothers & Bangs became insolvent in 1907 or 1908. Suit on the bond was begun June 4, 1909.

Mr. Emanuel J. Myers argued the cause, and, with Messrs. Leonidas Dennis and Gordon S. P. Kleeberg, filed a brief for plaintiff in error:

Neither the act of Congress nor the terms of the bond warrant a recovery for preparation for the performance of the contract.

City Trust, S. D. & Surety Co. v. United States, 77 C. C. A. 397, 147 Fed. 157; United States use of Sabine & E. T. R. Co. v. Hyatt, 34 C. C. A. 445, 63 U. S. App. 767, 92 Fed. 442; United States use of Thomas Laughlin Co. v. Morgan, 111 Fed. 484; United States use of Sica v. Kimpland, 93 Fed. 406; United States ex rel. McAllister v. Fidelity & D. Co. 86 App. Div. 478, 83 N. Y. Supp. 752; Philadelphia v. Malone, 214 Pa. 95, 63 Atl. 539; Schaghticoke Powder Co. v. Greenwich & J. R. Co. 183 N. Y. 306, 2 L.R.A.(N.S.) 288, 111 Am. St. Rep. 751, 76 N. E. 153, 5 Ann. Cas. 443; Troy Public Works Co. v. Yonkers, 207 N. Y. 81, 44 L.R.A.(N.S.) 311, 100 N. E. 700; Kennedy v. Com. 182 Mass. 480, 65 N. E. 828.

No assignment of the wages to be there-

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after earned was proved sufficient to sustain a recovery in an action at law, but the transaction at most constituted only an equitable assignment, enforceable only in equity, and cognizable at law only after it had been legally completed or established.

Ridings v. Johnson, 128 U. S. 212, 217, 32 L. ed. 401, 402, 9 Sup. Ct. Rep. 72; Pacific Mut. L. Ins. Co. v. Webb, 84 C. C. A. 603, 157 Fed. 159, 13 Ann. Cas. 752; Levi v. Mathews, 76 C. C. A. 122, 145 Fed. 154; Re Black, 138 App. Div. 564, 123 N. Y. Supp. 371; Hovey v. Elliott, 118 N. Y. 136, 23 N. E. 475; Union Trust Co. v. Bulkeley, 80 C. C. A. 328, 150 Fed. 514.

The contractor's bond is a substitute under the act of Congress for a mechanics' lien secured by a statute to laborers and materialmen.

Title Guaranty & T. Co. v. Puget Sound Engine Works, 89 C. C. A. 618, 163 Fed. 174; Title Guaranty & T. Co. v. Crane Co. 219 U. S. 34, 55 L. ed. 77, 31 Sup. Ct. Rep. 140; United States v. Ansonia Brass & Copper Co. 218 U. S. 452, 471, 54 L. ed. 1107, 1114, 31 Sup. Ct. Rep. 49; United States ex rel. McAllister v. Fidelity & D. Co. 86 App. Div. 479, 83 N. Y. Supp. 752; Kennedy v. Com. 182 Mass. 481, 65 N. E. 828.

A claim of lien for a wilfully exaggerated and unconscionable amount cannot be enforced against the owner even for the actual amount that may be due.

Lane & B. Co. v. Jones, 79 Ala. 163; Camden Iron Works v. Camden, 60 N. J. Eq. 214, 47 Atl. 220; Uthoff v. Gerhard, 42 Mo. App. 256; Springer Land Asso. v. Ford, 168 U. S. 513, 42 L. ed. 562, 18 Sup. Ct. Rep. 170; Marsh v. Mick, 159 Ill. App. 407; Stubbs v. Clarinda, C. S. & S. W. R. Co. 62 Iowa, 280, 17 N. W. 530, 65 Iowa, 513, 22 N. W. 654; J. E. Greilick Co. v. Taylor, 143 Mich. 704, 107 N. W. 712; Griff v. Clark, 155 Mich. 611, 29 L.R.A.(N.S.) 305, 130 Am. St. Rep. 582, 119 N. W. 1076; State ex rel. Connors v. Shelton, 238 Mo. 291, 142 S. W. 417; Lynch v. Cronan, 6 Gray, 531; Jones v. Keen, 115 Mass. 171; McPherson v. Walton, 42 N. J. Eq. 282, 11 Atl. 21; Reeve v. Elmendorf, 38 N. J. L. 125; Romanik v. Rapoport, 148 App. Div. 691, 132 N. Y. Supp. 892; Nicolai Bros. Co. v. Van Fridagh, 23 Or. 149, 31 Pac. 288; Bohn Mfg. Co. v. Keenan, 15 S. D. 377, 89 N. W. 1009; Robinson v. Brooks, 31 Wash. 60, 71 Pac. 721.

The claim made against the surety is so gross, so exorbitant, and so unconscionable as to defeat any and all right of recovery.

Industrial & General Trust v. Tod, 180 N. Y. 225, 73 N. E. 7; Aeschlimann v. Presbyterian Hospital, 165 N. Y. 302, 80 Am. St. Rep. 723, 59 N. E. 148; Equitable Sav. & L. Asso. v. Hewitt, 55 Or. 338, 106 Pac. 447.

Where the items for which a lien can be claimed are inextricably blended and intermingled with items for which no right or lien can be urged, the action cannot be maintained.

United States use of Rockland Lake Trap Rock Co. v. Conkling, 68 C. C. A. 220, 135 Fed. 512; Schulenburg & B. Lumber Co. v. Strimple, 33 Mo. App. 160.

The creditor's gross laches and delay in presenting his claim against the surety, followed by the withdrawal of retained percentages and the insolvency of the principal, bars recovery.

United States Fidelity & G. Co. v. Golden Pressed & Fire Brick Co. (United States Fidelity & G. Co. v. United States) 191 U. S. 416, 426, 48 L. ed. 242, 246, 24 Sup. Ct. Rep. 142; United States use of Heise v. American Bonding & T. Co. 89 Fed. 924.

The admissions and declarations of Hughes Brothers & Bangs, who were subcontractors of the principal in the bond, were inadmissible and incompetent as against the surety.

1 Greenl. Ev. § 187, 16th ed. note 1; Hatch v. Elkins, 65 N. Y. 496; Rae v. Beach, 76 N. Y. 168; Wheeler v. State, 9 Heisk. 393; White v. German Nat. Bank, 9 Heisk. 475; Bocard v. State, 79 Ind. 270; Knott v. Peterson, 125 Iowa, 407, 101 N. W. 173; Lee v. Brown, 21 Kan. 458; Howe Mach. Co. v. Farrington, 16 Hun, 591; Ayer v. Getty, 46 Hun, 288.

Both at law and in equity a claimant will not be heard to allege that he was ignorant of payments made to him, unless the burden of proof cast upon him of establishing such ignorance is fairly met.

Lynch v. Cronan, 6 Gray, 531; McPherson v. Walton, 42 N. J. Eq. 282, 11 Atl. 21; Gibbs v. Hanchette, 90 Mich. 657, 51 N. W. 691; Jones v. Keen, 115 Mass. 170.

Messrs. **Edward W. Norris** and **Horace L. Cheyney** argued the cause, and, with Mr. Henry B. Hammond, filed a brief for defendant in error:

The surety company is liable, under its bond, for the wages of the laborers who were employed in the quarry and in all other work necessary for the complete performance of the contract of Donovan with the government.

Title Guaranty & T. Co. v. Puget Sound Engine Works, 89 C. C. A. 618, 163 Fed. 168, affirmed in 219 U. S. 24, 55 L. ed. 72, 31 Sup. Ct. Rep. 140; United States use of Hill v. American Surety Co. 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 168; American Surety Co. v. Lawrenceville Cement Co. 110 Fed. 717; Title Guaranty &

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T. Co. v. Crane, 219 U. S. 34, 55 L. ed. 77, 31 Sup. Ct. Rep. 140.

The laborers made complete legal assignments of their wages claims to Bartlett.

Re Black, 138 App. Div. 562, 123 N. Y. Supp. 371.

Bartlett was not guilty of fraud upon the Surety Company by bringing suit for more than was found by the jury to be due to him.

Pioneer Min. Co. v. Delamotte, 108 C. C. A. 90, 185 Fed. 752; Schmulbach v. Caldwell, 115 C. C. A. 650, 196 Fed. 28; Ringle v. Wallace Iron Works, 149 N. Y. 439, 44 N. E. 175.

After making the foregoing statement, Mr. Justice **Day** delivered the memorandum opinion of the court:

The nature of liability upon bonds given in pursuance of the act of Congress has been the subject of frequent consideration in this court, and the former discussions and conclusions need not be repeated here. United States Fidelity & G. Co. v. Golden [243] Pressed & Fire Brick Co. (United States Fidelity & G. Co. v. United States) 191 U. S. 427, 48 L. ed. 247, 24 Sup. Ct. Rep. 142; United States use of Hill v. American Surety Co. 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 168; Mankin v. United States, 215 U. S. 533, 54 L. ed. 315, 30 Sup. Ct. Rep. 174.

The first contention of the plaintiff in error is that the work done at the quarry and the hauling and delivering of stone at the breakwater, or, at least, certain parts of such work, are not within the terms of the contract and bond, as work done or material furnished in the prosecution of the work provided for in the contract. This contention was rejected by the court below, and we think properly. The object of the contract was to put the stone in place, much of it being merely dropped into the water, with a view to the construction of the breakwater. To accomplish this purpose it was, of course, necessary to have the material taken from the quarry, using tools and labor for that purpose, and transported to the location of the breakwater, and there deposited. This material could not be had immediately at the breakwater, and bids were required to show samples of stone and names and locations of quarries to be used as the source of supply. The work involved in the claim here made was all necessary to the performance of the contract, and in our view comes clearly within the class of labor accounts the satisfaction of which it was the purpose of the act of Congress to secure by a proper bond.

It is next contended that the laborers had not assigned their claims to Bartlett in such way as to give him any more than an equitable right thereto, and had not clothed him with the legal right to maintain an action at law upon the bond. But we think that the testimony discloses that so much of the laborers' wages as were necessary to satisfy Bartlett's advances were assigned to him with their consent, and deductions to that extent made from such wages with their approval in such wise as to consummate the assignment.

It is next urged that in making the claim for an excessive [244] amount there was such gross fraud that no recovery can be had in the case. It is sought to bring this contention within that class of cases which have held that mechanics' liens, when wilfully and intentionally made, for an amount in excess of that fairly due, cannot be enforced for any sum. We do not think the record displays a case of that character. It appears that some of the books of Bartlett, left in a building at the quarry, had been destroyed, and that efforts were made to obtain the amount of payments from other sources. At the trial it appeared that the credits to be made upon the account were contained upon certain cards which were in the possession of counsel for the plaintiff in error. Upon production at the trial they were admitted and accepted as containing proper credits to be made upon the account, and the judge charged the jury that the credits shown on the cards should be made the basis of calculations by the jury, if they found, under the facts shown, that any statement of the account was required, and the verdict was rendered accordingly.

As to the contention that the suit of defendant in error, in view of the delay in bringing it and want of previous demand or notice to the surety, shows gross laches, we agree with the circuit court of appeals that the record does not disclose any such laches or change of relation affecting the rights of the surety as would relieve it of liability. Nor do we think there was such confusion of accounts or error in the admission of testimony as to require a reversal.

It therefore follows that the judgment of the Circuit Court of Appeals, affirming the judgment of the Circuit Court, must be affirmed.

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[245] YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Etienne Gele, et al., Plffs. in Err.,

v.

MRS. ANNIE E. BREWER.

(See S. C. Reporter's ed. 245-249.)

Error to state court — decision on non-Federal ground.

A decision of a state court adverse to the defense, in a suit over the title to real property, of the two years' limitation "from the time the cause of action accrued for or against" an assignee in bankruptcy, prescribed by U. S. Rev. Stat. § 5057, for suits between the assignee and a person claiming an adverse interest touching any property or rights of property transferable to, or vested in, such assignee, rests upon a non-Federal ground so as to exclude the appellate jurisdiction of the Federal Supreme Court, where such decision was based upon the theory that because the adverse claimants, or those under whom they claimed, were not in possession of the land when the assignee in bankruptcy was appointed, no cause of action to recover the land had then accrued.

[For other cases, see Appeal and Error, 1465-1528, in Digest Sup. Ct. 1908.]

[No. 62.]

Argued November 12 and 13, 1913. Decided December 1, 1913.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which affirmed a judgment of the Civil District Court for the Parish of Orleans, in that state, in favor of plaintiff in a suit to establish title to real property. Dismissed for want of jurisdiction.

See same case below, 128 La. 544, 54 So. 987.

The facts are stated in the opinion.

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On error to state court in cases involving land titles—see note to O'Conor v. Texas, 50 L. ed. U. S. 1120.

Mr. Benjamin Ory argued the cause, and, with Messrs. Hunter C. Leake, Gustave Lemle, Charles N. Burch, and H. D. Minor, filed a brief for plaintiffs in error.

Mr. Monte M. Lemann argued the cause, and, with Mr. J. Blanc Monroe, filed a brief for defendant in error.

Mr. Justice Day delivered the opinion of the court:

This is a suit by Mrs. Annie E. Brewer as plaintiff, now defendant in error, brought in the civil district court for the parish of Orleans, in the state of Louisiana, against [246] the Yazoo & Mississippi Valley Railroad Company, one of the plaintiffs in error, to establish title to a certain portion of the square of ground known as square No. 150 in the city of New Orleans. The district court decided the case in favor of Mrs. Brewer, and the judgment was affirmed upon appeal to the supreme court of Louisiana (128 La. 544, 54 So. 987), and the case is brought here.

Both parties claim title under one Henry Parish, who in 1848 appears to have been the owner of the land. He died in New York, and on December 17, 1857, his will was there admitted to probate. By the will, the square in controversy passed to Peter Conrey in trust for the benefit of one Henry Parish Conrey, with directions that it should be conveyed to him. In December, 1859, Henry Parish Conrey died, and his succession was opened in the second district court for the Parish of Orleans. Inventory was taken, including the property now in question, and on June 9, 1860, James Grimshaw, as administrator, executed a notarial act conveying the property to George Brewer. On December 28, 1875, George Brewer was adjudged a bankrupt, and on January 15, 1876, his estate, real and personal, was conveyed to Charles H. Reed, as assignee, who, on November 23, 1876, by order of court, conveyed the property to Mrs. Annie E. Brewer, plaintiff below. This is the title upon which Mrs. Brewer relied.

The defendants claimed title from the fact that Daniel Parish on April 11, 1868, appearing as a resident of the state of New York, presented a petition to the second district court of the parish of Orleans, alleging that the will of Henry Parish had been admitted to probate in that state, and that he had qualified as one of the executors, and submitted an exemplified copy of the will and of the proceedings, and prayed that the will be executed, which was accordingly done. The executor, under an order of sale, [247] on April 25, 1871, conveyed the property in question to H. C.

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Boucher. On January 15, 1872, Boucher sold to George W. Babcock, and on September 8, 1896, the widow and heirs of Babcock sold to Benjamin Recurt, and on March 31, 1897, Recurt sold to William Laferriere, Etienne Gele, and Jean Marie Gele, and these last named on November 22, 1898, sold a portion of square 150 to the railroad company.

For reasons dependent upon the law of the state, which we need not now recite, the supreme court of Louisiana held that the property had vested in Henry Parish Courey, and that subsequently, by the various means stated, had passed to the present defendant in error, plaintiff below. It also held that the title of the railroad company was fatally defective for reasons resting upon state law, which are set forth in the opinion.

It is contended by the plaintiff in error that the record presents a question decided in the supreme court of the state in such manner as to deny rights asserted in that court under a statute of the United States. This contention rests upon the prescription claimed by Laferriere and the Geles, warrantors of the railroad company (the various warrantors in title having been made parties to the suit), which is said to arise under § 5057 of the Revised Statutes of the United States, which reads as follows:

"No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed."

The plaintiff in error insists that under this statute the alleged right of action of Mrs. Brewer was barred, and [248] that this defense should have been available when invoked in the state court.

The object of the statute is manifest and its purposes are kindred to other statutory provisions looking to a speedy settlement of estates in bankruptcy. The section was before this court in Dushane v. Beall, 161 U. S. 513, 40 L. ed. 791, 16 Sup. Ct. Rep. 637, and it was there held that it applied "only to suits growing out of disputes in respect of property and of rights of property of the bankrupt which came to the hands of the assignee, in which adverse claims existed while in the hands of the bankrupt and before assignment." This construction of the act was adhered to in Hammond v. Whittredge, 204 U. S. 538, 550, 51 L. ed. 606, 612, 27 Sup. Ct. Rep. 396. It therefore follows that in order to have barred the cause of action asserted by Mrs. Brewer in the present case, an adverse claim in favor of the plaintiffs in error must have existed while the property was in the hands of the bankrupt, and before assignment. It is the contention of the plaintiffs in error that the claim existed as against George Brewer, the bankrupt, and as against the assignee as soon as he was appointed, growing out of the adverse title recorded by Boucher and Babcock in 1871 and 1872. But this view was rejected by the supreme court of Louisiana, and, dealing with the prescription claimed for the warrantors because of § 5057, that court said (p. 557):

"The provision of law thus invoked applies, in terms, to causes of action which have accrued 'for or against such assignee,' but not to causes of action which arise between persons who purchase property from an assignee and other persons, long after such purchases, and long after the assignee has become *functus officio;* and it does not apply to this case, because, in January, 1876, when Reed was appointed assignee in bankruptcy of Brewer, the cause of action here sued on did not exist, since neither the defendant nor any of its authors pretended at that time to be in possession of the land here claimed, or had ever done anything [249] to interfere with the constructive possession following the authentic act by which Brewer acquired his title."

Citing other decisions of the supreme court of Louisiana the learned counsel for the plaintiffs in error contends that the law is otherwise,—a contention which is resisted with vigor by the learned counsel for the defendant in error. The decision of the supreme court of Louisiana in this case upon a question of Louisiana law is conclusive upon this court. The supreme court of Louisiana held that no cause of action existed when Reed was appointed assignee in bankruptcy, and that neither the defendant nor any of its authors had made any pretense of possession of the land in controversy, nor had they done anything to interfere with the constructive possession following the act by which Brewer acquired title. When the cause of action accrued to recover the land was a question of state law, not depending upon the Federal statute. In deciding that no cause of action had accrued to Brewer, available to the assignee, because the plaintiffs in error, or those under whom they claimed, were not in possession of the land, the court rested its decision wholly upon state law. The disposition of this question by the state court in the manner we

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have stated controlled the decision of the case, and was sufficiently broad to support the judgment without involving the denial of any Federal right asserted by the plaintiff in error. Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 116, 53 L. ed. 431, 433, 29 Sup. Ct. Rep. 227.

It follows that the writ of error must be dismissed.

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[250] THOMAS R. MARSHALL, as Governor of the State of Indiana, et al., Plffs. in Err.,

v.

JOHN T. DYE.

(See S. C. Reporter's ed. 250–259.)

Error to state court — parties — substitution.

1. The present members of the state board of election commissioners which, under 2 Burns's Ann. Stat. (Ind.) 1908, § 6897, is a continuing board, will be substituted on motion as plaintiffs in error on a writ of error from the Federal Supreme Court to review a judgment of a state court, entered against their predecessors as composing such board, and their successors in office.

[For other cases, see Appeal and Error, IV. b, 5; IV. c; Abatement, II. d, in Digest Sup. Ct. 1908.]

Error to state court — Federal question —republican form of government.

2. The contention that the judgment below contravened U. S. Const. art. 4, § 4, which provides that the United States shall guarantee to every state in the Union a republican form of government, presents no justiciable controversy concerning which the judgment of a state court is reviewable in the Federal Supreme Court upon writ of error, since such provision depends for enforcement upon political and governmental action through powers conferred upon Congress.

[For other cases, see Appeal and Error, 1751–1797; Courts, I. e. 2, in Digest Sup. Ct. 1908.]

Error to state court — who may raise Federal question — officers.

3. Members of a state board of election commissioners and the Secretary of State have no such personal interest as entitles them to a writ of error from the Federal Supreme Court to review a judgment of a state court enjoining them, as officers of the state, from taking steps to submit a proposed Constitution to the electors because, in the court's judgment, the legislative act requiring such submission violates the state Constitution.

[For other cases, see Appeal and Error, 2068, 2069, in Digest Sup. Ct. 1908.]

[No. 401.]

Argued October 23, 1913. Decided December 1, 1913.

IN ERROR to the Supreme Court of the State of Indiana to review a decree which affirmed a decree of the Circuit Court of Marion County, in that state, enjoining certain state officers from taking steps to submit a proposed Constitution to the electors. Dismissed for want of jurisdiction.

See same case below, — Ind. —, 99 N. E. 1.

The facts are stated in the opinion.

Messrs. **Frank S. Roby**, and **Dan W. Simms** argued the cause, and, with Mr. Thomas M. Honan, Attorney General of Indiana, and Messrs. James E. McCullough and Ward H. Watson, filed a brief for plaintiffs in error:

While the suit was originally begun against the plaintiffs in error as officers of the state of Indiana, it was in effect a suit against the office and against the people of the state represented by the plaintiffs in error. It therefore is one of those proceedings which may be commenced with one set of officers and terminated with another set, the latter being bound by the judgment.

Thompson v. United States, 103 U. S. 480, 26 L. ed. 521; Pittsburgh, Ft. W. & C. R. Co. v. Martin, 53 Ohio St. 386, 41 N. E. 690; Hines v. Stahl, 79 Kan. 88, 20 L.R.A. (N.S.) 1118, 131 Am. St. Rep. 280, 99 Pac. 273, 17 Ann. Cas. 298.

The governor and his associates have authority to meet litigation and continue it to a final conclusion; otherwise, any kind of a judgment by any kind of a court, in

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NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see note to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal —see note to Wedding v. Meyler, 66 L.R.A. 833.

On parties to appellate proceedings in Federal Supreme Court—see note to Amadeo v. Northern Assur. Co. 50 L. ed. U. S. 723.

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any kind of a case, would result in permanently preventing the laws being enforced.

Norman v. Kentucky Bd. of Managers, 93 Ky. 537, 18 L.R.A. 557, 20 S. W. 901; Barbour, Parties in Law & Eq. p. 106.

Messrs. Thomas M. Honan, James E. McCullough, Frank S. Roby, Ward H. Watson, W. V. Stuart, E. P. Hammond, Dan W. Simms, Sol. H. Esarey, and Elias D. Salsbury also filed a brief for plaintiffs in error.

Mr. Addison C. Harris argued the cause, and, with Mr. Ralph Kane, filed a brief for defendant in error:

The plaintiffs in error have no personal interest and have not been hurt.

Smith v. Indiana, 191 U. S. 138, 148, 48 L. ed. 125, 126, 24 Sup. Ct. Rep. 51; Braxton County Ct. v. West Virginia, 208 U. S. 192, 52 L. ed. 450, 28 Sup. Ct. Rep. 275.

The mere averment of a Federal question is not enough to give this court jurisdiction over the judgment of a state court. A bare averment of a Federal question is not sufficient. There must be a real, and not a fictitious, Federal question apparent upon the record in order to confer jurisdiction.

Hamblin v. Western Land Co. 147 U. S. 531, 532, 37 L. ed. 267, 268, 13 Sup. Ct. Rep. 353; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 87, 35 L. ed. 943, 946, 12 Sup. Ct. Rep. 142.

This is now a moot case, and should be dismissed.

Mills v. Green, 159 U. S. 651, 653, 40 L. ed. 293, 294, 16 Sup. Ct. Rep. 132; Pennsylvania v. Wheeling & B. Bridge Co. 18 How. 421, 15 L. ed. 435; California v. San Pablo & T. R. Co. 149 U. S. 308, 314, 37 L. ed. 747, 748, 13 Sup. Ct. Rep. 876; New Orleans Flour Inspectors v. Glover, 160 U. S. 170, 40 L. ed. 382, 16 Sup. Ct. Rep. 321; Jones v. Montague, 194 U. S. 147, 151, 48 L. ed. 913, 914, 24 Sup. Ct. Rep. 611; Tennessee v. Condon, 189 U. S. 64, 47 L. ed. 709, 23 Sup. Ct. Rep. 579; Richardson v. McChesney, 218 U. S. 487, 54 L. ed. 1121, 31 Sup. Ct. Rep. 43.

Mr. Justice Day delivered the opinion of the court:

The case originated in a complaint filed in the circuit court of Marion county, Indiana, by John T. Dye, in which he alleged that he brought the suit for himself and other electors and taxpayers of the state of Indiana, the object of the suit being to enjoin the defendants, Thomas R. Marshall, governor, Muter M. Bachelder, and Charles O. Roemler, jointly composing the state board of election commissioners, and Lew G. Ellingham, secretary of state, from taking the steps required by statute to certify and transmit to the clerks of the several counties in the [255] state a new Constitution proposed by the legislature of the state, and from printing and publishing a statement to be printed upon the ballots in such manner that the electors might indicate their choice as to such new Constitution. Upon trial in the circuit court, an injunction was granted. Upon appeal to the supreme court of the state of Indiana the judgment of the circuit court was affirmed. 99 N. E. 1. The case was then brought here by writ of error.

A motion was filed in this court on September 24, 1913, accompanied by an affidavit, stating the death of John T. Dye, defendant in error, and the appointment of Hugh Dougherty as his executor, and his qualification as such, in compliance with the laws of the state of Indiana, and asking that he be permitted to appear and defend as such executor, which motion is granted.

There was also submitted on October 14, 1913, a motion to substitute Samuel M. Ralston, governor, and Will H. Thompson and John E. Hollett, members of the state board of election commissioners, of the state of Indiana, as plaintiffs in error. As the judgment in this case was against the defendants Thomas R. Marshall, Muter M. Bachelder, and Charles O. Roemler, composing the state board of election commissioners, and their successors in office, and as such board is a continuing board (§ 6897, 2 Burns's Anno. Stat. [Ind.] 1908), notwithstanding its change of personnel, this motion is within the principle laid down in Murphy v. Utter, 186 U. S. 95, 46 L. ed. 1070, 22 Sup. Ct. Rep. 776, and is granted. See also Richardson v. McChesney, 218 U. S. 487, 492, 493, 54 L. ed. 1121, 1122, 31 Sup. Ct. Rep. 43. Lew G. Ellingham, secretary of state, is one of the plaintiffs in error, and the judgment sought to be reviewed ran against him as such secretary of state, and he still occupies that office.

The statute (Acts of 1911, p. 205) under which it was proposed to submit the new Constitution of the state provided for its submission at the general election in [256] November, 1912, and required the election officials and other officers to perform like duties to those required at general elections, with a view to the submission of such questions. The supreme court sustained the contention that the act was void under the state Constitution, holding in substance that the act of 1911 was unconstitutional for want of authority in the legislature to submit an entire Constitution to the electors of the state for adop-

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tion or rejection, and that, if the instrument could be construed to be a series of amendments, it could not be submitted as such for the reason that article 16 of the Constitution of the state requires that all amendments to the state Constitution shall, before being submitted to the electors, receive the approval of two general assemblies, which was not the case here, and that article 16 further provides that while an amendment or amendments to the Constitution, which have been agreed upon by one general assembly, are awaiting the action of a succeeding general assembly or of the electors, no additional amendment or amendments shall be proposed, and that, as a matter of fact, another amendment was still awaiting the action of the electors.

The contention mainly urged by the plaintiffs in error of the denial of Federal rights is that the judgment below is in contravention of article 4, § 4, of the Constitution of the United States, which provides that the United States shall guarantee to every state in the Union a republican form of government. In Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224, this court had to consider the nature and character of that section, and held that it depended for enforcement upon political and governmental action through powers conferred upon the Congress of the United States. The full treatment of the subject in that case renders further consideration of that question unnecessary, and the contention in this behalf presents no justiciable controversy concerning which the decision is [257] reviewable in this court upon writ of error to the state court. Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 314, 47 L. ed. 190, 193, 23 Sup. Ct. Rep. 123. And as to all questions said to be of a Federal character, although the judgment of the supreme court was rested solely upon its interpretation of the state Constitution, the rulings are assailed because of alleged wrongs done to the plaintiffs in error in their official capacity only.

We have had frequent occasion to declare that the right of this court to review the judgment of the highest court of a state is circumscribed within the limits of § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), now § 237 of the Judicial Code [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227]. See Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220, and cases there cited. Among the limitations upon this right is the principle which requires those who seek to bring in review in this court the judgment of a state court to have a personal, as distinguished from an official, interest in the relief sought and in the Federal right alleged to be denied by the judgment of the state court. This principle was laid down in Smith v. Indiana, 191 U. S. 138, 48 L. ed. 125, 24 Sup. Ct. Rep. 51, in which it was held that the auditor of a county of the state of Indiana could not, upon writ of error to this court, have the judgment of the supreme court of Indiana, declaring an exemption law of that state valid and the performance of its provisions obligatory upon him, reviewed upon the ground that the act was repugnant to the Federal Constitution. The court, Mr. Justice Brown delivering the opinion, said (p. 149):

"It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their nonperformance was equally so. He neither gained nor lost anything by invoking the advice of the supreme court as to the proper action he should take. He was testing the constitutionality of the law purely in the interest of third persons; *viz.*, [258] the taxpayers; and in this particular the case is analogous to that of Caffrey v. Oklahoma, 177 U. S. 346, 44 L. ed. 799, 20 Sup. Ct. Rep. 664. We think the interest of an appellant in this court should be a personal, and not an official, interest, and that the defendant, having sought the advice of the courts of his own state in his official capacity, should be content to abide by their decision."

In Braxton County Ct. v. West Virginia, 208 U. S. 192, 52 L. ed. 450, 28 Sup. Ct. Rep. 275, it was held that, where the supreme court of West Virginia had compelled a county court by mandamus to lower its assessment so that it would be within the limit designated by a certain statute, this court would not entertain a writ of error to review the judgment of the state court, although the plaintiff in error had set up that the assessment contended for would not provide a sufficient amount to pay the expenses of the county, part of which it was alleged had by contract attached before the statute in question was passed. Speaking for the court, Mr. Justice Brewer said:

"That the act of the state is charged to be in violation of the national Constitution, and that the charge is not frivolous, does not always give this court jurisdiction to review the judgment of a state court. The party raising the question of constitutionality and invoking our jurisdiction must be interested in and affected adversely by the decision of the state court sustaining the act, and the interest must be of a

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personal, and not of an official, nature. Clark v. Kansas City, 176 U. S. 114, 118, 44 L. ed. 392, 396, 20 Sup. Ct. Rep. 284; Lampasas v. Bell, 180 U. S. 276, 283, 45 L. ed. 527, 530, 21 Sup. Ct. Rep. 368; Smith v. Indiana, 191 U. S. 138, 148, 48 L. ed. 125, 126, 24 Sup. Ct. Rep. 51."

In the present case the supreme court of the state has enjoined the plaintiffs in error, as officers of the state, from taking steps to submit the proposed Constitution to the electors of the state, because in its judgment the act of the legislature of the state, requiring such submission, was in violation of the state Constitution. Whether this duty [259] shall or shall not be performed concerns the plaintiffs in error in their official capacity only. The requirement that they refrain from taking such steps concerns their official, and not their personal, rights. Applying the rule established by the previous decisions of this court, it follows the judgment of the state supreme court is not reviewable here, as it is not alleged to violate rights of a personal nature, secured by the Federal Constitution or laws.

It therefore follows that this writ of error must be dismissed.

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, Appts.,
v.
W. A. HENSON, Receiver of the Vicksburg Waterworks Company, and Lelia Boykin.

(See S. C. Reporter's ed. 259–274.)

Appeal — final judgment — issues undisposed of.

1. A decree of a Federal district court enjoining a municipality, on grounds of estoppel by judgment, from issuing bonds for, or constructing, a waterworks plant to be put in operation when an existing private waterworks franchise should expire, is final for the purpose of an appeal to the circuit court of appeals, although there were allegations in the pleadings which permitted or required a consideration of the law under which the bonds were to be issued, and which were independent of the alleged claim of *res judicata*, where the record and proceedings make it evident that both the court and the parties concerned treated the bill as an attack upon the right of the municipality to proceed to build a waterworks system before the expiration of the franchise, although to be operated thereafter.

[For other cases, see Appeal and Error, I. d, in Digest Sup. Ct. 1908.]

Appeal — from circuit court of appeals — diverse citizenship — questions subsequently arising.

2. The jurisdiction of a circuit court of appeals is not final because the jurisdiction of the district court, as originally invoked, depended solely upon diverse citizenship, where, by an amended and supplemental bill, there were added to the ground of original jurisdiction constitutional grounds which existed before the suit was begun, and which might have been averred in the original bill.

[For other cases, see Appeal and Error, III. d, 2, b, in Digest Sup. Ct. 1908.]

Judgment — res judicata — confining decree to issues.

3. A final decree adverse to the municipality in a suit brought by a private waterworks company to enjoin municipal competition during the continuance of its franchise, on the ground that such franchise was exclusive, is not an adjudication against the right of the municipality, first asserted subsequent to such decree, to issue bonds for, and to construct, a plant not to be put in operation until after the expiration of such franchise, although there may be provisions in such decree which, read alone, without regard to the pleadings, would have that effect.

[For other cases, see Judgment, III. j, in Digest Sup. Ct. 1908.]

Municipal corporations — water supply — contract against public establishment.

4. An exclusive franchise granted by a municipality to a private waterworks company to supply water for public and private use for a definite term does not prevent the municipality from issuing bonds for, and constructing, its own waterworks system, where such system is not to be put in operation until the franchise has expired.

[For other cases, see Municipal Corporations, II. f, in Digest Sup. Ct. 1908.]

[No. 546.]

Argued and submitted October 28, 1913. Decided December 1, 1913.

NOTE.—As to what judgments or decrees are final for purposes of review—see notes to Gibbons v. Ogden, 5 L. ed. U. S. 302, and Schlosser v. Hemphill, 49 L. ed. U. S. 1001.

On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

Generally as to full faith and credit to be given to state records and judicial proceedings—see notes to Lindley v. O'Reilly, 1 L.R.A. 79; Cummington v. Belchertown, 4 L.R.A. 131; Rand v. Hanson, 12 L.R.A. 574; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 578; Darby v. Mayer, 6 L. ed. U. S. 367; Mills v. Duryee, 3 L. ed. U. S. 411; D'Arcy v. Ketchum, 13 L. ed. U. S. 648; and Huntington v. Attrill, 36 L. ed. U. S. 1123.

On the establishment and regulation of municipal water supply—see note to State ex rel. Hallauer v. Gosnell, 61 L.R.A. 34.

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APPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which affirmed a decree of the District Court for the Southern District of Mississippi, enjoining a municipality from issuing bonds for, or constructing, a waterworks system during the term of an existing exclusive franchise. Reversed and remanded for further proceedings.

See same case below, 121 C. C. A. 664, 203 Fed. 1023.

The facts are stated in the opinion.

Messrs. T. C. Catchings, O. W. Catchings, and George Anderson submitted the cause for appellants. Mr. John Brunini was on the brief:

The franchise does not prohibit the city from erecting waterworks to be operated after its termination.

Denver v. New York Trust Co. 229 U. S. 123, 57 L. ed. 1101, 33 Sup. Ct. Rep. 657; Syracuse Water Co. v. Syracuse, 116 N. Y. 167, 5 L.R.A. 546, 22 N. E. 381; Thomas v. Grand Junction, 13 Colo. App. 80, 56 Pac. 665; Long v. Duluth, 49 Minn. 280, 32 Am. St. Rep. 547, 51 N. W. 913; Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. Rep. 400; El Paso Water Co. v. El Paso, 152 U. S. 157, 38 L. ed. 396, 14 Sup. Ct. Rep. 494; Sioux Falls v. Farmers' Loan & T. Co. 69 C. C. A. 373, 136 Fed. 721.

The burden of proof is on the party asserting an estoppel by judgment.

Harrison v. Remington Paper Co. 3 L.R.A. (N.S.) 954, 72 C. C. A. 405, 140 Fed. 385, 5 Ann. Cas. 314; Lewis v. Ocean Nav. & Pier Co. 125 N. Y. 341, 26 N. E. 301.

Upon an issue of *res judicata* all doubts must be resolved against the party pleading it.

De Sollar v. Hanscome, 158 U. S. 216, 39 L. ed. 956, 15 Sup. Ct. Rep. 816; Russell v. Place, 94 U. S. 606, 24 L. ed. 214; Duckworth v. Duckworth, 35 Ala. 70; Freeman, Judgm. § 258; Hopkins v. Lee, 6 Wheat. 109, 5 L. ed. 218.

The essential conditions upon which the exception of *res judicata* becomes applicable are the identity of the thing demanded, the identity of the cause of the demand, and of the parties in the character in which they are litigants.

Washington, A. & G. Steam Packet Co. v. Sickles, 24 How. 333, 16 L. ed. 650; Freeman, Judgm. § 252.

It is first necessary to inquire whether or not the cause of action in both cases was the same; for if this is so, all matters are concluded which were or might have been litigated, while otherwise only those defenses are barred which were actually asserted in the prior cause.

Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Davis v. Brown, 94 U. S. 423, 24 L. ed. 204; Nesbit v. Independent Dist. 144 U. S. 610, 36 L. ed. 562, 12 Sup. Ct. Rep. 746; Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; Crowder v. Red Mountain Min. Co. 127 Ala. 260, 29 So. 847.

It is always admissible to consult the record of the prior case to determine what was decided, and the language of the judgment or decree relied upon as an estoppel must be interpreted with relation to and limited by the issues presented.

Davis v. Brown, 94 U. S. 423, 24 L. ed. 204; Washington Gaslight Co. v. District of Columbia, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564; Graham v. Chamberlain, 3 Wall. 704, 18 L. ed. 247; Barnes v. Chicago, M. & St. P. R. Co. 122 U. S. 1, 30 L. ed. 1128, 7 Sup. Ct. Rep. 1043; Freeman, Judgm. § 271.

The rule that a decree cannot go beyond the issues involved is not merely one of construction, but is a limitation upon the power of the court.

Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; Munday v Vail, 34 N. J. L. 418.

Issues can only be raised by appropriate allegations of fact; and if a court goes beyond the issues so raised, its judgment is void.

Harrison v. Nixon, 9 Pet. 483, 9 L. ed. 201; Harding v. Handy, 11 Wheat. 103, 6 L. ed. 429; Foster v. Goddard, 1 Black, 506, 17 L. ed. 228; Crocket v. Lee, 7 Wheat. 522, 5 L. ed. 513; Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; Outram v. Morewood, 3 East, 346, 7 Revised Rep. 473, 5 Mor. Min. Rep. 484; 11 Enc. Pl. & Pr. 868.

Issues cannot be enlarged or extended by praying relief which the case made by the bill does not warrant. A special prayer for relief may narrow the issues presented by not asking as extensive relief as the complainant is entitled to; but it can never be so framed as to enlarge the scope of the bill.

16 Cyc. 225; Staton v. Rising, 103 Ala. 454, 15 So. 848; Thoms v. Thoms, 45 Miss. 263; English v. Foxall, 2 Pet. 595, 7 L. ed. 531; Lockhart v. Leeds, 195 U. S. 427, 49 L. ed. 263, 25 Sup. Ct. Rep. 76; Hardin v. Boyd, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771; Hobson v. M'Arthur, 16 Pet. 182, 10 L. ed. 930; Tayloe v. Merchants' F. Ins. Co. 9 How. 390, 13 L. ed. 187.

An important test of whether an estoppel exists is to compare the proof used to sustain the respective allegations of the two suits.

Stone v. United States, 12 C. C. A. 451, 29

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U. S. App. 32, 64 Fed. 667, affirmed in 167 U. S. 178, 42 L. ed. 127, 17 Sup. Ct. Rep. 778; Freeman, Judgm. § 259; Clark v. Blair, 4 McCrary, 311, 14 Fed. 812; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238.

The city adopted its plan to build waterworks at a time when the franchise had almost expired, to be held in readiness to supply water at that time, many years after the decision of Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585; and its rights in the premises depend, therefore, upon a state of facts which has arisen since the rendition of the decree in that case. It necessarily follows that nothing which was decided at that time can constitute an estoppel.

2 Black, Judgm. § 617; Winnipiseogee Lake Co. v. Young, 40 N. H. 420; 24 Am. & Eng. Enc. Law, 777; 23 Cyc. 1161, 1290.

A question cannot be held to have been adjudged before an issue on the subject could possibly have arisen.

Third Nat. Bank v. Stone, 174 U. S. 432, 43 L. ed. 1035, 19 Sup. Ct. Rep. 759.

Courts refuse to be drawn into the determination of mere abstract principles of law; they decline to construe possible future controversies which have not yet arisen; it is not their province to deal with vague general questions as to the relative rights of parties to contracts, and to construe their provisions in advance; they do not decide moot questions.

State ex rel. Wright v. Savage, 64 Neb. 684, 90 N. W. 898, 91 N. W. 557; State v. Lambert, 52 W. Va. 248, 43 S. E. 176; New Orleans & N. W. R. Co. v. Linehan Ferry Co. 104 La. 53, 28 So. 840.

The city had threatened to build and operate a waterworks system and subject the existing company to its competition, and the aid of the court was appropriately invoked to prevent this injury. It had never threatened to build noncompeting waterworks upon the termination of the franchise, and even if this constituted an infringement of the complainant's rights, upon familiar principles, it could not have procured an injunction against the doing of an act which had never been threatened or even contemplated.

Truly v. Wanzer, 5 How. 141, 12 L. ed. 88; Richmond, F. & P. R. Co. v. Louisa R. Co. 13 How. 71, 14 L. ed. 55.

A judgment is conclusive by way of estoppel only as to facts without the existence and proof or admission of which it could not have been rendered.

Bigelow, Estoppel, 82; Washington, A. & G. Steam Packet Co. v. Sickles, 5 Wall. 580, 18 L. ed. 550.

General expressions in an opinion which are not essential to the disposition of the case cannot control the judgment in subsequent suits.

Harriman v. Northern Securities Co. 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493.

An instructive case, which illustrates the liberal attitude assumed by this court in construing decrees, is that of Conway v. Taylor, 1 Black, 604, 17 L. ed. 191.

Appellee is now estopped to assert that the city cannot erect a waterworks system to be operated after the termination of the franchise.

Philadelphia, W. & B. R. Co. v. Dubois, 12 Wall. 47, 20 L. ed. 265.

The city should not be enjoined from erecting waterworks to be operated after the expiration of the franchise, for the reason that such a decree would at this time be inequitable.

St. Louis, K. C. & C. R. Co. v. Wabash R. Co. 81 C. C. A. 643, 152 Fed. 849.

Mr. Edgar H. Farrar argued the cause, and, with Messrs. J. C. Bryson and Joseph Hirsh, filed a brief for appellees:

The decree of the district court is not final,—

1st. Because it failed to adjudicate the validity of the bond election and the right to issue bonds thereunder, irrespective of the purpose for which they were to be issued.

2d. Because it failed to dispose of the issue raised by the petition of Lelia Boykin, the intervener. She did not ask any relief on the ground that the right of the city to build waterworks during the life of the Bullock franchise had been adjudicated. On the other hand, she, by the express terms of her petition, excluded the complainant's averments in that regard, and did not pray any relief whatever predicated upon the question of *res judicata*, or upon the terms of the Bullock franchise. She sought relief solely on the ground that the bond election was invalid and void, and did not empower the appellant city to issue the bonds in question. That question the court pointedly declined to adjudicate or even to dismiss her petition, or a similar demand contained in complainant's proceedings.

Craighead v. Wilson, 18 How. 199, 15 L. ed. 332; Green v. Fisk, 103 U. S. 518, 26 L. ed. 485; Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; Grant v. Phœnix Mut. L. Ins. Co. 106 U. S. 429, 27 L. ed. 237, 1 Sup. Ct. Rep. 414; St. Louis, I. M. & S. R. Co. v. Southern Exp. Co. 108 U. S. 24, 27 L. ed. 638, 2 Sup. Ct. Rep. 6; Dainese v. Kendall, 119 U. S. 53, 30 L. ed. 305, 7 Sup. Ct. Rep. 65;

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Rexford v. Brunswick-Balke-Collender Co. 228 U. S. 339, 57 L. ed. 864, 33 Sup. Ct. Rep. 515; Paducah v. East Tennessee Teleph. Co. 229 U. S. 476, 57 L. ed. 1286, 33 Sup. Ct. Rep. 816; Keystone Manganese & Iron Co. v. Martin, 132 U. S. 91, 33 L. ed. 275, 10 Sup. Ct. Rep. 32; McGourkey v. Toledo & O. C. R. Co. 146 U. S. 536, 36 L. ed. 1079, 13 Sup. Ct. Rep. 170; Covington v. First Nat. Bank, 185 U. S. 270, 46 L. ed. 906, 22 Sup. Ct. Rep. 645; Thomas v. Wooldridge, 23 Wall. 283, 23 L. ed. 135; Loudon v. Taxing Dist. 104 U. S. 771, 26 L. ed. 923; New Orleans Mail Co. v. Flanders (New Orleans & B. S. Mail Co. v. Fernandez) 12 Wall. 130, 20 L. ed. 249; The Maria Martin (Martin v. Northern Transp. Co.) 12 Wall. 31, 20 L. ed. 251; Mt. Pleasant v. Beckwith, 100 U. S. 514, 25 L. ed. 699; Loudon v. Taxing Dist. 104 U. S. 771, 26 L. ed. 923; Groves v. Sentell, 153 U. S. 465, 38 L. ed. 785, 14 Sup. Ct. Rep. 898; United States v. Blackfeather, 155 U. S. 180, 39 L. ed. 114, 15 Sup. Ct. Rep. 64; Cherokee Nation v. Blackfeather (United States v. Blackfeather) 155 U. S. 218, 39 L. ed. 126, 15 Sup. Ct. Rep. 63; Bolles v. Outing Co. 175 U. S. 262, 44 L. ed. 156, 20 Sup. Ct. Rep. 94; Ex parte Russell, 13 Wall. 664, 20 L. ed. 632; Harrington v. Holler (Crawford v. Holler) 111 U. S. 796, 28 L. ed. 602, 4 Sup. Ct. Rep. 697; Re Parker, 131 U. S. 221, 33 L. ed. 123, 9 Sup. Ct. Rep. 708.

The test of the right to appeal to this court from the circuit court of appeals is whether or not the jurisdiction of the district court was invoked solely upon any other ground than that of diverse citizenship. If a ground of Federal jurisdiction, other than diverse citizenship, be raised in the case at any time after the filing of the original bill, it cannot be considered for jurisdictional purposes.

Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; Borgmeyer v. Idler, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; Press Pub. Co. v. Monroe, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40; Ex parte Jones, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222; Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452; Spreckles Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376; Bagley v. General Fire Extinguisher Co. 212 U. S. 477, 53 L. ed. 605, 29 Sup. Ct. Rep. 341; Weir v. Rountree, 216 U. S. 607, 54 L. ed. 635, 30 Sup. Ct. Rep. 418; St. Louis, K. C. & C. R. Co. v. Wabash R. Co. 217 U. S. 247, 54 L. ed. 752, 30 Sup. Ct. Rep. 510; Third Street & Suburban R. Co. v. Lewis, 173 U. S. 457, 43 L. ed. 766, 19 Sup. Ct. Rep. 451; Provident Sav. Life Assur. Soc. v. Ford, 114 U. S. 635, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104; Leather Mfrs' Nat. Bank v. Cooper, 120 U. S. 778, 30 L. ed. 816, 7 Sup. Ct. Rep. 777; Metcalf v. Watertown, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; Gableman v. Peoria, D. & E. R. Co. 179 U. S. 335, 45 L. ed. 220, 21 Sup. Ct. Rep. 171; Lovell v. Newman, 227 U. S. 412, 57 L. ed. 577, 33 Sup. Ct. Rep. 375; Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704.

Messrs. Edgar H. Farrar, J. C. Bryson, Joseph Hirsh, and Richard F. Goldsborough also filed a brief for appellees:

The litigation previously had between the parties, and the decree therein entered by the circuit court, and specifically affirmed by the Supreme Court of the United States, is *res judicata* of the issues involved in this cause.

10 Enc. U. S. Sup. Ct. Rep. 729, 798; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 81, 46 L. ed. 815, 22 Sup. Ct. Rep. 585; Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

The effect of making the franchise a part of the bill of complaint by way of an exhibit was to set up and plead every right accruing to the water company under the franchise which had been or was threatened to be transgressed by appellant in building new works.

American Bell Tel. Co. v. Southern Tel. Co. 34 Fed. 803; 3 Enc. Pl. & Pr. 362, 363; 8 Enc. Pl. & Pr. 740; Electrolibration Co. v. Jackson, 52 Fed. 773; Samuel Cupples Envelope Co. v. Lackner, 99 App. Div. 231, 90 N. Y. Supp. 954; Miller v. Wayne International Bldg. & L. Asso. 32 Ind. App. 480, 70 N. E. 180.

A party cannot split up his cause of action for part of an indivisible demand.

Re Chiles (Texas v. White) 22 Wall. 157, 22 L. ed. 819.

The same rule is applicable to an attempt to split up a defense.

Dimock v. Revere Copper Co. 117 U. S. 559, 29 L. ed. 994, 6 Sup. Ct. Rep. 855; Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; Aurora v. West, 7 Wall. 82, 19 L. ed. 42; Tioga R. Co. v. Blossburg & C. R. Co. 20 Wall. 137, 22 L. ed. 331; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Fayerweather v. Ritch, 195 U. S. 276, 49 L. ed. 193, 25 Sup. Ct. Rep. 58; Beloit v. Morgan, 7 Wall. 619, 19 L. ed. 205.

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A distinction exists between error in construction of document, to be corrected only upon appeal, and not collaterally, and lack of jurisdiction, which alone subjects a judgment to collateral attack.

United States use of Hine v. Morse, 218 U. S. 493, 54 L. ed. 1123, 31 Sup. Ct. Rep. 37, 21 Ann. Cas. 782; Fayerweather v. Ritch, 195 U. S. 276, 49 L. ed. 193, 25 Sup. Ct. Rep. 58.

Mistake of law is mere error.

American Exp. Co. v. Mullins, 212 U. S. 311, 53 L. ed. 525, 29 Sup. Ct. Rep. 381, 15 Ann. Cas. 536.

Appellant's attack on the former decree is collateral, and nothing can now be considered except the jurisdiction to render it. If there was jurisdiction, the decree may be ever so erroneous, yet it must stand as rendered.

Case v. Beauregard (Case v. New Orleans & C. R. Co.) 101 U. S. 692, 25 L. ed. 1005.

The original Bullock franchise excluded the defendant city from erecting and maintaining during the existence of the franchise a water system of its own, even one to be operated after the Bullock franchise had expired.

Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253.

The case at bar falls short of many of the essential elements of estoppel.

Sturm v. Boker, 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. Rep. 99; Bloomfield v. Charter Oak Nat. Bank, 121 U. S. 121, 30 L. ed. 923, 7 Sup. Ct. Rep. 865; Brant v. Virginia Coal & I. Co. 93 U. S. 326, 23 L. ed. 927; Meridian Waterworks Co. v. Meridian, 85 Miss. 515, 37 So. 927; Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331.

Mr. Justice Day delivered the opinion of the court:

This suit originated in the district court of the United States for the southern district of Mississippi, where an injunction restraining the appellants from constructing a waterworks system during the term of a certain franchise previously granted by the city of Vicksburg was allowed upon the complaint of W. A. Henson, receiver of the [261] Vicksburg Waterworks Company, one of the appellees herein (whom we will hereafter call "the receiver"), and the decree upon appeal was affirmed by the circuit court of appeals for the fifth circuit (121 C. C. A. 664, 203 Fed. 1023), from which affirmance this appeal is taken.

The case, as made out in the district court and shown by the record, appears to be:

The receiver alleged that in 1886 the city, under authority of an act of the legislature, by ordinance granted to Samuel R. Bullock & Company a franchise to furnish the city with water for a term of thirty years; that he had succeeded to the rights and interests of Bullock & Company; that he was paying taxes upon the property of the Vicksburg Waterworks Company, and was entitled to the rights and privileges of a taxpayer; that in 1900 the city of Vicksburg attempted to abandon the contract, and to build and operate a waterworks system of its own, and that in a suit instituted in the circuit court of the United States for the southern district of Mississippi, such action had been enjoined; that by the final decree therein it was, among other things, ordered "that the defendant refrain from constructing waterworks of its own until the expiration" of the franchise, and that, upon appeal to this court, such decree was affirmed. The pleadings, final decree, and opinion of this court in the former case and the franchise of 1886 were introduced into the record in this case as exhibits, and, to save repetition, reference is made to the franchise as quoted in 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585, to the opinion in 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253, and the outline of the pleadings in that case as set forth in those reports.

The receiver alleged further that the city had since made efforts to free itself from the franchise, and specified various suits and negotiations to that end; that early in 1912 the appellants, by resolution and election, undertook to authorize the sale of bonds for the construction of a waterworks plant, which was not to be operated until [262] after the expiration of the franchise; that he would be compelled to pay taxes upon such bonds, and that the issuance and sale of the bonds and construction of the plant would depreciate the value of the Waterworks Company's property; that the city was commencing the construction of a plant too long before the expiration of the franchise; that the purpose of the city was really to depreciate the value of the Waterworks Company's plant so that the city might buy it at a price materially less than its actual value; and that the bond election, for several reasons, which the receiver stated, under the statutes and Constitution of Mississippi, and because of fraud, was of no effect, and the receiver offered to sell the plant at any time upon appraisement. The receiver prayed that the appellants be enjoined from issuing bonds for the construction of a waterworks

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system, and from taking any further steps toward the building of such plant during the term of the franchise, for the reason that the matter of construction of the plant during such time was *res judicata*, and that such construction would violate the franchise, and, further, that the bond election was void. The receiver also prayed for an injunction restraining the appellants from letting contracts for the laying of certain water mains, in violation of the franchise and of the decree in the former suit.

The appellants denied that the decree in the former case precluded the question raised here, and that the construction by the city of its own waterworks system would violate the terms of the franchise; that the receiver was, or was entitled to the rights and privileges of, a taxpayer, and alleged that the statement by the receiver of the dealings and negotiations between the city and the Waterworks Company was irrelevant and false. They also denied that the receiver or the Waterworks Company, as a taxpayer, would be affected by the bond issue; and alleged that, if the issuance of the bonds and construction [263] of the plant should depreciate the property of the Waterworks Company, it would be something for which it would not be responsible. They further denied that the steps taken by the city were premature, in view of the long time that must elapse before the expiration of the franchise, and that the city did not intend to build a plant; and alleged that the purpose of the Waterworks Company was to compel the city to buy its plant at an exorbitant price; and they denied that the bond election was void. The appellants further alleged that if the decree should be construed as contended for by the receiver, the court below, as a court of equity, would not at that time give the decree that effect, for the reason that the situation of the parties was so changed as to make it inequitable to prohibit the appellants from taking the action sought to be enjoined; that the receiver, by permitting the city to lay certain mains, had conceded the appellants' right to construct a waterworks plant, and was estopped from contesting such right; that the receiver and the Waterworks Company actively participated in the election, conceding appellants' right to build its own waterworks system, and therefore were estopped from asserting the contrary; that the receiver, by conceding appellants' right to construct its plant, itself construed the decree as only enjoining competition, and that the court should give effect to the decree as construed by the parties, and that the decree did not attempt to enjoin the sale of bonds, and that that is all that is sought to be restrained by this suit. The appellants also denied that the letting of contracts for laying mains would violate either the decree or the franchise.

Upon petition, Lelia Boykin, a taxpayer of the city of Vicksburg, the other appellee herein, was, upon order, admitted as a party to the suit, and by proper pleadings issues were made with reference to her as such taxpayer.

Upon final decree the court held that the receiver was [264] entitled to the relief prayed for, and ordered that the appellants be enjoined from constructing a system of waterworks and from disposing of the bonds covered by the suit during the term of the franchise, and in its opinion the court based its decision upon the decree made by it and its affirmance in 202 U. S., and decided that the matter was *res judicata*. Upon appeal to the circuit court of appeals the decree of the district court was affirmed upon the ground that the decree and affirmance in the case in 202 U. S. constituted an estoppel. The case was thereupon brought here upon appeal, the assignments of error asserting that the circuit court of appeals erred in affirming the decree of the district court, in holding that the decree affirmed in 202 U. S. was an estoppel, and that the appellants had no right to build a waterworks system before the expiration of the franchise, and in not deciding that the receiver was estopped to assert that appellants did not have such right.

A motion was made to dismiss the appeal, first, upon the ground that the decree was not final in the district court, and hence was not appealable to the circuit court of appeals, because it left undisposed of one of the substantial issues in the case. That contention arises from this alleged situation: The pleadings of the receiver, as well as the petition filed by the intervener, Lelia Boykin, attacked the right to issue the bonds in question upon a ground independent of the former adjudication; namely, because the election at which the bonds were authorized to be issued was illegal for the reason that the city failed to make the statutory publication of the election, and that the curative act was unconstitutional, for the reason that the city had exceeded the limit of indebtedness allowed under chapter 142 of the Laws of Mississippi for 1910, the exception in such act being unconstitutional, and for the reason that the bond election was held under an ordinance purporting to amend the charter of the city, which ordinance [265] was itself void, and for fraudulent and corrupt practices and for unlawful registration. This ground of attack, the appellees say, went to the

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right to issue the bonds to build a waterworks system at any time, and rendered them invalid, whether undertaken to be issued before or after the expiration of the Bullock franchise, and that such is the case is said to appear from reference to the final decree which was entered in the suit. The decree enjoined the appellants from building or constructing a system of waterworks or any part thereof within the city until after the 18th day of November, 1916,—the date of the termination of the Bullock franchise,—and it further provided:

"It is further ordered and decreed that the defendant, the Mayor and Aldermen of the City of Vicksburg, be and is hereby enjoined from disposing of the issue of four hundred thousand dollars ($400,000) of bonds mentioned and described in the pleadings with a view of constructing a waterworks system, or any part thereof, in said city during the life of the said franchise; that is, between now and the 18th day of November, 1916."

So much of the decree as relates to the bonds, it is contended, leaves open the right of the city to issue them after the expiration of the Bullock franchise, although they were attacked as being wholly illegal and the city wanting authority to issue them at any time.

It is true that the original bill contained allegations which went to the validity of the issue of bonds, if the same were proposed to be issued after the expiration of the Bullock franchise, as well as before the expiration of that time, and the prayer of the original bill, among other things, asked for an injunction restraining the defendant city from issuing the bonds or taking any action to that end by virtue of the election. In the amended and supplemental bill filed in the case, however, not only allegations by way of amendment were made, but the case was restated at great length, and the prayer of the bill asked upon [266] final hearing for "a decree against the said defendant, holding the said bond election void and without effect, and the said defendant without power to issue and float said bonds for the purpose of building a waterworks plant during the life of the Bullock franchise, and for an injunction against the said defendant, restraining it from issuing bonds under the said election, and from taking any further steps looking to the building of a waterworks plant during the life of the said Bullock franchise," and for general relief. When Lelia Boykin intervened, she filed a petition averring that she was the owner of real estate in and a taxpayer of the city of Vicksburg, and a citizen and resident of Georgia, adopting the allegations of the original bill and amended and supplemental bill, except so much thereof as set up the former adjudication in favor of the Waterworks Company, and joining in the original complainant's prayer for relief, and also asking for general relief.

It may be true that there were allegations in the pleadings which permitted or required a consideration of the law under which the bonds were to be issued for the purpose of erecting a waterworks system, and which were independent of the alleged claim of *res judicata*, but the record and proceedings make it evident that the court and the parties concerned treated the bill as an attack upon the right of the city to proceed to build a waterworks system before the expiration of the Bullock franchise, although to be operated thereafter. The opinion of the court and the decree show that the court so regarded it, and no objection to this disposition of the case was made by any of the parties, and when the case reached the circuit court of appeals a motion was made to dismiss upon the ground that the proceeding was merely ancillary to the decree of the court, affirmed in this court (202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253), enjoining the city from constructing and operating a plant of its own during the term of the franchise. [267] The decree was final as to the city's right to do what it was then proposing to do, to issue bonds and erect a system of waterworks to be used after the expiration of the Bullock franchise. The decree as rendered prevented the city from doing this. There was no reservation of the right to a further decree as to the legality of the bonds, and no retention of jurisdiction after the decree for any purpose. Neither in the circuit court of appeals nor in the district court was there any attempt to require the court to consider the case in its further aspect, but, as we have said, both courts and all parties treated the case as presenting a controversy concerning the right of the city to proceed, as it was about to do, to sell the bonds and build a plant before the expiration of the franchise in question. The record thus considered, we think there was a final decree in the district court from which an appeal could be taken to the circuit court of appeals.

The further contention is made that the jurisdiction of the circuit court of appeals was final because the jurisdiction of the district court as originally invoked depended solely upon diverse citizenship. But it appears that when the amended and supplemental bill was filed there were added to the ground of original jurisdiction alle-

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gations concerning the proper construction of the contract rights of the receiver, which attacked the proposed action of the city on the ground that it would be destructive of constitutional rights. We think those allegations brought into the case a ground of jurisdiction independent of diversity of citizenship. They were grounds which existed before the suit was begun, which might have been averred in the original bill, and which were brought into the case by the amendment. We think, therefore, that the jurisdiction of the district court did not rest solely upon diversity of citizenship, but upon the additional ground of deprivation of Federal right. In this view the decision of the circuit court of appeals is not final, and an appeal may [268] be taken to this court. Macfadden v. United States, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490.

Coming to the question whether the former decree disposed of the rights of the parties, as was held in the court below, which judgment was affirmed by the circuit court of appeals, it is undoubtedly true that a right, question, or fact put in issue and decided by a court of competent jurisdiction must be taken as settling the rights of the parties in respect to such controversy, and while it remains undisturbed is conclusive between them. The enforcement of this rule has been repeatedly said to be essential to secure the peace and repose of society, and in order that an end may be made of controversies between parties who have once invoked and have had the determination by competent judicial tribunal of the matters in dispute between them. It is no less true that to hold upon any unsubstantial ground that a controversy has been thus concluded is to do an injustice to litigants. We must therefore be careful to see, when the contention of former adjudication is made, that the matter was actually presented and decided, and the rights of the contending parties thereby concluded. We think that an examination of the record in the former case, put in evidence in this case, does not support the contention that the matter here in issue was then adjudicated and determined. It is true there is some broad language in the decree. It provided:

"Fourth. That the said defendant refrain from in any manner accepting the benefits of or proceeding under the act of the legislature of the state of Mississippi, approved March 9th, 1900, and from issuing bonds under and by virtue of said act or any other act or ordinance for the purpose of erecting waterworks of its own during the period prescribed in said ordinance contract and franchise.

"Fifth. That the said defendant refrain from constructing waterworks of its own until the expiration of the [269] period prescribed in the said ordinance contract and franchise dated 18th day of November, 1886."

The fifth paragraph, read alone, without regard to the pleadings in the case, would broadly enjoin the city from constructing a waterworks system of its own until the expiration of the period named in the franchise held by the complainant. The fourth paragraph used language in enjoining the issuance of bonds which concluded with an injunction "from issuing bonds under and by virtue of said act or any other act or ordinance for the purpose of erecting waterworks of its own during the period prescribed in said ordinance contract and franchise." It is also true that the court, in concluding its opinion in 202 U. S., said that it found "no error in the decree of the circuit court enforcing the contract rights of the complainant, and enjoining the city from erecting its own works during the term of the contract."

It is well settled, however, that a decree is to be construed with reference to the issues it was meant to decide. Graham v. Chamberlain, 3 Wall. 704, 710, 18 L. ed. 247, 251; Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 507, 51 L. ed. 1155, 1160, 27 Sup. Ct. Rep. 762; Haskell v. Kansas Natural Gas Co. 224 U. S. 217, 223, 56 L. ed. 738, 741, 32 Sup. Ct. Rep. 442. In Barnes v. Chicago, M. & St. P. R. Co. 122 U. S. 1, 30 L. ed. 1128, 7 Sup. Ct. Rep. 1043, this court, speaking by Mr. Chief Justice Waite, said (14):

"Every decree in a suit in equity must be considered in connection with the pleadings, and, if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided. Graham v. Chamberlain, 3 Wall. 704, 18 L. ed. 247. Here the suit was by and for creditors to set aside the mortgage to Barnes and the foreclosure thereunder, because made and had to hinder and delay them in the collection of their debts. The decree, therefore, although broader in its terms, must be held to mean [270] no more than that the foreclosure was void as to these creditors, whose claims were inferior in right to that of the mortgage, and that the Minnesota Company was restrained and enjoined from asserting title as against them."

What was the situation which confronted the parties at the time of the institution

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of the original suit, and what rights were the Waterworks Company striving to protect? The company contended that it had a franchise good for thirty years, and that this franchise was exclusive; at least, in so far as it would prevent the city from building a waterworks system of its own, and operating it in competition with the plaintiff company, and in destruction of its rights yet to be enjoined under its unexpired franchise. At that time the franchise had over half its term yet to run. There was no indication on the part of the city that it intended to build a waterworks system of its own, and then await the expiration of the franchise before it operated such system. The city contended for and maintained the right to erect its own system and operate it at that time and in competition with the Waterworks Company. This competition, it was contended, would be destructive of the rights and property of the complainant, and virtually destroy the exclusive privilege which the city had granted to it for the period of thirty years. It was only after the conclusion of the litigation that the city undertook to construct a waterworks system, withholding operation thereof until the expiration of the franchise belonging to the Waterworks Company. It was driven to that position by the decree against it in the former case. The building of such waterworks system, and not the one that it originally intended, was only proposed by the city after it had lost the original controversy, in which it contended for the right to erect a competing plant, to be operated during the term of the franchise. Reference to the original bill filed in the former case confirms this view, where the following appears:

[271] "By reason of said ordinance and contract [the franchise], said city has no right within the period of thirty years to engage in the business of supplying water to the inhabitants of said city in competition with said Bullock & Company, or their assigns, notwithstanding which, said act [under which the city was then proceeding to erect a plant] authorizes and permits said city to construct and maintain waterworks for said purpose;"

and the prayer, in part, asked that the defendant might be "decreed from constructing or acquiring and operating a system of waterworks in competition with your orator's waterworks." The amended and supplemental bill read, in part, as follows:

"Therefore said city, by its contract and ordinance with S. R. Bullock & Company and assigns, are precluded from issuing and selling bonds to build, construct, maintain, and operate a waterworks of its own, as provided by said legislative act and said resolution and said election of 1900, in competition with your orator against its own contract.

"The premises considered, your orator prays that this honorable court will enjoin the defendant from issuing and selling said bonds for the purpose of building and constructing waterworks of its own in competition with your orator."

In considering the rights of the parties and the position taken by them, this court, in 202 U. S. 453 et seq. 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253, said:

The rights of the Waterworks Company under its exclusive contract, it alleged, "would be practically destroyed if subjected to the competition of a system of waterworks to be erected by the city itself. . . . We think it would be a palpable injustice to the stockholders to permit the competition of the city by new works of its own; which, whether operated profitably for the municipality or not, might be destructive of all successful operation [272] in furnishing water to consumers by the private company." Stating the question of the power of the city to grant an exclusive contract: "Whether it can, in exercising this legislative power, exclude itself from constructing and operating waterworks for the period of years covered by the contract. . . . And unless the city has excluded itself in plain and explicit terms from competition with the Waterworks Company during the period of this contract, it cannot be held to have done so by mere implication. . . . These are the words of the contract, and the question upon this branch of the case is, conceding the power of the city to exclude itself from competition with the grantee of these privileges during the period named, has it done so by the express terms used? It has contracted with the company in language which is unmistakable, that the rights and privileges named and granted shall be *exclusive*. Consistently with this grant, can the city submit the grantee to what may be the ruinous competition of a system of waterworks to be owned and managed by the city, to supply the needs, public and private, covered in the grant of privileges to the grantee? It needs no argument to demonstrate, as was pointed out in the Walla Walla Case [172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77], that the competition of the city may be far more destructive than that of a private company. The city may conduct the business without regard to the profit to be gained, as it may resort to public taxation to make up for losses. A private company would be com-

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pelled to meet the grantee upon different terms, and would not likely conduct the business unless it could be made profitable. We cannot conceive how the right can be exclusive and the city have the right at the same time to erect and maintain a system of waterworks which may and probably would practically destroy the value of rights and privileges conferred in its grant. . . . We think it was distinctly agreed that for the term named the right of furnishing water to [273] the inhabitants of Vicksburg under the terms of the ordinance was vested solely in the grantee, so far, at least, as the city's right to compete is concerned."

And in 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762, where it was contended that the former adjudication was a bar to the rights contended for in regulating rates, this court, in construing its former decision in 202 U. S., said (506):

The former case settled the right of the Waterworks Company "under the contract, to carry on its business without the competition of works to be built by the city itself, as the city had lawfully excluded itself from the right of competition."

It is said that upon the argument in this court of the case in 202 U. S., the too broad character of the decree was brought to our attention. An examination of the briefs then filed shows that this objection rested upon the allegation that the decree would prevent the city from putting in hydrants and other facilities not covered by the contract. There was no suggestion that the city would be prevented from putting in its own waterworks for use after the expiration of the franchise.

The nature and extent of the former decree is not to be determined by seizing upon isolated parts of it or passages in the opinion considering the rights of the parties, but upon an examination of the issues made and intended to be submitted, and what the decree was really designed to accomplish. We cannot agree with the court below or with the majority of the circuit court of appeals, that the effect of the former adjudication was to preclude the rights of the parties in the present controversy.

Upon the merits, irrespective of the effect of the former decree, we think the object and purpose of the franchise granted to Bullock & Company, and their successors, was to permit and protect the operation of a system of waterworks to the end of the franchise term. After that time the city was to be free to supply its inhabitants itself, [274] if it saw fit, or make other contracts with those who could supply the wants of the city in that respect. We see no reason why the city might not, if it so determined, make preparation for water supply to its own citizens which would be available upon the expiration of the contract, the contract accomplishing that purpose until by its terms it had expired. To appropriately accomplish this required time, and we think the city was within its rights, not being obligated by any contract to purchase the works of the Waterworks Company, the company having been content to accept the franchise without this requirement, and was free to make other adequate provision to meet this essential requirement of the inhabitants of the city.

The views we have expressed require a reversal of the judgment of the Circuit Court of Appeals, affirming the decree of the District Court. It is therefore ordered that the judgment be reversed and the case remanded to the District Court of the United States for the Southern District of Mississippi, for further proceedings not inconsistent with this opinion.

UNITED STATES, Interstate Commerce Commission, and Federal Sugar Refining Company, Appts.,

v.

BALTIMORE & OHIO RAILROAD COMPANY et al.

(See S. C. Reporter's ed. 274-298.)

Carriers — allowance to shippers.

1. Sugar refiners whose plant is situated some 10 miles beyond the limits of the free lighterage zone established for the commercial and manufacturing river front of Greater New York by interstate trunk railway lines whose freight rail terminals are at the New Jersey shore of New York harbor are not entitled to compensation from such railway companies, under the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), as for services in aid of transportation, for lightering their sugar from refinery to such terminals, because they have their lighters stop on the way at a point within the free lighterage district, but without notifying the railway companies, or making any tender to them at that pier.

[For other cases, see Carriers, III. c, in Digest Sup. Ct. 1908.]

Public wharves — creation by contract.

2. A fee-simple title or a lease is not essential to constitute a private dock and warehouses a public freight station, but

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NOTE.—On the right of carrier to grant rebate or allowance to shipper for use of latter's tracks—see note to Chicago & A. R. Co. v. United States, 26 L.R.A.(N.S.) 551.

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they may become such by a contract between railroad companies and the owners.

[Matters as to wharves, see Wharves, in Digest Sup. Ct. 1908.]

Carriers — allowance to shippers — discrimination.

3. Interstate trunk railway companies whose freight rail terminals are at the New Jersey shore of New York harbor, having established a zone covering substantially the commercial and manufacturing river front of Greater New York, within which, as a part of the transportation, they perform lighterage service without additional charge to and from any public or private dock, may pay a reasonable compensation upon the tonnage basis to the owners of a water front within such zone, who are operating a sugar refinery near by, for the maintenance by them of a public freight terminal station there, and for lightering all freight between that station and the rail terminals, without allowing similar compensation to sugar refiners whose plant is situated some 10 miles beyond the limits of the free lighterage zone, for lightering their sugar from refinery to such terminals, though touching on the way at a pier within the free lighterage district, but not notifying the railway companies, or making any tender to them at the pier, since, even as to the former's own sugar shipments, the compensation made is a proper allowance under the act of June 29, 1906, as for instrumentalities furnished and services performed by the shippers in aid of transportation by the railroads, and not an allowance for accessorial services which would constitute an illegal preference or discrimination forbidden by the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), § 3, unless accorded to other shippers.

[For other cases, see Carriers, III. e, in Digest Sup. Ct. 1908.]

Appeal — from commerce court — questions not raised below.

4. The contention that an arrangement between a terminal company and certain interstate railway carriers violates the commodity clause of the act of June 29, 1906, will not be considered on appeal to the Federal Supreme Court from the commerce court, to review an order enjoining the enforcement of an order of the Interstate Commerce Commission, where there is nothing in the record showing that such a contention was pressed upon the Commission or considered by that body, or that the order rendered was in any event based upon the commodity clause,—especially where the assumption that the order was based upon that clause would necessitate the conclusion that the Commission by its order gave sanction to and permitted the continuance of the wrong which its powers were exercised to suppress.

[For other cases, see Appeal and Error, VIII. j, in Digest Sup. Ct. 1908.]

[No. 385.]

Argued January 16 and 17, 1913. Decided December 1, 1913.

APPEAL from the United States Commerce Court to review a decree enjoining the enforcement of an order of the Interstate Commerce Commission, requiring certain carriers to cease paying certain allowances to shippers, which the Commission held amounted to an illegal preference or discrimination. Affirmed.

See same case below, 200 Fed. 770.

The facts are stated in the opinion.

Solicitor General Bullitt argued the cause and filed a brief for the United States:

Arbuckle Brothers, in operating the Jay Street Terminal and in transporting freight by floats, etc., between Brooklyn and Jersey City, are an integral part of the through trunk line systems operating into and out of Greater New York, and as such are common carriers by railroad, and are subject to the interstate commerce act.

United States v. Union Stock Yard & Transit Co. 226 U. S. 286, 302, 304, 306, 57 L. ed. 226, 232—234, 33 Sup. Ct. Rep. 83; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527.

The Hepburn act does not authorize the railroads to make the arrangement in question with Arbuckle Brothers, and to pay them for their services in transporting freight between Brooklyn and Jersey City.

Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22; Union P. R. Co. v. Updike Grain Co. 222 U. S. 215, 56 L. ed. 171, 32 Sup. Ct. Rep. 39.

Mr. P. J. Farrell filed a brief for the Interstate Commerce Commission:

The right of the carriers to discriminate between Arbuckle Brothers and the Federal Sugar Refining Company does not depend upon the question of whether the latter changed its method of shipping to avoid such discrimination.

Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360.

One provision of the act may not be seized upon and used regardless of other provisions of the same act, to justify inequalities in the treatment accorded by carriers to shippers, while this court, in speaking of the interstate commerce act as a whole, has repeatedly said that it was enacted for the purpose of preventing such inequalities.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 277, 36 L. ed. 699, 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Cincinnati, N. O. & T.

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P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 197, 40 L. ed. 935, 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 219, 40 L. ed. 940, 947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 172, 42 L. ed. 414, 425, 18 Sup. Ct. Rep. 45; Wight v. United States, 167 U. S. 512, 518, 42 L. ed. 258, 260, 17 Sup. Ct. Rep. 822; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 18, 45 L. ed. 719, 725, 21 Sup. Ct. Rep. 516; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 439, 51 L. ed. 553, 558, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 119, 52 L. ed. 705, 712, 28 Sup. Ct. Rep. 493; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 477, 54 L. ed. 280, 290, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 253, 55 L. ed. 448, 457, 31 Sup. Ct. Rep. 392; Union P. R. Co. v. Updike Grain Co. 222 U. S. 215, 220, 56 L. ed. 171, 173, 32 Sup. Ct. Rep. 39; Union P. R. Co. v. Goodridge, 149 U. S. 680, 690, 37 L. ed. 896, 902, 13 Sup. Ct. Rep. 970; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 506, 42 L. ed. 243, 255, 17 Sup. Ct. Rep. 896.

Mr. Ernest A. Bigelow filed a brief for the Federal Sugar Refining Company:

The finding that there is unjust discrimination is a conclusion of fact.

Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392.

The transportation of Arbuckle sugar by these carriers does not begin until the lighters are made fast to their float bridges on the New Jersey shore, that being the point of time at which the carriers accept the goods and assume responsibility therefor.

Missouri P. R. Co. v. McFadden, 154 U. S. 155, 38 L. ed. 944, 14 Sup. Ct. Rep. 990; London & L. F. Ins. Co. v. Rome, W. & O. R. Co. 144 N. Y. 200, 43 Am. St. Rep. 752, 39 N. E. 79; Coe v. Errol, 116 U. S. 517, 528, 29 L. ed. 715, 719, 6 Sup. Ct. Rep. 475.

The act to regulate commerce does not allow the carriers to make a difference in rates because of differences in circumstances arising before the service of the carrier begins.

Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392.

The act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference, and it would be absurd to allow the incidental and wholly subordinate provisions of § 15 to frustrate the fundamental purpose of the act.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 477, 54 L. ed. 290, 30 Sup. Ct. Rep. 155.

The carrier cannot pay one shipper for transportation service and enforce an arbitrary rule which deprives another of compensation for similar service.

Union P. R. Co. v. Updike Grain Co. 222 U. S. 215, 56 L. ed. 171, 32 Sup. Ct. Rep. 39.

Merely to state the Commission's proposition that the Federal Company initiates the interstate transportation of its sugar, so far as these carriers are concerned, at pier 24, a point within the lighterage limits, is to answer it. This proposition depends upon whether the intention of the Federal Company as to the ultimate destination of its sugar has any bearing on its two separate contracts with the Ben Franklin Company, one to transport the sugar to pier 24, and notify the consignee; the other to transport from pier 24 to the rail terminals.

Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360.

The essential service rendered by both shippers is to get the sugar from a point within the lighterage limits to the rail terminals, and whether this involves an expensive investment in Brooklyn or a hired dock in Manhattan, and whether, in addition to this service, the Arbuckles also lighter freight for the general public, are immaterial.

Interstate Commerce Commission v. Baltimore & O. R. Co. 225 U. S. 326, 343, 56 L. ed. 1107, 1112, 32 Sup. Ct. Rep. 742; Pennsylvania R. Co. v. International Coal Min. Co. 97 C. C. A. 383, 173 Fed. 1.

Mr. George F. Brownell argued the cause, and, with Mr. H. A. Taylor, filed a brief for the Railroad Companies:

The Federal Sugar Refining Company has not the status of a shipper from New York within lighterage limits; there is a single continuous shipment of sugar by boat from Yonkers to the Jersey shore, and no new shipment originating at pier 24, North river.

Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 526, 527, 55 L. ed. 310, 320, 31 Sup. Ct. Rep.

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279; Texas & P. R. Co. v. Railroad Commission, 183 Fed. 1005.

The petitioners are under no statutory or other legal obligation to extend their lines by rail or water.

Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 621.

The service performed by the Federal Sugar Refining Company through the medium of the Ben Franklin Transportation Company is not a transportation service of the railroad companies, but is wholly accessorial, and cannot lawfully be paid for by these appellees.

Re Allowances for Transfer of Sugar, 14 Inters. Com. Rep. 627; Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822; Chicago & A. R. Co. v. United States, 26 L.R.A.(N.S.) 551, 84 C. C. A. 324, 156 Fed. 558; General Electric Co. v. New York C. & H. R. R. Co. 14 Inters. Com. Rep. 237; Solvay Process Co. v. Delaware, L. & W. R. Co. 14 Inters. Com. Rep. 246.

Railroads may secure and maintain freight depots by contract with shippers, and such depots thereby become legally and to all intents and purposes the freight depots of the railroads.

Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; Railroad Commission v. Louisville & N. R. Co. 10 Inters. Com. Rep. 173; Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co. 11 Inters. Com. Rep. 277.

The Commission's decision is based on its erroneous conception of the grounds on which, under the statute, an advantage may be pronounced undue, and on its mistaken view that because of possible incidental advantages, the employment of the owner of property transported to render a service connected with such transportation, and to furnish instrumentalities to be used therein, for no more than a just and reasonable compensation for such services and the use of such instrumentalities, creates undue preferences and unjust discrimination.

Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22.

The order of the Commission is, of course, inconsistent in permitting the continuance of what it apparently considers an accessorial allowance to Arbuckle Brothers on condition of payment of another similar illegal allowance to the Federal Sugar Refining Company.

Penn Ref. Co. v. Western New York & P. R. Co. 208 U. S. 208, 52 L. ed. 456, 28 Sup. Ct. Rep. 268; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; Interstate Commerce Commission v. Louisville & N. R. Co. 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. Rep. 687; Louisville & N. R. Co. v. United States, 197 Fed. 60.

The entering into a contract with one shipper to furnish station facilities does not result in a violation of the provisions of the act to regulate commerce forbidding undue preferences and advantages even if similar contracts are not made with all competing shippers in the same locality.

Central Stock Yards Co. v. Louisville & N. R. Co. 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113, affirmed in 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; Covington Stock Yards Co. v. Keith, 139 U. S. 128, 136, 35 L. ed. 73, 76, 11 Sup. Ct. Rep. 461; Butchers' & D. Stock Yards Co. v. Louisville & N. R. Co. 14 C. C. A. 290, 31 U. S. App. 252, 67 Fed. 35; United States ex rel. Morris v. Delaware, L. & W. R. Co. 2 Inters. Com. Rep. 617, 40 Fed. 101; Consolidating Forwarding Co. v. Southern P. Co. 9 Inters. Com. Rep. 182; Worcester Excursion Car Co. v. Pennsylvania R. Co. 3 I. C. C. Rep. 577, 2 Inters. Com. Rep. 793; Re Transportation of Fruit, 10 Inters. Com. Rep. 360.

An unjust discrimination or an undue preference is not created by the action of a railroad company in employing a shipper to perform a part of the transportation service, when the shipper is paid a compensation that is reasonable for the performance of the service, simply because other shippers who are not in position to perform the same transportation service may be subject to disadvantages. For example, it is perfectly lawful to pay a shipper for elevating his own grain in transit through his own elevator, even though he may be able to treat his grain during the elevation, and thus secure incidental advantages over another competing shipper who does not happen to own an elevator. These incidental advantages accrue because of the fact that one shipper owns the elevator and the other does not. The carrier paying the allowance does not discriminate against the shipper who cannot perform the same transportation service, if the service is offered to all.

F. H. Peavey & Co. v. Union P. R. Co. 176 Fed. 409, affirmed in 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22.

Mr. William N. Dykman argued the cause and filed a brief for the Jay Street Terminal and Arbuckle Brothers:

The petitions present questions of law.

People ex rel. Stephenson v. Bingham, 205 N. Y. 168, 98 N. E. 384; The E. A. Packer, 140 U. S. 360, 36 L. ed. 453, 11 Sup. Ct. Rep. 794; Interstate Commerce Commission v. Baltimore & O. R. Co. 225 U. S. 326, 330–341, 56 L. ed. 1107, 1111, 1112, 32 Sup. Ct.

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Rep. 742; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 470, 54 L. ed. 287, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 547, 56 L. ed. 308, 311, 32 Sup. Ct. Rep. 108; Interstate Commerce Commission v. Stickney, 215 U. S. 98, 54 L. ed. 112, 30 Sup. Ct. Rep. 66; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Interstate Commerce Commission v. Northern P. R. Co. 216 U. S. 538, 54 L. ed. 608, 30 Sup. Ct. Rep. 417; Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535.

All the services and all the instrumentalities of the Federal Company used before the delivery of its sugar to the carriers at Jersey City are accessorial to transportation, and the carrier is forbidden by the act to pay the shipper for accessorial services.

Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822; Chicago & A. R. Co. v. United States, 26 L.R.A.(N.S.) 551, 84 C. C. A. 324, 156 Fed. 558; General Electric Co. v. New York C. & H. R. R. Co. 14 Inters. Com. Rep. 237; Solvay Process Co. v. Delaware, L. & W. R. Co. 14 Inters. Com. Rep. 246; Re Allowances for Transfer of Sugar, 14 Inters. Com. Rep. 619.

The payment to Jay Street Terminal for transportation service and the refusal of the carriers to pay the Federal Sugar Refining Company for its accessorial services do not work a discrimination.

1 Drinker, Interstate Commerce Act, p. 214; Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; Covington Stock Yards Co. v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461; United States ex rel. Morris v. Delaware, L. & W. R. Co. 2 Inters. Com. Rep. 617, 40 Fed. 101; Consolidated Forwarding Co. v. Southern P. Co. 9 Inters. Com. Rep. 182; Worcester Excursion Car Co. v. Pennsylvania R. Co. 3 I. C. C. Rep. 577, 2 Inters. Com. Rep. 793; Re Transportation of Fruit, 10 Inters. Com. Rep. 360.

The payments to the Jay Street Terminal by the carriers were made for services and instrumentalities used in transportation, and are expressly permitted by the statute.

F. H. Peavey & Co. v. Union P. R. Co. 176 Fed. 409; Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22.

When the Jay Street Terminal receives Arbuckle sugar for shipment, and issues a bill of lading for and in the name of the railroad company, two results follow:

1. Title to the merchandise changes from the consignor to the consignee.

New York Sales Act, § 127; Mee v. McNider, 109 N. Y. 500, 17 N. E. 424; Wilcox Silver Plate Co. v. Green, 72 N. Y. 17; Waldron v. Romaine, 22 N. Y. 368; Gilbert v. New York C. & H. R. R. Co. 4 Hun, 378; Williston, Sales, § 278.

2. The railroad journey and responsibility begin. The liability of the carrier in fact begins as soon as it receives the merchandise for carriage, even if bills of lading have not been issued or the journey commenced; the mere receipt of the goods for immediate transportation inaugurates the liability.

Hutchinson, Carr. § 89; London & L. F. Ins. Co. v. Rome, W. & O. R. Co. 144 N. Y. 200, 43 Am. St. Rep. 752, 39 N. E. 79; Merritt v. Old Colony & N. R. Co. 11 Allen, 82; Bulkley v. Naumkeag Steam Cotton Co. 24 How. 386, 16 L. ed. 599.

The contracts between the carriers and the Jay Street Terminal do not violate the commodities clause.

F. H. Peavey & Co. v. Union P. R. Co. 176 Fed. 409; Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527.

Mr. H. B. Closson filed a brief for the Brooklyn Eastern District Terminal.

Messrs. George F. Brownell, William N. Dykman, and H. B. Closson filed a brief in reply to the government's brief:

The Jay Street Terminal is not a railroad company within the meaning of the commodities clause.

Holland v. Lynn & B. R. Co. 144 Mass. 425, 11 N. E. 674, 9 Am. Neg. Cas. 441; Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co. 4 Inters. Com. Rep. 578, 9 C. C. A. 659, 27 U. S. App. 1, 61 Fed. 993; Randolph County v. Post, 93 U. S. 502, 23 L. ed. 957; Parker v. Elmira, C. & N. R. Co. 165 N. Y. 274, 59 N. E. 81; United States v. Harris, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; Taggart v. Republic Iron & Steel Co. 73 C. C. A. 144, 141 Fed. 910.

Railroad companies have always had the right to employ others to perform a portion of the duties which they owe to the public.

Central Stock Yards Co. v. Louisville & N. R. Co. 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113, affirmed in 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; Covington Stock Yards Co. v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461; Re Exchange of Free Transportation, 12 Inters. Com. Rep. 40; Anacostia Citizens Asso. v. Baltimore & O. R. Co. 25 Inters. Com. Rep. 411.

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Mr. Justice Lurton delivered the opinion of the court:

This appeal involves the legality of an order made by the Interstate Commerce Commission, holding that certain allowances made by the appellees to Arbuckle Brothers on sugar shipped by them over one or another of the railroad companies' lines constitute an illegal preference or discrimination in violation of the act to regulate commerce. The order of the Commission required the railroad companies to cease and desist from paying such allowances, "while at the same time paying no such allowances to the Federal Sugar Refining Company," on its sugar brought by it on lighters to the carriers at the same rail terminals. 20 Inters. Com. Rep. 200. The carriers affected filed a bill in the commerce court, alleging the invalidity and illegality of the order, and sought an injunction *pendente lite* and a permanent injunction against its enforcement. An injunction until the cause could be finally heard was granted [281] by the commerce court. This was appealed from by the United States and the injunction sustained as within the sound discretion of the court below. 225 U. S. 306, 56 L. ed. 1100, 32 Sup. Ct. Rep. 817. Thereupon the cause was finally heard upon motion of the appellants to dismiss the bill for want of equity, all answers and pleas theretofore filed having been withdrawn. The commerce court denied this motion and sustained the equity of the bill. The appellants declining to further defend, the temporary injunction was made permanent. From that decree this appeal is prosecuted.

The situation out of which the questions for decision arise, shortly stated, is this:

The railroad companies held by the Interstate Commerce Commission to have discriminated in favor of Arbuckle Brothers and against the Federal Sugar Refining Company are interstate trunk lines whose freight rail terminals are at the New Jersey shore of the harbor of New York. Transportation of freights into and out of the city of New York is practicable only by means of car floats, barges, and steam lighters, operating between the city and the New Jersey shore.

To meet this condition the appellee railroads have long held themselves out as extending transportation of freights bound east to a defined area along the river front of the city, and as beginning such transportation westbound when freight is delivered at designated points within the same area. The necessary lighterage service is performed without additional cost or charge, the flat rate into or out from such points being identical with that applicable at the New Jersey rail terminals. The limits within which such lighterage service is performed as a part of the transportation assumed have long been defined and published in the several filed rate sheets of the carriers. The district embraces substantially the commercial and manufacturing river front of Greater New York, and within it the railroads hold themselves out as undertaking [282] to receive or deliver freight at any public dock, or at any accessible private dock where the shipper shall arrange for the use of the dock. Within this lighterage zone each of the appellees has established and long maintained public freight terminal stations, at which it will deliver eastbound freights and receive freights bound west. Some of these stations are owned or managed solely by one of the railroads, and some are union stations operated for the joint use of two or all of the railroads. Some of them are operated by third persons, who manage and operate them under contracts as agents for one or more of the railroads. But whether operated under contract or directly by the company or companies using them, they are represented to be public delivery and receiving stations, and are so set out in the filed tariff sheets of the companies interested.

The "allowance" to Arbuckle Brothers referred to in the order of the Commission is the consideration paid by the railroad companies to them for instrumentalities and facilities furnished and services performed in the maintenance of one of these public stations, known as the Jay Street Terminal, and for the lighterage of all freight between that station and the railroad terminals on the New Jersey shore. Arbuckle Brothers, a copartnership, are large refiners of sugar and dealers in coffee. Much of their product of sugar finds a market in the west at points upon the lines of the railroads here involved. Their refinery is upon the water front of Brooklyn. They also own a contiguous property fronting upon East river some 1,200 feet. Upon this property they have erected a dock, piers, and large warehouses for the receipt of freight intended for transportation to the railroad terminals on the New Jersey shore, or received from such terminals for consignees nearby. They also own steam lighters, car floats, barges, etc., constructed for the transfer of cars, loaded or unloaded, between this dock and the New Jersey terminals. The premises were peculiarly adapted for use [283] as a public union freight station, and for the purpose of extending transportation by their several lines to this portion of the commercial and manufacturing water front of

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Greater New York, the appellee railroad companies, in 1906, entered into separate, but identical, contracts with Arbuckle Brothers, the latter contracting under the business name and style of "The Terminal Company." The contracts are too lengthy to be set out. Their essential points may be thus summarized:

1. The Terminal Company agrees to maintain the premises in good order and condition for the receipt of freight, and to provide all necessary boats, car floats, docks, and piers, adequate at all times to receive, discharge, transfer, and deliver freights, loaded and unloaded, adequate to accommodate the business contemplated.

2. The Terminal Company will receive at the New Jersey terminals all freights, in or out of cars, intended for delivery at the aforesaid freight station, and safely convey the same to the premises, and there make delivery to the consignees. It will also receive and load into cars all freights which may be delivered to it at its said premises for transportation over the lines of any of said railroad companies, and carry and deliver the same to said railroad company's New Jersey rail terminals.

3. For the facilities supplied and the services performed each of the railroad companies agrees to pay on freight in and out of the station, a compensation measured by the tonnage handled for each such railroad of 4⅛ cents per hundred pounds on freight originating at or destined to points west of what is called "trunk line territory," and on freight originating at or destined to points east thereof, 3 cents per hundred pounds.

Under these contracts, consignments to or by Arbuckle Brothers are handled in the same manner as the shipments of the general public, and comprise a part of the tonnage [284] in and out of that station by which the compensation paid to the Terminal Company is measured. This fact was the basis of the complaint made by the Federal Sugar Refining Company, whose sugar seeks the same market, and who claimed that as it lightered its sugar from its own shipping dock to the terminals at the New Jersey shore, the so-called "allowance" made in respect to the sugar of Arbuckle Brothers, handled under the contracts referred to above, was an unjust and an illegal discrimination unless a like allowance was made to it.

The order of the Commission does not forbid the allowance to Arbuckle Brothers as in itself illegal or unreasonable, but forbids it only as a discrimination unless a like allowance is made to the Federal Sugar Refining Company. That there is no undue discrimination against the Federal Sugar Refining Company in refusing to make a like allowance to it will appear when the conceded circumstances and conditions are considered. This latter company is a competitor of Arbuckle Brothers in the sale and shipment of sugar to the same markets. Its refinery is located at Yonkers on the Hudson river, a point some 10 miles beyond the limits of the free lighterage district. It owns its docks and piers upon the river, but has never enjoyed the free lighterage privilege accorded to all shippers from docks and piers inside the free zone under the tariff sheets of the carriers. It has therefore been compelled to furnish its own means for lightering shipments from its docks to the New Jersey shore. This is an undoubted disadvantage in competing with Arbuckle Brothers, as well as with all other refiners and shippers of sugar within the lighterage district. For many years it had an arrangement with the Ben Franklin Transportation Company, an independent transportation company, by which the latter transported its sugar directly from its Yonkers dock to the railway terminals on the New Jersey shore. There it was delivered to one of the appellees and a bill of lading [285] signed. The freight rates under such bills were identical with the flat rate from stations and piers within the free lighterage district. This disadvantage arising from its location was made the subject of a prior complaint before the Commission, wherein it sought to have the free lighterage district extended so as to include its Yonkers docks, or to have an allowance made to it for the transportation of its sugar from its dock to the New Jersey terminals. Such relief would have removed the disadvantage under which it had long labored. But this relief was denied and its petition dismissed without prejudice. In that proceeding it was ruled by the Commission that the free lighterage arrangements theretofore made by the carriers were the only available means by which they could extend their lines to New York, and were not forbidden by the commerce act, and that by such extension the carriers had come under no obligation to extend the district to Yonkers. It was also ruled that the service rendered by Arbuckle Brothers in the lighterage of their own sugar from the Jay Street Terminal to the New Jersey shore was a service in aid of transportation, and that for the instrumentalities and services, under the very contracts here involved, they did not receive an unreasonable consideration. 17 Inters. Com. Rep. 40.

After the promulgation of that opinion the methods adopted for delivering sugar from the Yonkers dock to the New Jersey

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terminals were changed. The manager of the company's city office at 138 Front street would notify the manager of the Refinery at Yonkers every morning of the sugar necessary to fill accepted orders. This necessary sugar was then loaded at the Yonkers dock upon the lighter Ben Johnson just as before. For this sugar the master of the lighter gave a receipt and was handed a document showing the Federal Sugar Refining Company to be the consignor and the consignee its city office, 138 Front street. This document also gave the [286] number, weight and description of the packages. The Ben Johnson would then go down the river to pier No. 24, within the free lighterage district, where the boat tied up, and the city office was notified; "thereupon," say the Commission, "the complainant issues shipping instructions to the transportation company and hands to its representative bills of lading for execution by the carrier upon delivery at the New Jersey shore." The lighter then proceeds to the Jersey shore, where the sugar is delivered to the carrier, and the blank bills of lading are signed and returned to the lighter's captain. For the service of the lighter in taking the sugar to pier 24 and then across the river to the railroad terminals, it is paid 3 cents per hundred pounds. The claim upon these facts was and is that unless an allowance is made to it identical with that made to Arbuckle Brothers for their service in respect to their own shipments of sugar, a discrimination unlawful in character will result. And this was the conclusion of the Commission.

The commerce court was of opinion that the circumstances and conditions were so dissimilar as not to make the same rule applicable, and that the result reached by the Commission was based upon manifest errors of law.

That pier 24 is within the free lighterage district, and that the defendant carriers held themselves out as ready to take freight at any public or accessible private dock within that zone, and lighter it across the river without any other charge than that published in their tariff sheets, applicable alike to freight delivered to them at such dock or pier or at the New Jersey shore, is conceded. But the carriers have not established any public station at pier 24, and the Federal Company did not notify them, nor make any tender to them at that pier of their sugar for transportation. If such sugar had been tendered to them there, and they had refused to receive it and lighter it at their own cost across the river, a very different question [287] would have arisen. That such tender was not made was obviously due to the fact that the sugar, when loaded on the Ben Johnson at their Yonkers dock, was destined for the railroad terminals at the New Jersey shore, and thence by rail to the real consignee, the purchaser of the sugar at western points on the carriers' lines. The sugar had been sold before it was loaded at Yonkers, and the stopping at this pier and the receipt of unsigned bills of lading showing the consignees and destinations was, as the commerce court held, not a break in the continuity of the transportation, but a plain subterfuge to give the transaction the appearance of a shipment from pier 24. We agree with the commerce court and the minority of the Commission in thinking that the change in method after the failure to obtain relief in the first case did not change the substance of the transaction in point of law or fact. The claim by the Federal Company is a claim for an allowance on account of lightering done for their own convenience,—a lighterage service which, under the facts of the case, the carriers were under no obligation to do as a duty of transportation. It was therefore a demand for a purely accessorial service; as much so as if they had claimed for carting their shipments to a depot or station.

Assuming, then, that the lighterage service performed by the Federal Sugar Refining Company was a service by it for its own convenience, for which the railroads were under no obligation to make compensation, we come to the question whether the facilities employed and the service performed by Arbuckle Brothers in respect to their own sugar after delivery at the Jay Street Terminal are accessorial, or services in aid of railroad transportation, for which they may be paid a reasonable compensation without discriminating unduly against the Federal Sugar Refining Company.

That the plain purpose of the contracts between the [288] several railroad companies and the Terminal Company was to constitute the dock and warehouses of that company a public freight station is too clear for extended discussion. That the premises became such a depot through contract with the owners, and not by virtue of a fee-simple title or a lease, is of no legal significance. Railroad Commission v. Louisville & N. R. Co. 10 Inters. Com. Rep. 175; Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co. 11 Inters. Com. Rep. 277. Nor is there the slightest substantial evidence that in the selection of the premises of Arbuckle Brothers there was any purpose to give them, as large nearby shippers, any preference, or to unduly discriminate against competing sugar refineries. The premises were ideally adapted to meet the necessities of the great manufacturing and commercial

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business interests along the river front of Brooklyn, and constituted the only property reasonably obtainable by the railroads for the extension of their lines of transportation to the Brooklyn side of East river. That through instrumentalities furnished by the Terminal Company and the service by it performed transportation by the railroads begins and ends at this station is most obvious. This continuity of transportation is not questioned by the brief for the United States in this case. Thus, after referring to the instrumentalities furnished and the services performed by the Terminal Company, it is said: "In connection with the further fact that all of the railroad companies make through rates from Brooklyn and New York to western points, covering (1) the service performed by Arbuckle Brothers, and (2) the transportation by rail from Jersey City westward, show such a continuity of transportation as to render argument unnecessary that the transportation from Brooklyn to western points is by one continuous transportation by railroad. The mere fact that the physical rails stop at Jersey City does not mean that the railroad transportation there ends. It continues over to [289] Brooklyn by means of car floats, upon which further rails are laid and on which empty and loaded freight cars stand and are transported, so that the rails upon the car floats are brought into contact with the rail ends at Jersey City, and the continuation thereof at Brooklyn, and in this way the transportation by railroad is carried on without interruption from the western points directly to Brooklyn."

It is true that this clear admission by the Solicitor General is made for the purpose of establishing a contention he makes, namely, that Arbuckle Brothers, under the name of the Terminal Company, are in law and fact common carriers by railroad, who violate the commodity clause of the Hepburn act [34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288] by transporting their own products,—a view to which we later refer. The concession as to the continuity of common carrier transportation by railroad from and to this station under the published freight tariffs, which include the services performed by the Terminal Company, is not inconsistent with the view of the Commission, so far as transportation to and from that station is confined to the shipments made to or by one of the general public. Thus the Commission say: "So far as the general public is concerned, the Arbuckle dock may doubtless be regarded as a public receiving station of the defendant." It is said further: "Arbuckle Brothers not only operate their station for the defendants as a railway facility, but they also perform the lighterage service between the dock and the regular station of the defendants on the west shore."

The order of the Commission is made to rest upon an erroneous assumption that the services performed by Arbuckle Brothers in respect of their own westbound shipments of sugar after the delivery of such sugar at this station is a shipper's service, done for their convenience, with their own facilities, and, therefore, an accessorial service for which they cannot be allowed compensation [290] unless a similar compensation is allowed to the Federal Sugar Refining Company for the lighterage of its sugar to the west shore railroad terminals.

That certain advantages inured to Arbuckle Brothers from the fact that their refinery was so near this public station that their product might be trucked or carted to the station at slight cost is obvious. That this was a consideration which operated as an inducement to make these contracts may be true. But this mere advantage of nearness was one which they shared in common with every other shipper who chanced to be near a shipping station. That they were large shippers was also more or less an inducement to the railroads to place their depot in a locality which would tend to secure their shipments as against rival carriers may also be conceded. But these were business considerations which are far from showing any purpose to give them any illegal preference or to discriminate against other shippers. That the station constituted a great public utility by which the shipping public was served is too plain for argument. Although nearly one third of all westbound shipments through that station were made by Arbuckle Brothers, the remaining two thirds of the tonnage was furnished by the general public. Thus, the uncontradicted averment of the bill is that during the first six months of 1907 the shipments of general merchandise through that station numbered 92,622, of which more than 85,000 were by shippers other than Arbuckle Brothers, though the tonnage of the latter aggregated nearly one third of the total. Thus it is demonstrated that while Arbuckle Brothers are by far the largest shippers, yet the advantages of the station are availed of by thousands of the general public.

Upon all of the conceded facts of the case, we must conclude that the contracts by virtue of which the premises owned by Arbuckle Brothers were converted into a public freight station under their management as agents for the [291] several carrier lines

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were contracts made in good faith, and not as a cover for any fraudulent scheme to give rebates or any other illegal advantage. The case must turn here, as it did before the Commission and in the commerce court, upon the question whether the allowance to Arbuckle Brothers of compensation upon their own shipments was for instrumentalities and services accessorial in character. Thus the Commission says:

"The complainant contends that in lightering their sugar to the Jersey shore and there delivering it to the defendants, Arbuckle Brothers perform what the complainant refers to as a purely accessorial service. We incline to think this a sound view of the matter upon the facts shown of record. Neither the actual possession of their sugar nor their relation to it is in any respect changed until it is delivered into the physical possession of the defendants at Jersey City. This fact is clearly developed upon the record. Arbuckle Brothers handle their sugar out of their own refinery to their own dock, and themselves deliver it to the defendants west of the river, using in the process only property and facilities that are owned by them and employees that are paid by them. Moreover, under the terms of the contracts between them and the defendant carriers none of the duties, obligations, responsibilities, or liabilities of common carriers attaches to the defendants, with respect to the sugar of Arbuckle Brothers, until the defendants have actually received it at their regular freight stations west of the river. Yet it is here contended that, through some sort of alchemy in their provisions, these contracts transmute Arbuckle Brothers from shippers into carriers' agents while they are in the act of delivering their own sugar to themselves at their own dock. We are not necessarily controlled, however, by the face of these documents or by the merely superficial relation that they purport to establish between these shippers and the defendant carriers, if, as seems to [292] be abundantly clear upon a reading of their provisions, the real and actual relation of Arbuckle Brothers to the defendants, so far as their own sugar is concerned, is that of shippers up to the moment of time when they physically deliver their sugar to the defendants on the Jersey shore. The contracts expressly provide that until that moment the sugar is to be handled by Arbuckle Brothers at their own risk, and only from that moment does the carrier's risk begin. It is only when the defendants actually accept and physically take possession of the sugar at their receiving stations west of the river that they agree to, and do in fact, assume the liabilities of common carriers with respect to the sugar of Arbuckle Brothers."

We must now recur to the distinction drawn by the Commission between the compensation paid by the railroad companies to Arbuckle Brothers for the instrumentalities furnished and the service performed by them in respect of their own westbound shipments of sugar, and the compensation paid to them in respect to the freight handled by them through their station for the general public. The Commission find no fault with reference to the compensation paid for the latter, but do find that the compensation paid for the former is an undue discrimination unless a like compensation is made to the Federal Sugar Refining Company for the lighterage of its sugar.

We have before noticed that the order of the Commission is in the alternative. The obvious inference is that the Commission found nothing unlawful *per se* in the compensation paid to Arbuckle Brothers under the contract, although they are compensated upon a gross tonnage which includes their own sugar, for it sanctions its continuance upon condition that a like allowance shall be paid upon the sugar lightered by the Federal Sugar Refining Company. Penn Ref. Co. v. Western New York & P. R. Co. 208 U. S. 208, 218, 52 L. ed. 456, 460, 28 Sup. Ct. Rep. 268.

But, as has already been shown, the railroads were [293] under no obligation to lighter the sugar of the Federal Sugar Refining Company. Upon the other hand, if the lighterage of the Arbuckle sugar was included in the through rate from the Jay Street Station, and a part of the transportation which the railroads were under obligation to perform, and that lighterage was done by Arbuckle Brothers at the instance and procurement of the carriers, they, as owners of the freight thus transported, were entitled to demand a compensation reasonably commensurate with the facilities furnished and the services performed. Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822; General Electric Co. v. New York C. & H. R. R. Co. 14 Inters. Com. Rep. 237; Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 46, 56 L. ed. 83, 87, 32 Sup. Ct. Rep. 22. In the case last cited, it is said:

"The act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in § 15; the only restriction being, that he shall pay no more than is reasonable, and the only permissive element

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being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion. Act of June 18, 1910, chap. 309, § 12, 36 Stat. at L. 539, 551, U. S. Comp. Stat. Supp. 1911, p. 1301). As the carrier is required to furnish this part of the transportation upon request, he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it."

This principle is not controverted, but the Commission failed to give it application, because, as shown in the excerpt from its report, set out above, it construed this relation of Arbuckle Brothers, under the terms of the contract, in respect of their own shipments of sugar, "as that of shipper up to the moment of time when they physically deliver their sugar to the defendants at the Jersey shore." Again, the Commission say that "the [294] contracts expressly provide that until that moment the sugar is to be handled by Arbuckle Brothers at their own risk, and only until that moment does the carrier's risk begin," etc. Of course, if this was the case, their services up to the time of delivery at the New Jersey shore were shipper's services, purely accessorial, and not connected with or in aid of transportation by the railroad, and, therefore, a discrimination would result unless a like allowance was made to the Federal Sugar Refining Company. But this construction of the contract has no other basis than appears in the clause defining the responsibility of the Terminal Company to the contracting carriers while the freights remain in the Terminal Company's physical possession. That clause reads thus:

"The responsibility of said Terminal Company for eastwardly bound cars and the freights therein shall begin when the cars are placed upon its floats at the said float bridges at the aforesaid station of said railroad company, and shall continue as respects the cars until they have been returned by it, loaded or empty; and as respects the freights contained in eastwardly bound cars, its responsibility shall continue until the actual delivery thereof to and acceptance by the consignees at Brooklyn. As respects the freights to be transported westbound, said Terminal Company's responsibility shall commence at the time the same is received from the consignor at its aforesaid premises, and shall continue until said freights, loaded into cars, have been brought to the float bridge of said railroad company at its aforesaid freight station, and until the floats have been attached to the float bridge and the cars are in complete readiness for removal from the car floats by said railroad company."

That clause deals both with east and westbound freight, and covers both the freight and the cars of the railroad company. It is too plain for argument that its only purpose is to fix the responsibility upon the contracting company [295] for both the cars of the carrier and the freight of all shippers while in its physical possession. The liability imposed is between agent and principal, and is substantially that imposed by general principles of law. It is plainly not intended to affect the responsibility of the carriers to all shippers after the receipt of freight for transportation,—a responsibility which they hold themselves out as assuming by their published tariff sheets.

The contracts between the carriers and the Terminal Company make no distinction whatever between the duty and obligation of the latter company in respect to the shipments of Arbuckle Brothers as sugar refiners, and those made through their station by the general public. Nor was there any distinction recognized by the undisputed course of business under the contracts. When the shipments of Arbuckle Brothers were delivered at the station, carriers' bills of lading were then signed and delivered just as in the case of freight delivered by the general public. If carrier responsibility began at that station for the shipments of the public, it also began as to the freight there received from Arbuckle Brothers. The physical possession of the Arbuckle Sugar, as stated by the Commission, remained with them until actually placed in the possession of the carrier on the New Jersey shore. But that is equally true as to the shipments of the general public. In both cases, however, the possession after such delivery and until delivered at the New Jersey shore was, under the contract, that of Arbuckle Brothers, under the business name of the Terminal Company, as agents of the carrier over whose lines the freight was routed and whose bill of lading had been duly issued. The Commission, while seeming to recognize this relation of agency, in effect deny it as to the freight received and receipted for at the station if it constituted a shipment by Arbuckle Brothers. But neither the words, nor the purpose of the contract, nor the actual method of conducting [296] the business, furnish the slightest reason for any such distinction as that drawn by the Commission. All freight, both in and out of the station, was handled in the same way.

The suggestion in the brief of the Solicitor General for the United States that "joint published tariffs are issued by the

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railroads and Arbuckle Brothers" has no other foundation of fact than that found in the seventh paragraph of the contract between the Erie Railroad and the Terminal Company, where it is said that the Terminal Company "shall not be required to receive or carry any freight which may, from time to time, be classed as prohibited freights in the joint published tariffs of itself and the railroad company." But there is not a scintilla of evidence that any such joint published tariffs have ever been filed or published, nor that the Terminal Company has ever published or been required to file any tariff sheets whatever. The filed tariff sheets showing the services performed by Arbuckle Brothers, and the facilities provided for extending transportation between the New Jersey terminals and this station, are those published and filed by the railroad companies, who thereby hold themselves out as common carriers to and from this station. That it might originally have been expected that the Terminal Company might join in such published tariffs is possible. That it never did is plain.

To say that the "allowance" made to Arbuckle Brothers is an allowance for lightering their own sugar across the river is to only half state the case. This so-called allowance is not only for such lighterage service, but is also compensation for the use of all of the terminal properties, docks, warehouses, tracks, steam lighters, car floats, and every instrumentality used under the contract. It includes the services and responsibility of Arbuckle Brothers, as agents for the several lessees using the station, and their staff of employees engaged in receiving, delivering, [297] loading, and unloading freights thus received, both incoming and outgoing. As the measure of compensation is the tonnage in and out of the station, and as this compensation is paid by the several railroads maintaining the station in proportion to the tonnage which they severally handle, there is a sense in which it is in part an allowance to Arbuckle Brothers upon their own shipments. But they receive the same compensation upon the tonnage of every other shipper through that station, and it is the aggregate of the compensation which must determine the reasonableness of the allowance when we come to deal with it as an allowance to them for services or instrumentalities furnished, under the 15th section of the act to regulate commerce.

That the compensation of 3 and 4½ cents per hundred pounds upon the total tonnage in and out of this station is not unreasonable was and is not challenged, and therefore we pass that subject by.

The contention to which we have hitherto referred, that the arrangement made by the Terminal Company violates the commodity clause of the act to regulate commerce, is not necessary to be considered. There is nothing in the record showing that such a contention was pressed upon the Commission, considered by that body, or that the order rendered was in any respect based upon the commodity clause. Indeed, the order permitted the continuance of the Jay Street Terminal and the business there conducted, providing only that like rights and allowances were made to the Federal Sugar Refining Company. The order, therefore, cannot be assumed to have contemplated that the Jay Street Terminal business was a violation of the commodity clause, since, under that hypothesis, the conclusion would be inevitable that the Commission, by its order, gave sanction to and permitted the continuance of the wrong which its powers were exerted to suppress. As we do not consider the contentions [298] concerning the commodity clause as properly arising for decision, and hence do not pass on them, they are not foreclosed, and hence our action in this case will be without prejudice to the right to assert them in the future if those having the right to do so are so advised.

Viewing the whole case in a broad light, it is apparent that the disadvantage under which the Federal Sugar Refining Company labors is one which arises out of its disadvantageous location. That disadvantage would still remain if the title to the Jay Street Station was in the railroad companies, and its business in charge of a third person.

We fail to find any error in the decree of the Commerce Court holding the order of the Commission void, and its decree is accordingly approved.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appt.,

v.

GREEN GARRETT† et al., Individually and as Constituting the Railroad Commission of Kentucky.

(See S. C. Reporter's ed. 298-320.)

Federal courts — jurisdiction — questions not all Federal.

1. All the questions in the case, local as well as Federal, may be determined by a Federal circuit court upon an application for a preliminary injunction to restrain the enforcement of a state statute upon the

†Substituted for Siler et al., sued as constituting the Railroad Commission of Kentucky.

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ground of its unconstitutionality, made under the act of June 18, 1910 (36 Stat. at L. 539, chap. 309), § 17, which requires a hearing before three judges, and authorizes an appeal to the Federal Supreme Court.

[For other cases, see Courts, 509, in Digest Sup. Ct. 1908.]

Appeal — from circuit court — extending review beyond Federal question.

2. The Federal Supreme Court, on an appeal from a circuit court, taken under the act of June 18, 1910, § 17, to review an order denying an application before three judges for a preliminary injunction to restrain the enforcement of a state statute on the ground of its unconstitutionality, may consider all the questions in the case, local as well as Federal.

[For other cases, see Appeal and Error, 4297–4300, in Digest Sup. Ct. 1908.]

Constitutional law — delegation of judicial power — rate regulation.

3. Judicial powers were not conferred upon the Kentucky Railroad Commission, contrary to Ky. Const. §§ 27, 28, 109, 135, by the act of March 10, 1900 (Carroll's Ky. Stat. 1909), § 820a, authorizing such commission, upon complaint that the rates of any railroad company are extortionate, or upon its own information to that effect, to fix reasonable rates, if, after a hearing, it finds the rates to be extortionate, such rate order to be "in full force and effect" at the expiration of ten days after notice, subject to revocation and modification by the commission.

[For other cases, see Constitutional Law, III. b, 4, in Digest Sup. Ct. 1908.]

Injunction — against rate regulation — sufficiency of bill.

4. General allegations in a bill, attacking an order of a state railroad commission fixing maximum freight rates, which in substance state the judgment of the pleader as to what the evidence before the commission did not "establish" or "tend to establish," are wholly insufficient to justify a court in enjoining the enforcement of the rate-making order upon the ground that the commission either had denied the hearing contemplated by statute, or, by its arbitrary action, had been guilty of an abuse of power.

[For other cases, see Injunction, I. j. in Digest Sup. Ct. 1908.]

Injunction — against rate regulation — discrimination.

5. The enforcement of an order of the Kentucky Railroad Commission, fixing maximum intrastate freight rates on distiller's raw materials and supplies from certain specified places of origin to the places of destination therein mentioned, will not be enjoined, if such order is otherwise valid, because the maintenance by the complaining carrier of other rates to other distillery stations on its road, not yet passed upon by the commission, may bring about the unjust discrimination and undue preference which Ky. Stat. §§ 817 and 819 forbid.

[For other cases, see Injunction, I. j, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law —equal protection of the laws — rate regulation — judicial review.

6. The failure of the Kentucky act of March 10, 1900, to provide for an appeal to any court from the final order of the state railroad commission fixing maximum freight rates under the authority of that statute, or for a judicial review of the reasonableness of the prescribed rates before they become effective, does not invalidate such statute as operating to deprive the carrier of its property without due process of law, or to deny to it the equal protection of the laws, contrary to U. S. Const., 14th Amend., where the statute does not—unless by its separable penal provisions—deny the carrier the right of access to the courts for the purpose of determining any matter which would be the appropriate subject of judicial inquiry.

[For other cases, see Constitutional Law, 266–291, 608–628, in Digest Sup. Ct. 1908.]

Courts — judicial review of rate regulation.

7. A rate-making order of the Kentucky Railroad Commission, made pursuant to the Kentucky act of March 10, 1900, authorizing such commission, upon complaint that the existing rates of a carrier are extortionate, to fix reasonable rates if, after a hearing, it finds the rates to be extortionate, is not subject to revision of the Federal courts upon the questions of fact as to the reasonableness of the particular rates existing at the time the order was made, as well as of those fixed by the commission.

[For other cases, see Courts, 205–218, in Digest Sup. Ct. 1908.]

Injunction — against rate regulation.— sufficiency of bill.

8. A case of confiscation entitling a carrier to injunctive relief against an order fixing maximum intrastate freight rates on certain commodities between specified points is not made by a bill which, apart from general averments, merely alleges that certain specified losses in revenue will result, without any showing as to the value of the property employed, the expense of operation, or the return which will be permitted under the rates prescribed.

[For other cases, see Injunction, I. j, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — rate regulation.

9. A carrier cannot assert, as against the operation of a rate-making order of the state railroad commission, made under the authority of the Kentucky act of March 10, 1900, the constitutional protection of a contract right under its charter to charge certain rates, where, subsequent to such statute, but prior to the making of such order, its charter became, by the carrier's own voluntary act, subject to legislative alteration, since the commission's order fixing rates is a legislative act under delegated power.

[For other cases, see Constitutional Law 1386–1412, 1430–1434, in Digest Sup. Ct. 1908.]

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Statutes — invalid in part.

10. The validity of the provisions of the Kentucky act of March 10, 1900, governing rate making by the state railroad commission, is not affected by the possible invalidity of the penalty attached by the statute to the disobedience of the commission's order.

[For other cases, see Statutes, I. d, 4, in Digest Sup. Ct. 1908.]

Commerce — state regulation of local rates of interstate carrier — congressional inaction.

11. Congressional inaction on the subject leaves each state free to establish maximum intrastate rates for interstate carriers which are reasonable in themselves, although the state's requirements may necessarily disturb the existing relation between interstate and intrastate rates as to places within zones of competition crossed by the state boundary line.

[For other cases, see Commerce, I. c; III. c, in Digest Sup. Ct. 1908.]

Parties — in suit to enjoin reparation order of railroad commission.

12. Those persons awarded specified amounts by a state railroad commission under the supposed authority of Ky. Stat. §§ 821, 829, in reparation for payments previously made to a carrier for transportation in excess of the rates found by such commission to be reasonable, which awards, on being filed, could be enforced by proceedings in the state courts, are necessary parties to a suit in a Federal court to restrain the enforcement of the reparation order.

[Necessary parties defendant, see Parties, II. a, in Digest Sup. Ct. 1908.]

[No. 23.]

Argued April 4, 1912. Decided December 1, 1913.

APPEAL from the Circuit Court of the United States for the Eastern District of Kentucky to review a decree denying an interlocutory injunction to restrain the enforcement of a rate-making order of the Kentucky Railroad Commission. Affirmed.

See same case below, 186 Fed. 176.

The facts are stated in the opinion.

Messrs. **Henry L. Stone** and **Albert S. Brandeis** argued the cause, and, with Mr. **William G. Dearing**, filed a brief for appellant:

The McChord act violates the state Constitution by undertaking to confer upon the railroad commission judicial powers.

Louisville & N. R. Co. v. McChord, 103 Fed. 222; Southern P. Co. v. Railroad Comrs. 78 Fed. 236; Western U. Teleg. Co. v. Myatt, 98 Fed. 335; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Roberts v. Hackney, 109 Ky. 265, 58 S. W. 810, 59 S. W. 328; Pratt v. Breckinridge, 112 Ky. 1, 65 S. W. 136, 66 S. W. 405; McChord v. Louisville & N. R. Co. 183 U. S. 495, 46 L. ed. 295, 22 Sup. Ct. Rep. 165; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 499, 42 L. ed. 253, 17 Sup. Ct. Rep. 896.

The fact that the Kentucky court of appeals decided that the railroad company could be compelled, in a suit brought by the state, to render a service which was essentially its duty to perform, under its charter or the general laws of the state, cannot be used to sustain the contention of the appellees that the commonwealth has a right to institute an action for a mandamus or a mandatory injunction to force a carrier to obey an order of the commission, fixing rates for the transportation of freight.

Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Missouri P. R. Co. v. Kansas, 216 U. S. 262–278, 54 L. ed. 472–479, 30 Sup. Ct. Rep. 330.

The McChord act, as administered by the commission, operates to deprive the carrier of its property without due process of law, and to deny to the carrier the equal protection of the laws.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 458, 33 L. ed. 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Reagan v. Farmers' Loan & T. Co. 154 U. S. 394, 399, 38 L. ed. 1022, 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Louisville & N. R. Co. v. McChord, 103 Fed. 224; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 172, 44 L. ed. 420, 20 Sup. Ct. Rep. 336; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 460, 33 L. ed. 982, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Cooley, Const. Lim. 7th ed. 502, 506; Hagar v. Reclamation Dist. 111 U. S. 708, 28 L. ed. 572, 4 Sup. Ct. Rep. 663; Davidson v. New Orleans, 96 U. S. 107, 24 L. ed. 620; Hovey v. Elliott, 167 U. S. 418, 42 L. ed. 221, 17 Sup. Ct. Rep. 841; Violett v. Alexandria, 92 Va. 569, 31 L.R.A. 382, 53 Am. St. Rep. 825, 23 S. E. 909; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246; Roller v. Holly, 176 U. S. 409, 44 L. ed. 524, 20 Sup. Ct. Rep. 410.

Appellant is entitled to just and reasonable compensation for each separate service, and if compelled to accept less compensation, without a judicial hearing, it is de-

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prived of its property in violation of the due process clause of the 14th Amendment.

Southern P. Co. v. Railroad Comrs. 78 Fed. 236; Houston & T. C. R. Co. v. Storey, 149 Fed. 499; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Gulf, C. & S. F. R. Co. v. Railroad Commission, 102 Tex. 338, 113 S. W. 741, on rehearing, 102 Tex. 353, 116 S. W. 796; Railroad Commission v. Houston & T. C. R. Co. 90 Tex. 340, 38 S. W. 755; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Southern R. Co. v. St. Louis Hay & Grain Co. 214 U. S. 297, 53 L. ed. 1004, 29 Sup. Ct. Rep. 678; Ex parte Young, 209 U. S. 147, 52 L. ed. 723, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Railroad Commission v. Cumberland Teleph. & Teleg. Co. 212 U. S. 414, 53 L. ed. 577, 29 Sup. Ct. Rep. 357; Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 95, 46 L. ed. 103, 22 Sup. Ct. Rep. 30; Northern P. R. Co. v. North Dakota, 216 U. S. 580, 54 L. ed. 624, 30 Sup. Ct. Rep. 423; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900.

The mere fact that an increase has been made by a carrier is no evidence whatever that the rate as increased is unreasonable, nor does even a legal presumption arise from such fact that it is unreasonable.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 697, 43 L. ed. 858, 864, 19 Sup. Ct. Rep. 565; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 119, 120, 52 L. ed. 712, 713, 28 Sup. Ct. Rep. 493.

The McChord act, by reason of its penalty provisions, violates the due process and equal protection clauses of the 14th Amendment.

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 100, 46 L. ed. 105, 22 Sup. Ct. Rep. 30; Ex parte Young, 209 U. S. 147, 52 L. ed. 723, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

To take away appellant's right to charge and collect the maximum rates fixed in its charter, there must be found a statute expressly repealing its charter in that respect.

Louisville & N. R. Co. v. McChord, 103 Fed. 225; Louisville & N. R. Co. v. Com. 99 Ky. 142, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129; Pingree v. Michigan C. R. Co. 118 Mich. 314, 53 L.R.A. 274, 76 N. W. 635; Louisville & N. R. Co. v. Robbins, 33 Ky. L. Rep. 778, 111 S. W. 283.

The effect of the statute is to deny to the parties the right to introduce before the court material and competent evidence affecting the matter in contest, and, so far as concerns the carrier defendant, to deny to it the right to make a defense based upon such evidence. A statute that does this denies to the carrier due process of law. It excludes by statute such evidence from consideration in the judicial investigation, and does not differ in principle from giving to the order of the commission a conclusive effect.

Hovey v. Elliott, 167 U. S. 409–413, 42 L. ed. 215–219, 17 Sup. Ct. Rep. 841; 2 Wigmore, Ev. § 1353; Birdsong v. Brooks, 7 Ga. 88; Windsor v. McVeigh, 93 U. S. 274, 277, 23 L. ed. 914, 915.

The commission has no powers except such as have been expressly granted by the state Constitution or the legislature.

State ex rel. La Follette v. Chicago, M. & St. P. R. Co. 16 S. D. 517, 94 N. W. 407; Railroad Comrs. v. Oregon R. & Nav. Co. 17 Or. 65, 2 L.R.A. 195, 19 Pac. 702; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 494, 42 L. ed. 243, 251, 17 Sup. Ct. Rep. 896; 2 Elliott, Railroads, 2d ed. § 684; Siler v. Louisville & N. R. Co. 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. Rep. 451; Chicago, I. & L. R. Co. v. Railroad Commission, 38 Ind. App. 439, 78 N. E. 338, 79 N. E. 520.

The facts established show an interference with, and burden upon, and a regulation of, interstate commerce which is prohibited by settled principles of law.

Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 101, 45 L. ed. 765, 770, 21 Sup. Ct. Rep. 561; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 2, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Shepard v. Northern P. R. Co. 184 Fed. 770; St. Louis Southwestern R. Co. v. Arkansas, 217 U. S. 136, 54 L. ed. 698, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476.

Messrs. Henry L. Stone, Albert S. Brandeis, William G. Dearing, and William A. Colston, also filed a brief for appellant:

The court will take judicial notice that the elements of intrastate traffic handled on interstate railroads, and the elements of interstate traffic handled on such railroads, are so intermixed, interdependent, indivisible, and inseparable that it is impossible, in connection with such railroads, to regulate or adjust the one kind of traffic without regulating, adjusting, and interfering with the other kind of traffic.

Northern P. R. Co. v. Keyes, 91 Fed. 52; McPherson, Workings of Railroads, p. 91;

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Johnson, American R. Transp. pp. 272, 274; South & North Ala. R. Co. v. Pilgreen, 62 Ala. 307; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 37, 54 L. ed. 355, 370, 30 Sup. Ct. Rep. 190.

The authorities cited by appellees are not in conflict with appellant's proposition; and where appellees' conclusions of law in this respect are opposed to the proposition, such conclusions of law are not supported by the authorities cited.

Shepard v. Northern P. R. Co. 184 Fed. 765; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Gibbons v. Ogden, 9 Wheat. 1, 195, 6 L. ed. 23, 69; The Daniel Ball, 10 Wall. 557, 564, 19 L. ed. 999, 1001; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 27, 54 L. ed. 355, 366, 30 Sup. Ct. Rep. 190; Sands v. Manistee River Improv. Co. 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Allen v. Pullman's Palace Car Co. 191 U. S. 171, 180, 48 L. ed. 134, 138, 24 Sup. Ct. Rep. 39; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 26, 48 L. ed. 325, 327, 24 Sup. Ct. Rep. 202; Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 30, 49 L. ed. 925, 930, 25 Sup. Ct. Rep. 552; Re Rahrer, 140 U. S. 545, 562, 35 L. ed. 572, 576, 11 Sup. Ct. Rep. 865; Southern R. Co. v. King, 217 U. S. 524, 533, 54 L. ed. 868, 871, 30 Sup. Ct. Rep. 594; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 268, 23 L. ed. 543, 547; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 328, 331, 50 L. ed. 772, 775, 776, 26 Sup. Ct. Rep. 491; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465.

The Federal power over commerce is exclusive whenever a uniform rule of regulation is required.

Gibbons v. Ogden, 9 Wheat. 1, 196, 224, 225, 231, 6 L. ed. 23, 70, 76–78; Cooley v. Port Wardens, 12 How. 299, 319, 13 L. ed. 996, 1004; State Freight Tax Case, 15 Wall. 232, 280, 21 L. ed. 146, 163; Welton v. Missouri, 91 U. S. 275, 280–282, 23 L. ed. 347, 349, 350; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 272, 23 L. ed. 543, 549; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203, 204, 29 L. ed. 158, 161, 162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 100, 101, 45 L. ed. 765, 769, 770, 21 Sup. Ct. Rep. 561; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; Passenger Cases, 7 How. 283, 399, 400, 12 L. ed. 702, 750, 751; The Federalist, Nos. 7 and 22.

The Federal power over commerce is exclusive not only with respect to interstate traffic, but also with respect to intrastate traffic which extends to or affects other states.

Gibbons v. Ogden, 9 Wheat. 1, 136, 195, 6 L. ed. 23, 55, 69; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 103, 39 L. ed. 910, 912, 15 Sup. Ct. Rep. 802; Ex parte Young, 209 U. S. 147, 52 L. ed. 723, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

The test of the validity of the state regulation is to be found in its effect upon commerce among the states.

Gibbons v. Ogden, 9 Wheat. 1, 195, 6 L. ed. 23, 69; Southern R. Co. v. King, 217 U. S. 524, 533, 54 L. ed. 868, 871, 30 Sup. Ct. Rep. 594; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 27, 54 L. ed. 355, 366, 30 Sup. Ct. Rep. 190; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 268, 23 L. ed. 543, 547.

The record shows the commission exceeded its powers and jurisdiction, and the orders complained of are void, within the doctrine announced in Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288; Western Oregon Lumber Mfrs. Asso. v. Southern P. Co. 14 Inters. Com. Rep. 61; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 119, 120, 52 L. ed. 712, 713, 28 Sup. Ct. Rep. 493; Lake Shore & M. S. R.

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Co. v. Smith, 173 U. S. 684, 697, 43 L. ed. 858, 864, 19 Sup. Ct. Rep. 565; Ex parte Young, 209 U. S. 147, 52 L. ed. 723, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

The rate orders of the Kentucky Railroad Commission cannot be lawfully made final and conclusive, or beyond judicial review upon the question of the reasonableness of the rates prescribed thereby.

Ex parte Young, supra; Southern P. Co. v. Railroad Comrs. 78 Fed. 236; Western U. Teleg. Co. v. Myatt, 98 Fed. 335; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108; Railroad Commission v. Cumberland Teleph. & Teleg. Co. 212 U. S. 414, 420, 53 L. ed. 577, 580, 29 Sup. Ct. Rep. 357.

The contention of appellees' counsel that the Kentucky Railroad Commission possesses judicial powers is untenable.

Hannibal Bridge Co. v. United States, 221 U. S. 194, 55 L. ed. 699, 31 Sup. Ct. Rep. 603; Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67.

The remedy provided in the McChord act for the enforcement of the commission's rate-making orders is exclusive of all others.

Com. v. Louisville & N. R. Co. 120 Ky. 91, 85 S. W. 712.

Mr. Edward W. Hines argued the cause, and, with Mr. James Breathitt, former Attorney General of Kentucky, and Messrs. Charles C. McChord, J. Van Norman, and John F. Lockett, filed a brief for appellees:

The only judicial inquiry which can be demanded as to rates fixed by law is as to whether or not they are confiscatory.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, — L.R.A.(N.S.) —, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Noyes, Am. R. Rates, p. 211; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 331, 29 L. ed. 636, 644, 6 Sup. Ct. Rep. 334, 388, 1191; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288.

The provision for penalties may be eliminated from the McChord act and the remainder of the statute upheld.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, — L.R.A.(N.S.) —, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129.

It is contended that the act is void because it applies to railroad carriers alone, and not to other carriers, and thus deprives railroad carriers of the equal protection of the laws. To this objection the case of Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191, is a complete answer.

It is manifest that the court had no thought when it decided in Siler v. Louisville & N. R. Co. 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. Rep. 451, that the commission had no power to make a schedule of rates, that such a construction of the statute would of itself render the statute void.

A statute authorizing the reduction of a rate upon complaint is not objectionable as discriminating against companies against which complaints were filed.

Southern P. Co. v. Bartine, 170 Fed. 725.

The act does not confer upon the railroad commission legislative, executive, and judicial powers.

Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; Saratoga Springs v. Saratoga Gas, E. L. & P. Co. 191 N. Y. 123, 18 L.R.A.(N.S.) 713, 83 N. E. 693, 14 Ann. Cas. 606; Southern P. Co. v. Bartine, supra; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; Pennington v. Woolfolk, 79 Ky. 13.

The court of appeals of Kentucky has shown that it is disposed to construe liberally the provisions of the Kentucky Constitution and statutes relating to the railroad commission, in order to give that body as large powers in the regulation of the railroads of the state as is possible under the Federal Constitution.

Louisville & N. R. Co. v. Com. 106 Ky. 633, 90 Am. St. Rep. 236, 51 S. W. 164, 1012; Com. v. Louisville & N. R. Co. 120 Ky. 91, 85 S. W. 712.

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The fact that the carrier had for many years prior to March, 1910, charged much lower rates than those it was charging at the time of the hearing before the commission made it incumbent upon the carrier to give a good reason for the change; and it does not appear from its bill that it made any attempt to do so.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 119, 52 L. ed. 705, 712, 28 Sup. Ct. Rep. 493; Memphis Cotton Oil Co. v. Illinois C. R. Co. 17 Inters. Com. Rep. 313.

All of the objections which relate to the readjustment of rates which will become necessary if the order of the commission is obeyed go to the expediency of the order, and not to the power of the commission.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155.

Complainant must first present all the facts bearing on the reasonableness of the rates to the railroad commission before resorting to the Federal courts.

Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67.

Any corporation accepting the provisions of the Kentucky Constitution becomes subject to all legislation enacted after the adoption of the Constitution.

Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; Newport & C. Bridge Co. v. Gill, 21 Ky. L. Rep. 942, 53 S. W. 650.

The order of the commission was not a regulation of interstate commerce.

Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Sands v. Manistee River Improv. Co. 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; Allen v. Pullman's Palace Car Co. 191 U. S. 171, 180, 48 L. ed. 134, 138, 24 Sup. Ct. Rep. 39; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 26, 48 L. ed. 325, 327, 24 Sup. Ct. Rep. 202; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 30, 49 L. ed. 925, 930, 25 Sup. Ct. Rep. 552; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Smyth v. Ames, 169 U. S. 466, 521, 42 L. ed. 819, 840, 18 Sup. Ct. Rep. 418; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 519, 46 L. ed. 298, 306, 22 Sup. Ct. Rep. 95; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Siler v. Louisville & N. R. Co. 213 U. S. 179, 53 L. ed. 755, 29 Sup. Ct. Rep. 451; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336.

It is only where its power is exclusive that the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restriction.

Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.

And even as to some matters as to which the power of Congress when exercised is exclusive, any action taken by the state must be respected until Congress intervenes.

Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 488, 48 L. ed. 268, 272, 24 Sup. Ct. Rep. 132; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; Saunders v. Southern Exp. Co. 18 Inters. Com. Rep. 422; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564.

While Congress can neither delegate its own powers nor enlarge those of a state, yet it may adopt as its own the law of a state, provided the law be one which it would have been competent for it to enact.

Re Rahrer, supra.

We deny that Congress either has the power to prohibit the granting of favors to intrastate shipments as against interstate shipments, or has attempted to exercise that power.

Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Louisville & N. R. Co. v.

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Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277.

The Interstate Commerce Commission is quite as free to regulate interstate rates after the state has limited intrastate rates as it was before; and whatever regulation it may make will be purely voluntary.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Re Freight Rates, 11 Inters. Com. Rep. 180; Hope Cotton Oil Co. v. Texas & P. R. Co. 12 Inters. Com. Rep. 265; Saunders v. Southern Exp. Co. 18 Inters. Com. Rep. 415; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277.

If the power of the state to regulate intrastate rates depended upon whether or not interstate rates were made by combining intrastate rates, it would be within the power of the carrier to withdraw all intrastate rates from regulation by the state, and the power of the state would depend upon the form of the carrier's tariffs.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272.

If it be an injustice for Covington to have lower rates to interior Kentucky points than Cincinnati has, the injustice is one that either the carrier or the Interstate Commerce Commission may remove. But if the carrier should refuse to lower rates from Cincinnati, and the Interstate Commerce Commission should determine that the carrier ought not to be required to lower those rates, then such injustice or inconvenience as might result would be one of the unavoidable effects of our dual form of government.

New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418.

Changes in interstate rates, made from business policy, to meet changed business conditions brought about by a state regulation of intrastate rates, cannot be said to result directly from such state regulation.

Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330.

It has repeatedly been held by this court that a state statute requiring an interstate carrier to assign colored intrastate passengers to coaches other than those provided for white passenger is not a regulation of interstate commerce.

Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101.

The court recognizes the right of carriers to refuse to apply to interstate passengers state regulations as to intrastate passengers, even though discrimination may result; but, as a matter of business policy, the carrier finds it desirable to apply to interstate passengers the rule which the state imposes upon him as to intrastate passengers, and this the court has held he has the right to do.

Chiles v. Chesapeake & O. R. Co. 218 U. S. 71, 54 L. ed. 936, 30 Sup. Ct. Rep. 667, 20 Ann. Cas. 980.

State regulations do not violate the commerce clause unless, by their "necessary operation," they affect interstate commerce; and it cannot be said that changes in interstate rates voluntarily made by a carrier, as a matter of business policy, to meet changes in intrastate rates forced upon him by the state, are a part of the "necessary operation" of the state regulation.

Ames v. Union P. R. Co. 64 Fed. 165, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336.

That it is necessary for the protection of shippers that the power to require intrastate rates to be reduced shall exist somewhere cannot be doubted, and the question is whether the state or Congress shall have that power. It being clear that Congress has not the power, it follows that the state must have the power.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

Neither the McChord act nor the rate order complained of is a regulation of interstate commerce.

Perkins v. Northern P. R. Co. 155 Fed. 445; St. Louis & S. F. R. Co. v. Hadley, 168 Fed. 317; Oregon R. & Nav. Co. v. Campbell, 173 Fed. 957; Re Arkansas Rate Cases, 187 Fed. 290; Re Freight Rates, 11 Inters. Com. Rep. 180; Hastings Malting Co. v. Chicago, M. & St. P. R. Co. 11 Inters. Com. Rep. 675; Saunders v. Southern Exp. Co. 18 Inters. Com. Rep. 415.

Complainant has an adequate remedy at law.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

The right to injunction must be free from doubt.

Ibid.; Willcox v. Consolidated Gas Co.

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212 U. S. 19, 53 L. ed. 382, — L.R.A.(N.S.) —, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

Mr. James Garnett, Attorney General of Kentucky, also argued the cause, and, with Messrs. Edward W. Hines, Charles C. McChord, and J. Van Norman, filed a brief for appellees:

Regardless of any mistakes made by the commission in the inferences which it drew from the evidence, the law presumes that the rates which it has fixed are reasonable, and the burden is upon the carrier to show that they are unreasonable.

Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Railroad Commission v. Cumberland Teleph. & Teleg. Co. 212 U. S. 414, 53 L. ed. 577, 29 Sup. Ct. Rep. 357.

The fact that the carrier has for many years given certain rates to the principal shippers of a commodity tends to show to some extent what would be a just and reasonable rate to all shippers of that commodity, no change of conditions being shown.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 119, 52 L. ed. 705, 712, 28 Sup. Ct. Rep. 493; Alabama & V. R. Co. v. Mississippi R. Commission, 203 U. S. 496, 51 L. ed. 289, 27 Sup. Ct. Rep. 163.

The court cannot assume that the evidence as to the old rate was the only evidence heard by the commission.

Railroad Commission v. Cumberland Teleph. & Teleg. Co. supra.

If the evidence was not preserved, the court must assume that there was some evidence to support the conclusions of the commission. There is no reason why the complainant should not at least state the substance of the evidence.

Shoemaker v. National Mechanics' Bank, 31 Md. 396, 100 Am. Dec. 73.

The allegation that the carrier will be compelled to do certain things if the order of the commission is enforced is not a statement of an existing fact, and is therefore not admitted by the demurrer.

Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868, 30 Sup. Ct. Rep. 594.

There must, in any event, be an allegation that the rate or rates in question are so low as to deprive the carrier of his property without due process of law before the court can interfere upon that ground, and such an allegation is wanting here. But even if such an allegation were made, it would not be sufficient without the further allegation of some fact from which the court might conclude that the rate would deprive the carrier of his property without due process of law.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 401, 38 L. ed. 1014, 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

The McChord act does not confer judicial power on the railroad commission.

Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Gibbs v. Louisville, 99 Ky. 490, 36 S. W. 524.

The failure of the railroad company to prove before the commission the effect on other rates which the changes asked for in existing rates would have is a bar to an injunction on the ground that the effect would be to reduce other rates.

Creath v. Sims, 5 How. 192, 12 L. ed. 111; Hendrickson v. Hinckley, 17 How. 443, 15 L. ed. 123.

The carrier cannot complain that discrimination would result from the enforcement of the order of the commission.

Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 54 L. ed. 946, 30 Sup. Ct. Rep. 651.

Commerce among the states, within the meaning of the commerce clause, is only that commerce which crosses state lines.

Gibbons v. Ogden, 9 Wheat. 195, 196, 6 L. ed. 69, 70; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 573, 30 L. ed. 244, 249, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

The court has repeatedly recognized the distinction between direct and indirect burdens upon interstate commerce as affecting the validity of state regulations.

Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 49 L. ed. 925, 25 Sup. Ct. Rep. 552; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; Alabama & V. R. Co. v. Mississippi R. Commission, 203 U. S. 496, 51 L. ed. 289, 27 Sup. Ct. Rep. 163.

The power of the state to regulate intrastate traffic is not determined by the actual effect of the regulation as shown by the proof in each case as it arises.

Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129.

The power of Congress to regulate interstate commerce does not impair the power of the states to adopt regulations for the protection of their people.

New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Chicago, R. I. & P. R. Co.

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v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275.

Congress, while regulating interstate rates, has elected to leave to the states the regulation of intrastate rates, and thereby has decided that there need not be uniformity of regulation.

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564.

Mr. Justice Hughes delivered the opinion of the court:

This is an appeal from an order denying a motion for an interlocutory injunction. Louisville & N. R. Co. v. Siler, 186 Fed. 176. The motion was heard by three judges, and the appeal is taken under § 17 of the act of June 18, 1910, chap. 309, 36 Stat. at L. 539, 557.

The suit was brought by the Louisville & Nashville Railroad Company, a corporation organized under the laws of Kentucky, to enjoin the enforcement of two orders made by the railroad commission of that state on August 10, 1910. One of these orders prescribed maximum freight rates for certain intrastate traffic; that is, for the transportation of corn, rye, barley, malt, empty barrels, boxes, etc., from three points of origin,—Louisville, Covington, and Newport,—to sixteen points of destination in Kentucky. The second order awarded specified amounts in reparation for payments previously made to the carrier for such transportation in excess of the rates found to be reasonable.

For many years, the railroad company had given special rates to the owners of distilleries along its lines in Kentucky for the transportation of the commodities above mentioned, which constituted their raw materials and supplies. These rates were withdrawn on March 25, 1910, and what are described as the standard rates of the company, that is, those which had theretofore been charged to others than distillers, were substituted. Thereupon, numerous distillery companies complained to the railroad commission of the state, insisting that the new rates were exorbitant and that the former rates were just [302] and reasonable. After hearing, the commission sustained the contention of the petitioners, and fixed the maximum rates in question. These rates were the same as the special rates which, prior to March 25, 1910, the railroad company had given to the distillery companies; but, by the commission's order, the rates as fixed were made applicable to the transportation between the points stated, of the described commodities, without distinction as to persons or as to the use to be made of the commodities by the consignees.

The statute under which the commission acted, in establishing these rates, is that of March 10, 1900, known as the McChord act (Ky. Stat. § 820a, Carroll's ed. 1909).† It provides in substance that when complaint shall be made to the railroad commission, accusing any railroad company of charging extortionate rates, or when the commission shall receive information or have reason to believe that such rates are being charged, it shall be its duty "to hear and determine the matter as speedily as possible." The commissioners are to give the company complained of not less than ten days' notice, stating the time and place of hearing and the nature of the complaint or matter to be investigated. They "shall hear such statements, argument, or evidence offered by the parties as the commission may deem relevant, and should the commission determine that the company or corporation is, or has been, guilty of extortion, said commission shall make and fix a just and reasonable rate, toll, or compensation, which said railroad company or corporation may charge, collect, or receive for like services thereafter rendered." The rate so fixed is to be entered as an order on the record book of the commission; a copy thereof is to be mailed to a representative of the railroad company [303] affected, and it is to be "in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record." If the railroad company, or any officer, agent, or employee thereof, charges a greater rate for like services thereafter, "said company . . . and said officer, agent, or employee, shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than $500, nor more that $1,000, and upon a second conviction, in any sum not less than $1,000 nor more than $2,000, and for a third and succeeding conviction in any sum not less than $2,000 nor more than $5,000." The circuit court, in the appropriate counties as prescribed by the statute, is to have jurisdiction of such prosecutions, which are to be by indictment.

The bill attacked the statute and the action of the commission, as violative of the rights secured to the complainant by the Federal Constitution. Objections were also made under the Constitution and statutes of the state. Demurrers were filed, but upon these no decision was made. The

†This statute is set forth in full in McChord v. Louisville & N. R. Co. 183 U. S. 483, 485, 46 L. ed. 289, 290, 22 Sup. Ct. Rep. 165, and in Siler v. Louisville & N. R. Co. 213 U. S. 175, 178-180, 53 L. ed. 753-755, 29 Sup. Ct. Rep. 451.

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motion for preliminary injunction was heard upon bill and affidavits. In denying the motion, the court did not pass upon the validity of the second order, as it was of the opinion that those in whose favor the award of reparation had been made were "necessary parties in interest;" these had not been brought in. 186 Fed. 176, 203.

First. The order fixing rates.

Because of the Federal questions raised by the bill the circuit court had jurisdiction and was authorized to determine all the questions in the case, local as well as Federal. Siler v. Louisville & N. R. Co. 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 Sup. Ct. Rep. 451. A similar rule must be deemed to govern the application for preliminary injunction under the statute which requires a hearing before three judges, and authorizes an [304] appeal to this court. 36 Stat. at L. 557, chap. 309. This statute applies to cases in which the preliminary injunction is sought in order to restrain the enforcement of a state enactment upon the ground of its "unconstitutionality." The reference, undoubtedly, is to an asserted conflict with the Federal Constitution, and the question of unconstitutionality, in this sense, must be a substantial one. But, where such a question is presented, the application is within the provision, and this being so, it cannot be supposed that it was the intention of Congress to compel the exclusion of other grounds, and thus to require a separate motion for preliminary injunction, and a separate hearing and appeal, with respect to the local questions which are involved in the case, and would properly be the subject of consideration in determining the propriety of granting an injunction pending suit. The local questions arising under the state Constitution and statutes were therefore before the circuit court and the appeal brings them here. They may be first considered.

1. It is objected that the act of March 10, 1900, violates §§ 27, 28, 109, and 135 of the state Constitution† by undertaking [305] to confer judicial powers upon the commission. By these sections, provision is explicitly made for three distinct departments of government; the judicial power of the commonwealth is vested in the courts established by the Constitution, and no judicial power can be exercised by any other officer except those thus named unless authorized by some other provision of that instrument. Roberts v. Hackney, 109 Ky. 265, 268, 58 S. W. 810, 59 S. W. 328; Pratt v. Breckinridge, 112 Ky. 1, 65 S. W. 136, 66 S. W. 405.

So far as we are advised, the court of appeals of Kentucky has not passed upon the validity of the act in question; and this court has often expressed its reluctance to adjudge a state statute to be in conflict with the Constitution of the state before that question has been considered by the state tribunals,—to which it properly belongs,—unless the case imperatively demands such a decision. Pelton v. Commercial Nat. Bank, 101 U. S. 143, 144, 25 L. ed. 901; Michigan C. R. Co. v. Powers, 201 U. S. 245, 291, 50 L. ed. 744, 760, 26 Sup. Ct. Rep. 459. Here, the argument against the statute is not of that compelling character.

It has frequently been pointed out that prescribing rates for the future is an act legislative, and not judicial, in kind. Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 499, 42 L. ed. 243, 253, 17 Sup. Ct. Rep. 896; McChord v. Louisville & N. R. Co. 183 U. S. 483, 495, 46 L. ed. 289, 295, 22 Sup. Ct. Rep. 165; Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 226, 53 L. ed. 150, 158, 29 Sup. Ct. Rep. 67; Knoxville v. Knoxville Water Co. 212 U. S. 1, 8, 53 L. ed. 371, 378, 29 Sup. Ct. Rep. 148. It pertains, broadly speaking, to the legislative power. The legislature may act directly, or, in the absence of constitutional restriction, it may commit the authority to fix rates to a subordinate body. Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 336, 29 L. ed. 636, 646, 6 Sup. Ct. Rep. 334, 388, 1191; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 393, 394, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 19, 51 L. ed. 933, 941, 27 Sup. Ct. Rep.

†The provisions referred to are as follows:

"Section 27. The powers of the government of the commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative to one; those which are executive to another; and those which are judicial to another.

"Section 28. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

"Section 109. The judicial power of the commonwealth, both as to matters of law and equity, shall be vested in the senate when sitting as a court of impeachment, and one supreme court (to be styled the court of appeals), and the courts established by this Constitution."

"Section 135. No courts save those provided for in this Constitution shall be established."

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585, 11 Ann. Cas. 398; Honolulu Rapid Transit & Land Co. v. Hawaii, 211 U. S. 282, 291, 53 L. ed. 186, 188, 29 Sup. Ct. Rep. 55; Grand Trunk Western R. Co. v. Railroad Commission, 221 [306] U. S. 400, 403, 55 L. ed. 786, 787, 31 Sup. Ct. Rep. 537. The Railroad Commission of Kentucky was established by § 209 of the Constitution (adopted in the year 1891), which provided that "the powers and duties of the railroad commissioners shall be regulated by law," and that "until otherwise provided by law, the commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation, as now conferred, prescribed, and allowed by law to the existing railroad commissioners;" and by § 218 of the same instrument (the long and short haul provision) the commission was authorized "in special cases, after investigation," to permit a less charge for longer than for shorter distances, and to "prescribe the extent" to which the common carrier might be "relieved from the operations" of the section. Louisville & N. R. Co. v. Com. 106 Ky. 633, 90 Am. St. Rep. 236, 51 S. W. 164, 1012, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95. It is unnecessary to review the statutes defining the powers of the then-existing commission, to which § 209 refers (Gen. Stat. [Ky.] ed. 1888, pp. 1021 et seq.; act of March 7, 1890, I Acts 1889-90, p. 25). For, while the former commission had not been authorized to fix rates, it can hardly be doubted that the Constitution, in providing that the powers and duties of the new commission should be regulated by law, contemplated that it should be available as an appropriate instrument in the supervision and regulation of railroads, and left the legislature free to adopt, if it saw fit, a practice already familiar (Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 495, 496, 42 L. ed. 243, 251, 252, 17 Sup. Ct. Rep. 896), and to call this agency to its aid in prescribing reasonable intrastate rates. This authority the legislature granted by the act of March 10, 1900, empowering the commission where, as in this case, particular rates were found to be exorbitant, to fix the reasonable rates thereafter to be charged. Siler v. Louisville & N. R. Co. 213 U. S. 175, 197, 53 L. ed. 753, 760, 29 Sup. Ct. Rep. 451.

[307] The contention is that, before the commission makes such an order, it is required to exercise judicial functions. It is first to determine whether the carrier has been exacting more than is just and reasonable; it is to give notice and a hearing; it is to "hear such statements, arguments, or evidence offered by the parties" as it may deem relevant; and it is in case it determines that the carrier is "guilty of extortion" that it is to prescribe the just and reasonable rate. Still, the hearing and determination, viewed as prerequisite to the fixing of rates, are merely preliminary to the legislative act. To this act, the entire proceeding led; and it was this consequence which gave to the proceeding its distinctive character. Very properly, and it might be said, necessarily,—even without the express command of the statute,—would the commission ascertain whether the former, or existing, rate, was unreasonable before it fixed a different rate. And in such an inquiry, for the purpose of prescribing a rule for the future, there would be no invasion of the province of the judicial department. Even where it is essential to maintain strictly the distinction between the judicial and other branches of the government, it must still be recognized that the ascertainment of facts, or the reaching of conclusions upon evidence taken in the course of a hearing of parties interested, may be entirely proper in the exercise of executive or legislative, as distinguished from judicial, powers. The legislature, had it seen fit, might have conducted similar inquiries through committees of its members, or specially constituted bodies, upon whose report as to the reasonableness of existing rates it would decide whether or not they were extortionate and whether other rates should be established, and it might have used methods like those of judicial tribunals in the endeavor to elicit the facts. It is "the nature of the final act" that determines "the nature of the previous inquiry." Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 227, 53 L. ed. 150, 159, 29 Sup. Ct. Rep. 67.

[308] It is also urged in support of the objection that the order of the commission is to be "in full force and effect" at the expiration of ten days after notice, and that this is the equivalent of a declaration that the order shall be final and conclusive; but the finality of the act did not change its essential character. So far as it was final, unless revoked or modified by the commission, it was final as a legislative act within the commission's authority.

2. It is contended that the commission acted arbitrarily. We are referred to the allegations of the bill that there was "no testimony" before the commission "that did establish or that tended to establish" the unjust or unreasonable nature of any of the rates maintained by the appellant; that there was "no evidence" introduced in the investigation or considered by the com-

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mission "showing or tending to show" that the appellant's rates were, "in and of themselves, unjust, unreasonable, or extortionate;" that the evidence "had no proper relation" to the reasonableness of rates for transporting the commodities in question when they were to be used for distillery purposes; and that "no evidence whatsoever was adduced at the hearing and investigation aforesaid, which showed or tended to show in the slightest degree what was or might be a just or reasonable rate to be charged" for the transportation described in the commission's order.

But it appears that upon receiving the complaint of the distillers with respect to the rates which the appellant had put into effect, the commission set the matter for hearing; that the parties were heard; that each party produced a number of witnesses; and that the appellant, represented by counsel, was permitted to cross-examine the witnesses of the complainants. The rates as fixed by the commission were the same as those which for many years had been maintained by the appellant for the distillers' supplies. The evidence taken by the commission was not before the court below; and the general allegations of [309] the bill, which in substance stated the judgment of the pleader as to what such evidence did not "establish" or "tend to establish," and the statements contained in the affidavits submitted upon the application for injunction, were utterly insufficient to justify the court in enjoining the rates upon the ground that the commission either had denied the hearing which the statute contemplated, or by its arbitrary action had been guilty of an abuse of power.

It is also charged, invoking a doctrine analogous to that declared in Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 53 L. ed. 283, 31 Sup. Ct. Rep. 298, that the commission assumed a power which it did not possess by proceeding upon the theory of a supposed equitable estoppel in favor of the distillers because they had been induced to erect and extend their plants upon the faith of the former rates. This contention finds no support in the record. The commission purported to act under its statutory authority, and, finding the rates charged by the carrier to be extortionate, fixed other rates which they declared to be reasonable.

Again, it is further said that the enforcement of the rate order should have been enjoined in order to prevent unjust discriminations and undue preferences in contravention of §§ 817 and 818 of the Kentucky statutes. Section 817 prohibits unjust discrimination in charges, as between persons, for like and contemporaneous service in transportation. Section 818 makes it unlawful to give any undue or unreasonable preference or advantage to one person or locality as compared with another. Section 819 prescribes penalties for violation, the prosecution to be by indictment. The point of this objection is that obedience to the commission's order with respect to the traffic from the three places of origin to the sixteen places of destination therein mentioned will bring about discrimination in intrastate rates, contrary to these statutes, as against thirty-two other distillery stations on the lines [310] of the appellant, the distillers at which, so far as appears, have not complained of the appellant's rates.

In view of the decision in Com. v. Louisville & N. R. Co. 20 Ky. L. Rep. 491, 46 S. W. 700, to the effect that the provisions of § 818 are too uncertain to support a criminal proceeding under § 819, it is not contended by the appellant that it would be subject to the prescribed penalties so far as § 818 is concerned. And it is urged by the attorney general of the state, on behalf of the appellees, that § 817 does not apply to discrimination as between localities.

But, aside from these considerations, we find the objection to be without merit. The commission dealt with the question before it, and, on complaint as to the rates to the sixteen points of destination, ordered what it found to be reasonable rates for that transportation. In so doing, it acted in conformity with the statute. To give legality to its order as to the particular rates in question, it was not necessary for the commission to require a reduction in other rates. Certainly, the fact that the other rates described, which had not yet been passed upon by the commission, might likewise be open to the objection of unreasonableness, and that their maintenance by the appellant might lead to unjust discrimination, would furnish no basis for restraining the enforcement of the commission's order if that order were otherwise valid.

3. The order is further attacked upon the ground that the statute under which it was made operates to deprive the carrier of its property without due process of law, and to deny to it the equal protection of the laws, contrary to the 14th Amendment.

It is insisted that the failure to provide for an appeal to any court from the final order of the commission, or for a judicial review of the reasonableness of the prescribed rates before they become effective, makes the statute [311] void. But the statute does not deny to the carrier the right of access to the courts for the purpose of determining any matter which would be the appropriate subject of judicial inquiry.

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We have not been referred to any decision of the state court holding that the statute should be so construed (Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 456, 33 L. ed. 970, 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702). If the commission establishes rates that are so unreasonably low as to be confiscatory, an appropriate mode of obtaining relief is by bill in equity to restrain the enforcement of the order. Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 459, 460, 33 L. ed. 970, 982, 983, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 659, 666, 39 L. ed. 567, 570, 573, 15 Sup. Ct. Rep. 484; Ex parte Young, 209 U. S. 123, 166, 52 L. ed. 705, 731, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764. Presumably, the courts of the state, as well as the Federal courts, would be open to the carrier for this purpose (Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 278, 53 L. ed. 176, 184, 29 Sup. Ct. Rep. 50) without express statutory provision to that effect. In answer to the present objection, it is sufficient to say that there is no showing here of an attempt to preclude such resort to the courts, or to deny to the carrier the assertion of its rights, unless it can be found in the severity of the penalties attached to disobedience of the order. And, if it were assumed that these would be open to objection as operating to deprive the carrier of a fair opportunity to contest the validity of the commission's action, still, the penal provisions would be separable, and the force of the remaining portion of the statute would not be impaired. Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 395, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53, 54, 53 L. ed. 382, 400, — L.R.A.(N.S.) —, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 443, 54 L. ed. 826, 831, 30 Sup. Ct. Rep. 535; Western U. Teleg. Co. v. Richmond, 224 U. S. 160, 172, 56 L. ed. 710, 717, 32 Sup. Ct. Rep. 449; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 380, 57 L. ed. 1511, 1534, 33 Sup. Ct. Rep. 729; Southern P. Co. v. Campbell, 230 U. S. 537, 553, 57 L. ed. 1610, 1625, 33 Sup. Ct. Rep. 1027.

4. The appellant, however, submits a broader contention which concerns the scope of the review to which it is entitled in this suit, and the nature of the judicial function [312] where rates fixed by the legislature, or under its direction, are assailed as unreasonable.

It is urged that so long as a carrier's existing rates are just and reasonable for the services it performs, it is within its constitutional and statutory rights; that what constitutes a just and reasonable rate for the services it has performed is a question of fact upon which the carrier is entitled to a judicial hearing; that even more clearly is it entitled to such a hearing, if, as a consequence of a decision by the commission that it has exceeded the limits of just and reasonable compensation for past services, it "must forfeit in favor of such statutory body its rate-making power, and be deprived of that property right with respect to 'like services thereafter rendered,' as provided in the McChord act." It is said further, that under the statute the finding from the evidence that the carrier has charged more than a reasonable compensation is "the essential jurisdictional fact" which must exist before the commission can fix rates, and it is insisted that if, upon a judicial investigation and the evidence adduced by the parties, it turns out that this jurisdictional fact did not exist, then the commission's entire action must be regarded as null and void, without regard to the question whether the new rates prescribed by it, in such circumstances, are reasonable or unreasonable, compensatory or confiscatory. It is therefore contended that the appellant is now entitled to a judicial hearing upon the questions of fact as to the reasonableness of the particular rates existing at the time the order was made, as well as of those fixed by the commission; and that in this view the injunction asked for should have been granted.

These arguments are elaborated and earnestly pressed; but the questions presented have been so frequently dealt with by this court that an extended discussion is unnecessary. The right of the carrier to make its own intrastate rates is subject to the law of the state, constitutionally [313] enacted. In the absence of a legislative rate, it is the province of the courts in deciding cases that arise between shippers and carriers to pass upon the reasonableness of the compensation which the carrier has demanded for its services. In so doing, the courts apply the common law. But it is the province of the legislature to make the law; and when the legislature, or the body acting under its authority, establishes the rate to be thereafter charged by the carrier, it is the duty of the courts to enforce the rule of law so made unless the constitutional limits of the rate-making power have been transgressed. The rate-making power necessarily implies a range of legislative discretion; and, so long as the legislative action is within its proper sphere, the courts are not entitled to interpose and upon their own investigation of traffic conditions and transportation problems to

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substitute their judgment with respect to the reasonableness of rates for that of the legislature or of the railroad commission exercising its delegated power. It may be assumed that the statute of Kentucky forbade arbitrary action; it required a hearing, the consideration of the relevant statements, evidence, and arguments submitted, and a determination by the commission whether the existing rates were excessive. But, on these conditions being fulfilled, the questions of fact which might arise as to the reasonableness of the existing rates in the consideration preliminary to legislative action would not become, as such, judicial questions to be re-examined by the courts. The appropriate questions for the courts would be whether the commission acted within the authority duly conferred by the legislature, and also, so far as the amount of compensation permitted by the prescribed rates is concerned, whether the commission went beyond the domain of the state's legislative power and violated the constitutional rights of property by imposing confiscatory requirements. Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 331, 29 L. ed. 636, 644, 6 Sup. Ct. Rep. 334, 388, 1191; [314] Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 397-399, 38 L. ed. 1014, 1023, 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 526, 42 L. ed. 819, 842, 18 Sup. Ct. Rep. 418; San Diego Land & Town Co. v. National City, 174 U. S. 739, 754, 43 L. ed. 1154, 1160, 19 Sup. Ct. Rep. 804; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 446, 47 L. ed. 892, 896, 23 Sup. Ct. Rep. 571; Knoxville v. Knoxville Water Co. 212 U. S. 1, 8, 17, 53 L. ed. 371, 378, 381, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 41, 53 L. ed. 382, 395, — L.R.A.(N.S.) —, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 433, 434, 57 L. ed. 1511, 1555, 1556, 33 Sup. Ct. Rep. 729. Undoubtedly, a state may permit appeals to its courts from the rate-making orders of its railroad commission, and, upon the review of such orders, it may expressly authorize its judicial tribunals to investigate and decide questions which otherwise would not belong to them, or even to act legislatively (Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 227, 53 L. ed. 150, 159, 29 Sup. Ct. Rep. 67). But the guaranties of the 14th Amendment do not entitle the carrier to the exercise by the courts of such extrajudicial authority.

5. With respect to the question of confiscation, the circuit court ruled that the bill did not "clearly tender an issue that could be said to involve confiscatory rates." The court also referred in its opinion to the statement in the brief of complainant's counsel that the complainant was not bound in this case "to allege or prove that the new rates were confiscatory," and also to an oral disclaimer of a purpose to rely upon any such contention. "This concession," the court said, "we think, was but natural, in view of the history of the rates which the railroad company voluntarily maintained for years prior to March 25, 1910, as before pointed out. No averment is made touching the proportions in volume of distillers' traffic and of nondistillers' traffic, and it could not be assumed that the company had been carrying distillers' supplies and products at confiscatory rates, nor that the extension of those rates to all similar traffic on the lines in question would amount to the confiscation of property." 186 Fed. 176, 191.

It is explained by the appellant that what was conceded [315] below was that the bill as amended did not aver that the rates fixed by the commission would result in the confiscation of appellant's property on its entire intrastate business, but that it is insisted, and was insisted below, that the rates would not yield a fair or reasonable compensation for the services performed, and would deprive the company of the fair and reasonable return which it is entitled to earn upon the property devoted to such services, with respect to the described traffic.

Without passing upon the general propositions advanced in argument, it suffices to say that we are of the opinion that the bill as amended wholly failed to make a case entitling the appellant to the relief sought. Apart from the merely general averments, it is alleged that the rates fixed by the order would cause an annual loss in revenue on intrastate freight of at least $15,600, and also that, in consequence of the effect on interstate rates, there would be an additional annual loss of not less than $3,000; further, that if the carrier were compelled to put in similar rates to the thirty-two other distillery stations, there would be a loss of $54,000 a year on shipments to those places; and that there would be other losses to an amount not specified, on shipments to consignees other than distillers.

But it may be supposed that, other conditions being the same, a reduction in rates found to be excessive will cause a loss in revenue; and the question is not simply as to the amount of reduction, but whether the rates as fixed would allow a fair return. The bill does not show the value of the property employed, the expenses of operation, or the return which

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would be permitted under the rates prescribed.

6. It is further objected that the rate-making order impairs the obligation of the contract contained in the company's charter in violation of § 10, article 1 of the Federal Constitution. It is alleged in the amended bill that by its charter granted by the act approved March 5, 1850, [316] and the amendments thereto, the appellant was authorized to charge specified maximum rates for transportation over its lines, and that the rates fixed by the commission's order are less than those which it was thus empowered to maintain.

It is provided by § 3 of the Bill of Rights contained in the state Constitution adopted in 1891, that every grant of a franchise, privilege, or exemption, shall remain subject to revocation, alteration, or amendment. Section 190 of this Constitution is as follows: "No corporation in existence at the time of the adoption of this Constitution shall have the benefit of future legislation without first filing in the office of the secretary of state an acceptance of the provisions of this Constitution."

It is set forth in the amended bill that, by resolution of the board of directors of the appellant, adopted July 11, 1902, it "duly accepted the provisions of the present Constitution of the commonwealth of Kentucky, ordained September 28, 1891, and the provisions of chapter 32 of the Kentucky Statutes, being the act adopted April 5, 1893, with the amendments thereto," and that a copy of this resolution was filed with the secretary of the state of Kentucky. Chapter 32 of the General Statutes is the chapter upon private corporations. One of its provisions, contained in § 573, is that the "provisions of all charters and articles of incorporation, whether granted by special act of the general assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges, or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897. . . . After the 28th day of September, 1897, the provisions of this chapter shall apply to all corporations created or organized under the laws of this state, if said provisions [317] would be applicable to them if organized under this chapter." By another provision of this chapter, in the article relating to railroads (§ 816), a railroad corporation charging more than a just and reasonable rate of compensation is guilty of extortion; the penalty was a fine provided for in § 819. In Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129, the court of appeals, holding that § 816 was too indefinite to be sustained as a penal statute, concluded its opinion by saying: "It may be observed further, however, that it would seem singular if such a statute, even if in all respects valid, could be enforced against a carrier whose rates, as fixed in its charter, are in excess of the rates alleged to be excessive in the indictment. And this, not because such rates are secured by an irrepealable contract (a matter not now considered), but simply because they at least remain the legal rates until changed by law."

It was after the decision in this case that the act of March 10, 1900, was passed, empowering the railroad commission to fix rates.

The amended bill states that, upon the filing of the resolution accepting the provisions of the Constitution, and the provisions of chapter 32 of the General Statutes, "thereby and thereafter the said contract (with respect to the maximum freight and passenger rates it is entitled to charge and collect on its said lines of railroad) between complainant and the commonwealth of Kentucky became and is now no longer irrevocable or irrepealable;" but, it is averred that "nevertheless, said contract remains intact, and has never been revoked or repealed by any act of the legislature," and that its obligation was in full force and effect at the time the rate order was made (August 10, 1910). That is, it is insisted that § 573 of the statutes, above quoted, is not applicable for the reason that on April 5, 1893, when the statute, of which this provision was a part, was approved, and also on September 28, 1897, [318] when the repeal provided for in that statute was to take effect, the appellant's charter was not subject to repeal or amendment, and that it did not become so subject until 1902. It is also contended that the act authorizing the commission to fix rates does not apply because that was passed two years before the appellant filed its resolution; in other words, that its contract contained in its charter is still in force because the legislature has not enacted a repealing or amending provision since the resolution was filed.

We do not find it necessary to review all the questions that are suggested. Apart from other considerations, it is manifest that the statute of March 10, 1900, was a continuing authority to the railroad commission. The order of the railroad commission in fixing rates was a legislative act, under its delegated power. It had "the same force as if made by the legislature." Grand Trunk Western R. Co. v. Railroad

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Commission, 221 U. S. 400, 403, 55 L. ed. 786, 787, 31 Sup. Ct. Rep. 537. It is for this reason that it is a "law" passed by the state, within the meaning of the contract clause. New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31, 31 L. ed. 607, 612, 8 Sup. Ct. Rep. 741; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 148, 45 L. ed. 788, 791, 21 Sup. Ct. Rep. 575; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 590, 52 L. ed. 630, 633, 28 Sup. Ct. Rep. 341; Grand Trunk Western R. Co. v. Railroad Commission, supra; Ross v. Oregon, 227 U. S. 150, 163, 57 L. ed. 458, 463, 33 Sup. Ct. Rep. 220. As it had full legislative effect, the appellant could not assert against its operation the provision of a contract which had previously become subject to legislative alteration. Missouri P. R. Co. v. Kansas, 216 U. S. 262, 274, 275, 54 L. ed. 472, 477, 478, 30 Sup. Ct. Rep. 330. Upon the filing of the resolution, the charter provision as to the maximum rates therein specified ceased to be an obstacle, if it had been such before, to the exercise by the state of its rate-making power.

7. The remaining questions require only a brief mention. The penalty provisions of the statute in question are challenged upon the ground that they violate the [319] provisions of the 14th Amendment. But, as already stated, these provisions are separable. It is also objected that the order of the commission constitutes an unwarrantable interference with, and a regulation of, interstate commerce. The questions thus raised cannot be distinguished from those which were considered and decided in the Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 33 Sup. Ct. Rep. 729.

Second. The order for reparation.

This order was not made under the statute of March 10, 1900, authorizing the commission to fix rates. It is conceded on behalf of the appellees that if the commission was not authorized by §§ 821 or 829 of the Kentucky statutes to award reparation, it had no authority whatever for that purpose. Section 821 provides that it shall be the duty of the railroad commissioners to see that the laws relating to railroads are faithfully executed, and to exercise a general supervision over the railroads of the state. Section 829 authorizes the commission to "hear and determine complaints" under §§ 816, 817, and 818, to the provisions of which we have already referred. It provides that such complaints shall be in writing, that the company complained of shall have notice of hearing, that the commission shall hear and reduce to writing all the evidence adduced, and that it shall render such award as may be proper. If the award be not satisfied within ten days, the chairman of the commission is to file a copy of it and the evidence heard, in the office of the clerk of the proper circuit court, whereupon it is to be docketed for trial, and summons is to be issued, as in other cases, requiring the party against whom the award has been made to show cause why it should not be satisfied. If the party fails to appear, judgment is to be rendered by default; and, if a trial is demanded, the case is to be tried as other ordinary cases, except that no evidence is to be introduced by either party save that heard before the commission, unless the court shall be satisfied by sworn testimony that [320] it could not have been produced before the commission by the exercise of reasonable diligence.

It thus appears that the two proceedings, though they were conducted at the same time, were distinct in their nature. The one resulted in a legislative rule for the future; in the other, there was an award of specific sums of money to particular persons upon the basis of past transactions, and this award, according to the provisions of the statute, on being filed, could be enforced by proceedings in the courts of the state. The persons in whose favor the award was made were not parties to the suit, and we think that the court was right in declining to determine its validity.

The order denying the application for injunction is affirmed.

STURGES & BURN MANUFACTURING COMPANY, Plff. in Err.,
v.
ARTHUR BEAUCHAMP.

(See S. C. Reporter's ed. 320-326.)

Constitutional law — due process of law — employment of minors.

1. Prohibiting the employment of children under the age of sixteen years in various hazardous employments, as is done by Ill. Laws 1903, p. 187, does not take liberty or property without due process of law, contrary to U. S. Const., 14th Amend., although the statute is so construed by the highest court of the state that a violation

NOTE.—Constitutionality of laws fixing minimum age limit for child labor.

State legislatures may, under the police power, fix an age limit below which children may not be employed. Re Weber, 149 Cal. 392, 86 Pac. 809; Re Spencer, 149 Cal. 396, 117 Am. St. Rep. 139, 86 Pac. 896, 9 Ann. Cas. 1105; Inland Steel Co. v. Yedinak, 172 Ind. 423, 139 Am. St. Rep. 389, 87 N. E. 229; State v. Rose, 125 La. 462, 26 L.R.A.(N.S.) 821, 51 So. 496:

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of its provisions gives a right of action on behalf of an illegally employed minor if injured in the course of such employment, even if the employer acted in good faith, relying upon the representation of the minor that he was over sixteen.

[For other cases, see Constitutional Law, IV. b, 7; IV. c, 3, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification — employment of minors.

2. The employment of children under the age of sixteen years in hazardous occupations may be prohibited, as is done by Ill. Laws 1903, p. 187, without contravening the guaranty in U. S. Const., 14th Amend., of the equal protection of the laws.

[For other cases, see Constitutional Law; IV. a, 5, Digest Sup. Ct. 1908.]

[No. 54.]

Submitted November 3, 1913. Decided December 1, 1913.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Superior Court of Cook County, in that state, in favor of plaintiff in an action to recover damages for personal injuries sustained by a minor illegally employed. Affirmed.

See same case below, 250 Ill. 303, 95 N. E. 204.

The facts are stated in the opinion.

Messrs. **Almon W. Bulkley** and **Clair E. More** submitted the cause for plaintiff in error:

The common-law rule of contributory negligence applies to minors.

Mt. Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine Acci. & P. G. Ins. Co. 111 Md. 561, 134 Am. St. Rep. 636, 75 Atl. 105; Bryant v. Skillman Hardware Co. 76 N. J. L. 45, 69 Atl. 23; People v. Ewer, 141 N. Y. 129, 25 L.R.A. 794, 38 Am. St. Rep. 788, 36 N. E. 4; People v. Taylor, 124 App. Div. 434, 108 N. Y. Supp. 796, reversed on other grounds in 192 N. Y. 398, 85 N. E. 759; New York v. Chelsea Jute Mills, 43 Misc. 266, 88 N. Y. Supp. 1085; Starnes v. Albion Mfg. Co. 147 N. C. 556, 17 L.R.A.(N.S.) 602, 61 S. E. 525, 15 Ann. Cas. 470; Lenahan v. Pittston Coal Min. Co. 218 Pa. 311, 12 L.R.A.(N.S.) 461, 120 Am. St. Rep. 885, 67 Atl. 642; Stehle v. Jaeger Automatic Mach. Co. 220 Pa. 617, 69 Atl. 1116, 14 Ann. Cas. 122; Collett v. Scott, 30 Pa. Super. Ct. 430.

The minimum age limit upheld by these decisions ranges from twelve years (Starnes v. Albion Mfg. Co. 147 N. C. 556, 17 L.R.A. (N.S.) 602, 61 S. E. 525, 15 Ann. Cas. 470) to sixteen years (People v. Taylor, 124 App. Div. 434, 108 N. Y. Supp. 796, reversed on other grounds in 192 N. Y. 398, 85 N. E. 759; Collett v. Scott, 30 Pa. Super. Ct. 430).

The prohibitions of these statutes are usually directed against certain prescribed occupations or employments; but this classification has generally been regarded as a reasonable one, which does not render the statute invalid.

Forbidding the employment of children under twelve years of age in factories and manufacturing establishments does not deny the equal protection of the laws. Starnes v. Albion Mfg. Co. supra.

Singling out manufacturing or mercantile establishments, mines, quarries, laundries, renovating works, bakeries, or printing offices, as is done by an Indiana statute which in effect prohibits the employment of persons in such occupations if under fourteen years of age, and their employment for more than sixty hours in any one week if more than sixteen years of age, does not deny the equal protection of the laws, the classification being a natural, just, and reasonable one. Inland Steel Co. v. Yedinak, 172 Ind. 423, 139 Am. St. Rep. 389, 87 N. E. 229.

The enactment of a statute forbidding the employment of children under fourteen years of age in certain enumerated industries (excluding agricultural or domestic industries and those in which not more than five persons are employed), and in certain places, including employment for work and labor in any theater, concert hall, or in and about any place of amusement where intoxicating liquor is made or sold, does not abridge privileges or immunities, or deny the equal protection of the laws, but is a valid and constitutional exercise of the legislative power. State v. Rose, 125 La. 462, 26 L.R.A.(N.S.) 821, 51 So. 496. The court said: "In the enactment of the statute now in question the legislature had the power to discriminate between occupations by classifying some of them as unsuited to the proper mental, moral, or physical development of children of tender years. In such a matter the judgment of the court cannot be substituted for the discretion of the lawmaker. The act might have been deemed arbitrary and unreasonable if it had prohibited the employment of children in all kinds of occupation."

A statute forbidding the employment of children under the age of fourteen years in mills and factories except canning factories is not invalid under U. S. Const., 14th Amend., as based upon an arbitrary or unreasonable classification. Mt. Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine Acci. & P. G. Ins. Co. 111 Md. 561, 134 Am. St. Rep. 636, 75 Atl. 105.

The exception in favor of child singers or musicians in churches, schools, and academies, made by a statute prohibiting the employment of children under sixteen years of age in any dangerous or immoral occupation or business, or for public entertainment, etc., does not render the law invalid as working an unfair discrimination. Re Weber, 149 Cal. 392, 86 Pac. 809.

Forbidding the employment of any child under fourteen years of age in any mercantile institution, office, laundry, manufac-

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7 Am. & Eng. Enc. Law, 2d ed. 409; Heimann v. Kinnare, 190 Ill. 156, 52 L.R.A. 652, 83 Am. St. Rep. 123, 60 N. E. 215.

The common-law rule of contributory negligence is not abolished by child labor statutes.

Berdos v. Tremont & S. Mills, 209 Mass. 498, 95 N. E. 876, Ann. Cas. 1912B, 797; Beghold v. Auto Body Co. 149 Mich. 14, 14 L.R.A.(N.S.) 609, 112 N. W. 691; Bromberg v. Evans Laundry Co. 134 Iowa, 46, 111 N. W. 417, 13 Ann. Cas. 33; Braasch v. Michigan Stove Co. 153 Mich. 652, 20 L.R.A. (N.S.) 500, 118 N. W. 366; Burke v. Big Sandy Coal & Coke Co. 68 W. Va. 421, 69 S. E. 992; Darsam v. Kohlmann, 123 La. 171, 20 L.R.A.(N.S.) 881, 48 So. 781; Dalm v. Bryant Paper Co. 157 Mich. 550, 122 N. W. 257; Evans v. American Iron & Tube Co. 42 Fed. 519; Leathers v. Blackwell Durham Tobacco Co. 144 N. C. 330, 9 L.R.A. (N.S.) 349, 57 S. E. 11; Ornamental Iron & Wire Co. v. Green, 108 Tenn. 165, 65 S. W. 399; Jacobson v. Merrill & R. Mill Co. 107 Minn. 74, 22 L.R.A.(N.S.) 309, 119 N. W. 510; Kirkham v. Wheeler-Osgood Co. 39 Wash. 415, 81 Pac. 869, 18 Am. Neg. Rep. 661, 4 Ann. Cas. 532; Nairn v. National Biscuit Co. 120 Mo. App. 147, 96 S. W. 679; Nickey v. Steuder, 164 Ind. 189, 73 N. E. 117; Norman v. Virginia-Pocahontas Coal Co. 68 W. Va. 405, 31 L.R.A.(N.S.) 504, 69 S. E. 857; Perry v. Tozer, 90 Minn. 431, 101 Am. St. Rep. 416, 97 N. W. 137; Peters v. Gille Mfg. Co. 133 Mo. App. 412, 113 S. W. 706; Queen v. Dayton Coal &

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tory, workshop, restaurant, hotel, or apartment house, or in the distribution of merchandise or messages, does not constitute an unfair discrimination against the particular trades mentioned. And the further clause in the statute, that no child under sixteen years of age shall work at any gainful occupation during the hours that the public schools are in session, unless such child can read English at sight and write simple English sentences, or is attending night school, is a reasonable regulation to prevent those having control of such children from working them to such an extent as to hinder them from acquiring, or endeavoring to acquire, at least the beginning of an education, before arriving at the age of sixteen; nor is a provision that nothing in the act shall be construed to prevent the employment of minors at agricultural, viticultural, horticultural, or domestic labor an unreasonable discrimination, as the character of the exempted labor is a sufficient reason for the exemption. Re Spencer, 149 Cal. 396, 117 Am. St. Rep. 139, 86 Pac. 896, 9 Ann. Cas. 1105.

But so much of a statute making it unlawful to employ any minor under sixteen years of age inside of any anthracite coal mine, or to employ any minor under fourteen years in any anthracite coal breaker or colliery, or around the outside workings of any anthracite coal mine, as attempts to divide the minors who had reached the age prescribed in the statute into two classes, those who could furnish certain certificates as to date of birth, baptism, etc., and those who could not, contravenes the equality clause of the 14th Amendment to the Federal Constitution. Collett v. Scott, 30 Pa. Super. Ct. 430.

Excepting certain counties from the operation of Md. Laws 1902, chap. 566, prohibiting the employment of children under the age of fourteen years in mills and factories, does not render the statute invalid under U. S. Const., 14th Amend., as making an unreasonable or arbitrary classification. Mt. Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine Acci. & P. G. Ins. Co. supra.

A statute forbidding the employment of children under twelve years of age in factories or manufacturing establishments is not void because it fails to designate the kind of labor which is prohibited to children under a specified age. Starnes v. Albion Mfg. Co. 147 N. C. 556, 17 L.R.A.(N.S.) 602, 61 S. E. 525, 15 Ann. Cas. 470.

"It cannot be said, nor do we understand counsel . . . as seriously contending," said the court in Mt. Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine Acci. & P. G. Ins. Co. 111 Md. 561, 134 Am. St. Rep. 636, 75 Atl. 105, "that under an act entitled 'An Act to Regulate the Employment of Children, Generally,' the employment of children under a certain age may not be prohibited as a part of the regulation."

A construction of the Illinois act of May 15, 1903, § 11, as giving by implication a right of action by the injured child under sixteen, employed contrary to that section, does not render the section invalid as creating a liability which is not expressed in the title, "An Act to Regulate the Employment of Children in the State of Illinois, and to Provide for the Enforcement Thereof." Beauchamp v. Sturges & B. Mfg. Co. 250 Ill. 303, 95 N. E. 204.

But an amendment to a child labor law raising to fourteen years the minimum age at which children may be employed in workshops, mines, mills, and factories, is not comprehended by the title, "An Act to Amend Chapter 159 of the Acts of 1893, Being an Act Entitled, 'An Act to Make It Unlawful to Employ a Child Less Than Twelve Years of Age in Workshops, Mines, Mills, or Factories in This State.'" Jackson v. Weis & L. Mfg. Co. 124 Tenn. 421, 137 S. W. 757.

On the constitutionality of child labor laws generally—see note to Starnes v. Albion Mfg. Co. 17 L.R.A.(N.S.) 602.

On employment in violation of statute as affecting child's action for negligence—see notes to Rolin v. E. J. Reynolds Tobacco Co. 7 L.R.A.(N.S.) 335, and Fahey v. Jephcott, 1 B. R. C. 629.

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I. Co. 96 Tenn. 465, 30 L.R.A. 82, 49 Am. St. Rep. 935, 32 S. W. 460; Sharon v. Winnebago Furniture Mfg. Co. 141 Wis. 189, 124 N. W. 299; Rolin v. R. J. Reynolds Tobacco Co. 141 N. C. 300, 7 L.R.A.(N.S.) 335, 53 S. E. 891, 8 Ann. Cas. 638; Roberts v. Taylor, 31 Ont. Rep. 10; Smith v. National Coal & I. Co. 135 Ky. 671, 117 S. W. 280; Sterling v. Union Carbide Co. 142 Mich. 284, 105 N. W. 755; Syneszewski v. Schmidt, 153 Mich. 438, 116 N. W. 1107.

Corporations are persons within the 14th Amendment.

Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Lowe v. Kansas, 163 U. S. 88, 41 L. ed. 80, 16 Sup. Ct. Rep. 103; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 29, 32 L. ed. 586, 9 Sup. Ct. Rep. 207; Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132.

The court will interfere to correct errors of state tribunals if the law is administered so as to violate the 14th Amendment.

Chy Lung v. Freeman, 92 U. S. 275–279, 23 L. ed. 550–552; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259–273, 23 L. ed. 543–549; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Soon Hing v. Crowley, 113 U. S. 703–710, 28 L. ed. 1145–1147, 5 Sup. Ct. Rep. 730; Williams v. Mississippi, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583; Yick Wo v. Hopkins, 118 U. S. 356–373, 30 L. ed. 220–227, 6 Sup. Ct. Rep. 1064.

The defendant in error, Beauchamp, is an adult, not a child.

Allen v. State, 7 Tex. App. 298; 16 Am. & Eng. Enc. Law, 2d ed. 263, 265, 267; Bell v. State, 18 Tex. App. 53, 51 Am. Rep. 293; Black's Law Dict. "Child;" Century Dict. "Childhood;" McGregor v. State, 4 Tex. App. 599; Quattlebaum v. Triplett, 69 Ark. 91, 61 S. W. 162.

There is a broad distinction between contributory negligence and assumption of risk. The doctrine of assumed risk is based upon the contract of employment; that of contributory negligence is based upon the action or nonaction of the party in disregard of personal safety.

Berdos v. Tremont & S. Mills, 209 Mass. 497, 95 N. E. 876, Ann. Cas. 1912B, 797; Narramore v. Cleveland, C. C. & St. L. R. Co. 46 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298; Cleveland, C. C. & St. L. R. Co. v. Baker, 33 C. C. A. 468, 63 U. S. App. 553, 91 Fed. 224; Union P. R. Co. v. O'Brien, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618.

The judgment of the Illinois courts deprives plaintiff in error of the equal protection of the laws.

Chicago, M. & St. P. R. Co. v. Westby, 47 L.R.A.(N.S.) 97, 102 C. C. A. 65, 178 Fed. 619; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Cooley, Const. Lim. 3d ed. p. 391; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247.

The legislature has no power to give a civil remedy to one guilty of fraud and deceit.

Black, Const. Law, 2d ed. p. 373; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Story, Const. 5th ed. § 1945; Wilkinson v. Leland, 2 Pet. 627–657, 7 L. ed. 542–553; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914.

Reading into the statute a civil remedy, and abolishing common-law defenses, were legislative, not judicial, acts, and transcend the power of the court.

26 Am. & Eng. Enc. Law, 2d ed. 597; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508; Re Potts, 166 U. S. 266, 41 L. ed. 995, 17 Sup. Ct. Rep. 520; Doe ex dem. Poor v. Considine, 6 Wall. 458, 18 L. ed. 869; Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. Rep. 312; Scott v. McNeal, 154 U. S. 34–45, 38 L. ed. 896–901, 14 Sup. Ct. Rep. 1108; St. Paul, M. & M. R. Co. v. Phelps, 137 U. S. 528, 34 L. ed. 767, 11 Sup. Ct. Rep. 168; Sturges v. Crowninshield, 4 Wheat. 202, 4 L. ed. 550; United States v. St. Anthony R. Co. 192 U. S. 524, 48 L. ed. 548, 24 Sup. Ct. Rep. 333; United States v. Fisher, 2 Cranch, 358, 2 L. ed. 304; United States v. Wiltberger, 5 Wheat. 95, 5 L. ed. 42; Windsor v. McVeigh, 93 U. S. 274–282, 23 L. ed. 914–917.

The statute as held and enforced is not within the police power.

Chicago v. Gunning System, 214 Ill. 628, 70 L.R.A. 230, 73 N. E. 1035, 2 Ann. Cas. 892; Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Lawton v. Steele, 152 U. S. 133–136, 38 L. ed. 385–388, 14 Sup. Ct. Rep. 499; Minnesota v. Barber, 136 U. S. 313–320, 34 L. ed. 455–458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Mugler v. Kansas, 123 U. S. 623–661, 31 L. ed. 205–210, 8 Sup. Ct. Rep. 273; Ruhstrat v. People, 185 Ill.

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133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41, 12 Am. Crim. Rep. 453; State v. Caspare, 115 Md. 7, 80 Atl. 606; Yick Wo v. Hopkins, 118 U. S. 356–370, 30 L. ed. 220–226, 6 Sup. Ct. Rep. 1064.

The maxim "No one acquires a right of action from his own wrong" applies to minors.

16 Am. & Eng. Enc. Law, 2d ed. 311; Barham v. Turbeville, 1 Swan, 437, 57 Am. Dec. 782; Bigelow, Estoppel, 5th ed. p. 606; Commander v. Brazil, 88 Miss. 668, 9 L.R.A. (N.S.) 1117, 41 So. 497; Coleman v. Himmelberger-Harrison Land & Lumber Co. 105 Mo. App. 254, 79 S. W. 981; 22 Cyc. 512, "Infants;" Ex parte Unity Joint Stock Mut. Bkg. Asso. 3 De G. & J. 63, 27 L. J. Bankr. N. S. 33, 4 Jur. N. S. 1257, 6 Week. Rep. 640; Edgar v. Gertison, — Ky. —, 112 S. W. 831; Ferguson v. Bobo, 54 Miss. 121; Hall v. Timmons, 2 Rich. Eq. 120; Lowery v. Cate, 57 L.R.A. 673, note; Mathews v. Cowan, 59 Ill. 341; Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076; Pace v. Cawood, 33 Ky. L. Rep. 592, 110 S. W. 414; Parker v. Elder, 11 Humph. 546; Rice v. Boyer, 108 Ind. 472, 58 Am. Rep. 53, 9 N. E. 420; Sanger v. Hibbard, 2 Ind. Terr. 547, 53 S. W. 330; Vasse v. Smith, 6 Cranch, 226, 3 L. ed. 207; Wright v. Snowe, 2 De G. & S. 321; Vinson v. State, 124 Ga. 19, 52 S. E. 79; Williamson v. Jones, 43 W. Va. 562, 38 L.R.A. 694, 64 Am. St. Rep. 891, 27 S. E. 410, 19 Mor. Min. Rep. 19; Whittington v. Wright, 9 Ga. 29.

The statute in question is a penal statute, to be strictly construed.

Bandfield v. Bandfield, 117 Mich. 80, 40 L.R.A. 757, 72 Am. St. Rep. 550, 75 N. W. 287; Field v. United States, 69 C. C. A. 568, 137 Fed. 6; Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; Sarlls v. United States, 152 U. S. 570–575, 38 L. ed. 556–558, 14 Sup. Ct. Rep. 720; The Ben R. 67 C. C. A. 290, 134 Fed. 784; United States v. Harris, 177 U. S. 305–310, 44 L. ed. 780–782, 20 Sup. Ct. Rep. 609; United States v. Wiltberger, 5 Wheat. 96, 5 L. ed. 42; American Car & Foundry Co. v. Armentraut, 214 Ill. 509, 73 N. E. 766; Strafford v. Republic Iron & Steel Co. 238 Ill. 371, 20 L.R.A. (N.S.) 876, 128 Am. St. Rep. 129, 87 N. E. 358; Illinois C. R. Co. v. O'Connor, 189 Ill. 564, 59 N. E. 1098.

Mr. George E. Gorman submitted the cause for defendant in error. Mr. John M. Pollock was on the brief.

Mr. Justice Hughes delivered the opinion of the court:

The Sturges & Burn Manufacturing Company is a corporation engaged in manufacturing tinware and other metal products. It employed Arthur Beauchamp, the defendant in error, who was under sixteen years of age, as a press hand to operate a punch press used in stamping sheet metal. Beauchamp was injured in operating the press, and brought an action through his next friend, in the superior court of Cook county, to recover the damages sustained, counting on the statute of Illinois, passed in 1903 (Laws of 1903, p. 187, Hurd's Stat. 1909, p. 1082), which, by § 11, prohibited the employment of children under the age of sixteen years in various hazardous occupations, including that in which the injury occurred. The trial court, refusing to direct a verdict for the defendant, instructed the jury that if the plaintiff was in fact less than sixteen years old, and when injured [325] was employed by the defendant upon a stamping machine, the defendant was guilty of a violation of the statute, and the plaintiff was entitled to recover. A verdict was rendered for the plaintiff, and judgment thereon was affirmed by the supreme court of the state. 250 Ill. 303, 95 N. E. 204. The case comes here on error.

The plaintiff in error complains of the ruling that a violation of the statute gives a right of action to the employee in case of his injury, but this is a question of state law with which we are not concerned.

The Federal question presented is whether the statute, as construed by the state court, contravenes the 14th Amendment. It cannot be doubted that the state was entitled to prohibit the employment of persons of tender years in dangerous occupations. Holden v. Hardy, 169 U. S. 366, 392, 395, 42 L. ed. 780, 791, 792, 18 Sup. Ct. Rep. 383; Jacobson v. Massachusetts, 197 U. S. 11, 31, 49 L. ed. 643, 651, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Muller v. Oregon, 208 U. S. 412, 421, 52 L. ed. 551, 555, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 568, 569, 55 L. ed. 328, 338, 339, 31 Sup. Ct. Rep. 259. It is urged that the plaintiff in error was not permitted to defend upon the ground that it acted in good faith relying upon the representation made by Beauchamp that he was over sixteen. It is said that, being over fourteen, he at least had attained the age at which he should have been treated as responsible for his statements. But, as it was competent for the state, in securing the safety of the young, to prohibit such employment altogether, it could select means appropriate to make its prohibition effective, and could compel employers, at their peril, to ascertain whether those they employed were in fact under the

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age specified. The imposition of absolute requirements of this sort is a familiar exercise of the protective power of government. Reg. v. Prince, L. R. 2 C. C. 154, 44 L. J. Mag. Cas. N. S. 122, 32 L. T. N. S. 700, 24 Week. Rep. 76, 13 Cox C. C. 138, 1 Am. Crim. Rep. 1; People v. Werner, 174 N. Y. 132, 66 N. E. 667; State v. Kinkead, 57 Conn. 173, 17 Atl. 855; Ulrich v. Com. 6 Bush, 400; State v. Heck, 23 Minn. 549; State v. Hartfiel, 24 Wis. 60; State v. Tomasi, 67 [326] Vt. 312, 31 Atl. 780; Com. v. Green, 163 Mass. 103, 39 N. E. 775; 3 Greenl. Ev. § 21; 30 Am. Rep. 617–620, note. And where, as here, such legislation has reasonable relation to a purpose which the state was entitled to effect, it is not open to constitutional objection as a deprivation of liberty or property without due process of law. Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 70, 54 L. ed. 930, 935, 30 Sup. Ct. Rep. 663.

It is also contended that the statute denied to the plaintiff in error the equal protection of the laws; but the classification it established was clearly within the legislative power. Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 354, 52 L. ed. 236, 243, 28 Sup. Ct. Rep. 114; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54, 54 L. ed. 921, 928, 47 L.R.A.(N.S.) 84, 30 Sup. Ct. Rep. 676; Lindsley v. National Carbonic Gas Co. 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Mutual Loan Co. v. Martell, 222 U. S. 225, 236, 56 L. ed. 175, 180, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529.

The judgment is affirmed.

EASTERN EXTENSION, AUSTRALASIA & CHINA TELEGRAPH COMPANY, Limited, Appt.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 326–335.)

Claims — jurisdiction — treaty stipulations.

1. The broadening of the general jurisdiction of the court of claims, made by the act of March 3, 1887 (24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752), which repealed all inconsistent enactments, did not destroy the established exception set forth in U. S. Rev. Stat. § 1066, U. S. Comp. Stat. 1901, p. 739, by which such claims as grow out of, or are dependent upon, treaty stipulations, are excluded from the jurisdiction of that court.

[For other cases, see Claims, 171–178; Statutes, III. b, in Digest Sup. Ct. 1908.]

Claims — jurisdiction — treaty stipulations.

2. A claim based exclusively upon the transfer of sovereignty of the Philippine Islands from Spain to the United States, upon the theory that thereby, under the principles of international law, an obligation in favor of the claimant was imposed upon the United States, is excluded from the jurisdiction of the court of claims by U. S. Rev. Stat. § 1066, U. S. Comp. Stat. 1901, p. 739, as being one growing out of, or dependent upon, treaty stipulations.

[For other cases, see Claims, 171–178, in Digest Sup. Ct. 1908.]

Claims — against United States — implied contract.

3. A claim against the United States for the annual subsidy provided for in Spanish concessions for the construction and operation of submarine cables in the Philippine Islands, which rests not simply upon the succession of the United States to sovereignty, under the treaty of December 10, 1898 (30 Stat. at L. 1754), with Spain, but upon a contract to be implied from subsequent transactions between the United States and the telegraph company, is not one arising out of treaty stipulations, so as to be excluded from the jurisdiction of the court of claims by U. S. Rev. Stat. § 1066, U. S. Comp. Stat. 1901, p. 739, but

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NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

On delegation by legislature of power to regulate carriers—see notes to Saratoga Springs v. Saratoga Gas, E. L. & P. Co. 18 L.R.A.(N.S.) 713, and State v. Atlantic Coast Line R. Co. 32 L.R.A.(N.S.) 649.

On unconstitutional inequality or discrimination in state regulation of tolls or rates—see note to Cotting v. Godard, 46 L. ed. U. S. 92.

On state regulation generally of tolls, rates, and prices—see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177.

On elements entering into determination of reasonableness of railroad rates prescribed by the state for local traffic—see notes to Pennsylvania R. Co. v. Philadelphia County, 15 L.R.A.(N.S.) 108, and State ex rel. McCue v. Northern P. R. Co. 25 L.R.A.(N.S.) 1001.

On reasonableness of state limitation of railroad rates—see note to Chicago, M. & St. P. R. Co. v. Tompkins, 44 L. ed. U. S. 417.

On contract exemptions from legislative power to fix tolls, rates, or prices—see note to Detroit v. Detroit Citizens' Street R. Co. 46 L. ed. U. S. 592.

Generally, on statutes part valid and part invalid—see notes to Titusville Iron Works v. Keystone Oil Co. 1 L.R.A. 363, and Fayette County v. People's & D. Bank, 10 L.R.A. 196.

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is founded upon an implied contract with the government, within the meaning of the act of March 3, 1887, defining the jurisdiction of that court.

[For other cases, see Claims, 105–127, in Digest Sup. Ct. 1908.]

[No. 419.]

Argued October 22, 1913. Decided December 1, 1913.

APPEAL from the Court of Claims to review the dismissal upon demurrer of a claim against the United States. Reversed and remanded for further proceedings.

See same case below, 48 Ct. Cl. —.

The facts are stated in the opinion.

Mr. **Louis Marshall** argued the cause and filed a brief for appellant:

The court of claims had ample jurisdiction over this cause under the provisions of the Tucker act of March 3, 1887.

The Habana, 175 U. S. 677, 44 L. ed. 320, 20 Sup. Ct. Rep. 290; Hilton v. Guyot, 159 U. S. 113, 163, 40 L. ed. 95, 108, 16 Sup. Ct. Rep. 139; Respublica v. De Longchamps, 1 Dall. 111, 1 L. ed. 59; Waters v. Collot, 2 Dall. 247, 1 L. ed. 367; Ware v. Hylton, 3 Dall. 199, 228, 1 L. ed. 568, 580; Salomon v. United States, 19 Wall. 17, 22 L. ed. 46; United States v. Russell, 13 Wall. 623, 20 L. ed. 474; United States v. Jones, 131 U. S. 1, 33 L. ed. 90, 9 Sup. Ct. Rep. 669; United States v. Drew, 131 U. S. 21, 33 L. ed. 93, 9 Sup. Ct. Rep. 672; Dooley v. United States, 182 U. S. 229, 234, 45 L. ed. 1080, 1082, 21 Sup. Ct. Rep. 762; United States v. Borcherling, 185 U. S. 231, 46 L. ed. 888, 22 Sup. Ct. Rep. 607; United States v. Weld, 127 U. S. 51, 32 L. ed. 62, 8 Sup. Ct. Rep. 1000; United States v. Cornell S. B. Co. 202 U. S. 184, 50 L. ed. 987, 26 Sup. Ct. Rep. 648; United States v. Morgan, 39 C. C. A. 653, 99 Fed. 570; United States v. Palmer, 128 U. S. 262, 32 L. ed. 442, 9 Sup. Ct. Rep. 104; United States v. Great Falls Mfg. Co. 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; United States v. Smith, 94 U. S. 214, 24 L. ed. 115; United States v. Bostwick, 94 U. S. 53, 69, 24 L. ed. 65, 67; Knote v. United States, 95 U. S. 149, 24 L. ed. 442.

The legislation relative to the jurisdiction of the court of claims being remedial should receive a liberal construction.

Southern P. R. Co. v. United States, 38 Fed. 55.

The jurisdiction of a court does not depend upon its ultimate decision on the merits, but solely on the question as to whether it has the power to consider the case for the purpose of deciding, either correctly or incorrectly, as to the merits.

Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Illinois C. R. Co. v. Adams, 180 U. S. 34, 45 L. ed. 412, 21 Sup. Ct. Rep. 251; Rhode Island v. Massachusetts, 12 Pet. 667, 718, 9 L. ed. 1233, 1258; Byers v. McAuley, 149 U. S. 608, 628, 37 L. ed. 867, 876, 13 Sup. Ct. Rep. 906; United States v. Arredondo, 6 Pet. 691, 709, 8 L. ed. 547, 554; Grignon v. Astor, 2 How. 319, 333, 11 L. ed. 283, 288; The Resolute, 168 U. S. 437, 439, 42 L. ed. 533, 534, 18 Sup. Ct. Rep. 112.

If jurisdiction otherwise exists there is nothing in § 1066 of the United States Revised Statutes (U. S. Comp. Stat. 1901, p. 739) which affects such jurisdiction.

A. Even though that section had not been expressly repealed when the claim was filed, the Tucker act, then in force, superseded it, since it dealt with the entire subject of the jurisdiction of the court of claims, and embraced new provisions plainly showing that it was intended as a substitute for the former legislation relating to the jurisdiction of that court.

United States v. Tynen, 11 Wall. 88, 92, 20 L. ed. 153, 154; Murdock v. Memphis, 20 Wall. 590, 617, 22 L. ed. 429, 437; United States v. Claflin, 97 U. S. 546, 24 L. ed. 1082; King v. Cornell, 106 U. S. 395, 396, 27 L. ed. 60, 1 Sup. Ct. Rep. 312; Pana v. Bowler, 107 U. S. 529, 27 L. ed. 424, 2 Sup. Ct. Rep. 704; Tracy v. Tuffly, 134 U. S. 206, 223, 33 L. ed. 879, 884, 10 Sup. Ct. Rep. 527; Fisk v. Henarie, 142 U. S. 459, 468, 35 L. ed. 1079, 1082, 12 Sup. Ct. Rep. 207; District of Columbia v. Hutton, 143 U. S. 18, 27, 36 L. ed. 60, 62, 12 Sup. Ct. Rep. 369; The Habana, 175 U. S. 677, 44 L. ed. 320, 20 Sup. Ct. Rep. 290; United States v. Rider, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983; United States v. Hewecker, 164 U. S. 46, 41 L. ed. 345, 17 Sup. Ct. Rep. 18; Mitchell v. Brown, 1 El. & El. 267, 28 L. J. Mag. Cas. N. S. 53, 5 Jur. N. S. 707, 7 Week. Rep. 80; Ex parte Baker, 2 Hurlst. & N. 219, 26 L. J. Mag. Cas. N. S. 155, 3 Jur. N. S. 987, 5 Week. Rep. 661; Parry v. Croydon Commercial Gas Co. 15 C. B. N. S. 568, 10 Jur. N. S. 172, 9 L. T. N. S. 694, 12 Week. Rep. 212; Red Rock v. Henry, 106 U. S. 596, 601, 27 L. ed. 251, 253, 1 Sup. Ct. Rep. 434; Henderson's Tobacco, 11 Wall. 657, 20 L. ed. 237; United States v. Auffmordt, 122 U. S. 197, 30 L. ed. 1182, 7 Sup. Ct. Rep. 1182; Norris v. Crocker, 13 How. 429, 438, 14 L. ed. 210, 213; Henrietta Min. & Mill. Co. v. Gardner, 173 U. S. 123, 128, 43 L. ed. 637, 639, 19 Sup. Ct. Rep. 327.

B. But assuming that § 1066 of the United States Revised Statutes (U. S. Comp. Stat. 1901, p. 739) had not been repealed when appellant's claim was filed, the court

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of claims nevertheless had jurisdiction, because the right sought to be enforced did not grow out of, nor was it dependent on, any treaty stipulation entered into with a foreign nation.

United States v. Weld, 127 U. S. 51, 32 L. ed. 62, 8 Sup. Ct. Rep. 1000.

Under the doctrines of international law, as well as upon common law and equitable principles, all of which are applicable here (The Habana, 175 U. S. 677, 44 L. ed. 320, 20 Sup. Ct. Rep. 290), under the terms of the Tucker act, the claimant has made out a cause of action, since the appellee, by demurring to the question, has admitted the allegations.

Schoellkopf v. Coatsworth, 166 N. Y. 77, 59 N. E. 710.

On the acquisition by the United States of sovereignty over the Philippine Islands, the claimant's private rights of property were in no manner affected by the change of sovereignty, and the rights vested in it, both contractual and otherwise, and executory as well as executed, remained enforceable in accordance with the principles of international law.

Mutual Assur. Soc. v. Watts, 1 Wheat. 279, 4 L. ed. 91; United States v. Percheman, 7 Pet. 51, 8 L. ed. 604; Snow, International Law, p. 21; United States v. Clarke, 8 Pet. 436, 8 L. ed. 1001; Delassus v. United States, 9 Pet. 117, 9 L. ed. 71; Mitchel v. United States, 9 Pet. 711, 9 L. ed. 283; Strother v. Lucas, 12 Pet. 410, 412, 9 L. ed. 1137, 1138; Leitensdorfer v. Webb, 20 How. 176, 15 L. ed. 891; United States v. Moreno, 1 Wall. 400, 17 L. ed. 633; Peralta v. United States, 3 Wall. 434, 18 L. ed. 221; Townsend v. Greeley, 5 Wall. 326, 18 L. ed. 547; United States v. Roselius, 15 How. 36, 14 L. ed. 590; Dent v. Emmeger, 14 Wall. 308, 20 L. ed. 838; Cessna v. United States, 169 U. S. 186, 42 L. ed. 710, 18 Sup. Ct. Rep. 304; Soulard v. United States, 4 Pet. 511, 7 L. ed. 938; 2 Halleck, International Law, 3d Eng. ed. 493; Hall, International Law, 97.

Under the established doctrines of international law, where a part of the territory of one nation is annexed by cession or otherwise to the territory of another, the latter, by the act of annexation, becomes bound to fulfil all the obligations which pertained to the former in respect of the territory acquired and the property therein. It practically inherits the rights and obligations of the ceding state.

Westlake, International Law, p. 69; Martens, International Law, pp. 368, 369; Field, International Code, § 23; 1 Fiore, New Treaty of International Law, § 356, p. 313; Hershey, "Succession of States," American Journal of International Law, 1911, pp. 294, 295; Fiore, International Law Codified, § 152; Bentwich, Priv. Prop. in War, pp. 70, 72; Hall, International Law, 5th ed. p. 99; Wheaton, International Law, 4th ed. p. 46; 2 Baker's Halleck, International Law, 1878 ed. p. 504; 1 Calvo, Droit International, 4th ed. p. 428; 4 Calvo, Droit International, p. 404; Heffter, Droit International de l'Europe, 4th ed. pp. 63, 64; Huber, Die Staatensuccession, § 217; Phillimore, International Law, 3d ed. pp. 204, 210, 211; Snow, International Law, p. 22.

This case must be treated precisely as it would be if the questions now presented had arisen as between private individuals.

People v. Stephens, 71 N. Y. 549; Rhode Island v. Massachusetts, 12 Pet. 737, 738, 9 L. ed. 1265, 1266.

Under general principles of jurisprudence the facts set forth in the petition create an obligation on the part of the appellee to the appellant to pay the subsidy provided for in the concession so long as it shall continue to avail itself of the general and special rights and privileges which have accrued to it under the terms of the concession.

Stewart v. Long Island R. Co. 102 N. Y. 607, 55 Am. Rep. 844, 8 N. E. 200; Walton v. Stafford, 14 App. Div. 312, 43 N. Y. Supp. 1049; Cameron v. Nash, 41 App. Div. 532, 58 N. Y. Supp. 643; Frank v. New York, L. E. & W. R. Co. 122 N. Y. 197, 25 N. E. 332; Pollard v. Shaaffer, 1 Dall. 210, 1 L. ed. 104; Probst v. Rochester Steam Laundry Co. 171 N. Y. 588, 64 N. E. 504; Greenleaf v. Allen, 127 Mass. 248; Fennell v. Guffey, 155 Pa. 38, 25 Atl. 785; Wall v. Hinds, 4 Gray, 256, 64 Am. Dec. 64; Burnett v. Lynch, 5 Barn. & C. 589, 8 Dowl. & R. 368, 4 L. J. K. B. 274, 29 Revised Rep. 343; Astor v. Lent, 6 Bosw. 612; Schoellkopf v. Coatsworth, 55 App. Div. 331, 66 N. Y. Supp. 979, affirmed in 166 N. Y. 77, 59 N. E. 710; People v. Stephens, 71 N. Y. 527; Masson v. Bovet, 1 Denio, 69, 43 Am. Dec. 651; Vernol v. Vernol, 63 N. Y. 45; Mills v. Hoffman, 92 N. Y. 190; Baird v. New York, 96 N. Y. 589; Cobb v. Hatfield, 46 N. Y. 536; United States v. Russell, 13 Wall. 623, 20 L. ed. 474; Hollister v. Benedict & B. Mfg. Co. 113 U. S. 59, 28 L. ed. 901, 5 Sup. Ct. Rep. 717; United States v. Palmer, 128 U. S. 262, 32 L. ed. 442, 9 Sup. Ct. Rep. 104; Coleman v. United States, 152 U. S. 99, 38 L. ed. 369, 14 Sup. Ct. Rep. 473; Cavalieri, "Doctrine of Succession of a State," Pisa, 1910, p. 135.

Assistant Attorney General Thompson argued the cause, and, with Mr. William F. Norris, filed a brief for appellee:

The court of claims has no jurisdiction of claims where the United States is not a

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direct party or primarily liable, or of claims against other governments which the United States had assumed by treaty.

Ex parte Atocha (Ex parte United States) 17 Wall. 439, 21 L. ed. 696; Great Western Ins. Co. v. United States, 112 U. S. 193, 28 L. ed. 687, 5 Sup. Ct. Rep. 103.

Jurisdiction where there is a treaty involved is conferred by special act, and the authority of the court to hear and determine the stipulations of the treaty is limited and controlled by the provisions of the act granting such jurisdiction; in questions growing out of a treaty we shall give respect to the common law, but not be governed by it; we shall be influenced by the laws and decrees of individual states regulating international conduct, such as the decisions of international tribunals, the judgments of prize courts, etc.

United States v. Kingsley, 12 Pet. 476, 484, 9 L. ed. 1163, 1166; Thirty Hogsheads of Sugar v. Boyle, 9 Cranch, 191–198, 3 L. ed. 701–703; 1 Moore, International Law Dig. p. 2, ¶ 2.

U. S. Rev. Stat. § 1066, U. S. Comp. Stat. 1901, p. 739, is special legislation; the Tucker act is general legislation; the latter, being subsequent to the former, does not repeal § 1066.

Rodgers v. United States, 185 U. S. 83, 46 L. ed. 816, 22 Sup. Ct. Rep. 582; United States v. Matthews, 173 U. S. 388, 43 L. ed. 740, 19 Sup. Ct. Rep. 413; United States v. Healey, 160 U. S. 147, 40 L. ed. 373, 16 Sup. Ct. Rep. 247; South Carolina v. Stoll, 17 Wall. 431, 21 L. ed. 654; Magone v. King, 2 C. C. A. 363, 1 U. S. App. 267, 51 Fed. 526.

The treaty being silent about the assuming of the obligation, defendant is not bound to pay the same under the laws of nations or international law.

1 More, International Law Dig. pp. 2, 402; Thirty Hogsheads of Sugar v. Boyle, 9 Cranch, 191, 198, 3 L. ed. 701, 703.

Spain was a military monarchy; the people of the Philippine Islands were not represented in the making of the contract, nor was their consent asked or given.

1 Moore, International Law Dig. p. 402.

The contract was a personal one between Spain and appellant for the general benefit of Spain.

People v. Stephens, 71 N. Y. 549; Hall, International Law, 4th ed. p. 99.

Mr. Justice Hughes delivered the opinion of the court:

This is an appeal from the judgment of the court of claims which dismissed, upon demurrer, the petition of the claimant for the want of jurisdiction. 48 Ct. Cl. —.

The petition averred that the claimant, a British corporation, secured from the government of Spain, in the year 1879, a concession for the construction and operation of a submarine telegraph cable between the island of Luzon and Hong Kong, with an exclusive privilege for forty years, under which it maintained a cable from Hong Kong to Bolinao; and that in 1897, the government of Spain granted a further concession for three submarine telegraph cables to provide communication between the islands of Luzon, Panay, Negros, and Zebu, in the Philippine archipelago. Among the conditions of the last-mentioned grant, a copy of which is annexed to the petition and made a part of it, are the following:

[328] "Article 9. The concessionaire undertakes to work, at his own expense and risk, the cables of this concession for a period of twenty years, the said term to begin from the date of the taking over of the cables and their adjuncts in perfect working order.

"Article 10. The concessionaire shall enjoy an annual subsidy of £4,500 (four thousand, five hundred pounds sterling), payable monthly in twelve instalments, during the whole term of the working of the cables, the said payments being made at Manila by the chief treasury office of those islands."

"Article 16. The company holding the concession shall pay the state the 10 per cent, which tax, in its application to cablegrams, is fixed after first deducting the amount of the expenses for the maintenance of the stations, calculated at £6,000 (six thousand pounds sterling) per annum, the said expenses not to exceed the amount specified.

"Article 17. It shall be obligatory to transmit official despatches, which shall enjoy precedence, at half the rates charged for those of a private character. . . ."

In March, 1898, the claimant obtained an additional concession from the government of Spain for a submarine telegraph cable between Hong Kong and Manila, which was completed in the following month.

It was further alleged that the claimant had "actually fulfilled" and continued "to fulfil" all of the conditions of the concessions, and "to perform all of the duties imposed upon it" by their terms. After setting forth the making of the treaty of Paris [30 Stat. at L. 1754], and the cession thereby to the United States of the Philippine Islands [31 Stat. at L. 1942], the petition continued:

"Thereupon the United States of America entered into the occupancy of said Philippine Islands, and proceeded to exercise sovereignty over said islands and of

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the inhabitants thereof, and to assume jurisdiction and control [329] over all property and property rights in and upon said Philippine Islands, including the several lines of submarine cable and telegraph land lines established, constructed, and operated by the claimant, and availed itself of all of the benefits and advantages thereof, using the said lines of cable and telegraph for its governmental and other purposes, which it has continued to do ever since and still continues to do, and it has become in all respects the successor of the government of Spain to all rights, privileges, and advantages conferred upon and secured and reserved to the government of Spain under the terms of the aforesaid concessions. . . .

"By reason of the premises the United States of America assumed all of the obligations and the performance of all the conditions accepted by the government of Spain and agreed to by it, according to the terms of the aforesaid concessions . . . and of each of them, and agreed with the claimant to perform the covenants and agreements, and to fulfil the conditions, set forth in said several concessions, and accepted and agreed to by the government of Spain.

"The United States of America has failed to perform said agreements and to fulfil the said conditions, in that it has failed and refused to pay to the claimant the annual subsidy of £4,500 sterling, as required by the terms of article 10 of the aforesaid concession . . . for the years 1905, 1906, 1907, 1908, and 1909, and for each of said years, and by reason of such failure and refusal to pay it has become indebted to the claimant in the sum of £4,500 sterling for each of said years, with interest on each of said annual instalments at the rate of 6 per cent per annum from the 31st day of December of the year in which the same became payable."

And judgment was demanded accordingly for the sum of $109,462.50, with interest as stated.

The government demurred to the petition, asserting (1) [330] that it did not set forth facts sufficient to constitute a cause of action against the United States, and (2) that it did not disclose a cause of action within the jurisdiction of the court.

Upon hearing, the court held that it was without jurisdiction, and it was upon this ground that the petition was dismissed. 48 Ct. Cl. — .

The act of February 24, 1855 (10 Stat. at L. 612, chap. 122), creating the court of claims, provided that it should hear and determine all claims "founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States," and also all claims which might be "referred to said court by either house of Congress." It required the court to report to Congress the cases upon which it had finally acted, stating the material facts found with its opinion, and to prepare such bills as would be appropriate, if enacted, to carry its decisions into effect. Important amendments were made by the act of March 3, 1863 (12 Stat. at L. 765, chap. 92), which gave jurisdiction of set-offs and counterclaims, authorized appeals to the Supreme Court, and provided for payment of final judgments out of any general appropriation made by law for the satisfaction of private claims.† But at the same time Congress was careful to exclude from the jurisdiction of the court such claims as arose out of treaty stipulations. (Id. § 9, 12 Stat. at L. 767, chap. 92, U. S. Comp. Stat. 1901, p. 739.) As was said in Ex parte Atocha (Ex parte United States) 17 Wall. 439, 444, 21 L. ed. 696, 698: "All the cases of which the court could subsequently take cognizance, by either the original or amendatory act, were cases arising out of contracts or transactions between the government or its officers and claimants. . . . Those acts have since then applied only to claims made directly against [331] the United States, and for the payment of which they were primarily liable, if liable at all, and not to claims against other governments, the payment of which the United States had assumed or might assume by treaty."

The provisions of the act of 1855, as amended, relating to jurisdiction, were placed in § 1059 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 734), and § 9 of the act of 1863 became § 1066 of the revision (U. S. Comp. Stat. 1901, p. 739), as follows:

"Sec. 1066. The jurisdiction of the said court shall not extend to any claim against the government not pending therein on December one, eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes."

By the act of March 3, 1887 (24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752), the general jurisdiction of the court theretofore defined by § 1059 (U. S. Comp. Stat. 1901, p. 734) was broadened, and it was thus provided:

"That the court of claims shall have

†cf. Act of March 17, 1866, 14 Stat. at L. 9, chap. 19; United States v. Alire, 6 Wall. 573, 576, 18 L. ed. 947, 948.

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jurisdiction to hear and determine the following matters.

"First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the government of the United States, or for damages liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty if the United States were suable: Provided, however, That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as 'war claims,' or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, department, or commission authorized to hear and determine the same.

[332] "Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court."

The statute of 1887 repealed all inconsistent enactments. The question whether § 1066 (U. S. Comp. Stat. 1901, p. 739) was thus repealed has been raised, but not decided. United States v. Weld, 127 U. S. 51, 57, 32 L. ed. 62, 65, 8 Sup. Ct. Rep. 1000; Juragua Iron Co. v. United States, 212 U. S. 297, 310, 53 L. ed. 520, 525, 29 Sup. Ct. Rep. 385. Both the provisions above quoted and those of § 1066 (U. S. Comp. Stat. 1901, p. 739) are incorporated in the Judicial Code, §§ 145, 153 [36 Stat. at L. 1136, 1138, chap. 231, U. S. Comp. Stat. Supp. 1911, pp. 198, 201]. It is argued that the act of 1887 was intended to provide a complete scheme for the bestowal of jurisdiction over all claims against the government, save those therein expressly excepted, and that, hence, it must be regarded as a substitute for the provisions of the Revised Statutes, including § 1066 (U. S. Comp. Stat. 1901, p. 739), which should therefore be deemed to be repealed (United States v. Tynen, 11 Wall. 88, 92, 20 L. ed. 153, 154; The Habana, 175 U. S. 677, 684, 685, 44 L. ed. 320, 322, 323, 20 Sup. Ct. Rep. 290). We cannot accede to this view. The question is one of legislative intent (United States v. Claflin, 97 U. S. 546, 551, 24 L. ed. 1082, 1084). The section dealt with a special class of cases. There is no essential repugnancy between the broadening of the general provisions as to jurisdiction and the maintenance of the limitation as to claims based upon treaties, and, in considering the scope and manifest purpose of the later act in relation to claims arising out of transactions between the government, or its officers and claimants, we find no warrant for concluding that, in enlarging the jurisdiction previously conferred by § 1059 (U. S. Comp. Stat. 1901, p. 734), it was the intention of Congress to effect such a complete substitution as would destroy the established exception set forth in § 1066 (U. S. Comp. Stat. 1901, p. 739). So far, then, as the petition may be viewed as one seeking to assert a claim growing out of the treaty with Spain, we are of the opinion that it was not within the jurisdiction of the court of claims.

[333] It is insisted, however, that the claim should not be treated as one dependent upon a treaty stipulation (United States v. Weld, 127 U. S. 51, 57, 32 L. ed. 62, 65, 8 Sup. Ct. Rep. 1000); that the treaty merely serves to confer upon the United States the title to the Philippine Islands (30 Stat. at L. 1754; 31 Stat. at L. 1942); and that the claim is based upon considerations of international law. It is pointed out that it was stated in the protocol that an article proposed for the assumption of contracts which had been entered into by the Spanish government was rejected by the American commissioners, while it was also set forth that it might be assumed that the United States would deal justly and equitably in respect of contracts that were binding under the principles of international law (Sen. Doc. No. 62, 55th Cong. 3d Sess. pp. 240, 241). But, if the claim of the appellant were deemed to rest exclusively upon the transfer of sovereignty, upon the theory that thereby, under the principles of international law, an obligation in its favor was imposed upon the United States, the claim would still, in our judgment, be excluded by the statute from the consideration of the court below. The words "treaty stipulation" should not be so narrowly interpreted as to permit the exercise of jurisdiction where the claim arises solely out of the treaty cession. Whether the liability asserted is said to result from an express provision of assumption contained in a treaty, or is sought to be enforced as a necessary consequence of the cession made by a treaty, it is equally within the policy and spirit of the statute; and the letter of the statute should not be otherwise construed. It is its evident purpose that the obligations of the United States, directly resulting from a treaty, should not be determined by the court of claims.

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But the petition has another aspect. The grant to the appellant, as already stated, provided in article 16 for a payment of a tax of 10 per cent, and, under article 17, for precedence and half rates in the transmission of official [334] despatches. It is argued by the appellant that the fact that the United States "has received and is receiving the special tax" and "the precedence and half rates specified" must be regarded as admitted; and it is urged that under the general principles of jurisprudence the facts set forth in the petition import an obligation on the part of the United States to the appellant to pay the subsidy provided for in the concession so long as the United States shall continue to avail itself of the rights and privileges which have accrued to it under the terms of the concession.

If the petition can be fairly said to present the claim that the United States, not simply by virtue of succession to sovereignty under the treaty of cession, but through its subsequent transactions with the appellant, and by contract to be implied from such transactions, has become indebted to the appellant, we think that the claim, as thus limited, would be within the jurisdiction of the court below under the act of 1887. It is true that the averments of the petition lack definiteness. It is not specifically alleged that the United States has received the tax or enjoyed the benefit of the half rates, nor is it precisely stated what transactions have been had between the government and the appellant. But the petition alleges that the United States, since it entered into the occupancy of the Islands, has "availed itself of all the benefits and advantages" of the submarine cable and telegraph lines established by the appellant, "using the said lines of cable and telegraph for its governmental and other purposes, which it has continued to do ever since and still continues to do," and that "it has become in all respects the successor of the government of Spain to all rights, privileges, and advantages conferred upon and secured and reserved to the government of Spain under the terms of the aforesaid concession." These general allegations are not altogether inapposite with respect to a claim based upon an implied contract outside of the treaty itself, [335] and the claimant should not be denied the right to have its claim, thus considered, adjudicated. In this view, the petition would be susceptible of amendment, and its sufficiency, in law and fact, could be heard and determined.

We express no opinion upon the merits of the claim, in this aspect, as they are not before us, the court below having declined to take jurisdiction. But as we think there was jurisdiction to pass upon the claim under the limitations above stated, the judgment will be reversed and the cause remanded, with instructions to the court below to take further proceedings in conformity with this opinion.

It is so ordered.

JOANNA LITTLE, Plff. in Err.,
v.
J. J. WILLIAMS et al.

(See S. C. Reporter's ed. 335–341.)

Error to state court — questions reviewable — local practice.

1. A ruling of the highest state court as to the proper interpretation of a stipulation between counsel, made for the purpose of avoiding the production of other evidence upon the subject, that certain townships, including a lake as meandered on the surveyor's map, were listed by the Secretary of the Interior as swamp lands, and patented to the state under the swamp land act of September 28, 1850 (9 Stat. at L. 519, chap. 84), is not open to review in the Federal Supreme Court on writ of error to the state court.

[For other cases, see Appeal and Error, 2209–2226, in Digest Sup. Ct. 1908.]

Public lands — swamp and overflowed land — passing of title.

2. Prior to identification the state acquired only an inchoate title to swamp and overflowed lands under the swamp land act of September 28, 1850, although the terms of the 1st section of that act denote a present grant to the state of the swamp and overflowed lands "made unfit thereby for cultivation," since the 2d section lays upon the Secretary of the Interior the duty of identifying and listing the lands coming within the terms of the grant, and of causing patents therefor to be issued to the state "at the request of" its governor, and then declares "and on that patent, the fee simple to said lands shall vest in the said state," subject to the disposal of its legislature.

[For other cases, see Public Lands, I. c, 4, in Digest Sup. Ct. 1908.]

Public lands — swamp and overflowed lands — extinguishing inchoate title.

3. The inchoate title of the state of Arkansas to unidentified swamp and overflowed lands under the swamp land act of September 28, 1850, was extinguished by a compromise and settlement between the state and

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Note.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On error to state court in cases involving land titles—see note to O'Conor v. Texas, 50 L. ed. U. S. 1120.

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the United States, approved by the state legislature in Ark. Laws 1897, p. 88, and by Congress in the act of April 29, 1898 (30 Stat. at L. 367, chap. 229), by which the state accepted the lands theretofore patented, approved, or confirmed to it under the swamp land act as the full measure of lands due to it thereunder, and relinquished to the United States all other claims or demands, adjusted or unadjusted, growing out of that act.

[For other cases, see Public Lands, I. c, 4, in Digest Sup. Ct. 1908.]

Public lands — swamp and overflowed lands — conveyance by levee district.

4. A levee district to which had passed the state's inchoate title to unidentified swamp and overflowed lands under the swamp land act of September 28, 1850, being a mere political subdivision created by the state, and invested under Ark. Laws 1893, pp. 24, 119, with authority to construct and maintain levees to protect lands within its limits from overflow by the waters of the Mississippi river, and to levy and collect taxes and take other measures to that end, was bound by the subsequent action of the state in accepting the lands theretofore patented, approved, or confirmed to the state under the swamp land act as the full measure of lands due to it thereunder, and relinquishing to the United States all other claims or demands, adjusted or unadjusted, growing out of that act, and the levee district could not thereafter invest its grantee with a title which it no longer possessed.

[For other cases, see Public Lands, I. c, 4, in Digest Sup. Ct. 1908.]

[No. 8.]

Submitted October 30, 1913. Decided December 1, 1913.

IN ERROR to the Supreme Court of the State of Arkansas to review a decree which affirmed a decree of the Chancery Court of Mississippi County, in that state, dismissing the complaint in a suit to quiet title. Affirmed.

See same case below, 88 Ark. 37, 113 S. W. 340.

The facts are stated in the opinion.

Mr. Henry Craft submitted the cause for plaintiff in error:

Swamp land passed to the states under the swamp land grant, though not laid off in sections.

Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Indiana v. Milk, 11 Biss. 197, 11 Fed. 394; Heath v. Wallace, 138 U. S. 584, 34 L. ed. 1068, 11 Sup. Ct. Rep. 380; McDade v. Bossier Levee Board, 109 La. 625, 33 So. 628; People v. Warner, 116 Mich. 228, 74 N. W. 705.

An identification of swamp land was all that was needed, and where surveys and plats show that a given area was swamp land or a shallow lake that could be reclaimed, it has a sufficient identification, whether crossed by section lines or not.

Covington v. Berry, 76 Ark. 464, 88 S. W. 1005; Kean v. Calumet Canal & Improv. Co. 190 U. S. 452, 460, 47 L. ed. 1134, 1137, 23 Sup. Ct. Rep. 651.

I grant that the rule has been generally established that a meander line is not a boundary, and that the title and rights of a grantee of fractional sections abutting the meander line will be so extended as to include any small strip of land, or any body of land inconsiderable in comparison with the original grant, which may lie between the meander line and the body of water.

But where the established facts plainly show that a mistake was made in the survey, such as the assumption by the surveyor that another body of water was the body of water which he meandered, and it appears that the unsurveyed land lying between the meandered line and the body of water intended to be meandered is many times greater in extent than the fractional sections abutting the meandered line, then in such event, and under such circumstances, an exception to the general rule is established, and the meander line will be treated as a boundary line.

Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988.

Another well-established exception to the general rule that official plats and surveys are conclusive, and that meander lines are not lines of boundary, arises when the facts show that that there never was a lake or stream such as the surveyors undertook to meander, or if there was any lake or stream, its actual location was such that it would not be reached by extending the lines of the sections which had been platted and surveyed as fractional sections on the meandered line.

French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563.

The effect of the statute was to devolve upon the Secretary of the Interior the duty, and confer upon him the power, of determining what lands were swamp and overflowed lands, and to make his office the tribunal whose decisions were to be controlling. And except in cases where he fails or refuses to act, his jurisdiction is exclusive.

Smith v. Hollis, 46 Ark. 17; Morgan v. Hannibal & St. J. R. Co. 63 Mo. 129; Stephenson v. Stephenson, 71 Mo. 127; Carroll v. United States, 83 C. C. A. 245, 154 Fed. 425; Ogden v. Buckley, 116 Iowa, 353, 89 N. W. 1115.

How can defendants be heard to assert that there was a lake in front of their fractional sections? If there was none, then the

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case of French-Glenn Live Stock Co. v. Springer, supra, is conclusive of the question of their riparian rights, and fixes the meandered line as a boundary line. The line being a boundary, under the rule as stated in Horne v. Smith, supra, nothing passed by riparian right from the government to the state, nor from state to its vendees, but this in no way interfered with the title passing to the state, under the swamp land act, and the patents for the townships.

What riparian rights were acquired by defendants as the vendees of the state when they acquired the fractional sections is a question of local law.

Barney v. Keokuk, 94 U. S. 324, 328, 24 L. ed. 224, 227; Hardin v. Shedd, 190 U. S. 508, 47 L. ed. 1156, 23 Sup. Ct. Rep. 685; Whitaker v. McBride, 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. Rep. 530; Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840.

No auditor, governor, or land commissioner ever undertook to sell any of the so-called lake beds. They were not admeasured, and these officials had power to sell only by the public surveys and by the acre.

State v. Portsmouth Sav. Bank, 106 Ind. 435, 7 N. E. 379.

As we have seen, the question of whether or not there existed any lake when the state conveyed was not a question to be considered. If the state, and all persons, would have been bound by the official survey and plat, even that was out of the way, because the Land Department, which had had the survey and plat made, had already determined that its showing was erroneous in so far as it showed a lake, and the Secretary of the Interior had pronounced the so-called lake bed to be swamp land. This finding was conclusive.

Western & H. Invest Co. v. Farmers' & T. Nat. Bank, 35 Or. 298, 57 Pac. 912.

The supreme court of Arkansas has itself in effect overruled its opinion in this cause in a well-considered opinion delivered by Mr. Justice Kirby in 1911, in Chapman & D. Lumber Co. v. St. Francis Levee Dist. 100 Ark. 94, 139 S. W. 625.

No appearance for defendants in error.

Solicitor General Davis as *amicus curiæ*.

Mr. Justice Van Devanter delivered the opinion of the court:

This was a suit to quiet the title to about 1,200 acres of land in Mississippi county, in the state of Arkansas, lying within the meander line of what was represented on the plats of the United States survey as Walker's lake. The plaintiff claimed title through (a) the act of Congress of September 28, 1850 (9 Stat. at L. 519, chap. 84), granting swamp and overflowed lands to the state; (b) an act of the state legislature in 1893 (Laws Ark. 1893, p. 172), granting to the St. Francis Levee District "all the lands of this state" lying within that district; and (c) a deed of March 11, 1903, from the levee district to the plaintiff. The defendants, in addition to denying the plaintiff's title, asserted title in themselves, in virtue of their ownership, under swamp-land patents from the United States to the state, and from the state to their grantors, of fractional sections abutting on the meander line of the lake. After a trial, the chancery court of the county entered a decree dismissing the complaint on the merits, and the decree was affirmed by the supreme court of the state. 88 Ark. 37, 113 S. W. 340.

[337] The material facts, due regard being had for the findings of the supreme court, are these: The lands in the vicinity of Walker's lake were surveyed, in 1847, into two fractional townships, made so by meandering, and excluding what the surveyor designated as the lake; but the meander line, instead of approximately following the margin of the actual lake, a small, non-navigable body of water, was run about a mile distant therefrom, along a slash or slough which the surveyor probably mistook for the outer portion of the lake. The land in controversy, although then wet and swampy, as were also the lands outside the meander line, was not part of the bed of the lake, but lay between its bank, which was well defined, and the meander line. After the enactment of the swamp-land act, the surveyed lands in the two townships were listed by the Secretary of the Interior as swamp lands, and were patented to the state under that act, and the fractional sections abutting on the meander line and opposite the land in controversy were then patented by the state to the defendants' grantors. The unsurveyed land within the meander line was never selected by the state, or listed by the Secretary of the Interior, as swamp or overflowed land; nor was it ever patented to the state.

As part of a compromise and settlement between the state and the United States, negotiated in 1895, and approved by the state legislature in 1897, and by Congress in 1898, the state, subject to certain exceptions not here material, accepted the lands theretofore patented, approved, or confirmed to it under the swamp-land act as the full measure of lands due to it thereunder, and relinquished to the United States all other claims or demands, adjusted or unadjusted, growing out of that

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act. Senate Report No. 76, 54th Cong. 1st Sess.; Laws Ark. 1897, p. 88; 30 Stat. at L. 367, chap. 229.

In disposing of the case, the supreme court of the state, after observing that the plaintiff must recover, if [388] at all, upon the strength of her own title, and not upon the weakness of that of her adversaries, held (a) that, as the land in controversy had not been selected, listed, or patented as swamp or overflowed land under the swamp-land act, the title thereto remained in the United States, unless it had passed to the state as a riparian owner in virtue of the patents for the adjoining fractional sections; (b) that if the title had so passed to the state, it in like manner had passed thence with those sections to the defendants' grantors prior to the grant of 1893 to the levee district; and (c) that in view of the state's relinquishment under the compromise and settlement of 1895, the plaintiff, as a subsequent vendee of the district, was not in a position to question the riparian rights asserted by the defendants.

In the chancery court it was stipulated by counsel, for the purpose of avoiding the production of other evidence upon the subject, that "the townships including Walker's lake, as meandered on the map," were listed by the Secretary of the Interior as swamp lands, and patented to the state under the swamp-land act, and one of the controverted questions in the supreme court was whether this stipulation, rightly interpreted, meant that the listing and patenting embraced all the lands which would have been within the two townships if the township and subdivisional lines had been extended over the area represented on the plat as the lake, or only the surveyed lands; that is, those lying without the meander line. The court, having recourse to the plats of the survey as produced in evidence (which represented the townships as fractional by reason of the exclusion of the meandered area from the survey), as also to the government's well-known practice of patenting lands according to the legal subdivisions shown upon the plats, held that the stipulation should be taken as referring to the fractional townships, and not to the unsurveyed lands within the meander line; and in [339] that connection it was said: "It is evident that the parties meant only the surveyed lands appearing on the plat, leaving all questions as to the character of the unsurveyed territory and title thereto open to further proof and adjudication." This is assigned as error; but as no Federal question was involved, but only the proper interpretation of a stipulation of counsel, the ruling is not open to review by this court. It is not as if the patents had been in evidence, and the question had been one of their interpretation or legal import. See French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 54, 46 L. ed. 800, 803, 22 Sup. Ct. Rep. 563.

In view of the finding that the land in controversy was never patented to the state, it will be perceived that a pivotal question in the case is whether the swamp-land act of 1850 in itself operated to invest the state with the title in any such sense as to be of present avail to the plaintiff. The state court answered the question in the negative, and the correctness of that ruling is now to be passed upon.

Although the terms of the 1st section of the act denote a present grant to the state of the "swamp and overflowed lands, made unfit thereby for cultivation," the 2d section lays upon the Secretary of the Interior the duty of identifying and listing the lands coming within the terms of the grant, and of causing patents therefor to be issued to the state "at the request of" its governor, and then declares: "And on that patent the fee simple to said lands shall vest in the said state," subject to the disposal of its legislature. It became necessary, in Rogers Locomotive Mach. Works v. American Emigrant Co. 164 U. S. 559, 41 L. ed. 552, 17 Sup. Ct. Rep. 188, to determine the meaning and effect of the act in the light of these provisions and of prior decisions, and it was there said (p. 570): "While, therefore, as held in many cases, the act of 1850 was *in præsenti*, and gave an inchoate title, the lands needed to be identified as lands that passed under the act; which being done, and not before, the title [340] became perfect as of the date of the granting act." And again (p. 574): "It belonged to him [the Secretary of the Interior], primarily, to identify all lands that were to go to the state under the act of 1850. When he made such identification, then, and not before, the state was entitled to a patent, and 'on such patent' the fee-simple title vested in the state. The state's title was, at the outset, an inchoate one, and did not become perfect, as of the date of the act, until a patent was issued." What was there said has since been regarded as the settled law upon the subject. Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 592, 42 L. ed. 591, 592, 18 Sup. Ct. Rep. 208; Brown v. Hitchcock, 173 U. S. 473, 476, 43 L. ed. 772, 773, 19 Sup. Ct. Rep. 485; Niles v. Cedar Point Club, 175 U. S. 300, 308, 44 L. ed. 171, 174, 20 Sup. Ct. Rep. 124; Ogden v. Buckley, 116 Iowa, 352, 89 N. W. 1115; Birch v. Gillis, 67 Mo. 102; Carr v. Moore, 119

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Iowa, 152, 159, 97 Am. St. Rep. 292, 93 N. W. 52.

As this land was never so identified, and, so far as appears, its identification was never even requested by the state, it follows that, even if, at the date of the act, the land was in fact swamp or overflowed, the state never acquired more than an inchoate title to it,—a claim which was imperfect both at law and in equity.

We have seen that by the compromise and settlement of 1895, which was approved by the state legislature and by Congress, the state accepted the lands theretofore patented, approved, or confirmed to it under the swamp-land act as the full measure of lands due to it thereunder, and relinquished to the United States all other claims or demands, adjusted or unadjusted, growing out of that act. Without any doubt this extinguished the state's incohate title, and estopped the state from thereafter asserting that title or demanding a patent.

Assuming that the inchoate title had then passed to the levee district under the act of 1893, was the district in any better situation than the state? The answer turns upon the relation of the one to the other. The district was a mere political subdivision of the state, created by the [341] latter, and invested with authority to construct and maintain levees to protect lands within its limits from overflow by the waters of the Mississippi river, and to levy and collect taxes and take other measures to that end. Laws Ark. 1893, pp. 24, 119. It was essentially a subordinate agency of the state, was exercising a power of the state for its convenience, could have no will contrary to the will of the state, held its property and revenue for public purposes, and was in all respects subject to the state's paramount authority. In view of this relation, we are quite clear that the state's action was binding upon the district, and that the latter could not, by its subsequent deed to the plaintiff, invest her with a title which it no longer possessed. In this respect the case is not distinguishable from Rogers Locomotive Mach. Works v. American Emigrant Co. 164 U. S. 559, 576, 577, 41 L. ed. 552, 559, 17 Sup. Ct. Rep. 188.

We conclude, therefore, that the plaintiff was without title and could not maintain the suit. This renders it unnecessary to consider whether, in point of Federal law, the riparian rights asserted by the defendants are ill or well founded.

Decree affirmed.

OTTO MONSON, Plff. in Err.,
v.
S. J. SIMONSON.

(See S. C. Reporter's ed. 341-347.)

Indian allotments — restrictions on alienation.

1. The restrictions upon alienation imposed upon an Indian allottee by the act of February 8, 1887 (24 Stat. at L. 388, chap. 119), § 5, were not instantly removed by the provision in the Indian appropriation act of March 3, 1905 (33 Stat. at L. 1067, chap. 1479), authorizing and empowering the Secretary of the Interior to issue a full and unrestricted patent to such allottee, but must be deemed to have remained in force until such patent was actually issued,—especially since other kindred provisions in the latter act relating to other allotments contained the words, not found here, "and all restrictions as to sale, encumbrance, or taxation of said lands are hereby removed."

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indian allotments — restrictions on alienation — after-acquired title.

2. A title acquired by an Indian allottee through an unrestricted patent issued conformably to the Indian appropriation act of March 3, 1905, could not, by reason of any state statute, inure to the benefit of the grantee in a deed made by an allottee while the restrictions on alienation imposed by the act of February 8, 1887, § 5, were still in force, rendering such deed "absolutely null and void."

[For other cases, see Indians, VIII.; Estoppel, II. c, in Digest Sup. Ct. 1908.]

[No. 14.]

Submitted October 30, 1913. Decided December 1, 1913.

IN ERROR to the Supreme Court of the State of South Dakota to review a judgment which affirmed a judgment of the Circuit Court of Roberts County, in that state, in favor of plaintiff in an action to determine conflicting claims to a tract of land sold by an Indian allottee. Reversed.

See same case below, 22 S. D. 238, 117 N. W. 133.

The facts are stated in the opinion.

Mr. Moses E. Clapp submitted the cause in behalf of Mr. M. D. Munn. Mr. Chester L. Caldwell was on the brief.

No appearance for defendant in error.

Mr. Justice Van Devanter delivered the opinion of the court:

This is a suit to determine conflicting claims to the title to 160 acres of land in Roberts county, South Dakota. Both parties claim through Henry A. Quinn, an In-

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dian of the Sisseton and Wahpeton tribe, to whom the land was allotted under the act of Congress of February 8, 1887 (24 Stat. at L. 388, chap. 119), the 5th section of which, omitting portions not here material, reads as follows:

"That upon the approval of the allotments provided [343] for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare, that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the state or territory where such land is located, and that, at the expiration of said period, the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust, and free of all charge or encumbrance whatsoever: Provided, That the President of the United States may in any case, in his discretion, extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

In 1889, following the approval of the allotment, a trust patent or allotment certificate, conforming to this statute, was duly issued to the allottee; and on March 3, 1905, nine years before the expiration of the trust period, Congress incorporated in the Indian appropriation act of that date (33 Stat. at L. 1067, chap. 1479) the following provision:

"That the Secretary of the Interior is hereby authorized and empowered to issue a patent to Henry A. Quinn for the east half of the northwest quarter, the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter of section thirty-two, township one hundred and twenty-five north, range fifty west of the fifth principal meridian, South Dakota."

The land so described is that covered by the allotment, and a patent therefor, passing the full and unrestricted title, was issued to the allottee by the Secretary of the [344] Interior, June 29, 1905, in the exercise of the authority and power given by this provision.

Upon the trial it appeared that the plaintiff claimed under two warranty deeds from the allottee, one made and acknowledged May 31, 1905, and recorded June 2, following, and the other purporting to have been made May 30, and acknowledged July 3, 1905, but not recorded. The defendant claimed under a deed from the allottee executed and delivered July 10, 1905, and recorded the same day. The matters in controversy were, (1) whether the plaintiff's deed of May 31 was void because made and delivered before the unrestricted patent was issued, (2) the real date of the acknowledgment and delivery of the plaintiff's unrecorded deed, and whether it was void for the like reason, and (3) whether the defendant purchased with notice of the plaintiff's claim under the latter deed. That deed was admitted in evidence over the objection of the defendant, and the ruling was made the subject of a special exception.

The trial court found the issues for the plaintiff, and while the finding made no mention of his deed of May 31, it did recite that his unrecorded deed was executed and delivered July 3, 1905; that he was in actual and open possession from that date until after the date of the deed to the defendant; and that the latter purchased with notice of the plaintiff's claim. Upon this finding a judgment was entered quieting the title in the plaintiff, and shortly thereafter a motion to vacate the judgment and for a new trial was interposed by the defendant, supported by divers affidavits purporting to set forth newly discovered evidence tending to discredit the plaintiff's unrecorded deed and the claim that it was acknowledged and delivered July 3, 1905. The motion was denied, and the defendant appealed to the supreme court of the state, which affirmed both the judgment and the order denying the motion. 22 S. D. 238, 117 N. W. 133. The affirmance was put upon [345] the ground that the plaintiff's deed of May 31 was valid, and, being a warranty deed purporting to convey the land in fee simple, the title subsequently acquired through the unrestricted patent inured to the plaintiff by operation of a statute of the state. Rev. Civ. Code, § 947, subdiv. 4. Reaching that conclusion, the court deemed it unnecessary to consider or decide the questions presented respecting the plaintiff's unrecorded deed and the effect to be given to it.

The Federal question presented for decision by us is whether the restrictions upon alienation imposed upon the allottee by § 5 of the act of 1887 were instantly removed by the act of March 3, 1905, or remained in force until the issuing of the patent carrying the full and unrestricted title. The defendant sought to maintain the latter view, but the state court sustained the other.

The act of 1887 was adopted as part of

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the government's policy of dissolving the tribal relations of the Indians, distributing their lands in severalty, and conducting the individuals from a state of dependent wardship to one of full emancipation, with its attendant privileges and burdens. Realizing that so great a change would require years for its accomplishment, and that in the meantime the Indians should be safeguarded against their own improvidence, Congress, in prescribing by the act of 1887 a system for allotting the lands in severalty, whereby the Indians would be established in individual homes, was careful to avoid investing the allottee with the title in the first instance, and directed that there should be issued to him what is inaptly termed a patent (United States v. Rickert, 188 U. S. 432, 436, 47 L. ed. 532, 535, 23 Sup. Ct. Rep. 478), but is in reality an allotment certificate, declaring that for a period of twenty-five years, or such enlarged period as the President should direct, the United States would hold the allotted land in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and at the expiration of that period would [346] convey to him by patent the fee, discharged of the trust, and free of any charge or encumbrance; and, as a safeguard against improvident conveyances or contracts made in anticipation of the ultimate or real patent, it was expressly provided that any conveyance of the land, or any contract touching the same, made before the expiration of the trust period, should be absolutely null and void. It is thus made plain that it was the intention of Congress that the title should remain in the United States during the entire trust period, and that, when conveyed to the allottee or his heirs by the ultimate patent at the expiration of that period, it should be unaffected by any prior conveyance or contract touching the land.

It also is plain that, in the absence of further and permissive legislation, the Secretary of the Interior was without authority to shorten the trust period and at once invest the allottee with the title in fee. Recognizing that this was so, and for reasons deemed sufficient, Congress, by the provision in the act of March 3, 1905, clothed the Secretary with such authority with respect to this allotment. That provision says: "The Secretary of the Interior is hereby authorized and empowered to issue a patent" to the allottee. By "patent" is meant, of course, the ultimate patent passing the fee; for the trust patent or allotment certificate had issued sixteen years before. The language of the provision is permissive, not mandatory, and evidently was designed to enable the Secretary to shorten the trust period, by issuing the final patent, if, in his judgment, it seemed wise, but not to require him to do so. And it is significant that the provision contains no words directly or presently removing the existing restrictions upon alienation, while other kindred provisions in the same act, relating to other allotments, contain the words "and all restrictions as to sale, encumbrance, or taxation of said lands are *hereby* removed." It hardly can be said that the absence of those words in this instance [347] and their presence in others is not indicative of a difference in meaning and purpose. We conclude that the restrictions upon alienation contained in the act of 1887 were not instantly removed by the act of 1905, but remained in force as to this allotment until the Secretary of the Interior, in the exercise of the authority conferred by the latter act, terminated the trust period by issuing the final patent passing the fee.

As that patent was issued June 29, 1905, and as the deed from the allottee upon which alone the judgment of affirmance was rested was made and delivered May 31, preceding, it follows that this deed was, in the language of the statute, absolutely null and void, and that the title subsequently acquired by the allottee through the final patent could not inure to the plaintiff in virtue of his being the grantee in that deed. See Starr v. Long Jim, 227 U. S. 613, 624, 57 L. ed. 670, 675, 33 Sup. Ct. Rep. 358. A state statute could not make it the basis of passing subsequently acquired title when the Federal statute pronounces it entirely void. See Bagnell v. Broderick, 13 Pet. 436, 450, 10 L. ed. 235, 242; Gibson v. Chouteau, 13 Wall. 92, 99, 20 L. ed. 534, 536.

The judgment is accordingly reversed and the cause remanded, but without prejudice to the power of the Supreme Court of the state to proceed to a determination of the questions which were left open by its opinion. See Murdock v. Memphis, 20 Wall. 590, 635, 636, 22 L. ed. 429, 444.

Judgment reversed.

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[348] STREET & SMITH, a Copartnership, etc., Appts.,
v.
ATLAS MANUFACTURING COMPANY et al.

(See S. C. Reporter's ed. 348–353.)

Appeal — from circuit court of appeals — trademark case — certiorari.

An appeal to the Federal Supreme Court to review a decision of a circuit court of

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appeals in a case arising under the trademark act of February 20, 1905 (33 Stat. at L. 724, chap. 592, U. S. Comp. Stat. Supp. 1911, p. 1459), cannot be maintained under the Judicial Code, § 241, as one not made final by that Code, although trademark cases are not included in the enumeration, in § 128 of the Code, of the decisions which shall be final (except as reviewable under §§ 239, 240, on certified questions or by certiorari), since these sections, in view of the provisions of §§ 292, 294, 297 of the Code, bearing upon the extent to which it was intended to affect or repeal prior laws, must be read in connection with § 18 of the trademark act, placing trademark cases upon the same footing, as respects the remedy by certiorari, as cases arising under the patent laws.

[For other cases, see Appeal and Error, III. d, 2; Certiorari, 40, 41, in Digest Sup. Ct. 1908.]

[No. 618.]

Submitted November 10, 1913. Decided December 1, 1913.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which, reversing a decree of the District Court for the Eastern District of Missouri, directed the dismissal of a suit to enjoin the infringement of a registered trademark and unfair trade. Dismissed for want of jurisdiction.

See same case below, 47 L.R.A.(N.S.) 1002, 204 Fed. 398.

The facts are stated in the opinion.

Mr. Hugh K. Wagner submitted the cause for appellants. Mr. Leonard J. Langbein was on the brief.

Mr. James Love Hopkins submitted the cause for appellees. Mr. Nelson Thomas was on the brief.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This is an appeal from a decree of a circuit court of appeals, directing the dismissal of a suit to enjoin infringement of a registered trademark and unfair trade. 47 L.R.A.(N.S.) 1002, 204 Fed. 398. The decree was rendered and the appeal allowed after the Judicial Code, adopted March 3, 1911 (36 Stat. at L. 1087, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 128), became effective. Our jurisdiction is challenged by a motion to dismiss; and if we have jurisdiction it is solely because the case was in part one arising under the act of February 20, 1905, infra, under [350] which the trademark was registered. Whether in a case so arising the judgment or decree of a circuit court of appeals may be reviewed by this court upon an appeal or writ of error, or only upon a writ of certiorari, is the question for decision.

Section 128 of the Judicial Code declares that, except as provided in §§ 239 and 240, "the judgments and decrees of the circuit courts of appeals shall be final . . . in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases." Section 239 permits the certification to this court of questions of law by a circuit court of appeals concerning which it desires instruction for the proper decision of a case within its appellate jurisdiction, and is not important here. Section 240 reserves to this court the discretionary power to require, by certiorari, upon the petition of a party, that any case in which the decision of a circuit court of appeals is made final by the Code be certified here for review and determination, with the same power and authority in the case as if brought here by appeal or writ of error. Section 241 declares that any case in which the decision of a circuit court of appeals is not made final by the Code may be brought here, as of right, by appeal or writ of error, if the matter in controversy exceeds $1,000, besides costs.

These provisions, it is said by counsel for the appellants, enabled them to appeal, as of right, the statutory amount being involved, and did not remit them to the discretionary writ of certiorari; the argument being that § 128 enumerates the cases in which the decisions of the circuit courts of appeals shall be final, and does not include among them cases arising under the trademark laws, and that § 241 gives an appeal or writ of error, as of right, in any case in which the decision of the circuit court of appeals is not thus made final, if, as here, the requisite amount is in controversy. If the question turned entirely [351] upon the Code provisions relied upon, the argument probably would be convincing. But there are other statutory provisions which must be considered, some within and others without the Code.

The Code does not purport to embody all the law upon the subjects to which it relates. It contains some new provisions and some that are modifications of old ones; but much of it is merely a re-enactment of prior laws with appropriate re-

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

On certiorari from Federal Supreme Court to circuit courts of appeals—see note to United States v. Dickinson, 53 L. ed. U. S. 711.

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gard to their proper classification and orderly arrangement. Among others, it contains the following provisions bearing upon the extent to which it was intended to affect or repeal prior laws:

"Sec. 292. Wherever, in any law not contained within this act, a reference is made to any law revised or embraced herein, such reference, upon the taking effect hereof, shall be construed to refer to the section of this act into which has been carried or revised the provision of law to which reference is so made. . . .

"Sec. 294. The provisions of this act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest. . . .

"Sec. 297. The following sections of the Revised Statutes and acts and parts of acts are hereby repealed: . . . [many sections, acts, and parts of acts are here enumerated]. Also all other acts and parts of acts, in so far as they are embraced within and superseded by this act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this act had not been passed."

Sections 128, 239, 240, and 241 of the Code, as before described, substantially, almost literally, repeat the provisions of § 6 of the circuit courts of appeals act of March 3, 1891 (26 [352] Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488). There is but a single change deserving mention here, and it is that cases arising under the copyright laws are in § 128 added to the enumeration of cases in which the decisions of the circuit courts of appeals are declared final. But this has no bearing upon cases arising under the trademark laws, save as it indicates that Congress was extending, rather than contracting, the list of cases in which finality attaches to the decisions of the circuit courts of appeals. Passing this consideration, there is nothing in the Code denoting a purpose to change the existing appellate jurisdiction in trademark cases: it is left as it was before.

The trademark act of February 20, 1905 (33 Stat. at L. 724, chap. 592, U. S. Comp. Stat. Supp. 1911, p. 1459), dealt with the subject we are considering. By § 17 it invested the circuit courts of appeals with appellate jurisdiction of cases arising under that act, and by § 18 declared that writs of certiorari might be granted by this court for the review of decisions of those courts in such cases "in the same manner as provided for patent cases" by the circuit courts of appeals act. In placing such trademark cases upon the same footing as cases arising under the patent laws, as respects the remedy by certiorari, Congress undoubtedly intended that this remedy should have the same attributes in the one class of cases as in the other. We already have seen that the circuit courts of appeals act, in § 6, made it exclusive in cases arising under the patent laws. Before the adoption of the Code, this court said in Hutchinson, P. & Co. v. Loewy, 217 U. S. 457, 460, 54 L. ed. 838, 839, 30 Sup. Ct. Rep. 613, a case like this: "We are of opinion that this appeal will not lie, and that the remedy by certiorari is exclusive. . . . We think that the language of § 18 places suits brought under the trademark act [February 20, 1905] plainly within the scope of the act establishing the court of appeals [March 3, 1891], and that a final decision of that court can be reviewed in this court only upon certiorari."

[353] Of course, that case and this are not to be confused with others arising under earlier trademark laws not containing any provisions respecting appellate jurisdiction such as are embodied in the act of 1905.

The provisions of that act upon this subject are not among those enumerated in § 297 of the Code as thereby repealed, and neither do they appear to have been embraced within and superseded by the Code. And while the circuit courts of appeals act, to which § 18 of the act of 1905 makes reference, has been superseded by being incorporated into the Code, that section has not thereby lost any of its original effect, for § 292 of the Code requires the reference to be construed as if naming the very sections of the Code into which the circuit courts of appeals act has been carried.

It follows that the motion to dismiss the appeal must be sustained, as was done in Hutchinson, P. & Co. v. Loewy, supra.

Appeal dismissed.

R. H. DOWNMAN, Plff. in Err.,
v.
STATE OF TEXAS.

(See S. C. Reporter's ed. 353-357.)

Constitutional law — discrimination — due process of law — taxation of mineral rights.

The assessment for taxing purposes of

NOTE.—On interests of one other than the owner of the soil in mineral *in situ* as independent subject of taxation—see note to Wolfe County v. Beckett, 17 L.R.A.(N.S.) 688.

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mineral rights where they have been separately conveyed and are owned by persons other than the owners of the surface estates, without any corresponding deduction from the assessments against the surface owners, does not violate U. S. Const., 14th Amend., as discriminating against the owners of the mineral rights so assessed, where it does not appear that mineral rights known to exist were consciously relieved from taxation if they belonged to the owners of the surface.

[For other cases, see Constitutional Law, 292–336, 523–553, in Digest Sup. Ct. 1908.]

[No. 43.]

Submitted November 3, 1913. Decided December 1, 1913.

IN ERROR to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas to review a judgment which, reversing a judgment of the District Court of Llano County in that state, upheld taxation assessments of mineral rights owned by persons other than the owners of the surface estates. Affirmed.

See same case below, — Tex. Civ. App. —, 134 S. W. 787.

The facts are stated in the opinion.

Mr. **Robert L. Batts** submitted the cause for plaintiff in error. Mr. V. L. Brooks was on the brief.

Mr. **B. F. Looney**, Attorney General of Texas, submitted the cause for defendant in error. Messrs. G. B. Smedley and Knight Stith were on the brief:

It is a settled rule of the Supreme Court of the United States that it will not review the conclusions of the highest court of a state upon questions of fact.

Kerfoot v. Farmers' & M. Bank, 218 U. S. 281, 54 L. ed. 1042, 31 Sup. Ct. Rep. 14; Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; Thomas v. Texas, 212 U. S. 278, 53 L. ed. 512, 29 Sup. Ct. Rep. 393; Rankin v. Emigh, 218 U. S. 27, 54 L. ed. 915, 30 Sup. Ct. Rep. 672.

The Federal Constitution imposes no rigid rule of equality upon the states in the assessment and collection of their taxes, but leaves to the discretion and wisdom of the states a wide latitude; and the fact that the assessment and collection of taxes may in some instances operate unequally, or may in some cases result in double taxation, does not render the imposition of such taxes a violation of the Federal Constitution.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Travellers' Ins. Co. v. Connecticut, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673; State R. Tax Cases, 92 U. S. 575, 612, 23 L. ed. 663, 673; Davidson v. New Orleans, 96 U. S. 97, 105, 24 L. ed. 616, 620; Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 229, 41 L. ed. 683, 698, 17 Sup. Ct. Rep. 305; Paddell v. New York, 211 U. S. 446, 53 L. ed. 275, 29 Sup. Ct. Rep. 139, 15 Ann. Cas. 187; Nolan v. San Antonio Ranch Co. 81 Tex. 315, 16 S. W. 1064; Lick v. Austin, 43 Cal. 590; Cooley, Taxn. 3d ed. p. 391.

When a separate interest in real estate is fairly valued and taxed against its owner, such owner cannot avoid payment of the tax by showing that the value of his interest in the land has been included in the assessment against the person who owns the other interest in the land.

Globe Lumber Co. v. Lockett, 106 La. 414, 30 So. 902; Lick v. Austin, 43 Cal. 590.

Mr. Justice **Lamar** delivered the opinion of the court:

The state of Texas brought suit against Downman to collect taxes on "mineral rights" owned by him in 50,000 acres of land in Llano county. In his answer he contended that he was not liable because the mineral rights were not real estate, but mere licenses to work and develop mines in the future; that if real estate they had already been returned by the owners of the surface, and, as the latter had already paid taxes on the land, no additional sum could be collected from him. Further, he claimed that the assessments were void as being an unlawful discrimination against the class of persons who, like himself, owned mineral rights separate from the surface estate.

On the trial it appeared that there was no mining in the county, but in many sections there were signs indicating the existence of ore. Prior to 1907 there had been no assessment of mineral either to the owner of the surface or to persons to whom the mineral right had been separately conveyed. In that year the tax books were made up [355] as usual, grazing and agricultural lands being assessed at from $2 to $3 per acre. The tax books were then forwarded to the county commissioners for equalization of values. Acting in pursuance of instructions from the comptroller, the commissioners made order directing the county taxing officer to assess mineral rights where they were owned by persons other than the owners of the sur-

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face estate. He thereupon examined the public records and secured the names of the grantees in all deeds which conveyed such rights. Without further investigation as to the existence or value of ore, he assessed the owner on the basis of 50 cents per acre, entering the tax in the column headed, "Mineral Rights Only." No deduction was made from the amount already entered against the owner of the land proper. The books, with both classes of assessments appearing thereon, were then finally approved, and, in due course, the surface owners paid the taxes assessed against them on the land. Downman, for the reasons already stated, refused to pay the sum demanded of him as taxes on mineral rights in the 50,000 acres. His defense was sustained by the district judge, who held that when the surface owners returned real estate, that included every interest connected with the land, and consequently Downman could not be held for an additional tax on property or value which had already been assessed to the owner of the surface. The court of civil appeals recognized that if the owner of the land, in paying his taxes, had, in fact, paid on the mineral rights also, Downman could not be held liable in the present suit. But the judgment of the district court was reversed for the reason that, in approving the books having two assessments,—one against land and one against mineral rights in the same tract,—the commissioner had recognized the existence of two separate interests in the same property, belonging to two different owners. The supreme court of the state declined to interfere, and the case was brought here by [356] writ of error in which Downman renews his attack on the validity of the assessment. He contends that mineral rights, when belonging to the owner of the surface, were not included in the assessment, but were taxed as soon as they were sold; that such "a tax was discriminatory against owners who, like appellant, own mineral rights in lands, the surface estate of which was owned by others," and that such discriminatory assessment imposes upon the latter an unlawful burden of taxation, and takes his and their property without due process of law.

The Texas court recognized that if a mineral right was not an estate, but a mere license to enter and work in the future, it was not taxable. It held, however, that the deeds conveying ore, stone, and minerals were grants of property, and conveyed to Downman title to the mineral, with the right to work the same. This title and right were held to be real estate, and taxable as such. On this writ of error from the state court we are not concerned with that construction of the statute, nor with the regularity of the method by which the taxes were assessed, nor with the fairness of the valuation. The only Federal question arises out of the contention that there was a discrimination against Downman in taxing him on mineral rights when the same were not taxed if they belonged to the owner of the surface estate. In effect he claims that taxability of mineral rights was made to depend not on value, but on ownership, being taxable after they had been conveyed, but not taxable as long as they remained the property of the holder of the surface. The record, however, does not support this position, for it does not appear that the landowner was consciously relieved of taxation on mineral rights known to exist. If the mineral actually added to the value, the law required that it should be represented in the assessment of the land. But if the owner and the assessor did not know of the existence of ore, there was no injustice nor known discrimination [357] in assessing it merely as grazing land. When, however, an actual sale of the mineral rights in a particular tract was made, and the deed recorded, a new value was brought to light. There was then no reason why the taxing officers should not accept the action of the buyer in paying therefor $1.50 per acre as evidence that the mineral right had a separate value. This right, being real estate, was taxable; but if assessed against the owner of the surface, the result would have been that he would have had to pay on an interest in the land with which he had absolutely parted. Usually real estate is taxed as a unit; but as different elements of the land are capable of being severed and separately owned, the statute may authorize a separate assessment against the owners of the severed parts. Accordingly, if the title has been severed, land may be taxed to one, timber to another, or land to one and coal to another. The state court held that such was the law of Texas, in view of the general language of the statute defining real estate as including not only the land itself, but the buildings on the land and the minerals under the land. There was therefore nothing discriminatory in assessing Downman as owner of the mineral right which had been sold to him, and separately assessing the owner of the surface with what remained. That the two owners were thus separately assessed, each on his own property, appears from the fact that both values were separately entered upon the tax books,—Downman's mineral rights, for which he paid $1.50 an acre, being assessed at 50 cents an acre,

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and the surface estate at from $2 to $3 per acre. If the latter was overassessed, it affords Downman no defense. The record discloses no violation of a Federal right, and the judgment is affirmed.

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[358] UNITED STATES, Petitioner,
v.
TWENTY-FIVE PACKAGES OF PANAMA HATS, Maximo Castillo, Claimant.

(See S. C. Reporter's ed. 358–362.)

Duties — forfeiture — undervaluation by foreign consignors.

The fraudulent undervaluation by foreign consignors in the foreign country of goods consigned to a person in New York constitutes, upon their arrival at the port of entry, an attempt to introduce them into the commerce of the United States, and when they are unloaded and placed in general order they are actually introduced into that commerce, within the meaning of the customs administrative act of June 10, 1890 (26 Stat. at L. 135, chap. 407, U. S. Comp. Stat. 1901, p. 1895), § 9, as amended by the act of August 5, 1909 (36 Stat. at L. 97, chap. 6, U. S. Comp. Stat. Supp. 1911, p. 904), § 28, providing for the forfeiture of any imported merchandise which the consignor or seller shall introduce or attempt to introduce into the commerce of the United States by means of any fraudulent or false invoice, although the owner might at any time within a year have withdrawn the goods and directed them to be forwarded to a foreign country without payment of duties.

[For other cases, see Duties, XII. b. 2, in Digest Sup. Ct. 1908.]

[No. 257.]

Argued October 30, 1913. Decided December 1, 1913.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the District Court for the Northern District of New York, sustaining exceptions to a libel to forfeit imported merchandise for fraud of the foreign consignors. Reversed and remanded for further proceedings.

See same case below, 115 C. C. A. 340, 195 Fed. 438.

The facts are stated in the opinion.

Assistant Attorney General Adkins argued the cause and filed a brief for petitioner:

Inasmuch as the amendment of the act of June 10, 1890, was undoubtedly due to the construction placed thereon by the courts, an examination of those decisions is necessary to a proper understanding of the amendment.

United States v. One Silk Rug, 86 C. C. A. 178, 158 Fed. 974; United States v. 20 Boxes of Cheese, 163 Fed. 369; United States v. 82 Half-Boxes of Cheese, 164 Fed. 778; United States v. Mescall, 164 Fed. 580; United States v. One Trunk, 171 Fed. 772; United States v. One Trunk, 175 Fed. 1012, affirmed in 114 C. C. A. 353, 192 Fed. 913; United States v. Baker, 5 Ben. 25, Fed. Cas. No. 14,500; United States v. Cargo of Sugar, 3 Sawy. 46, Fed. Cas. No. 14,722; United States v. Legg, 45 C. C. A. 134, 105 Fed. 933.

It cannot be denied that, in amending the statute, Congress intended to make some change in the law, and it is reasonable to presume that Congress intended by the change to make the law more effective.

United States v. Mescall, 215 U. S. 32, 54 L. ed. 79, 30 Sup. Ct. Rep. 19.

A statute should be so construed as to effectuate the legislative intent, and when the language used is susceptible of either a narrow, technical, or a broad, popular meaning, the courts must adopt that meaning which will accomplish, and not defeat, the intent.

United States v. Hartwell, 6 Wall. 396, 18 L. ed. 832; American Security & T. Co. v. District of Columbia, 224 U. S. 491, 56 L. ed. 856, 32 Sup. Ct. Rep. 553.

The commerce of the United States is all-inclusive, taking in both its domestic and its foreign commerce. The only qualification in the statute is that the goods shall be imported; and this is true, of course, when they have been brought to a port of the United States with intent to unlade.

United States v. Arnold, 1 Gall. 348, Fed. Cas. No. 14,469; Flagler v. Kidd, 24 C. C. A. 123, 45 U. S. App. 461, 78 Fed. 341.

Interstate commerce of the United States continues from the receipt of goods by the common carrier to delivery to the consignee.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Heyman v. Southern R. Co. 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130.

The courts will adopt the meaning intended by Congress.

United States v. Chavez, 228 U. S. 525, 57 L. ed. 950, 33 Sup. Ct. Rep. 595.

Mr. Albert H. Washburn argued the cause and filed a brief for respondent:

There has been no attempt to enter or introduce into the commerce of the United

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NOTE.—On forfeiture for violation of revenue laws—see note to United States v. 99 Diamonds, 2 L.R.A.(N.S.) 185.

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States merchandise in general order within the meaning of subsec. 9 of § 28 of the tariff act of August 5, 1909.

United States v. Cargo of Sugar, 3 Sawy. 46, Fed. Cas. No. 14,722; United States v. Legg, 45 C. C. A. 134, 105 Fed. 930.

Assuming that preparations were made in a foreign country by some unknown consignor in anticipation of the commission of an offense, or of an attempt to commit an offense, or of an attempt to commit an offenc, where is the overt act essential either to the offense or to the attempt to commit an offense?

Keck v. United States, 172 U. S. 434, 43 L. ed. 505, 19 Sup. Ct. Rep. 254; United States v. 1 Pearl Chain, 71 C. C. A. 500, 139 Fed. 513; People v. Youngs, 122 Mich. 292, 47 L.R.A. 108, 81 N. W. 114; People v. Murray, 14 Cal. 160; United States v. One Trunk, 171 Fed. 772, affirmed in 106 C. C. A. 459, 184 Fed. 317.

It is conceivable that the new language with respect to introducing or attempting to introduce imported merchandise into the commerce of the United States, found in subsec. 9 of § 28, was inserted in view of the language of the trial judge in the Mescall Case so as to broaden the scope of the section to include a customs weigher, even though it subsequently transpired after the passage of the act of 1909 that § 9 of the old act, as construed by this court (United States v. Mescall, 215 U. S. 26, 54 L. ed. 77, 30 Sup. Ct. Rep. 19), was sufficiently comprehensive as it stood. This is something that Congress, of course, could not surely anticipate.

[359] Mr. Justice Lamar delivered the opinion of the court:

This was a proceeding to forfeit, for fraud of foreign consignors, goods not technically entered at the New York customs house, but unloaded from the ship and stored in general order. The libel charges that Castillo & Company were engaged in buying and selling Panama hats shipped to them by merchants from foreign ports. These consignors, as required by law (26 Stat. at L. 131, chap. 407, U. S. Comp. Stat. 1901, p. 1886), delivered to the American consular agent, at the point of shipment, three sets of invoices showing the value of the property intended for importation into the United States. One of these invoices was retained by that officer, one was sent to the collector of the port at New York, and the third was delivered to the consignor, and by him forwarded to the consignee, Castillo & Company. All the provisions of the law were complied with, except that the consignors falsely and fraudulently undervalued the merchandise. The goods arrived in New York during April, May, and June, 1910, but were not called for by the consignee. They were accordingly put in general order by virtue of customs regulations (§§ 1087, 1088, 1902; Rev. Stat. §§ 2954, 2989, U. S. Comp. Stat. 1901, pp. 1943, 1960), whereby the collector takes possession of goods unloaded, but unclaimed. They are then stored in a general order warehouse, the consignee having the right at any time within twelve months to withdraw them and make due entry therefor. If not so entered within the year, the merchandise must be sold at public auction.

The libeled goods not having been called for, the collector, in May, 1911, caused proceedings to be instituted to have them forfeited under the provisions of § 9 of the tariff act [of 1890, 26 Stat. at L. 135, chap. 407, U. S. Comp. Stat. 1901, p. 1895, as amended by § 28] of 1909 (36 Stat. at L. 97, chap. 6, U. S. Comp. Stat. Supp. 1911, p. 904), which declares "that if any consignor, seller, owner, importer, consignee, agent, or other person or persons, shall enter or introduce, or attempt to enter or introduce, into the commerce of the United States, any imported [360] merchandise by means of any fraudulent or false invoice . . . or shall be guilty of any wilful act or omission by means whereof the United States may be deprived of the lawful duties . . . such merchandise or the value thereof, to be recovered from such person or persons, shall be forfeited . . . and such person or persons shall, upon conviction, be fined . . . or be imprisoned . . . or both, in the discretion of the court."

Maximo Castillo, as claimant, filed exceptions to the libel on the ground that the merchandise was not subject to forfeiture because there had been no entry of the goods; contending that placing them in general order was not even an attempt to introduce them into the commerce of the United States, inasmuch as the owner might, during the year, direct them to be forwarded to a foreign country without payment of a duty here. This contention was sustained by the district judge. That judgment was affirmed by the circuit court of appeals (115 C. C. A. 340, 195 Fed. 438), and the case is here on writ of certiorari.

The prior tariff act (26 Stat. at L. 131, chap. 407, U. S. Comp. Stat. 1901, p. 1886) provided for the forfeiture of the goods "if any owner, importer, consignee, agent, or other person, shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice." In several cases arising under that act it was held that the language used did

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not cover the case of fraud by the consignor, nor could the goods be forfeited for the wrongful conduct of any person if the act preceded the making of the documents or taking any of the steps necessary to enter the goods. United States v. 646 Half Boxes of Figs, 164 Fed. 778 (1908); United States v. One Trunk, 171 Fed. 772 (July, 1909). Under the statute, as thus construed, there was no penalty for the grossest fraud on the part of the consignor, notwithstanding the fact that his invoice valuation was of great importance in determining true value, as a basis for collecting the duty. And even if the consignor was [361] also consignee, it had been held that there was a *locus pœnitentiæ* so that he might, before entry, substitute a true for a false invoice, and thus escape a forfeiture.

In order to close those loopholes and to make the act more effective Congress, on August 5, 1909 (36 Stat. at L. 97, chap. 6, U. S. Comp. Stat. Supp. 1911, p. 904), changed the law so as to increase the number of persons whose fraud should be punished. It also enlarged the scope of conduct for which the goods should be forfeited. Instead of punishing only for the fraud of the "owner, importer, consignee, and other persons," as under the act of 1890, provision was made for forfeiture for fraud, of the "consignor or seller." Instead of punishing only for entering or attempting to enter on a fraudulent invoice, it punished an attempt by such means "to introduce any imported merchandise into the commerce of the United States." This latter phrase necessarily included more than an attempt to enter, otherwise the amendment was inoperative against the consignor against whom it was specially aimed, for he does not, as such, make the declaration, sign the documents, or take any steps in entering or attempting to enter the goods. When he makes the false invoice in a foreign country there is no extraterritorial operation of the statute whereby he can be criminally punished for his fraud. But when the consignor made the fraudulent undervaluation in the foreign country, and on such false invoice the goods were shipped, and arrived consigned to a merchant in New York, the merchandise was within the protection and subject to the penalties of the commercial regulations of this country, even though the consignor was beyond the seas and outside the court's jurisdiction.

It was argued that the goods could only be forfeited for the same acts that would support an indictment; and inasmuch as the consignor could not be prosecuted here for making a false invoice in a foreign country, neither could the goods be forfeited for the same conduct in the [362] same place. But while punishment for the crime and forfeiture of the goods will often be coincident penalties, they are not necessarily so, nor is there any inconsistency in proceeding against the *res* if the wrongdoer is beyond the jurisdiction of the court. The very fact that the criminal provision of the statute does not operate extraterritorially against the consignor would be a reason why the goods themselves should be subjected to forfeiture on arrival here. Cf. American Banana Co. v. United Fruit Co. 213 U. S. 356, 53 L. ed. 832, 29 Sup. Ct. Rep. 511, 16 Ann. Cas. 1047; United States v. Nord Deutscher Lloyd, 223 U. S. 512, 56 L. ed. 531, 32 Sup. Ct. Rep. 244. The consignor's absence would not relieve the goods from the liability to be forfeited. He must be treated as having made the shipment with a knowledge that they could not remain in the vessel (Rev. Stat. § 2880, U. S. Comp. Stat. 1901, p. 1913), and that if, after being unloaded, they were not called for, they would be stored in general order, there to remain, free from the burden of any state legislation, and within the protection of the commerce clause of the Constitution. The foreign consignor is charged with knowledge that, if goods stored in such warehouse were not called for within the year, they were to be sold at public outcry; or if, during that period, they were taken out for shipment to a foreign port, they would start from a place of storage within the territory of the United States, and move thence in a channel of its commerce. So that in the present case, when the goods, fraudulently undervalued and consigned to a person in New York, arrived at the port of entry, there was an attempt to introduce them into the commerce of the United States. When they were unloaded and placed in general order, they were actually introduced into that commerce, within the meaning of the statute intended to prevent frauds on the customs. The judgment dismissing the libel is reversed, and the cause remanded for further proceedings in conformity with this opinion.

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[363] DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY, Plff. in Err.,

v.

UNITED STATES OF AMERICA.

(See S. C. Reporter's ed. 363–373.)

Constitutional law — governmental regulation of interstate carrier — association with commodity carried.

1. Forbidding a railway company to

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transport in interstate commerce from market to mine an article purchased by it for use in its private business of mining, conducted under charter authority, as is done by the Hepburn act of June 29, 1906 (34 Stat. at L. 585, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1287), does not deny the due process of law guaranteed by U. S. Const., 5th Amend., but such prohibition is a valid exercise of the power of Congress to regulate commerce.

[For other cases, see Constitutional Law, IV. b, 7; Commerce, III., in Digest Sup. Ct. 1908.]

Carriers — governmental regulation — association with commodity carried.

2. The transportation by a railway company in interstate commerce from market to mine of articles purchased by it for use by it in its private business of mining is a violation of the commodity clause of the Hepburn act of June 29, 1906, which makes it unlawful for any railway company to transport in interstate commerce any article which it may own or in which it may have any interest except such as may be necessary for its use in the conduct of its business as a common carrier.

[Governmental control of carrier, see Carriers, III., in Digest Sup. Ct. 1908.]

Carriers — governmental regulation — association with commodity carried.

3. Hay purchased by a railway company for the use of animals employed in operating its coal mines cannot be said to have been necessary for the use of the company in the conduct of its business as a common carrier, within the meaning of the commodity clause of the Hepburn act of June 29, 1906, which makes it unlawful for any railway company to transport in interstate commerce any article it may own, or in which it may have any interest except such as may be necessary for its use in the conduct of its business as a common carrier, where the company sells for public consumption 75 per cent of the coal produced, using the remaining 25 per cent as fuel for its locomotives.

[Governmental control of carrier, see Carriers, III., in Digest Sup. Ct. 1908.]

Sale — when title passes — delivery — acceptance.

4. An acceptance which passes title with the right to rescind as for a condition subsequent if, on later inspection, the quality is found not to correspond with the specifications, results from the receipt by a carrier at a point on its own line of hay delivered to it by the vendor in a contract by which the latter agreed to sell the hay to the carrier at a specified price f. o. b. at that point, from which the carrier was to transport it to such other points on its line as it should determine, having the right to inspect at those points before acceptance, and agreeing to pay therefor only after such inspection and acceptance.

[For other cases, see Sale, I. e, in Digest Sup. Ct. 1908.]

[No. 275.]

Argued October 17, 1913. Decided December 1, 1913.

IN ERROR to the District Court of the United States for the Western District of New York to review a conviction of a carrier for violating the commodities clause of the Hepburn act. Affirmed.

The facts are stated in the opinion.

Mr. W. S. Jenney argued the cause and filed a brief for plaintiff in error:

The hay in question was not owned by the railroad company during the transportation thereof from Black Rock to Scranton. The title to said hay did not pass to the railroad company until it accepted it after an inspection thereof at the mines.

Williston, Sales, §§ 274, 277, 278, 280, 472, 480, 482; Benjamin, Sales, 5th ed. pp. 341, 346, 347, 355, 748, 753; 35 Cyc. 306; Hershiser v. Delone, 24 Neb. 380, 38 N. W. 863; Stephens v. Santee, 49 N. Y. 35; Kein v. Tupper, 52 N. Y. 550; Cooke v. Millard, 65 N. Y. 352, 22 Am. Rep. 619; Nichols & S. Co. v. Paulson, 6 N. D. 400, 71 N. W. 136; Hathaway v. O'Gorman Co. 26 R. I. 476, 59 Atl. 397; Smith v. Wisconsin Invest. Co. 114 Wis. 151, 89 N. W. 829; Mechem, Sales, §§ 721, 724, 726, 729, 730, 733, 736, 1369, 1370; Blackburn, Sales, p. 129; Braddock Glass Co. v. Irwin, 153 Pa. 440, 25 Atl. 490; Dannemiller v. Kirkpatrick, 201 Pa. 218, 50 Atl. 928; McNeal v. Braun, 53 N. J. L. 617, 26 Am. St. Rep. 441, 23 Atl. 687; A. J. Neimeyer Lumber Co. v. Burlington & M. River R. Co. 54 Neb. 321, 40 L.R.A. 534, 74 N. W. 670; United States v. Andrews, 207 U. S. 229, 52 L. ed. 185, 28 Sup. Ct. Rep. 100; Star Brewery Co. v. Horst, 58 C. C. A. 362, 120 Fed. 246; Holmes v. Gregg, 66 N. H. 621, 28 Atl. 17; Cornell v. Clark, 104 N. Y. 451, 10 N. E. 888; Ballantyne v. Appleton, 82 Me. 570, 20 Atl. 235; Potter v. Holmes, 87 Minn. 477, 92 N. W. 411; Cefalu-Derrig Co. v. Fitzsimmons, 65 Minn. 480, 67 N. W. 1018; Grimoldby v. Wells, L. R.

NOTE.—On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, G. & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

On the passing of title by delivery f. o. b. —see notes to Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co. 62 L.R.A. 798, and Dentzel v. Island Park Asso. 32 L.R.A.(N.S.) 54.

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10 C. P. 391, 44 L. J. C. P. N. S. 203, 32 L. T. N. S. 490, 23 Week. Rep. 524; Perkins v. Bell [1893] 1 Q. B. 193, 62 L. J. Q. B. N. S. 91, 4 Reports, 212, 67 L. T. N. S. 792, 41 Week. Rep. 195.

The power to regulate commerce among the states is limited by the 5th Amendment.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Monongahela Nav. Co. v. United States, 148 U. S. 336, 37 L. ed. 471, 13 Sup. Ct. Rep. 622; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764.

The limitations imposed by the 5th Amendment upon the exercise by Congress of the power to regulate commerce are the same as those imposed by the 14th Amendment upon the exercise of the police power by the state legislature.

Freund, Pol. Power, §§ 65, 66; Twining v. New Jersey, 211 U. S. 78, 101, 53 L. ed. 97, 107, 29 Sup. Ct. Rep. 14; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 410, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66.

The 5th Amendment forbids Congress, in the exercise of the power to regulate commerce, to interfere arbitrarily, unreasonably, or unnecessarily with individual rights of liberty and property. That statute is an arbitrary, unreasonable, and unnecessary interference with such rights which has no reasonable relation to the accomplishment of any legitimate public object.

Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Martin v. District of Columbia, 205 U. S. 135, 139, 51 L. ed. 743, 744, 27 Sup. Ct. Rep. 440; Atlantic Coast Line Co. v. North Carolina Corp. Commission, 206 U. S. 1, 20, 51 L. ed. 933, 942, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560.

The commodities clause, in its application to the facts of this case, deprived the railroad company of its liberty and property.

Allgeyer v. Louisiana, 165 U. S. 589, 41 L. ed. 835, 17 Sup. Ct. Rep. 427.

Assistant to the Attorney General Todd argued the cause and filed a brief for defendant in error:

The defendant was the owner of the hay while transporting it from Black Rock (Buffalo) to Scranton.

Alden v. Hart, 161 Mass. 576, 37 N. E. 742; Allen v. Maury, 66 Ala. 10; Ballantyne v. Appleton, 82 Me. 570, 20 Atl. 235; Boothby v. Plaisted, 51 N. H. 436, 12 Am. Rep. 140; Burrows v. Whitaker, 71 N. Y. 291, 27 Am. Rep. 42; Cefalu v. Fitzimmons-Derrig Co. 65 Minn. 480, 67 N. W. 1018; Chicago, I. & L. R. Co. v. United States, 219 U. S. 486, 55 L. ed. 305, 31 Sup. Ct. Rep. 272; Cornell v. Clark, 104 N. Y. 451, 10 N. E. 888; Crofoot v. Bennett, 2 N. Y. 258; Fogel v. Brubaker, 122 Pa. 7, 15 Atl. 692; Fromme v. O'Donnell, 124 Wis. 529, 103 N. W. 3; Gass v. Astoria Veneer Mills, 121 App. Div. 182, 105 N. Y. Supp. 794; Graff v. Fitch, 58 Ill. 375, 11 Am. Rep. 85; Grimoldby v. Wells, L. R. 10 C. P. 391, 44 L. J. C. P. N. S. 203, 32 L. T. N. S. 490, 23 Week. Rep. 524; Hatch v. Standard Oil Co. 100 U. S. 124, 25 L. ed. 554; Holmes v. Gregg, 66 N. H. 621, 28 Atl. 17; Re Transportation of Company Material, 22 Inters. Com. Rep. 439; Kelsea v. Haines, 41 N. H. 246; Kuppenheimer v. Wertheimer, 107 Mich. 77, 61 Am. St. Rep. 317, 64 N. W. 952; Leonard v. Davis, 1 Black, 476, 17 L. ed. 222; Lingham v. Eggleston, 27 Mich. 324; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Macomber v. Parker, 13 Pick. 175; McCarty v. Gordon, 16 Kan. 35; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; McNeal v. Braun, 53 N. J. L. 617, 26 Am. St. Rep. 441, 23 Atl. 687; Murphy v. Sagola Lumber Co. 125 Wis. 363, 103 N. W. 1113; Perkins v. Bell [1893] 1 Q. B. 193, 62 L. J. Q. B. N. S. 91, 4 Reports, 212, 67 L. T. N. S. 792, 41 Week. Rep. 195; Pierson v. Crook, 115 N. Y. 539; Pope v. Allis, 115 U. S. 363, 29 L. ed. 393, 6 Sup. Ct. Rep. 69; Potter v. Holmes, 87 Minn. 477, 92 N. W. 411; Riddle v. Varnum, 20 Pick. 280; Star Brewery Co. v. Horst, 58 C. C. A. 362, 120 Fed. 246; United States v. Andrews, 207 U. S. 229, 52 L. ed. 185, 28 Sup. Ct. Rep. 100; United States v. Sunday Creek Co. 194 Fed. 252; Wadhams v. Balfour, 32 Or. 313, 51 Pac. 642; Weil v. Stone, 33 Ind. App. 112, 104 Am. St. Rep. 243, 69 N. E. 698; Williston, Sales, § 472; Young Bros. v. Minkler, 14 Colo. App. 204, 59 Pac. 622.

The commodities clause is constitutional as applied to the transportation by a railroad, also engaged in production, of articles owned by it and intended for use in its operation as a producer. Hence, it is constitutional as applied to the transportation by defendant of the hay in question.

Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; Cedar Hill Coal & Coke Co. v. Atchison, T. & S. F. R. Co. 15 Inters. Com. Rep. 75; Com. v. Gilbert, 160 Mass. 157, 22 L.R.A. 439, 35 N. E. 454; 2 Enc. U. S. Sup. Ct. Rep. 111, note 23; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; Lemieux

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v. Young, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Opinion of Justices (Re House Bill No. 1230) 163 Mass. 589, 28 L.R.A. 344, 40 N. E. 713; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Public Clearing House v. Coyne, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; Denn ex dem. Scott v. Reid, 10 Pet. 524, 9 L. ed. 519; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; St. Paul, M. & M. R. Co. v. Phelps, 137 U. S. 528, 34 L. ed. 767, 11 Sup. Ct. Rep. 168; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; United States v. Lehigh Valley R. Co. 220 U. S. 257, 55 L. ed. 458, 31 Sup. Ct. Rep. 387; United States v. Goldenberg, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3.

Mr. Justice **Lamar** delivered the opinion of the court:

The Delaware, Lackawanna, & Western Railroad Company was indicted for hauling, over its lines, between Buffalo, New York, and Scranton, Pennsylvania, twenty carloads of hay, belonging to the company, but not necessary for its use as a common carrier. This transportation [**369**] was charged to be in violation of the commodity clause of the Hepburn act (34 Stat. at L. 585, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1287), which makes it unlawful "for any railroad company to transport [in interstate commerce] any article . . . it may own . . . or in which it may have any interest . . . except such . . . as may be necessary . . . for its use in the conduct of its business as a common carrier."

On the trial it appeared that the defendant was not only chartered as a railroad, but had also been authorized to operate coal mines. The hay, referred to in the indictment, had been purchased for the use of animals employed in and about the mines at Scranton,—all the coal taken therefrom being sold for use by the public, except the steam coal which was used as fuel for the company's locomotives.

The defendant was found guilty and sentenced on each of the twenty counts. It brought the case here, insisting that the commodity clause violated the 5th Amendment, deprived the company of a right to contract, and prevented it from carrying its own property needed in a legitimate intrastate business, conducted under authority of a charter granted by the state of Pennsylvania, many years before the adoption of the Hepburn bill.

1. This contention must be overruled on the authority of United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 416, 53 L. ed. 835, 852, 29 Sup. Ct. Rep. 527. It is true that the decision in that case related to shipments of coal from mine to market, while here the merchandise was transported from market to mine. But the statute relates to "all commodities, except lumber, owned by the company," and includes inbound as well as outbound shipments. Both classes of transportation are within the purview of the evil to be corrected, and therefore subject to the power of Congress to regulate interstate commerce. The exercise of that power is, of course, limited by the provisions of the 5th Amendment [**370**] (Monongahela Nav. Co. v. United States, 148 U. S. 336, 37 L. ed. 471, 13 Sup. Ct. Rep. 622; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367), but the commodity clause does not take property, nor does it arbitrarily deprive the company of a right of property. The statute deals with railroad companies as public carriers, and the fact that they may also be engaged in a private business does not compel Congress to legislate concerning them as carriers so as not to interfere with them as miners or merchants. If such carrier hauls for the public and also for its own private purposes, there is an opportunity to discriminate in favor of itself against other shippers in the rate charged, the facility furnished, or the quality of the service rendered. The commodity clause was not an unreasonable and arbitrary prohibition against a railroad company transporting its own useful property, but a constitutional exercise of a governmental power intended to cure or prevent the evils that might result if, in hauling goods in or out, the company occupied the dual and inconsistent position of public carrier and private shipper.

It was suggested that the case is not within the statute because, as the company could buy, in Scranton, hay that had already been transported over its line, no possible harm could come to anyone if it bought the same hay in Buffalo, and then hauled it to Scranton for use at the mine, but not for sale in competition with other dealers in stock food. But the courts are not concerned with the

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question as to whether, in a particular case, there had been any discrimination against shippers or harm to other dealers. The statute is general, and applies not only to those particular instances in which the carrier did use its power to the prejudice of the shipper, but to all shipments which, however innocent in themselves, come within the scope and probability of the evil to be prevented.

2. In this case the hay was purchased for use in operating [371] mines where 75 per cent of the coal produced was "assorted sizes" intended to be sold for domestic purposes. The remaining 25 per cent was steam coal,—all of which was used as fuel on the company's locomotives. This steam coal was in the nature of a by-product from a mine operated primarily for the purpose of obtaining coal for sale. Hay purchased for use in such mining cannot be said to have been necessary for the use of the company in the conduct of its business as a common carrier.

3. Lastly, it was contended that the hay did not belong to the railroad company at the time of the transportation, and therefore the conviction should be set aside, since the statute only prohibits the hauling of commodities owned by the carrier.

This contention is based upon the terms of the contract, by which the Vassar Company, of Millington, Michigan, agreed to sell to the railroad company 3,000 tons No. 1 timothy hay, at $15.40 per ton, f. o. b. Buffalo, payment to be made as follows: Upon the delivery of the hay to the purchaser, at Buffalo, same will be transported by the purchaser to various points on its line of railroad, to be determined by the purchaser, at which places the purchaser shall have the right to inspect such hay before acceptance, and if, upon such inspection, said hay shall prove to be of the kind specified, the purchaser shall accept such hay and pay for the same within thirty days after such acceptance. Each of the twenty carloads of hay mentioned in the indictment was received by the company at Buffalo. Each was then reconsigned to itself at Scranton. The waybills were marked, "Freight free—Company use." After arrival at Scranton it was inspected, accepted, and used.

On these facts the defendant insists that the title did not pass until after acceptance, and many authorities are cited to support the proposition that, in a contract for the sale of personal property, not only delivery by the [372] seller, but acceptance by the buyer, is necessary for the transfer of title. But there are two kinds of acceptance,—one of quality and the other of title. They are not necessarily contemporaneous. There may be an acceptance of quality before delivery, as where goods are selected by the purchaser, delivery and transfer of title being postponed until a later time. Or, there may be an acceptance of title without an acceptance of quality; so that in many cases, after the title has passed, the purchaser may recover damages if the goods, upon inspection, prove to be of a quality inferior to that ordered. Day v. Pool, 52 N. Y. 416, 11 Am. Rep. 719; Zabriskie v. Central Vermont R. Co. 131 N. Y. 72, 29 N. E. 1006; Bagley v. Cleveland Rolling Mill Co. 22 Blatchf. 342, 21 Fed. 159 (3), 164; Miller v. Moore, 83 Ga. 684, 6 L.R.A. 374, 20 Am. St. Rep. 329, 10 S. E. 360. Again, though there may be such an acceptance as will transfer the title, the purchaser may, under the contract, have the right to rescind, as for a condition subsequent, if the goods do not correspond with the specifications. Such was the case here. When the hay was received by the purchaser at Buffalo, there was such an acceptance as to transfer title to the railroad, which accordingly took possession and exercised control in fixing when and to what point on its line the hay should be shipped. Title prima facie passes when delivery is made, and if such possession, followed by acts of ownership, did not transfer the title to the railroad company, it left the risk of unknown dangers, at unknown points, for an indefinite time, upon the seller. So hard and unusual an incident is not, under facts like these, necessarily to be implied from the use of the ambiguous phrase, "pay after inspection and acceptance," and no such construction should be given unless demanded by the explicit terms of the contract. The parties, by their conduct, showed that they did not understand that the hay remained the property of the seller after it had been delivered to the buyer, for the hay, after being received, was consigned by the company to itself, and went [373] forward from Buffalo to Scranton on waybills containing the entry, "Freight free—Company use." If the hay did, in fact, then belong to the Vassar Company, such a shipment on such a waybill would have been a departure from the published tariff, contrary to the provisions of the act to regulate commerce. No such offense, however, was committed, for the contract, both by its terms and in the light of the conduct of the parties, meant that the title should pass when delivery was accepted by the defendant at Buffalo, but that the railroad company might rescind if, on later inspection, the quality was found to be different from what had been described in the contract of sale. But after such delivery and before such rescission, the title was in the railroad company. Allen v. Maury, 66 Ala. 10; Burrows

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v. Whitaker, 71 N. Y. 291, 27 Am. Rep. 42; Kuppenheimer v. Wertheimer, 107 Mich. 77, 61 Am. St. Rep. 317, 64 N. W. 952. As the hay belonged to the defendant and was intended for use in its private business of mining, the transportation over its lines, in interstate commerce, was a violation of the commodity clause.

Judgment affirmed.

PEOPLE OF THE STATE OF NEW YORK EX REL. AMOSKEAG SAVINGS BANK OF MANCHESTER, NEW HAMPSHIRE,† Plff. in Err.,

v.

LAWSON PURDY and Others, Commissioners of Taxes and Assessments of the City of New York.

(See S. C. Reporter's ed. 373–394.)

Evidence — burden of proof — taxation — discrimination.

1. An owner of national bank shares seeking to overthow a state taxation system on the ground that it discriminates against holders of such shares, contrary to U. S. Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502, assumes the burden of proving such discrimination.

[For other cases, see Evidence, 450–471, in Digest Sup. Ct. 1908.]

Taxes — national bank shares — discrimination.

2. The imposition upon the basis of book values of a 1 per cent tax upon national bank stock under the New York tax law (Consol. Laws, chap. 60), which forbids any deductions because of the personal indebtedness of the shareholders, such as are allowed when assessing other taxable personal property, does not contravene the provision of U. S. Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens, where shareholders in state banks are subjected to precisely the same taxation, and a substantially similar burden is imposed upon shareholders in trust companies and savings banks by the franchise tax of 1 per cent on the capital stock, surplus, and undivided profits of the trust companies, and on the surplus and undivided earnings of the savings banks, while individual bankers, who are entitled to the privilege of deduction for personal debts, are taxed at the higher general tax rate locally applicable upon the amount of capital invested in the banking business.

[For other cases, see Taxes, I. b, 2, in Digest Sup. Ct. 1908.]

Taxes — national bank shares — discrimination.

3. The taxing scheme of N. Y. Consol. Laws, chap. 60, cannot be said to contravene U. S. Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502, forbidding discrimination against holders of national bank stock, merely because in individual cases it may result that an owner of shares of national bank stock, who is indebted, may sustain a heavier tax than another likewise indebted, who has invested his money otherwise.

[For other cases, see Taxes, I. b, 2, in Digest Sup. Ct. 1908.]

[No. 6.]

Argued December 4 and 5, 1912. Decided December 1, 1913.

IN ERROR to the Supreme Court of the State of New York in and for New York County to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which affirmed a judgment of the Appellate Division of the Supreme Court, First Department, which had in turn affirmed a judgment of the Supreme Court at Special Term, dismissing a proceeding by certiorari to review the determination of commissioners of taxes and assessments, refusing to cancel an assessment upon national bank stock. Affirmed.

See same case below in Appellate Division, 134 App. Div. 966, 119 N. Y. Supp. 1139; in Court of Appeals, 198 N. Y. 503, 92 N. E. 1096.

The facts are stated in the opinion.

Mr. **Maxwell Evarts** argued the cause, and, with Mr. George Richards, filed a brief for plaintiff in error:

It is a violation of § 5219 of the United States Revised Statutes (U. S. Comp. Stat. 1901, p. 3502), for the commissioners of taxes to refuse to permit the Amoskeag Savings Bank to deduct from the value of its national bank stock its just debts when the owner of other moneyed capital is allowed to do so.

New York v. Weaver, 100 U. S. 539, 25 L. ed. 705; Pelton v. Commercial Nat. Bank, 101 U. S. 143, 145, 25 L. ed. 901, 902; Albany County v. Stanley, 105 U. S. 305, 311, 26 L. ed. 1044, 1049; Hills v. National Albany Exch. Bank, 105 U. S. 319, 26 L. ed. 1052; Evansville Nat. Bank v. Britton, 105 U. S. 322, 324, 26 L. ed. 1053, 1054; Boyer v. Boyer, 113 U. S. 689, 28 L. ed. 1089, 5 Sup. Ct. Rep. 706; Whitbeck v. Mercantile Nat. Bank, 127 U. S. 193, 32 L. ed. 118, 8 Sup. Ct. Rep. 1121; Palmer v. McMahon, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep.

†This case is reported by the Official Reporter under the title of "Amoskeag Savings Bank."

NOTE.—On state taxation of national bank—see note to McHenry v. Downer, 45 L.R.A. 737.

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324; People's Nat. Bank v. Marye, 191 U. S. 272, 48 L. ed. 180, 24 Sup. Ct. Rep. 68.

Important classes of investors are debarred or deterred from investing in national bank stock; and, as to them, at least, and to this extent, this discriminatory measure cannot be enforced.

People's Nat. Bank v. Marye, supra.

Mr. William Herbert King argued the cause, and, with Mr. Archibald R. Watson, filed a brief for defendants in error:

The system of taxation established by the tax law of New York does not discriminate against shares of national bank stock, but, on the contrary, is favorable to capital so invested, it was desired by the banks, and it is successful and fair in its operation.

People ex rel. Bridgeport Sav. Bank v. Feitner, 191 N. Y. 96, 83 N. E. 592.

The plaintiff has failed to show that the taxes imposed upon national bank shares in New York are at a greater rate than taxes imposed upon other moneyed capital in the state.

Pelton v. Commercial Nat. Bank, 101 U. S. 143, 146, 101 L. ed. 901, 902; Evansville Nat. Bank v. Britton, 105 U. S. 322, 324, 26 L. ed. 1053, 1054; Boyer v. Boyer, 113 U. S. 689, 28 L. ed. 1089, 5 Sup. Ct. Rep. 706; Whitbeck v. Mercantile Nat. Bank, 127 U. S. 193, 32 L. ed. 118, 8 Sup. Ct. Rep. 1121; First Nat. Bank v. Chapman, 173 U. S. 205, 219, 220, 43 L. ed. 669, 674, 675, 19 Sup. Ct. Rep. 407; People's Nat. Bank v. Marye, 191 U. S. 272, 48 L. ed. 180, 24 Sup. Ct. Rep. 68; First Nat. Bank v. Ayers, 160 U. S. 660, 40 L. ed. 573, 16 Sup. Ct. Rep. 412.

In the absence of any material unfriendly or substantial discrimination against capital invested in national banks compared with capital of a similar and competing character, no case is presented requiring the court to interpose for the protection of shareholders in national banks, and to determine that the system of taxation is in conflict with the act of Congress.

Boyer v. Boyer, 113 U. S. 689, 28 L. ed. 1089, 5 Sup. Ct. Rep. 706; Hepburn v. School Directors, 23 Wall. 480, 23 L. ed. 112; Mercantile Nat. Bank v. New York, 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. Rep. 826; Palmer v. McMahon, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324; First Nat. Bank v. Ayers, 160 U. S. 660, 40 L. ed. 573, 16 Sup. Ct. Rep. 412; First Nat. Bank v. Chehalis County, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629; National Bank v. Seattle, 166 U. S. 463, 41 L. ed. 1079, 17 Sup. Ct. Rep. 996; First Nat. Bank v. Chapman, 173 U. S. 205, 43 L. ed. 669, 19 Sup. Ct. Rep. 407; Commercial Nat. Bank v. Chambers, 182 U. S. 556, 45 L. ed. 1227, 21 Sup. Ct. Rep. 863; Lander v. Mercantile Nat. Bank, 186 U. S. 458, 46 L. ed. 1247, 22 Sup. Ct. Rep. 908; Covington v. First Nat. Bank, 198 U. S. 100, 49 L. ed. 963, 25 Sup. Ct. Rep. 562.

Mr. Lawson Purdy also argued the cause for defendants in error.

[376] Mr. Justice Pitney delivered the opinion of the court:

The question presented is the validity of certain taxes imposed in the year 1908 by the taxing officers of New York city upon some shares of stock in certain national banking associations located in that city, which shares were owned by the relator, a New Hampshire corporation doing business in its home state. The taxable value of the shares was ascertained by the commissioners of taxes and assessments, in accordance with the provisions of the law of the state of New York, by adding together the capital, surplus, and undivided profits of each bank, and dividing the amount by the number of outstanding shares. It is admitted that at the time of the making of this assessment the relator owed just debts exceeding the value of its gross personal estate, including its bank shares, after deducting therefrom the value of its property taxable elsewhere and the value of its property not taxable anywhere; that no portion of such debts had been deducted from the assessment of any of its personal property, other than the bank shares; and that no portion of the indebtedness was contracted in the purchase of nontaxable property or securities, or for the purpose of evading taxation. Relator made application to the commissioners of taxes and assessments for the cancelation of the assessment, upon the ground that it was entitled to have its indebtedness deducted from the assessed valuation of the bank shares. This application was denied, a proceeding by certiorari taken to review the determination of the commissioners was dismissed at the special term of the supreme court of New York; the appellate division affirmed the dismissal (134 App. Div. 966, 119 N. Y. Supp. 1139), upon the authority of People ex rel. Bridgeport Sav. Bank v. Feitner, 191 N. Y. 88, 83 N. E. 592, and the court of appeals affirmed the order of the appellate division, upon the same authority (198 N. Y. 503, 92 N. E. 1096). The case comes here by writ of error under § 709, Rev. [377] Stat. (U. S. Comp. Stat. 1901, p. 575) (Judicial Code, § 237 [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227]), upon the ground that the taxation imposed is in

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violation of the rights of the relator under § 5219, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3502).†

The contention of the plaintiff in error, made in the state tribunals and reiterated here, is that the taxes are invalid because made without allowing any deduction for relator's debts, as alleged to be allowed by the laws of New York in the case of other moneyed capital in the hands of individual citizens of that state; it being insisted that inasmuch as the debts of relator exceeded the valuation of the bank shares, the assessment should be wholly canceled.

The taxing laws in force at the time the assessment was made were, in the following year, consolidated and re-enacted as the "tax law." (Laws 1909, chap. 62; in effect February 17, 1909, Consol. Laws, chap. 60.) Those sections that are deemed in anywise pertinent to the matter in issue are set forth in full in the margin.‡

[378] Sec. 21 provides for the preparation of the assessment roll, and requires that it shall contain separate columns, in which the assessing officers shall set down the pertinent items, and, among others, "4. In the fourth column the full value of all the taxable personal property owned by [379] each person respectively, after deducting the just debts owing by him." This provision is held to apply equally to corporations and individuals (People ex rel. Cornell S. B. Co. v. Dederick, 161 N. Y. 195, 55 N. E. 927), and has the effect of allowing a deduction of the amount of the debts of the [380] taxpayer from the valuation of his general personal estate, not, however, including bank shares, which are dealt with in other sections. Sec. 23 requires the chief fiscal officer of every bank or banking association organized under the laws of the state or of the United States to furnish annually, [381] on or before July 1st, to the assessors of the tax district in which its principal office is located, a sworn state-

†Sec. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

‡Extracts from New York tax law.

Section 7:

"§ 7. When property of nonresidents is taxable.—1. Nonresidents of the state, doing business in the state, either as principals or partners, shall be taxed on the capital invested in such business, as personal property, at the place where such business is carried on, to the same extent as if they were residents of the state."

Sections 14 and 25:

"§ 14. Place of taxation of individual bank capital.—Every individual banker shall be taxable upon the amount of capital invested in his banking business in the tax district where the place of such business is located, and shall, for that purpose, be deemed a resident of such tax district."

"§ 25. Individual banker, how assessed.—Every individual banker doing business under the laws of this state must report before the 15th day of June under oath to the assessors of the tax district in which any of the capital invested in such banking business is taxable, the amount of capital invested in such banking business in such tax district on the 1st day of June preceding. Such capital shall be assessed as personal property to the banker in whose name such business is carried on."

Section 21:

"§ 21. Preparation of assessment roll.—They shall prepare an assessment roll containing nine separate columns, and shall, according to the best information in their power, set down:

"1. In the first column the names of all the taxable persons in the tax district.

"2. In the second column the quantity of real property taxable to each person, with a statement thereof in such form as the commissioners of taxes shall prescribe.

"3. In the third column the full value of such real property.

"4. In the fourth column the full value of all the taxable personal property owned by each person respectively after deducting the just debts owing by him. . . ."

Section 13:

"§ 13. Stockholders of bank taxable on shares.—The stockholders of every bank or banking association organized under the authority of this state, or of the United States, shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholders in the assessment of taxes in the tax district where such bank or banking association is located, and not elsewhere, whether the said stockholders reside in said tax district or not."

Section 23:

"§ 23. Banks to make report.—The chief fiscal officer of every bank or banking asso-

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ment of the condition of the bank on the 1st day of June next preceding, stating the amount of its capital stock, surplus, and undivided profits, the number of shares, [382] and the names and residences of the stockholders, with the number of shares held by each. Sections 13 and 24 relate to the taxation of these shares, stockholders in state and in national banks being treated alike. Section 13 takes the place of § 13 of the tax law of 1896 (Laws 1896, chap. 908, p. 802). Section 24 of the latter act was amended by Laws 1901, chap. 550; Laws 1902, chap. 126; Laws 1903, chap. 267; Laws 1907, [383] chap. 739; and in its final form became § 24 of the tax law of 1909. In this form § 24 is evidently a more recent enactment than § 13, and, so far as inconsistent, impliedly repeals it. The provision of § 13 for taxing bank shares in the district where the bank is located remains in force. It will be observed that § 24 declares (in obedience to [384] § 5219, Rev. Stat. [U. S. Comp. Stat. 1901, p. 3502]) that "the assessment and taxation shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this state;" that the valuation of the shares of going concerns is to be ascertained by dividing the amount of capital stock, surplus, and undivided profits by the number of shares; the valuation, in the case of banks in liquidation, to be fixed by dividing the actual assets by the number of shares; that a fixed rate of tax equal to 1 per centum upon the value thus ascertained is imposed without deduction because of the personal indebtedness of the owners, or for any other reason; that the tax is in lieu of all other state taxation upon the choses in action and personal property held by the bank whose value enters into the valuation of its shares of stock; that this section is not to be construed as an exemption of the real estate

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ciation organized under the authority of this state, or of the United States, shall, on or before the 1st day of July, in each year, furnish the assessors of the tax district in which its principal office is located a statement under oath of the condition of such bank or banking association on the 1st day of June next preceding, stating the amount of its authorized capital stock, the number of shares, and the par value of the shares thereof, the amount of stock paid in, the amount of its surplus and of its undivided profits, if any, a complete list of the names and residences of its stockholders, and the number of shares held by each. . . . The list of stockholders furnished by such bank or banking association shall be deemed to contain the names of the owners of such shares as are set opposite them, respectively, for the purpose of assessment and taxation."

Section 24:

"§ 24. Bank shares, how assessed.—In assessing the shares of stock of banks or banking associations organized under the authority of this state or the United States, the assessment and taxation shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this state. The value of each share of stock of each bank and banking association, except such as are in liquidation, shall be ascertained and fixed by adding together the amount of the capital stock, surplus, and undivided profits of such bank or banking association, and by dividing the result by the number of outstanding shares of such bank or banking association. The value of each share of stock in each bank or banking association in liquidation shall be ascertained and fixed by dividing the actual assets of such bank or banking association by the number of outstanding shares of such bank or banking association. The rate of tax upon the shares of stock of banks and banking associations shall be 1 per centum upon the value thereof, as ascertained and fixed in the manner hereinbefore provided, and the owners of the stock of banks and banking associations shall be entitled to no deduction from the taxable value of their shares because of the personal indebtedness of such owners, or for any other reason whatsoever. Complaints in relation to the assessments of the shares of stock of banks and banking associations, made under the provisions of this article, shall be heard and determined as provided in § 37 of this chapter. The said tax shall be in lieu of all other taxes whatsoever for state, county, or local purposes upon the said shares of stock, and mortgages, judgments, and other choses in action, and personal property held or owned by banks or banking associations, the value of which enters into the value of said shares of stock, shall also be exempt from all other state, county, or local taxation. The tax herein imposed shall be levied in the following manner: The board of supervisors of the several counties shall, on or before the 15th day of December in each year, ascertain from an inspection of the assessment rolls in their respective counties, the number of shares of stock of banks and banking associations in each town, city, village, school, and other tax district, in their several counties, respectively, in which such shares of stock are taxable, the names of the banks issuing the same, respectively, and assessed value of such shares, as ascertained in the manner provided in this article and entered upon the said assessment rolls, and shall forthwith mail to the president or cashier of each of said banks or banking associations a statement setting forth the amount of its capital stock, surplus, and undivided profits, the number of outstanding shares

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of the banks from taxation; and that no share of stock of such banks, by whomsoever held, is to be exempt from the tax imposed. In construing § 24, the court of appeals of New York has held (People ex rel. Bridgeport Sav. Bank v. Feitner, 191 N. Y. 88, 96, 83 N. E. 592) that the effect of introducing into the section the limitation prescribed by § 5219, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3502), is such that if any bank is located in a tax district where the rate is less than 1 per centum, its stockholders are entitled to a reduction to conform to the local rate.

Respecting other moneyed capital, trust companies, by § 188, are subjected to an annual franchise tax "equal to 1 per centum, on the amount of its capital stock, surplus, and undivided profits." The practical burden of such a tax (which of course falls eventually upon the stockholder) is presumably not materially different from the burden of a tax at the same rate, imposed upon the individual stockholder on a valuation of his shares, arrived at by taking into consideration the same elements of capital stock, surplus, and undivided profits. And of course the stockholder [385] has no relief from such a franchise tax because of his individual debts. By § 189 savings banks are subjected to a franchise tax of 1 per centum on the par value of the surplus and undivided earnings. These institutions are thus apparently taxed upon the basis of what they possess over and above what they owe to their depositors. The individual banker, by §§ 14 and 25, is taxed at the place where his business is located upon the "amount of capital invested in his banking business."

It is not insisted that this tax law discriminates against national banks or the stockholders thereof as compared particularly with individual bankers, trust com-

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thereof, the value of each share of stock taxable in said county, as ascertained in the manner herein provided, and the aggregate amount of tax to be collected and paid by such bank and banking association, under the provisions of this article. A certified copy of each of said statements shall be sent to the county treasurer. It shall be the duty of every bank or banking association to collect the tax due upon its shares of stock from the several owners of such shares, and to pay the same to the treasurer of the county wherein said bank or banking association is located, and in the city of New York to the receiver of taxes thereof on or before the 31st day of December in said year; and any bank or banking association failing to pay the said tax as herein provided shall be liable by way of penalty for the gross amount of taxes due from all the owners of the shares of stock, and for an additional amount of $100 for every day of delay in the payment of said tax. Every bank or banking association so paying the taxes due upon the shares of its stock shall have a lien on the shares of stock, and on all property of the several share owners in its hands, or which may at any time come into its hands, for reimbursement of the taxes so paid on account of the several shareholders, with legal interest; and such lien may be enforced in any appropriate manner. The tax hereby imposed shall be distributed in the following manner: The board of supervisors of the several counties shall ascertain the tax rate of each of the several town, city, village, school, and other tax districts in their counties, respectively, in which the shares of stock of banks and banking associations shall be taxable, which tax rates shall include the proportion of state and county taxes levied in such districts, respectively, for the year for which the tax is imposed, and the proportion of the tax on bank stock to which each of said districts shall be respectively entitled shall be ascertained by taking such proportion of the tax upon the shares of stock of banks and banking associations, taxable in such districts, respectively, under the provisions of this chapter, as the tax rate of such tax district shall bear to the aggregate tax rates of all the tax districts in which said shares of stock shall be taxable. The clerks of the several cities, villages, and school districts to which any portion of the tax on shares of stock of banks and banking associations is to be distributed under this section shall, in writing and under oath, annually report to the board of supervisors of their respective counties, during the first week of the annual session of such board, the tax rate of such city, village, and school district for the year prior to the meeting of each such board. The said board of supervisors shall issue their warrant or order to the county treasurer on or before the 15th day of December in each year, setting forth the number of shares of bank stock taxable in each town, city, village, school, and other tax district in said county, in which said shares of stock shall be taxable, the tax rate of each of said tax districts for said year, the proportion of the tax imposed by this chapter to which each of said tax districts is entitled, under the provisions hereof, and commanding him to collect same, and to pay to the proper officer in each of such districts the proportion of such tax to which it is entitled under the provisions of this chapter. The said county treasurer shall have the same powers to enforce the collection and payment of said tax as are possessed by the officers now charged by law with the collection of taxes, and the said county treasurer shall be entitled to a commission of 1 per centum for collecting and paying out said moneys, which commission shall be deducted from the gross amount of said

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panies, or savings banks. The ground of complaint is that § 24, in providing that owners of bank stock (state or national) shall not be entitled to deduction from the taxable value of their shares because of their personal indebtedness, is contrary to the restriction contained in § 5219, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3502), that the shares of national banks shall not be taxed "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state," because, under § 21 of the tax law, all persons are permitted to deduct their debts from their other taxable personal property in general, including, as is claimed, other moneyed capital.

Plaintiff in error relies chiefly upon the decision of this court in New York v. Weaver, 100 U. S. 539, 25 L. ed. 705. That case was in effect a review of the decision of the court of appeals of New York in People ex rel. Cagger v. Dolan, 36 N. Y. 59. The question was as to the validity of an assessment and taxation of national bank shares in the city of Albany under the state law of April 23, 1866 (N. Y. Laws 1866, p. 1647), without deduction because of the indebtedness of the taxpayer, in view of the fact that under other laws the owners of other kinds of personal property were entitled to have the amount of their debts deducted from the valuation for the purposes of taxation. The state court in the Dolan [386] Case had justified the method adopted in taxing the bank shares, upon reasoning that assumed "that while Congress limited the state authorities in reference to the ratio or percentage levied on the value of these shares, which could not be greater than on other moneyed capital invested in the state, it left the matter of the relative valuation of the shares and of other moneyed capital wholly

taxes before the same is distributed. In issuing their warrants to the collectors of taxes, the board of supervisors shall omit therefrom assessments of and taxes upon the shares of stock of banks and banking associations. Provided, that, in the city of New York the statement of the bank assessment and tax herein provided for shall be made by the board of tax commissioners of said city, on or before the 15th day of December in each year, and by them forthwith mailed to the respective banks and banking associations located in said city, and a certified copy thereof sent to the receiver of taxes of said city. The tax shall be paid by the respective banks in said city to the said receiver of taxes on or before the 31st day of December in said year, and said tax shall be collected by the said receiver of taxes, and shall be by him paid into the treasury of said city to the credit of the general fund thereof. This section is not to be construed as an exemption of the real estate of banks or banking associations from taxation. No shares of stock of such banks and banking associations, by whomsoever held, shall be exempt from the tax hereby imposed."

Section 188:

"§ 188. Franchise tax on trust companies.—Every trust company incorporated, organized, or formed under, by, or pursuant to a law of this state, and any company authorized to do a trust company's business solely or in connection with any other business, under a general or special law of this state, shall pay to the state annually for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity, an annual tax which shall be equal to 1 per centum on the amount of its capital stock, surplus, and undivided profits."

Section 189:

"§ 189. Franchise tax on savings banks.—Every savings bank incorporated, organized, or formed under, by, or pursuant to a law of this state, shall pay to the state annually for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity, an annual tax which shall be equal to 1 per centum on the par value of its surplus and undivided earnings."

Section 191:

"§ 191. Tax upon foreign bankers.—Every foreign banker doing business in this state shall annually pay to the treasurer a tax of 5 per centum on the amount of interest or compensation of any kind earned and collected by him on money loaned, used, or employed in this state by such banker. The term, 'doing a banking business,' as used in this section, means doing such business as a corporation may be created to do under article 3 of the banking law, or doing any business which a corporation is authorized by such article to do. The term, 'foreign banker doing a banking business in this state,' as used in this section, includes:

"1. Every foreign corporation doing a banking business in this state, except a national bank.

"2. Every unincorporated company, partnership, or association of two or more individuals, organized under or pursuant to the laws of another state or country, doing a banking business in this state.

"3. Every other incorporated company, partnership, or association, of two or more individuals, doing a banking business in this state, if the members thereof, owning more than a majority interest therein, or entitled to more than one half of the profits thereof, or who would, if it were dissolved, be entitled to more than one half of the net assets thereof, are not residents of this state.

"4. Every nonresident of this state, doing a banking business in this state, in his own name and right only."

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to the control of state regulation." This court held that the clause in § 5219,—"that the taxation shall not be at a greater rate than is assessed upon other moneyed capital," etc., meant that the taxation upon shares should not be greater than on other moneyed capital, taking into consideration both the rate of assessment and the valuation. In other words, that the restriction contained in the act of Congress had to do with the actual incidence and practical burden of the tax upon the taxpayer.

This decision was followed by several others to the same effect. In Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044, it was pointed out that the decision in the Weaver Case had not the effect of declaring the New York act of 1866 void, but only of deciding that the tax there in question was void because the taxpayer had been refused the same deduction for his debts that was allowed to other taxpayers having moneyed capital otherwise invested. Hills v. National Albany Exch. Bank, 105 U. S. 319, 26 L. ed. 1052, and Evansville Nat. Bank v. Britton, 105 U. S. 322, 26 L. ed. 1053, applied the same principle.

But the pertinent statutes in the Weaver Case differed from those now before us, and the authority of that decision is not controlling. The act of 1866 is quoted in full in the report, 100 U. S. at p. 540. And in that case, as the opinion shows (pp. 542, 543), it was not disputed—"that the effect of the state law is to permit a citizen of New York, who has money capital invested otherwise than in banks, to deduct from that capital the sum of all his debts, leaving the remainder alone subject to taxation, while he whose money is invested in shares of bank stocks can make [387] no such deduction. Nor, inasmuch as nearly all the banks in that state and in all others are national banks, can it be denied that the owner of such shares who owes debts is subjected to a heavier tax on account of those shares than the owner of moneyed capital otherwise invested, who also is in debt, because the latter can diminish the amount of his tax by the amount of his indebtedness, while the former cannot. That this works a discrimination against the national bank shares as subjects of taxation, unfavorable to the owners of such shares, is also free from doubt."

The tax law of New York now in question is materially different. As already shown, moneyed capital is dealt with for the purposes of taxation upon lines different from those upon which the taxation of other personal property proceeds. By §§ 13 and 24, state bank shares and national bank shares are both dealt with, and they are treated alike, being assessed not upon the basis of market values, but upon a valuation determined by a consideration of the capital stock, surplus, and undivided profits (yielding what is commonly known as "book value"), and leaving out of consideration other elements, such as good will and the like, which enter into the determination of the actual market value of such shares. On the other hand, personal property in general is by § 21 to be assessed at its full value, which presumably means market value. Sec. 24, instead of subjecting the owners of bank shares to taxation at the rate locally obtaining for other personal property, imposes a "flat rate" of 1 per centum upon the valuation, with the proviso, as held in the Feitner Case, supra, that if the local rate be less than 1 per centum, the owners of shares in the bank have the benefit of it.

Enough has been said to show that the decision in the Weaver Case, which had to do with a tax assessed upon bank stock on the basis of the same method of valuation and the same rate of assessment as personal property in [388] general, including other moneyed capital, but without allowance for the indebtedness of the taxpayer, although such allowance was made to the owners of personal property in general, including other moneyed capital, is not to be deemed conclusive upon the present controversy, in view of the differences in the taxing laws.

The Weaver Case, however, and others that followed it, did establish that the question whether an owner of national bank shares has been subjected to a state tax in excess of the limitation imposed by § 5219, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3502), is a practical question, to be determined by considering whether he is actually discriminated against in favor of other moneyed capital in the hands of individual citizens of the state. And the meaning of the term "other moneyed capital" has been elucidated by several decisions, of which the leading one is Mercantile Nat. Bank v. New York, 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. Rep. 826. This was a suit brought by a national bank to restrain the collection of taxes assessed upon its stockholders under New York Laws 1882, chap. 409, § 312,—an enactment that followed the general lines of the act of 1866, dealt with in the Weaver Case, and quoted in the opinion of the court therein, except that in obedience to that decision the act of 1882 required that—"in the assessment of said shares, each stockholder shall be allowed all the deductions and exceptions allowed by law in assessing the value of other taxable personal

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property owned by individual citizens of this state." The contention was that the state had not complied with the condition contained in § 5219 of the Revised Statutes, because it had by its legislation expressly exempted from all taxes in the hands of individual citizens numerous species of moneyed capital, while subjecting national bank shares and state bank shares in the hands of individual holders to taxation upon their full actual value, less only a proportionate amount of the real estate owned by the bank. The court (speaking by Mr. Justice Matthews), in examining and [389] disposing of this contention, after reviewing the previous decisions of this court bearing upon the subject, proceeded to expound the true intent and meaning of § 5219 of the Revised Statutes as follows (p. 153):

"It follows, as a deduction from these decisions, that 'moneyed capital in the hands of individual citizens' does not necessarily embrace shares of stock held by them in all corporations whose capital is employed, according to their respective corporate powers and privileges, in business carried on for the pecuniary profit of shareholders, although shares in some corporations, according to the nature of their business, may be such moneyed capital. . . . The key to the proper interpretation of the act of Congress is its policy and purpose. The object of the law was to establish a system of national banking institutions, in order to provide a uniform and secure currency for the people, and to facilitate the operations of the Treasury of the United States. The capital of each of the banks in this system was to be furnished entirely by private individuals; but, for the protection of the government and the people, it was required that this capital, so far as it was the security for its circulating notes, should be invested in the bonds of the United States. These bonds were not subjects of taxation; and neither the banks themselves, nor their capital, however invested, nor the shares of stock therein held by individuals, could be taxed by the states in which they were located without the consent of Congress, being exempted from the power of the states in this respect, because these banks were means and agencies established by Congress in execution of the powers of the government of the United States. It was deemed consistent, however, with these national uses, and otherwise expedient, to grant to the states the authority to tax them within the limits of a rule prescribed by the law. In fixing those limits it became necessary to prohibit the states from imposing such a burden as would prevent [390] the capital of individuals from freely seeking investment in institutions which it was the express object of the law to establish and promote. The business of banking, including all the operations which distinguish it, might be carried on under state laws, either by corporations or private persons, and capital in the form of money might be invested and employed by individual citizens in many single and separate operations forming substantial parts of the business of banking. A tax upon the money of individuals, invested in the form of shares of stock in national banks, would diminish their value as an investment, and drive the capital so invested from this employment, if at the same time similar investments and similar employments under the authority of state laws were exempt from an equal burden. The main purpose, therefore, of Congress, in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy."

And again (p. 157): "The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals, employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily, with a view to sale [391] or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property. Accordingly, it was said in Evansville Nat. Bank v. Britton, 105 U. S. 322, 26 L. ed. 1053: 'The act of Congress does not make the tax on personal property the measure of the tax on the bank shares in the state, but the tax on moneyed capital in the hands of the individual citizens. Credits, money loaned at interest, and demands against persons or corporations, are more purely representative of moneyed capital than personal property, so far as they can

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be said to differ. Undoubtedly there may be said to be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands, and money at interest mentioned in the Indiana statute, from which bona fide debts may be deducted, all mean moneyed capital invested in that way.' This definition of moneyed capital in the hands of individuals seems to us to be the idea of the law, and ample enough to embrace and secure its whole purpose and policy."

The rule of construction thus laid down has been since consistently adhered to by this court. Palmer v. McMahon, 133 U. S. 660, 667, 33 L. ed. 772, 775, 10 Sup. Ct. Rep. 324; First Nat. Bank v. Chehalis County, 166 U. S. 440, 454, 41 L. ed. 1069, 1075, 17 Sup. Ct. Rep. 629; First Nat. Bank v. Chapman, 173 U. S. 205, 214, 43 L. ed. 669, 673, 19 Sup. Ct. Rep. 407; Commercial Nat. Bank v. Chambers, 182 U. S. 556, 560, 45 L. ed. 1227, 1229, 21 Sup. Ct. Rep. 863; Jenkins v. Neff, 186 U. S. 230, 46 L. ed. 1140, 22 Sup. Ct. Rep. 905.

According to this practical test, it seems to us that the scheme adopted by the state of New York for taxing shares in national banks cannot upon this record be denounced as violative of the limitations prescribed by § 5219, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3502). The holders of shares in state banks are subjected to precisely the same taxation, and with respect to other competitive institutions, such as trust companies, the franchise taxes imposed upon them apparently result in a substantially similar burden upon the [392] shareholder. Nor is there any discrimination in favor of savings banks. With respect to individual bankers, there is a difference, they being apparently subject to the local rate of taxation, and entitled to the privilege of deduction for personal debts; but as they are taxable upon the amount of the capital invested in the banking business, which is normally only such as remains after the deduction of debts, it is not plain that they possess any valuable privilege of reducing the tax assessment by deducting debts. Foreign bankers are separately treated, for reasons sufficiently obvious; but no criticism is made of this. If there be other forms of "moneyed capital in the hands of individual citizens" of the state employed in a banking or quasi-banking business in competition with the national banks, and which are subjected to a more favorable rule of taxation, our attention is not called to them. Moreover, we agree with what was said by the court of appeals of New York in the Feitner Case (191 N. Y. 88, 96, 83 N. E. 592) that "the state is not obliged to apply the same system to the taxation of national banks that it uses in the taxation of other property, provided no injustice, inequality, or unfriendly discrimination is inflicted upon them." The court there took note of the fact that the flat rate of 1 per centum assessed upon national bank shares was more favorable to the relator than the general tax rate for the same year in the borough of Manhattan, where the banks were located. That local rate (for the year 1901) was 2.31733 per centum. In the present case it is stipulated that the general tax rate locally applicable for the year 1908 to personal property, not including bank shares, was 1.61407 per centum. There are other considerations to be weighed in determining the actual burden of the tax, one of which is the mode of valuing bank shares—by adopting "book values"—which may be more or less favorable than the method adopted in valuing other kinds of personal property. As against the owner of bank shares [393] who, by alleging discrimination, assumes the burden of proving it, and who fails to show that the method of valuation is unfavorable to him, it may be assumed to be advantageous.

Plaintiff in error contends that the statement of the New York court that "when all things are considered, the rate, even without the privilege of deducting debts, is not greater than that applied to other moneyed capital in the hands of individual citizens of the state," is based upon no facts of experience or investigation, and amounts to a pure surmise. We do not think it is to be so lightly treated; but, if it were, it still remains to be said that it was incumbent upon plaintiff in error to show affirmatively that the New York taxation system discriminates in fact against the holders of shares in the national banks, before calling upon the courts to overthrow it; and no such showing has been made.

Nor can we say that the taxing scheme contravenes the limits prescribed by § 5219, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3502), merely because in individual cases it may result that an owner of shares of national bank stock, who is indebted, may sustain a heavier tax than another, likewise indebted, who has invested his money otherwise. Such is, in effect, the objection urged by plaintiff in error to the position taken by the court of appeals of New York. In other words, it is insisted that § 5219 deals with the burden of the tax upon the individual shareholder, rather than upon shareholders as a class. We think this

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argument is sufficiently answered by reference to the language of § 5219. The declaration is that "the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state." And this restriction is imposed upon a grant of authority to tax "all the shares of national banking associations located within the state." The language clearly prohibits discrimination against shareholders in national banks, and in favor of the shareholders [394] of competing institutions, but it does not require that the scheme of taxation shall be so arranged that the burden shall fall upon each and every shareholder alike, without distinction arising from circumstances personal to the individual.

Judgment affirmed.

UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND, Plff. in Err.,
v.
COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 394-399.)

Commerce — state taxation — commercial agencies.

Attorneys on the guaranteed list of a foreign corporation, furnished to subscribing business men and merchants, who, upon request of any such subscriber, are to inquire into and report upon the credit and standing of persons engaged in doing business within the state with whom such subscriber may contemplate business dealings, there being no direct or necessary connection between such service and the making or fulfilling of commercial contracts, are not engaged in interstate commerce so as to relieve the corporation from liability for a license tax imposed under Carroll's Ky. Stat. 1909, § 4224, upon commercial agencies, although some of the inquiries may be received from merchants without the state, in anticipation of future commercial interstate transactions.

[For other cases, see Commerce, IV, in Digest Sup. Ct. 1908.]

[No. 26.]

Argued April 21, 1913. Decided December 1, 1913.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a conviction in the Mason Circuit Court of a foreign commercial agency for failing to pay a license tax. Affirmed.

See same case below, 139 Ky. 27, 47 L.R.A.(N.S.) 648, 129 S. W. 314, Ann. Cas. 1912B, 333.

The facts are stated in the opinion.

Mr. Allan D. Cole argued the cause, and, with Mr. W. T. Cole, filed a brief for plaintiff in error.

Mr. James Garnett, Attorney General of Kentucky, argued the cause, and, with Mr. D. O. Myatt, filed a brief for defendant in error.

Mr. Justice Pitney delivered the opinion of the court:

Section 4224 of the Kentucky Statutes (Carroll's ed. 1909) provides as follows:

"Before engaging in any occupation or selling any article named in this subdivision of article 12 of this act, the person desiring to do so shall procure license and pay the tax thereon as follows: . . . Commercial agencies.—Each and every person, partnership, or corporation having representatives in this state, who engage in the business of inquiring into and reporting upon the credit and standing of persons engaged in business in this state, shall pay a license tax of $100."

Plaintiff in error was indicted for failing to pay the license tax required by this provision, and, upon trial, was convicted and fined. The trial court, and, on appeal, the court of appeals of Kentucky (139 Ky. 27, 39, 47 L.R.A.(N.S.) 648, 129 S. W. 314, Ann. Cas. 1912B, 333), overruled the contention that the business done by plaintiff in error was interstate commerce, within the meaning [396] of § 8 of article 1 of the Federal Constitution, and for that reason not subject to the taxing power of the state.

The indictment was based upon the employment by plaintiff in error of a firm of attorneys at Maysville, Kentucky, as its representatives for inquiring into and reporting upon the credit and standing of persons engaged in business in that state. Plaintiff in error is a corporation of the state of Maryland, and is engaged in the

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NOTE.—State licenses or taxes, generally, as affecting interstate commerce—see notes to Rothermel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburgh & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

On corporate taxation and the commerce clause—see note to Sandford v. Poe, 60 L.R.A. 641.

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publication and distribution of a list of selected attorneys in the United States. With the several attorneys upon the list, plaintiff in error has an arrangement by which, in consideration of a fee paid by them to it, their names are inserted, and plaintiff in error guarantees to merchants and other persons sending claims to the attorneys that they will promptly and faithfully pay over all moneys collected. It furnishes the list of attorneys to business men and merchants throughout the United States. It provides the attorneys, and also the subscribers to or purchasers of the book, with blank forms upon which information respecting the business and financial standing of persons with whom a subscribing merchant desires to deal may be furnished, and the attorneys, upon request, make replies to inquiries of this character when received from subscribing members. The attorneys do not make reports to the plaintiff in error, but send them direct to the person or firm making the inquiry. The attorneys are not the agents for either buyer or seller, in the sense that any goods are bought or sold through their instrumentality. Such was the business that was done by the Maysville attorneys, as representatives of the plaintiff in error. They did not sell or offer to sell any goods, nor deliver or offer to deliver any, and had nothing to do with buying, selling, transporting, delivering, or handling any merchandise. If any commercial transaction took place between the merchant whose standing was reported and the merchant to whom the report was sent, it was due entirely to negotiations [397] between them, with which the reporting attorney had nothing to do. Correspondence in which the Maysville attorneys furnished nonresident dealers with information was only desultory, and occasional, and was not followed by the making of any contract or the transportation of any goods between the parties to the correspondence.

The contention of plaintiff in error is that the Maysville attorneys and its other representatives of the same kind are, through the means of the system employed, acting in fact as agents of merchants engaged in interstate commerce, to furnish them with information through the mails or by telephone or telegraph, as a result of which merchandise may be transported in interstate commerce, or withheld from such transportation, according to the character of the information reported; and that the service thus rendered is so connected with interstate commerce as to preclude the state of Kentucky from enacting a statute imposing a license tax whose tendency is or may be to prevent plaintiff in error from operating in that state.

The tax in question is an excise or privilege tax, and undoubtedly within the power of the state, unless it has the effect of directly burdening interstate commerce. It is only one of a great number of license taxes dealt with in a single section of the statute, and including a great variety of occupations. In the case of commercial agencies, the thing that is laid hold of as the subject of the excise is a business carried on within the state. If it have consequences extending beyond the borders of the state, and affecting interstate commerce, these are only incidental and fortuitous. The case is, we think, easily to be distinguished from McCall v. California, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881, and International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103, relied upon by plaintiff in error. In the McCall Case the local instrumentality that was held to be exempt from [398] interference by state taxation was an agent whose business was the direct solicitation of passengers for interstate journeys by rail. This was clearly within the reasoning and authority of Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, and other cases of that class. In the case of the International Textbook Company, there was a systematic and continuous interstate traffic in instruction papers, text-books, and illustrative apparatus for courses of study pursued by means of correspondence, and this was held to be in its essential characteristics commerce among the states within the meaning of the Federal Constitution, and entitled thereunder to exemption from any direct burden imposed by state legislation.

In the present case it appears that there is not even systematic or continuous correspondence, much less interstate commerce resulting therefrom. There is no direct or necessary connection between the service performed by plaintiff in error through its representatives and the making or fulfilment of commercial contracts. The most that can be said is that inquiries received by those representatives in Kentucky with respect to the credit and standing of persons engaged in business in that state may be received from merchants without the state in anticipation of commercial transactions between them in the future. But, on the other hand, similar inquiries may be received from merchants in Kentucky, and may have reference alone to intrastate, and not to interstate, transactions. Or,

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the information may be desired as an aid in extending or refusing to extend credit for past transactions, as well as to lay the basis for future dealings. The circumstance that in a substantial number of cases —even if in the greater number—there is correspondence, by letter or otherwise, from state to state, which may perhaps have an effect upon the conduct of other parties about entering or not entering into transactions of interstate commerce, is not controlling.

[399] The present case has no close parallel in former decisions, but in some of its aspects it bears a resemblance to the case of a tax imposed upon a resident citizen engaged in a general business that happens to include a considerable share of interstate business. Ficklen v. Taxing Dist. 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810. Or the business of the live stock exchange that was under consideration in Hopkins v. United States, 171 U. S. 578, 592, 43 L. ed. 290, 296, 19 Sup. Ct. Rep. 40. Or the business of a cotton broker dealing in futures or options. Ware v. Mobile County, 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031.

To warrant interference with the exercise of the taxing power of a state on the ground that it obstructs or hampers interstate commerce, it must appear that the burden is direct and substantial. We do not think the present is such a case.

Judgment affirmed.

STRATTON'S INDEPENDENCE, Limited,
v.
F. W. HOWBERT, Collector of Internal Revenue in and for the District of Colorado.

(See S. C. Reporter's ed. 399–423.)

Internal revenue — excise on corporation — mining companies.

1. Mining corporations engaged solely in mining upon their own premises are subject to the excise tax imposed by the act of August 5, 1909 (36 Stat. at L. 11, chap. 6, U. S. Comp. Stat. Supp. 1911, p. 741), § 38, upon the carrying on or the doing of business in a corporate or quasi corporate capacity, such corporations being within the general description of that section, which comprises every corporation organized for profit and having a capital stock represented by shares, and engaged in business, and not being among the classes of corporations specified in that section as exempt from its operation.

[For other cases, see Internal Revenue, III., in Digest Sup. Ct. 1908.]

Internal revenue — excise on corporation — income — proceeds of ore.

2. The proceeds of ore mined by a corporation from its own premises are "income" within the meaning of the act of August 5, 1909, § 38, imposing an excise tax measured by net annual income upon the carrying on or the doing of business in a corporate or quasi corporate capacity.

[For other cases, see Internal Revenue, III., in Digest Sup. Ct. 1908.]

Internal revenue — excise on mining corporations.

3. Treating the proceeds of ore mined by a corporation upon its own premises as "income" within the meaning of the act of August 5, 1909, § 38, which imposes an excise tax measured by net annual income upon the carrying on or the doing of business in a corporate or quasi corporate capacity, does not make such excise the equivalent of a direct tax upon the property, and therefore invalid, because not apportioned to population, as prescribed by the Federal Constitution.

[For other cases, see Internal Revenue, I. b, in Digest Sup. Ct. 1908.]

Internal revenue — excise upon corporation — depreciation.

4. Assuming that the depletion of the mineral supply from the process of mining is an element to be considered in determining the reasonable depreciation that, under the act of August 5, 1909, § 38, is to be deducted from the net annual income of a mining company when assessing the excise imposed by that section upon the doing or carrying on of a business in a corporate or quasi corporate capacity, the difference between the gross proceeds of the sales of ores during the year, and the amount expended in extracting, mining, and marketing such ores, cannot be treated as the value of the ore in place for such purpose.

[For other cases, see Internal Revenue, III., in Digest Sup. Ct. 1908.]

Cases certified — scope of inquiry.

5. Only the several propositions of law that are certified by a circuit court of appeals under the act of March 3, 1891 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 6, will be answered by the Federal Supreme Court. Questions of fact or of mixed law and fact will not be considered.

[For other cases, see Cases Certified, VI. a, in Digest Sup. Ct. 1908.]

[No. 457.]

Argued October 21, 1913. Decided December 1, 1913.

ON A CERTIFICATE from the Circuit Court of Appeals for the Eighth Circuit presenting questions as to the liability of a mining corporation to the Federal corporation tax, and as to the right to deduct

NOTE.—On definiteness of question to be certified—see note to Waco Water & Light Co. v. Waco, 31 L.R.A. 392.

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the value of ore in place as depreciation. The last question answered in the negative. The others in the affirmative.

The facts are stated in the opinion.

Mr. William V. Hodges argued the cause, and, with Mr. A. A. Hoehling, Jr., filed a brief for Stratton's Independence:

A general classification of corporations in the legislative mind ordinarily excludes mining corporations. And this condition is especially pronounced in legislation relating to taxation.

Taxation of Min. Claims, 9 Colo. 639, 21 Pac. 476; Pilgrim Consol. Min. Co. v. Teller County, 32 Colo. 334, 76 Pac. 364; People ex rel. Iron Silver Min. Co. v. Henderson, 12 Colo. 369, 21 Pac. 144; Foster v. Hart Consol. Min. Co. 52 Colo. 459, 122 Pac. 48; A. Leschen & Sons Rope Co. v. Allen, 110 C. C. A. 315, 187 Fed. 980; Re South Mountain Consol. Min. Co. 8 Sawy. 366, 14 Fed. 349; Ross v. Kelly, 36 Minn. 38, 29 N. W. 591, 31 N. W. 219; Re Elk Park Min. & Mill. Co. 101 Fed. 423; Re Rollins Gold & S. Min. Co. 102 Fed. 982; Re Keystone Coal Co. 109 Fed. 872; Re Woodside Coal Co. 105 Fed. 56.

Mining corporations are not engaged in carrying on business within the meaning of the act.

Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; McCoach v. Minehill & S. H. R. Co. 228 U. S. 295, 57 L. ed. 842, 33 Sup. Ct. Rep. 419; Zonne v. Minneapolis Syndicate, 220 U. S. 187, 55 L. ed. 428, 31 Sup. Ct. Rep. 361; Clark v. Sidway, 142 U. S. 682, 35 L. ed. 1157, 12 Sup. Ct. Rep. 327; Farrand v. Gleason, 56 Vt. 637; Jordan v. Soule, 79 Me. 590, 12 Atl. 786; Harris v. De Raismes, — N. J. Eq. —, 38 Atl. 637; Childers v. Neely, 47 W. Va. 70, 49 L.R.A. 468, 81 Am. St. Rep. 777, 34 S. E. 828, 20 Mor. Min. Rep. 222; Judge v. Braswell, 13 Bush, 67, 26 Am. Rep. 185, 11 Mor. Min. Rep. 508; Nash v. Mitchell, 71 N. Y. 203, 27 Am. Rep. 38.

The application of the act to mining corporations results in a tax upon the capital itself; while, as applied to corporations having an income as distinguished from capital, it does not result in a tax upon capital. This inequality of operation is inherently unjust. Laying aside all questions of constitutional limitations, the act should not be so construed as to accomplish this unjust result, if there be a fair and reasonable construction to be given the act which would avoid such result.

Washington & I. R. Co. v. Cœur D'Alene R. & Nav. Co. 160 U. S. 77, 101, 40 L. ed. 346, 355, 16 Sup. Ct. Rep. 231; Bate Refrigerator Co. v. Sulzberger, 157 U. S. 1, 37, 39 L. ed. 601, 610, 15 Sup. Ct. Rep. 508.

The act ought not to be construed to include mining corporations unless it clearly appears that Congress intended to include them. It is an established canon of construction in this court that "duties are never imposed on the citizen upon vague or doubtful interpretations."

Pennsylvania Steel Co. v. New York City R. Co. 117 C. C. A. 556, 198 Fed. 775; Taylor v. Treat, 153 Fed. 656; Parkview Bldg. & L. Asso. v. Herold, 203 Fed. 880.

The fact that mining corporations come within the letter of the act, if true, does not conclude the argument; for, if mining corporations be not within the spirit of the act, it is not applicable to them.

Brewer v. Blougher, 14 Pet. 178, 10 L. ed. 408; United States v. Kirby, 7 Wall. 482, 486, 19 L. ed. 278, 280; Heydenfeldt v. Daney Gold & S. Min. Co. 93 U. S. 634, 638, 23 L. ed. 995, 996, 13 Mor. Min. Rep 204; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511.

Are the proceeds of ores mined by a corporation from its own premises income within the meaning of the act?

People ex rel. Cornell University v. Davenport, 30 Hun, 180; Thorn v. de Breteuil, 86 App. Div. 416, 83 N. Y. Supp. 849; Wilcox v. Middlesex County, 103 Mass. 546; Sargent Land Co. v. Von Baumbach, 207 Fed. 423; Gray v. Darlington, 15 Wall. 63, 21 L. ed. 45; Spooner v. Phillips, 62 Conn. 68, 16 L.R.A. 461, 24 Atl. 524; Foster v. Hart Consol. Min. Co. 52 Colo. 467, 122 Pac. 48; Smith v. Hooper, 95 Md. 16, 51 Atl. 844; Vinton's Appeal, 99 Pa. 434, 44 Am. Rep. 116; Gehr v. Mount Alto Iron Co. 174 Pa. 430, 34 Atl. 638; Mercer v. Buchanan, 132 Fed. 507; Re Armitage [1893] 3 Ch. 337, 63 L. J. Ch. N. S. 110, 7 Reports, 290, 69 L. T. N. S. 619.

Assuming that the proceeds of ore are to be treated as income within the meaning of the act, we submit that such proceeds result solely from depletion of capital, and are therefore deductible as depreciation.

United States v. Nipissing Mines Co. 202 Fed. 803.

Mr. John R. Van Derlip also filed a brief for Stratton's Independence:

A corporation which has leased its property and surrendered the control and operation thereof is not carrying on or doing business in respect of such property.

Zonne v. Minneapolis Syndicate, 220 U. S. 187, 55 L. ed. 428, 31 Sup. Ct. Rep. 361; McCoach v. Minehill & S. H. R. Co. 228 U. S. 295, 57 L. ed. 842, 33 Sup. Ct. Rep.

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419; United States v. Nipissing Mines Co. 202 Fed. 803.

A corporation is not subject to the Federal tax merely because of the ownership and enjoyment of property.

Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; McCoach v. Minehill & S. H. R. Co. 228 U. S. 295, 57 L. ed. 842, 33 Sup. Ct. Rep. 419.

A corporation which amends its charter so as to disqualify it from business activity in respect of its property is not subject to the imposition of the tax.

Zonne v. Minneapolis Syndicate, 220 U. S. 187, 55 L. ed. 428, 31 Sup. Ct. Rep. 361; Sargent Land Co. v. Von Baumbach, 207 Fed. 423.

A corporation which has leased its properties to another, which operates or develops them, and pays rentals, royalties, or earnings therefrom to the former, is not doing business and taxable.

Zonne v. Minneapolis Syndicate, supra; United States v. Nipissing Mines Co. 202 Fed. 804; Sargent Land Co. v. Von Baumbach, supra.

Receipts from sales of capital assets, whether ore or property of other character, are not "income," but merely a conversion of property from one form to another.

Sargent Land Co. v. Von Baumbach, supra.

A mining company is entitled to deduct from its gross income from ore sales the value in place of the ore sold, as constituting a diminution or depreciation of its capital assets.

United States v. Nipissing Mines Co. 202 Fed. 803.

In so far as a company is simply engaged in disposing of its existing assets, and in putting them to the only practical and reasonable beneficial use of which they are susceptible, it falls far short of being a business corporation.

Flint v. Stone Tracy Co. 220 U. S. 171, 55 L. ed. 421, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; State v. Boston Club, 45 La. Ann. 585, 20 L.R.A. 185, 12 So. 895; Graham v. Hendricks, 22 La. Ann. 524; Greenough v. Police Comrs. 30 R. I. 212, 136 Am. St. Rep. 953, 74 Atl. 785; Re Elk Park Min. & Mill. Co. 101 Fed. 422; Re Chesapeake Oyster & Fish Co. 112 Fed. 960.

The proceeds of ores mined by a corporation from its own premises are not income.

People v. New York C. R. Co. 24 N. Y. 490; Braun's Appeal, 105 Pa. 415; Gehr v. Mount Alto Iron Co. 174 Pa. 430, 34 Atl. 638; Levi v. Louisville, 97 Ky. 394, 28 L.R.A. 480, 30 S. W. 973; Mundy v. Van Hoose, 104 Ga. 292, 30 S. E. 783; Sargent Land Co. v. Von Baumbach, 207 Fed. 423; Spooner v. Phillips, 62 Conn. 62, 16 L.R.A. 461, 24 Atl. 524.

Mr. William D. Guthrie filed a brief as *amicus curiæ:*

If a mining company should sell its land and the mine on it, it would plainly be transferring not income, but capital; and it would be wholly immaterial whether the sale was at an advance, since not even the advance would constitute income.

Gray v. Darlington, 15 Wall. 63, 66, 21 L. ed. 45, 46; Machen, Fed. Corp. Tax Law, §§ 31, 35.

It is in violation of no one's rights for a mining corporation, after it has paid its operating expenses and made proper provision for creditors and contingencies, to distribute the balance of its receipts among the stockholders as dividends (4 Thomp. Corp. 2d ed. § 3932; 1 Morawetz, Corp. 2d ed. § 442; Lee v. Neuchatel Asphalte Co. L. R. 41 Ch. Div. 24, 58 L. J. Ch. N. S. 408, 61 L. T. N. S. 11, 37 Week. Rep. 321, 1 Megone, 140; Excelsior Water & Min. Co. v. Pierce, 90 Cal. 131, 27 Pac. 44; White, Canadian Co. Law, p. 98). But it does not follow that such dividends consist of income. As matter of fact, they consist of capital.

It would, of course, be entirely proper for a corporation which had made adequate provision for its creditors to reduce the capital stock, and distribute among its stockholders the surplus of its capital over and above the amount of the reduced capital stock (5 Thomp. Corp. 2d ed. § 5312), but such a distribution, though termed a dividend, would be of capital, and not income. A mining corporation occupies an analogous position. It is permitted by law to distribute its capital among its shareholders, as its operations go forward, so long as it protects its creditors; but it is freed from the necessity of periodically reducing its nominal capital stock, because, by virtue of the very nature of the business, its nominal share capital can rarely furnish any indication of its actual capital, and hence no useful purpose would be served by changing the nominal capital from one amount to another.

Re South Mountain Consol. Min. Co. 7 Sawy. 32, 5 Fed. 403, 13 Mor. Min. Rep. 615, 8 Sawy. 366, 14 Fed. 347; 2 Morawetz, Corp. 2d ed. § 830.

In other words, a mining company is authorized to distribute its capital in dividends, not because such capital has been transmuted into income, but because its capital does not constitute a fund which it must retain and keep equivalent to the nominal amount of its share capital.

4 Thomp. Corp. 2d ed. § 3932.

Taxing acts must be strictly construed and

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all reasonable doubts in respect thereto resolved in favor of the citizen.

Mutual Ben. L. Ins. Co. v. Herold, 198 Fed. 199, affirmed in 120 C. C. A. 256, 201 Fed. 918; Parkview Bldg. & L. Asso. v. Herold, 203 Fed. 876.

The English Income Tax Cases relied on by the government relate to statutes quite different from the one before the court, but even they serve to show that ore in place or its value is not income.

Rex v. Attwood, 6 Barn. & C. 277; Troy Iron & Nail Factory v. Corning, 45 Barb. 247; Betts v. Betts, 4 Abb. N. C. 400; Jarvis, Income Tax, 1912 ed. p. 53; Addie & Sons v. Internal Revenue (1875) 12 Scot. L. R. 274; Miller v. Farie (1878) 16 Scot. L. R. 189, 6 R. 270; Alianza Co. v. Bell [1906] A. C. 18, 75 L. J. K. B. N. S. 44, 54 Week. Rep. 413, 93 L. T. N. S. 705, 22 Times L. R. 94, [1905] 1 K. B. 190, 74 L. J. K. B. N. S. 219, 53 Week. Rep. 257, 92 L. T. N. S. 184, 21 Times L. R. 134; Forder v. Handyside & Co. L. R. 1 Exch. Div. 233, 45 L. J. Exch. N. S. 809, 35 L. T. N. S. 62, 24 Week. Rep. 764; Gillatt v. Colquhoun, 33 Week. Rep. 258; Smith v. Westinghouse Brake Co. 4 Times L. R. 649; Edinburgh Southern Cemetery Co. v. Inland Revenue (1889) 27 Scot. L. R. 71, 17 R. I. 154; Morant v. Wheal Grenville Min. Co. 71 L. T. N. S. 758.

The value in place of ore that has been extracted from a mining property during a given year is a proper depreciation charge to be allowed in computing the tax.

T. D. 1571 Dec. 3, 1909, art. 4; T. D. 1606 Mar. 29, 1910, ¶¶ 72, 75; T. D. 1742 Dec. 15, 1911, ¶ 97; United States v. Nipissing Mines Co. 202 Fed. 803; Machen, Fed. Corp. Tax Law, §§ 53, 57.

Messrs. Charles S. Thomas, W. H. Bryant, George L. Nye, William P. Malburn, William Story, and William Story, Jr., also filed a brief as *amici curiæ*.

Assistant Attorney General Graham argued the cause and filed a brief for Howbert, Collector:

The corporation tax act applies to mining corporations.

Gay v. Baltic Min. Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312.

The proceeds of ore mined by a corporation on its own premises are income within the meaning of the act.

Ibid.; Clegg v. Rowland, L. R. 3 Eq. 368, 36 L. J. Ch. N. S. 137, 15 L. T. N. S. 385, 15 Week. Rep. 251; Daly v. Beckett, 24 Beav. 114, 3 Jur. N. S. 754, 5 Week. Rep. 514; Eley's Appeal, 103 Pa. 300; McClintock v. Dana, 106 Pa. 386; Raynolds v. Hanna, 55 Fed. 783; Shoemaker's Appeal, 106 Pa. 392; Com. v. Ocean Oil Co. 59 Pa. 61, 14 Mor. Min. Rep. 126; Com. v. Penn Gas Coal Co. 62 Pa. 241, 14 Mor. Min. Rep. 163.

The rule that corporations whose capital is intended to provide a permanent means of carrying on business must first charge off depletion in plant or stock has no application to a corporation whose sole purpose is to invest its capital in a specific piece of property like a mine, and afterwards to consume the property or extract its value at a profit.

Morawetz, Priv. Corp. 2d ed. § 442.

The payment of dividends by a mining company out of the proceeds of ore sold is not a payment out of capital.

Excelsior Water & Min. Co. v. Pierce, 90 Cal. 131, 27 Pac. 44; Lee v. Neuchatel Asphalte Co. L. R. 41 Ch. Div. 1, 58 L. J. Ch. N. S. 408, 61 L. T. N. S. 11, 37 Week. Rep. 321, 1 Megone, 140.

A mining company is not entitled to deduct the value in place of ore mined during the year as depreciation within the meaning of the corporation tax act.

Alianza Co. v. Bell [1904] 2 K. B. 666, [1905] 1 K. B. 184, 74 L. J. K. B. N. S. 219, 53 Week. Rep. 257, 92 L. T. N. S. 184, 21 Times L. R. 134, [1906] A. C. 18, 75 L. J. K. B. N. S. 44, 54 Week. Rep. 413, 93 L. T. N. S. 705, 22 Times L. R. 94; Coltness Iron Co. v. Black, L. R. 6 App. Cas. 315, 51 L. J. Q. B. N. S. 626, 45 L. T. N. S. 145, 29 Week. Rep. 717, 46 J. P. 20.

Mr. Justice Pitney delivered the opinion of the court:

This action was brought in the district court of the United States by Stratton's Independence, Limited, a British corporation carrying on mining operations in the state of Colorado upon mining lands owned by itself, to recover certain moneys paid under protest for taxes assessed and levied for the years 1909 and 1910 under the provisions of the corporation tax act, being § 38 of the act of August 5, 1909 (36 Stat. at L. 11, 112, chap. 6, U. S. Comp. Stat. Supp. 1911, pp. 741, 946). The case was tried upon an agreed statement of facts, from which it appears, as to the year 1909, that the company extracted from its lands during the year certain ores bearing gold and other precious metals, which were sold by it for sums largely in excess of the cost of mining, extracting, and marketing the same; that the gross sales amounted to $284,682.85, the cost of extracting, mining, and marketing amounted to $190,939.42, and "the value of said ores so extracted in the year 1909, when in place in said mine and before extraction thereof, was $93,743.43." With respect to the operations of

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the company for the year 1910, the agreed facts were practically the same, except as to dates and amounts. It does not appear that the so-called "value of the ore in place," or any other sum, was actually charged off upon the books of the company as depreciation. Upon this state of facts each party moved the court for a directed verdict, at the same time presenting for consideration certain questions of law, and among them the following:

"1. Is the value of the ore in place that was extracted [407] from the mining property of the plaintiff during the years in question properly allowable as depreciation in estimating the net income of the plaintiff subject to taxation under the act of Congress of August 5, 1909 (36 Stat. at L. chap. 6, p. 11, U. S. Comp. Stat. Supp. 1911, p. 741)?

"2. Is the right to such credit affected by the fact that the plaintiff does not carry such items on its books in a depreciation account?"

The court directed a verdict in favor of the plaintiff with respect to certain amounts that were undisputed and concerning which no question is now raised; but directed a verdict in favor of the defendant with respect to so much of the taxes paid as represented the value in place of the ore that was extracted during the years in question, overruling the contention that such value was properly allowable as depreciation in estimating the net income of the plaintiff. To this ruling proper exceptions were taken. The resulting judgment having been removed by writ of error to the circuit court of appeals, that court certifies that the following questions of law are presented to it, the decision of which is indispensable to a determination of the cause, and upon which it therefore desires the instruction of this court:

"I. Does § 38 of the act of Congress entitled, 'An Act to Provide Revenue, Equalize Duties, and Encourage the Industries of the United States, and for Other Purposes,' approved August 5, 1909 (36 Stat. at L. p. 11, chap. 6, U. S. Comp. Stat. Supp. 1911, p. 741), apply to mining corporations?

"II. Are the proceeds of ores mined by a corporation from its own premises income within the meaning of the aforementioned act of Congress?

"III. If the proceeds from ore sales are to be treated as income, is such a corporation entitled to deduct the value of such ore in place and before it is mined as depreciation within the meaning of § 38 of said act of Congress?"

[408] The provisions of § 38 are set forth in the margin.†

The principal grounds upon which it is contended that the questions ought to receive answers favorable to the company are expressed in various forms; *viz.*, that mining corporations are *sui generis*, because the [409] natural enjoyment of mining lands necessarily results in the waste of the estate; that the true value thereof is impossible of accurate determination, and hence mining corporations are not included in general classifications of corporations as such classifications are employed in other legislation; that the provisions of § 38 do not fit [410] the conditions of a mining corporation; that such corporations are not in truth engaged in "carrying on business" within the meaning of the act; that the application of the act to them results in a tax upon the capital, while as applied to other corporations it does not result in such a tax, the result being an inequality of operation that is [411] inherently unjust; that the proceeds of mining operations do not represent values created by or incident to the business activities of such a corporation, and therefore cannot be a bona fide measure of a tax leveled at such corporate business activities; that the proceeds of mining [412] operations result from a conversion of the capital represented by real estate into capital represented by cash, and are in no true sense income; and that to measure the tax by the excess of receipts for ore marketed over the cost of mining, extracting, and marketing the same, is [413] equivalent to a direct tax upon the property, and hence unconstitutional. Next, assuming the proceeds of ore are to be treated as income within the meaning of the act, it is yet insisted that such proceeds result solely

†Sec. 38. That *every corporation*, joint stock company, or association, *organized for profit and having a capital stock represented by shares*, and every insurance company, now or hereafter organized under the laws of the United States or of any state or territory of the United States, or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter *organized under the laws of any foreign country, and engaged in business in any state or territory of the United States*, or in Alaska or in the District of Columbia, *shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation*, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance

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from the depletion of capital, and are therefore deductible as depreciation under the provisions of the act.

We do not think it necessary to follow the argument through all its refinements. The pith of it is that mining corporations engaged solely in mining upon their own premises have but one kind of assets, and that in the ordinary use of them the enjoyment of the assets and the wasting thereof are in direct proportion, and proceed *pari passu;* and hence that a mining corporation is not engaged in business, properly speaking, but is merely occupied in converting its capital assets from one form into another, and that a tax upon the doing of such a business, where the tax is measured by the value of the property owned by the corporation, would be in excess of the constitutional limitations that existed at the time of the passage of the act of 1909, as laid down in Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, s. c., 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912.

The peculiar character of mining property is sufficiently obvious. Prior to development it may present to the naked eye a mere tract of land with barren surface, and of no practical value except for what may be found beneath. Then follow excavation, discovery, development, extraction of ores, resulting eventually, if the process be thorough, in the complete exhaustion of the mineral contents so far as they are worth

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companies, subject to the tax hereby imposed; or *if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States* and its territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; provided, however, that nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders, or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.

Second. *Such net income shall be ascertained by deducting from the gross amount of the income of such corporation,* joint stock company or association, or insurance company, *received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income* in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) *all losses actually sustained within the year and not compensated by insurance, or otherwise including a reasonable allowance for depreciation of property, if any,* and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts, and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association, or trust company, all interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any state or territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; provided, that *in the case of a corporation,* joint stock company or association, or insurance company, *organized under the laws of a foreign country, such net income shall be ascertained by deducting from the gross amount of its income received within the year from business transacted and capital invested within the United States* and any of its territories, Alaska, and the District of Columbia, (first) *all the ordinary and necessary expenses actually paid within the year out of earnings* in the maintenance and operation of its business and property within the United States and its territories, Alaska, and the District of Columbia, including all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property; (second) *all losses actually sustained within the year in business conducted by it within the United States* or its territories, Alaska, or the District of Columbia, not compensated by insurance or otherwise, *including a reasonable allowance for depreciation of property, if any,* and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts, and the net addition, if any, required by law to be made within

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removing. Theoretically, and according to the argument, the entire value of the mine, as ultimately developed, existed from the beginning. Practically, however, and from the commercial standpoint, the value—that is, the exchangeable or market value—depends upon different considerations. Beginning from little, when the existence, character, and extent of [414] the ore deposits are problematical, it may increase steadily or rapidly so long as discovery and development outrun depletion, and the wiping out of the value by the practical exhaustion of the mine may be deferred for a long term of years. While not ignoring the importance of such considerations, we do not think they afford the sole test for determining the legislative intent.

As has been repeatedly remarked, the corporation tax act of 1909 was not intended to be and is not, in any proper sense, an income tax law. This court had decided in the Pollock Case that the income tax law of 1894 amounted in effect to a direct tax upon property, and was invalid because not apportioned according to population, as prescribed by the Constitution. The act of 1909 avoided this difficulty by imposing not an income tax, but an excise tax upon the conduct of business in a corporate capacity, measuring, however, the amount of tax by the income of the corporation, with certain qualifications prescribed by the act itself. Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; McCoach v. Minehill & S.

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the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness, not exceeding the proportion of its paid-up capital stock outstanding at the close of the year, which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its territories, Alaska, and the District of Columbia bears to the gross amount of its income derived from all sources within and without the United States; (fourth) the sums paid by it within the year for taxes imposed under the authority of the United States or of any state or territory thereof; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, and insurance companies, subject to the tax hereby imposed. In the case of assessment insurance companies the actual deposit of sums with state or territorial officers, pursuant to law, as additions to guaranty or reserve funds, shall be treated as being payments required by law to reserve funds.

Third. There shall be deducted from the amount of the net income of each of such corporations, joint stock companies or associations, or insurance companies, ascertained as provided in the foregoing paragraphs of this section, the sum of five thousand dollars, and said tax shall be computed upon the remainder of said net income of such corporation, joint stock company or association, or insurance company for the year ending December 31, 1909, and for each calendar year thereafter; and *on or before the first day of March*, 1910, *and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice president, or other principal officer, and its treasurer or assistant treasurer, shall be made by each of the corporations*, joint stock companies or associations, and insurance companies, *subject to the tax imposed by this section*, to the collector of internal revenue for the district in which such corporation, joint stock company or association, or insurance company, has its principal place of business, or, *in the case of a corporation*, joint stock company or association, or insurance company, *organized under the laws of a foreign country, in the place where its principal business is carried on within the United States*, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth, (first) the total amount of the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year; (second) the total amount of the bonded and other indebtedness of such corporation, joint stock company or association, or insurance company, at the close of the year; (*third*) *the gross amount of the income of such corporation*, joint stock company or association, or insurance company, received during such year *from all sources, and if organized under the laws of a foreign country the gross amount of its income received within the year from business transacted and capital invested within the United States* and any of its territories, Alaska, and the District of Columbia; also the amount received by such corporation, joint stock company or association, or insurance company, within the year by way of dividends upon stock of other corporations, joint stock companies or associations or insurance companies, subject to the tax imposed by this section; (fourth) the total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and properties of such corporation, joint stock company or association, or insurance company, within the year, stating separately all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property, and, if organized under the laws of a foreign country, the amount so paid in the maintenance and operation of its business within the United States and its territories, Alaska, and the District of Columbia; (*fifth*) *the total amount of all*

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H. R. Co. 228 U. S. 295, 57 L. ed. 842, 33 Sup. Ct. Rep. 419; United States v. Whitridge (decided at this term, 231 U. S. 144, ante, 159, 34 Sup. Ct. Rep. 24).

For this and other obvious reasons we are little aided by a discussion of theoretical distinctions between capital and income. Such refinements can hardly be deemed to have entered into the legislative purpose. Of course, if it were demonstrable that to read the act according to its letter would render it unconstitutional, or glaringly unequal, or palpably unjust, a reasonable ground would exist for construing it according to its spirit rather than its letter. But in our opinion the act is not fairly open to this criticism. It is not correct, from either the theoretical or the practical standpoint, to say that a mining corporation is not engaged in business, but is merely occupied in converting its capital assets from one form into another. The sale outright of a mining property might be fairly described as a mere conversion of the capital from land [415] into money. But when a company is digging pits, sinking shafts, tunneling, drifting, stoping, drilling, blasting, and hoisting ores, it is employing capital and labor in transmuting a part of the realty into personalty, and putting it into marketable form. The very process of mining is, in a sense, equivalent in its results to a manufacturing process. And, however the operation shall be described, the transaction is indubitably "business" within the fair meaning of the act of 1909; and the gains derived from it are properly and strictly the income from that business; for "income" may be defined as the gain derived from capital, from labor, or from both combined, and here we have combined operations of capital and labor. As to the alleged inequality of operation between mining corporations and others, it is of course true that the revenues derived from the working of mines result to some extent in the exhaustion of the capital. But the same is true of the earnings of the human brain and hand when unaided by capital, yet such earnings are commonly dealt with in legislation as income. So it may be said of many manufacturing corporations that are clearly subject to the act of 1909, especially of those that have to do with the production of patented articles; although it may be foretold from the beginning that the manufacture will be profitable only for a limited time, at the end of which the capital value of the plant must be subject to material depletion, the annual gains of such corporations are certainly to be taken as income for the purpose of measuring the amount of the tax.

It seems to us that the first two questions certified must be answered in the affirmative principally for two reasons. First, because mining corporations are within the general description of § 38, which comprises "*every corporation*, joint stock company, or association *organized for*

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losses actually sustained during the year, and not compensated by insurance or otherwise, *stating separately any amounts allowed for depreciation of property*, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; *and in the case of a corporation*, joint stock company or association, or insurance company, *organized under the laws of a foreign country, all losses actually sustained by it during the year, in business conducted by it within the United States* or its territories, Alaska, and the District of Columbia, not compensated by insurance or otherwise, *stating separately any amounts allowed for depreciation of property*, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve fund; (sixth) the amount of interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking associations, or trust company, stating separately all interest paid by it within the year on deposits; or in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, interest so paid on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the proportion of its paid-up capital stock outstanding at the close of the year, which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its territories, Alaska, and the District of Columbia, bears to the gross amount of its income derived from all sources within and without the United States; (seventh) the amount paid by it within the year for taxes imposed under the authority of the United States or any state or territory thereof, and separately the amount so paid by it for taxes imposed by the government of any foreign country as a condition to carrying on business therein; (eighth) the net income of such corporation, joint stock company or association, or insurance company, after making the deductions in this section authorized. All such returns shall, as received, be transmitted forthwith by the collector to the Commissioner of Internal Revenue.

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profit, and having a capital stock represented by shares, . . . and *engaged in business* in any state or territory of the United [416] States;" and, secondly, because the act *specifies those classes of corporations that are to be exempt* from its operation, and mining corporation are not among them. Those exempted are labor, agricultural, or horticultural organizations, fraternal beneficiary societies, orders or associations operating under the lodge system, domestic building and loan associations, corporations and associations organized and operated for religious, charitable, or educational purposes, etc. Moreover, the section imposes "a special excise tax with respect to the carrying on or doing business by such corporation," etc. That mining companies are doing business, within the fair intent and meaning of this clause, seems to us entirely plain, for reasons already given. The conduct of such business results in profit, for it cannot be seriously contended that the ores are not worth more at the mine mouth than they were worth in the ground, *plus* the cost of mining. Corporations engaged in such business share in the benefits of the Federal government, and ought as reasonably to contribute to the support of that government as corporations that conduct other kinds of profitable business.

As to what should be deemed "income" within the meaning of § 38, it of course need not be such an income as would have been taxable as such, for at that time (the 16th Amendment not having been as yet ratified) income was not taxable as such by Congress without apportionment according to population, and this tax was not so apportioned. Evidently Congress adopted the income as the measure of the tax to be imposed with respect to the doing of business in corporate form because it desired that the excise should be imposed, approximately, at least, with regard to the amount of benefit presumably derived by such corporations from the current operations of the government. In Flint v. Stone Tracy Co. 220 U. S. 107, 165, 55 L. ed. 107, 419, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1912, it was held that Congress, in exercising the right to tax a legitimate subject of taxation as a franchise [417] or privilege, was not debarred by the Constitution from measuring the taxation by the total income, although derived in part from property which, considered by itself, was not taxable. It was reasonable that Congress should fix upon gross income, without distinction as to source, as a convenient and sufficiently accurate index of the importance of the business transacted. And from this point of view, it makes little difference that the income may arise from a business that theoretically or practically involves a wasting of capital.

Moreover, Congress evidently intended to adopt a measure of the tax that should be easy of ascertainment and simply and readily applied in practice. The act prescribed that the tax should be "equivalent to one per centum upon the entire net income over and above $5,000 received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations," etc., or, with respect to foreign corporations, "upon the amount of net income over and above $5,000, received by it from business transacted and capital invested within the United States," etc. And the net income was to be ascertained by taking, first, the "gross amount of the income of such corporation . . . received within the year from all sources," or, in the case of foreign corporations, "from business transacted and capital invested within," etc., and deducting therefrom losses sustained, interest paid, etc. And the return was to be made under oath by the president and treasurer, or other officers having like duties, indicating in the clearest manner that it was to set forth *data* that with proper accounting would appear upon the books of the corporation. We have no difficulty, therefore, in concluding that the proceeds of ores mined by a corporation from its own premises are to be taken as a part of the gross income of such corporation. Congress no doubt contemplated that such corporations, amongst others, were doing business [418] with a wasting capital, and for such wastage they made due provision in declaring that from the gross income there should be deducted (*inter alia*) "all losses actually sustained within the year," including "a reasonable allowance for depreciation of property, if any," etc.

This brings us to the third question, which is whether such a mining corporation is entitled to deduct the value of ore in place and before it is mined, as depreciation within the meaning of § 38. This question, however, is to be read in the light of the issue that is presented to the circuit court of appeals for determination, as recited in the certificate. From that certificate it appears that the case was submitted to the trial court and a verdict directed upon an agreed statement of facts, and in that statement the gross proceeds of the sale of the ores during the year were diminished by the moneys expended in extracting, mining, and marketing the ores, and the precise difference was taken to be the value of the ores when in place in the mine.

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That we do not misconstrue the certificate, and that, on the contrary, the parties advisedly adopted this definition of "value of the ore in place," is apparent not only from the form of the agreed statement of facts, but from the arguments presented here in behalf of the plaintiff. The contention is that if the proceeds of ore sales are to be treated as income, the value of the ore in place and before it is mined is to be deducted as depreciation, and that such value is to be arrived at by the process indicated. Briefs submitted in behalf of *amici curiæ* have suggested other modes for determining depreciation; but plaintiff stands squarely upon the ground indicated by the certificate, as the following excerpts from the brief will show: "Assuming, then, that the proceeds of ore are to be treated as income within the meaning of the act. we submit that *such proceeds result solely from depletion of capital*, and are therefore deductible as depreciation under the [419] provisions [of the act] set out above. . . . And we contend that if a part of the capital assets are removed and sold, the property, as it originally stood, is actually depreciated in value to the exact extent of such removal. As an actual matter of experience, the original cost of the property must, from its very nature, be highly speculative. The values in the property are invisible and impossible of determination. They may be worth many times the cost, or they may be worth nothing. . . . The value of the ore in sight does represent a part of the capital, but there is no warrant for limiting it to this amount, nor is there any warrant for limiting the value of ore bodies thereafter discovered in any case to a standard fixed before their discovery, and therefore, of necessity, purely conjectural. . . . The true capital of a mining corporation is the true value of the minerals within the limits of its properties, irrespective of developed ore bodies or those known to exist at any one moment. Investigation or development may demonstrate the existence of values theretofore unknown, but this results in no addition to the actual capital. It remains the same as it was before. . . ." And again: "With every dollar's worth removed, the land from which it is taken contains that much less of value; the corporation owns precisely that much less real property than it possessed before; for every dollar of cash received it relinquishes an equivalent amount of ore in place, and makes no gain or profit by the exchange."

Reading these extracts in connection with what is contended respecting the first and second questions,—to the effect that mining corporations are not "doing business," but are merely converting their capital assets from one form into another,—it is clear that a definition of the "value of the ore in place" has been intentionally adopted that excludes all allowance of profit upon the process of mining, and attributes the entire profit upon the mining [420] operations to the mine itself. In short, the parties propose to estimate the depreciation of a mining property attributable to the extraction of ores according to principles that would be applicable if the ores had been removed by a trespasser.

It is at the same time obvious that any method of stating the account that excludes all element of gain from the process of mining must, through one process or another, exempt mining companies from liability to tax under the act of 1909 with respect to their mining operations. And so, an affirmative answer to the third question as propounded would be the same in effect as a negative answer to the first or the second. For it is a matter of little or no moment whether it is to be said (a) that mining corporations are not "engaged in business" at all, or (b) that they are engaged in business, but the proceeds of ore mined are not income, or (c) that such proceeds are income, but that there must be allowed as depreciation all that part of the proceeds which remains after paying the bare outlays of the business. In either case mining corporations would be exempt from the tax.

In our opinion, there are at least two insuperable obstacles in the way of returning an affirmative answer to the third question as certified.

In the first place, it is fallacious to say that, whatever may have been the original cost of a mining property or the cost of developing it, if in fact it afterwards yield ores aggregating many times its original cost or market value, this result merely proves and at the same time measures the intrinsic value that existed from the beginning. We are here seeking the correct interpretation and construction of an act of legislation that was, at least, designed to furnish a practicable mode of raising revenue for the support of the government, and to do this in part by imposing annual taxes upon corporations organized for profit, and by measuring the amount of the contribution [421] to be required from each corporation according to its annual income. The act deals with corporations engaged in actual business transactions, and presumably conducted according to ordinary business principles. It was of course contemplated that the income might be derived from the employment of property in business, and that this property might become

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more or less exhausted in the process; and because of this, a reasonable allowance was to be made for depreciation of it, if any. But plainly, we think, the valuation of the property and the amount of the depreciation were to be determined not upon the basis of latent and occult intrinsic values, but upon considerations that affect market value and have their influence upon men of affairs charged with the management of the business and accounting of corporations that are organized for profit and are engaged in business for purposes of profit.

And, secondly, assuming the depletion of the mineral stock is an element to be considered in determining the reasonable depreciation that is to be treated as a loss in the ascertainment of the net income of a mining company under the act, we deem it quite inadmissible to estimate such depletion as if it had been done by a trespasser, to whom all profit is denied.

With respect to the proper measure of damages where ore has been unlawfully mined by one person upon the land of another, there is much conflict of authority. Different modes of determining the damages have been resorted to, dependent sometimes upon the form of the action, whether trespass or trover; sometimes upon whether the case arose at law or in equity; and often upon whether the trespass was wilful or inadvertent. See E. E. Bolles Woodenware Co. v. United States, 106 U. S. 432, 27 L. ed. 230, 1 Sup. Ct. Rep. 398, and cases cited; Benson Min. & Smelting Co. v. Alta Min. & Smelting Co. 145 U. S. 428, 434, 36 L. ed. 762, 765, 12 Sup. Ct. Rep. 877, 17 Mor. Min. Rep. 488; Pine River Logging & Improv. Co. v. United States, 186 U. S. 279, 293, 46 L. ed. 1164, 1171, 22 Sup. Ct. Rep. 920; United States v. St. Anthony R. Co. 192 U. S. 524, 542, 48 L. ed. 548, 555, 24 Sup. Ct. Rep. 333; Martin v. Porter (1839) 5 Mees. & W. 352, 2 Horn & H. 70, 17 Eng. Rul. Cas. 841, 10 Mor. Min. Rep. 75; [422] Jegon v. Vivian (1871) L. R. 6 Ch. 742, 760, 40 L. J. Ch. N. S. 389, 19 Week. Rep. 365, 17 Eng. Rul. Cas. 843, 8 Mor. Min. Rep. 628; Livingstone v. Rawyards Coal Co. (1880) L. R. 5 App. Cas. 25, 34, 42 L. T. N. S. 334, 28 Week. Rep. 357, 44 J. P. 392, 10 Mor. Min. Rep. 291; Coal Creek Min. & Mfg. Co. v. Moses, 15 Lea, 300, 54 Am. Rep. 415, 15 Mor. Min. Rep. 544; Winchester v. Craig, 33 Mich. 205. See also English and American Notes to Martin v. Porter, and Jegon v. Vivian, 17 Eng. Rul. Cas. 873, 876, etc. We are not at this time concerned with this vexed question, beyond saying that the rules applicable to trespassers can have only a modified application to the case of a mine owner conducting mining operations upon its own lands, where the question is,—What is the income derived from the business?—and the incidental question,—What is the reasonable depreciation, if any, of the mining property?

What has been said necessitates a negative answer to the third question as certified. And we shall not go further into the question of depreciation. The case comes here under § 239, Judicial Code [36 Stat. at L. 1157, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 228] (derived from § 6 of the Evarts act, 26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549). It is established that in the exercise of this jurisdiction this court, unless it see occasion to require the whole record to be sent up for consideration, is to make answer respecting the several propositions of law that are certified, and is not to go into questions of fact, or of mixed law and fact. Our Rule 37 requires that the certificate shall contain a proper statement of the facts upon which the questions of law arise, and we deal with the facts as thus certified, and not otherwise. Graver v. Faurot, 162 U. S. 435, 437, 40 L. ed. 1030, 1031, 16 Sup. Ct. Rep. 799; Cross v. Evans, 167 U. S. 60, 63, 42 L. ed. 77, 78, 17 Sup. Ct. Rep. 733; United States v. Union P. R. Co. 168 U. S. 505, 512, 42 L. ed. 559, 561, 18 Sup. Ct. Rep. 167; Emsheimer v. New Orleans, 186 U. S. 33, 46 L. ed. 1042, 22 Sup. Ct. Rep. 770; Cincinnati, H. & D. R. Co. v. McKeen, 149 U. S. 259, 37 L. ed. 725, 13 Sup. Ct. Rep. 840.

It would therefore be improper for us at this time to enter into the question whether the clause, "a reasonable allowance for depreciation of property, if any," calls for an allowance on that account in making up the tax, where [423] no depreciation is charged in practical bookkeeping; or the question whether depreciation, when allowable, may properly be based upon the depletion of the ore supply estimated otherwise than in the mode shown by the agreed statement of facts herein; for to do this would be to attribute a different meaning to the term "value of the ore in place" than the parties have put upon it, and to instruct the circuit court of appeals respecting a question about which instruction has not been requested, and concerning which it does not even appear that any issue is depending before that court.

The first and second questions certified will be answered in the affirmative; and the third question will be answered in the negative.

Mr. Chief Justice White, Mr. Justice McKenna, and Mr. Justice Holmes dissent with respect to the answer made to the third question.

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KANSAS CITY SOUTHERN RAILWAY COMPANY, Appt.,
v.
UNITED STATES OF AMERICA and the Interstate Commerce Commission.

(See S. C. Reporter's ed. 423–457.)

Interstate Commerce Commission — powers — accounting.

1. The authority of the Interstate Commere Commission, under the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), § 20, as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), to prescribe a uniform system of accounting and bookkeeping for the carriers subject to that act, is not exceeded because such uniformity requirements control or tend to control the conduct of the carrier in its capacity as a public servant engaged in interstate commerce.

[For other cases, see Interstate Commerce Commission, I., in Digest Sup. Ct. Supp. 1913.]

Constitutional law — delegation of power — Interstate Commerce Commission.

2. Legislative power is not unconstitutionally delegated to the Interstate Commerce Commission by the act of February 4, 1887, § 20, as amended by the act of June 29, 1906, authorizing the Commission to prescribe a uniform system of accounting and bookkeeping for the carriers subject to that act, even though such uniformity requirements may control or tend to control the conduct of the carrier in its capacity as a public servant engaged in interstate commerce.

[For other cases, see Constitutional Law, III. b, 3, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — accounting — operating expenses — property abandoned as incident to improvement.

3. The regulations of the Interstate Commerce Commission adopted in the exercise of its power under the act of February 4, 1887, § 20, as amended by the act of June 29, 1906, to prescribe a uniform system of accounting and bookkeeping for the carriers subject to that act, do not amount to an abuse of such power because they reject the theory that the cost of property abandoned as an incident to permanent improvement should remain in the property account, rather than be charged to operating expenses.

[For other cases, see Interstate Commerce Commission, I., in Digest Sup. Ct. Supp. 1913.]

Interstate Commerce Commission — accounting — grade revision — property account — operating expenses.

4. The powers of the Interstate Commerce Commission, under the act of February 4, 1887, § 20, as amended by the act of June 29, 1906, to prescribe a uniform system of accounting and bookkeeping for the carriers subject to that act, were not abused by the adoption of regulations under which a railway company is not permitted to carry into its property account the full cost of reducing grades by removing short stretches of track to a new roadbed built on adjacent land, but is required first to deduct from such cost the estimated replacement cost of the portions of track no longer used, less salvage, carrying the difference only into the property account, and charging the estimated replacement cost to operating expenses, although had the railway company adopted the more expensive method of lowering the roadbed on the existing right of way, it could, under such regulations, have carried into its property account the full cost of the improvement.

[For other cases, see Interstate Commerce Commission, I., in Digest Sup. Ct. Supp. 1913.]

Constitutional law — due process of law — regulation of carriers — preferred stockholders.

5. The fact that preferred stockholders may be deprived of a considerable part of the noncumulative dividends from net earnings, to which they would otherwise be entitled, by the enforcement of the regulation adopted by the Interstate Commerce Commission in the exercise of its authority under the act of February 4, 1887, § 20, as amended by the act of June 29, 1906, to prescribe a uniform system of accounting and bookkeeping for the carriers subject to that act, which regulations reject the theory that the cost of property abandoned as an incident to permanent improvement should remain in the property account rather than be charged to operating expenses, does not justify the conclusion that such stockholders are thereby deprived of their property without due process of law.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — accounting — property account — operating expenses.

6. A carrier is not relieved from compliance with the regulations of the Interstate Commerce Commission, adopted in the exercise of its power under the act of February 4, 1887, § 20, as amended by the act of June 29, 1906, to prescribe a uniform system of accounting and bookkeeping for the carriers subject to that act, which regulations reject the theory that the cost of property abandoned as an incident to permanent improvement should remain in the property account rather than be charged to operating expenses, because they were promulgated after such carrier had mortgaged its property and issued bonds for the purpose of financing such improvement, since whatever was done with reference to authorizing the improvement and financing the cost from the bond issue was so done subject to displacement by the exercise of the powers

NOTE.—On delegation by legislature of power to regulate carriers—see note to State v. Atlantic Coast Line R. Co. 32 L.R.A.(N.S.) 639.

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previously conferred upon the Interstate Commerce Commission.

[For other cases, see Interstate Commerce Commission, I., in Digest Sup. Ct. Supp. 1913.]

Interstate Commerce Commission — judicial review — accounting regulations.

7. Judicial belief that the cost of property abandoned by a carrier as an incident to permanent improvements should be charged to accumulated surplus or to profit and loss is not a sufficient ground for holding that the Interstate Commerce Commission abused its powers when exercising its authority under the act of February 4, 1887, § 20, as amended by the act of June 29, 1906, to prescribe a uniform system of accounting and bookkeeping for the carriers subject to that act, because, under these regulations, such cost must be charged to operating expenses.

[For other cases, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — accounting — improvements — profit and loss — operating expenses.

8. The Interstate Commerce Commission in prescribing, pursuant to the act of February 4, 1887, § 20, as amended by the act of June 29, 1906, a uniform system of accounting and bookkeeping for the carriers subject to that act, cannot be said to have abused its powers because, under its regulations, a railway company erecting a new and enlarged shop and terminal plant upon a different location from that of the existing shop and terminal plant, which are to be abandoned, cannot charge the estimated value of such abandoned property against the accumulated surplus as represented in the profit and loss account, but must charge to operating expenses the estimated replacement cost, less salvage, of such existing shop and plant.

[For other cases, see Interstate Commerce Commission, I., in Digest Sup. Ct. Supp. 1913.]

[No. 571.]

Argued October 29 and 30, 1913. Decided December 1, 1913.

APPEAL from the United States Commerce Court to review a decree dismissing the petition in an action to enjoin the enforcement of certain regulations of the Interstate Commerce Commission relative to the uniform accounting and bookkeeping system prescribed for interstate railway carriers. Affirmed.

See same case below, 204 Fed. 641.

Statement by Mr. Justice Pitney:

This is an appeal from a decree of the commerce court, dismissing appellant's petition in an action brought to have certain regulations of the Interstate Commerce Commission relative to the method of keeping the accounts of carriers declared invalid, and to enjoin the enforcement thereof. 204 Fed. 641. The regulations are contained in the "Classification of Expenditures for Additions and Betterments of Steam Roads," effective July 1st, 1909, and the First Revised Issue thereof, effective July 1, 1910.

The facts as set forth in appellant's brief may be summarized as follows:

Appellant is engaged in interstate commerce. Its main line is about 786 miles in length, and extends from Kansas City to Port Arthur, on the Gulf of Mexico, traversing the states of Missouri, Kansas, Oklahoma, Arkansas, Louisiana, and Texas. The road was built years ago, when the country was heavily timbered and sparsely settled, and the traffic was correspondingly small. The traffic would not [426] then support, nor could capital be obtained for, an expensively constructed road; and in consonance with the general practice in the development of the country, the road was built with rather heavy ruling grades. But it was not defectively or improperly constructed or located; it had substantially the same grades as other roads then constructed in the West; and it was adequate to serve the then-existing needs of the country. A railroad with heavy grades is, of course, more cheaply constructed than a road of low grades. And a road of heavy grades is generally adequate in a new country, where the volume of traffic offered is small, the train loads light, and the trains few.

The ruling maximum grade of appellant's line as originally constructed was 1 per cent; and in the mountain district as high as 1.35 per cent. The evidence is undisputed that it was properly located, well constructed, and ample for the needs of the country. In the course of time, with the development of the country, and the resultant increase in traffic, whereby the limit of the road's capacity was being approached, the conditions warranted and rendered desirable such additions or improvements as would enlarge the road's capacity, and permit traffic to be moved more rapidly and economically.

Two methods of increasing the capacity of the road were presented: one by double-tracking, the other by lowering the grades and thus permitting traffic to be moved more rapidly. The road was in active competition with powerful rivals operating in the same general territory; among them, the Southern Pacific, the Missouri, Kansas, & Texas, the Missouri Pacific, the St. Louis Southwestern, the Texas & Pacific, the St. Louis & San Francisco, the Atchison, Topeka, & Sante Fe, and the Rock Island. The character of the road as a trunk line, hav-

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ing a long average haul and the prevalence of low-class traffic,—timber, coal, oil, and like commodities,—necessarily entailed a low average freight rate; its average rates per ton [427] per mile being lower than those of any of its competitors above named.

Under these conditions the management found that the most desirable plan was to lower the grades of the road, and thus to increase its capacity, procure economy in operation, and render better service to the public. Two methods of reducing the grades at various points along the line were presented: one by raising or lowering the roadbed on the existing right of way; the other by the construction of short sections of new road in substitution for portions of the road, in instances where the same result could be thus obtained at less cost. The program of improvement contemplated, therefore, not only many changes on the original right of way, but also a number of changes by the substitution of short sections of road on new ground, where that method was more economical.

The first six sections of the road where new locations were utilized are covered by the petition herein. Other similar changes are being made as the work proceeds, which will cover several years, and is estimated to cost $3,000,000. The road at these six points was in no way worn out, was fully maintained, and was capable of performing for an indefinite term the function for which it was originally constructed. All of these changes are being made for the purpose of increasing the capacity of the line, of securing economy in operation, and of rendering improved service to the public.

At the six sections of the road in question it was found by the estimates of the engineers that the cost of securing the required gradient upon the original roadbed would be $1,230,318.99; but that the same result could be obtained by means of re-locations upon adjacent land for a net expenditure of $629,399.74.

The actual expenditure on these six new locations, as ascertained on completion of the work (after the filing of the petition), was $763,798; and the testimony shows [428] that had the work been done on the original roadbed the cost would have been increased over the estimates in an equal or greater proportion; the variation being due to increase in the cost of labor, materials, etc. For present purposes, the figures set forth in the petition are adopted.

The grade revisions at the six sections of line involved herein having been completed by removing the tracks to adjacent parcels of ground, which were procured and substituted for the original parcels, the use of the latter parcels was, of course, discontinued.

The expenditure required to improve the property by bringing it to the desired grade of $\frac{4}{10}$ of 1 per cent being deemed a capital expenditure, appellant's directors determined to finance the work by applying to it the proceeds of a bond issue. It is claimed to have been necessary to finance the improvements in this way if they were to be made at all, because the appellant did not have current earnings available for these improvements, and could not have financed its program, involving the revision of about 41 per cent of the entire line and an ultimate expenditure of several million dollars, in any other way than by raising capital for that purpose through the issuance of bonds.

Appellant, in order to raise funds for this and certain other purposes, made an issue of bonds secured by a second mortgage on its property. This was duly authorized by the directors and stockholders in the month of June, 1909; a portion of the bonds was sold and an initial sum of $1,250,000 thus obtained became applicable to the improvements referred to in the petition and other improvements in the grade. Additional bonds have since been issued as the work has proceeded.

In 1907, appellant began the payment of dividends at the rate of 4 per cent per annum upon its preferred stock, the total amount of which was $21,000,000, and has continued to pay such dividends each year until the present time. [429] These dividends are noncumulative and are payable only out of the earnings of the current year. The fact that appellant had paid its dividends for several years was a factor in its credit. Preferred dividends having been established, it is claimed that their discontinuance would have affected the credit of the road so seriously that it would have been unable except on prohibitive terms to dispose of additional bonds as further money was required from time to time during the progress of the work. It is further claimed that appellant was able to finance its improvements only out of the proceeds of a bond issue; and that it could not have financed them at all except by adopting the economical method of making a considerable part of the grade reductions by means of changes off the line of the right of way.

Appellant, having paid the cost of the six improvements out of its issue of bonds, was confronted with the regulations of the Commission bearing on the method of recording the transaction in its books of account. Except for those regulations, it is said that the full cost of the improvements would

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have been charged to the account of "Additions and Betterments,"—a subdivision of the property accounts,—and credited to the proceeds of the bonds, because that sum had been expended for additions and betterments, and because the bonds had supplied the funds. In the balance sheet the "Assets" would have shown an increment of approximately $629,399 under the subdivision of Additions and Betterments, and, *per contra*, the "Liabilities" would have shown a corresponding increase under the subdivision of "Bonds."

Under the regulations in question, it was found that if the improvements had been made on the original right of way, the entries would have been made as above indicated. But, with respect to improvements made off the right of way, different treatment was prescribed. Here the appellant was not permitted to carry into its property [430] accounts the full cost of the improvement, but was required first to deduct from the cost thereof the estimated replacement cost of the portions of track no longer used, the difference only being carried into the property accounts, and a sum equal to the estimated cost of replacing the old sections of track being charged to the operating expenses of that year.

The text of the Classification of Additions and Betterments relative to revisions made on the original line is as follows: "Grade Revisions.—(Reducing of grades by cutting down summits and raising sags without materially changing the alinement).—The amount to be charged to this account is the cost of additional grading done, including as a portion of such cost the rent and cost of operation of steam shovels and work trains; building temporary tracks for steam shovels and grading outfits; tools, etc., used in the work; raising or lowering existing bridges; increasing the length of culverts and replacing riprap at culvert ends; changing grade crossings for farm or country roads, highways, and streets, including crossing gates, highway crossing alarms, and watch houses."

Relative to changes off the original line the regulation is as follows: "Changes of Line.—(Construction of new lines for the purpose of improving grade or alinement).—The amount to be charged to this account is the difference between the cost of the new line and the cost of replacing in kind the line abandoned, exclusive of right of way."

The General Instructions contained in the Classification supplement these rules and prescribe charges to Operating Expenses as follows:

"5. In case it becomes necessary directly in connection with betterment or improvement work to abandon any property, the cost of replacing the abandoned property in kind, plus the cost of removal, but less the value of salvage, should be charged to the appropriate accounts under Operating Expenses. In case, however, the amount so [431] chargeable is large, and its inclusion in a carrier's operating expenses for a single year would unduly burden the operating expense accounts for that year, the carrier may, if so authorized upon application to the Interstate Commerce Commission, charge such cost to the Property Abandoned account provided in the Form of General Balance Sheet Statement, or to the reserve account mentioned in paragraph 6.

"6. When property is abandoned and not replaced, the original cost (estimated, if not known) should be credited to the appropriate Additions and Betterments Accounts and charged, less salvage, to Profit and Loss Account, to which should also be charged all incidental expenses directly connected with the abandonment. If so authorized upon application to the Interstate Commerce Commission, however, a carrier may set up depreciation accounts under 'Maintenance of Way and Structures,' for the purpose of creating a reserve to which (instead of Profit and Loss) should be charged the original cost, less salvage, of the property (other than land or equipment) abandoned, and all incidental expenses directly connected with the abandonment."

These are the regulations as they appeared in the Classification of 1909. In the First Revised Issue (1910) there were some slight changes, but none now important.

To restrain the enforcement of the regulations so far as they required or tended to require appellant to charge against its earnings the estimated replacement value (less salvage) of the six parcels of railroad line that was abandoned as an incident to grade reduction as above set forth was the principal object of the suit.

The petition sets forth the following as a second ground of complaint. As a part of its program of improvements, appellant is engaged in erecting a new and enlarged shop and terminal plant at Shreveport, upon a different location from that of the existing shop and terminal plant, [432] which latter are incidentally to be abandoned. It is claimed that the present shop and equipment are not worn out or obsolete, but are in good condition, and capable, with ordinary running repairs, of performing for an indefinite time the functions for which they were originally constructed. Appellant desires to charge the estimated value of the abandoned shop and terminal plant, amounting approximately to $100,000.

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against its accumulated surplus as represented in its Profit and Loss Account. The regulations of the Interstate Commerce Commission relative to accounting, however, prohibit this charge, and require that the estimated replacement cost (less salvage) of the existing shop and terminal plant shall be charged to the Operating Expense Account. An injunction against the enforcement of the regulations in this regard also was prayed.

Mr. Samuel Untermyer argued the cause, and, with Messrs. Walter C. Noyes, Arthur M. Wickwire, and Irwin Untermyer, filed a brief for appellant:

The power delegated to the Commission to prescribe the "form" of accounts cannot be extended so as to authorize the exercise of substantial powers of railway management not otherwise within its authority.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Louisville & N. R. Co. 73 Fed. 409; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 56 L. ed. 729, 32 Sup. Ct. Rep. 436.

Property abandoned as an incident to permanent improvements is not an operating expense.

Union P. R. Co. v. United States, 99 U. S. 402, 25 L. ed. 274; Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700; Lackawanna Iron & Coal Co. v. Farmers' Loan & T. Co. 176 U. S. 298, 44 L. ed. 475, 20 Sup. Ct. Rep. 363; Wood v. Guarantee Trust & S. D. Co. 128 U. S. 416, 32 L. ed. 472, 9 Sup. Ct. Rep. 131; Fordyce v. Omaha, K. C. & E. R. Co. 145 Fed. 544; Illinois Trust & Sav. Bank v. Doud, 52 L.R.A. 481, 44 C. C. A. 389, 105 Fed. 123; 18th Annual Rep. Statistics of Railways, p. 84; 19th Annual Rep. Statistics of Railways, pp. 11, 12.

The commerce court should have set aside the order complained of because it "was based upon the assumption by the Commission of the possession of power not conferred by law," and "the mere form given by the Commission to its action does not relieve the courts from the duty of reviewing and correcting an abuse of power."

Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288.

The re-enactment of language which has long been subject to administrative interpretation, such interpretation not being manifestly contrary to the language itself, is an enactment of the administrative interpretation.

Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; United States v. Falk, 204 U. S. 143, 51 L. ed. 411, 27 Sup. Ct. Rep. 191; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272.

The term "operating expenses" had a well-understood meaning at the time this statute was enacted. Congress knew the meaning of the term, and did not intend that the operating accounts should include items which, beyond all question, are not operating expenses. The requirement that the annual reports shall show the operating expenses is an express limitation upon the grant of power to prescribe the forms of the accounts, and hence the meaning of the term "operating expenses" cannot be given a false definition by the Commission.

United States v. United Verde Copper Co. 196 U. S. 207, 49 L. ed. 449, 25 Sup. Ct. Rep. 222.

Since the regulations in question compel the appellant to make false entries in its accounts, and thereby deprive the preferred stockholders of dividends to which they are lawfully entitled, the regulations are in violation of the 5th Amendment to the Constitution of the United States.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; Railroad Tax Case, 8 Sawy. 238, 13 Fed. 722, 116 U. S. 138, 29 L. ed. 589, 6 Sup. Ct. Rep. 317; Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 385, affirmed in 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115.

Mr. Charles W. Needham argued the cause and filed a brief for the Interstate Commerce Commission:

The power of Congress over interstate and foreign commerce has been declared to be plenary, with all the incidents of sovereignty that attend the manifestation and exercise and application of this power.

Gibbons v. Ogden, 9 Wheat. 1, 196, 6 L. ed. 23, 70; Lottery Case (Champion v. Ames) 188 U. S. 353, 47 L. ed. 500, 23 Sup. Ct. Rep. 321; Hoke v. United States, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; The Daniel Ball, 10 Wall. 557, 566, 19 L. ed. 999, 1002; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 497, 52 L. ed. 308, 28 Sup. Ct. Rep. 141; Second Employers' Liability Cases (Mondou

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v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 205, 56 L. ed. 729, 733, 32 Sup. Ct. Rep. 436.

Forms of accounts and reports have a substantial relation to the regulation of commerce. The original cost of a railroad, and its cost kept accurately up to date by proper charges and withdrawals from its property account, have a real and substantial relation to, and connection with, the cost of the transportation regulated. The need of this information is constant and vital in the regulation of railroad rates, and must be considered by Congress and by the Commission.

Smyth v. Ames, 169 U. S. 466, 541, 544, 547, 42 L. ed. 819, 847–849, 18 Sup. Ct. Rep. 418; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 215, 56 L. ed. 737, 32 Sup. Ct. Rep. 436.

The work of the Commission in preparing a detailed classification is only an extension of the congressional action. The whole must be considered as one fabric. Congress outlined the general plan, and left the details to be formulated by the agency it had created for that purpose.

Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; United States v. Grimaud, 220 U. S. 506, 515–517, 55 L. ed. 563, 567, 568, 31 Sup. Ct. Rep. 480; Light v. United States, 220 U. S. 523, 55 L. ed. 570, 31 Sup. Ct. Rep. 485; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 205, 56 L. ed. 729, 733, 32 Sup. Ct. Rep. 436.

In prescribing the classification of accounts, bookkeeping, and an annual balance sheet, the Commission was acting in purely a legislative capacity. The act did not require that any hearing be given to the carriers. Like Congress, the Commission was to inform itself upon the subject, and, in pursuance of the general instructions of Congress, contained in the act, was authorized to prescribe a uniform classification and system of accounts for all interstate carriers. The Commission was to fill in the details, and this involved a classification of the items going into the accounts. The proceedings by the Commission fall within the general category of administrative functions.

Buttfield v. Stranahan, 192 U. S. 470, 496, 497, 48 L. ed. 525, 535, 536, 24 Sup. Ct. Rep. 349; Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 56 L. ed. 729, 32 Sup. Ct. Rep. 436; Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 226, 53 L. ed. 227, 53 L. ed. 150, 158, 159, 29 Sup. Ct. Rep. 67.

Depreciation is an operating expense.

Montgomery, Auditing, Theory & Practice, 1912, p. 319.

It is not a question of evidence, it is a question of power; power of Congress to determine what its public records shall show; power to determine for the public what depreciation is, and where depreciation shall be charged in the accounts of railroads subject to the act; power to declare that the property account shall not be padded with wreckage.

Buttfield v. Stranahan, 192 U. S. 470, 496, 497, 48 L. ed. 525, 535, 536, 24 Sup. Ct. Rep. 349.

It has been repeatedly held by this court that, even as to orders entered by the Commission when acting as a quasi judicial body, it is a question of power, and not of expediency; that if the Commission had power to make the order, and it acted within the statute, and not arbitrarily or in bad faith, the courts will not review the Commission's conclusions of fact, or substitute the judgment of the court for the judgment of the Commission. If this be true of quasi judicial orders, it must be pre-eminently true of orders to effectuate a law of Congress. This has been uniformly held in reference to general orders made in pursuance of an act of Congress, from the decision in Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495, to that of the Goodrich Transit Co.'s Case, 224 U. S. 194, 56 L. ed. 729, 32 Sup. Ct. Rep. 436. To determine otherwise, and in favor of the contentions of the appellant, would be to overthrow this whole line of decisions.

Assistant Attorney General Denison argued the cause, and, with Mr. Thurlow M. Gordon, filed a brief for the United States:

Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 56 L. ed. 729, 32 Sup. Ct. Rep. 436, settled the right of Congress to grant to the Commission this power to prescribe accounts, and therefore the only question here is whether the grant has been exceeded.

In dealing with such a question it is important to keep in mind that the function of the Commission in this class of matters is not even quasi judicial, but exclusively administrative, and so open to no review in any matter of opinion.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 470, 54 L. ed. 280, 287, 30 Sup. Ct. Rep. 155; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; United States v. Grimaud, 220 U. S. 515–517, 55 L. ed. 567, 568, 31 Sup. Ct. Rep. 480; Interstate Commerce

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Commission v. Union P. R. Co. 222 U. S. 541, 547, 56 L. ed. 308, 311, 32 Sup. Ct. Rep. 108.

In requiring that abandoned property (over and above salvage) should not be continued as an asset, the Commission does not act arbitrarily or injuriously.

Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 56 L. ed. 729, 32 Sup. Ct. Rep. 436; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 33 Sup. Ct. Rep. 729.

Nor did the Commission act arbitrarily and injuriously in requiring that property abandoned in connection with improvements should be charged off through operating expense instead of through surplus.

(a) The policy of the Commission is to allow an indulgence to the railroads by permitting them to maintain a basis for higher rates until the abandoned property has been paid for.

(b) Obsolescence is depreciation, and a proper and authoritatively recognized part of the definition of "operating expense."

Cumberland Teleph. & Teleg. Co. v. Louisville, 187 Fed. 637; Eastern Case, Re Advances in Rates, 20 Inters. Com. Rep. 243; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 212, 56 L. ed. 736, 32 Sup. Ct. Rep. 436; Montgomery, Auditing, Theory & Practice, 1912 ed. p. 319; People ex rel. Brooklyn Heights R. Co. v. Tax Comrs. 69 Misc. 646, 127 N. Y. Supp. 825; People ex rel. Queens County Water Co. v. Woodbury, 67 Misc. 490, 123 N. Y. Supp. 599; San Joaquin & K. R. Canal & Irrig. Co. v. Stanislaus County, 191 Fed. 875; Whitten, Valuation of Public Service Corp. §§ 450, 451–454, 458, 481, 487.

(c) Even if dividends should be lost, owing to the abandonment of property, such loss is no reason for invalidating this order.

Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265.

(d) But there is no reason to assume that the Commission will refuse to spread the charge so as to avoid such a result.

Mr. Justice Pitney, after making the foregoing statement, delivered the opinion of the court:

The contention of appellant in the commerce court and in this court is, that the regulations of the Interstate Commerce Commission relative to the method of keeping the accounts of common carriers, so far as they are here questioned, are unreasonable, beyond the power or authority of either Congress or the Commission, and violative of the Fifth Article of Amendments to the Constitution of the United States, as being a deprivation of property without due process of law. It is claimed that the effect of enforcing the regulations under the circumstances of the case is to reduce the amount of net earnings applicable to dividends, and thereby cause an irreparable loss to the [438] preferred stockholders, whose dividends are noncumulative, and payable only out of the income of the current year; that the property accounts become inaccurate, because while appellant has actually expended something more than $600,000 in the improvement of its property, and its bonded indebtedness has been in fact increased by the like amount, the accounts will declare that for this expenditure the company has obtained a net accretion to its property of only a little over $200,000 ($629,399.74 less $386,484, or $234,747.74); that the Operating Expense Accounts will be improperly swollen by the inclusion therein of the sum of $386,484, to the deception of the stockholders and the investing public, and the impairment of the financial credit of the company; and that under the requirements of the Commission this sum of $386,484 cannot be charged to and finally taken out of the proceeds of the bonds, but must be charged to operating expenses, and thus taken from operating revenue, because of which (as is claimed) this amount, which has already been paid out of the proceeds of bonds, must ultimately be restored in cash to the bond account, and returned to the trustee or otherwise accounted for to the bondholders. As to the Shreveport shop and terminal plant that are to be abandoned, it is contended that it is unreasonable to require the cost of abandonment to be charged to operating expenses, and that this is a proper charge against the accumulated surplus, as represented in the Profit and Loss Account.

The authority of the Commission rests upon § 20 of the "act to regulate commerce" (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), as amended by the Hepburn act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288).† The constitutional [439] validity of this legislation was sustained in Interstate Commerce Commission

†"Sec. 20. That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, and from the owners of all railroads engaged in interstate commerce as defined in this act, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail

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v. Goodrich Transit Co. 224 U. S. 194, 211, 214, 56 L. ed. 729, 736, 737, 32 Sup. Ct. Rep. 436.

The authority conferred by Congress upon the commerce court (act of June 18, 1910, 36 Stat. at L. 539, chap. 309; [440] Judicial Code, § 207 [36 Stat. at L. 1148, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 216]) with respect to enjoining or setting aside the orders of the Commission, like the authority previously exercised by the Federal circuit courts, was confined to determining whether there had been violations of the Constitution, or of the power conferred by statute, or an exercise of power so arbitrary as virtually to transcend the authority conferred. Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 470, 54 L. ed. 280, 287, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 547, 56 L. ed. 308, 311, 32 Sup. Ct. Rep. 108; Proctor & G. Co. v. United States, 225 U. S. 282, 297, 56 L. ed. 1091, 1096, 32 Sup. Ct. Rep. 671; Interstate Commerce Commission v. Baltimore & O. R. Co. 225 U. S. 326, 340, 56 L. ed. 1107, 1111, 32 Sup. Ct. Rep. 742.

As to the intent and meaning of § 20, it is first insisted that the power conferred upon the Commission to prescribe the forms of accounts, records, and memoranda to be kept by the carriers, recognizes a distinction between the form and the substance; and that while the Commission, in order to obtain full and accurate information concerning the affairs of each corporation, must have power to require any reports, schedules, and accounts necessary to show the true financial condition of each carrier; yet that the grant must by fair interpretation, and in order not to amount to an unconstitutional delegation of legislative power, stop short of the point where the regulation in its essence goes not to the form, but to the substance, and involves interference with the internal affairs of the corporation. We do not, however, think that any such distinction between the form and the substance is admissible with respect to the declared object of standardizing railroad accounts and obtaining therefrom full and accurate information concerning the affairs of the respective corporations. The very object of a system of accounts is to display the pertinent financial operations of the company, and throw light upon its present condition. If they are to truly do this, the form must correspond with the substance. In order that accounts may be standardized, [441] it is necessary that the accounts of the several carriers shall be arranged under like headings or titles; and it is obviously essential that charges and credits shall be allocated under the proper headings,—the same with one carrier as with another. Unless "Additions and Betterments," on the one hand, and "Operating Expenses," on the other, are to indicate the same class of entries upon the books of one carrier that they indicate upon the books of other carriers, there is no possibility of standardization. So far as such uniformity requirements control or tend to control the conduct of the carrier in its capacity as a public servant engaged in interstate commerce, they are within the authority constitutionally conferred by Congress upon the Commission. There is no direct interference with the internal affairs

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the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; . . . the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

. . . . . .

The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees."

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of the corporation; and if any such interference indirectly results, it is only such as is incidental to the lawful control of the carrier by the Federal authority, and to this the rights of stockholders and bondholders alike are necessarily subject.

It is said, however, that the meaning of the term "operating expenses" was well defined at the time of the passage of the act of 1887, and that during the period intervening between the beginning of the work of the Commission thereunder and the passage of the Hepburn act in 1906, the term had never been construed to include any charge for property abandoned in the course of improvements; and that this settled construction, upon familiar principles, must be deemed to have entered into the purpose of Congress when it re-enacted the language of § 20 in the latter year, and added to it authority to the Commission to prescribe in its discretion the forms of accounts and a prohibition against keeping any others than those prescribed or approved by the Commission. But it will be observed that § 20, as originally enacted, authorized the Commission "in its discretion, for the purpose of enabling it the better to carry out the purposes of this act, [442] [to] prescribe . . . a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept." Congress, when it enacted the Hepburn act in 1906, must have known that the Commission had not as yet found occasion to enforce this provision; and at the same time may be deemed to have contemplated that the authority then for the first time conferred upon the Commission to determine and prescribe the maximum rates to be charged by the carriers for the services to be performed by them furnished a new and more cogent reason for establishing a uniform system of accounts.

The contention that the term "operating expenses" had a well-understood and defined meaning, either recognized at the time of the passage of the act of 1887, or established by the constant practice of the Commission from that time until the Hepburn act, so that the use of the term in the latter act amounted to an express limitation upon the grant of power to prescribe the forms of the accounts, is not well founded. Congress, in authorizing the Commission to prescribe a uniform system of accounts, recognized that accounting systems were not then uniform; and in reiterating this authorization in 1906, and adding a prohibition against the keeping of other accounts than those prescribed, manifested a purpose to standardize and render uniform the accounts of the different carriers with respect to matters that entered into property and the improvements thereof, on the one hand, and the current operations of the company, on the other. By the very terms of § 20, Congress at least outlined the classification of the carriers' accounts, for it required the annual reports to show "the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same . . . the surplus fund, if any, . . . the funded and floating [443] debts, . . . the cost and value of the carrier's property, franchises, and equipments; . . . the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet." By the same section the Commission was authorized to require these annual reports from all carriers subject to the act, and to prescribe the manner in which the reports should be made, and for this and other purposes to require carriers to have "as near as may be, a uniform system of accounts, and [to prescribe] the manner in which such accounts shall be kept."

Plainly, the lawmaking body recognized the essential distinctions between property accounts and operating accounts, between capital and earnings; it recognized that the practice of different carriers varied in respect to these matters; and that no system of supervision and regulation would be complete without requiring the accounts of all the carriers to speak a common language.

There is here no unconstitutional delegation of legislative powers. The reasoning adopted in Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 210, etc., 56 L. ed. 729, 735, 32 Sup. Ct. Rep. 436, is controlling. And since, as just shown, uniformity in accounting is dependent upon the adoption and enforcement of precise classification, the authority to define the terms of the classification necessarily follows. It amounts, after all, to no more than laying down the general rules of action under which the Commission shall proceed, and leaving it to the Commission to apply those rules to particular situations and circumstances by the establishment and enforcement of administrative regulations.

It is contended that the regulations of the Commission, in respect to the matters

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now under consideration, are [444] so unreasonable and arbitrary as to constitute an abuse rather than an exercise of the powers conferred by § 20, and consequently that they ought to be set aside by judicial action. This is not on the ground that the Commission did not proceed with due deliberation and after proper inquiry. Respecting this, the record abundantly shows that in the year 1906, and shortly after the passage of the Hepburn act, the Commission undertook, and for nearly three years prosecuted, a most thorough investigation into the current practice of the principal railroad lines, procuring reports and recommendations from experts, and submitting tentative plans for the classification of accounts to the executives of the railroad lines and to a committee of accounts created by the Association of American Railway Accounting Officers, which association was made up of members representing practically every important railroad in the country.

The present attack upon the classification as adopted is, and must be, rested at bottom upon the contention that the regulations embodied in it are so entirely at odds with fundamental principles of correct accounting as intrinsically to manifest an abuse of power.

There is evidence in the record that substantially the same method of distributing charges for so-called "Additions and Betterments" between the Property Accounts and the Operating Accounts is and has long been pursued by important railroad carriers, and has received the sanction of at least one recent text-book writer,—Whitten, Valuation of Public Service Corporations, §§ 450, 451, 458, etc. Nevertheless, it is insisted with emphasis that property abandoned as an incident to permanent improvements is not an operating expense, and, in effect, that no matter what practice may be pursued by railroad accounting officers, it cannot properly be treated as such.

We are thus brought back to the fundamental distinction between (a) the property or capital accounts, designed [445] to represent the investment of the stockholders, and to show the cost of the property as originally acquired, with subsequent additions and improvements; these assets being balanced by the liabilities, including the amount of the capital stock and of bonded and other indebtedness, with net profits or surplus, whether carried under the head of "profit and loss" or otherwise; and (b) the operating accounts, designed to show, on the one side, gross receipts or gross earnings for the year, and on the other side, the expenditures involved in producing those gross earnings and in maintaining the property, the balance being the net earnings.

Since the regulation of the railroad carrier by the public authority, and especially the fixing of the rates to be charged, depend primarily upon two fundamental considerations, (a) the value of the property that is employed in the public service, and (b) the current cost of carrying on that service, it is clear that the maintenance of a proper line of distinction between property accounts and operating accounts is essential to the execution by the Interstate Commerce Commission of the supervisory and regulatory powers conferred upon it by Congress.

Appellant contends, *inter alia*, that since the original locations were necessary in the development of its railroad line, and were abandoned only as an incident to the improvement and development of the property, the cost thereof, being, as it is termed, a part of the "cost of progress," should remain in the property account, as representing a part of the stockholders' present investment.

Support for this contention is sought in previous decisions of this court. In Union P. R. Co. v. United States, 99 U. S. 402, 25 L. ed. 274, a decision that turned upon the meaning and effect of an act of 1862 for aiding the construction of the railroad (12 Stat. at L. 489, chap. 120), it was said, at p. 420: "As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed [446] in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves. It may often be difficult to draw a precise line between expenditures for construction, and the ordinary expenses incident to operating and maintaining the road and works of a railroad company. Theoretically, the expenses chargeable to earnings include the general expenses of keeping up the organization of the company, and all expenses incurred in operating the works and keeping them in good condition and repair; whilst expenses chargeable to capital include those which are incurred in the original construction of the works, and in the subsequent enlargement and improvement thereof." In Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700, the Commission had held (206 U. S. 449, 10 Inters. Com. Rep. 544) that while repairs were properly chargeable to current operating expenses, yet expenditures for improvements and equipment "should not be taxed as part of the current or operating

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expenses of a single year, but should be, so far as practicable and so far as rates exacted from the public are concerned, projected proportionately over the future." And in this court it was said (p. 462): "It would seem as if expenditures for additions to construction and equipment, as expenditures for original construction and equipment, should be reimbursed by all of the traffic they accommodate during the period of their duration, and that improvements that will last many years should not be charged wholly against the revenue of a single year." And, after pointing out that the case of the Union Pacific Railway Company in 99 U. S. had to do not with rates of transportation or the like, but with the construction of the words "net earnings" in an act of Congress, the court, in pointing out the difference between the position of the government in that case and the position of a shipper of commodities in the case *sub judice*, said, with respect to the latter (p. 463): [447] "His right is immediate. He may demand a service. He must pay a toll, but a toll measured by the reasonable value of the service. The elements of that value may be many and complex, not always determinable, as we have seen, with mathematical accuracy; but, we think, it is clear, that instrumentalities which are to be used for years should not be paid for by the revenues of a day or year; and this is the principle of returns upon capital which exists in durable shape."

The expressions quoted were properly employed with respect to the questions then presented for decision. As expressions of the general principle, we see no occasion now to qualify them. In both cases it was recognized that in so complicated a matter as the construction, maintenance, and operation of a railroad line, it is difficult to define and perhaps more difficult to consistently apply a precise distinction between capital and expense accounts; and while the propriety of distributing improvement costs over a series of years was recognized, the impossibility of scientific accuracy in that regard was acknowledged. The question now is, whether the regulations of the Commission under attack do violence to these general principles,—rather, it is whether those regulations are so clearly contrary to these and other applicable principles that they should be set aside as being in excess of the powers conferred by Congress upon the Commission.

We are unable to see that there is substantial inconsistency with principle, much less gross violation thereof. The contention of the appellant that property, originally acquired because necessary in the construction of the road, and afterwards abandoned only because rendered unnecessary by the improvement and development of the property, should remain in the property account as a part of the stockholders' investment, will be found, upon analysis, to rest upon the unwarrantable assumption that all capital expenditures result in permanent accretion to the [448] property of the company. This in effect ignores depreciation,—an inevitable fact which no system of accounts can properly ignore. A more complete depreciation than that which is represented by a part of the original plant that through destruction or obsolescence has actually perished as useful property, it would be difficult to imagine. The fact that the original investment was necessary in order that the second investment might be made is not a conclusive test. Reference is made to the cost of the scaffolding used in the erection of a house, and discarded when the house is completed; and to the cost of the paper that goes to the waste-basket, rather than to the printer, in the preparation of a literary composition; but these are fanciful analogies, and do not assist us here, where the real question is not how shall original cost be ascertained, but, how shall subsequent depreciation in value be reckoned and accounted for?

In Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148, this court had to do with a similar element of depreciation, and, after pointing out that such a plant as was there in question begins to depreciate in value from the moment of its use, and that before coming to the question of profit at all, the company was entitled to earn a sufficient sum annually to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they should come to the end of their life, the court proceeded to say (p. 14): "If, however, a company fails to perform this plain duty and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon overissues of securities, or of omission to exact proper prices for the output, the fault is its own. When, therefore, a public regulation of its prices comes under question, the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past."

[449] And since one of the manifest objects of Congress in authorizing the supervision and standardization of carriers' accounts, as is done in § 20 of the interstate commerce act, was to enable the Commission-

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ers to intelligently perform their duties respecting the regulation of carriers' rates for the services performed, and since it is settled that the property investment which is to be taken into consideration as one of the elements in fixing such rates is the property then in use (Smyth v. Ames, 169 U. S. 466, 546, 42 L. ed. 819, 849, 18 Sup. Ct. Rep. 418; San Diego Land & Town Co. v. National City, 174 U. S. 739, 757, 43 L. ed. 1154, 1161, 19 Sup. Ct. Rep. 804; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 442, 47 L. ed. 892, 894, 23 Sup. Ct. Rep. 571; Willcox v. Consolidated Gas Co. 212 U. S. 19, 41, 53 L. ed. 382, 395, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 434, 454, 458, 57 L. ed. 1511, 1555, 1563, 1565, 33 Sup. Ct. Rep. 728), it is obvious that, so far as the regulations of the Commission now under consideration discard the "cost of progress" theory, they need no further vindication.

It is insisted that if the appellant, having expended in round figures $600,000, secured by the sale of bonds for improvements, can be compelled to charge $400,000 of that amount to the operating expense of one year, or to distribute it among the operating expenses of a series of years, and if it be forbidden to keep any other record representing the transaction, it will have in its possession no kind of record from which it can report accurately either the cost of its property or the cost of improvements or its operating expenses. This, we think, is a misapprehension of the effect of the regulations. They do not require appellant to falsify its books or to change in any way the evidential character of the original entries. The source of the money, and the disposition made of it as expended, may and should be correctly shown. The regulations do require that the contemporaneous abandonment of other property be likewise shown, and the replacement cost, less salvage, charged to the appropriate accounts under operating expenses. This, if observed, of course results [450] in enforcing a prescribed distinction between capital expense and operating expense. It does not require that the record of the expenditure be obliterated; but it does of course affect the results as they work out upon the balance sheet. If this be fairly done, there is no transmutation of new property into operating expenses, but only an insistence upon the requirement that new property added shall not alone be the measure of the accretion to the property account, and that the depletion attributable to contemporaneous abandonment of other property shall likewise be reflected upon the books.

Stress is laid upon the fact that if the grade reductions in question had been made upon the line of the original right of way, even though made at double the expense, the cost would have gone into "additions and betterments," and would have stood as a permanent increment of assets in the property account; while with respect to similar improvements made off the line of the original right of way, appellant is not permitted to carry into the property account the full cost of the improvement, but must first deduct therefrom the estimated replacement cost (less salvage) of the portions of track no longer used, charging this to the account of operating expenses.

So far as the comparative expense of the different modes of improvement is concerned, little need be said. The accounting regulations do not seek to control railroad companies in the exercise of their discretion respecting what shall be done and how it shall be done, but only to systematize their accounts with respect to whatever is done. It is to be presumed that boards of directors will select that method of accomplishing a needed grade revision that shall be preferable from the engineering standpoint and suited to the financial condition and prospects of the company; not that they will adopt an inferior or more costly method of improvement because of the accounting requirements.

[451] The distinction drawn between grade improvements "off the line" and those made "on the line" rests upon the view that the discarding of sections of the original line of road is a loss or depreciation that in correct accounting should be taken out of the property account. If this is to be done, its value must be charged, directly or indirectly, as an expense incident to the operation of the road. Whether it should be charged against the accumulated profits of previous years, as reflected in the Profit and Loss Account, or against the profits of present and future years, may depend upon circumstances. The theory upon which the Commission has acted in formulating its regulations is fairly stated in its brief herein as follows: The abandonment of property incident to grade revision is "depreciation," and such depreciation is of two kinds,—(1) that which is not replaced in kind, and (2) that which is replaced by improved materials, track, or equipment. If a trunk line of road has a branch extending into a territory not served by its main line, and, finding the branch unprofitable, abandons it, taking up the track, without constructing any substitute to serve the same territory, the abandoned branch ceases to be an earning instrumentality; the

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stockholders can thereafter derive no profit from it; it has served its purpose, and only past operations have benefited from it. So far as the profits of past operations have not been distributed to the stockholders, they are represented in the Profit and Loss Account, and therefore such an abandonment or depreciation is properly chargeable to that account unless a special depreciation account has been established in anticipation of such abandonments; and for such an account, provision is made in the regulations. The other kind of depreciation is the result of changes attributable to the inadequacy of the existing property to meet the demands of the future. The road or the structures have to be replaced with stronger or more efficient instrumentalities. Abandonments [452] occasioned by changes of this character are therefore chargeable to future earnings, for the reason that the improved condition of the road is not only designed to meet the demands of the future, but presumably will result in economies of operation; and so the resulting benefits will be reaped by those who hold the stock of the company in the present and in the future. The railroad company may, if it sees fit, anticipate general depreciations, and make provision for them by establishing a reserve for the purpose; but if no such provision has been made, the abandonment should be taken care of by charging them to present or future operating expense. In case, however, the amount is so large that its inclusion in a carrier's operating expenses for a single year would unduly burden the operating expense account for that year, the carrier may, if so authorized by the Commission, distribute the cost throughout a series of years.

A statement of the theory is sufficient to show that the regulation is not arbitrary in the sense of being without reasonable basis. And there is evidence to show that the Commission was warranted in adopting it, as sustained by expert opinion and approved by experience.

One of the reasons for the distinction made in accounting between improvements made on, and those made off, the old right of way, is that in the former case the improvements show themselves in the physical structures, and can be inventoried and appraised by witnesses; the deepening of cuts and increasing of fills, while involving some abandonments (and these under the regulations are to be taken out of the operating account), yet in the main are visible upon the ground, and capable of mensuration and appraisement. To the suggestion that cuts filled up and embankments reduced would not be thus manifest, it is sufficient to say that if such cases occur they must be most extraordinary. When a railroad is originally constructed, cuts and fills are made to overcome natural [453] inequalities of surface; if any undue grades are permitted to remain, it is usually because, for reasons of economy, cuts have been made less deep and fills less high than otherwise they would have been made. Therefore grade revisions upon the line of the original right of way are normally required for the purpose of removing summits in cuts and raising sags in fills; not *vice versa*.

It is said that the effect of the regulations, if complied with, is to deprive the preferred stockholders of a considerable part of the noncumulative dividends from the net earnings of the company, to which they would otherwise be entitled. The preferred stockholders, as such, are not before the court, and this is not a proper occasion for determining their rights. Supposing, however, that the enforcement of the accounting system does require them to forego their current dividends, we do not concede that this amounts to an unlawful taking of their property. Assuming (as of course we must) that the management of the company has acted prudently in making these extensive improvements within a short time, instead of distributing them throughout a series of years, and without providing in advance any fund applicable to them, still it must be presumed that the improvements are necessary to the general welfare of the company, and will result in its increased prosperity, and therefore make better the assurance of dividends for the preferred stockholders in the future.

But, aside from that, the interstate commerce act deals with the carrier in its capacity as a servant of the public, and as a distinct entity, amenable to the legitimate regulation of Congress and the Commission. If in this aspect the carrier is not unwarrantably injured or deprived of its property by the exercise of the regulatory powers, the operation of such regulations cannot be restrained on the ground of agreements made by the stockholders amongst themselves for apportioning profits to one or the [454] other class of stockholders. To admit this might materially hamper the Federal control over interstate carriers, and evidently would tend to render impracticable the standardization of methods of accounting.

Much stress is laid upon the situation that results from the circumstance that (as is claimed) these regulations were promulgated after appellant had mortgaged its property and issued bonds for financing the improvements in question. It is not contended that the regulations impair the

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rights of either party under the mortgage. The contention is that the company had the right to finance the full cost of the improvements out of the proceeds of a bond issue, and that the regulations amount in effect to a veto upon the action of the directors in this respect. Supposing this to be true, we are unable to perceive that the appellant is thereby relieved from compliance with the regulations. Whatever was done about authorizing the improvements and financing the cost from the bond issue was done subject to being displaced by the exercise of the powers conferred upon the Interstate Commerce Commission by the act of 1906. The regulations do not affect the administration of the borrowed money. It was borrowed *inter alia* specifically for use in "reducing grades to ½ of 1 per cent on three full operating divisions, aggregating 41 per cent of the total length of the line." And by the mortgage appellant covenanted to use the bonds and the proceeds thereof in calling in and redeeming an outstanding loan, "and for the general improvement of its property." In short, so far as appears, there is nothing in the regulations to prevent the appellant from devoting the money strictly to the purposes for which it was borrowed, although they do prevent the keeping of the accounts in such manner as to make it appear that the book value of the company's assets is enhanced to the full extent of the moneys disbursed in the improvements.

[455] When it is said that the amount of $386,484, which, under the requirements of the Commission, must be charged to operating expenses, must for that reason be ultimately restored in cash to the bond account and returned to the trustee, or otherwise accounted for to the bondholders, this does not mean that any obligation of that kind is imposed upon appellant by the classification. We are not referred to anything in the classification, in the provisions of the mortgage, or in the law, that imposes any such duty. What is meant (as we presume), is that if the operating expenses are increased and the operating revenue decreased by the amount mentioned, in accordance with the regulations, and the payment of dividends should nevertheless continue, the books would make it appear that the dividends were paid not from earnings, but from the proceeds of the bonds. In other words, the regulations of the Commission prevent the proceeds of the bond issue from being used, in whole or in part, to maintain dividend payments *without that fact appearing upon the accounts;* and since it is improbable that appellant would be willing to have the accounts bear such an interpretation, it is probable that the proceeds of the bonds will not be employed for dividend purposes, and unless required for further improvements, may as well be returned to the trustee for the bondholders. Since one of the very purposes of establishing the accounting system is to deter the payment of dividends out of capital, the criticism, upon analysis, bears its own refutation.

The same may be said of the argument that enforcement of the regulations will impair the credit of appellant by diminishing apparent earnings, preventing continuance of dividends upon preferred stock, and keeping down the aggregate value of "assets" upon the property accounts. Presumably the regulations have a tendency to place the accounting system upon a sound basis in these respects; and to accomplish this was one of the legitimate [456] objects at which Congress aimed in the enactment of § 20 of the interstate commerce act.

It is further insisted that even the theory upon which the accounting regulations rest does not, when analyzed, justify a charge of abandoned property to operating expenses, but at most a charge to profit and loss. The suggestion apparently has force; but, upon consideration, we are unable to see that it furnishes ground for judicial interference with the course pursued by the Commission. Except for the contention (already disposed of) that the value of the abandoned parcels should be permanently carried in the property account as part of the cost of progress, it is and must be conceded that sooner or later it must be charged against the operating revenue, either past or future, if the integrity of the property accounts is to be maintained; and it becomes a question of policy whether it should be charged *in solido* to profit and loss (an account presumptively representative of past accumulations) or to the operating accounts of the present and future. If abandoned property is not charged off in one way or the other it remains as a permanent inflation of the property accounts, and tends to produce, directly or indirectly, a declaration of dividends out of capital. If it be charged off to the surplus account, it tends to prevent the declaration of dividends based upon a supposed accumulation of past earnings. If charged to operating expenses of the current and future years, it has a tendency to prevent the declaration of dividends from current earnings until the amount of the depreciation shall have been made up out of the earnings.

But, did we agree with appellant that the abandonments ought to be charged to surplus or to profit and loss, rather than to operating expenses, we still should not deem this a sufficient ground to declare that

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the Commission had abused its power. So long as it acts fairly and reasonably within the grant of power constitutionally conferred [457] by Congress, its orders are not open to judicial review.

What has been said respecting the enforced disposition of the charges for property abandoned in grade revision applies as well to the abandonment of the present shop and terminal plant at Shreveport.

Decree affirmed.

GRAND TRUNK RAILWAY COMPANY OF CANADA and Detroit, Grand Haven, & Milwaukee Railway Company, Appts.

v.

MICHIGAN RAILROAD COMMISSION, Cassius L. Glasgow, Lawton T. Hemans, George W. Dickinson, and Franz C. Kuhn, Attorney General of the State of Michigan.

(See S. C. Reporter's ed. 457–473.)

Carriers — governmental regulation — judicial interference.

1. The Federal courts will not disturb, on the theory of any interference with interstate commerce, an order of a state railroad commission suspending an interstate railway company's supplemental tariff, in order to give the commission an opportunity to investigate, where the conclusion that such order does so interfere must rest upon the balancing of conflicting affidavits.

[For other cases, see Carriers, 239, 240, in Digest Sup. Ct. 1908.]

Commerce — conflicting state and Federal regulation — interchange of railway traffic.

2. Congress has not so taken over the whole subject of terminals, team tracks, switching tracks, sidings, etc., of interstate railways, as to invalidate all state regulations relative to the interchange of traffic.

[For other cases, see Commerce, I. c, III., in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — compelling interchange of railway traffic.

3. The tracks and terminals of a railway company within the corporate limits of Detroit are not appropriated for the use and benefit of other railroads, contrary to U. S. Const., 14th Amend., forbidding the taking of property without due process of law, by an order of the state railroad commission in aid of the enforcement of Mich. Acts 1909, act. No. 300, as amended by Pub. Acts 1911, act No. 139, under which the company may be compelled to receive and transport at reasonable rates loaded cars between junction points with other carriers within such corporate limits and its own team tracks, and between such team tracks and industrial sidings on its own line.

[For other cases, see Constitutional Law, 458–466, in Digest Sup. Ct. 1908.]

Statutes — invalid in part.

4. The possible invalidity of the penalty provisions of Mich. Pub. Acts 1909, act No. 300, as amended by Pub. Acts 1911, act No. 139, which are in a section by themselves, as precluding, by reason of their severity, an appeal to the courts to restrain the enforcement of the provisions of that statute for the compulsory interchange of railway traffic, does not affect the validity of the latter provisions.

[For other cases, see Statutes, I. d, 4, in Digest Sup. Ct. 1908.]

Carriers — interchange of traffic — intra-city transportation.

5. Railway companies cannot assert, as against the power of the state to compel the interchange of traffic within the corporate limits of a city, that they were not incorporated for intra-city transportation.

[For other cases, see Carriers, III. h, in Digest Sup. Ct. 1908.]

[No. 382.]

Argued October 23 and 24, 1913. Decided December 8, 1913.

APPEAL from the District Court of the United States for the Eastern District of Michigan to review an order refusing to restrain the enforcement of an order of the Michigan Railroad Commission, suspending the tariff of an interstate railway company. Affirmed.

See same case below, 198 Fed. 1009.

The facts are stated in the opinion.

Mr. George W. Kretzinger, Jr., argued the cause, and, with Messrs. George W. Kretzinger and A. B. Browne, filed a brief for appellants:

One carrier cannot be required to allow to another carrier the use of its terminals, and to do the switching necessary to that end. The duty of a carrier to accept goods tendered at its station does not extend to the acceptance of the cars offered to it at an arbitrary point near its terminus by a competing road, for the purpose of reaching and using its terminal station. A state Constitution requiring such services of a common carrier is unconstitutional.

Louisville & N. R. Co. v. Central Stock

Note.—On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107, and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

On power to compel railroad to build, maintain, or connect with, side tracks for accommodation of shippers—see note to State ex rel. Mt. Hope Coal Co. v. White Oak R. Co. 28 L.R.A.(N.S.) 1013.

Generally, on statutes part valid and part invalid—see notes to Titusville Iron Works v. Keystone Oil Co. 1 L.R.A. 363, and Fayette County v. People's & D. Bank, 10 L.R.A. 196.

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Yards Co. 212 U. S. 132, 145, 53 L. ed. 441, 446, 29 Sup. Ct. Rep. 246.

A fortiori, therefore, a statute requiring such services and all orders of a state commission, however general or specific may be the powers conferred upon it by the state to demand such duties of a carrier, are void. Such is the order of the Michigan Railroad Commission, dated April 10, 1912. In the case just cited the delivery points were 8 miles apart.

Louisville & N. R. Co. v. Central Stock Yards Co. 133 Ky. 148, 97 S. W. 780.

A carrier need not give the use of its terminals to other carriers except on such terms and conditions as it may impose; and it may choose the carriers to whom it will allow the use of those terminals.

Louisville & N. R. Co. v. West Coast Naval Stores Co. 198 U. S. 483, 498, 499, 49 L. ed. 1135, 1141, 1142, 25 Sup. Ct. Rep. 745; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246; United States v. Terminal R. Asso. 224 U. S. 403, 56 L. ed. 817, 32 Sup. Ct. Rep. 513.

This is particularly true where the use of the terminal facilities cannot be granted to all carriers alike without such congestion as to render prompt and adequate service to any impossible.

Louisville & N. R. Co. v. West Coast Naval Stores Co. 198 U. S. 499, 49 L. ed. 1137, 25 Sup. Ct. Rep. 745.

To require a carrier to receive and transport over its tracks the merchandise and cars of any other corporation or individual having connecting tracks is to require it to give the use of its tracks and terminal facilities to another railroad engaged in like business.

Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; Little Rock & M. R. Co. v. St. Louis & S. W. R. Co. 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775; Oregon Short Line & U. N. R. Co. v. Northern P. R. Co. 4 Inters. Com. Rep. 249, 51 Fed. 473.

A carrier cannot be required to give its team tracks for the service of loading a car to be turned over to another carrier at a junction point within the same city. Nor can it be required to turn over its own cars to such another carrier to make delivery for it within the same city, where it has its own terminals, whether the car has come from within or without that city.

Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246; Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 571, 48 L. ed. 565, 569, 24 Sup. Ct. Rep. 339.

The business of intra-city switching, or transportation between junction points of carriers and other points all within the same city, is a very different business from that of ordinary transportation, or hauls the width or breadth of one or more states.

State ex rel. Atty. Gen. v. Terminal R. Asso. 182 Mo. 296, 81 S. W. 395; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 145, 53 L. ed. 441, 446, 29 Sup. Ct. Rep. 246.

Such intra-city transportation, or switching service, is beyond the calling of a railroad company, not incorporated for such a purpose, and this it cannot be compelled to do. Even the Constitution of a state, so far as it requires such service, is void.

Louisville & N. R. Co. v. Central Stock Yards Co. supra.

This is particularly the law where such regulations, as shown in the bills filed herein, result in interference with interstate commerce.

Louisville & N. R. Co. v. West Coast Naval Stores Co. 198 U. S. 483, 498, 499, 49 L. ed. 1135, 1141, 1142, 25 Sup. Ct. Rep. 745; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246; United States v. Terminal R. Asso. 224 U. S. 403, 56 L. ed. 817, 32 Sup. Ct. Rep. 513.

The Congress of the United States having acted under the interstate commerce act as to terminals and switching services of carriers engaged in interstate commerce, and having enacted therein that carriers subject to that act shall not be required to give the use of their tracks or terminal facilities to other carriers engaged in like business, any authority given by state statute to make such requirements is now superseded. This service the interstate carriers are not required to give.

Morris Iron Co. v. Baltimore & O. R. Co. 26 Inters. Com. Rep. 240; Railroad Commission v. St. Louis, I. M. & S. R. Co. 24 Inters. Com. Rep. 295; Northern P. R. Co. v. Washington, 222 U. S. 370, 378, 379, 56 L. ed. 237, 239, 240, 32 Sup. Ct. Rep. 160; Southern R. Co. v. United States, 222 U. S. 26, 27, 56 L. ed. 74, 75, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822.

Where a carrier is engaged in both state and interstate commerce, and its facilities are used in common for both such classes of commerce, an act of Congress relating to the use of such facilities and the manner of carrying on business therewith supersedes all state legislation on the subject.

Northern P. R. Co. v. Washington, 222 U. S. 370, 375, 378, 379, 56 L. ed. 237–240, 32 Sup. Ct. Rep. 160; Southern R. Co. v. United States, 222 U. S. 20, 26, 27, 56 L. ed. 72, 74, 75, 32 Sup. Ct. Rep. 21, 3 N. C. C. A. 822; Michigan C. R. Co. v. Vree-

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land, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, 3 N. C. C. A. 779; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651.

The expression of the intention of Congress to bring the subject within its control is alone sufficient. Though there be no act of Congress operative, and no regulation in force, such expression, as soon as uttered in legislative form, at once supersedes and excludes all power of a state to legislate on or enforce legislation with reference to the subject.

Northern P. R. Co. v. Washington, 222 U. S. 370, 378, 379, 56 L. ed. 237, 239, 240, 32 Sup. Ct. Rep. 160.

A service that interferes with interstate commerce cannot be imposed by a state. A statute imposing such service is void.

Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 327, 328, 50 L. ed. 772, 774, 775, 26 Sup. Ct. Rep. 491; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 7, 27, 37, 54 L. ed. 355, 357, 366, 370, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 65, 54 L. ed. 378, 385, 30 Sup. Ct. Rep. 232; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 162, 54 L. ed. 423, 429, 30 Sup. Ct. Rep. 280; Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 268, 23 L. ed. 543, 547; Minnesota v. Barber, 136 U. S. 313, 319, 330, 34 L. ed. 455, 457, 461, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862.

The mere extension of a facility to the public by a carrier which it is not required under the law to give will not prevent such carrier from withdrawing that facility from the use of the public at any time it may see fit.

Express Cases, 117 U. S. 1, 26, 29 L. ed. 791, 802, 6 Sup. Ct. Rep. 542, 628; Providence Coal Co. v. Providence & W. R. Co. 1 Inters. Com. Rep. 368; Douglas & Co. v. Chicago, R. I. & P. R. R. Co. 21 Inters. Com. Rep. 102.

These statutes, by reason of the heavy fines provided for all violations thereof, with no opportunity given therein to test their validity as to the provisions complained of in these bills without incurring the risk of these penalties, are unconstitutional on their face.

Ex parte Young, 209 U. S. 123, 148, 52 L. ed. 714, 724, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

Mr. Hal H. Smith argued the cause and filed a brief for appellees:

An interchange of traffic at a terminal midway on the line haul does not involve the use of a carrier's tracks and terminals.

Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 381, 37 Fed. 630; Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co. 4 Inters. Com. Rep. 537, 59 Fed. 400.

Neither does an interchange of traffic after it had crossed the limits of a city, but was still several miles from its ultimate destination.

Cardiff Coal Co. v. Chicago, M. & St. P. R. Co. 13 Inters. Com. Rep. 460; St. Louis, S. & P. R. Co. v. Peoria & P. Union R. Co. 26 Inters. Com. Rep. 226.

A carrier can be compelled to perform the intra-city switching service.

Iowa v. Chicago, M. & St. P. R. Co. 4 Inters. Com. Rep. 425, 33 Fed. 391.

The order is not in conflict with the doctrine of this court in Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246.

(a) That case dealt with a constitutional provision providing for interchange of traffic, but making no provision for compensation.

(b) That case dealt with the delivery of live stock at stock yards,—a service distinguishable from that in question here.

North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 31 L. ed. 287, 8 Sup. Ct. Rep. 266; Covington Stock-Yards Co. v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461; Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; Chicago, I. & L. R. Co. v. Railroad Commission, 175 Ind. 630, 95 N. E. 364.

The order is not void as imposing "intra-city switching" upon the appellant railroads. The appellants as railroads are incorporated to do switching and perform a terminal service.

Bridwell v. Gate City Terminal Co. 127 Ga. 520, 10 L.R.A.(N.S.) 909, 56 S. E. 624; State ex rel. Atty. Gen. v. Terminal R. Asso. 182 Mo. 284, 81 S. W. 395.

Neither the order complained of nor the statute of Michigan under which the order is made imposes any burdens upon interstate commerce, nor are they void by reason of any conflict with any provisions of the interstate commerce act.

Louisville & N. R. Co. v. Kentucky, 183 U. S. 511, 46 L. ed. 303, 22 Sup. Ct. Rep. 95; Atlantic Coast Line R. Co. v. Com. 102 Va. 599, 49 S. E. 911; Iowa v. Chicago, M. & St. P. R. Co. 4 Inters. Com. Rep. 425, 33 Fed. 391; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 33 Sup. Ct. Rep. 729; New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896.

The order was intended to facilitate commerce and to compel carriers to perform

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transportation services for the benefit of the public which, as common carriers, they should perform. The statute and order are therefore in aid of commerce; they tend to promote the safe and prompt delivery of goods. The order should be sustained as an order to compel the performance of a duty by a common carrier, which, in the absence of the statute, it should perform.

Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378: Western U. Teleg. Co. v. Crovo, 220 U. S. 364, 55 L. ed. 498, 31 Sup. Ct. Rep. 399.

Mr. Grant Fellows, Attorney General of Michigan, also filed a brief for appellees:

The requirement that one carrier shall accept for transportation local carload traffic originating at one point in a city, and consigned to another point in the same city, or offered to the delivering carrier at a junction point in said city, does not require the use of the tracks or terminal facilities of one carrier by another. The service thus required of a carrier is essentially a transportation service; it is not a mere switching service, and therefore does not, as such, constitute the use of another carrier's terminal facilities.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203, 29 L. ed. 158, 161, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Dixon v. Central of Georgia R. Co. 110 Ga. 173, 35 S. E. 369; Akron Gravel & S. Co. v. Baltimore & O. R. Co. (June 2, 1911) Ohio R. Com.; Cardiff Coal Co. v. Chicago, M. & St. P. R. Co. 13 Inters. Com. Rep. 468; Michigan R. Commission v. Michigan C. R. Co. 168 Mich. 230, 132 N. W. 1068; Enterprise Fuel Co. v. Pennsylvania R. Co. 16 Inters. Com. Rep. 219.

Complainant is a foreign corporation, and by coming into the state, it has submitted itself to the laws of the state, and has agreed to do the very things required by act No. 300 of the Public Acts of 1909, as amended by act No. 139 of the Public Acts of 1911, and it cannot therefore attack such laws.

Home Ins. Co. v. Davis, 29 Mich. 239; 19 Cyc. 1251: Hooper v. California, 155 U. S. 648, 655, 39 L. ed. 297, 300, 5 Inters. Com. Rep. 610. 15 Sup. Ct. Rep. 207.

Even if complainant had not subjected itself to the laws of Michigan requiring interchange of traffic, and could complain of such laws, such laws are valid and do not deprive a railroad company of its property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States.

Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 336, 12 L.R.A.(N.S.) 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; Jacobson v. Wisconsin, M. & P. R. Co. 71 Minn. 532, 40 L.R.A. 389, 70 Am. St. Rep. 358, 74 N. W. 893; Michigan C. R. Co. v. Smithson, 45 Mich. 221, 7 N. W. 795; Michigan R. Commission v. Michigan C. R. Co. 168 Mich. 230, 132 N. W. 1068; Pittsburgh, C. C. & St. L. R. Co. v. Hunt, 171 Ind. 189, 86 N. E. 328; Chicago, I. & L. R. Co. v. Railroad Commission, 175 Ind. 630, 95 N. E. 364; State ex rel. Lamar v. Jacksonville Terminal Co. 41 Fla. 377, 27 So. 225; Inman v. St. Louis Southwestern R. Co. 14 Tex. Civ. App. 39, 37 S. W. 37; Peoria & P. Union R. Co. v. Chicago, R. I. & P. R. Co. 109 Ill. 139, 50 Am. Rep. 605; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 296, 45 L. ed. 194, 199, 21 Sup. Ct. Rep. 115; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 263, 46 L. ed. 1156, 22 Sup. Ct. Rep. 900; Bloomington Coal Co. v. Chicago, etc. R. Co. (May 25, 1909) Ind. R. Com.; Munn v. Illinois, 94 U. S. 126, 24 L. ed. 84.

Mr. Justice McKenna delivered the opinion of the court:

Appeal from a decree of the district court, three judges sitting, denying a motion of appellants for interlocutory [459] injunction against an order of the Michigan Railroad Commission, and the denial of a motion of appellants for the continuance of a restraining order theretofore entered in the case.

The Commission was constituted by the Public Acts of the state, and invested with quite full and detailed powers of regulation of the railroads of the state. Act No. 300 of the Public Acts of Michigan of 1909, as amended by act No. 139, 1911.

Section 7, as originally enacted and as amended, is alone specially relevant to the discussion, and is inserted in the margin, subdivision (d) being the amendment.†

[460] After the amendment took effect, and on July 29, 1912, the Grand Trunk System, which is constituted of a number of railroad lines, published a tariff of charges, to be effective September 1, 1911, which, among other things, set forth the rates for the designated services within the corpo-

†(55) Sec. 7. (a) All railroads subject to the provisions of this act shall afford all reasonable and proper facilities by the establishment of switch connections between one another and the establishment of depots and otherwise for the interchange of traffic between their respective lines and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall transfer and deliver without unreasonable delay or discrimination any freight or cars or passengers destined to any point on its own line or on

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rate limits of the city of Detroit, and as to team track services, as follows:

"In case team track deliveries are required for the unloading of shipments received from other carriers, or when [461] such team tracks are used for the unloading of shipments for delivery to other carriers, $3 per car in excess of the charge made for switching to or from industrial sidings will be assessed."

This tariff also provided a charge of $5 for switching to and from industrial sidings, and a charge of $8 for team track delivery from junction points with other roads within the switching limits of Detroit.

A complaint was made by one John S. Haggerty to the Commission of this difference as discriminatory. Haggerty, it is said in one of the briefs, conducts a brick-making plant, having a siding on one of the railroads in Detroit, and to supply his trade ships carloads of freight over various railroad lines doing business in the city, among which are the lines of the Grand Trunk System.

An answer was filed to the complaint by the Grand Trunk Western Railway Company. After hearing, the Commission held that the difference in rates was discriminatory, and the railway company was ordered to file a tariff removing the discrimination; that is, the discrimination between the charges for industrial switching and for switching between junction points and team tracks; and to publish and make effective "like charges for the movement of a carload shipment received from an industry in the city of Detroit, upon said Grand Trunk Western Railway, consigned for delivery upon a team track or other siding of said road, within the same city, and for a like shipment received by said Grand Trunk Western Railway from a connecting carrier at a junction point within the corporate limits of the city of Detroit, consigned to a team track or other siding upon said road within the same city."

Subsequently to the making of such order the Grand Trunk System published a new tariff, to be effective March 16, 1912, naming a rate of $5 between industrial

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any connecting line, and shall not discriminate in their rates and charges between such connecting lines: Provided, precedence may be given to live stock and perishable property. Nothing in this act shall be construed as requiring any railroad to give the use of its tracks or terminal facilities to another railroad engaged in like business. Any person or any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier subject to the provisions of this act shall have the right and privilege of routing such shipments, and of prescribing and directing over what connecting line property so shipped shall be transported, and it shall be the duty of the initial carrier to observe the direction of such person or such officer or agent of any corporation or company, and to cause such freight to be transported over such connecting line as may be directed and required by such shipper.

(57) (c) Every corporation owning a railroad in use shall, at reasonable times and for a reasonable compensation, draw over the same the merchandise and cars of any other corporation or individual having connecting tracks; providing such cars are of the proper gauge, are in good running order, and equipped as required by law, and otherwise safe for transportation, and properly loaded; Provided further, if the corporations cannot agree upon the times at which the cars shall be drawn, or the compensation to be paid, the said commission shall, upon petition of either party and notice to the other, after hearing the parties interested, determine the rate of compensation and fix such other periods, having reference to the convenience and interests of the corporation or corporations and the public to be accommodated thereby, and the award of the commission shall be binding upon the respective corporations interested therein until the same shall have been revised.

(57a) (d) Every common carrier operating within this state shall receive and transport at reasonable rates any and all carload traffic offered for transportation under the usual conditions, locally consigned between points in the same city or town, and shall receive and transport at reasonable rates from any junction point or transfer point or intersection with another railroad in such city or town any and all such carload freight destined to team tracks or other sidings on any line operated by the delivering carrier, and shall deliver such car or cars upon such team tracks or sidings in the city or town where such car or cars are received from such connecting line, when required so to do; Provided, that when delivery is requested, which will involve the use of a private siding not owned or controlled by consignee, said consignee shall file with both receiving and delivering carriers written permission, signed by the owner or lessee of such private siding, authorizing the use of same. When the particular delivery desired cannot be accomplished, owing to the congestion of cars upon such siding or team tracks, it shall be the duty of the delivering carrier to notify consignee of such conditions, and it shall be the duty of such consignee, upon receipt of such notice, to advise upon what other siding delivery will be accepted, or whether or not it is desired that such car or cars shall be held awaiting the opportunity for delivery upon the siding originally designated as the destination.

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tracks, and a like rate between junction points with connecting [462] carriers, within the switching district of Detroit, and industrial tracks within the said limits; $8 between junction points with other railroad companies, within said limits, and team tracks within said limits; and $8 between team tracks on the railway's own lines. The tariff was duly filed with the Commission and with the Interstate Commerce Commission.

Haggerty filed a supplementary petition with the Commission, complaining that the new rates were unreasonable and exorbitant, and, on March 15, 1912, the Commission ordered the postponement of the same until April 29th to give the Commission an opportunity for investigation into "the reasonableness of such proposed rate and the matter set forth in the complaint." Thereupon the Grand Trunk System issued a supplement to its tariff, suspending the intrastate rates named in its tariff, and, on March 30th, published a new tariff, canceling all rates between industries having private sidings on the System, and hold or team tracks on that System, and all rates between junction points with other carriers within the corporate limits of Detroit and the team tracks of the System. The effect of this tariff was to withdraw all intrastate and interstate switching movements, except as to the Detroit & Toledo Shore Line, with which the Grand Trunk was under contract for terminal switching.

On April 10th the Commission suspended this supplemental tariff in order to give it opportunity to investigate, and two days afterward the bill in this case was filed. On April 27th an amended bill was filed, and, on the same day, the Detroit, Grand Haven, & Milwaukee Railway Company filed its bill.

We may observe that the order of the Commission of April 10th is the only one in controversy. The other orders of February 6th and March 15th, 1912, were directed against the Grand Trunk Western Railway, and when it came to the knowledge of the Commission that [463] that road did not enter the city, the orders were canceled.

The bills prayed that the acts referred to and the order of the Commission be declared null and void as to complainants, that injunctions interlocutory and perpetual be granted restraining appellees from executing the order, and from taking any steps or proceedings to enforce any of the penalties or remedies of the statute.

Answers were filed to the bills, and supporting and attacking affidavits. The district court, upon hearing, denied an injunction and vacated the restraining order, but suspended the formal entry of its orders. Subsequently the cases were consolidated for the purposes of an appeal, and an appeal allowed. The bond was fixed at $100,000, and the restraining orders continued in force pending the appeal.

The two suits may be treated as one, the material points being identical, except as to the territory through which the roads run and the diversity of citizenship which exists only in the first suit filed. The foundation of both suits is the same, that the order of the Commission and the acts of the state under which it was made, in so far as the order and the acts require of complainants or their property any of the services above set forth or so threatened to be required, constitute the taking of their property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States; and is also a violation of the commerce clause of that instrument. The specification under the latter is "that Congress has taken over the whole subject-matter of terminals, team tracks, switching tracks, sidings, etc., of carriers engaged in interstate commerce, and has enacted that such carriers shall not be required to give the use of such terminal facilities to other carriers engaged in like business."

It is further objected against said order that the companies [464] were not incorporated for the purpose of local or intrastate switching or drayage business, but for the purpose of interstate and intrastate commerce; and, further, the penalties prescribed by the acts under which the Commission purported to have acted are so drastic that a resort to court to test the validity thereof is at the risk of imprisonment in the jails of the various counties where the lines of the companies run, and, therefore, the companies are denied the equal protection of the laws, and their property is taken without due process of law.

The question in the case is whether, under the statutes of the state of Michigan, appellants can be compelled to use the tracks it owns and operates in the city of Detroit for the interchange of intrastate traffic; or, stating the question more specifically, whether the companies shall receive cars from another carrier at a junction point or physical connection with such carrier within the corporate limits of Detroit for transportation to the team tracks of the companies; and whether the companies shall allow the use of their team tracks for cars to be hauled from their team tracks to a junction point or physical connection with another carrier within such limits, and be required to haul such

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cars in either of the above-named movements or between industrial sidings.

It is contended that the order is an interference with interstate commerce. The contention is premature, if not without foundation. Section 7, before its amendment, required all railroads subject to it to establish switching connections between one another, and to establish depots, and otherwise, for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of property and passengers to and from their several lines and those connecting therewith, and also for the transfer and delivery of cars without unreasonable delay or discrimination to any point on their own lines or on any connecting line, and forbidding discrimination [465] in rates and charges. And the respective companies were required to draw over their roads the merchandise and cars of any other corporation or individual having connecting tracks when the cars are of proper gauge, equipment, and properly loaded. Power was given to the Commission, if the compensation could not be agreed on by the roads, to fix such compensation. In other words, the duty of investigation was imposed on the Commission, and the duty to render such judgment as was suitable to the situation, and to award compensation to the carriers for any service required of them.

We have seen from the statement of facts that the first concern of the Grand Trunk was the right to charge what it pleased or discriminate between the services. Inconvenience to its interstate business seems to be an afterthought. Besides, the fact of inconvenience is disputed. It is charged, it is true, in an affidavit filed by appellants; but there was a counter affidavit, and it was averred that the interchange of traffic required by the legislature of the state did not impede interstate business, but, on the contrary, facilitated it and intrastate commerce, and relieved, not caused, congestion on the tracks of the various railroads in the city. And, as we have seen, the order of the Commission was suspensory only of the tariff of the appellants, not a final determination against it, or of the conditions which might or might not justify it. It is too late in the day to question the competency of a state to create a commission and to give it the power of regulating railroads, and necessarily of investigating the conditions upon which regulation may be directed. If a judicial interference is sought with the exercise of such power, it must be clearly shown to have been transcended, not left as a conclusion from the balancing of conflicting affidavits, or even, it may be, as held by the district court, on *ex parte* affidavits. Courts are reluctant to interfere with the laws of a state or with the tribunals constituted [466] to enforce them. Doubts will not be resolved against the law, nor the decision of its tribunals prevented or anticipated unless the necessity for either be demonstrated. Upon these principles the district court acted, and rightly acted.

We will not dwell on the contention of appellants that Congress has taken over the whole subject of terminals, team tracks, switching tracks, sidings, etc. We need make no other comment than that it cannot be asserted as a matter of law that Congress has done so; and where the accommodation between intrastate and interstate commerce shall be made, we are not called upon to say on this record.

Before proceeding to the more important contention of appellants, that is, movement between junction points and other points, it is well to observe that a distinction is alleged to exist between team tracks and industrial sidings or tracks. The allegation (which is neither admitted nor denied in the answer) is that the lands upon which the latter are located are held, owned, or were acquired for the purpose of accommodating the tracks without expense to appellants, either in the acquisition or maintenance of the lands or tracks. Appellants, it is urged further, are not responsible for cars placed on such tracks, nor are appellants required to police them. Team tracks are laid upon the ground acquired by appellants and were constructed and are maintained by them. The latter, therefore, are distinctly accessories or facilities in the receipt and delivery of freight in transportation, both within and to and from points outside of the city. The industrial sidings have, it may be said, more special character. But upon this distinction no point is made in the argument, and the district court left it untouched in its decision, no doubt because in that court, as here, no emphasis was put upon the distinction. In other words, because it was considered that it falls under the principles [467] which related to the team tracks; and we may so regard it.

The proposition of appellants is, as said by the district court, that such service and team track service "are not in a proper sense transportation, but are essentially distinguishable therefrom;" or, to put it another way,—and one which expresses more specially the contention of appellants, —they are mere conveniences at the destination or initial point of the transportation, and hence are terminal facilities merely, and their use is not required to be

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given to other railroads. The district court did not regard them in the latter character. After stating the conditions which exist in Detroit and its extent, the court said of them: "Such tracks are necessary to prevent the congestion which would result from requiring all carload freight, both in and out, to be delivered at the freight depots of the respective roads, and in a very proper sense are shipping stations." The court concluded that the services were transportation, and that the statute of the state validly empowered the Commission "to require local transportation by a railroad between its own shipping stations within a city, whether such plurality of shipping stations has been voluntarily established by the railroad, as here, or has been required by the Commission, under its lawful powers; and provided such transportation is for such substantial distance and of such a character as reasonably to require a railroad haul, as distinguished from other means of carriage." The court further said: "It is also clear that a statute validly may, and the statutes we are considering do, authorize the employment of such depots, side tracks, and team tracks of a railroad for transporting carload freight to or from the junction of such road with another road as a substantial part of a continuous transportation routing, where such junction is outside the city limits." [198 Fed. 1016, 1017.] And it was remarked that the fact that the freight movement begins and ends within [468] the limits of a city does not take from it its character "of an actual transportation between two termini," the other conditions obtaining. We concur in the conclusion of the court.

The extent of Detroit is about 22 miles, and its population about 500,000. The effect of the order is simply that the companies shall accept freight at the designated points for shipment to the other designated points. This, except in an extreme sense, is not a use of the tracks and terminals; or, rather, it is only a proper use,—the use for which the roads were constituted to afford. An area of 22 miles is attempted by appellants to be localized and made a destination point. A city may, in a sense, be such a terminal unit, but considering the extent of Detroit, it is competent, we think, for the state, under the conditions which this record presents, to consider points within it the beginning and destination of traffic. And to call the service necessary to such intrastate movement of freight a taking of terminals is misleading, and puts out of view the full signification of the question which the record presents, which is, Is there a distinct and sufficient movement between places which the companies can be required to perform, or which, to put it another way, constitutes transportation, and therefore such as the companies were created to perform? That cars may be delivered or received is but an incident. The statute, therefore, is a regulation of the business of appellants, not an appropriation of their terminal facilities for the use and benefit of other roads. It is therefore justified by the doctrine of Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115. See also Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900. In the Jacobson Case an order of the Railroad Commission of the state of Minnesota was considered which required two railroads of the state to make track connections. The statute of the state provided that all common carriers subject to its provisions [469] should provide at all points of connection, crossing, or intersection at grade, where it was necessary for interstate commerce, ample facilities for transferring cars used in the regular business of their respective lines of road from other lines or tracks to those of any other carrier whose lines or tracks might connect with, cross, or intersect their own, and should provide facilities for the interchange of cars, and for the receiving, forwarding, and delivering of passengers, property, and cars to and from their several lines and those of other carriers connecting therewith, without discrimination in rates and charges. And it was provided that one carrier should not be required to furnish its tracks, equipment, or terminal facilities to another without reasonable compensation, the cost of connections to be proportionately divided between the carriers; and in case of disagreement, it was to be settled by the Commission. The roads were required to establish reasonable joint through rates at the demand of any person or of the Commission. And it was provided that carload lots should be transferred without unloading the cars unless it be done without cost to the shipper or receiver, and without unreasonable delay.

Under this statute track connections were required to be made by the Wisconsin &c. R. R. Co., with an intersecting road. In its answer before the State Railroad Commission it alleged that to construct a connecting track would require it to go outside of its right of way and to condemn land for that purpose. In addition it urged that to compel such connection would violate the commerce clause of the Constitution and the 14th Amendment. The Commission directed the connection to be made, and its order was affirmed by the

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local state court to which an appeal was taken, as provided by the statute. This court affirmed the order, deciding that it was a proper exercise of the power of regulation of the business of the companies. The reasoning to sustain this [470] conclusion need not be reproduced. It rested upon the ultimate proposition that railroad companies "are organized for the public interests and to subserve primarily the public good and convenience." And deciding this to be the purpose of the creation of the roads, and that government had power to secure it, it was held that where a provision for regulation is reasonable and appropriate, when considered with regard to the interests both of the company and of the public, the legislation is valid, and will furnish ample authority for the courts to enforce it, even though eminent domain must be exercised or cost incurred. This principle, illustrated by the facts of the case, is apposite to the regulation under review. If the establishment of track connections by intersecting roads, with the necessary accessories of sidings and switches, be required, and acceptance and delivery of loaded cars as a convenience of transportation, surely team tracks and sidings in Detroit and the delivery and acceptance of loaded cars are as much so.

This view is not opposed by Louisville & M. R. Co. v. Central Stock Yards Co., 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246. There a provision of the Constitution of the state of Kentucky which required a carrier to deliver its cars to a connecting carrier was held invalid because it did not provide adequate protection for their return, or compensation for their use. It was hence held that it amounted to a taking of property without due process of law. But the court was careful to say that "in view of the well-known and necessary practice of connecting roads, we are far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless transshipment or breaking bulk, in case of an unreasonable refusal by a carrier to interchange cars with another for through traffic." The point of the decision was that compensation should be provided, and by the law. As it is expressed in the opinion: "The law itself must save the parties' rights, and not leave them [471] to the discretion of the courts." This as a condition was explained, for it was said: "We do not mean, however, that the silence of the [state] Constitution might not be remedied by an act of legislature or a regulation by a duly authorized subordinate body if such legislation should be held consistent with the state Constitution by the state court." These conditions exist in the case at bar.

There is another part of the case which is more applicable to the contentions of the parties hereto, and determine, it is urged, against the statute under consideration and the order of the Commission. The judgment reviewed required the railroad company to receive at its connection with the Southern Railway Company, and to switch, transport, and deliver, all live stock consigned from the Central Stock Yards (the stock depot of the Southern Railway) to anyone at the Bourbon Stock Yards (the stock depot of the Louisville & Nashville Railroad). This part of the judgment was based also upon the Constitution of the state. We said: "If the principle is sound, every road into Louisville, by making a physical connection with the Louisville & Nashville, can get the use of its costly terminals and make it do the switching necessary to that end, upon simply paying for the service of carriage. The duty of a carrier to accept goods tendered at its station does not extend to the acceptance of cars offered to it at an arbitrary point near its terminus by a competing road for the purpose of reaching and using its terminal station. To require such an acceptance from a railroad is to take its property in a very effective sense, and cannot be justified, unless the railroad holds that property subject to greater liabilities than those incident to its calling alone."

It will be observed that the beginning of traffic was at the Central Stock Yards, the stock yards of the Southern, and was to be hauled by that road to its connection with the Louisville & Nashville, and by the latter from that [472] point to the Bourbon Stock Yards, the stock depot of the latter railroad. The yards were the terminals of the respective roads for live stock delivery, and the case turned upon the point that the roads were competitive, and that the point of delivery was an arbitrary one, and that thereby the terminal station of one company was required to be shared with the other company.

In the case at bar a shipper is contesting for the right, as a part of transportation. The order of the Commission was a recognition of the right, and legally so. Considering the theater of the movements, the facilities for them are no more terminal or switching facilities than the depots, side tracks, and main lines are terminal facilities in a less densely populated district. A precise distinction between facilities can neither be expressed nor enforced. Transportation is the business of railroads, and when that business may be regulated and to what extent regulated

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may depend upon circumstances. No inflexible principle of decision can be laid down. This was recognized in Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115. There the court was careful not to say that under no circumstances could an order requiring track connections between intersecting roads be a violation of constitutional rights. "It would depend," it was said, "upon the facts surrounding the cases in regard to which the judgment was given. . . . And in many cases questions of degree are the controlling ones by which to determine the validity, or the reverse, of legislative action." Indeed, no case could better illustrate the value of the principle than does this case, where the exceptional situation of Detroit as shown by the record, the relation of the tracks in controversy to that situation, their length and their functions, as respects the commerce of Detroit, which, in the nature of things, they perform, not merely as instruments of terminal service and delivery, but of railway transportation in the completest sense, are essential and controlling factors in the determination of [473] the question presented. To which controlling conditions there must, of course, be added the fact that the railroad itself for a long period of time had recognized the situation, and had applied the tracks to uses of transportation in the proper sense as distinguished from mere terminal service,—a use which was only abandoned or sought to be abandoned when authority was exerted to prevent unreasonable and to secure reasonable charges for the services.

It is contended by appellants that the statute is void upon its face because the severity of the penalties preclude an appeal to the courts against its provisions except at such risks and costs that they should not be compelled to incur, and Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, is adduced. But the provision for penalties is in a section by itself, and when their enforcement is attempted, their constitutionality can then be determined. Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 33 Sup. Ct. Rep. 729; Louisville & N. R. Co. v. Garrett, 231 U. S. 298, ante, 229, 34 Sup. Ct. Rep. 48.

As we have determined that the tracks or terminal facilities of appellants are not taken by the order of the Commission, we need not consider a subdivision of § 7 which provides that nothing in the act shall be construed as requiring any railroad to give the use of its tracks or terminal facilities to another railroad engaged in like business.

The contention of appellants that they were not incorporated for the purpose of intra-city transportation is untenable. They were incorporated for the purpose of transportation, and geographical limitations under the circumstances which this record exhibits cannot prevail against the power of the state to regulate.

Decree affirmed.

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[474] FRANK F. GRAHAM and the Title Guaranty & Surety Company, Plffs. in Err.,
v.
UNITED STATES OF AMERICA.

(See S. C. Reporter's ed. 474–481.)

Bonds — of public contractor.

1. Compliance with the formal requirements as to the mode of annulling a contract for a public work in case the contractor fails to prosecute the work diligently in the judgment of a designated official is not a prerequisite to the maintenance of an action upon the contractor's bond, where he has refused to proceed with the work.

[For other cases, see Bonds, I., in Digest Sup. Ct. 1908.]

Principal and surety — discharge of surety — extension — modification.

2. Waiving the original time limit, and calling upon the contractor, through correspondence, for extra work, for which he is paid, does not discharge the surety upon the bond of a contractor for a public work, where the bond in terms contemplated an extension of time as possible, and the contract provided for a waiver of the time limit, and for written modifications.

[For other cases, see Principal and Surety, III. f, in Digest Sup. Ct. 1908.]

United States — contracts — construction.

3. The obligation to furnish the necessary cars rests upon the contractor rather than the government, under a contract by which the former agrees to transport from the quarry, cut, box, and deliver complete, all the granite required for a public work, to be furnished by the government f. o. b. cars at the quarry, even if certain recitals in the preliminary descriptions and conditions can be construed to mean that, as between the quarryman and the government, the latter is bound to furnish the cars, where other recitals indicate that bidders were invited to step into the government's shoes and assume a like obligation to it.

[For other cases, see United States, VI. d, in Digest Sup. Ct. 1908.]

Trial — instructions — action on bond of public contractor.

4. The defendant in a suit on the bond of a public contractor for a breach of his contract to transport, cut, box, and deliver the granite needed for a public work, to be furnished by the government f. o. b. cars

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at the quarry, has no ground for valid complaint of an instruction to find in his favor if the jury shall determine that, on a fair average, the rough stone furnished did not comply with the stipulation that it should be furnished in "net dimension blocks," as they find the meaning and intention of that stipulation was understood by the parties to the contract, there being conflicting evidence as to the meaning of this phrase.

[For other cases, see Trial, VII., in Digest Sup. Ct. 1908.]

Appeal — misleading instructions.

5. The possibility that a reference to the period as to which the court understood there was special complaint, when instructing the jury to find for the defendant in a suit on the bond of a public contractor if they should find that the stone furnished to the contractor by the government did not comply with the stipulation that it should be furnished in net dimension blocks, as they find the meaning and intention of that stipulation was understood by the parties to the contract, might be understood by the jury as importing a limitation of time, is not ground for reversal, where the matter was not called to the attention of the trial court.

[For other cases, see Appeal and Error, VIII. m, 4, a, in Digest Sup. Ct. 1908.]

Trial — submitting case to jury — comment of court on evidence.

6. A Federal trial judge may direct the jury's attention to a portion of the testimony of a party if he leaves the decision of the case to them.

[For other cases, See Trial, VI. a, in Digest Sup. Ct. 1908.]

Appeal — prejudicial error — argument or remarks of counsel.

7. Counsel's action when putting in evidence a letter from the surety company in an action on the bond of a public contractor, in reading the letter head containing the words, "Capital and surplus over $1,000,000," and in stating in argument that "there is no room for sympathy for the poor defendant in this case," does not call for reversal of the judgment where the judge charged the jury that it was not a case for sentimental consideration of any kind.

[For other cases, see Appeal and Error, VIII. m, 5, in Digest Sup. Ct. 1908.]

[No. 76.]

Argued November 13 and 14, 1913. Decided December 8, 1913.

IN ERROR to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Maryland in favor of plaintiff in an action on the bond of a public contractor. Affirmed.

See same case below, 110 C. C. A. 465, 188 Fed. 651.

The facts are stated in the opinion.

Messrs. Charles F. Harley and George R. Gaither argued the cause, and, with Messrs. John B. A. Wheltle and Burdette B. Webster, filed a brief for plaintiffs in error:

The successive prayers of the plaintiff, which the jury could not possibly understand, operated virtually as an instruction to find for the plaintiff, and thus rid themselves of difficulties as to pleas which they never understood, and, indeed, never saw.

Hitchins Bros. v. Frostburg, 68 Md. 117, 6 Am. St. Rep. 422, 11 Atl. 826; Hughes, Instructions, § 53; Sackett, Instructions, § 214; 11 Enc. Pl. & Pr. 154; Adams v. Somerset County, 106 Md. 201, 66 Atl. 695.

The million dollar argument was prejudicial error.

Southern R. Co. v. Bryant, 105 Ga. 316, 31 S. E. 182; 4 Enc. Ev. 27; Sun Life Assur. Co. v. Bailey, 101 Va. 443, 44 S. E. 695; Bennett v. Beam, 42 Mich. 350, 36 Am. Rep. 442, 4 N. W. 8; Illinois C. R. Co. v. Seitz, 111 Ill. App. 243; Johnson v. Detroit & M. R. Co. 135 Mich. 360, 97 N. W. 760; Hillman v. Detroit United R. Co. 137 Mich. 184, 100 N. W. 399; Baltimore & O. R. Co. v. Boyd, 67 Md. 42, 1 Am. St. Rep. 362, 10 Atl. 315; 5 Enc. L. & P. 346, 365; West Chicago Street R. Co. v. Musa, 80 Ill. App. 223; White v. Chicago & N. W. R. Co. 145 Iowa, 408, 124 N. W. 309; Southwestern Teleg. & Teleph. Co. v. Taylor, — Tex. Civ. App. —, 118 S. W. 188; Ft. Worth Belt R. Co. v. Johnson, — Tex. Civ. App. —, 125 S. W. 387; United States Cement Co. v. Cooper, 172 Ind. 599, 88 N. E. 69; Lane v. State, 85 Ala. 11, 4 So. 730; Sullivan v. Chicago, R. I. & P. R. Co. 119 Iowa, 464, 93 N. W. 367; Bjoraker v. Chicago, M. & St. P. R. Co. 103 Minn. 400, 115 N. W. 202; Dallas Consol. Electric Street R. Co. v. Black, 40 Tex. Civ. App. 415, 89 S. W. 1087; Louisville & N. R. Co. v. Crow, 32 Ky. L. Rep. 1145, 107 S. W. 807; Illinois C. R. Co. v. Proctor, 122 Ky. 92, 89 S. W. 714; Union P. R. Co. v. Field, 69 C. C. A. 536, 137 Fed. 14; Saxton v. Pittsburg R. Co. 219 Pa. 492, 68 Atl. 1022; Chicago City R. Co. v. Henry, 62 Ill. 145.

There was prejudicial error in the court's remarks.

Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. Rep. 1, 10 Am. Neg. Cas. 574; Freiberg v. Beach Hotel & S. Improv. Co. 63 Tex. 455; Deshler v. Beers, 32 Ill. 368, 83 Am. Dec. 274; Cronkhite v. Dickerson, 51 Mich. 177, 16 N. W. 371; Williams v. West Bay City, 119 Mich. 395, 78 N. W. 328; Hudson v. Hudson, 90 Ga. 581, 16 S. E. 349; West v. Black, 65 Ga. 647; Knox v. Fuller, 23 Wash. 34, 62 Pac. 135; Kane v. Kinnare, 69 Ill. App. 81.

The whole question of damage is dis-

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posed of in a manner absolutely in conflict with the elementary principles of Hadley v. Baxendale, 6 Eng. Rul. Cas. 617.

It can hardly be said that the jury were "left free to consider the evidence for themselves."

Lincoln v. Power, 151 U. S. 442, 38 L. ed. 227, 14 Sup. Ct. Rep. 387.

The instructions had a tendency to withdraw from the consideration of the jury a considerable amount of important and pertinent testimony.

Jewell v. Jewell, 1 How. 219, 11 L. ed. 108; M'Lanahan v. Universal Ins. Co. 1 Pet. 170, 7 L. ed. 98; Nudd v. Burrows, 91 U. S. 426, 23 L. ed. 286.

Technical language constitutes a well-known exception to the rule that the interpretation of contracts is for the courts.

17 Cyc. 685.

It is true *inter partes*, when the language of a contract is uncertain, the acts and conduct of the parties may be considered to discover the meaning of the language used, but the parties cannot testify as to their understanding or interpretation of the contract.

Diamond v. Shriver, 114 Md. 643, 80 Atl. 217; American Syrup & Preserving Co. v. Roberts, 112 Md. 23, 76 Atl. 589; Dexter Sulphite Pulp & Paper Co. v. McDonald, 103 Md. 381, 63 Atl. 958; Mitchell v. Wedderburn, 68 Md. 139, 11 Atl. 760.

But even a party is not bound by "any construction which he may have put upon the instrument."

Ringgold v. Ringgold, 1 Harr. & G. 11, 18 Am. Dec. 250; Hutchins v. Dixon, 11 Md. 40; Varnum v. Thurston, 17 Md. 500; Stockham v. Stockham, 32 Md. 209.

The jury could not distinctly understand that what is said as to the facts is only advisory, and in no wise intended to fetter the exercise of their own independent judgment.

Nudd v. Burrows, 91 U. S. 426, 23 L. ed. 286.

It cannot be said that therein "all matters of fact are ultimately submitted to the determination of the jury.

Lovejoy v. United States, 128 U. S. 171, 32 L. ed. 389, 9 Sup. Ct. Rep. 57.

The thing is to find out the real intention of the parties as shown by their contract.

Hurst v. Altamont Mfg. Co. 73 Kan. 422, 6 L.R.A.(N.S.) 928, 117 Am. St. Rep. 525, 85 Pac. 551, 9 Ann. Cas. 549; R. J. Meuz Lumber Co. v. E. J. McNeeley & Co. 58 Wash. 223, 28 L.R.A.(N.S.) 1007, 108 Pac. 621.

When the work covenanted to be done was not finished and completed within the time fixed, and Graham was permitted to go on with the work, the sealed instrument was at an end.

Jewell v. Schroeppel, 4 Cow. 564; Burn v. Miller, 4 Taunt. 745, 14 Revised Rep. 655; Lucas v. Godwin, 3 Bing. N. C. 737, 4 Scott, 502, 3 Hodges, 114, 6 L. J. C. P. N. S. 205; Orem v. Keelty, 85 Md. 344, 36 Atl. 1030; Kendrick & Roberts v. Warren Bros. Co. 110 Md. 74, 72 Atl. 461.

Such changes and alterations were made in the contract without the surety company's consent as entitled it to release from its surety obligation.

Miller v. Stewart, 9 Wheat. 680, 6 L. ed. 189; Smith v. Montgomery, 3 Tex. 199; 2 Brandt Suretyship, §§ 427, 748; Schaeffer v. Bond, 72 Md. 507, 20 Atl. 176; Stearns, Suretyship, §§ 72, 79; Erfurth v. Stevenson, 71 Ark. 199, 72 S. W. 49; Judah v. Zimmerman, 22 Ind. 388; United States use of Schumacker v. McIntyre, 111 Fed. 590; Orleans & J. R. Co. v. International Constr. Co. 113 La. 409, 37 So. 10; Reese v. United States, 9 Wall. 13, 19 L. ed. 541; United States v. Freel, 186 U. S. 309, 46 L. ed. 1177, 22 Sup. Ct. Rep. 875; Mundy v. Stevens, 9 C. C. A. 366, 17 U. S. App. 442, 61 Fed. 77; Zeigler v. Hallahan, 66 C. C. A. 1, 131 Fed. 205; Fidelity & D. Co. v. United States, 70 C. C. A. 204, 137 Fed. 866; Cross v. Allen, 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. Rep. 67; United States Fidelity & G. Co. v. Golden Pressed & Fire Brick Co. (United States Fidelity & G. Co. v. United States) 191 U. S. 424, 48 L. ed. 243, 24 Sup. Ct. Rep. 142; United States use of Hill v. American Surety Co. 200 U. S. 202, 50 L. ed. 440, 26 Sup. Ct. Rep. 168; Plumley v. United States, 226 U. S. 545, 57 L. ed. 342, 33 Sup. Ct. Rep. 139.

The question of waiver is one for the jury, under the instruction of the court.

Spring Garden Mut. Ins. Co. v. Evans, 9 Md. 1, 66 Am. Dec. 308; Caledonian Ins. Co. v. Traub, 80 Md. 224, 30 Atl. 904; Pentz v. Pennsylvania F. Ins. Co. 92 Md. 444, 48 Atl. 139; Walter v. Victor G. Bloede Co. 94 Md. 90, 50 Atl. 433; Sumwalt Ice & Coal Co. v. Knickerbocker Ice Co. 112 Md. 444, 77 Atl. 56.

When a matter is left by the contracting parties to the judgment, sanction, or approval of a designated party, such judgment, sanction, or approval is conclusive only in the absence of bad faith.

Sweeney v. United States, 109 U. S. 618, 27 L. ed. 1053, 3 Sup. Ct. Rep. 344; Chicago, S. F. & C. R. Co. v. Price, 138 U. S. 185, 34 L. ed. 917, 11 Sup. Ct. Rep. 290; Kihlberg v. United States, 97 U. S. 398, 24 L. ed. 1106; United States v. Gleason, 175 U. S. 588, 44 L. ed. 284, 20 Sup. Ct. Rep. 228; Filston Farm Co. v. Henderson, 106 Md. 367, 67 Atl. 228; Chism v. Schipper, 51 N. J. L. 1, 2 L.R.A. 544, 14 Am. St. Rep. 668, 16 Atl. 316; Church v. Shanklin, 95 Cal. 626,

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17 L.R.A. 210, 30 Pac. 789; Baltimore & O. R. Co. v. Brydon, 65 Md. 225, 57 Am. Rep. 318, 3 Atl. 306, 9 Atl. 126; Doll v. Noble, 116 N. Y. 230, 5 L.R.A. 554, 15 Am. St. Rep. 398, 22 N. E. 406.

This question of good faith *vel non* should have gone to the jury.

Baltimore & O. R. Co. v. Brydon, 65 Md. 198, 57 Am. Rep. 318, 3 Atl. 306, 9 Atl. 126; Sonnentheil v. Christian Moerlein Brewing Co. 172 U. S. 401, 43 L. ed. 492, 19 Sup. Ct. Rep. 233; Warner v. Norton, 20 How. 448, 15 L. ed. 950; Thompson v. Sioux Falls Nat. Bank, 150 U. S. 231, 37 L. ed. 1063, 14 Sup. Ct. Rep. 94; Davis v. Schwartz, 155 U. S. 631, 39 L. ed. 289, 15 Sup. Ct. Rep. 237; People's Sav. Bank v. Bates, 120 U. S. 556, 30 L. ed. 754, 7 Sup. Ct. Rep. 679; Rowe v. United States, 164 U. S. 546, 41 L. ed. 547, 17 Sup. Ct. Rep. 172; 14 Am. & Eng. Enc. Law, 206; Bush v. Jones, 6 L.R.A. (N.S.) 774, note.

Solicitor General Davis argued the cause and filed a brief for defendant in error:

The obligation of the United States was merely to furnish the granite "without unnecessary delay, and without charge, free on board cars at the quarry at Bethel, Vermont." These words of the contract, in the absence of any agreement to the contrary, imposed upon Graham alone the duty of furnishing the cars.

Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co. 97 Md. 1, 62 L.R.A. 797, 54 Atl. 634; Hocking v. Hamilton, 158 Pa. 107, 27 Atl. 836; Baltimore & L. R. Co. v. Steel Rail Supply Co. 59 C. C. A. 419, 123 Fed. 655; Evanston Elevator & Coal Co. v. Castner, 133 Fed. 409; Sutherland v. Allhusen, 14 L. T. N. S. 666.

While the trial judge very properly called the jury's attention to certain specific evidence which seemed to him to have an important bearing on the question, he nevertheless stated this evidence with entire accuracy, and left the whole question to the jury. In this respect the charge is not open to objection.

Rucker v. Wheeler, 127 U. S. 85, 93, 32 L. ed. 102, 105, 8 Sup. Ct. Rep. 1142.

When Graham wholly abandoned the contract, as it is clear he did, the United States immediately acquired the right to treat the breach as absolute, and to hold him without more saying for any damages accruing to it, the measure of such damages being the increased cost of completing the work.

United States v. O'Brien, 220 U. S. 321, 328, 55 L. ed. 481, 484, 31 Sup. Ct. Rep. 406; United States v. McMullen, 222 U. S. 460, 471, 56 L. ed. 269, 273, 32 Sup. Ct. Rep. 128.

The defense of extension of time for completion is not available to a surety who assented to a stipulation in the contract waiving the time limit.

United States v. McMullen, supra.

The claim for extra work, which was paid, was based on alterations agreed upon in the manner provided by the contract, and inasmuch as the surety assented to such alterations, he cannot object.

United States v. McMullen, supra.

The rule *strictissimi juris* should not be applied to these professional bonding companies to release them from their just obligations where slight changes have been made in the contract, not injuring them in the least.

United States Fidelity & G. Co. v. Golden Pressed & Fire Brick Co. (United States Fidelity & G. Co. v. United States) 191 U. S. 416, 426, 48 L. ed. 242, 246, 24 Sup. Ct. Rep. 142; United States use of Hill v. American Surety Co. 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 168; Atlantic Trust & D. Co. v. Laurinburg, 90 C. C. A. 274, 163 Fed. 696.

The giving of special charges by a Federal judge is unnecessary. The matter may be presented in his own way, provided the law is correctly stated.

Continental Improv. Co. v. Stead, 95 U. S. 161, 166, 24 L. ed. 403, 406.

The cardinal purpose of the prosecution of the writ of error is delay; the judgment below should therefore be affirmed, with damages at 10 per cent, in accordance with the provisions of rule 23, ¶ 2, of this court.

Deming v. Carlisle Packing Co. 226 U. S. 102, 106, 57 L. ed. 140, 143, 33 Sup. Ct. Rep. 80.

Mr. Justice Holmes delivered the opinion of the court:

This is an action upon a bond against a contractor and his surety, for breach of a contract made under the act of March 3, 1903, chap. 1007, 32 Stat. at L. 1102, with Green, superintendent of construction, acting under the direction of the regents of the Smithsonian Institution, for the United States, party of the first part, which the bond was given to secure. The contractor, Graham, agreed to "transport from the quarry, cut, box, and deliver complete, all of the Bethel granite, to be furnished by the party of the first part free on board cars at the quarry at Bethel, Vermont, required for" a part of the National Museum in Washington, described in the specifications, "and to do all other things needful to carry out all and singular the several requirements of the said specifications, the drawings therein referred to, and the instructions and general conditions," for a gross sum. In case of failure to prosecute the work diligently in the judgment of the

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superintendent of construction, Green or his successor was given power, "with the sanction of the regents of the Smithsonian Institution, to annul" the contract by notice in [476] writing, whereupon payments under the contract were to cease, etc., and the United States was given the right to recover from Graham any excess over the contract price expended for completing the contract, which it was authorized to proceed to do. There were provisions for an extension of time by the superintendent, for written modifications of the contract as to the character or quantity of the labor or material, and for payment of 90 per cent as the progress of the work might warrant. The bond was for the performance of the contract according to its true intent and during any period of extension granted by the United States.

On March 7, 1908, after the time fixed for the completion of the work, Graham discharged his workmen and stopped work, the contract not having been performed. On March 11, the superintendent wrote to him, saying that he had heard that Graham apparently had stopped work indefinitely, and asking for immediate correct information. On the 14th Graham's lawyer answered that Graham had stopped work; that the step was necessary for his financial welfare in view of the damage that he had sustained through the government's conduct, and that "if this matter can be in any way amicably adjusted," he would be glad to do anything fair. On the 16th the superintendent replied that if he received no immediate assurance that the work was to be resumed promptly, he must proceed to annul the contract; and on the 18th notified Graham that the contract was annulled with the sanction of the regents of the Smithsonian Institution. To this Graham's lawyer rejoined that they could not concede any default, that the government alone was to blame, but that they were willing to do what was fair, and to let the government use their plant if the damage sustained could be adjusted. The superintendent had written on the 18th to the secretary of the board of regents, recommending the so-called annulment and notice [477] to the contractor and his surety, and had received his approval, expressed to be on behalf of the board of regents. Afterwards the United States completed the work. There was a long trial which resulted in a verdict and judgment for the plaintiff for the penalty of the bond, $50,000, subject to exceptions. The judgment was affirmed by the circuit court of appeals. 110 C. C. A. 465, 188 Fed. 651.

Before considering the excuses alleged by Graham, we will dispose of a preliminary objection that the suit cannot be maintained because the secretary of the board of regents did not consult the board before undertaking to sanction the "annulment" of the contract. It is unnecessary to pass upon the argument that, under the statute, the board could have no voice, and that by custom and practice, as well as by necessity, in view of the constitution of the board, the secretary represented it in matters like this. The provision as to annulment, construed in United States v. McMullen, 222 U. S. 460, 471, 56 L. ed. 269, 273, 32 Sup. Ct. Rep. 128, and cases cited, referred to cases where there was a failure to prosecute the work diligently in the judgment of the secretary, and allowed a revision of that judgment in cases of that sort, before the United States should decline to proceed further and complete the work by other means. But when Graham refused to go on, there was no question of judgment to be revised, but a plain breach of the contract unless the refusal was justified, and a right of action accrued without the need of a ceremony that would have had no meaning or use. The letters from March 7 to March 18, 1908, appear to us to show a clear refusal by Graham to do any further work. The expressions as to adjustment suggest nothing but a compromise of mutual claims, to be followed by the government's not Graham's, use of Graham's plant.

Another objection not going to the merits of Graham's case is that the surety was discharged by a waiver of the [478] original time limit without its assent, and by Graham's being called on for some extra work, due to a slight enlargement of the diameter of the dome, for which he was paid. The bond in terms contemplated an extension of time as possible, and the contract provided, as we have said, for a waiver of the time limit and for written modifications. The modifications were exhibited in letters, but perhaps it is unnecessary to consider how far a surety whose undertaking extends to modifications of the principal contract is concerned with the form in which they are made. The surety was not discharged. United States v. McMullen, 222 U. S. 460, 468, 469, 56 L. ed. 269, 272, 32 Sup. Ct. Rep. 128.

The only question of substance is whether Graham's refusal to finish the work was justified or excused by the conduct of the other party. The first and only serious matter of complaint on his part was delay in furnishing him granite. The undisputed testimony is that this delay was due to their being unable to get cars at the quarry to take the stone, and so, under the instructions, the jury must have found; so

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that the responsibility for it depends upon who was bound to furnish the cars. By the contract the government was to furnish the granite free on board the cars at the quarry, and Graham agreed to transport it from that place. On such an undertaking, as Graham was to do the transporting, and moreover was made responsible for safe delivery on the site of the Museum building, and as the railroad would be his bailee, he naturally would be held to furnish the cars. No different conclusion seems to us to follow from the language of the preliminary description and conditions. These recite that "the necessary Bethel granite stock, in net dimension blocks, is to be furnished to the government by the present contractor, free on board cars at the quarry in Bethel, ready for the contractor for the cutting of the granite, to transport it to his cutting yard for that purpose." They go on: "Bidders for the Bethel granite work [479] will therefore bid on the basis and understanding that the granite in net dimension blocks, one block for each separate pattern, will be furnished to them without unnecessary delay and without charge, free on board cars at the quarry at Bethel, Vermont." The first passage does not mean that because the quarryman was to furnish the granite free on board and ready for transportation, the quarryman was to furnish the cars. It may mean that, as between him and the government, the government was bound to do it; but, by the same reasoning, the second passage means that bidders were invited to step into the government's shoes and assume a like obligation towards it, as by the agreement, when made, Graham did. It follows that he cannot charge the United States with delay due to lack of cars. Furthermore, in a letter of February 10, 1908, when the delay had ceased, he wrote that the work was nearly finished, and that he intended to devote his whole yard to it until it should be about completed. This is wholly irreconcilable with the defense that a month later he abandoned the work because of the delay.

The next excuse put forward is that the granite was not furnished in "net dimension blocks." There was contradictory evidence as to the meaning of the phrase, Graham contending, in the face of his contract to cut, that it meant perfect blocks. But he admitted that he did not have that understanding when he contracted, and although on February 14, 1907, he complained of the size, in the letter just mentioned of February 10, 1908, he wrote that the work "has had to be cut and shipped, but it is now nearly finished, and I intend [redacted] my entire yard to Museum work, until I see the work about completed." The judge left it to the jury "whether, on a fair average, the rough stone furnished complied with the stipulation that it should be furnished in net dimension blocks, as you find the meaning and intention of that stipulation was understood by the parties to the contract." [480] He added: "If you find that in the latter part of February and the early part of March the stone, in point of its dimensions and roughness, did not comply with the contract, . . . Graham could not be held to the further performance of his contract; and your verdict should be for the defendants." The reference to February and March did not import a limitation of time, but simply a reference to the period as to which the judge understood that there was special complaint. No attention was called to the matter as it should have been if any misunderstanding was feared. The charge on the point was adequate and fair. It is objected that the judge called the jury's attention to Graham's testimony concerning his expectation when he contracted. The judge had a right to do more than that if he left the decision to them. Universal distrust creates universal incompetence. In the courts of the United States the judge and jury are assumed to be competent to play the parts that always have belonged to them in the country in which the modern jury trial had its birth. Rucker v. Wheeler, 127 U. S. 85, 32 L. ed. 102, 8 Sup. Ct. Rep. 1142.

The ground on which Graham testified that he stopped work was that he could not get any money; but there seems to be no evidence that the government failed in its obligations as to payment, and this point is not one of those most pressed. We have examined the places in the record referred to by the defendants, and think it enough to say that we discover no error of which they can complain.

Much emphasis was laid in the argument on what seem to us meticulous objections to every detail in the conduct of the trial. One that was dwelt upon was that, in putting in a letter from the surety, showing notice to it of Graham's default, and the position taken by it, the counsel was allowed to read the letter head, which contained the words "Capital and Surplus over $1,000,000," as well as the letter itself (which last was not objected to), and that in argument the counsel for the government said: "There is no [481] room for sympathy for the poor defendant in this case." The document went in as a whole, properly enough, and the judge charged the jury that it was "not a case for sentimental considerations of any kind," with more in

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the same direction. It would be absurd to upset a verdict upon a speculation that the jury did not do their duty and follow the instructions of the court. As to various remarks made by the judge in the course of the trial, it is enough to refer to what we have said already as to his power, and that we discover nothing that could have created a prejudice against the defendants, or have been open to objection, even if he had been more strictly tied down by law than he was.

We find no error on the question of damages. The judge instructed the jury that the plaintiff was entitled to recover, of course not exceeding the penalty of the bond, the difference between "the reasonable and necessary cost to the plaintiff for transporting, cutting, and delivering the granite mentioned in this case . . . and the amount specified in the contract" to be paid to Graham. There was some cavil at the phrase "granite mentioned in this case" but obviously it meant the granite in controversy. There was evidence warranting a finding, and the measure followed the contract and was correct. United States v. McMullen, 222 U. S. 460, 471, 56 L. ed. 269, 273, 32 Sup. Ct. Rep. 128. A superfluous number of prayers was submitted and exceptions were taken at every step. We deem it enough to say in regard to them all that the instructions to the jury were fair, the rulings on the questions in the case correct, and that nothing appears that would warrant us in ordering the case to be retried.

Judgment affirmed.

The CHIEF JUSTICE took no part in the decision of this case.

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[482] LUCIANO CHAVEZ et al., Appts.,
v.
ELOISA LUNA DE BERGERE et al.

(See S. C. Reporter's ed. 482–491.)

Deed — what constitutes — executed or executory instrument.

1. An executory contract for a conveyance, and not a present transfer with further assurance, was imported by an informal unacknowledged document, signed by both parties, which recites that one of such parties has sold and transferred to the other certain property supposed to be an unconfirmed Mexican grant, and will execute the documents of conveyance as soon as another specified grant shall be confirmed, the vendees to have possession in the interim.

[For other cases, see Deeds, II., in Digest Sup. Ct. 1908.]

Evidence — relevancy — ejectment.

2. Proof that the heirs of the vendor in an agreement reciting that he had sold and transferred certain lands, and would execute the documents of conveyance when a certain Mexican land grant should be confirmed, have advantageously sold or disposed of certain claims acquired under the act of March 3, 1891 (26 Stat. at L. 854, chap. 539, U. S. Comp. Stat. 1901, p. 765), §§ 17, 18, as amended by the acts of February 21, 1893 (27 Stat. at. L. 470, chap. 149), and June 27, 1898 (30 Stat. at L. 495, chap. 504, U. S. Comp. Stat. 1901, p. 776), within the limits of such grant after it had been rejected, is not admissible in an ejectment suit brought against those in possession, claiming under the vendees in such grant, either as tending to show that they treated the agreement as executed rather than executory, or upon the theory that, even if executory, they could not recover in the action without first surrendering the advantages obtained through such claims.

Adverse possession — vendor and purchaser — private land claims.

3. The mistaken belief that the surveyor general had power to adjudicate and approve unconfirmed Mexican land grants, entertained by both parties to an executory contract for the sale of land, investing the vendees with possession until such action by that official, prevents such possession from becoming adverse after he recommends the rejection of the grant, and such possession continues to be in virtue of the agreement until a final adverse decision by the proper legal authorities.

[For other cases, see Adverse Possession, I. c, in Digest Sup. Ct. 1908.]

Ejectment — claims — adverse possession.

4. A demand for surrender of possession is not a prerequisite to the maintenance of an action in ejectment, brought by the heirs of the vendor in an executory contract for the sale of land, where those claiming under the vendees continued in possession without right, after their right to do so in virtue of the agreement had terminated, and were asserting full title in themselves.

[For other cases, see Ejectment, V., in Digest Sup. Ct. 1908.]

Estoppel — vendor and vendee.

5. Those in possession of land as conditional vendees are estopped to call in question their vendor's title when sued by him in ejectment.

[For other cases, see Estoppel, 322, 334a, in Digest Sup. Ct. 1908.]

[No. 5.]

Submitted October 30, 1913. Decided December 8, 1913.

APPEAL from the Supreme Court of the Territory of New Mexico to review a

NOTE.—As to when vendee is estopped to dispute the title of his vendor—see note to Watkins v. Holman, 10 L. ed. U. S. 873.

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judgment which affirmed a judgment of the District Court of Santa Fe County, in that territory, in favor of plaintiffs in an action of ejectment. Affirmed.

See same case below, 14 N. M. 352, — L.R.A. (N.S.) —, 93 Pac. 762.

The facts are stated in the opinion.

Mr. A. B. Renehan submitted the cause for appellants:

The statute of limitations was a complete defense even if the contract was originally executory.

Maxwell Land Grant Co. v. Dawson, 151 U. S. 586, 38 L. ed. 279, 14 Sup. Ct. Rep. 458; Teall v. Schroder, 158 U. S. 172, 39 L. ed. 938, 15 Sup. Ct. Rep. 768; Sharon v. Tucker, 144 U. S. 535, 36 L. ed. 533, 12 Sup. Ct. Rep. 720; Ewing v. Burnet, 11 Pet. 41, 9 L. ed. 624; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 35 L. ed. 1062, 12 Sup. Ct. Rep. 239; Smith v. Gale, 144 U. S. 521, 36 L. ed. 525, 12 Sup. Ct. Rep. 674; Zeller v. Eckert, 4 How. 296, 11 L. ed. 982; Willison v. Watkins, 3 Pet. 43, 7 L. ed. 596; Jackson ex dem. Bradstreet v. Huntington, 5 Pet. 429, 8 L. ed. 180; McClaskey v. Barr, 42 Fed. 613; 1 Am. & Eng. Enc. Law, 2d ed. 803, 805; Ellicott v. Pearl, 10 Pet. 412, 9 L. ed. 475.

A presumption of grant and deed arises from lapse of time.

Fletcher v. Fuller, 120 U. S. 534, 30 L. ed. 759, 7 Sup. Ct. Rep. 667; United States v. Chavez, 175 U. S. 520, 44 L. ed. 258, 20 Sup. Ct. Rep. 159; Van Gunden v. Virginia Coal & I. Co. 3 C. C. A. 294, 8 U. S. App. 229, 52 Fed. 856; Fuller v. Fletcher, 44 Fed. 37; United States v. Devereus, 32 C. C. A. 564, 61 U. S. App. 548, 90 Fed. 187; Zeller v. Eckert, 4 How. 297, 11 L. ed. 982; Woodson v. Scott, 1 Dana, 472; Downing v. Ford, 9 Dana, 393; Brock v. Savage, 46 Pa. 83.

The statute of limitations was set in motion September 7, 1881, for then Oter's right of re-entry ripened, if he ever had it.

25 Cyc. 1065–1067; Mahoning County v. Young, 8 C. C. A. 27, 16 U. S. App. 253, 59 Fed. 96; 6 Am. & Eng. Enc. Law, 502, note 9.

Demand of possession or notice to quit was a prerequisite to suit.

Gregg v. Von Phul, 1 Wall. 282, 17 L. ed. 538; Costigan v. Wood, 5 Cranch, C. C. 507, Fed. Cas. No. 3,265; Jones v. Temple, 87 Va. 210, 24 Am. St. Rep. 649, 12 S. E. 404; Williamson v. Paxton, 18 Gratt. 475; Stackhouse v. Doc, 5 Blackf. 570; Getty v. Peters, 82 Mich. 661, 10 L.R.A. 465, 46 N. W. 1036.

But the tenant may forfeit that right.

Gregg v. Von Phul, 1 Wall. 282, 17 L. ed. 538; Jackson ex dem. Livingston v. Niven, 10 Johns. 335; Hotaling v. Hotaling, 47 Barb. 167.

The court should have sustained the motion to dismiss the cause because no notice to quit had been given, and because it was not shown that the exceptions and reservations from the deed by Miguel E. Pino to Manuel Antonio Otero were not the very lands claimed by the defendants or somebody else.

Maxwell Land Grant Co. v. Dawson, 151 U. S. 586, 38 L. ed. 279, 14 Sup. Ct. Rep. 458; Hawkins v. Barney, 5 Pet. 457, 8 L. ed. 190; Taylor v. Taylor, 3 A. K. Marsh. 18.

The plaintiffs are estopped by laches to have or recover the premises.

Kirk v. Hamilton, 102 U. S. 78, 26 L. ed. 82; Naddo v. Bardon, 2 C. C. A. 335, 4 U. S. App. 642, 51 Fed. 493; Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618.

Mr. T. B. Catron submitted the cause for appellees. Mr. R. C. Gortner was on the brief:

The instrument is plainly an executory contract to convey and to make title deeds upon the happening of a certain contingency, and to vest the possession and enjoyment of the fruits and products in the proposed vendee in the interim.

9 Am. & Eng. Enc. Law, 2d ed. 93; Williams v. Paine, 169 U. S. 76, 42 L. ed. 667, 18 Sup. Ct. Rep. 279; Jackson v. Moncrief, 5 Wend. 29; Ogden v. Brown, 33 Pa. 248; Phillips v. Swank, 120 Pa. 84, 6 Am. St. Rep. 691, 13 Atl. 712; Bell v. McDuffie, 71 Ga. 264; Jackson ex dem. Livingston v. Niven, 10 Johns. 335; Neave v. Jenkins, 2 Yeates, 107; Sherman v. Dill, 4 Yeates, 295, 2 Am. Dec. 408; Stouffer v. Coleman, 1 Yeates, 393; Stokely v. Trout, 3 Watts, 163; Stewart v. Lang, 37 Pa. 201, 78 Am. Dec. 414; Jackson ex dem. Green v. Clark, 3 Johns. 424; Schenley v. Pittsburgh, 104 Pa. 472.

A possession so taken is not adverse. It is expressly a possession in recognition of, and on behalf of, the owner.

1 Cyc. 1047; Hart v. Bostwick, 14 Fla. 178; Tyler, Ejectment, 875; Brandt ex dem. Walton v. Ogden, 1 Johns. 156; Jackson ex dem. Bonnell v. Sharp, 9 Johns. 163, 6 Am. Dec. 267; Jackson ex dem. Gansevoort v. Parker, 3 Johns. Cas. 124; Gay v. Moffit, 2 Bibb, 507, 5 Am. Dec. 633; McGee v. Morgan, 1 A. K. Marsh. 62; Kirk v. Smith, 9 Wheat. 241, 6 L. ed. 81; Jackson v. Berner, 48 Ill. 203; Floyd v. Mintsey, 7 Rich. L. 181; Williams v. Cash, 27 Ga. 507, 73 Am. Dec. 739; Jackson ex dem. Young v. Camp, 1 Cow. 605; Woods v. Dille, 11 Ohio, 455; McManus v. Matthews, — Tex. Civ. App. —, 55 S. W. 589; Durst v. Skillern, — Tex. Civ. App. —, 45 S. W.

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840; Greeno v. Munson, 9 Vt. 37, 31 Am. Dec. 605; 1 Am. & Eng. Enc. Law, 2d ed. 810; Tilghman & West v. Little, 13 Ill. 241; Alderson v. Marshall, 7 Mont. 288, 16 Pac. 576; Jones v. Pelham, 84 Ala. 208, 4 So. 22; Brunson v. Morgan, 84 Ala. 598, 4 So. 589; Estes v. Long, 71 Mo. 605; Parish Bd. of School Directors v. Edrington, 40 La. Ann. 633, 4 So. 574; Avery v. Baum, Wright (Ohio) 576; Thayer v. Society of United Brethren, 20 Pa. 62; Bidwell v. Evans, 156 Pa. 30, 26 Atl. 817; Davis v. Hurst, — Tex. —, 14 S. W. 610; Udell v. Peak, 70 Tex. 547, 7 S. W. 786; Wild v. Serpell, 10 Gratt. 405; Red v. Shepley, 6 Vt. 602; Holley v. Hawley, 39 Vt. 534, 94 Am. Dec. 350; Swann v. Thayer, 36 W. Va. 46, 14 S. E. 423; 1 Cyc. 1045, 1061; Adams v. Fullam, 47 Vt. 558; Pratt v. Canfield, 67 Mo. 50; Lucas v. Brooks, 18 Wall. 436, 21 L. ed. 779; Kirk v. Smith, 9 Wheat. 241, 6 L. ed. 81; Heermans v. Schmaltz, 10 Biss. 323, 7 Fed. 566; Stansbury v. Taggart, 3 McLean, 457, Fed. Cas. No. 13,292; 1 Am. & Eng. Enc. Law, 799; Graydon v. Hurd, 5 C. C. A. 258, 6 U. S. App. 610, 55 Fed. 724; Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151; Moshier v. Reding, 12 Me. 418; Gwynn v. Jones, 2 Gill & J. 173; Lyebrook v. Hall, 73 Miss. 509, 19 So. 348; Carson v. Broady, 56 Neb. 648, 71 Am. St. Rep. 691, 77 N. W. 80; Den ex dem. Decker v. Adams, 12 N. J. L. 99; People ex rel. Chrome Steel Co. v. Paulding, 22 Hun, 91; Jackson ex dem. Corson v. Cairns, 20 Johns. 301; Huntington v. Mattfield, — Tex. Civ. App. —, 55 S. W. 361; Holman v. Bonner, 63 Miss. 131; Hannibal & St. J. R. Co. v. Miller, 115 Mo. 158, 21 S. W. 915.

The tenancy relation applied to the successors of Sena y Baca.

1 Cyc. 1049, 1062; 1 Am. & Eng. Enc. Law, 811; Bedlow v. New York Floating Dry Dock Co. 112 N. Y. 265, 2 L.R.A. 629, 19 N. E. 800; Whiting v. Edmunds, 94 N. Y. 309; Potts v. Coleman, 67 Ala. 221; Russell v. Erwin, 38 Ala. 44; Jackson ex dem. Duncan v. Harder, 4 Johns. 202, 4 Am. Dec. 262; Blackwell v. Ryan, 21 S. C. 112; Hannibal & St. J. R. Co. v. Miller, 115 Mo. 158, 21 S. W. 915; Fulkerson v. Brownlee, 69 Mo. 371; Jackson ex dem. Griswold v. Bard, 4 Johns. 230, 4 Am. Dec. 267; Ketchum v. Spurlock, 34 W. Va. 597, 12 S. E. 832; Timmons v. Kidwell, 138 Ill. 13, 27 N. E. 756; Quinn v. Quinn, 27 Wis. 168.

A claim once filed remains *sub judice* before the surveyor general and Congress, subject to "adjudication and approval" at any time.

United States v. Ortiz, 176 U. S. 427, 44 L. ed. 531, 20 Sup. Ct. Rep. 466.

No notice to quit was necessary in this case.

15 Cyc. 56; Williams v. Cash, 27 Ga. 507, 73 Am. Dec. 739.

[483] Mr. Justice Van Devanter delivered the opinion of the court:

This was an action in ejectment to recover the possession of 317 acres of land in Santa Fe county, New Mexico. The defenses interposed were the general issue and that the cause of action did not accrue within ten years before the action was begun. A trial to the court without a jury resulted in a judgment for the plaintiffs, which was affirmed by the supreme court of the territory (14 N. M. 352, — L.R.A. (N.S.) —, 93 Pac. 762), and the case was then brought here. A statement of the facts, in the nature of a special verdict, and of the rulings and exceptions upon the rejection of certain evidence, was made and certified by the appellate court agreeably to the act of April 7, 1874 (18 Stat. at L. 27, chap. 80), § 2.

Briefly stated, the principal facts are as follows: On June 22, 1878, Manuel A. Otero and Jesus M. Sena y Baca entered into an agreement written in Spanish, a translation of which is as follows:

Know all men by these presents: That I, the undersigned, Manuel Antonio Otero, resident of the county of Valencia, in the territory of New Mexico, for consideration, have sold and transferred in favor of Jesus M. Sena y Baca and Agapita Ortiz, his wife, a ranch known as the ranch of Galisteo, which is situated in the county of Santa Fe and territory aforesaid, known as the ranch which was formerly of the deceased Don Miguel E. Pino; and that I will give and execute the documents of conveyance of the said ranch, in favor of Jesus M. Sena y Baca and Agapita Ortiz, as soon as there shall be adjudicated and approved by the surveyor general the grant of Bartolomé Baca of a tract which was ceded to him by the Governor Melgarez in the year 1819, and the which is situate in the county of Valencia in the territory of New Mexico; and furthermore, they will take possession of the aforesaid ranch, and will have and enjoy all the products [484] of the same, until the proper documents may be executed, and in conformity with the above stated; and the said Jesus M. Sena y Baca so agrees and has signed here jointly with me.

In witness whereof, we sign the present in La Constancia, county of Valencia, this 22d day of June, A. D. 1878.

Manuel A. Otero.
Jesus M. Sena y Baca.

At that time the Galisteo ranch and the

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Bartolomé Baca tract were supposed or claimed to be unconfirmed Mexican grants, the former of 24,000 acres and the latter of a vastly greater area. Otero had some substantial right in the former, and Sena y Baca was asserting an undivided interest in the latter, as an heir of the original grantee. As part of the transaction between them, Otero was to receive, and a few days after the signing of the agreement did receive, from Sena y Baca, a deed for the latter's asserted interest in the Bartolomé Baca tract.

The alleged grant from Mexico of that tract was thereafter presented to the surveyor general for New Mexico for examination and report under § 8 of the act of July 22, 1854 (10 Stat. at L. 308, chap. 103). That officer, on September 7, 1881, made a report recommending, upon the proofs then before him, that the grant be not confirmed, but rejected; and this report was duly laid before Congress for such action thereon as it should deem just and proper. While the matter was awaiting action by Congress, the court of private land claims was created by the act of March 3, 1891 (26 Stat. at L. 854, chap. 539, U. S. Comp. Stat. 1901, p. 765), and was invested with jurisdiction of proceedings looking to the confirmation or rejection of such grants. The Bartolomé Baca grant was then appropriately brought before that court for consideration and adjudication, and was confirmed to the extent of 11 square leagues; but in 1897, on an appeal to this court, [485] the judgment of confirmation was reversed and the grant rejected as invalid because resting upon a forged signature of the governor. United States v. Bergere, 168 U. S. 66, 42 L. ed. 383, 18 Sup. Ct. Rep. 4.

In the meantime the Galisteo grant was presented to the court of private land claims for consideration and adjudication, and was by that court confirmed as a valid grant for 317 acres only, the confirmed area being the land here in controversy.

The plaintiffs are heirs at law of Otero, who died in 1882, and the defendants are the successors in interest of Sena y Baca and his wife under the agreement of 1878. The mesne conveyances through which the defendants became such successors were quitclaim deeds, and were accompanied by a delivery of the original agreement.

Sena y Baca and his wife went into possession of the land in controversy under and pursuant to that agreement, and they and their successors continued in possession, farmed the land, made such improvements thereon as were incidental merely to its use in that way, received the rents and profits, paid some, but not all, of the taxes, and exercised other possessory rights ordinarily incident to ownership, but all consistent with the rights conferred by the agreement of 1878.

In the proceeding in the court of private land claims relating to the Galisteo grant, the successors of Sena y Baca and his wife sought to secure a confirmation of the grant for the full 24,000 acres theretofore claimed, and in that connection traced their right through the agreement with Otero, thus recognizing his title.

The present action was begun April 3, 1901, without any prior demand for the possession. At that time the defendants were openly claiming full title in themselves, notwithstanding the prior adjudication of the invalidity of the Bartolomé Baca grant, and notwithstanding there had been no conveyance by Otero or his heirs of the Galisteo grant, as contemplated by the agreement.

[486] Other facts disclosed in the certified statement will be noticed in connection with particular questions upon the decision of which it is claimed they have a bearing.

The territorial courts held that the agreement of 1878 was not a conveyance, but an executory contract for a conveyance in the event, and only in the event, of the favorable adjudication and approval of the Bartolomé Baca grant; that this event became an impossible one when, in 1897, this court rejected that grant as invalid; that the defendants' rights under the agreement were thereby terminated and extinguished; that the possession of Sena y Baca and his wife, which was continued by their successors, was acquired and held under the agreement and in recognition of Otero's title, and therefore was not adverse; and that upon all the facts the plaintiffs were entitled to recover.

While it does not appear to be claimed that the question of title as between these litigants was adjudicated by the court of private land claims in the Galisteo Case, it is well to observe that the act creating that court and defining its jurisdiction declared in subdivision 5 of § 13: "No proceeding, decree, or act under this act shall conclude or affect the private rights of persons as between each other, all of which rights shall be reserved and saved to the same effect as if this act had not been passed; but the proceedings, decrees, and acts herein provided for shall be conclusive of all rights as between the United States and all persons claiming any interest or right in such lands." See United States v. Conway, 175 U. S. 60, 71, 44 L. ed. 72, 76, 20 Sup. Ct. Rep. 13.

1. It is urged here that the agreement of 1878 in itself transferred the title to

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the Galisteo grant from Otero to Sena y Baca and his wife, and that the conveyance which was to be executed upon the adjudication and approval of the other grant was to operate only by way of a further assurance. Like the territorial courts, we think otherwise. [487] Although containing some words adapted to a present transfer, the instrument, taken in its entirety, shows that it was a mere contract to convey upon the contingency specified, with a provision investing the prospective vendees with the right of possession in the meantime. Had a present conveyance been intended, the right to a further assurance hardly would have been conditioned upon a contingency in no wise bearing upon the adequacy of the original conveyance, and, equally, the provision respecting the possession in the interim would have been superfluous. Then, too, the informality of the instrument, the signing by both parties, and the absence of an acknowledgment, make against the claim of a conveyance *in præsenti*. Bearing in mind that the question is one of intent, and judging of this by what appears upon the face of the instrument, we think it clearly was designed to be a contract to convey, and not a conveyance. See Williams v. Paine, 169 U. S. 55, 76, 42 L. ed. 658, 667, 18 Sup. Ct. Rep. 279.

2. In 1898 and 1899, after the Bartolomé Baca grant was adjudged invalid, the plaintiffs severally made application, under §§ 17 and 18 of the act of 1891, as amended February 21, 1893 (27 Stat. at L. 470, chap. 149), and June 27, 1898 (30 Stat. at L. 495, chap. 504, U. S. Comp. Stat. 1901, p. 776), for small-holding claims of 160 acres each within the limits of the rejected grant; and upon the trial the defendants sought to make proof of the advantageous sale or disposal of those claims. The evidence was rejected, and this, it is contended, was prejudicial error because, first, what was done tended to show that the plaintiffs treated the agreement of 1878 as executed rather than executory, and, second, even if the agreement was executory, the plaintiffs could not recover in the action without first surrendering to the defendants the advantages obtained through those claims. The contention is untenable. The right to those claims did not arise out of the agreement of 1878, or out of the rejected Bartolomé Baca grant, but arose, if at all, because the [488] plaintiffs were in possession and the United States permitted the acquisition of title to public land in New Mexico in that way. The alleged Bartolomé Baca grant being out of the way, whether the plaintiffs secured title to the 160-acre tracts and what they did with them were matters which did not concern the defendants.

3. Another contention is that the facts certified demonstrate that the defendants and their predecessors had been in adverse possession for more than ten years when the action was begun, and therefore that the defense of the statute of limitations was well founded. In our opinion, the territorial courts rightly held otherwise. Sena y Baca and his wife went into possession in virtue of a right so to do which was expressly given by the agreement, and was to continue until the happening of the event whereby their right to a conveyance was to be determined. Thus, their possession was not hostile or adverse, but in subordination to the Otero title, and the possession of their successors was plainly of the same character up to the time of the determinative event. There had been no unequivocal repudiation of the relation created by the agreement, for all that was done was consistent with a holding under it. Not until the conditional right to a conveyance was terminated did the possession cease to be a permissive one under the agreement, and that conditional right was not terminated until this court adjudged the Bartolomé Baca grant invalid and rejected it. That was less than four years before the action was begun.

We do not overlook the reference in the agreement to the surveyor general as the one whose decision was to be determinative, or his adverse report, which preceded the action by more than ten years. While the agreement uses the words, "shall be adjudicated and approved by the surveyor general," the naming of that officer evidently resulted from a misconception of his power and duty. Under the act of 1854, in force at the time, he was [489] not intrusted with power to adjudicate and approve Mexican grants, but was required to examine into their status and report thereon as a convenient means of aiding Congress in determining what should be done. His action was merely advisory, the power to decide and to approve or reject being reserved to Congress. United States v. Ortiz, 176 U. S. 422, 427, 44 L. ed. 529, 531, 20 Sup. Ct. Rep. 466. But notwithstanding the mistake, the intention of the parties is manifest and full effect should be given to it. To them the important thing was the adjudication and approval of the Bartolomé Baca grant, and the particular governmental agency from which such action should come was of secondary consideration. They could make their future acts and rights dependent upon the former, as was done, but were without power to designate the latter. Evidently they named the

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surveyor general in the belief that the power to adjudicate and approve had been lodged in him, their meaning being the same as if they had said, "shall be adjudicated and approved by the proper authority." This, in our opinion, is the true construction of the agreement. Of course, an authorized adjudication and approval was contemplated, not one that would be without authority and of no effect.

Being in the nature of a recommendation only, the adverse report of the surveyor general was not final, and bound no one. It did not even preclude him from making a further examination and basing a favorable report thereon. United States v. Ortiz, supra. Had Congress disapproved his adverse report and confirmed the grant, we entertain no doubt that the confirmation would have satisfied the condition of the agreement, and have entitled Sena y Baca and his wife to the stipulated conveyance; and a like result would have ensued had the decision of this court been one of confirmation instead of rejection.

It follows that the relation created by the agreement was not terminated by the surveyor general's report in 1881, but continued until the adverse decision of this [490] court in 1897, and that the possession in the interim, like that before, was in virtue of the agreement, and not adverse.

4. After the agreement was terminated by the adverse decision upon the Bartolomé Baca grant, the continued possession of the defendants was without right; and when the action was begun, almost four years thereafter, they were asserting full title in themselves. Therefore, a demand that they surrender the possession was not a prerequisite to the maintenance of the action.

5. We are asked to say that the findings do not show title in the plaintiffs' ancestor, Manuel A. Otero, or, at least, are so conflicting upon that point as to afford no basis for the judgment. The findings to which attention is invited may be summarized as follows: (a) At the date of the agreement the title to the land in controversy was in Otero; (b) as confirmed, the Galisteo grant consists of the land in controversy, but prior to confirmation it was claimed to embrace a much larger area; (c) Otero's title to the grant was founded upon a conveyance in 1856 which excepted three designated parcels theretofore transferred to others; and (d) the plaintiffs' proofs did not disclose whether the land in controversy passed under that conveyance or was within the excepted parcels.

While recognizing that these findings are confusing, if not conflicting, we think the judgment is adequately sustained by other findings which show that the agreement of 1878 did not contain the exceptions shown in the conveyance of 1856; that Sena y Baca and his wife went into possession of the land in controversy under that agreement; and that the possession which passed from them to their successors, including the defendants, was likewise a possession in virtue of the agreement. In short, the defendants acquired possession as conditional vendees of Otero, and so are estopped from calling his title in question. As is said in Tyler on Ejectment (p. 543):

[491] "There is a class of cases in which the defendant is not permitted to controvert the title of the claimants in an action of ejectment on the ground of *estoppel*. These are cases where a privity exists between the defendant and the plaintiff, or those from whom he derives title. If a privity in estate has subsisted between the parties, proof of title is ordinarily unnecessary on the part of the plaintiff, for the reason that a party is not permitted to dispute the title of him by whom he has been let into possession. In all these cases, therefore, the proof is directed to the question as to whether such a relation exists between the parties as to operate as an estoppel, and thereby supersede the necessity of introducing any evidence to establish the title of the claimant."

And again (p. 559): "Although, strictly speaking, the relation of landlord and tenant is not created between vendor and vendee, yet the vendee, in ejectment by the owner against him, is absolutely estopped from either showing title in himself, or setting up an outstanding title in another; and the same rule applies to one coming into possession under the vendee, either with his consent, or as an intruder."

Of like import are Lucas v. Brooks, 18 Wall. 436, 451, 21 L. ed. 779, 782; Jackson ex dem. Livingston v. Walker, 7 Cow. 637, 642; Towne v. Butterfield, 97 Mass. 105; Lacy v. Johnson, 58 Wis. 414, 423, 17 N. W. 246.

As we find no error in the record, the judgment is affirmed.

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[492] UNITED STATES, Plff. in Err.,
v.
JOHN H. CARTER.

(See S. C. Reporter's ed. 492-495.)

Appeal — review by government in criminal case — jurisdiction.

1. The decision of a Federal district court quashing as "bad in law" certain counts of

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an indictment purporting to charge violations of U. S. Rev. Stat. § 5209, U. S. Comp. Stat. 1901, p. 3497, is not reviewable in the Federal Supreme Court under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564), as based upon the construction of the statute on which the indictment was founded, since such ruling may as well have rested upon the opinion of the court as to the mere insufficiency of the indictment.

[For other cases, see Appeal and Error, I. e, in Digest Sup. Ct. 1908.]

Appeal — review by government in criminal case — jurisdiction.

2. The Federal Supreme Court will not examine the entire record in order to resolve in favor of its appellate jurisdiction a doubt as to whether a ruling of a district court, quashing certain counts of an indictment as "bad in law," was based upon a construction of the statute on which the indictment was founded, within the meaning of the criminal appeals act of March 2, 1907, or was rested upon the mere insufficiency of the indictment.

[For other cases, see Appeal and Error, I. e, in Digest Sup. Ct. 1908.]

[No. 722.]

Submitted December 1, 1913. Decided December 15, 1913.

IN ERROR to the District Court of the United States for the Western District of North Carolina to review a judgment quashing as "bad in law" certain counts of an indictment. Dismissed for want of jurisdiction.

Solicitor General Davis submitted the cause for plaintiff in error.

Messrs. Francis B. Carter and W. A. Blount submitted the cause for defendant in error.

Memorandum opinion by Mr. Chief Justice White, by direction of the court:

At the threshold we must consider a motion to dismiss. The case is a criminal one over which we have only the jurisdiction conferred by the criminal appeals act (34 Stat. at L. chap. 2564, p. 1246). There were two indictments containing, the one 54 and the [493] other 26 counts, purporting to charge alleged offenses against the national banking laws as embodied in Rev. Stat. § 5209, U. S. Comp. Stat. 1901, p. 3497. On demurrer the court quashed 43 of the counts because they were "bad in law." It is settled that under the criminal appeals act we have no authority to revise the mere interpretation of an indictment, and are confined to ascertaining whether the court in a case under review erroneously construed the statute: United States v. Keitel, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123; United States v. Stevenson, 215 U. S. 190, 196, 54 L. ed. 153, 156, 30 Sup. Ct. Rep. 35. Our power to review the action of the court then in this case can alone rest upon the theory that what was done amounts to a construction of the statute. But it is obvious that the ruling that the counts which were quashed were bad in law did not necessarily involve a construction of the statute, and may well have rested upon the opinion of the court as to the mere insufficiency of the indictment.

It is, however, insisted on behalf of the United States that by referring to the counts which were held good, and comparing them with those which were quashed, by a process of exclusion and inclusion, it will be possible to ascertain that the action of the court was based upon a construction of the statute, and we are asked to review the case upon this theory. At best, this proposition amounts to the contention that in every case where there is doubt as to whether the court construed the statute or interpreted the indictment, such doubt should be solved by an examination of the entire record. But the right to a review in a criminal case, being controlled by the general law, it follows that a case cannot be brought within the control of the special rule provided by the criminal appeals act unless it clearly appears that the exceptional, and not the general, rule applies. Aside from this consideration, we cannot give our approval to the suggestion made by the government, since in effect it virtually calls upon us to analyze and construe the indictment [494] as a prerequisite basis for the exertion of the limited power to review the action of the court in interpreting the statute. Indeed, to follow the suggestion would be to frustrate the purposes which manifestly the jurisdictional act was enacted to accomplish; because the intent to expedite in criminal cases the decision of questions involving statutory construction which was plainly one of the ends for which the law was intended would be of little avail if the right to review be extended by implication so as to embrace cases not within the purview of the statute, thereby multiplying appeals and delaying the speedy decision of such cases. Besides, we think, in consequence of the ambiguity of the ruling, a case like this is not within the scope of the fundamental evil intended to be guarded against by the reviewing statute; that is, to afford a direct and immediate remedy to correct an erroneous construction of a statute before final judgment, and thus to prevent the harm which otherwise might

NOTE.—On review by government in criminal case—see note to United States v. Stevenson, 54 L. ed. U. S. 153.

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result by the application of the construction to other cases, if the power to review could only be exerted after final judgment.

To suggest that if the mere form in which a ruling is clothed be made the test of the power to review, it will result that the exertion of the authority may be rendered unavailing in every case, is without foundation. It is not to be assumed that trial courts will not seek rightfully to discharge their duty. But, even if it were possible to indulge in such an assumption, to do so would disregard the power which exists as an incident to the exercise of appellate jurisdiction to compel, in a case which requires it, such action as will prevent a destruction of or render practically unavailing the reviewing power. There can be, however, no ground in this case for indulging the forebodings which we have just answered, because there is nothing in the record showing any request made to the trial court for an expression of opinion in such form as to manifest clearly whether its action proceeded upon a [495] construction of the statute, or merely upon the meaning which was given to the indictment. In saying this we are not unmindful of the fact that it is stated in the brief for the United States that when a bill of exceptions was, after the trial, presented to the court for settlement, a request was made and refused for a more specific statement of the reasons which led to the quashing of the accounts of the indictment. But, obviously, the refusal to grant a request made at the time and under the circumstances stated affords no reason for an exertion of a power to review which we do not possess.

Dismissed for want of jurisdiction.

NEW YORK LIFE INSURANCE COMPANY, Plff. in Err.,
v.
DEER LODGE COUNTY.

(See S. C. Reporter's ed. 495–512.)

Commerce — state taxation — life insurance.

Insurance is not commerce, and a foreign life insurance company may therefore be subjected to the annual tax imposed under Mont. Rev. Code 1907, § 4073, upon the basis of the excess of premiums received over losses and expenses incurred within the state during the previous year, although its manner of business is such that all risks are accepted, and contracts made, modified, and discharged at its home office, and the premiums are transmitted to such office, and all advances and loans to policy holders are consummated there.

[For other cases, see Commerce, 52-54, 382-382b, in Digest Sup. Ct. 1908.]

[No. 56.]

Argued November 11, 1913. Decided December 15, 1913.

IN ERROR to the Supreme Court of the State of Montana to review a judgment which affirmed a judgment of the District Court of Deer Lodge County, in that state, in favor of defendant in a suit by a foreign life insurance company to recover back the amount of taxes paid under protest, on the ground that the tax was an illegal burden on interstate commerce. Affirmed.

See same case below, 43 Mont. 243, 115 Pac. 911.

The facts are stated in the opinion.

Messrs. James H. McIntosh and Roscoe Pound argued the cause, and, with Mr. Robert L. Clinton, filed a brief for plaintiff in error:

The issue here differs from prior insurance cases.

Church v. La Fayette F. Ins. Co. 66 N. Y. 222; Ducat v. Chicago, 10 Wall. 410, 19 L. ed. 972; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Liverpool & L. Life & M. Ins. Co. v. Massachusetts (Liverpool & L. Life & F. Ins. Co. v. Oliver) 10 Wall. 566, 19 L. ed. 1029; Mutual L. Ins. Co. v. Armstrong, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; Noble v. Mitchell, 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 110; Nutting v. Massachusetts, 183 U. S. 553, 46 L. ed. 324, 22 Sup. Ct. Rep. 238; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

The issue here differs from labor or emigration agencies, bucket shops, and private banks.

Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; Ware v. Mobile County, 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128.

The course of the company's business is within the very object of the commerce clause.

Bancroft, History of U. S. Const. chap. 4; Bryce, Studies in History & Jurisprudence, 222; Montgomery v. Royal Exch. Assur. Corp. 5 Ala. App. 318, 59 So. 508; 1 Far-

NOTE.—On insurance as interstate commerce—see note to Sandford v. Poe, 60 L.R.A. 645.

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rand, Records of Federal Convention, 243, 247, 275, 496, 501, 546; 3 Farrand, Records of Federal Convention, 666.

The course of business here is within International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103, and the Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Hoke v. United States, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; McCall v. California, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; Richmond v. Southern Bell Teleph. & Teleg. Co. 174 U. S. 761, 43 L. ed. 1162, 19 Sup. Ct. Rep. 778; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126.

If Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357, is decisive of this case, then it is also decisive against the court's decision in the International Textbook and Lottery Cases.

Hooper v. California, 155 U. S. 647, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A. (N. S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; New York L. Ins. Co. v. Babcock, 104 Ga. 67, 42 L.R.A. 88, 69 Am. St. Rep. 134, 30 S. E. 273; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Xenos v. Wickham, L. R. 2 H. L. 296, 36 L. J. C. P. N. S. 313, 16 L. T. N. S. 800, 16 Week. Rep. 38, 13 Eng. Rul. Cas. 422.

The proposition that the company's business as performed by it is interstate commerce is in line with all the decisions of the court, and not in conflict with any decision.

Adair v. United States, 208 U. S. 176, 52 L. ed. 443, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Butler Bros. Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 156 Fed. 1; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Hoke v. United States, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A. (N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; New York v. Miln, 11 Pet. 102, 9 L. ed. 648; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Richmond v. Southern Bell. Teleph. & Teleg. Co. 174 U. S. 766, 43 L. ed. 1164, 19 Sup. Ct. Rep. 778; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126.

The object and purpose of the commerce clause sustains the plaintiff's claim.

1 Hamilton, Works, 179, 203; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; 2 Madison Papers, 859; Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; Report of Committee on Ins. Law, 29 Am. Bar Asso. 557; South Carolina v. Georgia, 93 U. S. 4, 23 L. ed. 782; 1 Wilson, Works, 335.

Writers on constitutional law criticize the interpretation of Paul v. Virginia except as limited to the facts before the court in that case.

Innes, Insurance in its Relation to Commerce, 39 Am. L. Rep. 717; Prentice & E. Commerce Clause of Fed. Const. 46; Report of Committee on Ins. Law, 29 Am. Bar Asso. 538; 1 Watson, Const. 520, 521; 2 Willoughby, Const. §§ 294, 296.

The tax is void.

Hall v. De Cuir, 95 U. S. 485, 24 L. ed. 547; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

Mr. D. M. Kelley argued the cause, and, with Mr. Albert J. Galen, Attorney General of Montana, and Mr. W. H. Poorman, filed a brief for defendant in error:

The statute in question does not violate the interstate commerce clause of the Federal Constitution for the reason that the business of insurance is not commerce.

Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Northwestern Mut. L. Ins. Co. v. Lewis & Clarke County, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982; Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619, 6 Ann. Cas. 317; Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365; Nutting v. Massachusetts, 183 U. S. 553, 46 L. ed. 324, 22 Sup. Ct. Rep. 238; Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Ducat

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v. Chicago, 10 Wall. 410, 19 L. ed. 972; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962.

Mr. Justice McKenna delivered the opinion of the court:

Plaintiff in error, called herein plaintiff, as it was such in the courts below, brought suit against the defendant in error, herein called defendant, to recover the sum of $209.79, with interest, the amount of taxes paid by plaintiff under protest to defendant.

The tax was levied under a law of the state requiring every insurance corporation or company transacting business in the state to be taxed upon the excess of premiums received over losses and ordinary expenses incurred within the state during the year previous to the year of listing in the county where the agent conducts the business, properly proportioned by the corporation or company at the same rate that all other personal property is taxed. It is provided that the agent shall render the list, and if he refuses, or to make affidavit that the same is correct to the best of his knowledge and belief, the amount may [499] be assessed to the best knowledge and discretion of the assessor. The corporations and companies are subject to no other tax under the laws of the state except on real estate, and the fees imposed by law.

It was alleged in the complaint that the "tax was and is illegal, unlawful, and void for that said defendant was without jurisdiction to levy or collect said tax, and the levy and collection thereof was and is a burden upon interstate commerce, contrary to § 8 of article 1 of the Constitution of the United States."

A summary of the allegations of the complaint, which is very long, is as follows:

The plaintiff is a New York corporation, with its home office in New York city, and has transacted and does transact the business of life insurance on a large scale in all of the states of the United States, and with persons residing in every country of the civilized world. It commenced to transact its business with residents of Montana in 1869, and its business has progressively increased until its total insurance in force in that state amounts to $10,023,445, calling for premiums amounting to $343,664.93. This total insurance is made up of policies averaging $2,000 each, and these are subject to sale, assignment, and transfer, and are used for collateral security and other commercial purposes, and are valuable for such purpose and for other general purposes of trade and commerce.

The company transacts its business through agents, who solicit insurance, collect the first premium, and deliver the policy, which is prepared and transmitted from the home office to him for such purpose. The company also employs an agency director by contract in writing directly with the home office through the mails, who supervises the work of soliciting agents and recommends those who desire to become such. The company also employs medical examiners, with specified duties, their employment being negotiated through the mails, and their [500] reports are made through the mails, and if further information is desired, the home office obtains it by correspondence through the mails. It has also a confidential employee called an inspector, whose employment is intended to be secret, and who transmits information through the mails. In Butte, in the state of Montana, the company maintains a cashier, appointed from the home office, whose authority, however, is limited to making and supervising such records as the business of the office requires, receiving from the soliciting agents and medical examiners applications for new insurance solely for transmission to the home office, receiving the reports of the home office of its action on such applications, and receiving policies, and the premiums which are paid on the new policies and not transmitted directly to the home office, mailing premium notices made out at the home office, and sent to him for that purpose; receiving renewal premiums when specially authorized; depositing the amount thereof in bank at Butte to the credit of the company and to be drawn upon by it, and not by him; keeping account of the insurance obtained by the soliciting agents and settling with such agents the commission. The company has never had any office or place of business except said office at Butte and one other at Helena, with like duties and authority.

Forms for the use of the several transactions are prepared at the home office and transmitted by mail to the company's employees. No agent is authorized to accept risks of any kind or make or modify contracts, nor have they ever done so. The officers of the company reside and have always resided in and near the city of New York, and had and have their offices and places of business at the home office. All risks are accepted and contracts made, modified, and discharged at the home office.

The manner of taking applications for insurance and the final issue of policies is alleged, which shows that the [501] ultimate judgment of their character and acceptance

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is reserved for the home office. The manner of paying premiums is alleged to be either directly to the home office through the mails, or to the cashier of the company at its office in Butte, and that the several policies provide for advances, and that the company has outstanding advances or loans to its policy holders in the state, aggregating the sum of $432,878. The loan is made by transmitting an application to the home office, where it is considered and acted upon, and, if accepted, a loan agreement is transmitted to the applicant, who, after executing it, returns it to the home office, and the proceeds of the loan are forwarded by mail to the policy holder by the company's check on its bank account in New York. And the use of the mails is alleged in payment of premiums and proofs of death.

On account of this manner of doing business it is alleged on information and belief to be interstate commerce and within the meaning of the commerce clause of the Constitution of the United States.

The laws of the state by virtue of which the tax was imposed are set out. They finally became § 4073 of the Revised Codes, 1907.

The company did not have any property within Deer Lodge county at any time during the year 1910. It paid without protesting the tax imposed by § 4017 of the Revised Codes for the year 1909, amounting to $3,496.85. It also, during said year, paid to the state licenses and fees aggregating the sum of $234. In 1909 it received from policy holders residing in the county, premiums aggregating the sum of $14,233.41. Its losses and expenses amounted to the sum of $8,888.41. The excess of premiums over losses for said year was the sum of $5,345, upon which there was imposed the sum sued for. The company paid the tax under protest.

A demurrer was sustained to the complaint and a [502] judgment entered dismissing the action. It was sustained by the supreme court of the state.

The same contention is made here as in the state courts; that is, that the tax is a burden on interstate commerce; and an elaborate argument is presented to distinguish this case from those in which this court has decided that insurance is not commerce. These cases are: Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357 (1868); Ducat v. Chicago, 10 Wall. 410, 19 L. ed. 972; Liverpool & L. Life & F. Ins. Co. v. Massachusetts (Liverpool & L. Life & F. Ins. Co. v. Oliver) 10 Wall. 566, 19 L. ed. 1029; Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Intern. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Noble v. Mitchell, 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 110; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; and Nutting v. Massachusetts, 183 U. S. 553, 46 L. ed. 324, 22 Sup. Ct. Rep. 238.

If we consider these cases numerically, the deliberation of their reasoning, and the time they cover, they constitute a formidable body of authority and strongly invoke the sanction of the rule of *stare decisis*. This we especially emphasize, for all of the cases concerned, as the case at bar does, the validity of state legislation, and under varying circumstances the same principle was applied in all of them. For over forty-five years they have been the legal justification for such legislation. To reverse the cases, therefore, would require us to promulgate a new rule of constitutional inhibition upon the states, and which would compel a change of their policy and a readjustment of their laws. Such result necessarily urges against a change of decision. In deference, however, to the earnestness of counsel, we will consider more particularly (1) what the cases decide, and (2) whether they are wrong in principle.

Paul v. Virginia is the progenitor case. A law of Virginia precluded any insurance company not incorporated under the laws of the state, doing business in the state without previously obtaining a license for that purpose, which could only be obtained by a deposit with the state treasury of bonds of a specified character to an amount varying from thirty to fifty thousand dollars. A [503] subsequent law required the agent of a foreign insurance company to take out a license.

Paul was appointed the agent of several fire insurance companies incorporated in the state of New York. He applied for a license, offering to comply with all the provisions of the law excepting the deposit of bonds. The license was refused and he, notwithstanding, undertook to act as agent for the companies, offered to issue policies in their behalf, and in one instance did issue a policy in their name to a citizen of Virginia. For this violation of the statute he was indicted and convicted in one of the state courts, and the judgment was affirmed by the supreme court of appeals of the state. Error was prosecuted from this court, based on, as one of its grounds, the alleged violation of the commerce clause of the Constitution of the United States.

Replying to the argument to sustain the contention, the court said, by Mr. Justice Field, that its defect lay in the character of the business done. "Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indem-

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nity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter, offered in the market as something having an existence and value independently of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do [504] not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York, whilst in Virginia, would constitute a portion of such commerce."

The doctrine announced, that insurance was not commerce, but a personal contract, was emphasized by illustrations. Nathan v. Louisiana, 8 How. 73, 12 L. ed. 992, was cited, where a tax on money and exchange brokers who dealt in the purchase and sale of foreign bills of exchange was sustained as not conflicting with the constitutional power of Congress to regulate commerce. The individual thus using his money, it was said (quoting the cited case), "is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than a shipbuilder, without whose labor foreign commerce could not be carried on." The doctrine was further illustrated by bills of exchange, foreign and domestic, which it was said were subject to the regulating and taxing laws of the states. And it was pointed out that the Federal government taxed not only foreign bills, but domestic bills and promissory notes, whether issued by individuals or banks,—a power the government could not have, it was said, if bills and notes were commerce. It was finally said: "If foreign bills may thus be the subject of state regulation, much more so may contracts of insurance against loss by fire."

We have taken the trouble to make this long excerpt from the opinion because, as we have said, the case is the primary one, and because its argument is really exhaustive of the general principle. We shall consider presently whether there is anything in the case at bar which takes it out of the principle.

In Ducat v. Chicago, a law of Illinois came up for review. It was a regulation of insurance companies not incorporated by the state, and required their agents to be licensed upon the performance of certain conditions. [505] Subsequently, by the act incorporating Chicago, the legislature imposed on all foreign insurance a tax of $2 upon the $100, and at that rate upon the amount of all premiums which should be received. It was made unlawful for any company to transact business until the payment was made. The state supreme court sustained the tax and this court affirmed its action, resting the decision on Paul v. Virginia, the reasoning of which, it was said, it was not necessary to repeat.

Liverpool & L. Life & F. Ins. Co. v. Massachusetts. The subject came up again for consideration in passing upon a statute of Massachusetts which levied a tax upon all premiums charged or received by any fire, marine, and fire and marine insurance company not incorporated under the laws of the state. The law was sustained. It was said: "The case of Paul v. Virginia decided that the business of insurance, as ordinarily conducted, was not commerce, and that a corporation of one state, having an agency by which it conducted that business in another state, was not engaged in commerce between the states."

Fire Asso. of Philadelphia v. New York. A statute of New York imposing taxes and conditions upon insurance companies of other states was considered and sustained. Paul v. Virginia was cited for the view that "issuing a policy of insurance is not a transaction of commerce."

We may say here that Paul v. Virginia was also cited for the proposition that the right of a foreign corporation to do business in a state other than that of its creation depends wholly upon the will of such other state. This proposition, it was said, was sustained by previous cases, and it has been sustained by many subsequent cases. Necessarily it could not be applied to foreign insurance companies if the business of insurance is commerce. In other words, that right exists and has only an exception, as was said in Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207, "where a corporation created by one state rests its right to enter [506] another and to engage in business therein upon the Federal nature of its business." And that was the contention in Hooper v. California, asserting the invalidity of the statute of the state making it a misdemeanor for any person in that state to procure insurance

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for a resident in the state from an insurance company not incorporated under its laws. The argument was that in as much as the contract involved was one for marine insurance, it was a matter of interstate commerce, and as such beyond the reach of state authority, and included among the exceptions to the rule. It was replied by the court: "This proposition involves an erroneous conception of what constitutes interstate commerce. That the business of insurance does not generically pertain to such commerce has been settled since the case of Paul v. Virginia." To the attempt to distinguish between policies of marine insurance and policies of fire insurance, and thus take the former out of the rule of Paul v. Virginia, it was answered: "It ignores the real distinction upon which the general rule and its exceptions are based, and which consists in the difference between interstate commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other." And it was pointed out that if the power to regulate interstate commerce applied to all of the incidents of such commerce and "to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states; and would exclude state control over many contracts purely domestic in their nature." And then, sweeping away the distinction between the different subject-matters of insurance contracts, and the different events indemnified against, and declaring the principle applicable to all and determinative of the regulating power of the states over all, it was said: "The business of insurance is not commerce. [507] The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'"

This declaration was repeated and applied in Noble v. Mitchell, 164 U. S. 368, 41 L. ed. 472, 17 Sup. Ct. Rep. 110, and in New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962. The latter case has special application, for the plaintiff in error here was the plaintiff in error there, and the case concerned life insurance companies and their policies. In that case it was contended that a policy of mutual life insurance was an interstate contract and the parties might choose its "applicatory law." The contention was made in many ways and with great amplitude of argument and illustration. It was urged that on account of the mutual character of the company it was the administrator of a fund collected from its policy holders in different states and countries for their benefit. And the extent of the business was displayed by a stipulation of the parties as follows: "That during the year 1886 and prior to the issuance of the policy sued upon, the amount of policies issued by defendant to citizens of Missouri was $1,617,085, and the amount of insurance in force on the lives of citizens of Missouri on December 31st, 1886, was $8,886,542, and the total amount of policies issued by defendant in said year 1886 was $85,178,294, and the total amount of policies in force on December 31st, 1886, issued by defendant, was $304,373,540."

It was also urged that modern life insurance had taken on essentially a national and international character, and that when Paul v. Virginia was decided the business was "to a great extent local; that is, conducted through the domestic contracts by stock companies. The great and commanding organizations of the present day had hardly begun the amazing developments which have made them [508] the greatest associations of administrative trusts of the business world."

These contentions were earnestly made; the reply to them deliberately meditated and its extent fully appreciated. The ruling in Paul v. Virginia and other cases was applied. We omitted the reasoning by which they demonstrated, we said, the correctness of their conclusion. We, however, repeated that "the business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the 'perils of the sea,'" and, we added, that "against the uncertainty of man's mortality."

In Nutting v. Massachusetts a statute of the state was sustained which required a licensing of the agent of a foreign insurance company not admitted to do business in the state, and made it a crime to solicit insurance of a resident in violation of the statute. The principle of the prior cases which we have referred to was affirmed.

This detail shows what the cases decided. Were they rightly decided? The reasoning of the cases anticipate and answer the question, and it would rack ingenuity to attempt to vary its expression or more aptly illustrate it. A policy of insurance, the cases declare, is a personal contract, a mere indemnity, for a consider-

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ation, against the happening of some contingent event which may bring detriment to life or property, and its character is the same no matter what the event insured against, whether fire or hurricane, acts of man or acts of God, storms on land or storms on sea, death or lessor accident. The same event may involve both life and property, precipitating the obligation of the policies. Nor does the character of the contracts change by their numbers or the residence of the parties. The latter is made much of in this case. It [509] was made much of in the Cravens Case. The effort has been to give a special locality to the contracts and determine their applicatory law, and, indeed, to a centralization of control, to employ local agents, but to limit their power and judgment. To accomplish the purpose there is necessarily a great and frequent use of the mails, and this is elaborately dwelt on by the insurance company in its pleading and argument, it being contended that this and the transmission of premiums and the amounts of the policies constitute a "current of commerce among the states." This use of the mails is necessary, it may be, to the centralization of the control and supervision of the details of the business; it is not essential to its character. And we may say, in passing, that such effort has led to regulating legislation, but that it cannot determine its validity was decided in the Cravens Case. See also Equitable Life Assur. Soc. v. Clements (Equitable Life Assur. Soc. v. Pettus) 140 U. S. 226, 36 L. ed. 497, 11 Sup. Ct. Rep. 822.

This legislation is in effect attacked by the contention of the insurance company. We have already pointed out that if insurance is commerce and becomes interstate commerce whenever it is between citizens of different states, then all control over it is taken from the states, and the legislative regulations which this court has heretofore sustained must be declared invalid.

The number of transactions does not give the business any other character than magnitude. If it did, the department store which deals with every article which covers or adorns the human body, or, it may be, nourishes it, would have one character, while its neighbor, humble in the variety and extent of its stock, would have another. Nor, again, does the use of the mails determine anything. Certainly not that which takes place before and after the transaction between the plaintiff and its agents in secret or in regulation of their relations. But put agents to one side and suppose the insurance company and the applicant negotiating or consummating a contract. That they may [510] live in different states and hence use the mails for their communications does not give character to what they do; cannot make a personal contract the transportation of commodities from one state to another, to paraphrase Paul v. Virginia. Such might be incidents of a sale of real estate (certainly nothing can be more immobile). Its transfer may be negotiated through the mails and completed by the transmission of the consideration and the instrument of transfer also through the mails.

It is contended that the policies are subject to sale and transfer, may be used for collateral security and other commercial purposes. This may be, but this use of them is after their creation,—a use by the insured, not by the insurer. The quality that is thus ascribed to them may be ascribed to any instrument evidencing a valuable right. The argument was anticipated in Paul v. Virginia, citing Nathan v. Louisiana, where, as we have seen, a tax on money and exchange brokers who dealt in the purchase and sale of foreign bills of exchange was sustained as not conflicting with the constitutional power of Congress to regulate commerce among the states or with foreign nations.

It is contended that Paul v. Virginia and the cases which follow it must be limited, as it is contended "the facts herein did limit them, to intrastate, not interstate, contracts," and that if they be not so limited the Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561, and International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103, cannot stand.

The basis of this contention necessarily is the insistence that the contracts in Paul v. Virginia and the succeeding cases were intrastate contracts while the contracts in the case at bar are interstate contracts. But this is a false characterization of the contracts. The decision of the cases is that contracts of insurance are not commerce at all, neither state nor interstate. This is the obstacle to the contention of the insurance company. The company [511] realizes it to be an obstacle and has attempted to remove it by detailing the manner of conducting its business as demonstrating that its policies are interstate contracts. We have replied to the attempt and shown that its manner of business has no such effect. It follows necessarily, therefore, that neither the Lottery Case nor the Pigg Case impugns the authority or the application of the cited cases. They, the Lottery Case and the Pigg Case, were concerned with

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transactions which involved the transportation of property, and were not mere personal contracts.

There are cognate cases to the cited cases, of contracts incident to commerce, but not of themselves commerce. In Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128, there was levied by the state of Georgia a tax upon each emigrant agent or employer or employee of such agent, doing business in the state. The law imposing the tax was attacked as a violation of the commerce clause of the Constitution of the United States. Commerce was defined, quoting Mr. Justice Field, in Mobile County v. Kimball, 102 U. S. 691, 702, 26 L. ed. 238, 241, to "consist in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." The court considered the definition comprehensive enough for the purpose of the case, and, testing its application, said, by Mr. Chief Justice Fuller: "These agents were engaged in hiring laborers in Georgia, to be employed beyond the limits of the state. Of course, transportation must eventually take place as the result of such contracts, but it does not follow that the emigrant agent was engaged in transportation." The conclusion was supported by cases, among others, Paul v. Virginia and Hooper v. California. On the authority of the same cases and New York L. Ins. Co. v. Cravens, in Ware & Leland v. Mobile County, 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031, it was held that contracts by brokers for the sale of [512] cotton for future delivery, where the transactions were closed by contracts completed and executed in one state, although the orders were received from another state, were legally subject to a tax. Such contracts, it was said, were not "the subjects of interstate commerce, any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and office of the company."

In Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190, a law of New York forbade individuals or partnerships to engage in the business of receiving deposits of money for safe-keeping or for the purpose of transmission to another, or for any other purpose, without a license from the comptroller. It was attacked as a violation of the commerce clause of the Constitution. The case was decided to be similar in principle to Ware & Leland v. Mobile County and Williams v. Fears, and the law was sustained.

Further discussion, we think, is unnecessary; and we have gone beyond the citing of the authoritative cases only in deference to the able and earnest argument of counsel.

Judgment affirmed.

Mr. Justice Hughes and Mr. Justice Van Devanter dissent.

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[513] ARTHUR GREEY, Trustee in Bankruptcy of Schwab-Kepner Company, Appt.,
v.
JOHN E. DOCKENDORFF.

(See S. C. Reporter's ed. 513-517.)

Appeal — review of facts — concurrent findings below.

1. Findings of fact by the master and the two lower courts as to insolvency and knowledge of the parties in the determination of a dispute between an assignee of the bankrupt's accounts and the trustee in bankruptcy, over the ownership of the proceeds of such accounts, will ordinarily be accepted by the Federal Supreme Court on appeal.

[For other cases, see Appeal and Error, 4920-4930, in Digest Sup. Ct. 1908.]

Appeal — to Federal Supreme Court — bankruptcy case.

2. A dispute between the assignee of the bankrupt's accounts and the trustee in bankruptcy, over the ownership of the proceeds of the assigned accounts collected by the trustee, which is presented by a petition filed in the bankruptcy proceedings, is a controversy arising in bankruptcy proceedings within the meaning of the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 24, governing the appellate jurisdiction of the circuit court of appeals and the Federal Supreme Court.

[For other cases, see Appeal and Error, 804, 805, in Digest Sup. Ct. 1908.]

Bankruptcy — voidable transfers — assignment of accounts.

3. Successive assignments of accounts by way of security, in pursuance of a contract under which advances were made to enable the assignor to get the goods, on the faith of the undertaking that the accounts should be assigned, made without knowledge of the assignor's insolvency, and without conscious fraudulent intent, were not bad as against the bankrupt assignor's general creditors without lien because the contract embraced

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NOTE.—On the appellate jurisdiction of the Federal Supreme Court in bankruptcy cases—see note to James v. Stone & Co. 57 L. ed. U. S. 573.

On the appellate jurisdiction of the Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

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all accounts, and the lien thereunder was a secret one.

[For other cases, see Bankruptcy, VI, b, 2, b, in Digest Sup. Ct. 1908.]

[No. 544.]

Argued December 2, 1913. Decided December 15, 1913.

APPEAL from the United States Circuit Court of Appeals for the Third Circuit to review a decree which affirmed a decree of the District Court for the District of New Jersey, in favor of the claim of an assignee of the bankrupt's accounts, to have paid over to him the proceeds of such accounts collected by the trustee. Affirmed.

See same case below, 121 C. C. A. 597, 203 Fed. 475.

The facts are stated in the opinion.

Mr. Benjamin G. Paskus argued the cause, and, with Messrs. Ralph Wolf, James N. Rosenberg, and Garrard Glenn, filed a brief for appellant:

The appellee's motion to dismiss the appeal should be denied.

Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 Ann. Cas. 789; Knapp v. Milwaukee Trust Co. 216 U. S. 545, 54 L. ed. 610, 30 Sup. Ct. Rep. 412.

Dockendorff, in asking to have the proceeds of the accounts transferred to him, is seeking the affirmative relief of this court as a court of equity.

Johnston v. Huff, A. & M. Co. 66 C. C. A. 534, 133 Fed. 704; Re The Leader, 190 Fed. 624; Carozza v. Boxley, 122 C. C. A. 69, 203 Fed. 674; Re Stiger, 202 Fed. 791; Central Trust Co. v. West India Improv. Co. 169 N. Y. 314, 62 N. E. 387: Holroyd v. Marshall, 10 H. L. Cas. 209, 33 L. J. Ch. N. S. 193, 9 Jur. N. S. 213, 7 L. T. N. S. 172, 11 Week. Rep. 171, 10 Eng. Rul. Cas. 426; Laclede Bank v. Shuler, 120 U. S. 511, 30 L. ed. 704, 7 Sup. Ct. Rep. 644.

He was entitled to it only if his conduct in the matter had been free from fraud, actual or constructive.

Primeau v. Granfield, 114 C. C. A. 549, 193 Fed. 912; Re Friedman, 164 Fed. 131; Binghamton Trust Co. v. Gregory, 148 App. Div. 525, 132 N. Y. Supp. 950; Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008.

We discard, and we have the right to ask this court to discard, the master's inferences, as distinct from his actual findings.

Re People's Department Store Co. 159 Fed. 287; Re Big Cahaba Coal Co. 190 Fed. 901; Baumhauer v. Austin, 108 C. C. A. 306, 186 Fed. 260; Re C. J. McDonald & Sons, 178 Fed. 487.

If facts appear which, under well-settled rules, justify the conclusion of fraud, then, however the lower court may find that there was no volition of fraud, the case is one of fraud, and the consequences must follow.

Coleman v. Burr, 93 N. Y. 31, 45 Am. Rep. 160.

The current of judicial decision in this country has set steadily against secret arrangements of this character.

Ryall v. Rowles, 1 Ves. Sr. 348; Donaldson v. Farwell, 93 U. S. 631, 633, 23 L. ed. 993, 994; Hennequin v. Naylor, 24 N. Y. 140; Frelinghuysen v. Nugent, 36 Fed. 229; Casey v. Cavaroc, 96 U. S. 467, 24 L. ed. 779; Skilton v. Codington, 185 N. Y. 80, 113 Am. St. Rep. 885, 77 N. E. 790; Gill v. Griffith, 2 Md. Ch. 271; Wood v. Lowrey, 17 Wend. 496; Millikin v. Second Nat. Bank, 206 Fed. 14; Re Noel, 137 Fed. 694; Potts v. Hart, 99 N. Y. 172, 1 N. E. 605; Blackburn v. Irvine, 205 Fed. 226; New York Security & T. Co. v. Saratoga Gas & E. L. Co. 159 N. Y. 137, 45 L.R.A. 132, 53 N. E. 758; Zartman v. First Nat. Bank, 189 N. Y. 267, 12 L.R.A.(N.S.) 1083, 82 N. E. 127; Titusville Iron Co. v. New York, 207 N. Y. 203, 100 N. E. 806; Re Marine Constr. & Dry Dock Co. 75 C. C. A. 451, 144 Fed. 649; Robinson v. Elliott, 22 Wall. 513, 22 L. ed. 758; Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. 392, 19 L. ed. 117; Louisville Trust Co. v. Louisville, N. A. & C. R. Co. 174 U. S. 674, 43 L. ed. 1130, 19 Sup. Ct. Rep. 827; Northern P. R. Co. v. Boyd, 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554; Ferguson v. Ann Arbor R. Co. 17 App. Div. 336, 45 N. Y. Supp. 172; Central Improv. Co. v. Cambria Steel Co. 120 C. C. A. 121, 201 Fed. 811; Keech v. Stowe-Fuller Co. 205 Fed. 890; Edgell v. Hart, 9 N. Y. 213, 59 Am. Dec. 532; Rogers v. Page, 72 C. C. A. 164, 140 Fed. 596, affirmed in 211 U. S. 575, 53 L. ed. 332, 29 Sup. Ct. Rep. 159; Re Brener, 166 Fed. 930; Re Southern Textile Co. 98 C. C. A. 305, 174 Fed. 523.

The tendency of even early cases has been toward the discouragement of sweeping transfers of one's assets, whether by way of sale or hypothecation.

Small v. Oudley, 2 P. Wms. 427; George M. West Co. v. Lea Bros. 174 U. S. 590, 43 L. ed. 1098, 19 Sup. Ct. Rep. 836; Re Gutwillig, 90 Fed. 475; People v. Mercantile Credit Guarantee Co. 166 N. Y. 422, 60 N. E. 24.

The transactions between Dockendorff and the bankrupt amounted to a general assignment of the latter's assets.

People v. Mercantile Credit Guarantee Co. supra.

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Such an act is a fraud upon the rights of the creditors as defined in the bankruptcy laws.

George M. West Co. v. Lea Bros. 174 U. S. 590, 43 L. ed. 1098, 19 Sup. Ct. Rep. 836.

After committing such an act of insolvency, it is fraudulent to incur credit for goods purchased without notifying the vendor of the facts.

Mitchell v. Worden, 20 Barb. 253.

An unusual occurrence, out of the ordinary mode of transacting such a business, is prima facie evidence of fraud, and throws the burden of proof on the purchaser to sustain the validity of his purchase.

Walbrun v. Babbitt, 16 Wall. 577, 21 L. ed. 489.

The master erred in his refusal to admit the books in evidence for the purpose of showing the insolvency of the company.

Deakers v. Temple, 41 Pa. 242; 20 Cyc. 775, 776; White v. Benjamin, 150 N. Y. 266, 44 N. E. 956; Smith v. Collins, 94 Ala. 406, 10 So. 334; Towns v. Smith, 115 Ind. 480, 16 N. E. 811; Woolridge v. Boardman, 115 Cal. 74, 46 Pac. 868; Loos v. Wilkinson, 110 N. Y. 195, 1 L.R.A. 250, 18 N. E. 99; Ernst v. Mechnics' & M. Nat. Bank, 200 Fed. 295; Re Docker-Foster Co. 123 Fed. 190; Hackney v. Hargreaves Bros. 13 Am. Bankr. Rep. 169; Flour City Nat. Bank v. Widener, 163 N. Y. 276, 57 N. E. 471; Hotopp v. Huber, 160 N. Y. 531, 55 N. E. 206; State Bank v. Brown, 165 N. Y. 216, 53 L.R.A. 513, 59 N. E. 1.

Mr. Julius Henry Cohen argued the cause, and, with Messrs. Gerard B. Townsend and Theodore B. Richter, filed a brief for appellee:

This is not a controversy arising in bankruptcy proceedings. This appeal should therefore be dismissed.

Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008; Re Loving, 224 U. S. 183, 56 L. ed. 725, 32 Sup. Ct. Rep. 446; Re Streator Metal Stamping Co. 205 Fed. 280; Re Friend, 67 C. C. A. 500, 134 Fed. 778; Morehouse v. Pacific Hardware & Steel Co. 100 C. C. A. 647, 177 Fed. 337; Collier, Bankr. 433, 437.

Both the district court and the circuit court of appeals held that the questions involved are questions of fact. The report of the special master evidences the most painstaking and thorough examination of the record. His findings have been accepted by both the district court and the circuit court of appeals. Under these circumstances this court will not disturb those findings.

Merillat v. Hensey, 221 U. S. 333, 55 L. ed. 758, 36 L.R.A.(N.S.) 370, 31 Sup. Ct. Rep. 575; Ann. Cas. 1912D, 497; Manson v. Williams, 213 U. S. 453, 53 L. ed. 869, 29 Sup. Ct. Rep. 519; Page v. Rogers, 211 U. S. 575, 53 L. ed. 332, 29 Sup. Ct. Rep. 159.

Actual fraud is required to invalidate a lien or transfer under the bankruptcy act.

Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008; Van Iderstein v. National Discount Co. 227 U. S. 575, 57 L. ed. 652, 33 Sup. Ct. Rep. 343.

It certainly cannot be successfully asserted that a concern not known by its active manager to be insolvent, and which is not shown to have been insolvent, which was making efforts to prepare itself to meet its maturing obligations, and in fact was discounting them right along, has purchased merchandise with the intent not to pay for it. The fact that upon being thrown into bankruptcy there were bills that remained unpaid is not sufficient basis for the trustee's elaborate theory of fraudulent intent and bad faith. The defect of this theory is that it involves the building of inference upon inference, with the result that the entire theory is no more than a conjecture. Such processes of reasoning are not sanctioned by the courts.

Ruppert v. Brooklyn Heights R. Co. 154 N. Y. 93, 47 N. E. 971, 3 Am. Neg. Rep. 711; Pinder v. Brooklyn Heights R. Co. 173 N. Y. 519, 66 N. E. 405, 13 Am. Neg. Rep. 417.

If our construction of the facts is justified by the record there can be no fraud.

Re Hawks, 204 Fed. 309; Studley v. Boylston Nat. Bank, 229 U. S. 523, 57 L. ed. 1313, 33 Sup. Ct. Rep. 806; Van Iderstine v. National Discount Co. supra.

There is no equitable estoppel here available to the trustee.

Brown v. Bowen, 30 N. Y. 541, 86 Am. Dec. 406; Ackerman v. True, 175 N. Y. 362, 67 N. E. 629; New York Rubber Co. v. Rothery, 107 N. Y. 310, 1 Am. St. Rep. 822, 14 N. E. 269; Wiser v. Lawler, 189 U. S. 260, 47 L. ed. 802, 23 Sup. Ct. Rep. 624, 22 Mor. Min. Rep. 630; Viele v. Judson, 82 N. Y. 32; Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; Re Hawks, 204 Fed. 309; Standard Sanitary Mfg. Co. v. Arrott, 68 C. C. A. 388, 135 Fed. 756; Morgan v. Chicago & A. R. Co. 96 U. S. 720, 24 L. ed. 744; Brant v. Virginia Coal & I. Co. 93 U. S. 326, 23 L. ed. 927; The Ottumwa Belle, 78 Fed. 643; Winegar v. Fowler, 82 N. Y. 315; Jewett v. Miller, 10 N. Y. 402, 61 Am. Dec. 751; Andrews v. Ætna L. Ins. Co. 85 N. Y. 334; Hardin v. Dolge, 46 App. Div. 416, 61 N. Y. Supp. 753; Crosthwaite v. Lebus, 146 Ala. 525, 41 So. 853.

The failure to notify the debtors of the assignment of the accounts receivable cannot be attacked upon the ground of bad faith. The authorities make it equally clear that

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the failure to give such notification in no wise militates against the validity of the assignment.

Clark v. Iselin, 21 Wall. 360, 22 L. ed. 568; Young v. Upson, 115 Fed. 192; Stackhouse v. Holden, 66 App. Div. 423, 73 N. Y. Supp. 203; White v. Platt, 5 Denio, 269; Williams v. Ingersoll, 89 N. Y. 508; Board of Education v. Duparquet, 50 N. J. Eq. 234, 24 Atl. 922.

In the absence of bad faith, the fact that secrecy is observed with reference to transactions affecting property of this character will not invalidate them.

Sexton v. Kessler & Co. 225 U. S. 90, 56 L. ed. 995, 32 Sup. Ct. Rep. 657.

A trustee who attacks a transaction as preferential has the burden of establishing that the transfer was made within the statutory period while the bankrupt was insolvent, with the intent on his part to prefer, and with knowledge or reasonable cause to believe, on the part of the creditor, that a preference was intended.

Getts v. Janesville Wholesale Grocery Co. 163 Fed. 417; Grant v. First Nat. Bank, 97 U. S. 80, 24 L. ed. 971; Re Bartlett, 172 Fed. 679; Re Pfaffinger, 154 Fed. 523; Calhoun County Bank v. Cain, 82 C. C. A. 114, 152 Fed. 983; Re Hines, 144 Fed. 142; Hardy v. Gray, 75 C. C. A. 562, 144 Fed. 922; Tumlin v. Bryan, 21 L.R.A.(N.S.) 960, 165 Fed. 166; Lopez v. Campbell, 163 N. Y. 340, 57 N. E. 501; Paulding v. Chrome Steel Co. 94 N. Y. 334; Re Rogers Constr. Co. 79 App. Div. 419, 79 N. Y. Supp. 444; Swan v. Stiles, 94 App. Div. 117, 87 N. Y. Supp. 1089; Reed v. Helois Carbide Specialty Co. 64 N. J. Eq. 231, 53 Atl. 1057.

Mr. Justice Holmes delivered the opinion of the court:

This was a petition by the appellee, Dockendorff, filed in the bankruptcy proceedings against the bankrupt, the [514] Schwab-Kepner Company, to have paid over to him the proceeds of accounts receivable alleged to have been assigned to him by the bankrupt. The defenses set up were that the assignment was a preference, and that it was made without present consideration, with intent to defraud creditors of the bankrupt concern. The case was referred to a special master, who found that it did not appear that either the petitioner or the bankrupt knew that the latter was insolvent at the time of the supposed preference, or that there were any transfers with intent to defraud creditors, and found for the petitioner. His finding of facts and conclusion were concurred in by the district court and circuit court of appeals. 121 C. C. A. 597, 203 Fed. 475.

A part of the appellant's brief is devoted to the attempt to show that the findings below as to insolvency and the knowledge of the parties was wrong, and a distinction is urged between what are called the master's inferences and the facts upon which those inferences were based. But no sufficient reason is shown for departing from our ordinary rule, where the master, the court of first instance, and the circuit court of appeals, have agreed, and in the course of the hearing this was admitted. Merillat v. Hensey, 221 U. S. 333, 55 L. ed. 758, 36 L.R.A.(N.S.) 370, 31 Sup. Ct. Rep. 575, Ann. Cas. 1912D, 497. On the other side it is argued that this is not a controversy arising in bankruptcy proceedings within § 24 of the bankruptcy act, and that therefore the appeal should not have been allowed. This contention, if open, seems to be answered sufficiently by Knapp v. Milwaukee Trust Co. 216 U. S. 545, 54 L. ed. 610, 30 Sup. Ct. Rep. 412. But the appellant's main proposition is that the transactions with the appellee were fraudulent in law, however unconscious of it the parties may have been, and so it is necessary to make a short statement of the facts.

The bankrupt, a New Jersey corporation, did business in New York as a cotton converter. It bought raw [515] material from the mills, ordered it sent to bleacheries designated by it, sold the goods when finished, and had them shipped from the bleacheries to the buyers. Dockendorff, on favorable statements of the company's condition, made successive agreements to procure loans not exceeding $175,000 at any one time, the bankrupt giving demand notes, assigning as security all its accounts receivable thereafter to be created, and paying certain commissions. In May, 1910, the agreement now in question was made. By this the bankrupt was to assign within seven days after shipment the accounts receivable of credit sales made by it; upon that security Dockendorff was himself to lend 80 per cent of the net face value of such as he should approve, less commissions and discounts, up to $175,000; the bankrupt was to give its notes, deliver the shipping documents, furnish evidence of actual receipt of the merchandise when required, notify Dockendorff of any return of goods or counterclaims, deliver the proceeds of such accounts as were proper, and permit him to examine its books and correspondence, etc.; Dockendorff's lien was to be for all sums due, and to cover all accounts, but he was not bound to lend on accounts not approved by him. Further details do not need to be stated in view of the establishment of the parties' good faith. On November 29, 1910, an involuntary petition was filed, the bankrupt then owing Dockendorff $252,838.54 for advances under the agrement, and he having received

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assignments of accounts from the bankrupt as it received orders; that is, after the contract of sale was made, but before the delivery of the goods.

The trustee relies upon the general application of the lien under the agreement as constituting a fraud in law. Whatever effect it might have as evidence must be laid on one side, in view of the findings below. The question here is whether successive assignments of accounts by way of security, in pursuance of a contract under which advances [516] were made to enable the assignor to get the goods, on the faith of the undertaking that the accounts should be assigned, were bad because the contract embraced all accounts, although neither party contemplated any fraud. The rule of the English statutes as to reputed ownership may extend to debts growing due to the bankrupt in the course of his business, but we have no such statute. The advances were the means by which the bankrupt got the ownership of the goods. The contract of itself would operate as a conveyance as soon as the rights to which it applied were acquired. Field v. New York, 6 N. Y. 179, 57 Am. Dec. 435. We do not see why, in the interval between the acquisition of the goods and the specific assignment of accounts, the right of general creditors without lien should intervene to defeat a security given in good faith, when, but for the promise of it, the property never would have come into the bankrupt's hands. There may have been a moment when the goods could have been attached, or when, if insolvency had been made known, as in National City Bank v. Hotchkiss, Nov. 3, 1913 [231 U. S. 50, ante, 115, 34 Sup. Ct. Rep. 20], it would have been too late to make the promised lien good. But in this case, the lien was acquired before any knowledge of insolvency, and before any attachment intervened. See Jaquith v. Alden, 189 U. S. 78, 47 L. ed. 717, 23 Sup. Ct. Rep. 649; Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008; Van Iderstine v. National Discount Co. 227 U. S. 575, 583, 57 L. ed. 652, 33 Sup. Ct. Rep. 343. It is objected that this lien was secret. But notice to the debtors was not necessary to the validity of the assignment as against creditors (Williams v. Ingersoll, 89 N. Y. 508, 522), and merely keeping silence to the latter, whether known or unknown, created no estoppel (Wiser v. Lawler, 189 U. S. 260, 270, 47 L. ed. 802, 809, 23 Sup. Ct. Rep. 624, 22 Mor. Min. Rep. 630; Ackerman v. True, 175 N. Y. 353, 363, 67 N. E. 629). There was no active concealment and no attempt to mislead anyone interested to know the truth.

We content ourselves with this very general answer to an argument that dealt with many details that we have not mentioned, because those details were material only to a [517] reconsideration of the findings of fact. Probably a hope of securing such a reconsideration was one of the inducements toward bringing the case here.

A subordinate question was raised on the exclusion of some of the bankrupt's books, as to which it seems to us enough to say that it does not appear that any wrong has been done.

Decree affirmed.

JAMES A. KINDER,† Trustee, Plff. in Err.,
v.
EDWARD SCHARFF et al.

(See S. C. Reporter's ed. 517-521.)

Limitation of actions — suit to set aside conveyance by bankrupt — fraud.

The two years' limitation after the closing of the estate, prescribed by the bankrupt act of July 1, 1898 (30 Stat. at L. 546, chap. 541, U. S. Comp. Stat. 1901, p. 3421), § 11d, for suits by or against trustees in bankruptcy, bars an action by a former trustee to set aside a conveyance made by the bankrupt as in fraud of creditors, brought after he had had the bankruptcy proceedings reopened for that purpose, on the ground that he had just discovered the facts, where, during the pendency of the original proceedings, the trustee suspected the alleged fraud and made some inquiries, but dropped the matter because he thought it would not pay to go farther.

[For other cases, see Limitation of Actions, III. j, in Digest Sup. Ct. 1908.]

[No. 99.]

Argued December 4 and 5, 1913. Decided December 15, 1913.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which, reversing a judgment of the District Court for the Parish of Calcasieu in that state, dismissed a suit brought by a trustee in bankruptcy, to set aside a conveyance made by the bankrupt, as in fraud of creditors. Affirmed.

See same case below, 129 La. 218, 55 So. 769.

The facts are stated in the opinion.

Messrs. Hannis Taylor and A. P. Pujo argued the cause, and, with Messrs. L. A.

†Death of James A. Kinder suggested, and appearance of Edgar N. Collins, his successor as trustee, filed and entered December 1, 1913, as plaintiff in error herein.

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Goudeau and W. B. Williamson, filed a brief for plaintiff in error:

Paragraph D, § 11, of the bankrupt act of 1898, as amended, providing that "no suit shall be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed," is a statute of limitation, and when pleaded as a bar to a suit to set aside an alleged fraudulent sale must be construed and applied as other statutes of limitation.

Bailey v. Glover, 21 Wall. 342–350, 22 L. ed. 636–639.

Where fraud is the foundation of the action, the limitation of two years under the bankrupt act does not begin to run, in the absence of negligence or laches of the plaintiff, until the discovery of the fraud.

Traer v. Clews, 115 U. S. 528–542, 29 L. ed. 467–471, 6 Sup. Ct. Rep. 155.

In suits in equity, where relief is sought on the ground of fraud and the party injured remained in ignorance of the fraud without fault or want of diligence on his part, limitation does not begin to run until the fraud is discovered, although there are no special circumstances and no effort on the part of the party committing the fraud to conceal it.

Levee Comrs. v. Tensas Delta Land Co. 204 Fed. 736.

A suit by a trustee to recover assets alleged to have been fraudulently transferred by the bankrupt within four months prior to the filing of the petition ought not to stand like a suit between private parties.

United States v. Minor, 114 U. S. 233–240, 29 L. ed. 110–112, 5 Sup. Ct. Rep. 836.

Courts of the United States follow their own adjudications in the interpretation, administration, and enforcement of Federal statutes, and not those of state courts.

Calhoun Gold Min. Co. v. Ajax Gold Min. Co. 182 U. S. 499–510, 45 L. ed. 1200–1206, 21 Sup. Ct. Rep. 885, 21 Mor. Min. Rep. 381.

Mr. Charles A. McCoy argued the cause, and, with Messrs. Leland H. Moss and Robert L. Knox, filed a brief for defendants in error:

This is a statute of limitation. It is precisely like other statutes of limitation, and applies to all judicial contests between the assignee and other persons touching the property or rights of property of the bankrupt, transferable to or vested in the assignee, where the interests are adverse and have so existed for more than two years from the time when the cause of action accrued, for or against the assignee. Such is almost the language in which the provision is expressed in § 5057 of the Revised Statutes.

Bailey v. Glover, 21 Wall. 342, 22 L. ed. 636.

There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself.

Wood v. Carpenter, 101 U. S. 135, 25 L. ed. 807; Johnson v. Standard Min. Co. 148 U. S. 370, 37 L. ed. 485, 13 Sup. Ct. Rep. 585, 17 Mor. Min. Rep. 554; Pearsall v. Smith, 149 U. S. 236, 37 L. ed. 717, 13 Sup. Ct. Rep. 833; Kirby v. Lake Shore & M. S. R. Co. 120 U. S. 130, 30 L. ed. 569, 7 Sup. Ct. Rep. 430; Burke v. Smith (Putnam v. New Albany & S. C. Junction R. Co.) 16 Wall. 390, 21 L. ed. 361; Johnson v. Atlantic, G. & W. I. Transit Co. 156 U. S. 648, 39 L. ed. 567, 15 Sup Ct. Rep. 520; Bates v. Preble, 151 U. S. 162, 38 L. ed. 111, 14 Sup. Ct. Rep. 277; Foster v. Mansfield, C. & L. M. R. Co. 146 U. S. 88, 36 L. ed. 899, 13 Sup. Ct. Rep. 28; Norris v. Haggin, 136 U. S. 389, 34 L. ed. 426, 10 Sup. Ct. Rep. 942.

Whatever is notice enough to excite attention to a fact and put a party on his guard and call for an inquiry is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant with it.

Johnson v. Standard Min. Co. 148 U. S. 370, 37 L. ed. 485, 13 Sup. Ct. Rep. 585, 17 Mor. Min. Rep. 554; Dauphin's Succession, 112 La. 139, 36 So. 287; Poirier v. Burton-Swartz Cypress Co. 127 La. 936, 54 So. 292; Citizens' Bank v. Jeansonne, 120 La. 399, 45 So. 367.

Concealment must be the result of positive acts; mere silence is insufficient.

Wood v. Carpenter, 101 U. S. 135, 25 L. ed. 807; Felix v. Patrick, 145 U. S. 317, 36 L. ed. 719, 12 Sup. Ct. Rep. 862; Pearsall v. Smith, 149 U. S. 236, 37 L. ed. 717, 13 Sup. Ct. Rep. 833; Bailey v. Glover, 21 Wall. 343, 22 L. ed. 636.

[520] Mr. Justice Holmes delivered the opinion of the court:

This is an action by a trustee in bankruptcy to recover land alleged to have been conveyed by the bankrupt in fraud of creditors. The defendant pleaded that the estate had been closed and that the action was barred by the lapse of two years, under § 11d of the bankruptcy act, and also that he purchased the land for its full value and in good faith. The estate had been closed and the two years had run, but after they had elapsed, the former trustee petitioned to have the proceedings reopened on the ground that he had just discovered the facts, and that the sale should be set aside. The petition was granted, this suit was brought, and the judge of first instance ordered a reconveyance. The supreme court

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of Louisiana found, as it was compelled to by the testimony of the trustee himself, that during the pendency of the original proceeding the trustee suspected the alleged fraud, made some inquiries, but dropped the matter because he thought that it was not worth while; that is, that it would not pay to go farther: He "voluntarily abstained from availing himself of the means put in his hand by the law itself for the ascertainment of a suspected fact," by examining the bankrupt and otherwise. On this ground the court held that he could not remove the bar of the statute, reversed the judgment, and dismissed the suit. 129 La. 218, 55 So. 769.

We are of opinion that the decision of the supreme court was right. It is not necessary to consider whether the running of the two years after the estate is first closed is a bar to all suits upon claims that might have been collected if they had been known, or to controvert the conclusion of Bilafsky v. Abraham, 183 Mass. 401, 67 N. E. 318, that such suits are not barred. But it is obvious that there must be some limits if the promise of repose after two years in § 11d is not to be a mirage. The power to reopen [521] estates given in § 2 (8) "whenever it appears [that] they were closed before being fully administered" [30 Stat. at L. 546, chap. 541, U. S. Comp. Stat. 1901, p. 3421] cannot be taken to put it into the power of the court of bankruptcy to remove the bar of § 11 at its own will simply because a trustee may have changed his mind. It was argued that the court of first instance found fraud, and that we could not review the findings of fact. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 97, 53 L. ed. 417, 424, 29 Sup. Ct. Rep. 220. But if so, we equally are barred from reviewing the findings of the supreme court, that the trustee was chargeable with knowledge of the fraud, if there was one. Therefore, a part from the difference between the statutes considered there and here, cases like Bailey v. Glover, 21 Wall. 342, 22 L. ed. 636, and Traer v. Clews, 115 U. S. 528, 29 L. ed. 467, 6 Sup. Ct. Rep. 155, where the cause of action for fraud was concealed, do not apply. The question is simply whether, when, after an estate is closed, and more than two years later a trustee comes to the conclusion that he undervalued a claim that he knew of and might have sued upon, or finds that the value has risen since, the bankruptcy court may reopen the estate for the sole purpose of getting rid of the statute, and allowing the trustee to sue. See Wood v. Carpenter, 101 U. S. 135, 25 L. ed. 807; Rosenthal v. Walker, 111 U. S. 185, 196, 28 L. ed. 395, 399, 4 Sup. Ct. Rep. 382.

The judge had no power, by an *ex parte* order reopening the estate, to remove the bar that was completed, and that there was no ground for removing. Whether it be put on the construction of the bankruptcy act or on the ground that the estate was fully administered *quoad hoc*, or of laches on the part of the trustee, it comes to the same thing. The claim in controversy cannot be made the ground of a suit.

Judgment of the Supreme Court affirmed.

Mr. Justice Pitney concurs in the result.

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[522] CLIFFORD G. LUDVIGH, as Trustee in Bankruptcy of the Estate and Effects of Philip Horowitz and Joseph Horowitz, Individually and as Copartners, etc., Appellant,

v.

AMERICAN WOOLEN COMPANY OF NEW YORK and the Niagara Woolen Company.

(See S. C. Reporter's ed. 522–530.)

Bankruptcy — assets — bailment or sale — validity as to creditors.

An agreement between woolen manufacturers and a corporation formed to represent a firm of dealers in woolens must be construed to amount to a bailment in the nature of a consignment arrangement, with the net proceeds of sale to be accounted for to the consignor, and with the right to return the unsold goods, which agreement, in the absence of fraud, is good as against creditors in the event of the bankruptcy of the firm, where, after providing for the delivery to the corporation of woolens, the title to which is to remain in the manufacturers until sold, such agreement binds the corporation to sell the same and to collect and pay over to the woolen company the proceeds, less the difference between invoice and selling price, to guarantee the payment of bills and accounts, to pay the invoice price of any goods not accounted for under the above provision, and to return to the possession of the manufacturers immediately upon the termination of the agreement all merchandise, the possession of which is held by the corporation under such agreement.

[For other cases, see Bankruptcy, VI., in Digest Sup. Ct. 1908.]

[No. 55.]

Argued November 7 and 10, 1913. Decided December 15, 1913.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which reversed a decree of the District Court for the Southern District of New York, in favor of a trustee in bankruptcy in a suit by him to

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set aside certain transactions of the bankrupts as fraudulent. Affirmed.

See same case below, 110 C. C. A. 180, 188 Fed. 30.

The facts are stated in the opinion.

Mr. Abram I. Elkus argued the cause, and, with Mr. Garrard Glenn, filed a brief for appellant:

In the present case every fact is present which would prevent this transaction from being one of factorage, and none of the essential elements of a factor's obligations appear. And *per contra*, every element of a sale appears.

1. In a consignment arrangement the principal selects the goods which he desires to be sold. Here the so-called factor selected the goods, bargaining about the price.

2. The so-called factor could not return any goods which had once been ordered. This is incompatible with the idea of a consignment, and renders the transaction one of sale.

Helby v. Mathews [1895] A. C. 471, 64 L. J. Q. B. N. S. 465, 11 Reports, 232, 72 L. T. N. S. 841, 43 Week. Rep. 561, 60 J. P. 20; Re Zephyr Mercantile Co. 203 Fed. 576.

3. It is inconsistent with the idea of a consignment agreement that one becomes a factor before the goods are delivered to him.

12 Am. & Eng. Enc. Law, 2d. ed. 631; Wright v. Campbell, 4 Burr. 2046, 1 H. Bl. 628; Ommen v. Talcott, 112 C. C. A. 239, 188 Fed. 401; Ryberg v. Snell, 2 Wash. C. C. 294, 403, Fed. Cas. Nos. 12,189, 12,190.

4. The factor's duty to keep the principal's goods separate from his own was not performed or required.

Clarke v. Tipping, 9 Beav. 284; 1 Am. & Eng. Enc. Law, 2d ed. 1089.

5. The factor's duty to turn over the moneys to his principal as received was not required.

Wallace v. Castle, 14 Hun, 106; Bills v. Schliep, 62 C. C. A. 103, 127 Fed. 103; Re Galt, 56 C. C. A. 470, 120 Fed. 64.

6. The other business methods of the parties are inconsistent with a consignment and show a sale.

7. It is inconsistent with a consignment agreement that the factor can sell when he desires and for what price he desires, but must pay his principal at a fixed price whether he sells or not. This constitutes a sale.

Ex parte White, L. R. 6 Ch. 397, 40 L. J. Bankr. N. S. 73, 24 L. T. N. S. 45, 19 Week. Rep. 488, affirmed sub nom. Towle v. White, 29 L. T. N. S. 78, 21 Week. Rep. 465; Stoneman v. Van Vechten, 46 App. Div. 370, 61 N. Y. Supp. 513, affirmed in 165 N. Y. 666, 59 N. E. 1131; Re Wells, 140 Fed. 752; Banker Bros. Co. v. Pennsylvania, 222 U. S. 210, 56 L. ed. 168, 32 Sup. Ct. Rep. 38.

8. Even if the majority of the circuit court of appeals be right in their construction of the agreements, and Horowitz was not bound to pay for the goods at any fixed time or so long as they remained unsold, still, as Horowitz had the absolute right to pay for the goods at invoice prices, no consignment relation arose.

Ex parte White, and Stoneman v. Van Vechten, supra; Re Penny, 176 Fed. 141.

When the language of a contract is ambiguous, it is elemental that the contract should be construed in the light of the attending circumstances.

Atty. Gen. v. Drummond, 1 Drury & War. 366, affirmed in 2 H. L. Cas. 837, 14 Jur. 137; District of Columbia v. Gallaher, 124 U. S. 505, 31 L. ed. 526, 8 Sup. Ct. Rep. 585; Lowrey v. Hawaii, 206 U. S. 206, 51 L. ed. 1026, 27 Sup. Ct. Rep. 622; Guaranty Trust Co. v. Koehler, 115 C. C. A. 475, 195 Fed. 669; Frankfort Broom Co. v. Western Warehouse Co. 118 C. C. A. 550, 200 Fed. 398; Nelson v. Ohio Cultivator Co. 112 C. C. A. 394, 188 Fed. 620; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; John D. Park & Sons Co. v. Hartman, 12 L.R.A. (N.S.) 135, 82 C. C. A. 158, 153 Fed. 24.

The rule applicable to this case is that any security arrangement, whether chattel mortgage or conditional sale, whether recorded or not, that allows the debtor to deal with the property as his own while the lien lasts, is void as against the creditors of the debtor.

Re Garcewich, 53 C. C. A. 510, 115 Fed. 87; Skilton v. Codington, 185 N. Y. 80, 113 Am. St. Rep. 885, 77 N. E. 790; Robinson v. Elliott, 22 Wall. 513, 22 L. ed. 758; Re Wells, 140 Fed. 752; Re Penny, 176 Fed. 141.

Any conditional sale or chattel mortgage has the effect of allowing the debtor to deal with the property as his own if it permits him to sell the goods at whatever price he pleases, and allows him to do anything with the proceeds other than turn them over to the mortgagee or vendor (Re Garcewich, 53 C. C. A. 510, 115 Fed 87; Re Penny, 176 Fed. 141), or if it permits him to retain even the expenses of his business out of the proceeds (Skilton v. Codington, 185 N. Y. 80, 113 Am. St. Rep. 885, 77 N. E. 790).

To be valid against the vendee's creditors it must require that the identical moneys received from each sale be turned over to the vendor as and when it is collected, in extinction of the debt, and without deduction for any purpose of the vendee's convenience.

Edgell v. Hart, 9 N. Y. 213, 59 Am. Dec. 532; Russell v. Winne, 37 N. Y. 591, 97 Am. Dec. 755; Skilton v. Codington, 185 N.

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Y. 80, 113 Am. St. Rep. 885, 77 N. E. 790; Re Garcewich, 53 C. C. A. 510, 115 Fed. 87; Re Howland, 109 Fed. 869; Ludden v. Hazen, 31 Barb. 650.

The validity of the arrangement under review as against the bankrupts' creditors is to be determined entirely by the law of New York, where the transactions occurred.

Dooley v. Pease, 180 U. S. 126, 45 L. ed. 457, 21 Sup. Ct. Rep. 329; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; Re Marine Constr. & Dry Dock Co. 75 C. C. A. 451, 144 Fed. 649; Re Garcewich, 53 C. C. A. 510, 115 Fed. 87; Re Howland, 109 Fed. 869.

A chattel mortgage or a conditional sale secures a debt, the debt being owed in the one case for a loan and in the other for the purchase price, and in either case the debtor has no legal title to the property.

Cole v. Berry, 42 N. J. L. 308, 36 Am. Rep. 511.

The New York cases start with the proposition that possession of goods should accompany ownership; hence the separation of the two is often presumptively fraudulent, and where they are separated and also the possession is coupled with such a right of dominion as a power of resale, given in advance by the one in whom the title is vested, the vesting of such power renders the whole transaction fraudulent, as matter of law, as against the other creditors of the debtor.

Edgell v. Hart, 9 N. Y. 213, 59 Am. Dec. 532; Skilton v. Codington, 185 N. Y. 80, 113 Am. St. Rep. 885, 77 N. E. 790.

That leads to this: that the creditor should not permit the debtor to resell the mortgaged property.

Conkling v. Shelley, 28 N. Y. 363, 84 Am. Dec. 348; Brackett v. Harvey, 91 N. Y. 214; Skilton v. Codington, 185 N. Y. 80, 113 Am. St. Rep. 885, 77 N. E. 790; Robinson v. Elliott, 22 Wall. 513, 22 L. ed. 758; Re Garcewich, 53 C. C. A. 510, 115 Fed. 87; Re Perkins, 155 Fed. 237; Mitchell v. Mitchell, 147 Fed. 280; Re Rasmussen, 136 Fed. 704; Re Hickerson, 162 Fed. 345; Re Galt, 120 Fed. 443; Re Gilligan, 81 C. C. A. 595, 152 Fed. 605; Edgell v. Hart, 9 N. Y. 213, 59 Am. Dec. 532.

People must be held to the natural consequences of their acts, however strong might be the inward justification. And if the facts appear which, under well-settled rules, justify the conclusion of fraud, then, however the court may find that there was no volition of fraud, the case is one of fraud, and the consequences must follow.

Coleman v. Burr, 93 N. Y. 31, 45 Am. Rep. 160.

The corporate identity of the Niagara Woolen Company cannot operate to defeat the claims of the creditors of Horowitz as above discussed.

Re Watertown Paper Co. 94 C. C. A. 528, 169 Fed. 252; Re Garcewich, 53 C. C. A. 510, 115 Fed. 87; Cook, Corp. 6th ed. § 663; Re Muncie Pulp Co. 71 C. C. A. 530, 139 Fed. 546; Re Rieger, 157 Fed. 609; Holbrook, C. & R. Corp. v. Perkins, 77 C. C. A. 462, 147 Fed. 166; Brundred v. Rice, 49 Ohio. St. 640, 34 Am. St. Rep. 589, 32 N. E. 169; First Nat. Bank v. F. C. Trebein Co. 59 Ohio St. 316, 52 N. E. 834; United States v. Milwaukee Refrigerator Transit Co. 142 Fed. 247; Booth v. Bunce, 33 N. Y. 139, 88 Am. Dec. 372; Re Darby [1911] 1 K. B. 101, 80 L. J. K. B. N. S. 180, 18 Manson, 10; Anthony v. American Glucose Co. 146 N. Y. 413, 41 N. E. 23.

Mr. Daniel P. Hays argued the cause, and, with Mr. Edwin D. Hays, filed a brief for appellees:

The merchandise in question was delivered to the Niagara Company merely on consignment. The title thereto never passed out of the Woolen Company.

Re Smith & N. Piano Co. 79 C. C. A. 53, 149 Fed. 111; Dows v. National Exch. Bank, 91 U. S. 618, 630, 23 L. ed. 214, 217; Re Galt, 56 C. C. A. 470, 120 Fed. 64.

Even if the transaction between the Woolen Company and the Niagara Company was not a consignment of the merchandise, nevertheless the Woolen Company retained title to the merchandise until payment was made, and, if the transaction was a sale, it was a conditional sale, valid under the laws of the state of New York.

Empire State Type Founding Co. v. Grant, 114 N. Y. 40, 21 N. E. 49; Adams v. Roscoe Lumber Co. 159 N. Y. 176, 53 N. E. 805; Fennnikoh v. Gunn, 59 App. Div. 132, 69 N. Y. Supp. 12; Dunlop v. Mercer, 86 C. C. A. 435, 156 Fed. 545; Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; Re New York Economical Printing Co. 49 C. C. A. 133, 110 Fed. 514; York Mfg. Co. v. Cassell, 201 U. S. 345, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; William W. Bierce v. Hutchins, 205 U. S. 340, 51 L. ed. 828, 27 Sup. Ct. Rep. 524; Conkling v. Shelley, 28 N. Y. 360, 84 Am. Dec. 348; Brackett v. Harvey, 91 N. Y. 214.

The entire distinction between the cases where the conditional sales and chattel mortgages are held valid and where they are invalid is based upon this question as to whether the vendee, who sells the goods, can consume the proceeds by using them for his own benefit, or whether he must turn them over to the vendor.

Brackett v. Harvey, 91 N. Y. 220; Robinson v. Elliott, 22 Wall. 524, 22 L. ed. 763;

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Conkling v. Shelley, 28 N. Y. 360, 84 Am. Dec. 348; Edgell v. Hart, 9 N. Y. 213, 59 Am. Dec. 532; Russell v. Winne, 37 N. Y. 591, 97 Am. Dec. 755; Re Howland, 109 Fed. 869; Re Penny, 176 Fed. 141; Re Garcewich, 53 C. C. A. 510, 115 Fed. 87; Re Wells, 140 Fed. 752; Skilton v. Codington, 185 N. Y. 80, 113 Am. St. Rep. 885, 77 N. E. 790; Pontiac Buggy Co. v. Skinner, 158 Fed. 858; Re Marine Constr. & Dry Dock Co. 75 C. C. 451, 144 Fed. 649; Smith v. Williams, 90 App. Div. 507, 85 N. Y. Supp. 506; Dunlop v. Mercer, 86 C. C. A. 435, 156 Fed. 545; Re Hartman, 185 Fed. 196; Re Perlhefter, 177 Fed. 299.

Mr. Justice Day delivered the opinion of the court:

This was a suit in the district court of the United States for the southern district of New York by Ludvigh, as trustee in bankruptcy of the firm of Philip Horowitz & Son, to set aside as fraudulent certain transactions of the bankrupts with the American Woolen Company of New York (which we will call the "Woolen Company"), and to recover for goods taken from the bankrupts by the Woolen Company prior to the institution of proceedings [523] in bankruptcy. The district court held in favor of the trustee and sustained his right to recover the value of the goods so taken (176 Fed. 145). Upon appeal to the circuit court of appeals for the second circuit the judgment of the district court was reversed (110 C. C. A. 180, 188 Fed. 30), and the case is here upon appeal.

The facts as found by both courts are very little in dispute. It appears that Horowitz & Son, the bankrupts, had had a contract in writing with the Woolen Company which expired on December 1, 1902, whereby goods were to be consigned to Horowitz & Son, the title to the merchandise or its proceeds to remain in the Woolen Company until fully accounted for, all bills of such consigned goods to be payable to the Woolen Company and acounts of sales to be rendered to that company at least once a month. The Horowitzes were also to give security to protect the Woolen Company from any failure to perform the contract; the profit of the Horowitz firm was to be the difference between the invoice prices and the selling prices of the goods; they were to have 7 per cent discount for payment within four months, and any increase in profits by varying the terms of trade was to go to them, and they were to have a drawing account of $1,200 a month, provided the goods sold by them warranted such payment. In 1902, for reasons which do not distinctly appear in the record, the Woolen Company expressed its desire to have the Horowitz firm incorporated, and a corporation was formed under the name and style of The Niagara Woolen Company (which we will designate the "Niagara Company"), for the purpose of contracting and dealing with the Woolen Company and of dealing in fabrics received therefrom. One hundred and ninety-five of the two hundred shares of the Niagara Company were issued to Philip Horowitz, as fully paid up, in consideration of a mortgage by him on certain real estate for $19,500. A contract in writing was entered into by the [524] terms of which it was agreed that the Woolen Company would deliver such merchandise to the Niagara Company as it saw fit, and that the Niagara Company would accept possession of the merchandise upon the following conditions: The Niagara Company should hold and care for the merchandise as the property of the Woolen Company, the title thereto or proceeds therefrom being vested in the latter company, and the merchandise being at all times under its control. The title to the merchandise was to pass directly from the Woolen Company to the purchaser. The property was to be insured for the benefit and in the name of the Woolen Company. The Niagara Company was to be given the usual discounts allowed by the Woolen Company, and was restricted to the city of Elmira, New York, and the state of Montana in doing a merchandise business other than as provided in the contract. The Niagara Company agreed to execute such other documents as the Woolen Company deemed advisable to carry out the agreement, and the Woolen Company had the option to terminate the agreement upon the breach of any condition by the Niagara Company. The agreement further provided:

"IV. Said party of the second part [the Niagara Company] agrees to sell such merchandise to such persons as they shall judge to be of good credit and business standing, and to collect for and in behalf of the party of the first part [the Woolen Company], all bills and accounts for the merchandise so sold, and to immediately pay over to the said party of the first part any amount collected as aforesaid, immediately upon its collection, minus, however, the difference between the price at which said merchandise so collected for has been invoiced to the party of the second part, and the price at which said merchandise has been sold as aforesaid by the party of the second part.

"V. Said party of the second part does hereby guarantee the payment of all bills and accounts for merchandise, [525] possession of which is delivered to it under this agreement, and it hereby agrees, in case any merchandise delivered under the provisions of this agreement by the party of the first

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part to the party of the second part is not accounted for to the party of the first part under the provisions of clause IV. of this agreement, to pay to the party of the first part the invoice price of said merchandise, and thereupon title to said merchandise, or to the proceeds thereof, so paid for, shall pass to the party of the second part, and shall then be exempted from the provisions of this agreement.

. . . . . .

"VIII. This agreement shall continue for one year. If, for any reason, this agreement terminates, all of the merchandise, possession of which is held by the party of the second part under this agreement, shall at said termination be immediately returned to the possession of the party of the first part."

At the same time an agreement was made by the Woolen Company and Horowitz & Company and one Jeremiah P. Murphy, whereby Horowitz & Company guaranteed the performance of the contract of the Niagara Company, and the Horowitzes, in accordance with the contract, transferred 197 shares of that company's stock to Murphy, who really represented the Woolen Company, in trust, the stock to be voted as the Woolen Company directed, except that so long as the Niagara Company and the Horowitzes performed their agreements, the stock should be voted for whomsoever they designated for president of the Niagara Company, and should be used in all meetings as though the Horowitzes had control of it, and they were to receive the dividends thereon. Upon breach the stock was to be transferred to the Woolen Company or whomsoever it designated. Horowitz was elected president of the Niagara Company, and one of the Woolen Company's employees was made treasurer of the [526] company: the by-laws of the Niagara Company provided that checks on the funds of the company were to be signed by the president and treasurer jointly. The Niagara Company had an office in part of the premises of Horowitz & Company with a sign on the outside door, under that of Horowitz & Company. Afterwards the Woolen Company put in a bookkeeper who kept an account of the goods billed to the Niagara Company and of sales and payments reported by the Horowitzes. The goods were sold in the name of the Niagara Company, and until May, 1904, when Philip Horowitz began to embezzle the funds of the Niagara Company by indorsing checks payable to the company for sales made by it, and depositing them in his personal account, such funds were deposited in the bank account of the Niagara Company. An amendment to this contract, extending it for another year, and changing it in respect to discounts, requiring the Niagara Company to make monthly accounts of sales, giving to it a discount of 8 per cent upon all invoices the amounts of which were turned over to the Woolen Company within sixty days after sale by the Niagara Company, and then a further discount of 2 per cent, but obliging the Niagara Company to pay 6 per cent interest in invoices the amounts of which were not turned over to the Woolen Company within sixty days, was made on November 11, 1903; otherwise it continued in force.

On October 26, 1904, a suspicious fire occurred on the premises and Philip Horowitz immediately left the country and has not been heard of since. On or about that date the Woolen Company removed from the premises of Horowitz & Company 760 pieces of goods which had been consigned to the Niagara Company, and for the value of which this suit was brought by the trustee, bankruptcy proceedings having been instituted shortly thereafter.

Both courts found that, whatever the true character of the Niagara Company was, there was no actual fraud [527] in the transaction. It is quite probable that the Woolen Company desired the method of doing business through the medium of the Niaraga Company because it was deemed to be a better legal form, and because it wanted to more effectually check up the transactions of the Horowitzes. The opinion of the district court, as well as the opinion of the circuit court of appeals, shows that the case has been made to turn mainly upon the interpretation of §§ 4 and 5 of the agreement with the Niagara Company, which, the district court found, was only another name for the Woolen Company, and which, the circuit court of appeals found, was a sort of cash box for the Woolen Company, and a check upon the transactions of Horowitz & Company. We think an examination of §§ 4 and 5, when read in connection with § 8, shows most clearly that the Niagara Company was not obliged to pay for goods in its possession and unsold.

By the provisions of § 4 the party of the second part, the Niagara Company, was obliged to sell to persons adjudged to be of good credit and business standing, and to collect for the party of the first part, the Woolen Company, accounts for merchandise sold, and immediately pay over to it the amounts collected, less the difference between the price of the merchandise as invoiced to the Niaraga Company, and the price at which it was sold. In § 5 of the contract the Niagara Company guaranteed the payment of bills and accounts, and agreed, in case any merchandise delivered was not accounted for *under the provisions*

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of clause 4, to pay to the Woolen Company its invoice price, whereupon title to the merchandise or proceeds thereof was to pass to the Niagara Company, and they were to be exempt from the terms of the agreement. That part of § 5 relating to goods not accounted for refers specifically to the provisions of clause 4 of the agreement, which deals with goods sold [528] only. The entire contract must be read to ascertain the purpose of the parties, and we find in clause 8, limiting the agreement to one year, the provision that if for any reason the agreement terminated, all of the merchandise, the possession of which was held by the Niagara Company under the agreement, should be immediately returned to the Woolen Company. The district court held that this agreement, §§ 4 and 5, obligated the Niagara Company to pay for each and every piece of goods delivered under the contract with it, but for the reasons we have stated we cannot agree with this construction. We find that the agreement was really one of bailment for the purpose of sale, with the right to return the unsold goods. There is nothing illegal in such contracts when made in good faith. As this court held in Sturm v. Boker, 150 U. S. 312, 330, 37 L. ed. 1093, 1100, 14 Sup. Ct. Rep. 99, an agency to sell and return the proceeds or the specific goods stands upon the same footing as a bailment where the identical article is to be returned in the same or altered form, and title to the property is not changed. It therefore follows that, if there are no other circumstances controlling the situation and establishing that this contract was a mere cover for a fraudulent or illegal purpose, there is nothing in its terms operating to transfer the title to the goods to the Niagara Company, or to prevent the return of those unsold to the Woolen Company, or their being retaken by that company upon the happening of the contingency shown in this case.

But it is insisted by the counsel for the appellant that the conduct of the parties shows that their real purpose and understanding were to make an effectual sale; and that the writing, even if interpreted to withhold the title by its terms, was merely a convenient resort to fortify the right to take the goods in event of disaster overtaking the Horowitz concern. Some of the most cogent of the circumstances relied upon will be noticed. It is said that the Horowitzes selected the goods, whereas, under the [529] contract, the Woolen Company had the right to turn over any it saw fit; but this circumstance may be readily explained, for the Horowitzes were familiar with and of course interested in their own trade, and more likely than anyone else to make proper selections for it, and from the sale of the goods chosen they were to make their profits.

A letter in evidence, written in December, 1903, by an agent of the Woolen Company in answer to a request to take back goods, contained the statement that the Woolen Company could not, at that late date, consent to have fall goods made expressly for the Horowitzes and delivered in accordance with the terms of the agreement turned back in the stock. It is true that this circumstance is more consistent with the idea of sale than of bailment, but it had reference to goods which were delivered, and evidenced the desire of the Woolen Company to have them sold under the consignment as the parties intended.

It is urged that the goods were not kept separately, but it appears that the tags of the Woolen Company were left upon the goods, and it is not shown that any creditor relied upon mismarking or misbranding. And memoranda are in evidence showing the names of certain salesmen thereon, but on these same bills it is stated that the goods were furnished under the agreement already referred to.

Against these considerations are the positive terms of the agreement, found to be free from fraud and fairly entered into, which, as we interpret them, permitted goods unsold to be returned. There is the further undisputed fact that until Philip Horowitz began, in the spring of 1904, to violate the agreement, checks for sales were quite uniformly deposited to the credit of the Niagara Company and the proceeds turned over to the Woolen Company; that the Woolen Company had a bookkeeper in the Horowitz place, who kept account of the goods consigned and sold; that checks were required to be indorsed by Horowitz and [530] a representative of the Woolen Company, and that an agent of the Woolen Company frequently visited the concern, inquiring into the sales, and urging prompt collections. The Horowitzes and the Niagara Company were not permitted to keep the proceeds of the sales or to use them for their own benefit, and this was only done through the fraudulent conduct of Philip Horowitz, in violation of the agreement and the purpose of the parties.

We are unable to find that this contract was either actually or constructively fraudulent, and hold, as was found in the Circuit Court of Appeals, that it was what it purported to be,—a consignment arrangement with the net proceeds of sales to be accounted for to the consignor, and with the right to return the unsold goods. Finding no error in the decree of the Circuit Court of Appeals, the same is affirmed.

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MARY R. PEABODY,† Saco & Biddeford Savings Institution, Samuel Ellery Jennison, and the Portsmouth Harbor Land & Hotel Company, Appts.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 530–540.)

Eminent domain — taking — apprehension of firing from government batteries.

Lands over which is the most suitable field of fire for practice and other purposes of an adjacent coast defense battery in times of peace cannot be said to have been appropriated by the government so as to raise an implied agreement on its part for compensation because of the impairment of the value of the lands, due to the apprehension of a repetition of the firing over and across them, where the guns have been so fired on but two occasions, both shortly after installation, and not at all within the last eight years, and there is nothing to show any intention on the part of the government to repeat such firing.

[For other cases, see Eminent Domain, V., in Digest Sup. Ct. 1908.]

[No. 289.]

Argued February 27, 1913. Decided December 15, 1913.

APPEAL from the Court of Claims to review a judgment dismissing petitions for compensation for land alleged to have been taken by the United States for public use. Affirmed.

See same case below, 46 Ct. Cl. 39.

The facts are stated in the opinion.

Mr. John Lowell argued the cause, and, with Messrs. William Frye White and Chauncey Hackett, filed a brief for appellants:

Property may be defined as certain rights in things which pertain to persons, and which are created and sanctioned by law. These rights are the right of user, the right of exclusion, and the right of disposition.

Old Colony & F. River R. Co. v. Plymouth County, 14 Gray, 161, Hare, Am. Const. Law, p. 357; 1 Bentham's Works, 1843 ed. 308; "Property," New Oxford Dict.; Morrison v. Semple, 6 Binn. 94; Jackson ex dem. Pearson v. Housel, 17 Johns. 281; Chicago & W. I. R. Co. v. Englewood Connecting R. Co. 115 Ill. 385, 56 Am. Rep. 173, 4 N. E. 246; Denver v. Bayer, 7 Colo. 113, 2 Pac. 6; St. Louis v. Hill, 116 Mo. 527, 21 L.R.A. 226, 22 S. W. 861; Sinking Fund Cases, 99 U. S. 700, 738, 25 L. ed. 496, 508; 1 Lewis, Em. Dom. 3d ed. pp. 51, 52; 2 Austin, Jur. 1051.

In the early cases a taking was held to be the actual physical appropriation of the property or a devesting of the title of it.

Sedgw. Stat. & Const. Law, 2d ed. pp. 456, 458.

The conception that a taking required actual appropriation of the property or a devesting of the title of it has been gradually broadening.

1 Lewis, Em. Dom. pp. 56, 57; Stockdale v. Rio Grande Western R. Co. 28 Utah, 211, 77 Pac. 849; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; 1 Hare, Am. Const. Law, p. 388; Chappell v. United States, 34 Fed. 673, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; Eaton v. Boston, C. & M. R. Co. 51 N. H. 504, 12 Am. Rep. 147; Grand Rapids Boom. Co. v. Jarvis, 30 Mich. 308; Thompson v. Androscoggin River Improv. Co. 54 N. H. 545; Peabody v. United States, 43 Ct. Cl. 16; United States v. Welch, 217 U. S. 338, 54 L. ed. 789, 28 L.R.A.(N.S.) 385, 30 Sup. Ct. Rep. 527, 19 Ann. Cas. 680; United States v. Grizzard, 219 U. S. 180, 55 L. ed. 165, 31 L.R.A.(N.S.) 1135, 31 Sup. Ct. Rep. 162; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; United States v. Alexander, 148 U. S. 186, 37 L. ed. 415, 13 Sup. Ct. Rep. 529; Sprague v. Dorr, 185 Mass. 10, 69 N. E. 344; 15 Cyc. 660, note 41, and pp. 661–670, and notes.

The claimants' land extends in contemplation of law *usque ad cœlum*.

Co. Litt. 4a; 2 Bl. Com. 18; 3 Kent, Com. 401; Webb's Pollock, Torts, p. 423; Lyman v. Hale, 11 Conn. 177, 27 Am. Dec. 728; Wandsworth Bd. of Works v. United Teleph. Co. L. R. 13 Q. B. Div. 912, 53 L. J. Q. B. N. S. 449, 51 L. T. N. S. 148, 32 Week. Rep. 776, 48 J. P. 676, 12 Eng. Rul. Cas. 630; Humphries v. Brogden, 12 Q. B. 739, 20 L. J. Q. B. N. S. 10, 15 Jur. 124, 17 Eng. Rul. Cas. 407; Roberts v. Haines, 6 El. & Bl. 643, 7 El. & Bl. 625, 27 L. J. Exch. N. S. 49, 3 Jur. N. S. 886, 5 Week. Rep. 631; 13 Mor. Min. Rep. 668; 2 Erskine, Principles, title 9, § 11; 1 Am. L. Reg. N. S. 577; Lemmon v.

†Death of Mary R. Peabody, one of the appellants herein, suggested, and appearance of Amory Eliot filed and entered February 24, 1913, as a party appellant herein.

NOTE.—Generally, as to what constitutes a taking of private property for public use —see notes to Memphis & C. R. Co. v. Birmingham, S. & T. River R. Co. 18 L.R.A. 166; D. M. Osborne & Co. v. Missouri P. R. Co. 37 L. ed. U. S. 156; Sweet v. Rechel, 40 L. ed. U. S. 188; and Backus v. Fort Street Union Depot Co. 42 L. ed. U. S. 853.

On consequential damages, generally, see notes to D. M. Osborne & Co. v. Missouri P. R. Co. 37 L. ed. U. S. 156, and Backus v. Fort Street Union Depot Co. 42 L. ed. U. S. 853.

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Webb [1895] A. C. 1, 64 L. J. Ch. N. S. 205, 11 Reports, 116, 71 L. T. N. S. 647, 59 J. P. 564; Corbett v. Hill, L. R. 9 Eq. 671, 39 L. J. Ch. N. S. 547, 22 L. T. N. S. 263.

The line of cases in this court in which it has been held that the acts complained of did not constitute a taking within the meaning of the 5th Amendment are clearly distinguishable from the case at bar.

Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Gibson v. United States, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; Bedford v. United States, 192 U. S. 217, 48 L. ed. 414, 24 Sup. Ct. Rep. 238; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349.

The claimants' property has been taken; the United States has taken title to the whole of the claimants' property commanded by the guns by acquiring the value thereof and assuming dominion thereof *in perpetuo*.

United States v. Lynah, supra; Co. Litt. 4b; Peabody v. United States, 43 Ct. Cl. 18.

Mr. Frederick De C. Faust argued the cause, and with Assistant Attorney General Thompson, filed a brief for appellee:

There has been no taking of appellants' property or any of its uses within the rule established by the decisions of this court.

Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; Sharp v. United States, 191 U. S. 341, 48 L. ed. 211, 24 Sup. Ct. Rep. 114; Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127; United States v. Welch, 217 U. S. 338, 54 L. ed. 789, 28 L.R.A.(N.S.) 385, 30 Sup. Ct. Rep. 527, 19 Ann. Cas. 680; United States v. Grizzard, 219 U. S. 180, 55 L. ed. 165, 31 L.R.A.(N.S.) 1135, 31 Sup. Ct. Rep. 162; Northern Transp. Co. v. Chicago, 99 U. S. 642, 25 L. ed. 338; Cooley, Const. Lim. p. 542; Radcliff v. Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357.

The injury of which appellants complain is not the result of a taking of any part of their property or a direct invasion thereof, but is consequential damage for which no right of compensation attaches.

Bedford v. United States, 192 U. S. 224, 48 L. ed. 417, 24 Sup. Ct. Rep. 238; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Northern Transp. Co. v. Chicago, 99 U. S. 642, 25 L. ed. 338; Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; Western Turf Asso. v. Greenberg, 204 U. S. 361, 51 L. ed. 521, 27 Sup. Ct. Rep. 384; Monongahela Nav. Co. v. Coons, 6 Watts & S. 101; Lansing v. Smith, 8 Cow. 146; Booth v. Rome, W. & O. Terminal R. Co. 140 N. Y. 267, 24 L.R.A. 105, 37 Am. St. Rep. 552, 35 N. E. 592; Hurdman v. North Eastern R. Co. L. R. 3 C. P. Div. 168, 47 L. J. C. P. N. S. 368, 38 L. T. N. S. 339, 26 Week. Rep. 489; Beseman v. Pennsylvania R. Co. 50 N. J. L. 235, 13 Atl. 164; Carroll v. Wisconsin C. R. Co. 40 Minn. 168, 41 N. W. 661; Benner v. Atlantic Dredging Co. 134 N. Y. 156, 17 L. R. A. 220, 30 Am. St. Rep. 649, 31 N. E. 328; Stevens v. Paterson & N. R. Co. 34 N. J. L. 549, 3 Am. Rep. 269.

Mr. Justice Hughes delivered the opinion of the court:

This is an appeal from a judgment of the court of claims, dismissing petitions for compensation for land alleged to have been taken by the United States for public use. 46 Ct. Cl. 39. Separate suits were brought by Samuel Ellery Jennison, the owner at the time the taking is said to have occurred, by his mortgagees, Mary R. Peabody and the Saco & Biddeford Savings Institution, and by his grantee, the Portsmouth Harbor, Land, & Hotel Company. These suits were consolidated and the merits were heard. The following facts are shown by the findings:

The land in question, comprising about 200 acres, forms the southern corner of Gerrish island, the southernmost point on the coast of Maine. It lies about 3 miles from Portsmouth, bordering on the south and [536] east the Atlantic ocean, and on the west the entrance to Portsmouth harbor. Its value consists almost entirely in its adaptability for use as a summer resort, and it had been improved for this purpose by the erection of a hotel, cottage, outbuildings, and pier, by the construction of roads, and by the provision of facilities for summer recreations.

In 1873, long before Jennison acquired title and improved the property, the United States began the construction of a twelve-gun battery upon a tract of 70 acres lying north and west of the land in suit and abutting upon it. This battery was to be one of the outer line of defenses of Portsmouth harbor, for which appropriation had been made by the act of February 21, 1873, 17 Stat. at L. 468, chap. 175. See also act of April 3, 1874, 18 Stat. at L. 25, chap. 74. By the year 1876, a large sum had been expended upon the work, which had reached an advanced stage of construction. Operations were closed in September of that year, however, for want of funds, and the fortification was not occupied by the United States thereafter until work was resumed in 1898. The government then constructed

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on the same site a battery consisting of three 10-inch guns and two 3-inch rapid fire guns. It was practically completed on June 30, 1901, and was transferred to the artillery on December 16, 1901, being named Fort Foster.

No part of the fort encroaches upon the land in suit; the fort is within 200 feet of its northwestern corner and about 1,000 feet from the hotel. The claimants' land lies between the fort and the open sea to the south and southeast; and the guns have a range of fire over all the sea front of the property. As the government reservation on its western side borders the entrance to the harbor, the court found that there was an available portion of the shore belonging to the reservation which permitted the firing of the guns in a southwesterly direction [537] "for practice and for all other necessary purposes in time of peace" without the projectiles passing over the land in question. This conclusion was reached by applying the local law governing the boundary lines of contiguous proprietors where there is a curvature of the shore. Emerson v. Taylor, 9 Me. 42, 23 Am. Dec. 531. It may be noticed here that the petitioners insist that the guns could not be fired over the narrow area thus found to be a part of the reservation without endangering life and property along the New Hampshire coast, and they present in their brief a map to support their assertion. The government urges that this map has not been identified and is wholly incompetent; and that, as the question is one of fact, the finding must be deemed conclusive. But while thus finding that there was a line of fire available to the government over its own shore property, the court also found that the most suitable field of fire for practice and other purposes in time of peace would be over the claimants' land.

On or about June 22, 1902, two of the guns were fired for the purpose of testing them at a target off the coast, the missiles passing over the land in suit; and another gun was fired for the same purpose and to the same effect on September 25, 1902, the resulting damage to buildings and property amounting to $150.

None of the guns has been fired since, but they have been kept in good condition by a detail from Fort Constitution, which is situated across the Piscataqua river. The court below further states in its findings that "it does not appear from the evidence that there is any intention on the part of the government to fire any of its guns now installed, or which may hereafter be installed, at said fort in time of peace over and across the lands of the claimants so as to deprive them of the use of the same or any part thereof, or to injure the same by concussion or otherwise, excepting as such intention can be drawn from the fact that the guns now installed in said fort are so fixed as to make it possible [538] so to do, and the further fact that they were so fired upon the occasions as hereinbefore found."

In the years 1903 and 1904, the hotel, which had previously been profitable, was conducted at a loss; since 1904, it has been closed and the cottages have been rented only in part and at reduced rates. It is found that the erection of the fort and the installation of the guns have materially impaired the value of the property, and that this impairment will continue so long as the fort and artillery are maintained. This is found to be due to the apprehension that the guns will be fired over the property.

The question is whether, upon this showing, the petitioners were entitled to recover.

It may be assumed that if the government had installed its battery, not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the government to fire projectiles directly across it, for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made. The subjection of the land to the burden of governmental use in this manner might well be considered to be a "taking" within the principle of the decisions (Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 177, 178, 20 L. ed. 557, 560; United States v. Lynah, 188 U. S. 445, 469, 47 L. ed. 539, 548, 23 Sup. Ct. Rep. 349; United States v. Welch, 217 U. S. 333, 339, 54 L. ed. 787, 789, 28 L.R.A.(N.S.) 385, 30 Sup. Ct. Rep. 527, 19 Ann. Cas. 680), and not merely a consequential damage incident to a public undertaking, which must be borne without any right to compensation (Northern Transp. Co. v. Chicago, 99 U. S. 635, 642, 25 L. ed. 336, 338; Gibson v. United States, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; Scranton v. Wheeler, 179 U. S. 141, 164, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48; Bedford v. United States, 192 U. S. 217, 224, 48 L. ed. 414, 417, 24 Sup. Ct. Rep. 238; Jackson v. United States, 230 U. S. 1, 23, 57 L. ed. 1363, 1374, 33 Sup. Ct. Rep. 1011).

But, in this view, the question remains whether it satisfactorily [539] appears that the servitude has been imposed; that is, whether enough is shown to establish an intention on the part of the government to impose it. The suit must rest upon contract, as the government has not consented to be sued

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for torts, even though committed by its officers in the discharge of their official duties (Gibbons v. United States, 8 Wall. 269, 275, 19 L. ed. 453, 454; Langford v. United States, 101 U. S. 341, 343, 25 L. ed. 1010, 1011; Schillinger v. United States, 155 U. S. 163, 169, 39 L. ed. 108, 110, 15 Sup. Ct. Rep. 85; Russell v. United States, 182 U. S. 516, 530, 45 L. ed. 1210, 1215, 21 Sup. Ct. Rep. 899; Harley v. United States, 198 U. S. 229, 234, 49 L. ed. 1029, 1030, 25 Sup. Ct. Rep. 634); and a contract to pay, in the present case, cannot be implied unless there has been an actual appropriation of property (United States v. Great Falls Mfg. Co. 112 U. S. 645, 656, 657, 28 L. ed. 846, 850, 5 Sup. Ct. Rep. 306).

The contention of the petitioners, therefore, is plainly without merit so far as it rests upon the mere fact that there is a suitable, or the most suitable, field of fire over their property. Land, or an interest in land, cannot be deemed to be taken by the government merely because it is suitable to be used in connection with an adjoining tract which the government has acquired, or because of a depreciation in its value, due to the apprehension of such use. The mere location of a battery certainly is not an appropriation of the property within the range of its guns.

The petitioners' argument assumes that the guns, for proper practice, must be fired over the land in suit, and, hence, that this burden upon it was a necessary incident to the maintenance of the fort. The fact of the necessity of practice firing is said to be established by the finding with respect to the line of fire over the government's portion of the shore, in which it is said that this would be sufficient "for purposes of practice and for all other necessary purposes in time of peace." But, in the light of other findings, this is far from affording a sufficient foundation for the conclusion upon which the petitioners insist. On the contrary, that no such necessity as is now asserted can be assumed from the mere fact that the fort is maintained [540] is demonstrated by the facts of this case. This suit was tried in the latter part of the year 1910, and it appeared that none of the guns had been fired for over eight years. When the suit was brought in 1905, nearly two years and a half had elapsed since the firing of a shot. The guns have been fired only upon two occasions, or three times in all, and this firing took place in 1902, shortly after the installation of the guns, for the purpose of testing them. It may be that practice in firing the guns would be highly desirable, but it is too much to say upon this record that the fort would be useless without it. Nor are we at liberty to conclude that the government has taken property, which it denies that it has taken, by assuming a military necessity in the case of this fort which is absolutely contradicted by the facts proved.

Reduced to the last analysis, the claim of the petitioners rests upon the fact that the guns were fired upon two occasions in 1902, as stated, and upon the apprehension that the firing will be repeated. That there is any intention to repeat it does not appear, but rather is negatived. There is no showing that the guns will ever be fired unless in necessary defense in time of war. We deem the facts found to be too slender a basis for a decision that the property of the claimants has been actually appropriated, and that the government has thus impliedly agreed to pay for it.

The judgment is affirmed.

Affirmed.

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[541] J. W. SPRINGSTEAD, J. C. Burwell, W. A. Fulton, et al., Plffs. in Err.,

v.

CRAWFORDSVILLE STATE BANK.

(See S. C. Reporter's ed. 541-543.)

Federal courts — jurisdictional amount — attorney's fee.

1. An attorney's fee, payment of which is provided for in a promissory note if suit should be brought, may be considered in determining whether the amount necessary to sustain the original jurisdiction of a Federal court is involved in an action on the note.

[For other cases, see Courts, V. c, 6, in Digest Sup. Ct. 1908.]

Pleading — allegations of citizenship — amendment.

2. Failure to allege the citizenship of the original payee of a note does not compel the dismissal of an action brought by the assignee in a Federal court in which the necessary diversity of citizenship as between plaintiff and defendant is alleged, since the error is susceptible to correction by amendment.

[For other cases, see Pleading, II. c, 2, a; I. n, in Digest Sup. Ct. 1908.]

Pleading — amendment — allegations of citizenship — jurisdiction.

3. Curing by amendment in a Federal court the failure to allege the citizenship of the original payee in an action brought by the assignee of a note is not open to the objection that it gives that court a jurisdiction which it no longer possesses because, after the suit was begun, but before

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Note.—As to whether amount of attorney's fee expressly stipulated for is to be included in computing amount involved for purpose of ascertaining jurisdiction—see note to Parks v. Granger, 27 L.R.A.(N.S.) 157.

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the amendment, the jurisdictional amount was by the Judicial Code increased to a sum in excess of that involved in the suit, since the saving clause of § 299 of that Code covers the case.

[For other cases, see Pleading, I. n, in Digest Sup. Ct. 1908.]

[No. 93.]

Submitted December 4, 1913. Decided December 22, 1913.

IN ERROR to the Circuit Court of the United States for the Southern District of Florida to review a judgment in favor of plaintiff in an action on a promissory note. Reversed and remanded, with directions to allow plaintiff to amend, otherwise to dismiss for want of jurisdiction.

Mr. J. C. Davant submitted the cause for plaintiffs in error:

The term "matter in dispute" is, in itself, a term with well-recognized meaning.

Lee v. Watson, 1 Wall. 337, 339, 17 L. ed. 557, 558; Smith v. Adams, 130 U. S. 167, 32 L. ed. 895, 9 Sup. Ct. Rep. 566.

It has been held that an attorney's fee could not, under the laws of the state of Georgia, be considered where dependent upon a statute providing for a reasonable attorney fee when suit was brought upon an insurance policy after nonpayment for a period of sixty days.

Peters v. Queen Ins. Co. 182 Fed. 113.

The present case seems to be within the distinction between the principal demand and the accessory demand, as defined in the case of Brown v. Webster, 156 U. S. 328, 39 L. ed. 440, 15 Sup. Ct. Rep. 377.

When suit is brought on a negotiable instrument of the character sued on here, the assignee can bring suit in the Federal courts only where diversity of citizenship is the ground for the jurisdiction of the court, in the event the original payee could have brought suit on such instrument in such courts; and the fact of the necessary diversity of citizenship between the maker and the payee of the note sued on must, of necessity, be shown affirmatively; else such court has no jurisdiction.

Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; King Iron Bridge & Mfg. Co. v. Otoe County, 120 U. S. 225, 30 L. ed. 623, 7 Sup. Ct. Rep. 552; Parker v. Ormsby, 141 U. S. 81, 35 L. ed. 654, 11 Sup. Ct. Rep. 912; Plant Invest. Co. v. Jacksonville, T. & K. W. R. Co. 152 U. S. 71, 38 L. ed. 358, 14 Sup. Ct. Rep. 483; Emsheimer v. New Orleans, 186 U. S. 33, 46 L. ed. 1042, 22 Sup. Ct. Rep. 770.

Messrs. Peter O. Knight and C. Fred Thompson submitted the cause for defendant in error:

Where, by express stipulation, valid in the state where made, a debtor becomes liable for a reasonable attorney's fee in case the debt is collected by suit, such fee may be added to the amount of the debt for the purpose of making up the jurisdictional amount. Such a fee is not a part of the costs, which are to be excluded under the judiciary acts of 1887 and 1888.

Brown v. Webster, 156 U. S. 328, 39 L. ed. 440, 15 Sup. Ct. Rep. 377; Continental Casualty Co. v. Spradlin, 95 C. C. A. 112, 170 Fed. 322; Howard v. Carroll, 195 Fed. 646; Less v. English, 29 C. C. A. 275, 56 U. S. App. 16, 85 Fed. 471; Rogers v. Riley, 80 Fed. 759.

Attorneys' fees expressly stipulated for in promissory notes are not considered costs, but are calculable in determining the amount in controversy.

Almand v. Almand, 95 Ga. 204, 22 S. E. 213; Altgelt v. Harris, — Tex. —, 11 S. W. 857; Baxter v. Bates, 69 Ga. 587; Beach v. Atkinson, 87 Ga. 288, 13 S. E. 591; Blankenship v. Wartelsky, — Tex. —, 6 S. W. 143; Brown v. Webster, 156 U. S. 328, 39 L. ed. 440, 15 Sup. Ct. Rep. 377; Clark v. Brown, 48 Tex. 212; Continental Casualty Co. v. Spradlin, 95 C. C. A. 112, 170 Fed. 322; 1 Enc. Pl. & Pr. 715, note 4; Fix v. Sissung, 83 Mich. 561, 21 Am. St. Rep. 616, 47 N. W. 340; Florida C. & P. R. Co. v. Seymour, 44 Fla. 557, 33 So. 424; Hill v. Haas, 73 Ga. 122; Howard v. Carroll, 195 Fed. 646; Less v. English, 29 C. C. A. 275, 56 U. S. App. 16, 85 Fed. 471; Moore v. Fay, 4 Tex. App. Civ. Cas. (Willson) 298, 15 S. W. 199; Rogers v. Riley, 80 Fed. 759; Warder, B. & G. Co. v. Raymond, 7 S. D. 451, 64 N. W. 525; Waters v. Walker, 4 Tex. App. Civ. Cas. (Willson) 463, 17 S. W. 1085; Parks v. Granger, 96 Miss. 503, 27 L.R.A. (N.S.) 157, 51 So. 716, Ann. Cas. 1912B, 232.

A stipulation for the payment of a reasonable amount as attorneys' fees is valid in the state of Florida.

Adams v. Fry, 29 Fla. 318, 10 So. 599; Carhart v. Allen, 56 Fla. 763, 48 So. 47; Cooper Grocery Co. v. Citizens' Bank & T. Co. 62 Fla. 142, 56 So. 435; Durham v. Stephenson, 41 Fla. 112, 25 So. 284; Kellogg v. Singer Mfg. Co. 35 Fla. 99, 17 So. 68; L'Engle v. L'Engle, 21 Fla. 131; Logan v. Slade, 28 Fla. 699, 10 So. 25; Long v. Herrick, 26 Fla. 356, 8 So. 50; Merrell v. Ridgely, 62 Fla. 546, 57 So. 352; Taylor v. Brown, 32 Fla. 334, 13 So. 957.

A Florida case as to principle involved and as to form of declaration is conclusive of this case.

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Florida C. & P. R. Co. v. Seymour, 44 Fla. 557, 33 So. 424.

The court will take judicial cognizance of the fact that attorneys' fees in controversy are of some value.

Colley v. Wolcott, 109 C. C. A. 425, 187 Fed. 595.

When the declaration is not sufficiently precise as to form, leave will be given to amend without remanding the cause for that purpose.

Williams v. Molther, 117 C. C. A. 220, 198 Fed. 462.

Plaintiff's allegations of value govern in determining the jurisdiction, except where, upon the face of his own pleadings, it is not legally possible for him to recover the jurisdictional amount.

Howard v. Carroll, 195 Fed. 646; Schunk v. Moline, M. & S. Co. 147 U. S. 500, 37 L. ed. 255, 13 Sup. Ct. Rep. 416; Smithers v. Smith, 204 U. S. 642, 51 L. ed. 660, 27 Sup. Ct. Rep. 297; Upton v. McLaughlin, 105 U. S. 640, 26 L. ed. 1197.

Memorandum opinion by Mr. Chief Justice White, by direction of the court:

This is a direct writ of error to determine a question of jurisdiction. The action arose prior to the adoption of the Judicial Code, and was on two promissory notes, each for $1,000 and each providing for the payment of a reasonable attorney's fee if suit were brought. Could [542] such an attorney's fee be considered in determining whether the jurisdictional amount was involved? We think so. Clearly such fee was no part of the costs, nor was it interest. It may be that the agreement to pay an attorney's fee in the event of suit created only an accessory right (though under Brown v. Webster, 156 U. S. 328, 39 L. ed. 440, 15 Sup. Ct. Rep. 377, this is doubtful), but nevertheless it gave a right to recover and created a legal obligation to pay. It is true its effectiveness was dependent upon suit being brought, yet the moment suit was brought the liability to pay the fee became a "matter in controversy," and as such to be computed in making up the requisite jurisdictional amount. Ibid., and this has been the rule since applied by lower Federal courts. Rogers v. Riley, 80 Fed. 759; Continental Casualty Co. v. Spradlin, 95 C. C. A. 112, 170 Fed. 322; Howard v. Carroll, 195 Fed. 646.

It is further urged that though the case is within the jurisdictional amount, nevertheless it was not within the competency of the court below because of a failure to allege the citizenship of the original payee of the notes. Act of August 13, 1888, 25 Stat. at L. p. 433, chap. 866, § 1, U. S. Comp. Stat. 1901, p. 508. The contention is clearly well taken. King Iron Bridge Co. v. Otoe County, 120 U. S. 225, 30 L. ed. 623, 7 Sup. Ct. Rep. 552; Parker v. Ormsby, 141 U. S. 81, 83, 35 L. ed. 654, 655, 11 Sup. Ct. Rep. 912. However, as between the plaintiff and the defendants the necessary diversity of citizenship was alleged, we are of opinion that the failure to allege the citizenship of the assignor of the paper does not compel the absolute dismissal of the case, as the error in that particular is susceptible to correction by amendment. King Iron Bridge Co. v. Otoe County, supra; Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690.

The argument that because, subsequent to the institution of suit, the jurisdictional amount was increased, to allow the amendment at this time would be giving the lower court jurisdiction of a case to which its authority does not now extend, is without merit, in view of the saving [543] clause of § 299 of the Judicial Code [36 Stat. at L. 1169, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 246], which was intended to cover such a case as this.

Reversed and remanded, with direction to allow plaintiff to amend by alleging the citizenship of the original parties to the paper, within such time as the court shall think proper, and upon failure to do so, to dismiss for want of jurisdiction.

ÆTNA LIFE INSURANCE COMPANY, Petitioner,
v.
JOHN T. MOORE, Administrator of John A. Salgue, Deceased.

(See S. C. Reporter's ed. 543-560.)

Insurance — untrue statements in application — good faith of insured.

1. Variations from the truth in the statements made by the insured in his application for life insurance, which are by the

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NOTE.—As to state decisions and laws as rules of decision in Federal courts—see notes to Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Clark v. Graham, 5 L. ed. U. S. 334; Mitchell v. Burlington, 18 L. ed. U. S. 351; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; and Snare & T. Co. v. Friedman, 40 L.R.A. (N.S.) 380.

On the effect of nonwaiver agreement upon conditions existing at inception of insurance policy—see note to Gish v. Insurance Co. of N. A. 13 L.R.A.(N.S.) 826.

On the effect of knowledge by insurance agent of falsity of statements in application

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policy expressly made the basis of the insurance contract, will, under the construction given to Ga. Code, §§ 2479, 2480, by the courts of that state, avoid the policy if such untruths are such as change the nature, extent, or character of the risk, whether they are made in good faith, without knowledge of their untruth, or are made fraudulently or wilfully.

[For other cases, see Insurance, V. a, 3; V. d, in Digest Sup. Ct. 1908.]

Appeal — prejudicial error — refusing instruction.

2. Error in refusing to instruct the jury in an action on a policy of life insurance that untrue answers in the application, if material, avoid the policy, regardless of the good faith of the insured, calls for the reversal of a judgment entered on a general verdict against the insurance company, where the evidence as to the untruthfulness of the answers is conflicting, since, the verdict being general, it is not possible to say what view the jury took of the conflict, or that it was necessary to resolve it in view of the charge of the court, or how they would have resolved it if the instructions requested had been given.

[For other cases, see Appeal and Error, VIII. m, 4, b, in Digest Sup. Ct. 1908.]

Insurance — untrue answer in application — application for other insurance.

3. The answer "no" to the question in the insured's application for life insurance whether any proposal or application to insure his life was pending in another company, or, if made, had not been granted, calling for particulars and the names of all such companies, associations, or agents, is

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—see note to Clemans v. Supreme Assembly, R. S. G. F. 16 L.R.A. 33.

What constitutes failure or refusal to issue life insurance which will falsify representations as to previous applications.

The ruling in ÆTNA L. INS. CO. v. MOORE, that the denial by an applicant that he had ever applied for insurance which had not been granted is not saved from being false because, after an unfavorable medical examination, he withdrew the application upon the advice of the soliciting agent before it reached the insurance company, is in harmony with decisions in analogous cases.

Thus, in Security Mut. L. Ins. Co. v. Webb, 55 L.R.A. 132, 45 C. C. A. 648, 106 Fed. 808, it was held that the refusal of an applicant for insurance to furnish a sample of urine to the medical examiners after answering the required questions in the application blank, because of which the application is rejected, does not annul the negotiations so as to justify a statement in an application to another company that no proposal or application for insurance has ever been made upon which a policy has not been issued.

The answer "none other" to the question in an application for insurance whether any proposition or negotiation or examination for life insurance had been made in this or any other company on which a policy had not been issued is false where there had previously been an informal unwritten examination by a medical examiner of another insurance company, terminated by the examiner as useless, not based upon a written application, and not reported to the company. Mutual L. Ins. Co. v. Nichols, — Tex. Civ. App. —, 24 S. W. 910, affirmed in — Tex. Civ. App. —, 26 S. W. 998.

And where, in an action upon an insurance policy, it appears that the applicant stated in his application that no proposal or application to insure his life had ever been made to any company or agent upon which a policy had not been issued, and that no physician had given an unfavorable opinion upon his life with reference to life insurance, and that such questions were truthfully answered, and to be considered as an essential part of the application, and as forming with it the basis of the proposed contract; and there was evidence that he had previously applied to become a member of another association, and that his application had been destroyed on failure to forward the medical examination, and that he was examined by the medical examiner, who found traces of Bright's disease, and so informed the applicant, but failed to inform the grand medical examiner on request of the applicant, and that the applicant, upon afterwards being urged to join another association, told a member he was not eligible, — a verdict should be directed in favor of the defendant, the only testimony tending in any way to lessen the force of this evidence being the answers made by the applicant to the questions in the application itself, and some inconsistent statements of the medical examiner, and the fact that the records of the lodge did not show the previous application, it having been shown that no record was made of an application unless accompanied by a report of a medical examiner. Ferris v. Home Life Assur. Co. 118 Mich. 485, 76 N. W. 1041.

The general rule seems to be that of Security Mut. L. Ins. Co. v. Webb, supra, that a failure or refusal to issue a policy which will falsify a denial by the applicant results not only when he has been examined and rejected because found to be an unsatisfactory risk, but also whenever, through any circumstances, a completed application does not result in actual insurance.

And see Prudential Ins. Co. v. Moore, 231 U. S. 560, post, 367, 34 Sup. Ct. Rep. 191, where the court held that untrue answers material to the risk which, under Ga. Code, §§ 2479, 2480, as construed by the courts of that state, avoid the policy, were given by the insured in his application made a part of the insurance contract, where he answered "no" to the question whether "any company or association ever

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such a variation from the truth as changes the nature, extent, and character of the risk, and therefore, under Ga. Code, §§ 2479, 2480, avoids a policy which makes the statements in the application the basis of the insurance contract, where, having made an application for insurance to the local agent of another company, whose medical examiner refused to pass him, the insured had withdrawn the application on the advice of such agent before it reached the insurance company.

[For other cases, see Insurance, V. d, in Digest Sup. Ct. 1908.]

Insurance — estoppel of insurer — knowledge of local agent.

4. Knowledge of the actual conditions and circumstances by the local agent who prepared the application for a policy of life insurance will not estop the insurance company from enforcing a condition rendering the policy void if material untrue statements are made in such application, where it was expressly agreed between the parties that "no statement or declaration made to any agent, examiner, or other person, and not contained in" the application, should "be taken or construed as having been made to or brought to the notice or knowledge of" the company, "or as charging it with any liability by reason thereof," and the insured specifically expressed his understanding to be that the company, or one or more of its executive officers, and no other person, could grant insurance or make any agreement binding upon the company.

[For other cases, see Insurance, VII. a, in Digest Sup. Ct. 1908.]

Courts — rules of decision — following decisions of state courts.

5. The question as to the effect of the knowledge of the local agent upon the right of a life insurance company to insist upon a condition rendering the policy void if material untrue statements are made in the application is one of general jurisprudence, upon which the Federal courts are not controlled by the decisions of state courts.

[For other cases, see Courts, VII. c, in Digest Sup. Ct. 1908.]

[No. 33.]

Argued November 3, 1913. Decided December 22, 1913.

ON Writ of Certiorari to the United States Circuit Court of Appeals for the

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declined to grant insurance" on his life, failed to answer the further question, "If 'yes,' give name of company or companies and when," and mentioned but one other company in answer to the question whether application for insurance was then pending in any other company, while in fact he then had applications in two other companies pending, and where, having made an application for insurance to the local agent of another company whose medical examiner refused to pass him, he had withdrawn such application upon the advice of the agent, before it reached the insurance company.

The answer "no" to the question, "Have you ever made an application for life insurance upon which a policy was not issued, or, if issued, upon a different plan from the one applied for," is clearly false where the applicant had made an application to another company a few days before, and had been told by the medical examiner for that company that he was postponed for a further examination. Fletcher v. Bankers L. Ins. Co. 135 App. Div. 295, 119 N. Y. Supp. 801.

Where an applicant for insurance applies to the agent of an insurance company, as such agent, for a policy upon his life in such company, and is furnished by the agent with a blank application, which the applicant fills up, signs, and delivers to the agent, the applicant has done all he is required to do; and where the medical examiner, who is his physician, pronounces him unfit for insurance without examination, the application has been made, and has not been successful, so as to render false a warranty made on a subsequent application to another company that applications made by him previously for insurance on his life have always been successful, and so as to invalidate a policy issued on the subsequent application, notwithstanding the refusal of the physician to examine him. Edington v. Ætna L. Ins. Co. 77 N. Y. 564, reversing 13 Hun, 543, subsequent appeal in 100 N. Y. 536, 3 N. E. 315.

And the test, in an action upon such an insurance policy, as to whether or not there had been a breach of such a warranty, is whether or not such previous applications had been granted, and not whether the medical examiner had authority finally to reject the application; if the medical examiner was utterly without authority to dispose of it, and the company for that reason never acted upon it, there was at least an application to the company which was not successful, and did not end in an accepted insurance. Edington v. Ætna L. Ins. Co. 100 N. Y. 536, 3 N. E. 315.

So, a denial by an applicant for insurance in his application, that he had applied for other insurance and been refused, is false, where a company which had insured his life failed, and another company agreed to insure its risks, but refused this applicant on account of his age. Gessel v. Republic L. Ins. Co. 1 Ohio L. J. 189.

And a failure upon the part of an insurance company to issue a policy to an applicant renders false a subsequent warranty on his part, in an application for insurance to another company, that he had never applied to any other company for insurance on his life without receiving a policy of the exact kind and amount applied for, and had never been declined or postponed by any company, although such failure and rejection were not because of any physical defect, but because of a request on his part to have the policy dated back one year for the purpose of enabling him to

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Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of Georgia in favor of plaintiff in an action on a policy of life insurance. Reversed and remanded for a new trial.

The facts are stated in the opinion.

Mr. A. L. Miller argued the cause, and, with Messrs. M. D. Jones, George S. Jones, Walter Defore, Wallace Miller, and Charles H. Hall, Jr., filed a brief for petitioner:

What the company required of the applicant, as a condition precedent to any binding contract, was that he would observe the utmost good faith towards it, and make full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation, or concealment of facts with which the company ought to be made acquainted, and by so doing, and only by so doing, would he be deemed to have made fair and true answers.

Fidelity Mut. Life Asso. v. Jeffords, 53 L.R.A. 193, 46 C. C. A. 377, 107 Fed. 403; Security Mut. L. Ins. Co. v. Webb, 55 L.R.A. 122, 45 C. C. A. 648, 106 Fed. 808; Jeffries v. Economical Mut. L. Ins. Co. 22 Wall. 47, 22 L. ed. 833; Farrell v. Security Mut. L. Ins. Co. 60 C. C. A. 374, 125 Fed. 684; Moulor v. American L. Ins. Co. 111 U. S. 345, 28 L. ed. 450, 4 Sup. Ct. Rep. 466; Ætna L. Ins. Co. v. France, 91 U. S. 510, 23 L. ed. 401.

The contract sued on is a Georgia contract.

Fidelity Mut. Life Asso. v. Jeffords, 53 L.R.A. 193, 46 C. C. A. 377, 107 Fed. 402; Equitable Life Assur. Soc. v. Clements (Equitable Life Assur. Soc. v. Pettus) 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; Northwestern Mut. L. Ins. Co. v. McCue, 223 U. S. 234, 56 L. ed. 419, 38 L.R.A. (N.S.) 57, 32 Sup. Ct. Rep. 220.

In the case of a warranty the answers must be true to justify a recovery. The agreement of the parties that the statements made in the application are true, and if untrue in any respect the policy is void, removes the question of their materiality from the consideration of the court or jury.

Ætna L. Ins. Co. v. France, 91 U. S. 510, 23 L. ed. 401.

Under the contract (policy) in this case,

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procure it at a less premium. Union Nat. Bank v. Manhattan L. Ins. Co. 52 La. Ann. 36, 26 So. 800.

Where an applicant for insurance, however, stated in his application that no physician had ever given an unfavorable opinion upon his life with reference to life insurance, except as therein stated, and it appeared that he had applied to the Royal Arcanum for membership, and his application was reported favorably by the examining physician, but rejected by the chief medical examiner on account of a fact which in itself did not constitute good ground for rejection, and which never affected the health of the applicant, and did not exist at the time of the latter application, and the reason for such action was never communicated to anyone, and the applicant was never informed of it, the misstatement will be deemed to have been innocently made so far as his application for membership in the Royal Arcanum was concerned, or, if regarded as a misrepresentation, will be deemed immaterial to the risk. Fidelity Mut. Life Asso. v. Miller, 34 C. C. A. 211, 63 U. S. App. 717, 92 Fed. 63.

And see Security Mut. L. Ins. Co. v. Webb, 55 L.R.A. 122, 45 C. C. A. 648, 106 Fed. 808, for a holding that a statement by an applicant for insurance that no physician had ever given an unfavorable opinion upon his life with reference to life insurance is not rendered false by an unfavorable opinion previously given by a physician to the medical examiner of a company applied to for insurance, privately communicated without the knowledge of the applicant.

The word "issued" in a warranty in an application for insurance that the applicant had applied for no insurance for which a policy had not issued does not include within its meaning a technical delivery; and where he had previously applied to another insurance company for $10,000 on his life, and the company declined to issue for the full amount, but wrote him for $5,000, and sent the policy to the medical examiner for delivery upon payment of the first premium, and the first premium was not paid, and the policy eventually was returned, there is no breach of warranty. Kansas Mut. L. Ins. Co. v. Coalson, 22 Tex. Civ. App. 64, 54 S. W. 388.

An indorsement upon an application for insurance, "Declined by Ex.," signed with the initials of the authorized medical examiner of the company, is competent evidence of the action of the insurance company in declining the application, in an action brought upon a subsequent policy issued by another company, to prove the falsity of a statement in the application for the subsequent policy, that no previous insurance had been applied for and declined, as such memoranda are made by the examiner, not for himself, but for the company as evidence of the action it has taken, and are not therefore in the nature of declarations of a third party. Elliot v. Mutual Ben. Life Asso. 76 Hun, 378, 27 N. Y. Supp. 696.

On the general subject of forfeiture of life insurance by false representations with respect to previous applications for insurance—see note to Security Mut. L. Ins. Co. v. Webb, 55 L.R.A. 122.

As to the character of insurance or company covered by question in application as to other insurance, or as to previous rejection of application—see note to Wright v. Fraternities Health & Acci. Asso. 32 L.R.A.(N.S.) 461.

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the questions and the answers thereto made by Salgue in the application and to the medical examiner are warranties, and he was bound by the truthfulness of his answers to these questions

Supreme Conclave, K. D. v. Wood, 120 Ga. 328, 47 S. E. 940.

The contract made each and every question and answer material. The law does not forbid parties contracting for life insurance to stipulate that the validity of a policy shall depend upon conditions or contingencies such as are embodied in the Ætna policy sued on.

Moulor v. American L. Ins. Co. 111 U. S. 341, 28 L. ed. 449, 4 Sup. Ct. Rep. 466; Phœnix Mut. L. Ins. Co. v. Raddin, 120 U. S. 189, 30 L. ed. 646, 7 Sup. Ct. Rep. 500.

Where an applicant for life insurance covenants in his application that the statements made to the medical examiner are true, and these statements are made a part of the contract of insurance, and form the basis of such contract, any variation in any of them, which is material, whereby the nature or extent or character of the risk is changed, will avoid the policy, whether the statement was made in good faith or wilfully or fraudulently.

Supreme Conclave, K. D. v. Wood, 120 Ga. 328, 337, 47 S. E. 940.

Parties may by their contract make material a fact which would be otherwise immaterial, or make immaterial a fact that would be otherwise material.

Phœnix Mut. L. Ins. Co. v. Raddin, 120 U. S. 189, 30 L. ed. 646, 7 Sup. Ct. Rep. 500.

Salgue's failure to give the name and address of each and every physician consulted by him during the specified time voided the policy.

Fidelity Mut. Life Asso. v. Jeffords, 53 L.R.A. 193, 46 C. C. A. 377, 107 Fed. 408; Moulor v. American L. Ins. Co. 111 U. S. 345, 28 L. ed. 450, 4 Sup. Ct. Rep. 466.

The court was asked to instruct the jury that if it appeared from the evidence that an application had been previously made by Salgue to the Penn Mutual upon which insurance had not been granted, then his denial would be a material misrepresentation of fact, and whether the answer was in good faith or not, it would render the policy void. Certainly, the question was material, and the company was entitled to an answer which spoke the truth. To answer honestly, Salgue must have answered "Yes." This would have put the company on inquiry as to why the policy had not been granted, and would have disclosed his entire transaction with the Penn Mutual Company. The untruthful answer was a distinct violation of that good faith required of him by law, and was such a variation from the truth as to make the policy void.

Security Mut. L. Ins. Co. v. Webb, 5 L.R.A. 122, 45 C. C. A. 648, 106 Fed. 809, 61 C. C. A. 383, 126 Fed. 635.

Where it is shown that a material statement made in such application was false, that its falsity was known to the insurer at the time it was made, that it was made with a view to procuring the insurance, that the company had no notice of its falsity, and that the company acted upon it to its injury, the law will conclusively presume an intent to deceive, and a case of actual fraud will be made out, although the insured may not have really intended to prejudice the rights of the company.

Northwestern L. Ins. Co. v. Montgomery, 116 Ga. 799, 43 S. E. 79.

The honesty, good faith, and truthfulness of the person whose life is insured forms the actual foundation of the agreement of life insurance. It is for this reason that contracts of life insurance are said to be *uberrimæfidei*, and any material misrepresentation or concealment is fatal to them.

Equitable Life Assur. Soc. v. McElroy, 28 C. C. A. 365, 49 U. S. App. 548, 83 Fed. 636.

Salgue is held in law to know the contents of the application signed by him, and that upon this application the policy would be issued, if issued at all. It was his duty to read the application he signed.

New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 529, 29 L. ed. 934, 937, 6 Sup. Ct. Rep. 837.

Contracts in writing, if unambiguous, must be permitted to speak for themselves, and cannot by the court, at the instance of one of the parties, be altered or contradicted by one of the parties.

Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 361, 46 L. ed. 234, 22 Sup. Ct. Rep. 133.

Representations made in writing in an application for insurance, in response to written questions, and warranted by the applicant to be true, as the basis of the contract, are thus made material by the action of the parties in so treating them; and their materiality is a matter of law arising from the contract, to be declared by the court, and not a question for the jury. Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co. 59 C. C. A. 545, 124 Fed. 26.

Where the policy furnishes the only way by which its terms can be waived, and expressly provides against modifications by customs of trade or manufacture, or by agents, and its provisions are unambiguous, courts cannot admit parol testimony to alter the written words of the contract.

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Penman v. St. Paul F. & M. Co. 216 U. S. 311, 54 L. ed. 493, 30 Sup. Ct. Rep. 312.

Whether the statements and answers contained in the application of the assured were the same statements made by him to the agents of the company securing his application, and to the medical examiner of the company, or not, yet, when he afterwards received the policy with a copy of the application attached and a memorandum indorsed thereon, calling his attention to the copy thus attached, with the request that any errors in the application be reported to the company for correction, it was his duty to report any answers incorrectly written down, and thus enable the company to correct them, and by his failure to do so he must be presumed to have accepted the policy upon the faith of the answers therein contained, and to have acquiesced and agreed that the application should remain as the basis of the contract of insurance.

Swan v. Watertown F. Ins. Co. 96 Pa. 43; American Ins. Co. v. Neiberger, 74 Mo. 173; Goddard v. Monitor Mut. F. Ins. Co. 108 Mass. 57, 11 Am. Rep. 307; New York L. Ins. Co. v. Fletcher, 117 U. S. 534, 29 L. ed. 939, 6 Sup. Ct. Rep. 837.

One who deals with an agent knowing that he is clothed with a circumscribed authority, and that his acts transcend his powers, cannot hold his principal; and this is true whether the agent is general or special; for a principal may limit the authority of one as well as of the other.

Slocum v. New York L. Ins. Co. 228 U. S. 374, 57 L. ed. 884, 33 Sup. Ct. Rep. 523; Penman v. St. Paul F. & M. Ins. Co. 216 U. S. 311, 54 L. ed. 493, 30 Sup. Ct. Rep. 312; Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 362, 46 L. ed. 235, 22 Sup. Ct. Rep. 33; New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837.

Messrs. Jesse Harris and Minter Wimberly argued the cause, and, with Mr. Alexander Akerman, filed a brief for respondent:

The testimony of John T. Moore shows conclusively that Salgue told the agents of the Ætna Life Insurance Company that he had made other applications, and that Dr. Little had stated that he had heart trouble. All of these facts were made known to the agents of the defendant company. Surely it cannot be said that there was any fraudulent concealment as to these questions by the insured. This being true, the policy will not be void.

Ley v. Metropolitan L. Ins. Co. 120 Iowa, 203, 94 N. W. 568; Patten v. United States Life & Acci. Ins. Co. 141 N. Y. 589, 36 N. E. 739; 25 Cyc. 796.

The falsity of an answer warranted to be true according to the honest belief of the assured, will not defeat recovery on the policy unless such falsity was known, or reasonably could have been known, to the assured.

O'Connell v. Supreme Conclave, K. D. 102 Ga. 143, 66 Am. St. Rep. 159, 28 S. E. 282.

While it is stated that answers in the application which are expressly made warranties must be strictly and literally true or the policy will be voided, still the general rule is that substantial truth in representations is all that is required.

Farrell v. Security Mut. L. Ins. Co. 60 C. C. A. 374, 125 Fed. 684.

There was a conflict as to the truth of the representations, and under the Georgia authorities, this was a jury question, and the court very properly refused the request and submitted the issue to the jury.

Supreme Conclave, K. D. v. Wood, 120 Ga. 338, 47 S. E. 940.

The insurance company is estopped from denying the truth of these answers, as the agents who solicited the insurance and the medical examiner for the company, who examined the deceased, acted as the agents of the insurance company, and the insurance company is bound thereby.

Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617; American L. Ins. Co. v. Mahone, 21 Wall. 152, 22 L. ed. 593; New Jersey Mut. L. Ins. Co. v. Baker, 94 U. S. 610, 24 L. ed. 268; Clubb v. American Acci. Co. 97 Ga. 502, 25 S. E. 333; German American Mut. Life Asso. v. Farley, 102 Ga. 735, 29 S. E. 615; Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87; Springfield F. & M. Ins. Co. v. Price, 132 Ga. 687, 64 S. E. 1074; Johnson v. Ætna Ins. Co. 123 Ga. 404, 107 Am. St. Rep. 92, 51 S. E. 339; Mechanics' & T. Ins. Co. v. Mutual Real Estate Bldg. Asso. 98 Ga. 262, 25 S. E. 457; Wood v. American F. Ins. Co. 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80.

Any agreement, declaration, or course of action on the part of the insurance company which leads the party insured to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, will estop the company from insisting upon the forfeiture.

Phœnix Mut. L. Ins. Co. v. Doster, 106 U. S. 30, 27 L. ed. 65, 1 Sup. Ct. Rep. 18; Hartford Life Annuity Ins. Co. v. Unsell, 144 U. S. 439, 36 L. ed. 496, 12 Sup. Ct. Rep. 671; New York L. Ins. Co. v. Eggleston, 96 U. S. 572, 24 L. ed. 841.

If the answer was not complete, or imperfectly answered, the issuance of the policy without further inquiry, especially when the insurance company had been put on notice, as in the case at bar, amounts to a

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waiver of the objection, and makes the omission immaterial.

Phœnix Mut. L. Ins. Co. v. Raddin, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. Rep. 500.

Medical consultation or attendance for merely slight or temporary indisposition need not be disclosed, the insured being entitled to a liberal construction of the language of the application.

McClain v. Provident Sav. Life Assur. Soc. 49 C. C. A. 31, 110 Fed. 80; Hubbard v. Mutual Reserve Fund Life Asso. 40 C. C. A. 665, 100 Fed. 719.

Questions and answers as to whether or not insured had ever had certain specified diseases, or any other serious ailment, are held to be representations though called warranties.

Minnesota Mut. L. Ins. Co. v. Link, 230 Ill. 273, 82 N. E. 637.

Misstatements by way of representations or warranty, which are made through fraud of the company's agent, cannot be relied on by it to defeat the policy, and especially is this so where the insured is misled by the agent into making the false statements.

Standard Life & Acci. Ins. Co. v. Fraser, 22 C. C. A. 499, 44 U. S. App. 694, 76 Fed. 705; 25 Cyc. 803.

Statements in the application in the handwriting of the medical examiner of the insurance company will be taken most strongly against the company.

Globe Mut. L. Ins. Asso. v. Meyer, 118 Ill. App. 155.

The statements made in the application by the insured are not warranties, but are mere representations; and the insured was only required to observe the utmost good faith in answering the questions in the application.

Moulor v. American L. Ins. Co. 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466; Fidelity Mut. Life Asso. v. Jeffords, 53 L.R.A. 193, 46 C. C. A. 377, 107 Fed. 402; Hagan v. Scottish Union & Nat. Ins. Co. 186 U. S. 423, 46 L. ed. 1229, 22 Sup. Ct. Rep. 862; Phœnix Mut. L. Ins. Co. v. Raddin, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. Rep. 500; Home L. Ins. Co. v. Fisher, 188 U. S. 726, 47 L. ed. 667, 23 Sup. Ct. Rep. 380; First Nat. Bank v. Hartford F. Ins. Co. 95 U. S. 673, 24 L. ed. 563; Franklin F. Ins. Co. v. Vaughan, 92 U. S. 516, 23 L. ed. 740; Mutual Ben. L. Ins. Co. v. Higginbotham, 95 U. S. 380, 24 L. ed. 499; Knickerbocker L. Ins. Co. v. Trefz, 104 U. S. 197, 26 L. ed. 708; 25 Cyc. 796–815; Penn. Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co. 38 L.R.A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 413.

From the testimony of a number of witnesses, the character of the deceased was above reproach; and when the insurance company attempted by the defenses interposed to attack the character of the deceased, and the proof of his character being undisputed, this would be a substantial plea for the trial court to permit the jury to settle the disputed facts in the case.

German-American Mut. Life Asso. v. Farley, 102 Ga. 720, 29 S. E. 615.

Mr. Justice McKenna delivered the opinion of the court:

Action on a life insurance policy for $6,000, issued upon the life of John A. Salgue, the intestate of respondent. It was tried to a jury, resulting in a verdict and judgment for respondent. The judgment was affirmed on writ of error to the circuit court of appeals by a *per curiam* opinion. This certiorari was then granted.

The questions in the case are based on certain statements made by Salgue, which, it is contended by petitioner (herein called the insurance company), became a part of the policy and constituted warranties.

The following are the material provisions of the policy and the application:

"This policy of insurance witnesseth: That the Ætna Life Insurance Company, in consideration of the statements, answers, and warranties contained in or indorsed [548] upon the application for this policy, which application is copied herein and made a part of this contract, and in further consideration of the annual premium . . . hereby insures the life of John A. Salgue . . .

"This policy is issued and accepted subject to the conditions, provisions, and benefits printed on the reverse of this page, which are hereby referred to and made a part hereof. . . .

"Conditions, provisions, and benefits which are made a part of this policy:

"Section 1. This policy shall not take effect until the first premium hereon shall have been actually paid during the lifetime and good health of the insured. . . .

"Section 7. All agreements by said company are signed by one of its executive officers. No agent or other person not an executive officer can alter or waive any of the conditions of this policy, or make any agreement binding upon said company."

Copy of the application:

"Being desirous of insuring my life with the Ætna Insurance Company, I do hereby declare and warrant that I am in good health, of sound body and mind, and that the following statements signed by me are full, correct, and true; and that I have no knowledge or information of any disease, infirmity, or circumstance not stated in this application which may render insurance

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on my life more hazardous than if such disease, infirmity, or circumstance had never existed; and I do hereby agree that the declarations and warranties herein made, and the answers to the following questions, together with those signed by me on the second page of this application, shall be the basis and form part of the contract (or policy) between me and the said company, and that if the same be in any respect untrue, said policy shall be void; and I further agree that the insurance hereby applied for shall not be binding upon said company until a policy has been issued, nor until [549] the amount of premium as stated therein has been received by said company, or its authorized agent, during my lifetime and good health, and a receipt given therefor, signed by an executive officer of said company; and I further agree that no statement or declaration made to any agent, examiner, or other person, and not contained in this application, shall be taken or considered as having been made to or brought to the notice or knowledge of said company, or as charging it with any liability by reason thereof; and I understand that all policies and agreements made by the said Ætna Life Insurance Company are signed by one or more of its executive officers, and that no other person can grant insurance or make any agreement binding upon said company."

The application also contained questions addressed to the insured by the examining physician, and the answers by him, among others, as follows:

"14. What are the names and residences of all the physicians whom you have personally employed or consulted during the last five years?"

Answer: "Dr. James T. Ross, Macon, Georgia."

"16. Has any proposal or application to insure your life been made to any company, association, or agent on which a policy of insurance is now pending? Or has any such proposal or application ever been made for which insurance has not been granted, or on which a policy or certificate of insurance was not issued in full amount, and of the same kind as applied for? If so, state particulars and the names of all such companies, associations, or agents."

Answer: "None."

"19. Has any physician expressed an unfavorable opinion upon your life with reference to life insurance?"

Answer: "No."

"21. Have you ever had any of the following diseases? Answer 'yes' or 'no' opposite each. If 'yes,' state the [550] date, duration, and severity of illness. . . . Disease of the heart?"

Answer: "No."

"23. Are you subject to dyspepsia, dysentery, or diarrhœa?"

Answer: "No."

"24. Have you had during the last seven years any disease or severe sickness? If so, state the particulars of each case and the names of the attending physicians."

Answer: "No."

There was discussion between Salgue and the examining physician in regard to the condition of Salgue's heart. His first statement was that he did not have heart disease, though he had been told he had. The physician explained to him the symptoms of the disease, and he replied that he did not have any of them and never had been treated for heart trouble. He had, he further said, consulted two doctors, Little and Winchester, and one of them told him he had heart disease "and scared him so." The other told him that he did not have any signs of it. And the recollection of the physician was that Salgue referred to Dr. Ross as having treated him for something several years previously. At the end of the discussion the physician put down the answer "No." He also reported that Salgue's respiration was "full, easy, and free. O. K., and that "auscultation" did not "indicate enlargement or disease of the heart of any kind."

There was testimony to the effect that about June 15, 1905, and prior to the application to the Ætna, Salgue applied to the local agent of the Penn Mutual Insurance Company at Macon for a policy of $6,000. The company's medical examiner refused to pass him, telling him that he had heart disease, and advising him to see his family physician, Dr. McAfee. Salgue consulted Dr. McAfee, and was informed by him that he had heart disease.

The contentions of the insurance company are based (1) upon a request for the direction of a verdict in its [551] favor; (2) the denial of requests for special instructions. We may confine our consideration to the special requests.

There was controversy as to whether Salgue had heart disease. We have seen the various opinions of the examining physicians. Salgue was a strong man physically and his strength was illustrated by instances. At one of his examinations he easily picked up and removed a large box of melons without any effect on his heart action. An effort of strength on another occasion was immediately detrimental, causing an aneurism which progressively developed and produced a rupture of the blood vessel and his death. By the advice

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of his physician he had quit work and had gone to a resort called Indian Springs. He remained there about ten days, and on his way home died suddenly on the cars.

It is not necessary to give at length the charges requested. They embrace the propositions (1) that the application and its statements, warranties, and covenants became part of the contract of insurance, and that any variation from them whereby the nature, extent, or character of the risk was changed, would affect the policy, whether the statements were made by the applicant in good faith, not knowing they were untrue, or made wilfully or fraudulently. And so also as to the answers to the questions put to Salgue as to his health, freedom from heart disease, the physicians he had consulted, the applications for insurance which he had made which were rejected or not accepted. (2) Under the terms of the policy the application constituted part of it, the answers to the questions were covenanted and warranted, and Salgue was bound thereby without regard to his good faith in making them; or that they were representations material to the risk by which he was bound without regard to his good faith, and that therefore the answers, if untrue, would make the policy void. (3) The provisions of the policy that no statement or declaration made to an agent, examiner, [552] or any other person, and not contained in the application, shall be taken or construed as having been made to or brought to the knowledge of the company, or as charging it with any liability by reason thereof, was binding on Salgue. So also the limitations on the powers of the agents and of what may have been said to them or by them. And further, that if the answers in the application were incorrect, it was Salgue's duty to report them as incorrect to the company, and, failing to do so, he was presumed to have accepted his policy upon the faith of them. It was therefore immaterial what may have been said by or to the agent or to the medical examiner which was not reduced to writing and presented to the officers of the company at the home office.

The charge of the court was very long,—too long even to attempt to condense. It was antithetical to the special requests made by the insurance company. Applying certain general principles which it expressed, the court said:

"To make them distinctly applicable to your duty, you are instructed that you must determine from all the facts, first, did Salgue make a misrepresentation or concealment of a fact of which he had knowledge? If he did not, the defense on this point must fail. Second, if he did, was such misrepresentation or concealment so material that it would have influenced one or both of the defendants not to issue the policy of insurance upon the respective applications? And third, in connection with this your inquiry will be, if such material misrepresentation or concealment as would have caused the defendants or either of them to withhold insurance was made, was it by Salgue wilfully or fraudulently done? In the absence of wilful or fraudulent misrepresentation or concealment of a material fact, the policy stands good and the insurance company must pay what it promised to pay by its policy, when it accepted the premium of the applicant."

We may note here that Salgue declared in his application [553] that he was "in good health;" that the statements made by him were "full, correct, and true;" and that he had no knowledge of "any disease, infirmity, or circumstance" which might "render insurance on his life more hazardous than if such disease, infirmity, or circumstance had never existed." He also agreed that "the declarations and warranties" therein made, and the answers to the questions, "should be the basis and form part of the contract (or policy)" between him and the company, "and that if the same be in any respect untrue" the policy should be "void."

The policy is conceded to be a Georgia contract. The character of its covenants, therefore, depends upon the law of that state, declared in § 2479 of its Code, as follows:

"Application, good faith.—Every application for insurance must be made in the utmost good faith, and the representations contained in such application are considered as covenanted to be true by the applicant. Any variation by which the nature or extent or character of the risk is changed will void the policy."†

But who is to decide—the court or jury—whether a variation be of the quality described? We have seen [554] how explicit the policy is, and this court in Jeffries v. Economical Mut. L. Ins. Co. 22 Wall. 47, 22 L. ed. 833, and Aetna L. Ins. Co. v. France,

†Sec. 2480. Effect of misrepresentation.—Any verbal or written representations of facts by the assured to induce the acceptance of the risk, if material, must be true, or the policy is void. If, however, the party has no knowledge, but states on the representation of others, bona fide, and so informs the insurer, the falsity of the information does not void the policy.

Sec. 2481. Concealment.—A failure to state a material fact, if not done fraudulently, does not void; but the wilful con-

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91 U. S. 510, 23 L. ed. 401, held that the parties to the contract may make the inquiries and answers material, and that therefore their materiality is not open to be tried by a jury.

These cases recognize the right of the insurer and the insured to make their own contract and determine for themselves what representations shall be material.

How far has this simple rule and the right of the parties been changed by the Georgia Code? In German-American Mut. Life Asso. v. Farley, 102 Ga. 720, 733, 29 S. E. 615, it was decided to be the established law of that state that mere immaterial matters, though incorporated in an application for insurance and declared to be warranties, do not avoid the policy, and that this was so imperatively the law of the state under the provisions of the Code that the parties could not contract to make immaterial matter material. The court, however, said: "Of course, what is in any degree material should be allowed its due effect; but the absolutely immaterial should count for nothing."

In Supreme Conclave, K. D. v. Wood, 120 Ga. 328, 47 S. E. 940, the Code again came up for construction and the statements of the insured were declared to be representations, not warranties, and that it was the purpose of the Code to get away from what the court denominated the "finer distinctions and strained constructions" of the cases. It was therefore held that under the Code of the state "a policy cannot now be avoided upon the ground of the falsity of the representation, though warranted, unless the representation be material and the variations from truth be such as to change the nature, extent, or character of the risk." But the court further held that if the representations have such variation, although the applicant may have made them in good faith, not knowing that they were untrue, if they were made the basis of the contract, [555] such contract is void. "It is therefore immaterial," the court declared, "whether the warrantor acted in good faith in making them."

The facts of the case were very much like those of the case at bar. The applicant represented himself, in answer to a question, as not having heart disease. Of this representation the court said that it "was certainly a material one, and doubtless the company acted upon it." And further: "It is scarcely conceivable that the company would have issued the policy if the applicant had answered that he was or had been afflicted with heart disease, or even if he had answered doubtfully. We think that if the answer made was untrue, the plaintiff below cannot recover."

The judgment in the case was reversed upon the ground, among others not necessary to be considered, of error in the instruction of the court, "that if Wood had heart disease and did not know it, the failure on his part to disclose it could not avoid the policy." There was dispute as to the fact, but the court did not pass upon it, remitting it as a question for the jury to decide at the next trial.

In Southern L. Ins. Co. v. Wilkinson, 53 Ga. 535, 549, 550, after commenting on the difference the cases made between warranties and representations, the peremptory character of the former, their truth being the only question, the effect of the latter being determined by their materiality to the risk, the court said the Code of the state determined the character of the statements. The court quoted § 2479 which we have given, and § 2480, which provides that "any verbal or written representation of facts by the assured to induce the acceptance of the risk, if material, must be true or the policy is void," and said that "the proper construction is that if there be any variation in them from what is true, whereby the nature or extent or character of the risk is changed, the policy, if it makes them the basis of the contract of assurance, [556] will be void, and that this will be so whether they are or are not wilfully or fraudulently made."

It is, however, contended by respondent that the questions asked in the application were truthfully answered, or, at any rate, whether they were truthfully answered was a question for the jury. And it is insisted that the answers of Salgue in regard to other insurance and the action thereon by other companies were correct.

But granting that the truthfulness of the answers was a question for the jury, the testimony was conflicting; and, as the verdict was general, it is not possible to say what view the jury took of the conflict, or that it was necessary to resolve it in view of the charge of the court, or how they would have resolved it if instructions requested by the insurance company had been given.

We think there was error also in refusing

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concealment of a fact which would enhance the risk will void the policy.

Sec. 2483. Wilful misrepresentation voids policy.—Wilful misrepresentation by the assured or his agent, as to the interest of the assured, or as to other insurance, or as to any other material inquiry made, will void the policy.

Sec. 2499. Law of fire insurance applicable.—The principles before stated as to fire insurance, wherever applicable, are equally the law of life insurance.

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other requests for instructions. We have seen questions were addressed to Salgue as to the names and residence of the physicians he had employed or consulted, and whether any physician had expressed an unfavorable opinion upon his life with reference to life insurance, and also whether any proposal or application to insure his life was pending in another company, or, if made, had not been granted. To the first question he gave the name of only one physician. There was testimony that he had consulted others. To the second question he answered, "No." There was testimony that the answer was untruthful. To the third question he answered, "None." The truthfulness of the answer is asserted notwithstanding it appeared from the testimony that he had made application to the Penn Mutual Company, which application had not been granted. The evidence was that the medical examiner had refused to pass him because he was of opinion that he, Salgue, had heart disease, and so reported to the agent of the company. The agent told Salgue if he, Salgue, would pay the doctor's fee to the company, he, the agent, would withdraw the [557] application before it reached the company, and that Salgue "could answer in the future that he had never been rejected by any company;" and the agent testified "that it is customary entirely with agents to stop examinations that way."

It is contended by respondent that this testimony shows that Salgue's application to the Penn Mutual was not rejected but was withdrawn; and, besides, whether it was rejected or withdrawn was a question for the jury. We are unable to concur with either contention. The question was a very broad one. It was whether any proposal or application had been made for which insurance had not been granted, and particulars were asked for, "and the names of all such companies, associations, or *agents*." Regarding the sense of the question—indeed, if not its letter—the answer was untruthful. The question certainly called for something more than an absolute negative. Its purpose was to ascertain the conduct of Salgue with reference to life insurance in order to judge of him as a risk. If it had been answered according to the facts, the company would have received information of circumstances certainly material for it to consider.

This conclusion is supported, as we have seen, by the cited Georgia cases, and is not opposed by Moulor v. American L. Ins. Co. 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466, or Phœnix Mut. L. Ins. Co. v. Raddin, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. Rep. 500. In the Moulor Case it was held that the statements made by an applicant would be considered as representations rather than warranties, the policy leaving it in doubt which they were contracted to be, and that they could not be considered either by the company or the applicant as covering diseases which the latter was not conscious of having. It was said that what the company desired of the applicant was the utmost good faith toward it, making "full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation, [558] or concealment of facts with which the company ought to be made acquainted; and that by so doing, and only by so doing, would he be deemed to have made 'fair and true answers.'"

In Phœnix Mut. L. Ins. Co. v. Raddin, there is a clear definition of principles. Answers to questions propounded to an applicant, it was held, will be considered representations unless clearly intended by both parties to be warranties, as to which substantial truth in everything material to the risk is all that is required of the applicant. And it was decided: "Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts; at least, when statements regarding them are required by the insurers as part of the basis of the contract. . . . Where an answer of the applicant to a direct question of the insurers purports to be a complete answer to the question, any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application."

The medical examiner, as we have seen, put down the answer "No" to the question asked Salgue as to whether he had heart disease, after being informed by Salgue, that he, Salgue, had been told by physicians that his heart was affected. It appears from the evidence that the other answers of Salgue in his application were written down by the agent of the company; and there is testimony for and against the fact that Salgue informed the agent of the opinion entertained of him by his physicians, and that he also informed the agent of other applications for insurance. It is hence contended that the agent, not Salgue is responsible for the positive character of the answers, and that the insurance company is estopped by this action of the agent and by his knowledge of the actual conditions and circumstances. It is therefore further contended that the case comes within the principle of the cases which [559] establish that where the agent of the company prepares the application or makes representations to the insured as to the char-

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acter and effect of the statements of the application, he will be regarded in so doing as the agent of the company, and not the agent of the insured. Among the cases cited to sustain the principle are the following in this court: Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617; American L. Ins. Co. v. Mahone, 21 Wall. 152, 22 L. ed. 593; New Jersey Mut. L. Ins. Co. v. Baker, 94 U. S. 610, 24 L. ed. 268; Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87; German-American Mut. Life Asso. v. Farley, supra, is also cited, and, being a Georgia case, its authority is especially urged.

There are, however, later cases which enforce the provisions of a policy, and we have seen that it was agreed in the policy under review "that no statement or declaration made to any agent, examiner, or other person, and not contained in" the application, should "be taken or construed as having been made to or brought to the notice or knowledge of" the company, "or as charging it with any liability by reason thereof." And he, Salgue, expressed his understanding to be that the company or one or more of its executive officers, and no other person, could grant insurance or make any agreement binding upon the company.

The competency of applicants for insurance to make such agreements, and that they are binding when made, is decided by Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; Northern Assur. Co. v. Grand View Bldg. Asso. 203 U. S. 106, 51 L. ed. 109, 27 Sup. Ct. Rep. 27; Penman v. St. Paul F. & M. Ins. Co. 216 U. S. 311, 54 L. ed. 493, 30 Sup. Ct. Rep. 312.

To the contention that German-American Mut. Life Asso. v. Farley is determinative, we answer that the principle which it is cited to support is one of general jurisprudence, and therefore the case is not controlling. Kuhn v. Fairmont Coal Co. 215 U. S. 349, 54 L. ed. 228, 30 Sup. Ct. Rep. 140.

[560] This case was consolidated by the court, against the objection of the insurance company, with the trial of the case of the same plaintiff against the Prudential Insurance Company. This action of the court was based on § 921 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 685), which provides that "causes of a like nature, or relative to the same questions," may be consolidated "when it appears reasonable to do so." The action of the court is assigned as error. We doubt if it was reasonable to consolidate the cases. We need not, however, pass definitely on that point, as we direct a new trial on other grounds.

Judgment reversed and cause remanded to the District Court for a new trial.

Mr. Justice Pitney dissents.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Petitioner,
v.
JOHN T. MOORE, Administrator of John Andrew Salgue, Deceased.

(See S. C. Reporter's ed. 560-568.)

Insurance — untrue statements in application — good faith of insured.

1. Variations from the truth in the statements made by the insured in his application for life insurance, which are by the policy expressly made the basis of the insurance contract, will, under the construction given to Ga. Code, §§ 2479, 2480, by the courts of that state, avoid the policy if such untruths are such as change the nature, extent, or character of the risk, whether they are made in good faith, without knowledge of their untruth, or are made fraudulently or wilfully.

[For other cases, see Insurance, V. a, 3; V. d, in Digest Sup. Ct. 1908.]

Insurance — untrue answers of insured — other applications for insurance.

2. Untrue answers material to the risk which, under Ga. Code, §§ 2479, 2480, as construed by the courts of that state, avoid the policy, were given by the insured in his application made a part of the insurance contract, where he answered "no" to the question whether "any company or association ever declined to grant insurance" on his life, failed to answer the further question "If 'yes,' give name of company or

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NOTE.—As to what constitutes failure or refusal to issue life insurance which will falsify representations as to previous applications—see note to Ætna L. Ins. Co. v. Moore, ante, 356.

On the general subject of forfeiture of life insurance by false representations with respect to previous applications for insurance—see note to Security Mut. L. Ins. Co. v. Webb, 55 L.R.A. 122.

On the effect of knowledge by insurance agent of falsity of statements in application—see note to Clemans v. Supreme Assembly, R. S. G. F. 16 L.R.A. 33.

As to the character of insurance or company covered by question in application as to other insurance or as to previous rejection of application—see note to Wright v. Fraternities Health & Acci. Asso. 32 L.R.A.(N.S.) 461.

On the effect of nonwaiver agreement upon conditions existing at inception of insurance policy—see note to Gish v. Insurance Co. of N. A. 13 L.R.A.(N.S.) 826.

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companies and when," and mentioned but one other company in answer to the question whether application for insurance was then pending in any other company, while in fact he then had applications in two other companies pending, and where, having made an application for insurance to the local agent of another company whose medical examiner refused to pass him, he had withdrawn such application upon the advice of the agent, before it reached the insurance company.

[For other cases, see Insurance, V. d, in Digest Sup. Ct. 1908.]

Insurance — estoppel of insurer — knowledge of agent.

3. No knowledge of the local agent who prepared the application for a policy of life insurance can estop the insurance company from insisting that the policy is void because of material untrue statements in such application, which is made a part of the insurance contract, where the policy provides that "no agent has power in behalf of the company to make or modify this or any contract of insurance, extending the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise, or making or receiving any presentation or information."

[For other cases, see Insurance, VII. a, in Digest Sup. Ct. 1908.]

[No. 47.]

Argued November 6, 1913. Decided December 22, 1913.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of Georgia in favor of plaintiff in an action on a policy of life insurance. Reversed and remanded for a new trial.

The facts are stated in the opinion.

Mr. Eugene R. Black argued the cause, and, with Messrs. Sanders McDaniel and Edward D. Duffield, filed a brief for petitioner:

A rejection by another company is a material matter.

American Union L. Ins. Co. v. Judge, 191 Pa. 484, 43 Atl. 374; Finn v. Metropolitan L. Ins. Co. 70 N. J. L. 255, 57 Atl. 438; Security Mut. L. Ins. Co. v. Webb, 55 L.R.A. 122, 45 C. C. A. 648, 106 Fed. 808; 3 Cooley, Briefs on Ins. p. 2071.

Where an applicant for life insurance has been rejected by the medical examiner of a company upon the ground of unsound health, he cannot thereafter deny such rejection in applications made by him to other companies, upon the ground that the first company has never acted upon his application, its failure to act being due solely to the applicant having, for the purpose of concealment, prevented its transmission to the home office.

Edington v. Ætna L. Ins. Co. 77 N. Y. 564, 100 N. Y. 536, 3 N. E. 315; Phœnix Mut. L. Ins. Co. v. Raddin, 120 U. S. 189, 30 L. ed. 646, 7 Sup. Ct. Rep. 500; Ferris v. Home Life Assur. Co. 118 Mich. 485, 76 N. W. 1041; Mutual L. Ins. Co. v. Nichols, — Tex. Civ. App. —, 24 S. W. 910; Security Mut. L. Ins. Co. v. Webb, 55 L.R.A. 122, 45 C. C. A. 648, 106 Fed. 808, affirmed in 61 C. C. A. 383, 126 Fed. 635.

An answer to a question, where warranted, as in this case, must not only be true, but must be complete; and any substantial omission in the answer voids a policy issued on the faith of the application.

Phœnix Mut. L. Ins. Co. v. Raddin, 120 U. S. 189, 30 L. ed. 646, 7 Sup. Ct. Rep. 500.

This question as to the pendency of other applications in other companies had reference to a material matter.

Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co. 38 L.R.A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 417; Home L. Ins. Co. v. Myers, 50 C. C. A. 544, 112 Fed. 846; Supreme Lodge, K. P. v. Few, 138 Ga. 785, 76 S. E. 91.

The questions "When were you last attended by a physician?" and "For what complaint?" were as to a material matter.

3 Cooley, Briefs on Ins. p. 2166; Aloe v. Mutual Reserve Fund Life Asso. 147 Mo. 561, 49 S. W. 557.

Such a question calls for important information which the insured is bound to give truthfully.

McCollum v. New York Mut. L. Ins. Co. 124 N. Y. 642, 27 N. E. 412; Cobb v. Covenant Mut. Ben. Asso. 153 Mass. 176, 10 L.R.A. 666, 26 N. E. 230; United Brethren Mut. Aid Soc. v. O'Hara, 120 Pa. 256, 13 Atl. 932; Metropolitan L. Ins. Co. v. McTague, 49 N. J. L. 587, 60 Am. Rep. 661, 9 Atl. 766; Cummings v. Kennebec Mut. L. Ins. Co. 89 Me. 37, 35 Atl. 1032; Mengel v. Northwestern Mut. L. Ins. Co. 176 Pa. 280, 35 Atl. 197.

Heart disease is a serious illness, and the question and answer in reference to it are material.

Supreme Conclave, K. D. v. Wood, 120 Ga. 336, 47 S. E. 940.

Where, as in this case, the facts are uncontradicted, the materiality of the representation is a question for the determination of the court, and not of the jury.

Fidelity Mut. Life Asso. v. Miller, 34 C. C. A. 211, 63 U. S. App. 717, 92 Fed. 63; Home L. Ins. Co. v. Myers, 50 C. C. A. 544, 112 Fed. 846.

If, as in this case, the misstatements re-

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lite to facts within the knowledge of the assured, and these misstatements relate to facts material to the risk, the motive of the applicant in making the misstatements is immaterial, and the policy is voidable.

Finn v. Metropolitan L. Ins. Co. 70 N. J. L. 255, 57 Atl. 438; Fletcher v. Bankers' L. Ins. Co. 135 App. Div. 295, 119 N. Y. Supp. 801; Northwestern L. Ins. Co. v. Montgomery, 116 Ga. 805, 43 S. E. 79; Supreme Conclave, K. D. v. Wood, 120 Ga. 334, 47 S. E. 940.

While this is the general law, it is especially important in this cause in considering the effect of these false answers that it be borne in mind that this insurance policy was a Georgia contract. The application was taken in Georgia, the premium paid, and the policy delivered in that state. This makes it a Georgia contract.

Fidelity Mut. Life Asso. v. Jeffords, 53 L.R.A. 193, 46 C. C. A. 377, 107 Fed. 408; Equitable Life Assur. Soc. v. Clements (Equitable Life Assur. Soc. v. Pettus) 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822.

A false answer made by an applicant for insurance to a question contained in the application involving a material matter, which false answer was warranted to be true, would void the policy, whether such false answer was or was not made with fraudulent intent.

Southern L. Ins. Co. v. Wilkinson, 53 Ga. 550; Northwestern L. Ins. Co. v. Montgomery, 116 Ga. 805, 43 S. E. 79; Supreme Conclave, K. D. v. Wood, 120 Ga. 335, 47 S. E. 940; Ætna L. Ins. Co. v. Conway, 11 Ga. App. 557, 75 S. E. 915.

In the case at bar the language of insured's warranty imports a warranty, but under the law of Georgia, whether the language imports a warranty or not, representations are covenanted to be true and are warranties.

Supreme Conclave, K. D. v. Wood, 120 Ga. 335, 47 S. E. 940.

In determining whether a false statement in respect to other insurance was made innocently or not, it is competent to show that in answers to similar questions in applications for other policies, the assured made answers equally untrue.

Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co. 38 L.R.A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 413.

There is fraud in law if a man makes a representation which he knows to be false, with the view to induce another to act on the faith thereof, who does so accordingly, and by so doing sustains damages, although he may have had no dishonest purpose in making the representation. If a man knowingly and wilfully makes a false representation whereby another is misled to his prejudice, it is immaterial that there may have been no intention on his part to benefit himself, or to injure the person to whom the representation was made.

Northwestern L. Ins. Co. v. Montgomery, 116 Ga. 808, 43 S. E. 79.

An applicant for a policy of insurance has no right to fence with the truth in answering such an inquiry. He should meet it in good faith and according to its letter and spirit. Nor will good faith excuse him if the answer is untrue.

Webb v. Security Mut. L. Ins. Co. 61 C. C. A. 383, 126 Fed. 635.

All of the facts on which the admitted misstatements of the insured in this case were made were clearly material to the risk. They related to the rejection by the Penn Mutual Company, to recent treatment by a physician for a serious illness, to the pendency of an application to the Sun Life Insurance Company, and to the condition of the applicant's health; they were all facts peculiarly within the knowledge of the insured, and of which the insuring company had no knowledge, relying entirely upon the truth of the statements made by the insured. They were all of such recent occurrence as must have impressed themselves upon the insured's mind. In this situation the false answers as to these matters peculiarly within the insured's knowledge necessarily voided the policy.

Henn v. Metropolitan L. Ins. Co. 67 N. J. L. 310, 51 Atl. 689; Dimick v. Metropolitan L. Ins. Co. 69 N. J. L. 384, 62 L.R.A. 774, 55 Atl. 291; Silcox v. Grand Fraternity, 79 N. J. L. 502, 76 Atl. 1018.

Where the application contains an agreement to the effect that the policy shall not take effect until delivery has been made while the insured is in good health, delivery of the policy while the insured is in good health constitutes a condition precedent to the liability of the company on the policy.

Reese v. Fidelity Mut. Life Asso. 111 Ga. 482, 36 S. E. 637; Few v. Supreme Lodge, K. P. 136 Ga. 181, 71 S. E. 130; Clark v. Mutual L. Ins. Co. 129 Ga. 571, 59 S. E. 283.

No obligation is assumed by the company until the first premium has been paid; and none even then unless upon this date the insured is in good health.

Gallant v. Metropolitan L. Ins. Co. 167 Mass. 79, 44 N. E. 1073; Barker v. Metropolitan L. Ins. Co. 188 Mass. 542, 74 N. E. 945; Packard v. Metropolitan L. Ins. Co. 72 N. H. 1, 54 Atl. 287; McClave v. Mutual Reserve Fund Life Asso. 55 N. J. L. 188, 26 Atl. 78; Anders v. Life Ins. Clearing Co. 62 Neb. 585, 87 N. W. 331; Ormond v. Fidelity Life Asso. 96 N. C. 158, 1 S. E. 796; Oliver v. Mutual L. Ins. Co. 97 Va.

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134, 33 S. E. 536; Volker v. Metropolitan L. Ins. Co. 1 Misc. 374, 21 N. Y. Supp. 456; 25 Cyc. 719.

Mr. Minter Wimberly argued the cause, and, with Messrs. Alexander Akerman and Jesse Harris, filed a brief for respondent.

For contentions of counsel, see their brief as reported in Ætna L. Ins. Co. v. Moore, ante, 356.

Mr. Justice McKenna delivered the opinion of the court:

Action upon a policy of insurance for $5,000, issued by petitioner, herein called the insurance company, upon the life of John Andrew Salgue. It was consolidated and tried with the case against the Ætna Company, and resulted in a verdict for the amount of the policy, upon which judgment was entered. It was affirmed by the circuit court of appeals and the case was then brought here. Though consolidated in the district court with the other case, it is here upon a separate record and submitted upon a separate argument. It, however, involves some of the same fundamental questions.

Salgue, in his application for insurance, declared and warranted that he was in good health and that all the statements and answers to the questions put to him were complete and true, and that the declaration should constitute a part of the contract of insurance applied for. He further agreed that the policy should not take effect [562] until the same should be issued and delivered by the company while his health was in the same condition as described in the application.

Certain provisions were made part of the policy, among others, that "no agent has power in behalf of the company to make or modify this or any contract of insurance, extending the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise, or making or receiving any presentation or information."

On the medical examination he declared as follows: "I hereby warrant that the answers to these questions are true and correct, and that they shall form a part of the contract of insurance applied for." The questions in the application and the answers thereto were as follows:

"Has any company or association ever declined to grant insurance on your life, or issue a policy of a different kind, or for a sum less than that applied for?"

Answer: "No."

"If 'yes,' give name of company or companies and when."

(No answer was given to this question.)

"Is application for insurance on your life pending at this time in any other company; if so, give the name of the company."

Answer: "Yes; Provident Savings Life."

"When were you last attended by a physician?"

Answer: "Early spring of 1905."

"For what complaint?"

Answer: "Bilious fever, two days."

"Have you ever had any serious illness?"

Answer: "No."

"Are you in good health?"

Answer: "Yes."

There was testimony in the case tending to show that these answers were untrue; that he had chronic acid [563] gastritis and heart disease, and that other applications for insurance were pending, and others not granted. And it is urged that, the answers to the questions above stated being in the negative, he omitted to answer other questions which were material to be answered in order to make his statement complete and truthful; that therefore his omission to answer amounted to a fraudulent concealment.

Error is assigned on the ruling of the court refusing to direct a verdict for the insurance company and refusing certain special instructions.

The policy is conceded to be a Georgia contract, and it is contended that the warranties contained in the application were all material to the risk, and that they were all broken (1) because the evidence showed that the answers to the questions were false, thereby avoiding the policy; (2) the policy was not delivered to Salgue while he was in good health, that being a condition precedent to its taking effect; and (3) the policy was void by reason of incomplete and untruthful answers. This, it is urged, is the effect of the Georgia law, which, while it modifies the imperative character of statements by an applicant for insurance as warranties, yet provides that any variation from the facts stated "by which the nature or extent or character of the risk is changed will void the policy" Code of Georgia, § 2479.

The insurance company, therefore, to sustain its contention that a verdict should have been directed for it, must establish that the representations were material to the risk, and that they were untrue. Whether they were untrue is a question of fact; and as the proposition of law which the insurance company relies upon is exhibited by the special request, we shall pass to the consideration of the latter. It presents the question of the materiality of Salgue's statements to the risk as one of law. The court submitted it to the jury as a ques-

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tion of fact, and [564] made as elements of decision Salgue's motive, his good or bad faith, his mistake or fraud in making the representations. This, we think, is the sense conveyed by the charge of the court, as we said in Ætna L. Ins. Co. v. Moore, just decided [231 U. S. 543, ante, 356, 34 Sup. Ct. Rep. 186], notwithstanding there are here and there qualifying words and a distinction made between misrepresentation of facts and the concealment of them. A few excerpts from the charge will illustrate this. After defining a warranty the court said: "On the other hand, representations are statements made to give information to the insurer, and otherwise induce it to enter into the insurance contract, and unless *distinctly material, and made with fraudulent purpose* (italics ours) do not avoid the policy. . . . Substantial integrity of conduct on the part of both insurer and insured is the prime object the law seeks to obtain. . . . The law of Georgia, while requiring that every application for insurance must be made in the utmost good faith, and that representations are considered as covenanted to be true, otherwise the policy will be voided, also provides that a failure to state a material fact, if not done fraudulently, does not void the policy. On the other hand, the wilful and fraudulent concealment of such a fact which would enhance the risk of the company will have the effect to void it. What is here stated to be true of wilful concealment is also true of wilful misrepresentation by the applicant to his agent as to any material inquiry made. It follows that under the law of Georgia, a misrepresentation in statement or a concealment of fact must first be material, or must be wilfully or fraudulently made in order to annul the insurance."

After further explanation, the court said: "These are the general principles. To make them distinctly applicable to your duty, you are instructed that you must determine from all the facts, first, did Salgue make a misrepresentation or concealment of a fact of [565] which he had knowledge? If he did not, the defense on this point must fail. Second, if he did, was such misrepresentation or concealment so material that it would have influenced one or both of the defendants not to issue the policy of insurance upon the respective applications? And, third, in connection with this your inquiry will be, if such material misrepresentation or concealment as would have caused the defendants or either of them to withhold insurance was made, was it by Salgue wilfully or fraudulently done? In the absence of wilful or fraudulent misrepresentation or concealment of a material fact, the policy stands good and the insurance company must pay what it promised to pay by its policy, when it accepted the premium of the applicant."

This being the charge of the court, wherein did it militate against the special request, which is as follows:

"The defendant, The Prudential Insurance Company of America, requests the court to charge as follows:

"Question 4-B of the application of said John A. Salgue to the said the Prudential Insurance Company of America is as follows: 'Has any company or association ever declined to grant insurance on your life, or issued a policy of a different kind, or for a sum less than that applied for? (Answer "Yes" or "No.")' The answer to this question is 'No.'

"The defendant insists that this answer is false, and says that the said Salgue, in the month of June, 1905, prior to the time of making this application, applied to the Penn Mutual Life Insurance Company for a policy, and was declined. If you believe from the evidence that the said Salgue made application to Anderson Clark, the agent for the Penn Mutual Life Insurance Company, for insurance, and that this application was signed by the said Salgue, and that this application was handed by the said Anderson Clark, as agent for the Penn Mutual Insurance Company, to Dr. Little, examiner for the said [566] Penn Mutual Company, for examination, and that Dr. Little, as said examiner, examined the said Salgue, and stated to the said Salgue that he had heart trouble, and that for this reason he could not pass him, then I charge you that this would amount to a declination by the Penn Mutual Life Insurance Company of the application for insurance made to it by the said Salgue, and if you believe from the evidence that such application was made and that such declination was made, then I charge you that the answer of Salgue to this question was false, and that it was warranted to be true, and that it was as to a material matter which would tend to change the nature, extent, and character of the risk assumed, and that in this event plaintiff could not recover."

It is contended that the instruction was "legal and pertinent" to the issue, and was not incorporated in the charge of the court. The court, we have seen, did not incorporate the instruction in its charge, and that the instruction was legal and pertinent to the issue between the parties is shown by the opinion in the Ætna Case.

The instruction based on the facts stated was peremptory of the right of the insurance company to recover. But respondent

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contends that the requirement was either void, or that the agent of the company wrote down and reported the answer, knowing the facts, and therefore the company is estopped to dispute the correctness of the answer or its completeness. There was testimony in the case upon which the contention could be based. But the case was not submitted to the jury in that view. This phase of the case, as its other phases, was made to turn upon the good faith of Salgue, not upon the materiality of the fact or the action of the agent of the insurance company. The court stated to the jury that the contention of the insurance company was that the transaction with the Penn Mutual showed a rejection of Salgue's application [567] by that company, "to be determined by the court as a matter of law." With the contention the court said it was unable to agree, "and leaves the question to the jury, it being a mixed question of law and fact."

The testimony in regard to the application to the Penn Mutual is the same as in the Ætna Case. We need not repeat it. It may be that it cannot be literally said that any company or association had rejected an application by Salgue. If that had been the question, and regarding sense, rather than form, it could be contended that the answer was untruthful. But the question asked Salgue was broader. He was asked "if any company or association ever declined to grant insurance" on his life, and the further question was put: "If so, give the name of the company or companies," to which he gave no answer. He was also asked, "Is application for life insurance on your life pending at this time in any other company; if so, give the name of the company?" To the latter question he answered, "Yes; Provident Savings Life." At that time he had an application pending with the Sun Life Insurance Company of Canada. The answers were, therefore, not true, and we think that they were material to the risk within the meaning of the Georgia Code. Ætna L. Ins. Co. v. Moore.

It is contended here, as in the Ætna Case, that the company is estopped by the knowledge of the agent, and the same cases are cited as were cited there. We answer here, as we answered there, that the terms of the policy constituted the contract of the parties and precluded a variation of them by the agent. We may, however, observe that Salgue did not inform the medical examiner in this case, as he did in the Ætna Case, that he was told he had heart disease. In other words, he made no communication to the examiner which modified in any way the positive character of his answers to the questions put to him. The testimony is conflicting as to the information [568] he gave to the agent of the company, who, the evidence shows, prepared the application.

We think, therefore, that the court erred in refusing the special request.

It is also contended, as it was in the Ætna Case, that the District Court erred in consolidating the causes, and it must be admitted that petitioner here has more ground of complaint of the ruling than the Ætna Company. We are, however, not required to pass upon the contention, though, as we said in the other case, there are grounds for it.

Judgment reversed and cause remanded to the District Court for a new trial.

Mr. Justice Pitney dissents.

SEATTLE, RENTON, & SOUTHERN RAILWAY COMPANY, Plff. in Err.,
v.
STATE OF WASHINGTON EX REL. A. G. LINHOFF.

(See S. C. Reporter's ed. 568-570.)

Error to state court — Federal question — due process of law.

Something more than a mere possible misconstruction of a municipal ordinance by the highest court of a state is necessary to present a question of due process of law which will sustain a writ of error from the Federal Supreme Court.

[For other cases, see Appeal and Error, 1124-1132, 1898-1913, in Digest Sup. Ct. 1908.]

[No. 107.]

Argued and submitted December 9, 1913.
Decided December 22, 1913.

Note.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On writs of error to state courts in cases involving questions of due process of law—see note to Burt v. Smith, 51 L. ed. U. S. 121.

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IN ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court of King County, in that state, granting a mandamus requiring a street railway company to issue and accept transfers to and from another street railway company on the basis of an equal division of the fares. Dismissed for want of jurisdiction.

See same case below, 62 Wash. 544, 114 Pac. 431.

The facts are stated in the opinion.

Mr. James A. Kerr submitted the cause for plaintiff in error:

Mr. Howard A. Hanson argued the cause, and, with Messrs. William B. Allison, James E. Bradford, and Ralph S. Pierce, filed a brief for defendant in error:

The appellate jurisdiction of this court cannot be invoked merely because the state court has erroneously construed a contract; the impairment of a contract cannot be said to result by judicial construction thereof, but only by some subsequent legislation which impairs such contract.

Knox v. Exchange Bank, 12 Wall. 382, 20 L. ed. 415; Lehigh Water Co. v. Easton, 121 U. S. 390, 30 L. ed. 1060, 7 Sup. Ct. Rep. 916; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 44, 45 L. ed. 417, 21 Sup. Ct. Rep. 256; Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; Mississippi & M. R. Co. v. Rock, 4 Wall. 177, 18 L. ed. 381; Mississippi & M. R. Co. v. McClure, 10 Wall. 511, 19 L. ed. 997; Delmas v. Merchants' Mut. Ins. Co. 14 Wall. 661, 20 L. ed. 757; Northwestern University v. Illinois, 99 U. S. 309, 25 L. ed. 387; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681.

The state supreme court decided no Federal question, nor was any Federal question necessary to its decision; but it disposed of the case entirely on non-Federal grounds sufficient to support its judgment. The franchise contracts in question were before the court for construction, and all the court did in its decision was to ascertain the real intent and meaning of these contracts under well-known rules of construction.

State ex rel. Linhoff v. Seattle, R. & S. R. Co. 62 Wash. 544, 114 Pac. 431.

There is no color for a contention that a man is deprived of property without due process of law by enforcing against him a decree for alimony rendered in another state in a proceeding in which he appeared and was heard.

Lynde v. Lynde, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555.

A party who seeks and is given the opportunity to litigate the rights claimed by it cannot have the judgment reversed in the Supreme Court of the United States on the ground that due process of law was denied because the litigation did not result successfully.

Remington Paper Co. v. Watson, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456.

The judgment or decree of a state court cannot be re-examined in the Supreme Court of the United States simply because a Federal question was presented to the state court for determination. That court must also decide it.

Crowell v. Randell, 10 Pet. 368, 9 L. ed. 458; Israel v. Arthur, 152 U. S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 583.

If the decision of a Federal question is rendered unnecessary by the view which the state court properly takes of the rest of the case within the scope of the pleadings, the judgment is not open to review in the Supreme Court of the United States.

Chapman v. Goodnow (Chapman v. Crane) 123 U. S. 540, 31 L. ed. 235, 8 Sup. Ct. Rep. 21; Wells v. Goodnow, 150 U. S. 84, 37 L. ed. 1007, 14 Sup. Ct. Rep. 22.

Where the state court disposes of the case upon non-Federal grounds sufficient to support its judgment, it is obvious that the Supreme Court of the United States cannot review such judgment on the theory that a decision of the Federal question was necessarily involved.

McManus v. O'Sullivan, 91 U. S. 578, 23 L. ed. 390; Note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 42.

It is necessary that the decision of the state court upon a Federal question be controlling in the disposition of the case.

Citizens' Bank v. Board of Liquidation (Louisiana ex rel. Citizens' Bank v. Board of Liquidation) 98 U. S. 140, 25 L. ed. 114.

The only questions which will be considered are those which are involved in the record, and which received the consideration of the state court.

First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904; Marsh v. Nichols, S. & Co. 140 U. S. 344, 35 L. ed. 413, 11 Sup. Ct. Rep. 798.

Even though the state court reached a wrong conclusion or placed an erroneous construction upon such contracts, yet the plaintiff in error having had its day in court, it cannot be said that such decision would deprive it of its property without due process of law.

Central Land Co. v. Laidley, 159 U. S. 112, 40 L. ed. 95, 16 Sup. Ct. Rep. 80;

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Fischer v. St. Louis, 194 U. S. 369, 48 L. ed. 1023, 24 Sup. Ct. Rep. 673; Bergemann v. Backer, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; Head v. Amoskeag Mfg. Co. 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678.

If a Federal question be involved, it was not seasonably and sufficiently raised and presented in the lower courts.

Farney v. Towle, 1 Black, 350, 17 L. ed. 217; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 41, 45 L. ed. 415, 21 Sup. Ct. Rep. 256; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

It is well settled that a real, and not a fictitious, Federal question, is essential to the exercise of jurisdiction by this court.

Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353.

As the due process clause of the Constitution was not designed to interfere with the power of the states to regulate the forms and modes of procedure, so neither was it designed to interfere with the state courts in administering the process provided by the law of the state. A state cannot, therefore, be deemed guilty of a violation of this clause because one of its courts makes a wrong decision.

5 Enc. U. S. Sup. Ct. Rep. 621, 622.

Mr. Justice Holmes delivered the opinion of the court:

This writ of error seeks to reverse a judgment in mandamus requiring the plaintiff in error, a street railway, to issue and accept transfers to and from the Seattle Electric Company, another street railway, redeemable by payment of 2½ cents for the ordinary 5 cent fares, and of 1½ cents and for school childrens' tickets costing 2½ cents. 62 Wash. 544, 114 Pac. 431. The Seattle Electric Company was made a defendant, but did not appeal from the judgment of the court of first instance, affirmed by the supreme court. The plaintiff in error contends that its property is taken without due process of law by the construction given to the ordinance under which it was operating its line when the suit was brought. That ordinance requires a division "on the basis of settlement that the transfer is to be redeemed at or for such a proportionate part of the fare paid as the run or local route of the car on which transfer is received bears to the sum of the runs of the local route of the cars from which the transfer is issued and on which the transfer is received." The supreme court construed the words "or local route" as meaning "the entire distance the passenger may travel upon that system of railway as if he had paid the ordinary [570] fare, whether he changes cars upon that system or not." 62 Wash. 549. Noting that the Electric Company had not appealed, it decided for an equal division of the fares. At every point of intersection between the two roads, the line of the Electric Company is longer than that of the plaintiff in error. In some cases a single car is routed over the entire length, in others the routes are divided, but a passenger is entitled to a transfer that will take him the whole length in the same general direction. Whether there shall be a continuous single route or a divided one is determined by each company for itself.

The possibility of a different construction and the grounds for the one adopted both are obvious, but this court does not sit to revise the construction of documents by state courts, even if alleged, as this ordinance is not alleged, to be contracts protected by the Constitution of the United States. Fisher v. New Orleans, 218 U. S. 438, 54 L. ed. 1099, 31 Sup. Ct. Rep. 57. There is no impairment of rights by later legislation, and it takes more than a possible misconstruction by a court to make a case under the 14th Amendment. Cross Lake Shooting & Fishing Club v. Louisiana, 224 U. S. 632, 638, 56 L. ed. 924, 927, 32 Sup. Ct. Rep. 577; Ross v. Oregon, 227 U. S. 150, 162, 57 L. ed. 458, 463, 33 Sup. Ct. Rep. 220; McGovern v. New York, 229 U. S. 363, 370, 371, 57 L. ed. 1228, 1231, 1232, 46 L.R.A.(N.S.) 391, 33 Sup. Ct. Rep. 876.

The plaintiff in error put forward suggestions of want of jurisdiction of the supreme court, etc., on the ground that since this suit was begun the ordinance referred to has been superseded by another. The supreme court, not we, is the judge of its own jurisdiction, but the later ordinance does not appear in the record. It was held not to affect the case when brought up at an earlier stage. 62 Wash. 124, 113 Pac. 260. In short, while the railway seems to have brought the case here under a strong conviction as to what were its rights, and although it refers to the Constitution in its answer, it discloses no grievance for which it is entitled to any remedy in this court.

Writ of error dismissed.

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[571] PULLMAN COMPANY, Appt.,
v.
A. C. CROOM, Comptroller of the State of Florida. (No. 28.)

PULLMAN COMPANY, Appt.,
v.
A. C. CROOM, as Comptroller of the State of Florida, and W. V. Knott, as Treasurer of the State of Florida. (No. 158.)

(See S. C. Reporter's ed. 571-577.)

Appeal — abatement — death of party.

1. The death of the state comptroller and the succession of another person to that office abates appeals to the Federal Supreme Court, taken under the Judicial Code, § 266, from orders of a Federal circuit court denying applications before three judges for interlocutory injunctions restraining such comptroller from levying and collecting certain taxes under the authority of certain state statutes whose validity under the Federal Constitution is challenged, there being no statutory authority for bringing in his successor; nor does it matter that the state treasurer was also brought in with a view to the recovery back from him of taxes alleged to have been wrongfully collected, where no injunction was asked against him.

[For other cases, see Appeal and Error, IV. c; Abatement, II. c, in Digest Sup. Ct. 1908.]

Appeal — judgment — vacating after term.

2. An order of substitution erroneously made upon suggestion of the death of the state official who was the only party appellee involved in the inquiry open on the appeal may be vacated by the Federal Supreme Court at a subsequent term, where there has been no final judgment in the case.

[For other cases, see Appeal and Error, IV. b, 5; IX. k; Judgment, XII. b, in Digest Sup. Ct. 1908.]

[Nos. 28 and 158.]

Argued October 31 and November 3, 1913.
Decided December 22, 1913.

APPEALS from the Circuit Court of the United States for the Northern District of Florida to review orders denying interlocutory injunctions to restrain the enforcement of a state tax law as in violation of the Federal Constitution. Dismissed because of death of appellee.

NOTE.—On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to Wedding v. Meyler, 66 L.R.A. 833.

On parties to appellate proceedings in the Federal Supreme Court—see note to Amadeo v. Northern Assur. Co. 50 L. ed. U. S. 723.

Statement by Mr. Justice Day:

These are appeals from orders of the circuit court of the United States for the northern district of Florida.

The Pullman Company, appellant herein, in its complaint filed in the court below, in the first case (No. 28 [572] of this term), alleged that it was an Illinois corporation, engaged in furnishing to railroad companies under contract, parlor, dining, and sleeping cars in Florida and other states, and had complied with the laws of Florida requisite to engaging in that business; that the defendant, A. C. Croom, was the duly qualified comptroller of the state of Florida, charged with the collection of all taxes due from such companies. It averred that chapter 5597 of the laws of Florida for the year 1907 provides for the payment of license taxes to the state, and that it had paid such taxes; that § 46 of chapter 5596 provides for the collection of an ad valorem tax upon the cars of sleeping and parlor car companies, and that it had satisfied such tax. The appellant further averred that by the provisions of an act approved June 1, 1895, which by sundry amendments had been re-enacted and incorporated into chapter 5596, being § 47, sleeping and parlor car companies operating their cars in the state were required to annually report, under oath, the total amount of the gross receipts of business done between points in the state to the comptroller of the state, and to pay into the state treasury $1.50 upon each $100 of such gross receipts, and in event of failure to make the report and pay the tax, the comptroller was authorized to estimate the amount of such gross receipts from the information he might obtain, and to add a penalty of 10 per cent of the tax, and to collect it, with costs and penalties, the same as other delinquent taxes.

The appellant stated that since the passage of the act in 1895, and up to 1907, no property tax had been levied upon it, and that it had therefore taken the act of 1895 to impose a tax upon its property, and had paid the amount required by it; but it asserted that the act of 1907, § 46 of chapter 5596, contained an ad valorem tax, and it stated that it had not made a report of its business on January 1, 1910, or January 1, 1911, as required by the act, and had not paid the tax provided for, and that the defendant had demanded [573] by wire that the reports be sent in at once. It assailed the constitutionality of the law, and pleaded allegations to support its claim to jurisdiction of the case by the court in equity. It prayed that the defendant be restrained and enjoined from estimating the gross receipts of the company and adding the pen-

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supreme court, will accept the construction placed by that court upon Ariz. Rev. Stat. 1901, ¶¶ 2764–2766, giving a right of action for death, as not requiring plaintiff to allege or prove the existence of beneficiaries or the amount of damages suffered by them, —especially as this ruling of the territorial court was but a reaffirmance, upon the eve of statehood, of a construction theretofore deliberately established and followed.

[For other cases, see Appeal and Error, 994, 995; Courts, VII. d, in Digest Sup. Ct. 1908.]

Appeal — prejudicial error — inconsistent instructions.

2. The inadvertent use of the word "beneficiaries" in instructing the jury as to damages in an action for death, tried throughout upon the correct theory that the damages to be awarded were such as were suffered by the decedent's estate, is not prejudicial error where, in view of the course of the trial and of the instructions given just prior to and immediately following the one in question, it cannot be said that the language complained of might have confused or misled the jury.

[For other cases, see Appeal and Error, 5071–5126, in Digest Sup. Ct. 1908.]

Error to territorial supreme court — scope of review — weight of evidence — damages.

3. An objection that the verdict is against the weight of evidence, or that the damages allowed are excessive, cannot be considered in the Federal Supreme Court on a writ of error sued out under the act of April 7, 1874 (18 Stat. at L. 27, chap. 80), § 2, to review a judgment of a territorial supreme court, where there was some evidence to go to the jury.

[For other cases, see Appeal and Error, VIII. e; VIII. 1, 2, in Digest Sup. Ct. 1908.]

Appeal — error in instructions — failure to point out objection.

4. Charging the jury in an action for death that it might "take into consideration the income and earning capacity of the deceased, his business capacity, experience, and habits, his health, physical condition, energy, and perseverance during what would probably have been his lifetime if he had not received the injuries from which death ensued," is not open to the objection in an appellate court that it failed to specify particularly what habits the jury was authorized to consider, where there was no request for an instruction referring to such habits with greater particularity.

[For other cases, see Appeal and Error, 5071–5126, in Digest Sup. Ct. 1908.]

Appeal — review — objection not raised below.

5. An objection to the charge of the trial court upon the subject of damages comes too late when raised in the Federal Supreme Court for the first time.

[For other cases, see Appeal and Error, 4731–4739, in Digest Sup. Ct. 1908.]

Appeal — review of territorial decision — local practice.

6. The refusal of a territorial supreme court, following its established practice, to scrutinize the reporter's transcript for the purpose of discovering the objections said to have actually been made to the action of the trial court in permitting answers to certain hypothetical questions addressed to physicians, where the objections disclosed by the abstract of record before the court were too general to be availing, will not be disturbed by the Federal Supreme Court.

[For other cases, see Appeal and Error, VIII. m, 1; Courts, VII. d, in Digest Sup. Ct. 1908.]

[No. 61.]

Argued November 12, 1913. Decided December 22, 1913.

IN ERROR to the Supreme Court of the Territory of Arizona to review a judgment which affirmed a judgment of the District Court of Yavapai County, in that territory, in favor of plaintiff in an action for death. Affirmed.

See same case below, 13 Ariz. 80, 108 Pac. 247; on rehearing, 13 Ariz. 279, 112 Pac. 844.

The facts are stated in the opinion.

Mr. Charles Cowles Tucker argued the cause, and Messrs. Louis H. Chalmers, Edward Kent, A. B. Browne, Alexander Britton, and Evans Browne filed a brief for plaintiff in error:

The act in question was taken from the statutes of Wyoming.

Southern P. Co. v. Wilson, 10 Ariz. 162, 85 Pac. 401.

The practice in that state is to allege and prove the existence of persons dependent upon the deceased, and the damage sustained by them through loss of support, etc.

Mestas v. Diamond Coal & Coke Co. 12 Wyo. 414, 76 Pac. 567; Burton v. Union P. Coal Co. 18 Wyo. 362, 107 Pac. 391; Thorpe v. Union P. Coal Co. 24 Utah, 475, 68 Pac. 145; Utah Sav. & T. Co. v. Diamond Coal & Coke Co. 26 Utah, 299, 73 Pac. 524; Re Lowham, 30 Utah, 436, 85 Pac. 445; Kelley v. Union P. R. Co. 141 Mo. App. 490, 125 S. W. 818; Tiffany, Death by Wrongful Act, 2d ed. § 24.

The damages recoverable under a similar Michigan statute are such as the next of kin sustain through loss of support, etc.

Van Brunt v. Cincinnati, J. & M. R. Co. 78 Mich. 530, 44 N. W. 321; Hurst v. Detroit City R. Co. 84 Mich. 539, 48 N. W. 44; Rouse v. Detroit Electric R. Co. 128 Mich. 149, 87 N. W. 68.

Likewise the supreme court of Nebraska has construed the statute of that state, allowing recovery for injuries resulting in death, which resembles the Arizona act very closely in its language, as providing for

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the assessment of damages on the basis of the loss sustained by persons dependent upon deceased.

Orgall v. Chicago, B. & Q. R. Co. 46 Neb. 4, 64 N. W. 450; Chicago, B. & Q. R. Co. v. Bond, 58 Neb. 385, 78 N. W. 710.

The authorities cited by the supreme court of Arizona in the Wilson Case hardly justify the conclusion there reached with respect to the proper interpretation of the Arizona act.

Roach v. Imperial Min. Co. 7 Fed. 698; Hedrick v. Ilwaco R. & Nav. Co. 4 Wash. 400, 30 Pac. 714; Madden v. Chespeake & O. R. Co. 28 W. Va. 610, 57 Am. Rep. 695; Baltimore & O. R. Co. v. Wightman, 29 Gratt. 442, 26 Am. Rep. 384; James v. Richmond & D. R. Co. 92 Ala. 231, 9 So. 335; Holmes v. Oregon &c. R. Co. 6 Sawy. 275, 5 Fed. 523; Perham v. Portland General Electric Co. 33 Or. 451, 40 L.R.A. 799, 72 Am. St. Rep. 730, 53 Pac. 14; Andrews v. Chicago, M. & St. P. R. Co. 86 Iowa, 677, 53 N. W. 399; Givens v. Kentucky C. R. Co. 89 Ky. 231, 12 S. W. 257.

In only nine states and territories does the law, either by express enactment or by judicial construction, provide that the damages in cases of injuries resulting in death shall be such as deceased's estate sustains.

Tiffany, Death by Wrongful Act, 2d ed. § 25.

In the great majority of the states and territories the damages recoverable are such as the persons dependent upon deceased sustain.

Tiffany, Death by Wrongful Act, § 24.

If this court adopts the construction of the Arizona act here contended for, then, it is submitted, the judgment below should be reversed. The mere fact that the evidence may have disclosed the existence of beneficiaries entitled to take under the statute does not remedy the fatal omission of the complaint to allege the existence of such beneficiaries and the quantum of damage suffered by them, on the general principle that a complaint that fails to state a cause of action will not support a judgment for the plaintiff.

Consolidated Canal Co. v. Peters, 5 Ariz. 80, 46 Pac. 74; McPherson v. Hattich, 10 Ariz. 104, 85 Pac. 731; Sandoval v. Randolph, 11 Ariz. 371, 95 Pac. 119.

The giving of inconsistent instructions constitutes reversible error as a matter of law.

11 Enc. Pl. & Pr. 145–147; District of Columbia v. McElligott, 117 U. S. 621, 29 L. ed. 946, 6 Sup. Ct. Rep. 884.

The failure of the court to charge that deceased's habits of thrift and economy were the gauge of plaintiff's recovery was not an omissive error, but an error of positive misdirection.

11 Enc. Pl. & Pr. 224, 227; Ward v. Cochran, 150 U. S. 597, 609, 610, 37 L. ed. 1195, 1198, 1199, 14 Sup. Ct. Rep. 230; Houston & T. C. R. Co. v. Johnson, 27 Tex. Civ. App. 420, 66 S. W. 72; International & G. N. R. Co. v. McVey, 99 Tex. 28, 87 S. W. 328; Evans v. George, 80 Ill. 54; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. Rep. 1, 10 Am. Neg. Cas. 574.

The supreme court of Arizona is in the habit of referring to the reporter's transcript for enlightenment on any point that is not made clear by the abstract.

Leatherwood v. Richardson, 11 Ariz. 280, 94 Pac. 1110; Copper Belle Min. Co. v. Costello, 11 Ariz. 350, 95 Pac. 94.

Mr. J. M. Jamison argued the cause, and, with Mr. John Mason Ross, filed a brief for defendant in error:

This court will ordinarily follow the decision of the supreme court of a territory on matters of local statutory construction.

Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization, 206 U. S. 474, 479, 51 L. ed. 1143, 1146, 27 Sup. Ct. Rep. 695; English v. Arizona, 214 U. S. 359, 363, 53 L. ed. 1030, 1033, 29 Sup. Ct. Rep. 658; Clason v. Matko, 223 U. S. 646, 653, 56 L. ed. 588, 593, 32 Sup. Ct. Rep. 392.

The conclusion deliberately reached in the Wilson Case, and subsequently re-affirmed in the De Amado Case and the case at bar, is obviously sound.

Southern P. Co. v. Wilson, 10 Ariz. 172, 85 Pac. 401; Chesapeake & O. R. Co. v. Hawkins, 26 L.R.A.(N.S.) 309, 98 C. C. A. 443, 174 Fed. 597; Turner v. Norfolk & W. R. Co. 40 W. Va. 675, 22 S. E. 83; Matthews v. Warner, 29 Gratt. 570, 26 Am. Rep. 396.

An instruction which is only defective for nondirection, and not for misdirection, which properly mentions some of the elements to be considered, but omits others which might properly be mentioned, is not ground for reversal.

Kansas City Southern R. Co. v. Henrie, 87 Ark. 443, 112 S. W. 967; Galveston Oil Co. v. Malin, 60 Tex. 645; Warren & O. Valley R. Co. v. Waldrop, 93 Ark. 127, 123 S. W. 792; Sharon v. Winnebago Furniture Mfg. Co. 141 Wis. 185, 124 N. W. 299.

If it might have been improved by greater particularity, plaintiff in error should have requested an instruction fully covering the subject in accordance with its view of the law. Having failed to do so, it may not now complain.

A. Backus Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 42 L. ed. 853.

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18 Sup. Ct. Rep. 445; Texas & P. R. Co. v. Volk, 151 U. S. 73, 38 L. ed. 78, 14 Sup. Ct. Rep. 239; Isaacs v. United States, 159 U. S. 487, 40 L. ed. 229, 16 Sup. Ct. Rep. 51.

This court will not now interfere with the rulings of the lower court in its oft-repeated holding that under its rules and the laws of the now state it will not go back and inspect the reporter's transcript to determine what objections have been made and the rulings thereon, and holding to the law and rules in conformity thereto that counsel must be confined to the abstract of record as made by them. The inquiry in this court will be limited to the matters presented and considered by the lower court.

Montana R. Co. v. Warren, 137 U. S. 348, 34 L. ed. 681, 11 Sup. Ct. Rep. 96; Robinson v. Belt, 187 U. S. 41, 50, 187 L. ed. 65, 69, 23 Sup. Ct. Rep. 16; Hegeman v. Springer, 189 U. S. 505, 47 L. ed. 921, 23 Sup. Ct. Rep. 849.

Mr. Justice Hughes delivered the opinion of the court:

This action was brought by the administrator of the estate of George W. Sanders against the Phœnix Railway Company to recover damages for negligence causing the death of the intestate. Judgment in favor of the administrator was affirmed by the supreme court of the territory. 13 Ariz. 80, 108 Pac. 247, 13 Ariz. 279, 112 Pac. 844.

The first assignment of error is to the effect that the court below misconstrued the statute under which the action was brought. Rev. Stat. (Ariz.) 1901, ¶¶ 2764–2766. The ruling was upon the sufficiency of the complaint, and the court followed Southern P. Co. v. Wilson (1906) 10 Ariz. 162, 85 Pac. 401, and De Amado v. Friedman, (1907) 11 Ariz. 56, 89 Pac. 588, which held that the action was for the benefit of the estate, and that it was not necessary for the plaintiff to allege or prove the existence of beneficiaries, or the amount of damages suffered by them.

In the first case cited, the history of the legislation was reviewed and the conclusion was rested upon the terms of the statute of 1901, as compared with the earlier act. This court has frequently stated that it is disposed to accept the construction which the territorial court has placed upon a local statute. Sweeney v. Lomme, 22 Wall. 208, 213, 22 L. ed. 727 728; Fox v. Haarstick, 156 U. S. 674, 679, 39 L. ed. 576, 578, 15 Sup. Ct. Rep. 457; Northern P. R. Co. v. Hambly, 154 U. S. 349, 361, 38 L. ed. 1009, 1014, 14 Sup. Ct. Rep. 983; Copper Queen Consol. Min. Co. v Territorial Bd. of Equalization, 206 U. S. 474, 479, 51 L ed. 1143, 1146, 27 Sup. Ct. Rep. 695; Lewis v. Herrea, 208 U. S. 309, 314, 52 L. ed. 506, 508, 28 Sup. Ct. Rep. 412; English v. Arizona, 214 [580] U. S. 359, 361, 53 L. ed. 1030, 1032, 29 Sup. Ct. Rep. 658; Santa Fe County v. New Mexico, 215 U. S. 296, 305, 54 L. ed. 202, 207, 30 Sup. Ct. Rep. 111; Albright v. Sandoval, 216 U. S. 331, 339, 54 L. ed. 502, 508, 30 Sup. Ct. Rep. 318; Clason v. Matko, 223 U. S. 646, 653, 56 L. ed. 588, 593, 32 Sup. Ct. Rep. 392. The applicable considerations gain in force where, as in this case, the construction of the statute, deliberately established and followed, has been reaffirmed upon the eve of statehood, and we are of the opinion that the ruling of the supreme court of the territory of Arizona should not be disturbed.

The next contention is that the court below should have reversed the judgment of the trial court because of inconsistent instructions to the jury. After charging the jury that if they found for the plaintiff they should award such damages as should fairly compensate the estate of the deceased for the loss sustained by reason of his death, not exceeding the amount fixed by the statute, the trial court gave a further instruction that it was "not necessary on the part of the plaintiff to show the precise money value of the life of the deceased, or the exact amount of damages suffered by the beneficiaries, in order to sustain a recovery for substantial damages." It is urged that the latter instruction was inconsistent with the former, and impliedly submitted a distinct basis of recovery; that is, the loss to beneficiaries. It appeared in evidence that the decedent left a wife and two adult children, and that his wife, at least, had enjoyed the benefit of his support. The court below, while conceding that the term "beneficiaries," in the light of its construction of the statute, was "technically inappropriate," was of the opinion that the action was tried throughout upon the theory that the damages to be awarded were such as were suffered by the estate, and that, on considering the course of the trial and the instructions given to the jury just prior to, and immediately following, the one in question, it could not be said that the language complained of might have confused or misled the jury. We concur in this view and find in this assignment of error no ground for reversal.

[581] It is said further that the court erred in holding that the plaintiff was entitled to recover substantial damages for the benefit of the estate "without evidence showing or tending to show that deceased had ever saved or would have saved any portion of his earnings." We have not been referred to any ruling to this effect. No such instruction was given to the jury, and the

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record does not disclose any request for an instruction which was refused by the trial court. The argument, in substance, is that the verdict was without sufficient basis in the evidence. It cannot be said, however, that there was no evidence to go to the jury, and, as we are limited to those questions which may be appropriately raised on writ of error, an objection that the verdict is against the weight of evidence, or that the damages allowed were excessive, cannot be considered in this court. Act of April 7, 1874, chap. 80, § 2, 18 Stat. at L. 27; Wilson v. Everett, 139 U. S. 616, 35 L. ed. 286, 11 Sup. Ct. Rep. 664; Ætna L. Ins. Co. v. Ward, 140 U. S. 76, 91, 35 L. ed. 371, 376, 11 Sup. Ct. Rep. 720; New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 75, 36 L. ed. 71, 80, 12 Sup. Ct. Rep. 356, 8 Am. Neg. Cas. 600; Herencia v. Guzman, 219 U. S. 44, 45, 55 L. ed. 81, 82, 31 Sup. Ct. Rep. 135.

The trial court charged the jury that it might "take into consideration the income and earning capacity of the deceased, his business capacity, experience, and habits, his health, physical condition, energy, and perseverance during what would probably have been his lifetime if he had not received the injuries from which death ensued." The court below granted a rehearing upon the question whether there was error in giving this instruction because of a failure to specify particularly what habits the jury was authorized to consider. 13 Ariz. 279, 112 Pac. 844. It was concluded that if the appellant desired an instruction with greater particularity upon this point it should have made a suitable request; and, having failed to do so, was not entitled to complain of the omission. This ruling is assigned as error. It is urged that the instruction as given by the trial court was wrong in itself, in that it directed the jury, in effect, to find for the plaintiff [582] the amount the deceased would have earned during the years of his life expectancy. But this is manifestly a misconstruction of the charge. It was not erroneous to instruct the jury, as did the court, with respect to what might be taken into consideration in determining the damages sustained by the estate, and the court below was right in saying that, if the plaintiff in error desired explicit reference to particular habits, an instruction to that effect should have been requested. Pennock v. Dialogue, 2 Pet. 1, 15, 7 L. ed. 327, 332; Congress & E. Spring Co. v. Edgar, 99 U. S. 645, 659, 25 L. ed. 487, 491, 1 Am. Neg. Cas. 375; Texas & P. R. Co. v. Volk, 151 U. S. 73, 78, 38 L. ed. 78, 80, 14 Sup. Ct. Rep. 239. A further objection to the charge of the trial court upon the subject of damages, with respect to the number of years which should be deemed to constitute the deceased's expectation of life, concededly was not presented to the court below, and, being raised in this court for the first time, comes too late. Clark v. Fredericks (Davis v. Fredericks) 105 U. S. 4, 26 L. ed. 938; Robinson v. Belt, 187 U. S. 41, 50, 47 L. ed. 65, 69, 23 Sup. Ct. Rep. 16.

The remaining assignments of error involve a question of appellate practice in the supreme court of the territory. That court held, with respect to the action of the trial court in permitting answers to certain hypothetical questions addressed to physicians, that the mere general objections disclosed by the abstract of record filed under its rules were unavailing, and it declined to scrutinize the reporter's transcript for the purpose of discovering the objections said to have been actually made. On this course, the court but applied its rule that "abstracts of record, as filed, will be treated by the court as containing such portions of the record as the parties deem sufficient upon which to try the assignments of error." Rule I., subdiv. 6, 8 Ariz. iv., 71 Pac. vi. It is urged that the refusal to examine the reporter's transcript was in violation of the act of 1907 (Laws of Arizona, 1907, chap. 74, p. 122). But the statute has not been thus construed, and we find no ground upon which we should be justified in holding [583] that the court committed error in following the established practice to which the court alludes in its opinion. 13 Ariz. 80, 84, 108 Pac. 247, 248; Laws of Arizona 1907, chap. 74, pp. 130, 131; Liberty Min. & Smelting Co. v. Geddes, 11 Ariz. 54, 90 Pac. 232; Donohoe v. El Paso & S. W. R. Co. 11 Ariz. 293, 94 Pac. 1091; Title Guaranty & Surety Co. v. Nichols, 12 Ariz. 405, 100 Pac. 825; Sanford v. Ainsa, 13 Ariz. 287, 114 Pac. 560, 228 U. S. 705, 707, 57 L. ed. 1033, 1035, 33 Sup. Ct. Rep. 704.

The judgment is affirmed.

Affirmed.

HAGON JOHN, Guardian, etc., Plff. in Err.,

v.

LEWIS PAULLIN et al.

(See S. C. Reporter's ed. 583-587.)

Error to state court — decision of Federal question — dismissal below.

1. A judgment of the supreme court of the state of Oklahoma, dismissing for a

NOTE.—On the general subject of writs of error from the United States Supreme

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defect in the parties a writ of error sued out to review a judgment of the district court of that state in a case transferred to the latter court from a Federal court for the Indian territory, under the combined operation of the enabling act of June 16, 1906 (34 Stat. at L. 267, chap. 3335), and of the state Constitution, turned upon a question of local law, and is not reviewable in the Federal Supreme Court.

[For other cases, see Appeal and Error, 1351–1528, in Digest Sup. Ct. 1908.]

States — relation to Federal government — appellate procedure.

2. The state laws and practice relative to the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise, are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law.

[For other cases, see States, IV. j, in Digest Sup. Ct. 1908.]

States — admission — appellate procedure.

3. The regulations governing appeals from the Federal courts in the Indian territory prescribed by the act of March 3, 1905 (33 Stat. at L. 1081, chap. 1479), § 12, did not and could not govern an attempt to secure a review in the Oklahoma supreme court of a judgment of a district court of that state in a case which had been transferred to the latter court from a Federal court in the Indian territory, upon the admission of Oklahoma into the Union.

[For other cases, see States, XI., in Digest Sup. Ct. 1908.]

[No. 105.]

Argued and submitted December 8 and 9, 1913. Decided December 22, 1913.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment dismissing, for a defect in the parties, a writ of error to the District Court of Bryan County, in that state, bringing up for review a judgment in an action to remove a cloud on title. Dismissed for want of jurisdiction.

See same case below, 24 Okla. 636, 104 Pac. 365; on rehearing, 24 Okla. 642, 106 Pac. 838.

The facts are stated in the opinion.

Mr. Edward F. Colladay argued the cause and filed a brief for plaintiff in error.

Mr. Napoleon B. Maxey also filed a brief for plaintiff in error.

Mr. W. T. Sprowls submitted the cause for defendants in error. Messrs. V. B. Hayes and Robert Crockett were on the brief.

Mr. Justice Van Devanter delivered the opinion of the court:

Our jurisdiction in this case is challenged by a motion to dismiss. The case was begun in the United States court for the central district of the Indian territory, and was pending in that court when the territory of Oklahoma and the Indian territory were admitted into the Union as the state of Oklahoma. Under the combined operation of the Oklahoma enabling act (34 Stat. at L. 267, chap. 3335; Id. 1286, chap. 2911) and the state constitution (see Benner v. Porter, 9 How. 235, 246, 13 L. ed. 119, 124), the case was then transferred to the district court of Bryan county, where a trial resulted in a judgment determining the matters in controversy, which turned in part upon the validity, under the laws of the United States, of certain deeds and leases executed by an Indian allottee, since deceased. The guardian of two minor heirs of the allottee had intervened in the cause, had asserted the invalidity of all the deeds and leases, and [585] had set up a claim to the property in question as against the other parties; but this claim was rejected, and the guardian sought to have the judgment reviewed and reversed by the supreme court of the state. That court held that some of the parties below, whose presence in the appellate proceeding was essential, had not been brought into that proceeding, or voluntarily appeared therein, in accordance with the law of the state, and upon that ground dismissed the proceeding, 24 Okla. 636, 104 Pac. 365, 106 Pac. 848. The guardian then sued out the present writ of error.

As the supreme court of the state did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the state, we do not perceive

Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

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any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. See Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575; Judicial Code, § 237 [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227]. Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision.

Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. Callan v. Bransford, 139 U. S. 197, 35 L. ed. 144, 11 Sup. Ct Rep. 519; Brown v. Massachusetts, 144 U. S. 573 36 L. ed. 546, 12 Sup. Ct. Rep. 757; Jacobi v. Alabama, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48; Hulbert v. Chicago, 202 U. S. 275. 281, 50 L. ed. 1026, 1028, 26 Sup. Ct. Rep. 617; Newman v. Gates, 204 U. S. 89, 51 L. ed. 385, 27 Sup. Ct. Rep. 220; Chesapeake & O. R. Co. v. McDonald, 214 U. S. 191, 195, 53 L. ed. 963, 965, 29 Sup. Ct. Rep. 546.

But it is said that the proceedings by which it was attempted to secure a review of the judgment of the trial court should have been tested by the act of Congress of [586] March 3, 1905, 33 Stat. at L. 1081; chap. 1479, § 12, and that the supreme court of the state erred in holding otherwise. We cannot accede to the contention. The act of 1905, § 12, related to the review of judgments rendered in the courts temporarily established by Congress in the Indian territory, and had no application to judgments rendered after statehood in the courts of the state. Besides, the mode of subjecting the judgments of the state's subordinate courts to review in its supreme court was a matter of local concern only, and not within the control of Congress. See Coyle v. Smith, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688.

The state Constitution provided (art. 7, § 8) that the appellate jurisdiction of the supreme court should be invoked in the manner prescribed by the laws of the territory of Oklahoma, until the state legislature should provide otherwise, and also (art. 25, § 2) that the laws of the territory of Oklahoma, not repugnant to the state Constitution or locally inapplicable, should be extended over the new state which embraced the Indian territory as well as the territory of Oklahoma. When the state was admitted into the Union the territory of Oklahoma had a full complement of laws regulating appellate proceedings. Wilson's Rev. & Anno. Stat. 1903, §§ 4732 et seq. It was by these constitutional provisions and laws that the supreme court tested the appellate proceedings in this instance, with the result that they were adjudged inadequate because they had not brought before the court within the time prescribed (Wilson's Stat. §§ 4736, 4748), parties whose presence was essential to enable it to review the judgment below.

Thus it appears that nothing was decided but the preliminary question of the court's jurisdiction to pass upon the controverted matters shown in the record, and that this question was resolved according to what the court deemed to be the true construction and effect of applicable provisions of the Constitution and laws of the state. In [587] short, the judgment of dismissal turned entirely upon a question of local law.

As particularly apposite, we quote the following from the opinion in Newman v. Gates, 204 U. S. 89, 51 L. ed. 385, 27 Sup. Ct. Rep. 220, a case in which this court declined to review a like judgment of dismissal by a state court:

"Had the appeal been properly taken, it would have been the duty of the supreme court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon the due faith and credit clause of the Constitution, which, on various occasions, was pressed upon the attention of the trial court. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court. As the jurisdiction of this court to review the judgments or decrees of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such question, when rendered by the highest court of a state in which a decision in the suit could be had, and as for the want of a proper appeal, no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting."

Writ of error dismissed.

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[588] DANIEL W. BAKER, Plff. in Err.,
v.
BRAINERD H. WARNER. (No. 41.)

DANIEL W. BAKER, Plff. in Err.,
v.
BRAINERD H. WARNER. (No. 42.)

(See S. C. Reporter's ed. 588–594.)

Libel — of public official — publication not libelous per se.

1. A newspaper communication from a candidate for public office in which, after referring to the district attorney's attendance at a conference of the candidate's enemies to determine "what ammunition was needed to defeat him," he inquires, "Where does the money come from in the contest?" following such inquiry immediately with the question, "How about the race track?" is not libelous *per se* of the district attorney.

[Matters as to libel and slander, see Libel and Slander, in Digest Sup. Ct. 1908.]

Judgment — arrest — construction of pleadings.

2. The pleadings will be liberally construed on a motion in arrest of judgment entered on a verdict in favor of plaintiff in an action for libel, and the plaintiff be given the benefit of every implication that can be drawn therefrom in his favor, and for that purpose sentences and paragraphs may be transposed and the allegations in one part of the complaint be aided by those in another, and if, taken together, they show the existence of facts constituting a good cause of action, defectively set forth or improperly arranged, the motion in arrest will be denied.

[For other cases, see Judgment, XII. c, in Digest Sup. Ct. 1908.]

Appeal — defect in pleadings — curing by verdict.

3. General statements in the innuendo in the complaint in an action for publishing a statement concerning a public official which was not libelous *per se*, that defendant, who was put on notice of the extrinsic facts surrounding the publication, meant to charge plaintiff with corruption in office, will, after verdict in the latter's favor, be treated as substantive allegations of fact, given by transposition their proper position in inducement or colloquium.

[For other cases, see Appeal and Error, VIII. k, 2, in Digest Sup. Ct. 1908.]

Appeal — from intermediate appellate court — scope of review — rendering proper judgment.

4. The Federal Supreme Court is not limited to a consideration of the points presented by plaintiff in error on a writ of error to the District of Columbia court of appeals to review a judgment which reversed a judgment of the supreme court of the District, but must enter the judgment which should have been rendered by the court below on the record then before it.

[For other cases, see Appeal and Error, VIII. e; IX. d, in Digest Sup. Ct. 1908.]

Trial — province of court and jury — meaning of ambiguous language in libel.

5. Whether words not libelous *per se* import a defamatory meaning is a question of fact for the jury where, in the light of the extrinsic facts averred, the words are susceptible of such a construction.

[For other cases, see Trial, VI. c, in Digest Sup. Ct. 1908.]

[Nos. 41 and 42.]

Argued November 5, 1913. Decided December 22, 1913.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which reversed a judgment of the Supreme Court of the District in favor of plaintiff in an action for libel. Also

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District in arrest of the original judgment. Reversed and remanded for a new trial.

See same case below, 36 App. D. C. 493.

Statement by Mr. Justice Lamar:

The plaintiff, Baker, United States district attorney for the District of Columbia, sued the defendant, Warner, for libel. Briefly stated, the complaint charges that:

The Washington Jockey Club owned a race track in [589] the District where races were run and bets were made and in January, 1908, the plaintiff, as district attorney, had obtained from the grand jury an indictment charging one Walters with betting at this race track, contrary to the statute against gaming in the District. A demurrer was filed, which was sustained on March 11, 1908,—the court holding that the laying of bets on horse races, at this track, was not a violation of the act of Congress, which, as appears by reference to the statute (D. C. Code, § 869, 31 Stat. at L. p. 1331, chap. 854), only prohibited such betting and bookmaking within 1 mile of the boundaries of the cities of Washington and Georgetown. The plaintiff immediately took an appeal from this judgment in order that the court

NOTE.—On libel by charging the raising or disbursing of campaign funds—see note to Scofield v. Milwaukee Free Press Co. 2 L.R.A.(N.S.) 691.

On amendment of record to cure defect for which motion in arrest of judgment has been made—see note to State v. Marsh, 67 L.R.A. 179.

On the effect of provision that jury shall determine the law and the facts in libel cases—see note to Oakes v. State, 33 L.R.A. (N.S.) 207.

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of appeals might determine whether such betting at such place was a violation of the gaming law of force in the District.

Shortly after the appeal, the Spring Meet of the Jockey Club began, being advertised to continue until April 14th. On the opening days of the Meet there were bookmaking and betting; but the complainant alleges that the plaintiff, "conforming himself, as it was his duty to do, to the law as judicially construed by the supreme court of the District, did not issue warrants for the arrest of or present to the grand jury any persons for betting on the horse races."

It is further alleged that at this time Warner was a candidate against Pearre for the nomination for Congress from Maryland, and, on March 28th, Warner composed and published, of and concerning the plaintiff, and of and concerning the office of the plaintiff, in a Washington newspaper, a certain false and defamatory libel. The article need not be set out at length, but the communication, after characterizing a speech by his opponent as undignified, proceeded to say that it was not wanting in dignity so much as for a judge of the District.

"who, with the United States district attorney (meaning the [590] plaintiff), went to Rockville (meaning the town of Rockville, county of Montgomery, state of Maryland) last Saturday (meaning Saturday, the 21st day of March A. D. 1908) to attend a conference of Mr. Warner's (meaning defendant's) enemies, and determine what ammunition was needed to defeat him.

"The question now is, Where does the money come from in the contest against Mr. Warner? (meaning the defendant.)

"How about the race track?

Lawyer."

"meaning thereby, . . . that the said plaintiff entered into a conference with others for the purpose of determining what funds were necessary, and how same should be raised, to be used in the campaign in behalf of Pearre, and meaning . . . that the plaintiff was and is corrupt, in not presenting to the grand jury and prosecuting before the courts of the District, persons laying bets upon the contests at the race track, in consideration of contributions of money in the contest against the defendant from some company or person interested in the race track or the contests carried on thereon."

The defendant filed a general denial, and, after a trial, there was a verdict in favor of the plaintiff. Motions for a new trial and in arrest of judgment were overruled and the case taken to the court of appeals, which held not only that reversible error had been committed, but that the judgment should have been arrested. In No. 41 the case is here on a writ to review that ruling. To avoid any question as to the finality of that judgment of the court of appeals plaintiff sued out another writ of error (No. 42) after the judgment had been arrested in the trial court.

Messrs. **Frank J. Hogan** and **Henry E. Davis** argued the cause and filed a brief for plaintiff in error:

The questions for consideration in this case are those, and those only, which are presented by the plaintiff's assignment of errors, since the defendant has sued no writ of error, and can therefore be heard only in support of the judgment below.

Bolles v. Outing Co. 175 U. S. 262, 268, 44 L. ed. 156, 158, 20 Sup. Ct. Rep. 94; Landram v. Jordan, 203 U. S. 56, 62, 51 L. ed. 88, 90, 27 Sup. Ct. Rep. 17; Fitchie v. Brown, 211 U. S. 321, 53 L. ed. 202, 29 Sup. Ct. Rep. 106; Southern Pine Lumber Co. v. Ward, 208 U. S. 126, 52 L. ed. 420, 28 Sup. Ct. Rep. 239; Green County v. Thomas, 211 U. S. 598, 601, 602, 53 L. ed. 343, 345, 346, 29 Sup. Ct. Rep. 168.

Conceding, as it must be and has been conceded, that the declaration contains within its four corners all the facts that are necessary to the statement of a good cause of action based upon the instant libel, the defects pointed out by the court and counsel below, assuming for the moment that such defects actually existed, were cured by the verdict.

Tuttle v. Bishop, 30 Conn. 80; Alcorn v. Bass, 17 Ind. App. 502, 46 N. E. 1024; Nestle v. VanSlyck, 2 Hill, 282; Schwartz v. Reesch, 2 App. D. C. 440; Washington & G. R. Co. v. Hickey, 5 App. D. C. 436; Chandler & T. Co. v. Norwood, 14 App. D. C. 357.

The alleged defects in the present declaration do not warrant the arrest of the judgment of the trial court.

Canadian P. R. Co. v. Elliott, 70 C. C. A. 242, 137 Fed. 904; Chicago, M. & St. P. R. Co. v. Voelker, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522; Stockton v. Bishop, 4 How. 155, 11 L. ed. 918.

A motion to direct a verdict for the defendant touches only the evidence in the case as a demurrer thereto, and does not touch any defects of pleading.

Cort v. Birkbeck, 1 Dougl. K. B. 218; Bank of United States v. Smith, 11 Wheat. 172, 6 L. ed. 443; Van Stone v. Stillwell & B. Mfg. Co. 142 U. S. 134, 35 L. ed. 903, 12 Sup. Ct. Rep. 181; McAfee v. Huidekoper, 9 App. D. C. 39, 34 L.R.A. 720; Ubhoff v. Brandenburg, 26 App. D. C. 3.

The record expressly shows that the defendant waived or abandoned his motion in

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arrest, and consented to the entry of a judgment from which he appealed.

Ganss v. Goldenberg, 39 App. D. C. 597.

The question of the sufficiency of that motion was not properly or at all presented to the trial court, and hence could not be raised for the first time on appeal, since the appellate court cannot be substituted for the trial court.

Eaton v. Brown, 20 App. D. C. 459; Norman v. United States, 20 App. D. C. 497.

The instant declaration appears to contain all of the essential elements of a declaration in libel properly drawn under the rules of special pleading.

White v. Nicholls, 3 How. 285, 286, 11 L. ed. 600; Culmer v. Canby, 41 C. C. A. 302, 101 Fed. 197; Chaloner v. Washington Post Co. 36 App. D. C. 233; Bailey v. Holland, 7 App. D. C. 184; Washington Gaslight Co. v. Lansden, 9 App. D. C. 508; Norfolk & W. S. B. Co. v. Davis, 12 App. D. C. 306; Washington Times Co. v. Downey, 26 App. D. C. 258, 6 Ann. Cas. 765; Raymond v. United States, 25 App. D. C. 555.

The motion in arrest is simply a postponed demurrer; that is, a demurrer interposed after verdict instead of during the pleadings, and applying to substantial errors appearing on the face of the declaration.

Perry, Pl. 212.

A motion in arrest will not lie for formal objections; formerly this was otherwise, and judgments were constantly arrested for errors of mere form; but this abuse has long since been removed by the statute of amendments and jeofails, by the effect of which a judgment at the present day cannot generally be arrested for any objection of form.

Perry, Pl. 211.

Treating the motion in arrest as a postponed demurrer, we invoke the rule that a demurrer to a declaration in libel admits the allegations in so far as it tests the actionable quality of the words used in the publication, and it admits the charges of falsity, publication, and malice, and the correctness of the innuendoes alleged, unless they attribute a meaning to the words that is not justified by the language itself, or by extrinsic facts with which they are connected.

Chaloner v. Washington Post Co. 36 App. D. C. 233.

Any question of privilege or permissible criticism is laid out of the case by the admission of the truth of the charges of malice, falsity, and want of probable cause.

Nalle v. Oyster, 230 U. S. 165, 57 L. ed. 1439, 33 Sup. Ct. Rep. 1043.

A demurrer—and a motion in arrest is only a postponed demurrer—can only be sustained where the court can affirmatively say that the words are incapable of any reasonable construction which will render them defamatory.

Culmer v. Canby, 41 C. C. A. 302, 101 Fed. 197.

If from the undisputed facts in evidence all reasonable and fair-minded men must draw the same conclusion, then the question at issue is one of law for the court, and not of fact for the jury, and it is the duty of the court to instruct the jury as to the conclusion which must be drawn. If, on the other hand, on the question at issue, from the facts in evidence, with all the fair inferences that may be drawn therefrom, reasonable men might fairly differ as to the conclusion to be arrived at, then the determination of the fact in issue is for the jury. Where the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury and direct a verdict.

Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Elliott v. Chicago, M. & St. P. R. Co. 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85; Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; Marande v. Texas & P. R. Co. 184 U. S. 173, 46 L. ed. 487, 22 Sup. Ct. Rep. 340; Bowditch v. Boston, 101 U. S. 16, 25 L. ed. 980; Texas & P. R. Co. v. Gentry, 163 U. S. 353, 41 L. ed. 186, 16 Sup. Ct. Rep. 1104; Pleasants v. Fant, 22 Wall. 116, 22 L. ed. 780; Commercial Pub. Co. v. Smith, 79 C. C. A. 410, 149 Fed. 704.

And the rule is the same respecting directing a verdict in favor of plaintiff as it is respecting the directing of a verdict in favor of defendant. If the facts in favor of the plaintiff are clearly established, and are sufficient and undisputed, it is the duty of the court to charge the jury to find for the plaintiff.

Hutchins v. Langley, 27 App. D. C. 234; Marshall v. Hubbard, 117 U. S. 415, 29 L. ed. 919, 6 Sup. Ct. Rep. 806; Orleans v. Platt, 99 U. S. 676, 25 L. ed. 404; Macon County v. Shores, 97 U. S. 272, 24 L. ed. 889; North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 31 L. ed. 287, 8 Sup. Ct. Rep. 266; Anderson County v. Beal, 113 U. S. 227, 28 L. ed. 966, 5 Sup. Ct. Rep. 433.

Stated with specific reference to libel and slander cases, the rule is:

(1) Where the words complained of are not susceptible of the defamatory meaning attributed to them by the plaintiff, and

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this must be the view of all, it is the duty of the court to direct a verdict for the defendant; in such case, the question is one of law for the court.

(2) Where the words complained of are fairly capable of two meanings, one harmless and the other defamatory, it is a question for the jury in what sense the readers may have understood them; in such case, the question is one of fact for the jury.

(3) Where the words complained of either by themselves or in the light of surrounding circumstances shown by the evidence are reasonably and fairly capable of only one construction, and that one gives to them a libelous meaning, then it is the duty of the court to so instruct the jury. And in reaching a true conclusion as to what interpretation is to be placed upon the words complained of, the court, no less than the jury, is to read the publication in its entirety, construe every part thereof with reference to all of its parts, and with reference to the conceded conditions in the community where it was circulated, and to understand it as it would generally be understood by the rest of mankind.

Adams v. Lawson, 17 Gratt. 256, 94 Am. Dec. 455; Rex v. Lambert, 2 Campb. 403, 11 Revised Rep. 248; 25 Cyc. 355, 361; Waters v. Jones, 3 Port. (Ala.) 442, 29 Am. Dec. 261; Odgers, Libel & Slander, 97, 98: Newell, Slander & Libel, 291; Negley v. Farrow, 60 Md. 158, 45 Am. Rep. 715; Mattice v. Wilcox, 147 N. Y. 626, 42 N. E. 270; Hanchett v. Chiatovich, 41 C. C. A. 648, 101 Fed. 744; Freisinger v. Moore, 65 N. J. L. 288, 47 Atl. 432; Kilgour v. Evening Star Newspaper Co. 96 Md. 16, 53 Atl. 716; Post Pub. Co. v. Hallam, 8 C. C. A. 201, 16 U. S. App. 613, 59 Fed. 530.

Defendant's article of March 28, 1908, cannot fairly be construed as constituting "fair comment" on the failure of the district attorney to institute new prosecutions against race track betters.

Hallam v. Post Pub. Co. 55 Fed. 456; Com. v. Wardwell, 136 Mass. 164; Democrat Pub. Co. v. Jones, 83 Tex. 306, 18 S. W. 652; Post Pub. Co. v. Moloney, 50 Ohio St. 71, 33 N. E. 921; Royce v. Maloney, 58 Vt. 437, 5 Atl. 395; More v. Bennett, 48 N. Y. 474; Lauder v. Jones, 13 N. D. 525, 101 N. W. 907; Montgomery v. New Era Printing Co. 229 Pa. 165, 78 Atl. 85, Ann. Cas. 1912A, 375; Pickford v. Talbott, 211 U. S. 199, 53 L. ed. 146, 29 Sup. Ct. Rep. 75, affirming 28 App. D. C. 498; Hetherington v. Sterry, 28 Kan. 426, 42 Am. Rep. 169; Mattice v. Wilcox, 147 N. Y. 624, 42 N. E. 270; White v. Nicholls, 3 How. 266, 11 L. ed. 591; Mann v. Dempster, 104 C. C. A. 110, 181 Fed. 81; State v. Norton, 89 Me. 290, 36 Atl. 394.

Messrs. J. J. Darlington and W. C. Sullivan argued the cause and filed a brief for defendant in error:

The inducement and colloquium must state the cause of action without the aid of the innuendo.

25 Cyc. 449, 450; 13 Enc. Pl. & Pr. 54, 55; Van Vechten v. Hopkins, 5 Johns. 220, 4 Am. Dec. 339, 1 Chitty, Pl. 400, 401, 406, 407; Barnes v. State, 88 Md. 354, 41 Atl. 781; Pollard v. Lyon, 91 U. S. 225, 233, 234, 23 L. ed. 308, 312, 313; Gaither v. Advertiser Co. 102 Ala. 458, 14 So. 788; Fry v. Bennett, 5 Sandf. 65; Grand v. Dreyfus, 122 Cal. 58, 54 Pac. 389; Bloss v. Tobey, 2 Pick. 320; Carter v. Andrews, 16 Pick. 1; Goldstein v. Foss, 2 Younge & J. 146, 4 Bing. 489, 1 Moore & P. 402, 29 Revised Rep. 610; Dodge v. Lacey, 2 Ind. 212; Hays v. Mitchell, 7 Blackf. 117; Edgerley v. Swain, 32 N. H. 478; Bowdish v. Peckham, 1 D. Chip. (Vt.) 144; Merritt v. Dearth, 48 Vt. 65; Sayre v. Jewett, 12 Wend. 135; Dyer v. Morris, 4 Mo. 214; Posnett v. Marble, 62 Vt. 491, 11 L.R.A. 162, 22 Am. St. Rep. 126, 20 Atl. 813; Peterson v. Sentman, 37 Md. 140, 11 Am. Rep. 534; McCuen v. Ludlum, 17 N. J. L. 12; Greenwood v. Cobbey, 26 Neb. 449, 42 N. W. 413.

The objection now under consideration was raised by motion at the trial, when, under the rules of the trial court, it might have been obviated by amendment, but the plaintiff elected to stand upon his declaration, without curing it. It was raised again by motion in arrest, as is held proper in 1 Chitty, Pl. 406, 407, and was the practice pursued in Bloss v. Tobey, 2 Pick. 320; Posnett v. Marble, 62 Vt. 481, 11 L.R.A. 162, 22 Am. St. Rep. 126, 20 Atl. 813; Carter v. Andrews, 16 Pick. 8; Goldstein v. Foss, 2 Younge & J. 146, 4 Bing. 489, 1 Moore & P. 402, 29 Revised Rep. 610; Atkinson v. Scammon, 22 N. H. 40; Bowdish v. Peckham, 1 D. Chip. (Vt.) 144; Ryan v. Madden, 12 Vt. 51; Merritt v. Dearth, 48 Vt. 65; Sayre v. Jewett, 12 Wend. 135, and perhaps a majority of the other cases cited supra.

The objection, namely, that the declaration is insufficient to state a cause of action, would have been good if made, in the first instance, in the appellate court.

Slacum v. Pomery, 6 Cranch, 221, 225, 3 L. ed. 205, 206; Bank of United States v. Smith, 11 Wheat. 171, 6 L. ed. 443; Cragin v. Lovell, 109 U. S. 194, 199, 27 L. ed. 903, 905, 3 Sup. Ct. Rep. 132; Cort v. Birkbeck, 1 Dougl. K. B. 224; Western U. Teleg. Co. v. Sklar, 61 C. C. A. 281, 126

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Fed. 302; Clement v. Fisher, 7 Barn. & C. 459, 1 Moody & R. 281, 6 L. J. K. B. 39.

The trial court erred in taking altogether from the jury the determination of the meaning of the article, on which depended the question whether or not it was libelous *per se*.

Barnes v. State, 88 Md. 351, 41 Atl. 781; Avirett v. State, 76 Md. 522, 25 Atl. 676, 987; Commercial Pub. Co. v. Smith, 79 C. C. A. 410, 149 Fed. 704; Gaither v. Advertiser Co. 102 Ala. 458, 14 So. 788.

An appellate court will not by too technical a construction preclude itself from correcting manifest error.

Dunlap v. Northeastern R. Co. 130 U. S. 653, 32 L. ed. 1060, 9 Sup. Ct. Rep. 647.

The motion to direct was not at all directed to the evidence, but was presented specifically upon the ground that the declaration, under the well-established rules relating to actions of slander and libel, did not state a cause of action. The proposition that, where this is the case, the court may nevertheless validly proceed to verdict and judgment against the defendant, over his objection and exception, is incapable of being sustained.

Bank of United States v. Smith, 11 Wheat. 171, 6 L. ed. 443.

Mr. Justice Lamar, after making the foregoing statement of facts, delivered the opinion of the court:

The plaintiff, who was United States district attorney for the District of Columbia, sued the defendant in an action for libel, and recovered a verdict for $10,000. The court of appeals (36 App. D. C. 493) held that the judgment should have been arrested, for the reason that the publication was not libelous *per se*, and was not shown to be defamatory by any averment of fact in the inducement or in the colloquim.

The publication was not libelous *per se*. The meaning of the article and person to whom it referred was so ambiguous that, in order to constitute a cause of action, it was necessary to set out extrinsic facts, which, when coupled with the words, would show that the writer charged the plaintiff with corruption in office. Accordingly, the plaintiff, in the inducement, averred that he was district attorney, charged with the duty of prosecuting violators of the law against gaming, and had procured an indictment against one for betting at the Washington Jockey Club, which indictment had been quashed, and, pending the appeal, and conforming to the ruling of the court, he had instituted no other prosecutions: That, under these circumstances, the defendant had published of and concerning the plaintiff, the article which is set out in the complaint.

There were general allegations that the article was written concerning the plaintiff in his office as district attorney, together with general statements in the innuendo that the defendant meant to charge him with corruption in office. There was, however, no distinct averment as to the meaning of those particular phrases in the publication [592] on which the cause of action was really based. The court of appeals thereupon sustained the defendant's contention that the complaint was defective because of the failure specifically to allege what, as a fact, the words meant, and to whom they referred. It further held that the absence of such specific averments was not supplied by the general statement in the innuendo that the defendant meant to charge the plaintiff with a crime. This was based on the rule that it is not the office of the innuendo to set out facts, but rather to explain what is ambiguous, or to state a conclusion which, to be effective, must be supported by averments, definitions, references, or other facts alleged in traversable form in inducement and colloquium. It is, however, unnecessary to discuss the sufficiency of the complaint, which, even if defective, was amendable. The defendant did not demur, but joined issue, the case was tried by a jury, a verdict for the plaintiff was rendered, judgment was entered, and the defendant then moved in arrest.

Such motions are not favored. In considering them, courts liberally construe the pleadings, giving the plaintiff the benefit of every implication that can be drawn therefrom in his favor. Sentences and paragraphs may be transposed. The allegations in one part of the complaint may be aided by those in another, and if taken together, they show the existence of facts constituting a good cause of action, defectively set forth or improperly arranged, the motion in arrest will be denied.

In the present case the defendant was put on notice of the extrinsic facts surrounding the publication. The statements in the innuendo, even if misplaced, may, after verdict, be treated as substantive allegations of fact, given by transposition their proper position in inducement or colloquium. The verdict cured the defects, if any, in the complaint, and made it improper to arrest the judgment. Stanley v. Brit, Mart. & Y. 222; M'Claughry [593] v. Wetmore, 6 Johns. 82, 5 Am. Dec. 194; Brittain v. Allen, 13 N. C. (2 Dev. L.) 124; Tuttle v. Bishop, 30 Conn. 80; Nestle v. Van Slyck, 2 Hill, 282. In answer to these decisions the defendant cites Ryan v. Madden, 12 Vt. 55, and other cases,

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to support his contention that the motion in arrest should have been granted. But those decisions announce what, in Bloss v. Tobey, 2 Pick. 330, was admitted to be a hard and technical rule,—one which, we think, has been modified by modern and more liberal rules of pleading and practice in the Federal courts and in those of most of the states.

The plaintiff, Baker, had a judgment in the trial court. The defendant, Warner, took the case to the court of appeals on various grounds, most of which were sustained. The plaintiff then brought the case here, assigning error on some of those rulings, but not on others. We are not limited, however, to a consideration of the points presented by the plaintiff, but, this being a writ of error from an intermediate appellate tribunal, must enter the judgment which should have been rendered by the court below on the record then before it.

While we reverse the order to arrest the judgment, we affirm the ruling of the court of appeals that there was an erroneous instruction on a matter material to the case and harmful to the defendant. The trial judge, summarizing the facts, charged that if the jury found from the evidence that plaintiff was district attorney; that in the District there was a race track where races were run and bets were made, which some claimed could have been prevented by prosecutions instituted by the plaintiff, and that he did not, in fact, prosecute such persons; if Warner was a candidate for Congress, and the plaintiff supported Pearre, his opponent, and the defendant, Warner, wrote and procured the publication of the article set out in the complaint,

"then you are instructed, as matter of law, that the said article is libelous and your [594] verdict should be for the plaintiff, and the only question for your determination is what amount of damages the plaintiff is entitled to recover by reason of the publication of said article."

This was error, since it was for the jury, and not for the court, to determine the meaning of ambiguous language in the published article. Where words are libelous *per se* the judge can so instruct the jury, leaving to them only the determination of the amount of damages. Where the words are not libelous *per se*, and, in the light of the extrinsic facts averred, could not possibly be construed to have a defamatory meaning, the judge can dismiss the declaration on demurrer, or, during the trial, may withdraw the case from the jury. But there is a middle ground where, though the words are not libelous *per se*, yet, in the light of the extrinsic facts averred, they are susceptible of being construed as having a defamatory meaning. Whether they have such import is a question of fact. In that class of cases the jury must not only determine the existence of the extrinsic circumstances, which it is alleged bring to light the concealed meaning, but they must also determine whether those facts when coupled with the words, make the publication libelous. Van Vechten v. Hopkins, 5 Johns. 219, 4 Am. Dec. 339. The meaning of the words was in dispute, and as that issue of fact was not submitted to the triers of fact, a new trial must be ordered.

This conclusion makes it unnecessary to consider the other questions in the case. The judgments of the Court of Appeals are reversed and the cases are remanded to that court with directions to reverse the judgments of the Supreme Court of the District of Columbia, and to remand the case to that court, with directions to grant a new trial, and for further proceedings in conformity with this opinion.

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[595] JAMES H. WORK, Appt.,
v.
UNITED GLOBE MINES.

(See S. C. Reporter's ed. 595-600.)

Appeal — from territorial supreme court — reversible error — statutory construction — limitation of actions.

1. A territorial supreme court commits no reversible error in holding that a foreign corporation may avail itself of the statute of limitations as a defense in a suit to quiet title, where it found that during the whole of the statutory time such corporation had complied with the local laws, was in possession of the property, paying taxes thereon, and conducting business by means of its use, and was subject there to be sued, having, under the territorial law, an agency for that purpose.

[For other cases, see Appeal and Error, VIII. m, 1; Courts, VII. d, in Digest Sup. Ct. 1908.]

Appeal — from territorial supreme court — reversible error — adverse possession — color of title.

2. A ruling of a territorial supreme court that a reference by way of mere recital to an earlier defective deed in the deed relied upon as color of title in support of a claim of adverse possession did not render the lat-

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NOTE.—As to review by the United States Supreme Court of territorial decisions—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

On the right of foreign corporation to plead the statute of limitations—see note to Winney v. Sandwich Mfg. Co. 18 L.R.A. 524.

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ter deed insufficient for the purpose, where, in every other respect, it is adequate, is not so manifestly erroneous as to require reversal in the Federal Supreme Court on appeal.

[For other cases, see Appeal and Error, VIII. m, 1; Courts, VII. d, in Digest Sup. Ct. 1908.]

[No. 46.]

Argued November 6, 1913. Decided January 5, 1914.

APPEAL from the Supreme Court of the Territory of Arizona to review a decree which affirmed a decree of the District Court of Gila County, in that territory, in favor of defendant in a suit to quiet title. Affirmed.

See same case below, 12 Ariz. 339, 100 Pac. 813.

The facts are stated in the opinion.

Mr. A. L. Piucoffs argued the cause and filed a brief for appellant:

The defendant, being a foreign corporation, cannot set up the statute of limitations.

Larson v. Aultman & T. Co. 86 Wis. 281, 39 Am. St. Rep. 893, 56 N. W. 915; Williams v. Metropolitan Street R. Co. 68 Kan. 17, 64 L.R.A. 794, 104 Am. St. Rep. 377, 74 Pac. 600, 1 Ann. Cas. 6; State v. National Acci. Soc. 103 Wis. 208, 79 N. W. 223; Robinson v. Imperial Silver Min. Co. 5 Nev. 44, 10 Mor. Min. Rep. 370; State v. Central P. R. Co. 10 Nev. 47; Barstow v. Union Consol. Silver Min. Co. 10 Nev. 386; Olcott v. Tioga R. Co. 20 N. Y. 210, 75 Am. Dec. 393; Clarke v. Bank of Mississippi, 10 Ark. 516, 52 Am. Dec. 248, 256, note.

A deed founded on a sale for taxes which on its face is absolutely void does not support adverse possession under a statute of limitations.

Redfield v. Parks, 132 U. S. 239, 33 L. ed. 327, 10 Sup. Ct. Rep. 83; Den ex dem. Saxton v. Hunt, 20 N. J. L. 493; Bradshaw v. Ashley, 180 U. S. 59, 45 L. ed. 423, 21 Sup. Ct. Rep. 297.

The ten years statute of limitations does not apply: (a) because its operation is restricted to the recovery of lands held without deed; and (b) because no such limitation was in existence when plaintiff's cause of action accrued, and the statute must be given a prospective operation.

Redfield v. Parks, supra.

If the statute is intended to have a retrospective effect, it is unconstitutional.

Gilbert v. Ackerman, 159 N. Y. 118, 45 L.R.A. 118, 53 N. E. 753; Price v. Hopkin, 13 Mich. 318.

Mrs. Sarah H. Sorin argued the cause and filed a brief for appellee:

A foreign corporation which had complied with the laws of Arizona governing such corporations, and was continuously engaged in doing business therein during the entire period required to bar this action, and during all that time had a resident agent there upon whom process could be served, can avail itself of the statute of limitations of Arizona and acquire title to real estate therein by adverse possession.

Sidway v. Missouri Land & Live Stock Co. 187 Mo. 673, 86 S. W. 150; Thompson v. Texas Land & Cattle Co. — Tex. Civ. App. —, 24 S. W. 856; United States Exp. Co. v. Ware, 20 Wall. 543, 22 L. ed. 422; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; Volivar v. Richmond Cedar Works, 152 N. C. 656, 68 S. E. 200, 21 Ann. Cas. 623; Southern R. Co. v. Mayes, 51 C. C. A. 70, 113 Fed. 84; Wehrenberg v. New York, N. H. & H. R. Co. 124 App. Div. 205, 108 N. Y. Supp. 704; McCabe v. Illinois C. R. Co. 4 McCrary, 492, 13 Fed. 827; Turcott v. Yazoo & M. Valley R. Co. 101 Tenn. 102, 40 L.R.A. 768, 70 Am. St. Rep. 661, 45 S. W. 1067; O'Connor v. Ætna L. Ins. Co. 67 Neb. 122, 93 N. W. 137, 99 N. W. 845; Wall v. Chicago & N. W. R. Co. 69 Iowa, 501, 29 N. W. 427; Tiller v. St. Louis & S. F. R. Co. 189 Fed. 994; Lawrence v. Ballou, 50 Cal. 258; Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. 14 N. D. 147, 70 L.R.A. 814, 116 Am. St. Rep. 642, 103 N. W. 915, 8 Ann. Cas. 1160; 25 Cyc. 1243.

The construction of this statute by the supreme court of the territory of Arizona is of great, if not controlling, weight.

Lewis v. Herrera, 208 U. S. 309, 52 L. ed. 506, 28 Sup. Ct. Rep. 412.

Paragraph 2299 of the Civil Code of 1887, which was the statute in effect in Arizona in 1893, when defendant's adverse possession commenced, and which was re-enacted as ¶ 2937 of the Revised Statutes of 1901, the statute in effect at the time this action was commenced, was adopted from Texas, and is identical with article 3342, Revised Statutes of Texas. This statute had been interpreted by the supreme court of Texas prior to its adoption in Arizona. Our legislature is therefore presumed to have adopted such interpretation, and the Texas decisions construing the statute control.

Goldman v. Sotelo, 8 Ariz. 85, 68 Pac. 558; Henrietta Min. & Mill. Mfg. Co. v. Gardner, 173 U. S. 123, 43 L. ed. 637, 19 Sup. Ct. Rep. 327; Richmond & A. R. Co. v. R. A. Patterson Tobacco Co. 169 U. S. 311, 42 L. ed.

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759, 18 Sup. Ct. Rep. 335; Metropolitan R. Co. v. Moore, 121 U. S. 558, 30 L. ed. 1022, 7 Sup. Ct. Rep. 1334.

The facts establish a performance of every requisite of the five-years statute of limitations. It appears therefrom that the deed from James and Dodge to appellee was recorded February 17, 1893, and that for more than five years prior to the institution of plaintiff's suit defendant held peaceable and adverse possession of the lands in dispute, working, using, and enjoying the same, claiming title thereto under that duly recorded deed, and paying all taxes due thereon. This was sufficient to vest the title in the defendant.

Stubblefield v. Hanson, — Tex. Civ. App. —, 94 S. W. 406; Long v. Thompson & T. Lumber Co. — Tex. Civ. App. —, 140 S. W. 501; Clark v. Asbury, — Tex. Civ. App. —, 134 S. W. 286.

Any instrument in the form of a deed, and not void upon its face, is sufficient as the basis of the five-years statute of limitation. It is entirely immaterial on a question of limitations and for the purpose of the defense of the five-years statute or the assertion of title by adverse possession thereunder what title appellee's grantors had to the land, or whether they owned any interest in it at all.

Hunton v. Nichols, 55 Tex. 230; Fry v. Baker, 59 Tex. 404; Harris v. Bryson, 34 Tex. Civ. App. 532, 80 S. W. 105; Brown v. O'Brien, 11 Tex. Civ. App. 459, 33 S. W. 267; Midkiff v. Stephens, 9 Tex. Civ. App. 411, 29 S. W. 54; Harris v. Wells, 85 Tex. 312, 20 S. W. 68; McDonough v. Jefferson County, 79 Tex. 535, 15 S. W. 490; Goldman v. Sotelo, 8 Ariz. 85, 68 Pac. 558.

The bar of the statute will not be prevented because a deed is inoperative by reason of extraneous circumstances.

Schleicher v. Gatlin, 85 Tex. 270, 20 S. W. 120.

The nature of the instrument as a conveyance of the land is not changed by the subsequent reference to the supervisor's deed.

Kirby v. Pitchfork Land & Cattle Co. — Tex. Civ. App. —, 129 S. W. 1151.

Good faith is never essential under the five or ten years statutes of limitation.

McDonough v. Jefferson County, 79 Tex. 535; Kinney v. Vinson, 32 Tex. 126; Tioga R. Co. v. Blossburg & C. R. Co. 20 Wall. 137, 22 L. ed. 331.

The facts are sufficient to establish appellee's title by adverse possession under the ten-years statute of limitations.

Kinney v. Vinson, 32 Tex. 126; Bruce v. Washington, 80 Tex. 368, 15 S. W. 1104; Carlock v. Willard, — Tex. Civ. App. —, 149 S. W. 363; Ball v. Filba, — Tex. Civ. App. —, 153 S. W. 685; MacGregor v. Thompson, 7 Tex. Civ. App. 32, 26 S. W. 649; Cox v. Sherman Hotel Co. — Tex. Civ. App. —, 47 S. W. 808; Link v. Bland, 43 Tex. Civ. App. 519, 95 S. W. 1110; Wiess v. Goodhue, 46 Tex. Civ. App. 142, 102 S. W. 793.

The ten-years statute of limitations of Arizona took effect September 1, 1901, and operated on causes of action then existing.

Cummings v. Rosenberg, 12 Ariz. 327, 100 Pac. 810; Lewis's Sutherland, Stat. Constr. § 175; Endlich, Interpretation of Statutes, 489; Russell v. H. C. Akeley Lumber Co. 45 Minn. 376, 48 N. W. 3; Osborne v. Lindstrom, 9 N. D. 1, 46 L.R.A. 715, 81 Am. St. Rep. 516, 81 N. W. 72.

The legislature may prescribe a limitation for the bringing of suits where none previously existed that will operate upon rights of action which accrued before it became effective, provided only that a reasonable time be given by the new law for the commencement of suit before the bar takes effect.

Wheeler v. Jackson, 137 U. S. 245, 34 L. ed. 659, 11 Sup. Ct. Rep. 76; Terry v. Anderson, 95 U. S. 628, 632, 24 L. ed. 365, 366; Koshkonong v. Burton, 104 U. S. 668, 26 L. ed. 886; Mitchell v. Clark, 110 U. S. 633, 28 L. ed. 279, 4 Sup. Ct. Rep. 170, 312; Soper v. Lawrence Bros. Co. 201 U. S. 359, 50 L. ed. 788, 26 Sup. Ct. Rep. 473; Bigelow v. Bemis, 2 Allen, 496; Smith v. Morrison, 22 Pick. 432; Merchants' Nat. Bank v. Braithwaite, 7 N. D. 358, 66 Am. St. Rep. 653, 75 N. W. 244; Hill v. Townley, 45 Minn. 167, 47 N. W. 653.

The period between the passage of the act and its going into effect may be considered in determining the question of reasonable time.

Cummings v. Rosenberg, 12 Ariz. 327, 100 Pac. 810; Lewis's Sutherland, Stat. Constr. § 707, and notes; Russell v. H. C. Akeley Lumber Co. 45 Minn. 376, 48 N. W. 3; Merchants' Nat. Bank v. Braithwaite, 7 N. D. 358, 66 Am. St. Rep. 653, 75 N. W. 244; Wrightman v. Boone County, 82 Fed. 412; Osborne v. Lindstrom, 9 N. D. 1, 46 L.R.A. 715, 81 Am. St. Rep. 516, 81 N. W. 72.

Adverse possession of land for the period fixed by the statute of limitations confers title thereto which may be quieted in an action brought for that purpose by the party asserting such title.

Pacheco v. Wilson, 2 Ariz. 411, 18 Pac. 597; Moody v. Holcomb, 26 Tex. 714; Smith v. Montes, 11 Tex. 24; Jones v. Creech, — Tex. Civ. App. —, 108 S. W. 975; Glasscock v. Dimmitt, — Tex. Civ. App. —, 141 S. W. 822; Ball v. Filba, — Tex. Civ. App. —, 153 S. W. 685; Independent Dist. v. Fagen, 94 Iowa, 676, 63 N. W. 456; Lougee v. Shuhart, 127 Iowa, 173, 102 N. W. 1125; Quinn v. Quinn, 76 Iowa, 565, 41 N. W. 316; Sharon

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v. Tucker, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 720; Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. Rep. 209.

The title acquired by adverse possession under the statute of limitations is title in fee. The statute of limitations invests the possessor with title as fully and effectually as if the title had been acquired by patent or by absolute conveyance from the holder in fee.

Bridges v. Johnson, 69 Tex. 717, 7 S. W. 506; Moody v. Holcomb, 26 Tex. 719; Hall v. Law, 102 U. S. 461, 466, 26 L. ed. 217, 219; Harpending v. Reformed Protestant Dutch Church, 16 Pet. 455, 492, 10 L. ed. 1029, 1043; Leffingwell v. Warren, 2 Black, 599, 605, 17 L. ed. 261, 263; Echols v. Hubbard, 90 Ala. 309, 7 So. 817; Murray v. Hoyle, 97 Ala. 588, 11 So. 797.

Mr. Chief Justice White delivered the opinion of the court:

We confine our statement to so much of the case as is necessary to develop the matters for decision.

Work, the appellant, who was plaintiff in the trial court, sued the United Globe Mines, the appellee, to quiet his title to certain described mining property, averring that he had the fee-simple title to the same, and although defendant asserted some adverse right, it had no title or interest in the property. The defendant, averring itself to be a New York corporation having its principle place of business in Globe, Gila county, Arizona, in its answer, besides traversing the averments of the complaint, alleged that it was entitled to the possession of the property sued for, and was the owner, because for more than five years before the commencement of the suit it had been

"in the actual, continuous, uninterrupted, peaceable, exclusive, open, notorious, hostile, and adverse possession of said premises, and has been cultivating, using, enjoying, and working the same, paying taxes thereon, and holding and claiming the same and the title thereto adversely to plaintiff and all the world, under a deed from William E. Dodge and D. Willis James, conveying said premises to [598] this defendant, which deed is dated January 31st, A. D., 1893, and which said deed was duly recorded on the 17th day of February, A. D., 1893, in the office of the county recorder of Gila county, said territory, in book 3, Deeds of Mines, at page 299;

"And defendant alleges that the cause of action, if any, stated in the complaint herein, did not accrue within five years next before the commencement of this action."

In addition, as a second ground, the ownership of the property was asserted to have been acquired by a period of ten years' limitation, the benefit of which was expressly pleaded. The prayer of the answer was not only that the claim of the plaintiff be rejected, but that there be affirmative relief adjudging the title of the property to be in the mining company.

The case was submitted to the trial court upon an agreed statement of facts, and was decided in favor of the defendant, and a judgment of affirmance followed in the supreme court of the state to which the case was taken, that judgment being the one to which this writ of error is directed. The court, for the purpose of its consideration of the case, adopted the statement of facts acted upon by the trial court.

Three principal questions were decided: (a) That the United Globe Mines, although a foreign corporation, was entitled to avail itself of the statute of limitations; (b) that the deed which the United Globe Mines asserted as the basis of its claim to a right of ownership resulting from the five years' limitation under § 2937 of the Revised Statutes of Arizona for 1901 was adequate, and hence the United Globe Mines was the owner of the property by limitation; and (c) besides that, the facts proven as the basis of the ten year limitation under § 2938 of the Revised Statutes of Arizona for 1901 were adequate to bring the United Globe Mines within the embrace of the statute, and therefore to additionally sustain its claim of ownership [599] on such ground. For the purposes of this appeal a number of grounds of error were asserted, but we content ourselves with the mere statement that we think they are without merit because, in the argument at bar for the appellant, only the rulings of the court below concerning the three propositions to which we have referred are discussed and insisted upon as a basis for reversal. We come, then, briefly to consider those propositions.

At the outset it is to be observed that the questions are inherently and in the strictest sense local in character, depending as they do upon the right to have the benefit in the territory of the statutes of limitation concerning real estate, and the application of such statutes to the case as made by the defendant, the United Globe Mines. But as to questions of such character the settled rule is that this court "accepts the construction which the territorial court has placed upon a local statute;" in other words, will not disregard or reverse the same unless constrained to do so by the clearest conviction of serious error. Phœnix R. Co. v. Landis, where a full list of the applicable cases is collected,

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decided December 22 last [231 U. S. 578, ante, 377, 34 Sup. Ct. Rep. 179]. With our duty thus defined the case is readily disposed of. As to the first question, the court below expressly found that during the whole of the statutory time the United Globe Mines, although a nonresident in the sense that it was a corporation of foreign organization, had complied with the laws of Arizona, was in possession of the property, paying taxes thereon and conducting business by means of its use, and was subject there to be sued, having under the law of the territory, an agency for that purpose. It is manifest under these conditions, if there be any ground for a different conclusion, which we do not intimate, there is no possible room for holding that such serious error was committed as to constrain us to reverse. As to the second proposition, —the five years' statute,—the only contention is that the court erred in holding that [600] a reference in the deed which was relied upon to the origin of title did not operate to render the deed relied on insufficient for the purposes of the statute, although it was in every other respect adequate. That is to say, the contention is that the sufficiency of the deed should have been tested not by its own adequacy, but by the insufficiency of another deed, not involved in the case, simply because such other deed by way of mere recital was referred to in the deed which was relied on, and upon which deed the application of the bar of the statute solely depended. We do not test the accuracy of the reasoning upon which the contention must rest, nor comprehensively review the authorities, since in our opinion it cannot be said, either from the point of view of reason, or from a consideration of the decided cases,† that there is ground for holding that there was such manifest error committed as to justify reversal. In saying this we intimate no doubt as to the correctness of the ruling below made; our sole purpose is to abstain from deciding a purely local question in the absence of those conditions which render it necessary for us to do so,—that is, the existence of plain error of so serious a nature as to require correction at our hands.

Affirmed.

†Jackson ex dem. Bradstreet v. Huntington, 5 Pet. 402, 447, 8 L. ed. 170, 186; Clarke v. Courtney, 5 Pet. 319, 354, 8 L. ed. 140, 152; Pillow v. Roberts, 13 How. 472, 14 L. ed. 228; Wright v. Mattison, 18 How. 50, 15 L. ed. 280; Cameron v. United States, 148 U. S. 301, 37 L. ed. 459, 13 Sup. Ct. Rep. 595.

[601] ADA E. H. VAN SYCKEL, in Her Own Right, and Margaret Ethel Van Syckel et al., by Ada E. H. Van Syckel, Their Next Friend, Appts.,

v.

JUAN JOSE ARSUAGA et al., Partners under the Firm Name of Sobrinos de Ezquiaga, and Paul A. English.

(See S. C. Reporter's ed. 601-615.)

Appeal — scope of review — findings of fact.

1. The findings of fact may be reviewed by the Federal Supreme Court on an appeal from the district court of the United States for Porto Rico so far as is necessary to pass upon the objections that such findings were, on the face of the record, manifestly based solely upon inferences drawn from parol proof, conflicting with the declarations of the parties contained in notarial acts, and which, under the local law, were not lawfully susceptible of being overthrown by parol proof, and that the necessary effect of such findings was to give effect to the parties' own fraud and deceit, since these propositions in their final analysis challenge the adequacy of the findings to sustain the legal conclusions based upon them.

[For other cases, see Appeal and Error, VIII. 1, in Digest Sup. Ct. 1908.]

Evidence — parol and extrinsic proof concerning writings — ambiguity.

2. Intrinsic ambiguity in a document or contract justifies by the express terms of Porto Rico Laws 1905, p. 73, § 28, the right to resort to extrinsic proof to dispel it.

[For other cases, see Evidence, VI. 1, in Digest Sup. Ct. 1908.]

Evidence — parol and extrinsic proof concerning writings — ambiguity.

3. There is such ambiguity in articles of copartnership concerning the method of carrying on the business for which the partnership was organized as to justify the admission of explanatory proof, where the partnership agreement is silent on the subject, and the property, one half of which was bought from one partner by the others, and the whole of which was then put by the joint owners into the firm as its sole capital in trade, appears on the face of the agreement to be an inventory of the assets and property of a pre-existing dairy and cattle business, and where, included in the property bought, was a sum of money stated to be "value of working capital," suggesting

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over Porto Rican courts—see note to Garrozi v. Dastas, 51 L. ed. U. S. 369.

Generally, on parol evidence to vary written contract—see notes to Durkin v. Cobleigh, 17 L.R.A. 270, and Atkinson v. Cummins, 13 L. ed. U. S. 223.

As to coming into equity with clean hands —see notes to Pittman v. Pittman, 11 L.R.A. 458, and Medford v. Levy, 2 L.R.A. 368.

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a present purpose to continue an existing business.

[For other cases, see Evidence, VI. i, in Digest Sup. Ct. 1908.]

Evidence — parol and extrinsic proof concerning writings — ambiguity.

4. Including in an agreement to form a firm to continue the dairy and cattle business previously conducted on leased land by one of the partners a paramount mortgage debt on the leased land as part of the plant and assets transferred by him to the partnership in itself creates ambiguity as to whether, by the transfer of the paramount right, it was not intended also to pass to the firm the subordinate lease right, which ambiguity becomes so apparent as to justify the admission of explanatory proof when it is considered that the established business was carried on by means of the leased property, and that the possession of that property was a necessary prerequisite to the continued conduct of the business, and that the interdependence of the lease and mortgage was so great that a transfer of the mortgage to the lessee, because he was the owner of the lease, had been judicially ordered, and that the partnership agreement required the transfer of the mortgage to a third person by legal subrogation if the mortgagor should so exact.

[For other cases, see Evidence, VI. i, in Digest Sup. Ct. 1908.]

Equity — clean hands — estoppel by wrongful act.

5. The surviving members of a partnership to which the deceased partner had transferred, by the partnership agreement, a lease of the land on which the firm business was to be conducted, together with a paramount mortgage thereon, are not precluded, on the theory that they are attempting to profit by their own fraud and wrongdoing, from insisting in equity, as against his widow and heirs, that such lease was extinguished by the purchase of the land by the firm at a sale on foreclosure of the mortgage, although, prior to the foreclosure proceedings, the firm and such partner, who still appeared upon the public records to be the owner of the lease, had entered into an agreement which they placed on record, whereby the lease was to have priority over the mortgage, since this was but the exercise of a right which the firm had as holder of both lease and mortgage, to prevent the deprivation of the one right by the enforcement of the other.

[For other cases, see Equity, 311–315, Estoppel, 226–232, in Digest Sup. Ct. 1908.]

[No. 69.]

Argued November 13, 1913. Decided January 5, 1014.

APPEAL from the District Court of the United States for Porto Rico to review a decree in a suit for the dissolution of a partnership which finds a lease to have been extinguished by a purchase of the leased property at a foreclosure sale. Affirmed.

See same case below on interlocutory hearing, 4 Porto Rico Fed. Rep. 222.

The facts are stated in the opinion.

Mr. N. B. K. Pettingill argued the cause, and, with Mr. George H. Lamar, filed a brief for appellants:

Equity will never relieve parties from the consequences of their contracts unless they have been induced to enter into such contracts by fraud, deception, accident, or mistake. Nothing resembling either of these things is alleged in this cross bill; on the contrary, it is averred and insisted that both parties to the contract knew just what they were doing and the exact purpose to be accomplished; that that purpose affected only third persons, and as between the parties themselves it was to be simply as so much waste paper. Courts will not hear parties so stultify themselves.

Walden v. Skinner, 101 U. S. 577, 584, 25 L. ed. 963, 966; Brown v. Slee, 103 U. S. 828, 838, 26 L. ed. 618, 622; Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 318, 46 L. ed. 213, 218, 22 Sup. Ct. Rep. 133; Simpson v. United States, 199 U. S. 397, 398, 50 L. ed. 245, 26 Sup. Ct. Rep. 54.

Where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

Davis v. Wakelee, 156 U. S. 680, 689, 39 L. ed. 578, 584, 15 Sup. Ct. Rep. 555.

The principle underlying our law of estoppel is also broadly recognized in the system of law governing Porto Rico,—in fact, it is one of the maxims of the Spanish law. It has been described by the supreme court of Porto Rico as "the moral and juridical principle that no one can deny his own acts."

Fernández v. Gutiérrez del Arroyo, 3 Castro Dec. de P. R. 37, 42, 10 P. R. R. 59.

In the case of each document it is attempted to set up a contemporary verbal agreement, vitally modifying—in the case of the document of July 27, 1901, even annulling—the solemn writing. We had supposed it to be elementary that such allegations could not be a basis for such action, unless it were averred that such contemporary matter would show fraud or mistake in securing complainant's signature to the written document.

Seitz v. Brewers' Refrigerating Mach. Co. 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46.

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exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them.

Atlantic Delaine Co. v. James, 94 U. S. 207, 24 L. ed. 112.

The cross bill showed that complainants therein did not come into court with clean hands.

Creath v. Sims, 5 How. 192, 204, 12 L. ed. 111, 117; Sample v. Barnes, 14 How. 70, 73, 14 L. ed. 330, 332; Randall v. Howard, 2 Black, 585, 17 L. ed. 269; Wheeler v. Sage, 1 Wall. 518, 17 L. ed. 646; Scholey v. Rew, 23 Wall. 331, 23 L. ed. 99; Wolf v. Stix, 99 U. S. 7, 25 L. ed. 312; Ballard v. Searls, 130 U. S. 55, 32 L. ed. 848, 9 Sup. Ct. Rep. 418; Dent v. Ferguson, 132 U. S. 50, 66, 33 L. ed. 242, 248, 10 Sup. Ct. Rep. 13.

Mr. Charles F. Carusi argued the cause and filed a brief for appellees:

Evidence is always admissible to prevent the fraudulent use of a written instrument by showing that it was not intended to be operative between the immediate parties.

Michels v. Olmstead, 157 U. S. 198, 39 L. ed. 671, 15 Sup. Ct. Rep. 580; Burke v. Dulaney, 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816; Hartford F. Ins. Co. v. Wilson, 187 U. S. 467, 47 L. ed. 261, 23 Sup. Ct. Rep. 189.

Mr. Chief Justice White delivered the opinion of the court:

When the court below delivered its opinion and made [602] a statement of facts, it did not enter a final decree, but directed a restatement of certain accounts to be made, and ordered a survey and report as to the condition of certain real estate, to the end that thereafter the case might be finally disposed of. Fixing their attention upon the controlling force of the reasons which the court had stated in its opinion, and the decisive character of the findings embodied in the statement of facts, the parties who believed themselves aggrieved at once appealed, but their appeal was dismissed for want of a final judgment. 220 U. S. 601, 55 L. ed. 603, 31 Sup. Ct. Rep. 716. The case is now here on an appeal from a final judgment, and the contentions previously relied upon to secure a reversal are applicable, and now require to be decided.

This suit was begun by the widow and heirs of Paul Van Syckel to liquidate and distribute the assets of two partnerships of which he was a member, *viz.*, P. Van Syckel & Company and the Santa Cruz Sugar Company. The defendants were the other members of the firms. From the petition and the documents annexed, from the answer, and a cross petition filed by the defendants to construe and limit a document referred to as an agreement for "postponement of rights," as also from the issues taken on the cross petition, and from the opinion of the court and the statement of facts which it made, it is beyond question that the only controversy between the partners arose from an assertion by the widow and heirs of Van Syckel that they were the holders of a subsisting lease covering an important piece of partnership real estate.

The solution of this controversy depended upon the answers proper to be made to the following questions: 1st. Did the lease which was owned by Van Syckel prior to the formation of the partnership of P. Van Syckel & Company pass to that firm as the result of its organization and the stipulations contained in the articles of partnership? 2d. If the firm became the owner of the lease, was such lease extinguished by confusion (Civil Code, § 1192) [603] as the result of the purchase by the firm of the leased property under a foreclosure sale? and 3d, even although, as a general rule, the lease was extinguished under the conditions stated, could the surviving members of the firm be heard to deny the existence of the lease as against the widow and heirs of Van Syckel, in view of the public record concerning the lease, of the stipulations of the agreement styled "postponement of rights," of the foreclosure proceedings, and of other declarations made in other notarial acts to which the partnership and the partners were parties?

Concluding that these questions required an affirmative answer, the court below rejected the claim based upon the existence of the alleged lease. The reasons which led to this conclusion were stated in an elaborate opinion, and the facts which were deemed controlling were enumerated in a statement of facts. While conceding that there is no power to review the facts, and while further conceding that if effect be given to the facts found, the judgment is clearly right, it is yet insisted by the appellants that there should be a reversal upon the following grounds: (a) Because the ultimate findings made by the court as to the nonexistence of the lease were, on the face of the record, manifestly alone based upon inferences drawn from parol proof conflicting with the declarations of the parties contained in notarial acts, and which, under the local law, were not lawfully susceptible of being overthrown by

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parol proof; and (b) because, moreover, error is manifest on the face of the findings as well as in the legal conclusions based on the findings, because it was impossible to conclude that the lease had no existence without permitting the defendants to repudiate their declarations made in notarial acts, to base a claim of right upon their deceit and fraud, and to discharge themselves and their property from an obligation by giving efficacy to their wrongdoing. As these propositions in their final analysis challenge the adequacy of the findings made to sustain the legal conclusions [604] based on them, it is our duty to consider and to decide them. As a prelude to doing so, we make a statement of the case as established by the findings, and as elucidated by the opinion of the court and the documents therein referred to.

In June, 1897, by notarial act, Paul Van Syckel leased from one Montilla, the Santa Cruz plantation except a small portion previously leased to someone else. The rent was payable monthly and the term was indeterminate; that is, was to last as long as Van Syckel chose to pay rent. The property when leased was encumbered by mortgage. Van Syckel used the leased property for the business of raising cattle and carrying on a dairy. The registration officer refusing to record the lease because of the uncertainty of the term, Van Syckel, in October 1899, made a notarial statement, fixing a term of six years, and reserving the right, at will, to fix future terms. The registering officer refusing to record this statement, Van Syckel sued to compel its registry, and was successful, the supreme court of Porto Rico (or the chief justice thereof) having affirmed an order directing the registry to be made. The holder of the mortgage on the leased property having commenced executory proceedings to foreclose, Van Syckel sued in the provisional court created by the American military authority to enjoin on the ground of an alleged fraudulent combination between the debtor and creditor by foreclosure of the paramount mortgage to wipe out the lease and impliedly, on the further ground that, having an interest, as lessee, in paying the paramount mortgage debt, he was entitled to do so and take a creditor's legal subrogation. Civil Code, §§ 1203, 1210, and 1211. The foreclosure proceeding as perpetually enjoined. The mortgage creditor acquiescing in the result, in March, 1900, transferred the debt to Van Syckel. During these proceedings there were pending in the local courts, suits in one or another [605] form, brought by Montilla, assailing the rights of Van Syckel. The exact character of these suits is not disclosed, but they are referred to in the findings, and a statement on the subject is contained in Montilla v. Van Syckel, 8 P. R. R. 153, 162.

In June, 1900, before a notary, Van Syckel and the firm of Sobrinos de Ezquiaga, an established and reputable commercial firm, formed a partnership styled P. Van Syckel & Company. The act recited that Van Syckel was the owner of enumerated property, *viz.:* a small farm, a lot of cattle "as per inventory," a lot of personal property, constituting the plant of a dairy, such as cans, bottles, milk straining apparatus, carts, milk wagons, etc., etc., and besides a mortgage paper secured on the Santa Cruz plantation, inventoried at about 11,000 pesos; and lastly, a sum of money stated in the inventory as "value of working capital," amounting to 1111 pesos. These various items gave a total value of 30,000 pesos, and one half, 15,000 pesos, was paid in cash by Sobrinos de Ezquiaga to Van Syckel as the purchase of one half the property which thus became jointly owned, and was by the joint owners, Van Syckel and Sobrinos de Ezquiaga, established as the capital of the new firm. The duration of the firm was two years, and the purpose of its organization was declared to be the carrying on of a dairy business and the purchase of cattle. There were careful provisions as to the keeping and rendering of the accounts of the firm, as to the equal power of management by the partners, and an equal division between them of profits. There was a stipulation relating to the mortgage debt on Santa Cruz, providing that if the debtor, Montilla, paid the same, the sum received should take the place of the debt as firm capital, and the firm should not be dissolved thereby, and the same result, it was expressly provided, would follow in case Montilla should "recuperate the debt" and require an assignment of the same; that is, in case [606] Montilla, by operation of legal subrogation, compelled a transfer of the debt to another.

The year following, in July, 1901, the firm of P. Van Syckel & Company and P. Van Syckel individually were parties to a notarial act styled "postponement of right," by which the firm, after reciting its ownership of the mortgage claim on the Santa Cruz property and the paramount character of the mortgage as to a lease on the property held by Van Syckel, waived the priority of the mortgage, gave precedence to the lease, and expressly renounced all right of the mortgage creditor "to rescind the lease" as against Van Syckel and his "*causa habientes.*" This act was placed on the public records. In September, 1901, Van Syckel & Company commenced executory proceedings against Montilla to enforce

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their mortgage debt, and in due course, in November, 1911, the property was adjudicated to them for two thirds of its estimated value, and, as was customary under the local law, the state of the record was referred to, and the priority of the recorded lease was recited.

In May, 1902, the firm of P. Van Syckel & Company was, by notarial agreement, extended for a period of four years to the 1st day of June, 1906. The articles of extension recited the original organization, the purchase from Van Syckel of the property which constituted the capital of the firm, including the debt secured by mortgage upon Santa Cruz. It then recited the foreclosure and the purchase of the property at less than the face value of the mortgage debt, and stipulated that the capital of the new firm should not be thereby diminished as the property took the place of the debt as a partnership asset. It would seem that after the foreclosure and probably after the extension of the firm, the suits brought by Montilla in the local courts, to which we have previously referred, were decided against him; but in December, 1902, a new suit in the Porto Rican courts was by him [607] commenced against Van Syckel individually and the firm of Van Syckel & Company and its members to rescind the lease and to vacate the foreclosure proceedings, and to recover the Santa Cruz property. Speaking generally, as to the lease, the ground of attack was that it was void for uncertainty, that the notarial declaration of Van Syckel as to the six-year term was unilateral and created no obligation, and that his reservation of future right to fix terms at his will was purely protestative and void for uncertainty. As to the mortgage debt, the assertion was that the transfer by which Van Syckel had acquired it, consequent on the decree of the provisional court, had extinguished the mortgage by payment, as no subrogation was expressed in the transfer or could, by operation of law, have resulted therefrom. In the meanwhile and before the extension of the partnership, Van Syckel removed from Porto Rico with his family to reside in Cuba, but left a power of attorney with his partners to carry on the business of the firm, he returning at intervals to Porto Rico to supervise and participate in the business. Subsequently, in leasing a portion of the Santa Cruz property, the lease was made to conform to the state of the public records, and therefore was so drawn as to pass not only the rights of the firm, but the right of Van Syckel under his apparently existing lease. In 1905, in conjunction with one English, the firm of Van Syckel & Company formed an agricultural partnership called the Santa Cruz Sugar Company, for the purpose of developing the sugar industry on the Santa Cruz property, and in that contract also the parties so acted as to make their agreement conform to the public records; that is, so as to recognize the lease apparently existing in the name of Van Syckel, as also the rights of the partnership in and to the property.

During the interval, the suit last referred to, brought by Montilla, was decided against him in the lower court, and on his appeal in March, 1905, the judgment of the lower [608] court was affirmed by the supreme court of Porto Rico, Montilla prosecuting an appeal to this court; but shortly thereafter the appeal was dismissed because of a compromise effected with Montilla by which the firm of Van Syckel & Company paid a small sum in cash, thus terminating the long controversy. Shortly prior, however, to this being done, Van Syckel died in Cuba, and the partnership having terminated not only as the result of his death, but by lapse of time, a controversy concerning the lease supervened and this suit followed.

Dealing with the facts which we have recited and the other proof before it, the court found that the sale made by Van Syckel to the firm of Sobrinos de Ezquiaga consisted of one half the plant and assets of a dairy establishment and cattle farm by him carried on in part, at least, on the leased property, and that not only as the result of implications necessarily arising from the provisions of the articles of partnership, but from the proof as to the situation of the parties and the manner in which they gave effect to the articles of partnership, it clearly resulted that the lease passed to the firm as a part and parcel of the contract by which the firm became the holder of the assets and plant.

Thus the court said:

"It is our opinion that Mr. Van Syckel sold a full half interest in his dairy business and all that constituted it, which included every right he had to all property concerned, for 15,000 pesos to respondents Sobrinos de Ezquiaga." [4 Porto Rico Fed. Rep. 241].

And again, speaking on the same subject:

"We fail to see the force of the claim that Van Syckel put in a mere 'credit' or mortgage debt as an asset of this firm, the business of which was to carry on a dairy, and it looks ridiculous to say that these respondents simply invested in half of an interest-bearing mortgage. Van Syckel himself had been using this ranch for some time [609] previous for this same purpose as a dairy ranch, and the firm continued to use

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it for the same purpose for some time thereafter. The firm could not ordinarily promote a dairy business by simply owning a mortgage which might be paid off any moment, so it seems to us to be plain that Van Syckel intended to include the possession which included the lease in the assets of the firm."

And this conclusion as to the ownership of the lease by the firm as the result of the formation of the partnership was reinforced by the following statements as to the conduct of the partners, their knowledge of the business, their participation therein, the accounts rendered concerning the same, and the profits distributed. The court said:

"There is not a word of evidence in the case which shows that P. Van Syckel & Company ever paid any rent to Paul Van Syckel for this lease, or have ever given him any credit for any such rent, or that Van Syckel ever asked the firm to so give him credit for any rent, although it is in evidence that Sobrinos de Ezquiaga sent Van Syckel numerous statements of their accounts of the firm's business while he was then living in Cuba."

And again:

"The overwhelming weight of the evidence in the case shows that Paul Van Syckel was just as prominent and even a much more active party than Sobrinos de Ezquiaga where in all defenses against or attacks upon Montilla. A reading of the correspondence that is in the evidence will convince anyone of this."

Indeed, the conclusive effect of the comprehensive findings of the court concerning the ownership by the partnership of the alleged lease is fully illustrated by finding 14, a portion of which we quote, and finding 17.

"14.

"The said Paul Van Syckel during his lifetime agreed with Sobrinos de Ezquiaga by the terms of his partnership [610] in the firm of P. Van Syckel & Company and otherwise, that said firm of P. Van Syckel & Company should be the sole and exclusive owners of the said farm "Santa Cruz," free and clear of any claims upon the part of said Paul Van Syckel by reason of said lease of June 23, 1897. . . .

"17.

"The evidence in this case is clear, unequivocal, and convincing that this lease of June 23, 1897, was to have no life or effect as between the parties in their accounting during or after the date of the partnership, but that the same was merged in the fee at the time of the adjudication thereof to said partnership of P. Van Syckel & Company, if not before."

Absolutely demonstrating, as these findings do, the want of merit in the contention that there was error in holding that the lease had no existence, if there was power to make and give effect to the finding, we come to consider those questions which, at the outset, we pointed out, are the only issues in the case.

Passing whether the face of the notarial acts to which we have referred do not, in and of themselves, fully establish the transfer of the lease by Van Syckel to the firm, and its extinguishment by confusion as the result of the purchase at the foreclosure sale, but without intimating any opinion whatever to the contrary, let us consider the subject in a somewhat narrower aspect.

Undoubtedly, under the local law (Laws of Porto Rico 1905, p. 73) if there was intrinsic ambiguity, the right to resort to extraneous proof to dispel it obtained; that is, proof, to use the words of § 28 of the statute, showing "the circumstances under which it (the document or contract) was made, including the situation of the subject of the instrument, and of the parties to it . . . so that the judge be placed in the position of those whose language he is to interpret."

[611] Was there, then, such ambiguity in the articles of partnership concerning the method of carrying on the business for which the partnership was organized as to justify the admission of explanatory proof?

The articles leave no doubt concerning what the business of the partnership was to be; that is, the carrying on of a dairy and the purchase of cattle; but there is nothing in the articles which expressly shows where and how the proposed business of the firm was to be conducted, and when light on this subject is sought from the implications of the text, to say the least, such a state of mental uncertainty is engendered as plainly justifies the resort to proof to clear up the ambiguity. We say this because in the first place the property, one half of which was bought from Van Syckel by Sobrinos de Ezquiaga, and the whole of which was then put by the joint owners into the firm as its sole capital in trade, on the face of the paper appeared to be an inventory of the assets and property of a pre-existing business, which, from the nature and character of a large part of the tangible property sold, was a dairy and cattle business. In the second place because, included in the articles bought, was a sum of money stated to be "value of working capital," which so persuasively suggests the present purpose to continue an existing business as beyond all doubt to justify proof as to the situation of the parties and of the subject-matter to which the contract related. The proof, then, being ad-

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missible, and establishing that Van Syckel was engaged in a dairy and cattle business upon the Santa Cruz property, and that the assets and capital, one half of which he sold, constituted the plant and assets of such business, which the firm continued to conduct, the question is, Was there such ambiguity in the contract as to the transfer of the lease as to again justify proof beyond the terms of the instrument to clear up that situation? Of this also we think there can be no doubt, for the following reason: The inclusion among the [612] transferred assets of the debt secured by mortgage upon the Santa Cruz property, and the dominancy of that debt as to the lease, in and of itself creates obscurity as to whether, by the transfer of the paramount right, it was not contemplated to also pass to the firm the subordinate lease right, and that ambiguity becomes more apparent when it is considered that the established business was carried on by means of the Santa Cruz property, and that possession of that property was necessarily a prerequisite to the continued conduct of the business. Indeed, this ambiguity becomes all the more marked when it is borne in mind that the interdependence of the lease and the mortgage was so great that the judicial power had compelled a transfer to Van Syckel of the mortgage because he was the owner of the lease. Certainly, as the possession of the Santa Cruz property for the purpose of the business was essential, and that possession could only be enjoyed by the firm as a consequence of the right to the lease or the rights to be possibly acquired as the result of the foreclosure of the mortgage, the inquiry as to whether one or both rights were intended to be embraced was essential to a comprehension of the contract, and its solution was made so ambiguous by particular provisions of the contract as to justify proof for its clarification. This arises from the provision requiring the transfer of the mortgage to a third person by legal subrogation in the event Montilla should so exact. The resulting ambiguity is apparent since in such event, unless the mortgage was subordinated by agreement or by operation of law to the lease, the destruction or impairment of the rights which it was the obvious intention of the partnership to create becomes self-evident. So, also, unless the firm owned the lease, it would have no interest to subordinate the mortgage to the lease, and in the event the right of legal subrogation was exercised and the mortgage, by operation of law, passed to a third person, such person, unless the partnership [613] owned the lease, would hold the mortgage as paramount to the lease, and therefore have the power to destroy it. Indeed, the duty to admit the proof, we think, would equally result if attention be not confined to the articles of partnership, but be extended to those articles in conjunction with "the postponement agreement," the foreclosure sale, the extension of the partnership, and the other notarial documents to which we have referred. But we do not deem it necessary to elaborate this view, as what we have said is adequate to demonstrate the want of merit in the contention that the controlling findings of fact made by the court below were, as a matter of law, void because of a want of power in the court to consider the proof upon which the findings were based.

This leaves only for consideration the contention that the action of the court was erroneous because it gave effect to fraud and deceit, and enabled the defendants to recover by alleging their own turpitude. Before we approach that subject, however, we dispose of another matter to which considerable attention was devoted in the argument at bar.

During the course of the trial Señor Vacuna, who had been the attorney of Sobrinos de Ezquiaga, of Van Syckel, and of the partnership, was offered as a witness to prove that "the postponement agreement" was advised by him and was executed as a mere precautionary measure to protect the interest of the firm in the lease; that is, to preserve the lease in case, by an adverse decision in the Montilla suits, the foreclosure proceedings were annulled and the firm deprived of its resulting ownership of the property. In other words, that the purpose was to leave the lease in such a position upon the public records that if it should result from the Montilla suits that the title resting upon the foreclosure was destroyed, the lease would not be treated as having been extinguished by confusion because on the records the ownership of the property and [614] the ownership of the lease had been in one and the same person. The court heard the witness over objection based upon the privileged character of the matter sought to be proved, and the form in which it was attempted to be elicited. But we do not think we need consider the subject because we are clearly of opinion, in view of the findings of the court concerning the sale of the lease to the partnership and its other findings of fact, that it is wholly immaterial to pass upon the objection because, even if it be assumed, for argument's sake, to have been well taken, prejudicial error under the circumstances did not result. The weight of the contention as to deceit, fraud, and wrongdoing is placed upon the postponement agreement.

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but, in view of the ownership by the partnership of the lease and the fact that Van Syckel, although he had disposed of the lease, still remained upon the public records as its owner, we fail to perceive the slightest foundation for the contention as to fraud or wrong or deceit, resulting from the postponement agreement, as applied to those who were parties to it. As the holder of both the lease and the mortgage, the firm had the right to seek to prevent the destruction of the one right by the enforcement of the other,—a destruction which would have been threatened by a resort to foreclosure if the agreement to postpone the mortgage to the lease had not been put upon the records. This is obvious for this reason: If, upon the records, the mortgage had continued to occupy a dominant position as to the lease, it would have resulted that the lease would have been extinguished by a sale to foreclose the mortgage; and therefore, if at such a sale, a third person had bought the mortgaged property, such purchaser would have taken the property free from the lease, and the firm, by the act of enforcing its mortgage, would necessarily have extinguished its lease. Under these circumstances there is no ground for charging fraud and wrongdoing, simply because the parties sought in a lawful mode to protect their legal rights. [615] In its last analysis the whole argument rests upon the assumption that because the parties to the contracts did not change the public records so as to cause them to conform to their contracts, they lost the right as between themselves to enforce their contract obligations,—a proposition which is refuted by its mere statement. Looking at all the transactions from first to last,—the silence of the articles of partnership as to the lease, the act of postponement, the foreclosure proceedings, the extension of the partnership, and the subsequent dealings, we can discover no ground by which it can be justly said that the parties were guilty of wrongdoing. The existence of the Montill.. suits assailing the title to the property as well as the validity of the lease suffices to explain the constant purpose to retain on the public records divergent ownership of the two—when in fact they were united in one person—lest the loss of one, th title, might carry with it by confusion the loss of the other, the lease, because both had been on the record in the name of the same person. Admitting that if the title had been vacated, the benignity of the law, by the application of the principle of *restitutio in integrum* would have prevented the loss of the lease by confusion, and therefore the fear of the partners was unnecessary, that fact does not justify treating them as wrongdoers or characterizing their acts as fraudulent.

Indeed, when it is considered that the controversy is between partners, and concerns acts in which they all bore an equal part, and that the charge of fraud is advanced to sustain the asserted right of one partner to recover, to the detriment of the other partners, property which he sold to the partnership, and for which he was paid without a return of the price, the want of merit in the contention becomes apparent.

Affirmed.

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[616] STATE OF WISCONSIN UPON THE RELATION OF HARRY W. BOLENS, Plff. in Err.,

v.

JAMES A. FREAR, Secretary of State of the State of Wisconsin, Andrew H. Dahl, State Treasurer, et al.

(See S. C. Reporter's ed. 616–622.)

Error to state court — who may bring error — relator in behalf of state.

A decree of the Wisconsin supreme court, dismissing a petition filed in the name of the state by a private citizen as relator, asking that court, in the exercise of its original jurisdiction under Wis. Const. art. 7, § 3, to enjoin certain state officials from putting in force the state income tax law, cannot, without the consent of the state, be brought up to the Federal Supreme Court by writ of error, because (a) the suit being one which, under the state law, could only be brought by the permission of the state and for the protection of its governmental authority, the state was the only real plaintiff below; (b) the suit having been brought by the consent of the state, in its behalf, the relator had no power to prosecute error and thus to implead the state without its consent; (c) there was no

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NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On parties to appellate proceedings in the Federal Supreme Court— see note to Amadeo v. Northern Assur. Co. 50 L. ed. U. S. 723.

On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to Wedding v. Meyler, 66 L.R.A. 833.

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assertion of individual right or grievance on behalf of the relator.

[For other cases, see Appeal and Error, 2050–2069; States, IX. b, in Digest Sup. Ct. 1908.]

[No. 447.]

Submitted December 15, 1913. Decided January 5, 1914.

IN ERROR to the Supreme Court of the State of Wisconsin to review a decree dismissing a petition filed in the name of the state by a private citizen as relator, asking that court, in the exercise of its original jurisdiction, to enjoin certain state officials from putting in force the state income tax law. Dismissed for want of jurisdiction.

See same case below, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147.

The facts are stated in the opinion.

Mr. **Paul D. Carpenter** submitted the cause for plaintiff in error:

In the course of the opinion below questions involving the Federal Constitution, and necessary to be decided, were decided adversely to plaintiff in error, and under the Wisconsin practice the decision of the state supreme court makes a precedent binding on all of the courts of Wisconsin on those questions concerning the Federal Constitution in whatever form new actions may be brought.

Atty. Gen. ex rel. Cushing v. Lum, 2 Wis. 507.

The learned Chief Justice of Wisconsin, having presided at the hearing in this case and written the exhaustive opinion in which the state court assumed jurisdiction, must be presumed to have known what that court meant by that decision. His allowance of the writ says in effect to this honorable court that, in his opinion, the decision involves a question within the appellate jurisdiction of this court, and that, in his opinion, the case on the face of the record justifies the allowance of the writ.

Greely v. Townsend, 25 Cal. 604; Twitchell v. Pennsylvania, 7 Wall. 321, 19 L. ed. 223; Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22.

The statute, even as amended, violates constitutional guaranties by grotesque classifications, by taxing certain people for the incomes of other people, by its system of double taxation; it impairs the obligation of various contracts; by radically reducing the taxing power of municipalities it impairs the obligation of municipal bond contracts, and it is unconstitutional on other grounds. The seriousness of these propositions can hardly be overstated, and we urge this court to deny the motions to dismiss in order that this case may be heard on the merits.

Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257.

The record affirmatively shows that there are involved Federal questions necessary to the determination of the cause, and that the cause could not have been decided as it was without such decision concerning the the Federal question; for in determining the ground upon which a judgment in a state court was rendered, this court may refer to the opinion of that court.

Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293–295, 35 L. ed. 193, 194, 11 Sup. Ct. Rep. 528.

Mr. **E. C. Brandenburg** submitted the cause in behalf of Messrs. Walter C. Owen, George G. Greene, and J. E. Dodge for defendants in error.

Messrs. George G. Greene and J. E. Dodge filed a brief for defendants in error:

The writ of error should be dismissed because obtained without the authority or consent of plaintiff in error.

Ex parte Dorr, 3 How. 103, 11 L. ed. 514; Anonymous, 11 Ill. 488; 7 Enc. Pl. & Pr. 802, 804.

There should be dismissal of the writ because all the parties request it.

7 Enc. Pl. & Pr. 906; Latham v. United States, 9 Wall. 145, 146, 19 L. ed. 771, 772; United States v. Young, 94 U. S. 258, 24 L. ed. 153; Birch v. Brown, 5 Mich. 31; Hancock County v. Marsh, 3 Ill. 491.

The writ should be dismissed because plaintiff in error is not injured by the decision of the state court.

Tyler v. Registration Ct. Judges, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; The Winnebago (Iroquois Transp. Co. v. Delaney Forge & Iron Co.) 205 U. S. 354, 360, 51 L. ed. 836, 839, 27 Sup. Ct. Rep. 509; Red River Valley Nat. Bank v. Craig, 181 U. S. 548, 45 L. ed. 994, 21 Sup. Ct. Rep. 703; Hooker v. Burr, 194 U. S. 415, 419, 48 L. ed. 1046, 1050, 24 Sup. Ct. Rep. 706; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Hampton v. St. Louis, I. M. & S. R. Co. 227 U. S. 456, 468, 57 L. ed. 596, 599, 33 Sup. Ct. Rep. 263; Darnell v. Indiana, 226 U. S. 390, 57 L. ed. 267, 33 Sup. Ct. Rep. 120; Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40; Lee v. New Jersey, 207 U. S. 67, 52 L. ed. 106, 28 Sup. Ct. Rep. 22; Citizens' Nat. Bank v. Kentucky, 217 U. S. 443, 54 L. ed. 832, 30 Sup. Ct. Rep. 532; Standard Stock Food Co. v. Wright, 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784; Williams v. Walsh, 222

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U. S. 415, 56 L. ed. 253, 32 Sup. Ct. Rep. 137; Keeney v. New York, 222 U. S. 525, 537, 56 L. ed. 299, 305, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105; Rosenthal v. New York, 226 U. S. 260, 57 L. ed. 212, 33 Sup. Ct. Rep. 27.

Mr. Walter C. Owen, Attorney General of Wisconsin, and Mr. J. E. Dodge also filed a brief for defendants in error:

Without its consent, given either by the legislative branch, or perhaps by the executive, no sovereign government can be made a party to an action in court.

Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; Christian v. Atlantic & N. C. R. Co. 133 U. S. 233, 243, 33 L. ed. 589, 593, 10 Sup. Ct. Rep. 260; Hans v. Louisiana, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504; Stanley v. Schwalby, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754; Louisiana v. Texas, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251; Hopkins v. Clemson Agri. College, 221 U. S. 636, 55 L. ed. 890, 35 L.R.A.(N.S.) 243, 31 Sup. Ct. Rep. 654; Porto Rico v. Rosaly y Castillo, 227 U. S. 270, 57 L. ed. 507, 33 Sup. Ct. Rep. 352; Chicago, M. & St. P. R. Co. v. State, 53 Wis. 509, 10 N. W. 560; Houston v. State, 98 Wis. 481, 42 L.R.A. 39, 74 N. W. 111; State ex rel. Atty. Gen. v. Frost, 113 Wis. 629, 89 N. W. 915; Troy & G. R. Co. v. Com. 127 Mass. 43.

The legislative authority of any person instituting any action in behalf of a state is always a necessary question.

State v. Duff, 83 Wis. 291, 53 N. W. 446; State v. Pederson, 135 Wis. 31, 114 N. W. 828; People v. Navarre, 22 Mich. 1; Benalleck v. People, 31 Mich. 200; Babcock v. Hanselman, 56 Mich. 27, 22 N. W. 99; D'Aquin's Succession, 9 La. Ann. 400; New Orleans & C. R. Co. v. New Orleans, 34 La. Ann. 429; Ex parte Dunn, 8 S. C. 230; Day Land & Cattle Co. v. State, 68 Tex. 526, 4 S. W. 865; Henry v. State, 87 Miss. 1, 39 So. 856; United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; United States v. San Jacinto Tin Co. 125 U. S. 273, 280, 284, 31 L. ed. 747, 749, 751, 8 Sup. Ct. Rep. 850.

The officer attempting to appeal must have due legislative delegation, express or necessarily implied, to decide upon this question of state policy, or his attempt is ineffectual.

State v. Duff, 83 Wis. 291, 53 N. W. 446; Babcock v. Hanselman, 56 Mich. 27, 22 N. W. 99.

Nowhere in the Constitution nor in the decisions by which is declared this power of authorizing suits in the name of the state is there any suggestion that the supreme court may declare the consent of the state to be made a litigant in any other forum—in any other court, either of Wisconsin or any other jurisdiction—which is an important difference.

Smith v. Reeves, 178 U. S. 436, 441, 44 L. ed. 1140, 1143, 20 Sup. Ct. Rep. 919.

There is no hint in the record that refusal or dismissal of the writ could in any way prejudice plaintiff in error. Nor is he in any wise aggrieved or injured in any of his legal rights by the judgment sought to be reviewed, which is essential to his recognition in this court.

Lampasas v. Bell, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368; Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; Tyler v. Registration Ct. Judges, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206.

It must not be overlooked that the state court, passing upon mere questions of jurisdiction and practice under state law, refused to entertain the cause with Bolens as a party. Its rulings on the subject entirely eliminated him. His name should have disappeared, even as relator, from all subsequent proceedings. It only lingered through clerical anxiety for identification of the cause. Not being a party, he, of course, could not maintain a writ of error.

Ex parte Cutting, 94 U. S. 14, 24 L. ed. 49; Ex parte Cockcroft, 104 U. S. 578, 26 L. ed. 856; South Carolina v. Wesley, 155 U. S. 542, 39 L. ed. 254, 15 Sup. Ct. Rep. 230.

Mr. Chief Justice White delivered the opinion of the court:

The attorney general of the state of Wisconsin, by direction of the governor of the state, moves to dismiss on the ground that the state is the real party in interest, because Bolens, the relator, personally, was in the court below the mere agent of the state, devoid of all authority to prosecute this writ of error and thereby to implead the state in this court without its consent. Indeed, the motion to dismiss in a strict sense is a motion to quash the writ of error on the ground that no writ was ever sued out, and that in effect there is no judgment below to which the writ could be directed, since the state, who was the party plaintiff, and the officers of the state, who were the defendants, both acquiesced in and have executed the judgment.

The decree to which the writ of error is directed was rendered on a demurrer to the petition filed in the supreme court of Wisconsin by Bolens, as relator, asking the court as a matter of original cognizance to enjoin the putting in force of a state law creating a new system of state taxation described as "progressive income taxation." 148 Wis. 456, 134 N. W. 673, 135 N. W. 164,

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Ann. Cas. 1913 A, 1147. We accept a statement contained in the argument of the plaintiff in error concerning the nature of the original jurisdiction of the court below:

"The Constitution of the state of Wisconsin confers original jurisdiction upon the supreme court of the state to issue writs of injunction and other original and remedial writs, and to hear and determine the same. Art. 7, [618] § 3. This clause gives full jurisdiction to the state supreme court over any question *quod ad statum reipublicae pertinet*, affecting the 'sovereignty of the state, its franchises or prerogatives, or the liberties of the people.' Such action is to be brought originally in the state supreme court, and may be instituted by the attorney general acting on his own initiative, or acting on the petition of a citizen; or, if he refuses to act on the petition of a citizen, then the citizen may, on notice, apply to the supreme court for permission to bring the action for the state in the name of the attorney general, and the court may refuse or grant such permission."

Further, we adopt a statement in the argument for the plaintiff in error as to the grievances which it was deemed required judicial redress and the steps taken which were exacted by the state statute as prerequisite to obtain an exertion by the court of its original jurisdiction:

"Harry W. Bolens presented his petition to the then attorney general of Wisconsin, setting up that the Wisconsin income tax law, chapter 658 of the Laws of Wisconsin for 1911, is wholly null, void, and of none effect, for that it violates numerous sections of both state and Federal Constitutions, most of these objections being set out in detail, followed by an omnibus allegation; and praying that for the wrongs complained of and for the protection of himself and all others similarly situated, and for the protection of all the taxpayers of the state against the threatened invasion of their rights and liberties, and forasmuch as all said persons are remediless in the premises without the interposition of the state supreme court, that the attorney general move the court for leave to bring the action designed 'so as fully to protect and secure the said rights and privileges guaranteed to the people of this state by the Constitution of the United States and the Amendments thereto, and the Constitution of the state of Wisconsin and the amendments thereto.'"

[619] The attorney general, refusing to comply with the request, the supreme court, on motion of the relator, ordered the petition to be filed without prejudice to thereafter considering whether there was jurisdiction to entertain it. Subsequently the court overruled a demurrer challenging its original jurisdiction, and moreover held on a demurrer addressed to the merits that the petition stated no ground for the relief which was prayed. The court, in so doing, defined the nature of the power possessed by it as a matter of original jurisdiction to hear and determine the case made by the petition.

It said:

"This transcendent jurisdiction is a jurisdiction reserved for the use of the state itself when it appears to be necessary to vindicate or protect its prerogatives or franchises or the liberties of its people. The state uses it to punish or prevent wrongs to itself or to the whole people. The state is always the plaintiff, and the only plaintiff, whether the action be brought by the attorney general, or against his consent, on the relation of a private individual, under the permission and direction of the court. It is never the private relator's suit. He is a mere incident. He brings the public injury to the attention of the court, and the court, by virtue of the power granted by the Constitution, commands that the suit be brought by and for the state. The private relator may have a private interest which may be extinguished (if it be severable from the public interest), yet still the state's action proceeds to vindicate the public right." Contrasting the authority thus possessed by virtue of its original jurisdiction with the ordinary processes for the redress of private wrongs, the court said: "These propositions, if correct, and we believe they are, demonstrate very clearly that there can be no such thing as a taxpayer's action (as that action is known in the circuit courts) brought in the supreme court within the original jurisdiction."

[620] Referring to such a taxpayer's suit, the court observed:

"The taxpayer himself is the actual party to the litigation, and represents not the whole public, nor the state, nor even all the inhabitants of his municipality, but a comparatively limited class; namely, the citizens who pay taxes. In short, he sues for a class. No such thing is known in the exercise of the original jurisdiction of this court. In actions brought within that jurisdiction, the state is the plaintiff, and sues to vindicate the rights of the whole people."

Applying these doctrines, it was said:

"The Bolens Case [this case] cannot, therefore, be held to come within the original jurisdiction of this court, if it be a mere taxpayer's action."

After further pointing out the distinction between the right of an individual to sue

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in a trial court to enforce an individual right or redress a wrong, and, if aggrieved, to prosecute error or appeal, and the difference between the exertion on such error or appeal of authority to review, and the extraordinary power exerted when original jurisdiction was invoked, the court came to consider the merits of the petition. In doing so it declared that because of the public nature of the controversy, it would confine attention solely to those matters which were addressed to the invalidity of the statute as a whole. In passing upon questions of that character, propositions which asserted the statute to be repugnant to both the United States and state Constitutions were analyzed and held to be without merit. The petition was dismissed.

From this statement it is apparent that the motion of the state to dismiss is well-founded for the following reasons: (*a*) Because accepting the interpretation affixed by the court below to the state Constitution, and the resulting ruling as to the scope of its own original jurisdiction, it follows that the state was the only real plaintiff below, [621] since the relator had no authority to sue but by the consent of the state, and as its mere agent for the purpose of calling into activity judicial authority, not for the redress of individual wrong, but for the protection of general public rights; (*b*) because the suit, having been brought by the consent of the state, in its behalf, the relator had no power, without the consent of the state, to prosecute error, and thus to implead the state without its consent; (*c*) because, as the relator did not resort to the methods provided by law for the enforcement of his individual rights, if any, but elected solely to resort, by the consent of the state, to a jurisdiction given only for the redress of general public wrongs, he may not, by means of a writ of error, directed from this court, transform the nature of the proceedings, and secure at the hands of this court, under the guise of an appellate proceeding, the exertion of authority to originally determine alleged grievances which were not passed upon by the court below and are not within the scope of Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575. The argument that if, asserting his individual grievances, the case had been brought in a trial court, and had been carried to the supreme court of the state from an adverse decision upon a Federal question, the judgment or decree of the supreme court would be here reviewable, hence the decision in this case, to save circuity of action, should be now reviewable, amounts but to saying that because there is authority to decide a legal question in a case where there is jurisdiction, there must also be power to pass upon the same question when it arises in a case over which there is no jurisdiction. Under the ruling below no individual right of the relator was denied, and because it may be inferred that if, in the future, a case asserting individual rights in due course of procedure comes to the court below, that court will be controlled or persuaded by the opinions expressed in this case, furnishes no ground for the exertion by this court in the [622] present case of a jurisdiction which it does not possess. Indeed, whether the case be considered in the light of the absence of any assertion of individual right or grievance on behalf of the relator, or be looked at from the point of view that the suit was one under the state law which could only be brought by the permission of the state and for the protection of its governmental authority, the state being therefore the real party plaintiff, or if it be tested by the want of authority on the part of the relator by means of a writ of error to implead the state under the circumstances disclosed without its consent in this court, the want of jurisdiction is so conclusively shown by previous decisions as to leave no room for controversy (Smith v. Reeves, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919.)

Dismissed for want of jurisdiction.

WYANDOTTE COUNTY GAS COMPANY, Plff. in Err.,

v.

STATE OF KANSAS, ON RELATION OF JOHN MARSHALL, Attorney for the Public Utilities Commission of the State of Kansas.

(See S. C. Reporter's ed. 622–630.)

Gas rates — municipal regulation — contracting away power to fix.

1. A municipality was not authorized to limit its power by contract to fix reasonable gas rates for the future by Kan. Laws 1903, chap. 122, §§ 2, 51, 169, 176, empowering cities of the first class to "make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers," to "prescribe and fix" maximum gas rates which shall "at all times be reasonable and just," to make contracts and grant franchises, etc., concerning light, heat, and power, and to "fix a reasonable schedule" of maximum gas rates, "at all times during the existence of any such grant, contract, or privilege."

[Regulation of gas rates, see Gas, in Digest Sup. Ct. 1913 Supp.]

Gas rates — municipal regulation — contracting away power to fix.

2. The limitations imposed upon first-class cities by Kan. Laws 1903, chap. 122,

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§§ 2, 51, 169, 176, rendering it impossible to contract away governmental power to fix reasonable rates for manufactured gas for the future, were made applicable to natural gas by § 170a, providing that nothing in that act should be construed to forbid the granting of a franchise for natural gas, including the right to lay and maintain mains and pipes on such terms and conditions as might be agreed upon between the city and the gas company.

[Regulation of gas rates, see Gas, in Digest Sup. Ct. 1913 Supp.]

[No. 472.]

Argued December 2, 1913. Decided January 5, 1914.

IN ERROR to the Supreme Court of the State of Kansas to review a decree which, with a modification, affirmed a decree of the District Court of Wyandotte County, in that state, enjoining a gas company from charging domestic consumers of natural gas in excess of the statutory rate. Affirmed.

See same case below, 88 Kan. 165, 127 Pac. 639.

The facts are stated in the opinion.

Mr. J. W. Dana argued the cause, and, with Mr. W. F. Douthirt, filed a brief for plaintiff in error:

This court will determine for itself whether or not a contract in law exists the obligations of which may not be impaired by legislation in contravention of the contract clause of the Federal Constitution.

Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683–697, 29 L. ed. 510–515, 6 Sup. Ct. Rep. 265; McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; Cross Lake Shooting & Fishing Club v. Louisiana, 224 U. S. 632, 56 L. ed. 924, 32 Sup. Ct. Rep. 577; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585.

The governmental power of rate regulation of public utilities, whether by the state or its agencies, may be suspended by contract of the state or by its authority.

Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762; Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585; Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253; Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 418.

The power to fix and regulate rates is governmental, inherent in the state, and does not inhere in the subordinate subdivisions of the state; and such power, if exercised by a municipality, must be conferred by the state, and cannot be assumed.

Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241.

The authority to suspend by contract the state's power of rate regulation may be conferred by necessary implication.

Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 418; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762.

An analysis of the decisions discloses a clear distinction between a delegation of authority to contract or agree and a delegation of authority to grant a franchise or to legislate. The one is the mutual meeting of the minds of two negotiating parties, the other is the sole sovereign act of a single party. The one authorizes consent, the other command. Any language of the legislature sufficient to denote an intent on the part of the legislature to authorize a consent, not a command, is sufficient authority from the state for an inviolable contract.

Vicksburg v. Vicksburg Waterworks Co. supra; Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; Omaha Water Co. v. Omaha, 12 L.R.A.(N.S.) 736, 77 C. C. A.

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267, 147 Fed. 1, 8 Ann. Cas. 614; Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 418; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653.

Kansas decisions are a part of the contract, and estop the state from denying its validity.

Territory v. Reyburn, McCahon (Kan.) 552; Jones v. State, 1 Kan. 273; Dudley v. Reynolds, 1 Kan. 285; Leavenworth v. Rankin, 2 Kan. 357; Hines v. Leavenworth, 3 Kan. 186; Leavenworth v. Laing, 6 Kan. 287; Atchison Street R. Co. v. Missouri P. R. Co. 31 Kan. 661, 3 Pac. 284; Wood v. National Waterworks Co. 33 Kan. 597, 7 Pac. 233; Wyandotte v. Corrigan, 35 Kan. 24, 10 Pac. 99; Winfield v. Winfield Gas Co. 37 Kan. 24, 14 Pac. 499; Manley v. Emlen, 46 Kan. 655, 27 Pac. 844; Burlington Waterworks Co. v. Burlington, 43 Kan. 725, 23 Pac. 1068; Columbus Waterworks Co. v. Columbus, 48 Kan. 99, 15 L.R.A. 354, 28 Pac. 1097; Winfield v. Winfield Water Co. 51 Kan. 70, 32 Pac. 663; State v. Hiawatha, 53 Kan. 478, 36 Pac. 1119; Watkins v. Glenn, 55 Kan. 417, 31 L.R.A. 82, 40 Pac. 316; Mills v. Osawatomie, 59 Kan. 463, 53 Pac. 470; State ex rel. Godard v. Topeka Water Co. 61 Kan. 561, 60 Pac. 337; Baxter Springs v. Baxter Springs Light & P. Co. 64 Kan. 591, 68 Pac. 63; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; Wyandotte County Gas Co. v. Spaeth, 83 Kan. 195, 109 Pac. 785; Columbus Waterworks Co. v. Columbus, 46 Kan. 666, 26 Pac. 1046; Potwin Place v. Topeka R. Co. 51 Kan. 609, 37 Am. St. Rep. 312, 33 Pac. 309; Atchison Street R. Co. v. Nave, 38 Kan. 744, 5 Am. St. Rep. 800, 17 Pac. 587; Kansas City v. Wyandotte Gas Co. 9 Kan. App. 325, 61 Pac. 317; Galena Water Co. v. Galena, 74 Kan. 644, 87 Pac. 735; Brown v. Atchison, 39 Kan. 37, 7 Am. St. Rep. 515, 17 Pac. 465.

All ambiguity must be resolved against the city's right to contract, and if its authority is balanced in doubt, such doubt must be resolved in favor of the state; but it is not the province of the court to contract or clip the legislative grant.

Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 282.

The "balanced doubt" should not arise in the mind of this court from the mere denial of such power by the state, nor from the judgment of the court below, but the rule adopted by Chief Justice White should apply, to wit: "The rule, then, to be applied when the matter is balanced in doubt, is this, and nothing more; that if, in using its independent judgment, as it is its duty to do, a serious doubt arises in the mind of the court, then the interpretation by the state court, acting upon a serious doubt created by the existence of independent judgment, will cause such judgment to preponderate in favor of the construction given by the state court to its own statute."

Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493.

The Freeport Case was referred to and greatly limited, if not in fact reversed, by this court, in Vicksburg v. Vicksburg Water Co. 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762.

The case of Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572, gives a clear view of the right rule of construction applicable to the case at bar.

The imposition of such enormous fines and penalties in rate regulation acts has been quite recently held by this court to be a denial of due process of law, contrary to the 14th Amendment to the Federal Constitution.

Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961.

Mr. Richard J. Higgins argued the cause, and, with Messrs. Henderson S. Martin and A. E. Helm, filed a brief for defendant in error:

The power to control rates is retained by the city or state, unless the statute specifically authorizes the city to grant a franchise in which rates are fixed for the life of the franchise, or for a certain definite period.

2 Wyman, Public Service Corp. 1424; Re Pryor, 55 Kan. 724, 29 L.R.A. 398, 49 Am. St. Rep. 280, 41 Pac. 958; Leavenworth v. Norton, 1 Kan. 432; Wyandotte v. Corrigan, 35 Kan. 24, 10 Pac. 99; Leavenworth v. Rankin, 2 Kan. 357; Leavenworth v. Laing, 6 Kan. 287; Freeport Water Co. v. Freeport, 180 U. S. 587–618, 45 L. ed. 679–696, 21 Sup. Ct. Rep. 493; Rogers Park Water Co. v. Fergus, 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490; Owensboro v. Owensboro Waterworks Co. 191 U. S. 358, 48 L. ed. 217, 24 Sup. Ct. Rep. 82; Stanislaus County v. San Joaquin & K. River Canal & Irrig Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; Water, Light & Gas Co. v. Hutchinson, 207 U. S. 385, 52 L. ed. 257, 28 Sup. Ct. Rep. 135; 6 Enc. U. S. Sup. Ct. Rep. 804; 9 Enc. U. S. Sup. Ct. Rep. 538; 11 Enc. U. S. Sup. Ct. Rep. 990.

No irrepealable contract can be made if that is the declared policy of the state.

Freeport Water Co. v. Freeport, 180 U. S. 593, 45 L. ed. 686, 21 Sup. Ct. Rep. 493.

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Any ambiguity or doubt must be resolved in favor of the public.

Ibid.

The Federal courts will lean toward an agreement of views with the state courts, if the question seems to them balanced with doubt.

Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10.

The state of Kansas cannot make an irrepealable contract fixing rates; neither can it authorize a municipality to make such a contract.

Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 211, 48 L. ed. 412, 24 Sup. Ct. Rep. 241; Atchison v. Bartholow, 4 Kan. 125; Gray v. Crockett, 30 Kan. 143, 1 Pac. 50; People ex rel. Jackson v. Suburban R. Co. 178 Ill. 594, 49 L.R.A. 650, 53 N. E. 349; Grosse Pointe v. Detroit & L. St. C. R. Co. 130 Mich. 363, 90 N. W. 42; Lansing v. Lansing City Electric R. Co. 109 Mich. 127, 66 N. W. 949; State ex rel. Atty. Gen. v. Madison Street R. Co. 72 Wis. 612, 1 L.R.A. 771, 40 N. W. 487; Sioux City Street R. Co. v. Sioux City, 138 U. S. 98, 34 L. ed. 898, 11 Sup. Ct. Rep. 226; Clinton v. Worcester Consol. Street R. Co. 199 Mass. 285, 85 N. E. 507; Cleveland v. Cleveland City R. Co. 194 U. S. 517–534, 48 L. ed. 1102–1107, 24 Sup. Ct. Rep. 756; Fath v. Tower Grove & L. R. Co. 105 Mo. 548, 13 L.R.A. 74, 16 S. W. 913; Detroit v. Ft. Wayne & B. I. R. Co. 95 Mich. 461, 20 L.R.A. 79, 35 Am. St. Rep. 580, 54 N. W. 958; Detroit v. Detroit City R. Co. 56 Fed. 880; Worcester v. Worcester Consol. Street R. Co. 192 Mass. 106, 78 N. E. 222; Allegheny v. Millville, E. & S. Street R. Co. 159 Pa. 415, 28 Atl. 202; Citizens' Horse R. Co. v. Belleville, 47 Ill. App. 388.

It may be said to be elementary that, in conferring a franchise to use the streets, in the exercise of its delegated authority from the legislature, a city's common council acts on behalf of the state as its agent, and not as the agent of the municipal corporation. The duty of protecting the public streets for public travel is a public, and not a corporate, duty.

Schultz v. Milwaukee, 49 Wis. 259, 35 Am. Rep. 779, 5 N. W. 342; Little v. Madison, 49 Wis. 605, 35 Am. Rep. 793, 6 N. W. 249; Williams v. Yorkville, 59 Wis. 119, 17 N. W. 546; Kittredge v. Milwaukee, 26 Wis. 50; Griggs v. Foote, 4 Allen, 195; Manners v. Haverhill, 135 Mass. 165; McCarthy v. Boston, 135 Mass. 197; People ex rel. Loomis v. Board of Town Auditors, 75 N. Y. 316; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Smith v. Washington, 20 How. 135, 15 L. ed. 858.

The state may fix in the company's charter the rates to be charged by it, and the rates thus fixed will be binding upon the company (*i. e.*, the company cannot exceed those rates), though the state may reserve the power to reduce the rates.

Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 29, 48 L. ed. 598, 604, 24 Sup. Ct. Rep. 310; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Ashley v. Ryan, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865.

Under the powers granted, the state, as principal, authorized the city, as its agency, to permit the gas company to lay its pipes in the streets and alleys. This right may not be taken away from the gas company.

The city at that time had the right to regulate the rates to be charged by public utilities. The taking of this right from the city does not affect the gas company. Even the city would not be heard to complain, and clearly, if it cannot, then the company cannot.

Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; 9 Enc. U. S. Sup. Ct. Rep. 498; 6 Enc. U. S. Sup. Ct. Rep. 854; Louisville & N. R. Co. v. Motley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341.

The rates in the franchise are maximum rates, therefore, subject to regulation and reduction.

Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 389, 46 L. ed. 608, 22 Sup. Ct. Rep. 410.

Messrs. John Marshall and Richard J. Higgins filed a brief in support of a motion to dismiss or affirm.

Mr. Chief Justice White delivered the opinion of the court:

The supreme court of the state of Kansas, with a modification to which it is not necessary to refer, affirmed a decree of the district court of Wyandotte county, Kansas, enjoining the plaintiff in error, the Wyandotte County Gas Company, from charging domestic consumers in the cities of Kansas City, Kansas, and Rosedale, Kansas, for natural gas furnished, any sum in excess of 25 cents per thousand cubic feet. To such decree this writ of error is directed, and the Federal ground relied upon for reversal is the existence of contract rights in favor of the Gas Com-

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pany, which it is insisted were impaired by the action of the court below.

[626] The price which the court below sustained was lower than the rate charged by the Gas Company, and was in effect a statutory rate, since a state law fixed the rate, and forbade the charging of a higher rate without the consent of the State Utilities Commission, which consent the Gas Company, under the theory that its contract relieved it from doing so, had not sought to obtain.

The court below rested its conclusion upon the grounds, first, that the company had no contract rights fixing rates which were impaired by enforcing the lower rate fixed in the subsequent state law, and second, that if the city had agreed with the company to fix contract rates, the action of the city was void, since the city possessed no authority to make a contract limiting its power to fix reasonable rates for the future. As the question of power, which the last proposition involves, lies at the foundation of the case, we come first to consider it, indulging, for the sake of argument, in the hypothesis that the city contracted with the company for fixed rates during a stated period, which contract would be impaired if the subsequent legislation here complained of was enforced.

At the outset it is certain that the determination of the question of power involves a consideration and construction of the law of the state from which the city derived its authority. While, indeed, that fact does not relieve us from the duty of determining for ourselves the scope and character of the asserted contract, it is yet elementary doctrine that, in the discharge of such duty, it is incumbent upon us not to lightly disregard the construction put by the court below upon the statutes of the state, but to seek to uphold such construction as far as it can be done consistently with the obligation to independently determine whether a contract exists which, in disregard of the Constitution, has been impaired by subsequent legislation.

The alleged contract arises from the passage in 1904 by the city of ordinance 6051, and action taken thereunder. [627] The question of power is to be determined by a consideration of a comprehensive state law adopted in 1903, regulating cities of the first class, of which Kansas City was one. This law was incorporated in the general statutes of Kansas for 1905, and in referring to it we quote the section numbers as found in the act of 1905, putting in brackets the section numbers of the law of 1903, as originally adopted. Under the heading of "General Provisions" in the 4th paragraph of § 734 (2) cities of the first class were empowered "to make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers."

Under the heading of "Legislative Department, Powers of the Mayor and Council," it was provided in § 784 (51):

"Rates for Water, Light, etc. § 51.—To prescribe and fix maximum rates and charges, and regulate the collection of the same, for all water, electric light, heat, power, gas, telephone service, or any other commodity or service furnished to such city or to any of the inhabitants thereof by any person or corporation now authorized by such city by virtue of a franchise ordinance, or that may hereafter be authorized by virtue of a franchise ordinance to furnish water, electric light, heat, power, gas, or telephone service, or any other commodity or service, to such city or to its inhabitants. The rates and charges so prescribed shall at all times be reasonable and just; and if any city shall fix unreasonable and unjust rates and charges, the same may, at the instance of any producer or consumer, be reviewed and determined by the district court of the county in which such city is situated."

Under the heading of "Public Utilities," § 902 (167), authority was given for the securing of an adequate supply of water and the granting of franchises to that end, as well as of contracting for laying pipes, etc., etc. The section contained the following provision as to rates:

[628] "Provided further, that . . . the mayor and council of any such city shall at all times during the existence of any such grant, contract, or privilege have the right by ordinance to fix a reasonable schedule of maximum rates to be charged for water for public and private purposes by any such person, company, or corporation. Provided, however, That said mayor and council shall at no time fix a rate which will prohibit such person, company, or corporation from earning at least 8 per cent on its capital invested over and above its operating expenses and expenses for maintenance and taxes. In establishing and fixing such rates, the value of the plant and property of any such person, company, or corporation shall be taken into consideration, but the value of such franchise, contract, and privilege given and granted by the city to such person, company, or corporation shall not be taken into consideration in ascertaining the reasonableness of the rates to be charged to the inhabitants of such city."

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Moreover, the section, after directing that a contract should be reduced to writing, contained the following:

"and any attempt to evade, directly or indirectly, the requirements of this act as to such consideration, or the obligations and conditions of such contract, shall render such contract and franchise absolutely null and void and inoperative."

By § 904 (169) the same general power was given to make contracts and grant franchises, etc., concerning heat, light, power, and street railway franchises, as was conferred, as above stated, for the purpose of obtaining a water supply; but as to the authority to fix rates by contract, the power was limited by a restriction in substance the same as that which was imposed upon the right to contract for rates for the purposes of a water supply, since by § 905 (170) the right of the city in that respect was expressly reserved to

"at all times during the existence of any such grant, [629] contract, or privilege . . . to fix a reasonable schedule of maximum rates to be charged for public and private purposes, including street lighting by any such person, company, or corporation, to the inhabitants of any such city, for gas light, electric light, electric power, or heat, and the rates of fare on any street railway."

Section 906 (170a) contained regulations as to the period of the contract which might be made and other general regulations, and closed with the provision which is inserted in the margin.†

Considering these statutory provisions, the court below (88 Kan. 165, 127 Pac. 639) decided that they did not authorize the city to devest itself by contract of its duty to see that nothing but reasonable rates were enforced, however much the statute might have as to other subjects conferred upon the city an authority to contract in the complete sense. Looking comprehensively at the provisions in question, in the light of the duty resting on us to which at the outset we referred, not lightly to disregard the construction which the state court of last resort has given to the statutes of the state, we can see no ground for holding that the court erred in its conclusion. Conceding that there are forms of expression used in the statute which, taken isolatedly, might be considered as having conferred the power to fix a contract rate, such concession is not decisive, since we must consider the statute as a whole. And [630] when we do so, we think, to divorce the expressions referred to from the context, would be not to interpret and apply, but to distort the statute. Especially is this conclusion necessary when the broad scope of the provisos which we have quoted is taken into view, since they in effect forbid the making of contract rates as to both water and gas by commanding that the governmental power to see to it that only reasonable rates are exacted shall be perpetually preserved and exerted. In face of such a plain manifestation of the legislative will, it would be a departure from the obvious intent and purpose of the lawmaker to hold that the statute conferred the power to do that which the text makes it apparent there was a dominant and fixed purpose of the legislature to forbid. This conclusive view also applies to the special provision concerning natural gas. We say this because, as obviously the prior sections of the statute embraced only manufactured gas, the provision as to natural gas was rendered necessary in order to give the same power to deal with that subject as was conferred concerning manufactured gas. In other words, on its face, the purpose of the provision was to bring natural gas within the statute, subject to the regulations and limitations which the statute imposed, and it could not therefore have been intended to cause dealings concerning natural gas to be for the purpose of power conferred within the statute, and at the same time to exclude the conferred authority from the safeguards and regulations which the statute exacted. The bringing of natural gas within the power, therefore, caused it to be subject to the limitations which the statute imposed, and which, as we have seen, rendered it impossible to contract away the governmental power to forbid unreasonable and secure reasonable rates.

Affirmed.

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†*Nothing in this act shall be construed as prohibiting any city governed and controlled by the provisions of this act from granting, and the mayor and council of any such city are hereby authorized to grant, to any person, company, or corporation, a franchise to construct, maintain, and operate a natural gas plant for the purpose of furnishing to said city and its inhabitants natural gas for lights, fuel, and all other purposes, with authority to lay and maintain all necessary mains and pipes in the streets, avenues, alleys, and public grounds of said city on such terms and conditions as may be agreed to by said mayor and council and such person, company, or corporation: Provided, That such franchise shall not continue for a longer period than twenty years.*

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[631] ALEXANDER C. M. PENNINGTON, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 631–638.)

Claims — executive allowance — following court decisions — proviso.

Claims against the United States not enumerated in the provision of the sundry civil appropriation act of March 4, 1907 (34 Stat. at L. 1356, chap. 2918, U. S. Comp. Stat. Supp. 1911, p. 58), making an appropriation for the payment in certain classes of cases of the amounts that may be certified to be due by the accounting officers of the Treasury, cannot be deemed to be embraced by the further clause, "provided, that in all cases hereafter so certified the said accounting officers shall, in stating balances, follow the decisions of the United States Supreme Court or of the court of claims of the United States after the time for appeal has expired, if no appeal be taken, without regard to former settlements or adjudications by their predecessors," whether this clause be regarded technically as a proviso or not.

[For other cases, see Claims, I. d, 1; Statutes, II. t, in Digest Sup. Ct. 1908.]

[No. 582.]

Submitted December 15, 1913. Decided January 5, 1914.

APPEAL from the Court of Claims to review a judgment which dismissed the petition of an Army officer for the recovery of additional rations and longevity pay. Affirmed.

The facts are stated in the opinion.

Messrs. **George A. King, William B. King,** and **William E. Harvey** submitted the cause for appellant:

The proviso was not restrictive.

White v. United States, 191 U. S. 545, 48 L. ed. 295, 24 Sup. Ct. Rep. 171; Hadden v. The Collector (Hadden v. Barney) 5 Wall. 107, 110, 111, 18 L. ed. 518, 519; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 181, 32 L. ed. 377, 380, 9 Sup. Ct. Rep. 47: Henry v. United States, 27 Ct. Cl. 144; Interstate Commerce Commission v. Baird, 194 U. S. 25, 36, 37, 48 L. ed. 860, 865, 866, 24 Sup. Ct. Rep. 563; United States v. Falk, 204 U. S. 143, 51 L. ed. 411, 27 Sup. Ct. Rep. 191; Lake County v. Rollins, 130 U. S. 662, 670, 32 L. ed. 1060, 1063, 9 Sup. Ct. Rep. 651; Carroll v. State, 58 Ala. 401.

"All" excludes the idea of limitation.

McLean v. United States, 226 U. S. 383, 57 L. ed. 264, 33 Sup. Ct. Rep. 122; Moore v. Virginia, F. & M. Ins. Co. 28 Gratt. 516, 26 Am. Rep. 373; Kellett v. Kellett, 94 Tex. 206, 59 S. W. 809; Prindle v. United States, 41 Ct. Cl. 8; United States v. Bowen, 100 U. S. 508, 25 L. ed. 631.

The words "so certified" are not a qualification of the character of the cases, but of the manner of certification.

Blanton v. State, 1 Wash. 269, 24 Pac. 439.

The word "so" is an adverb of manner, qualifying "certified." It cannot be converted into an adjective, "such," qualifying "cases." To do this would imply the legislator's ignorance of both the meaning of words and rules of grammar.

United States v. Goldenberg, 168 U. S. 95, 102, 42 L. ed. 394, 398, 18 Sup. Ct. Rep. 3.

If possible, effect must be given to every clause, section, and word of the statute.

United States v. Fisher, 109 U. S. 143, 145, 27 L. ed. 885, 886, 3 Sup. Ct. Rep. 154; Platt v. Union P. R. Co. 99 U. S. 48, 58, 25 L. ed. 424, 427.

No decision of this court authorizing "payment of amounts for arrears of pay of two and three year volunteers," etc., as provided for in the clause preceding the proviso, has been made since the decision in United States v. Hosmer, 9 Wall. 432, 19 L. ed. 662, at December term, 1861, under which all pending claims were settled up soon after its recommendation, leaving no ground for complaint.

On the other hand, this court at nearly every term has made some decision in a test case of some class or other, to which this provision is applicable, if construed in a general sense. The most recent case was Plummer v. United States, 224 U. S. 137, 56 L. ed. 697, 32 Sup. Ct. Rep. 467.

The mischief to be remedied was this: If the accounting officers of the Treasury decide against claims of a class, a test case is often brought in the court of claims to reverse this decision. If the final judicial decision is in favor of the claimant, the accounting officers will follow the judicial decision as to cases not once decided by them.

See 13 Comp. Dec. 707; 14 Comp. Dec. 151, 802; 15 Comp. Dec. 124; Meigs v. United States, 20 Ct. Cl. 181.

The mischief which existed when this act was passed is general, and the remedy must be general to reach the evil.

Leigh v. United States, 43 Ct. Cl. 374.

The application of this statute to this claim is to give a remedy to a long denied right.

United States v. Watson, 130 U. S. 80, 32 L. ed. 852, 9 Sup. Ct. Rep. 430.

NOTE.—On provisos in statutes—see note to United States v. Dickson, 10 L. ed. U. S. 689.

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Assistant Attorney General Thompson submitted the cause for appellee:

A proviso modifies or restrains the generality of the previous provisions.

Dollar Sav. Bank v. United States, 19 Wall. 227-236, 22 L. ed. 80, 81.

[632] Mr. Chief Justice White delivered the opinion of the court:

By the judgment appealed from the court below dismissed the petition in which recovery was sought by the appellant, of a stated sum charged to be due him because of the extra *per diem* ration for each five years' service allowed by the act of July 5, 1838, § 15, 5 Stat. at L. 258, chap. 162, and the 10 per centum increase of yearly pay given for each term of five years' service by Rev. Stat. § 1262, U. S. Comp. Stat. 1901, p. 896. To develop the questions to be decided, we chronologically arrange the facts alleged and somewhat abbreviate their statement, omitting nothing, however, relevant to the issues.

Stating the petitioner to be a brigadier general on the retired list, the petition alleged the period of his military service from 1855, when he entered the Military Academy, up to and including 1899, when, as a brigadier general, he was placed upon the retired list. The arms of the military establishment in which the services of the petitioner were rendered, during the period stated, as well as the various grades through which, by promotion, he passed, were enumerated, the whole period embracing service in the regular Army except a brief time between the 1st of October, 1864, and the 1st day of August, 1865, when it was alleged he served as an officer of the volunteer service. It was charged that:

"During the entire period of his service as second lieutenant, first lieutenant, and captain aforesaid, the practice of the War Department and of the accounting officers of the Treasury Department was not to count service as a cadet in the United States Military Academy in reckoning the term of five years of service for purposes of the additional ration provided by the act of July 5, 1838, or for longevity increase of pay under § 1262 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 896)."

[633] The following averments were then made:

"It was decided by the Supreme Court of the United States on the 27th day of October, 1884, in the case of United States v. Morton, 112 U. S. p. 3, 28 L. ed. 613, 5 Sup Ct. Rep. 1, and on the 11th day of March, 1889, in the case of United States v. Watson, 130 U. S. p. 80, 32 L. ed. 852, 9 Sup. Ct. Rep. 430, that officers of the United States Army were entitled, in computing their rations under said act of July 5, 1838, and in computing their longevity pay under § 1262 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 896), to be credited with their service as cadets in the United States Military Academy.

Notwithstanding said decisions of the Supreme Court of the United States, the Second Comptroller of the Treasury, on June 20, 1890, decided that he would not allow any claim for additional rations under § 15 of the act of July 5, 1838, aforesaid, and for increase of longevity pay under § 1262 of the Revised Statutes on account of any service not theretofore admitted as forming a proper subject of credit by the previous practice of the Treasury Department as aforesaid."

Although the date when the claim was presented was not stated, it was averred that "after the decisions of the Supreme Court aforesaid in the Morton and Watson Cases, a claim was presented by this claimant to the Second Auditor of the Treasury for additional rations and longevity pay due under the acts aforesaid in accordance with the decisions of the Supreme Court aforesaid, and said claim was disallowed [on December 13, 1890] by the Second Auditor in accordance with the decision of the Second Comptroller of the Treasury of June 20, 1890, as hereinbefore set forth, and no consideration was given by said Auditor to the interpretation of said statutes made by the Supreme Court in said cases."

It was alleged that on the 4th day of March, 1907, "a provision of law was passed by Congress as a portion [634] of the annual sundry civil appropriation bill (34 Stat. at L. 1356, chap. 2918, U. S. Comp. Stat. Supp. 1911, p. 58)," which provision was quoted in full in the petition. It was further alleged:

"That on the 18th day of May, 1908, the Comptroller of the Treasury decided . . . that in the future the decisions of the Supreme Court of the United States in the cases aforesaid would be followed by the accounting officers of the Treasury in claims for additional rations and longevity pay aforesaid, based upon service as a cadet at the Military Academy of West Point, but it was decided by said Comptroller in various cases that . . . the accounting officers of the Treasury would not reopen any claim as aforesaid in which a settlement or adjudication had once been made by their predecessors."

Following the enactment by Congress of the provision above referred to, it was averred:

"Your petitioner applied to the Auditor for the War Department in July, 1909,

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for all arrears of pay then due on account of his service aforesaid, particularly for additional rations and longevity pay on account of his service aforesaid as a cadet in the Military Academy. The Auditor for the War Department refused to consider said claim because of the settlement aforesaid, dated December 13, 1890, by the Second Auditor then in office, disallowing said claim."

Referring to the provision in the sundry civil appropriation act of 1907, it was then alleged:

"Your petitioner respectfully represents that by said provision of statute, there was granted to your petitioner a right to be paid additional rations under said act of 1838, and additional longevity pay under said § 1262 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 896), for the reason that the decisions of the Supreme Court of the United States and of the court of claims of the United States, aforesaid, held that such rations and longevity pay were due in a similar case, and such decisions should have been followed by said [635] accounting officers notwithstanding the former settlement or adjudication by one of their predecessors as aforesaid. The refusal of the accounting officers of the Treasury aforesaid to state a balance in favor of your petitioner on account of the former settlement aforesaid deprived your petitioner of a right granted under said act of Congress, for which there is no remedy except by action in this court."

Plainly, under this pleading the only ground upon which the right to a recovery was based was the provision in the sundry civil appropriation act which was counted upon as conferring a substantive new and independent right. The text of the proviso upon which the case depends is this:

"Back pay and bounty: For payment of amounts for arrears of pay of two and three year volunteers, for bounty to volunteers and their widows and legal heirs, for bounty under the act of July twenty-eighth, eighteen hundred and sixty-six [14 Stat. at L. 322, chap. 296], and for amounts for commutation of rations to prisoners of war in rebel states, and to soldiers on furlough, that may be certified to be due by the accounting officers of the Treasury during the fiscal year nineteen hundred and eight, $200,000: Provided, That in all cases hereafter so certified the said accounting officers shall, in stating balances, follow the decisions of the United States Supreme Court or of the court of claims of the United States after the time for appeal has expired, if no appeal be taken, without regard to former settlements or adjudications by their predecessors."

The complaint that the court below held that this provision does not "include the claim of the appellant" is the single matter assigned as error, and what is urged to be the correct meaning of the provision is thus stated in argument:

"1. That the above proviso in the act of March 4, 1907, is an acknowledgment of the indebtedness of the United States to all persons whose claims are therein described, [636] and, as a new promise, takes their claims out of the operation of the statute of limitations.

"2. That upon the refusal of the accounting officers to allow a claim as directed by this proviso, an action may be maintained upon the claim in the court of claims because it is a claim 'founded upon . . . any law of Congress' (Judicial Code, § 145, ¶ 1st [36 Stat. at L. 1136, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 198])."

It is apparent that the construction which the proposition affixes to the proviso does not confine its operation to the character of claims here involved, but extends it so as to embrace all claims of every nature if hereafter it be asserted that a prior administrative determination against the validity of the claim was reached without following the decisions of this court or of the court of claims. The foundation principle contended for by which the result just stated is brought about is that, by the effect of the proviso, a new cause of action is conferred upon the holder of every claim arising against the government from its foundation, however remote may have been the time when an adverse ruling was made, and however otherwise statutes of limitation would be applicable.

The arguments advanced to sustain the proposition make it clear that such is its scope. For instance, it is insisted that "Congress has by the proviso enacted that in all cases" "the administrative rule of *res judicata* shall not prevail against a judicial decision," and that the purpose of the provision was to remove the bar of all statutes of limitations as to every case to which the enactment relates. The extreme result of the proposition is thus made apparent. That its assertion is not academic becomes obvious when it is observed that maintaining it is essential to meet the requirements of the case, since without the asserted doctrine of new promise and the contention as to the removal of the bar of statutes of limitation the claim sued on would not be justiciable, and could be barred by limitations.

[637] Coming to test the proposition by the text of the provision it is seen that it consists simply of an item in a general appropriation act applying a designated sum

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to pay an enumerated class of cases, of which this is not one, accompanied with a proviso concerning the steps to be taken to ascertain and pay the claims appropriated for. This makes it clear that the sole ground upon which the proposition rests is a disregard of all that portion of the provision which precedes the word "provided," thus treating the latter part of the whole clause as distinct and independent legislation.

In other words, the only avenue of approach for the proposition is through a gateway created by wrenching the provision asunder. We are of opinion that this may not be done. (White v. United States, 191 U. S. 545, 48 L. ed. 295, 24 Sup. Ct. Rep. 171; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 181, 32 L. ed. 377, 380, 9 Sup. Ct. Rep. 47. But it is insisted that the words following the word "provided" do not technically amount to a proviso, and therefore the clause must be divided into two independent parts, consisting the one of that portion which goes before the word "provided," and the other, that portion which follows it. And when this is done the argument is that the word "all" in the latter portion renders it necessary to give to that portion the far-reaching significance claimed. Conceding for argument's sake that the latter part of the provision, that is, the portion which follows the word "provided," may not be technically a proviso, nevertheless the fact that the two provisions are united in enactment is one and the same clause, giving no intrinsic manifestation of a legislative purpose to separate them, causes the concession to be without influence in determining the proper construction of the provision. It is, however, urged that at the time of the enactment of the clause there were pending before Congress various bills concerning the action of the executive departments in failing to apply the rulings of this court [638] as to longevity pay, and therefore the provision must have been intended to remedy the evil by the adoption of a general provision accomplishing the results here claimed. The premise, if conceded, serves to refute, instead of to sustain, the proposition based on it, for if it be that the purpose of Congress was to unsettle the entire past administrative action as to all claims against the government, and to confuse the entire administration for the future, it cannot be conceived that such a radical intent would have been expressed in such an obscure and uncertain manner. And this leads us finally to examine the contention that, as in modern practice it has become common to adopt independent legislation on appropriation bills by what is called a "rider," therefore the provision here involved should be treated as having that character, and be accordingly independently interpreted as claimed. But whatever be the new habit, it can in no respect serve to relieve the judiciary, when called upon to consider a statute, of the old duty of correctly interpreting it. Indeed, the very suggestion of the practice of "riders" admonishes that things may not be so associated as one for the purpose of securing the enactment of legislation upon the theory that they are one, and when enacted be disassociated for the purpose of judicial construction so as to cause them to be wholly independent one of the other.

Affirmed.

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[639] IN RE CITY OF LOUISVILLE, Kentucky, Petitioner.

(See S. C. Reporter's ed. 639–646.)

Appeal — judgment — subsequent proceedings below.

A decision of the Federal Supreme Court which reversed, "without prejudice," because the evidence of confiscation was not so clear as to dispense with the test of actual experiment, a decree of a district court enjoining the enforcement as confiscatory of a municipal ordinance fixing telephone rates and remanded the cause for further proceedings not inconsistent with its opinion, gives the district court a discretion to retain the case for an actual experiment with the rates, which discretion was not abused by a subsequent order appointing a special master to ascertain and report the gross earnings, gross operating expenses, and net income of the telephone company after the rate ordinance went into effect, where an actual experiment with the ordinance rates had been voluntarily undertaken after the Supreme Court's action, and had been in effect for more than eight months before such order was entered.

[For other cases, see Appeal and Error, IX. 1, in Digest Sup. Ct. 1908.]

[No. 11, Original.]

Argued November 10, 1913. Decided January 5, 1914.

PETITION for a Writ of Mandamus to compel the judge of the District Court of the United States for the Western District of Kentucky to vacate a supplemental order retaining the case for an actual experiment after the Federal Supreme Court had reversed without prejudice a decree of the District Court enjoining as confiscatory the enforcement of a municipal ordinance fixing telephone rates. Rule discharged.

The facts are stated in the opinion.

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Mr. **Pendleton Beckley** argued the cause, and, with Messrs. J. W. S. Clements and Stuart Chevalier, filed a brief for petitioner:

An appeal is proper where the lower court has misconstrued an opinion of this court.

City Nat. Bank v. Hunter, 152 U. S. 512, 515, 38 L. ed. 534, 536, 14 Sup. Ct. Rep. 675; Whitaker v. Desfosse, 7 Bosw. 678; Cram v. Bradford, 4 Abb. Pr. 193; St. Paul & S. C. R. Co. v. Gardner, 19 Minn. 136, Gil. 99, 18 Am. Rep. 334; 2 Cyc. 612, 613.

In any event a writ of mandamus is proper to bring before this court the question whether its opinion or mandate has been misconstrued by a lower court.

Perkins v. Fourniquet, 14 How. 328, 14 L. ed. 441; Gaines v. Rugg (Gaines v. Caldwell), 148 U. S. 228, 37 L. ed. 432, 13 Sup. Ct. Rep. 611; Re Sanford Fork & Tool Co. 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291; Re Potts, 166 U. S. 263, 41 L. ed. 994, 17 Sup. Ct. Rep. 520.

The district court should retain jurisdiction of this case for the purpose (but for the purpose only) of decreeing restitution to the patrons of the telephone company of the amount of overcharges accruing from the passage of the rate ordinance to the filing of the mandate of this court upholding that ordinance.

Brown v. Detroit Trust Co. 113 C. C. A. 490, 193 Fed. 626; Northwestern Fuel Co. v. Brock, 139 U. S. 216, 35 L. ed. 151, 11 Sup. Ct. Rep. 523; Southern R. Co. v. Tift, 206 U. S. 435, 51 L. ed. 1125, 27 Sup. Ct. Rep. 709, 11 Ann. Cas. 846, 159 Fed. 555.

Messrs. **Alexander Pope Humphrey** and **William L. Granbery** argued the cause, and, Mr. Hunt Chipley, filed a brief for respondent:

The respondent proceeded in conformity with the mandate of this court.

Aurora & G. R. Co. v. Harvey, 178 Ill. 477, 53 N. E. 331; State ex rel. Broderick v. District Ct. 91 Minn. 161, 97 N. W. 581.

It is certainly no unheard-of thing where a plaintiff has, in the judgment of the appellate tribunal, failed to present sufficient evidence to justify a decision in his favor, for that tribunal to reverse the case and yet allow the plaintiff, upon a new trial, to present sufficient evidence to justify a new verdict. This court has held, in Slocum v. New York L. Ins. Co. 228 U. S. 364, 57 L. ed. 879, 33 Sup. Ct. Rep. 523, that this course of proceeding is obligatory in suits at common law. We do not, of course, contend that it is obligatory in suits in courts of equity; but that it is allowable in courts of equity cannot admit of a doubt.

Nor is it at all a new or unheard-of practice in cases of the character of the one at bar for the court to determine by actual trial during the pendency of a suit whether certain prescribed rates are confiscatory.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

Mr. Justice **McKenna** delivered the opinion of the court:

Petition for a rule on the judge of the district court of the United States for the western district of Kentucky, [642] to show cause why a mandamus should not issue commanding him to vacate the supplemental order of reference entered on March 10, 1913, in the cause entitled Cumberland Teleph. & Teleg. Co. v. Louisville, pending in said district court, and to desist from further trying in the cause the question whether the ordinance of March 6, 1909, in litigation in the cause, is confiscatory and void as to the company, and further commanding him to dismiss the bill of complaint, retaining the same on the docket, however, for the purpose of ascertaining the amounts collected by the company from its patrons in the city of Louisville in excess of the rates prescribed in the ordinance, and for the further purpose of distributing the same among the persons entitled thereto.

A rule was issued in accordance with the petitioner, and return thereon duly made by the district judge.

The suit referred to was brought by the Telephone & Telegraph Company against the city in the circuit court, the predecessor of the district court, on the 8th of March, 1909, and sought an injunction enjoining the city of Louisville from enforcing the ordinance referred to on the ground that the rates prescribed by it were confiscatory. Upon the filing of the bill a temporary restraining order was granted. A motion was also made for an injunction *pendente lite*, but was not passed upon till final hearing on the 25th of April, 1911, when a permanent injunction was decreed, the court adjudging the rates fixed to be confiscatory.

On the 15th of June, 1909, the city moved for an order requiring the company to pay into court all sums collected in excess of those fixed in the ordinance. Thereupon the company agreed that if the court make no order in pursuance of the motion, it would keep an accurate account of the sums collected in excess of the rates fixed in the ordinance, and would, on the final hearing, pay the amounts into court for distribution among those entitled thereto, [643] provided the ordinance was not declared to be confiscatory. In pursuance of the agreement

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the court refrained from making the order prayed for, and allowed the restraining order to remain in force.

An appeal to this court was taken by the city from the decree of perpetual injunction, and the decree was reversed. 225 U. S. 430, 56 L. ed. 1151, 32 Sup. Ct. Rep. 741. This court reviewed the evidence upon which the circuit court decided that the rates were confiscatory, and said:

"We express no opinion whether to cut this telephone company down to 6 per cent by legislation would or would not be confiscatory. But when it is remembered what clear evidence the court requires before it declares legislation otherwise valid void on this ground, and when it is considered how speculative every figure is that we have set down with delusive exactness, we are of opinion that the result is too near the dividing line not to make actual experiment necessary. The master thought that the probable net income for the year that would suffer the greatest decrease would be 8.60 per cent on the values estimated by him. The judge, on assumptions to which we have stated our disagreement, makes the present earnings 5-10.17 per cent, with a reduction by the ordinance to 3-6.17 per cent. The whole question is too much in the air for us to feel authorized to let the injunction stand.

"Decree reversed without prejudice."

A mandate was issued, the material parts of which are as follows:

"On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed with costs, without prejudice; and that the said defendant, city of Louisville, recover against the said complainant, $3,945.65, for its costs herein expended, and have execution therefor.

[644] "And it is further ordered that this cause be, and the same is hereby, remanded to the district court of the United States for the western district of Kentucky for further proceedings not inconsistent with the opinion of this court."

On the return of the case to the district court, as successor of the circuit court, in obedience to the mandate, the original decree was set aside and the case restored to the docket. Subsequently, on motion of the city, the court appointed a special master to take proof of and report the amount, with interest, collected by the company in excess of the rates fixed by the ordinance. Power was given to the master to subpœna witnesses and examine the books and records of the company. A motion of the city to require the company to pay the amount into the court was postponed. A motion of A. Englehard & Sons Company for leave to file a bill of intervention was set for hearing November 12, 1912. The master proceeded to the execution of his duties under the order, but had not completed them at the time the petition herein was filed. The sums in excess of the rate will aggregate more than $100,000.

On March 10, 1913, the district court (it is alleged, without any motion being made or any further steps taken by any party to the cause, on its own initiative, entered a supplemental order of reference wherein the clerk of the court was appointed a special master to ascertain and report the gross earnings of the company after the rate ordinance went into effect, the gross expenses incurred in operating its property, and the net income derived by the company from operating its plant since the ordinance was put into effect.

The court justified this order by its interpretation of the opinion and mandate of this court. The city protested against the entry of the order, denying that it was a proper interpretation of the opinion of this court, and insisted [645] that the district court, in response to the bill of complaint, should "adjudge that the ordinance in question was not confiscatory, and that the complainant take nothing by its bill." And it is now alleged that the cause is at an end so far as the rights of the company to have the ordinance adjudged confiscatory and void are concerned, and that the district court has no further jurisdiction; that the trial of the issue cost the city $20,000, and a new trial will cost it the same sum, and that no appeal can be taken until such trial be had; and, having no adequate remedy but mandamus, the petitioner prays that one issue to require the judge to vacate his order and to desist from further trying the issue.

It is alleged that the special master, who was appointed to ascertain the amounts collected by the company, is ready to make his report, and will make it in a short time.

It is further alleged the amounts collected in excess of the ordinance are a trust fund held by it for the benefit of the patrons of the company as their rights may appear, and that they are entitled to have restitution made to them by the district court, and that therefore the litigation between the company and the city should not be dismissed absolutely, but should be retained on the docket for the purpose of having collected and distributed the excessive collections. And this relief is prayed in addition to the mandamus.

Due return to the rule was made. It is, in effect, that the court considered the opinion and decree of this court permitted

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a discretion to retain the case for an actual experiment of the rates, and, thus considering it, made the order of March 10, 1913.

We think the discretion was properly exercised. The terms of the mandate permitted further proceedings, and it is well to recall what had been done. The decree of this court was rendered June 7, 1912. The Telephone Company put the ordinance rates into effect July 1, 1912. [646] On motion of the city a special master was appointed to take proof and report the amount collected by the company between the latter date and March 8, 1909, and subsequently, after an interchange of views between court and counsel, the order of March 10, 1913, was made. It will be observed, therefore, that an actual experiment of the rates had been voluntarily undertaken and had been in effect for more than eight months before the order under review was entered, and the court conceived that observation of the experiment might secure greater accuracy and confidence in the result, and, besides, inform the court of matters as they progressed.

We repeat, we think the court did not exceed the discretion permitted, and the rule is discharged.

IN RE ENGELHARD & SONS COMPANY, Petitioner.

(See S. C. Reporter's ed. 646–652.)

Mandamus — to control judicial discretion — intervention by representative of class.

The Federal Supreme Court will not revise by mandamus the exercise by a district court of its discretion, when retaining a case for an actual experiment with telephone rates fixed by a municipal ordinance after its decree enjoining the enforcement of such ordinance as confiscatory had been reversed "without prejudice" by the Supreme Court, in refusing to permit a telephone subscriber to intervene as representative of a class under equity rule 38, for the purpose of suing for, representing, and acting for all the other subscribers with respect to the restitution of the sums collected in excess of the rates fixed by the ordinance during the pendency of the injunction.

[For other cases, see Mandamus, II. c, 3; Parties, I. a, 5, in Digest Sup. Ct. 1908.]

[No. 12, Original.]

Argued November 10, 1913. Decided January 5, 1914.

PETITION for a Writ of Mandamus to compel the judge of the District Court of the United States for the Western District of Kentucky to vacate an order refusing to permit a telephone subscriber to intervene as representative of a class in the proceedings taken after the decree of the District Court, enjoining the enforcement as confiscatory of a municipal ordinance fixing telephone rates, had been reversed by the Supreme Court "without prejudice." Rule discharged.

The facts are stated in the opinion.

Mr. Clayton B. Blakey argued the cause, and, with Mr. Huston Quin, filed a brief for petitioner:

The city of Louisville is simply acting *pro bono publico*, and has no real interest in the litigation.

Georgetown v. Alexandria Canal Co. 12 Pet. 100, 9 L. ed. 1016.

Equity rule 38 only reiterated the recognized principle of equity practice.

Smith v. Swormstedt, 16 How. 302, 14 L. ed. 948.

There is nothing in the rule which indicates that this court intended to leave to the discretion of the district court this right granted to litigants.

Rio Grande Irrig. & Colonization Co. v. Gildersleeve, 174 U. S. 608, 43 L. ed. 1105, 19 Sup. Ct. Rep. 761.

But even where a court may exercise a discretion, the law requires that it shall not abuse that discretion.

Ibid.; Throckmorton v. Holt, 180 U. S. 565, 45 L. ed. 670, 21 Sup. Ct. Rep. 474; Rucker v. Bolles, 67 C. C. A. 30, 133 Fed. 858; Great Northern R. Co. v. Herron, 68 C. C. A. 599, 136 Fed. 49; Silverman v. Baruth, 42 App. Div. 21, 58 N. Y. Supp. 663; McElroy v. Minnesota Percheron Horse Co. 109 Wis. 116, 85 N. W. 119; Jarrett v. Jarrett, 11 W. Va. 584.

Mandamus is the only appropriate remedy.

Ex parte Cutting, 94 U. S. 20, 24 L. ed. 50; Credits Commutation Co. v. United States, 177 U. S. 311, 44 L. ed. 782, 20 Sup. Ct. Rep. 636; Chicago & A. R. Co. v. Wiswall, 23 Wall. 507, 23 L. ed. 103; Re Hohorst, 150 U. S. 663, 37 L. ed. 1215, 14 Sup. Ct. Rep. 221; State ex rel. Fourth Nat. Bank v. Johnson, 103 Wis. 591, 51 L.R.A. 33, 79 N. W. 1081.

The writ is asked in aid of this court's appellate jurisdiction.

Marbury v. Madison, 1 Cranch, 173, 2 L. ed. 72; Ex parte Bradstreet, 7 Pet. 634, 8 L. ed. 810; Re Connaway, 178 U. S. 421, 44 L. ed. 1134, 20 Sup. Ct. Rep. 951; Ex parte Parker, 120 U. S. 737, 30 L. ed. 818,

NOTE.—On mandamus to control inferior tribunal— see note to Ex parte Morgan, 29 L. ed. U. S. 135.

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7 Sup. Ct. Rep. 767; Re Parker, 131 U. S. 221, 33 L. ed. 123, 9 Sup. Ct. Rep. 708.

It is our contention that the patrons of the Telephone Company have paid $137,000 in excess of what they should have been required to pay, and that that sum was paid under an erroneous order of the district court. That sum, therefore, was wrongfully taken from one party to a litigation and handed over to another party who was not entitled thereto. Under such circumstances a court of equity should reach out its strong arm and restore to the rightful owners the sum so taken.

Northwestern Fuel Co. v. Brock, 139 U. S. 216, 35 L. ed. 151, 11 Sup. Ct. Rep. 523; Brown v. Detroit Trust Co. 113 C. C. A. 490, 193 Fed. 626; Lincoln Gas & Electric Light Co. v. Lincoln, 223 U. S. 349, 56 L. ed. 466, 32 Sup. Ct. Rep. 271; Southern R. Co. v. Tift, 206 U. S. 435, 51 L. ed. 1125, 27 Sup. Ct. Rep. 709, 11 Ann. Cas. 846, 159 Fed. 555; Lamb v. Ewing, 4 C. C. A. 320, 12 U. S. App. 11, 54 Fed. 269; Hendryx v. Perkins, 52 C. C. A. 435, 114 Fed. 828; Baltimore Bldg. & L. Asso. v. Alderson, 39 C. C. A. 609, 99 Fed. 493; Robinson v. Alabama & G. Mfg. Co. 67 Fed. 189.

Messrs. Alexander Pope Humphrey and William L. Granbery argued the cause, and, with Mr. Hunt Chipley, filed a brief for respondent:

In a case like this the city of Louisville represents all the patrons of the Telephone Company.

San Francisco Gas & Electric Co. v. San Francisco, 164 Fed. 884.

Mr. Justice McKenna delivered the opinion of the court:

This petition was argued and submitted with No. 11, Original [231 U. S. 639, ante, 413, 34 Sup. Ct. Rep. 255], and prays a mandamus issue commanding respondent to vacate the order made March 10, 1913, in the suit then and now pending, brought by the Cumberland Telephone & Telegraph Company against the city of Louisville, in so far as it denied to petitioner the right to sue for all subscribers of the Telephone & Telegraph Company similarly situated with petitioner, who paid the Telephone & Telegraph Company, during the pendency of the injunction against a certain rate ordinance enacted [648] by the city, sums in excess of the rates fixed in the ordinance, and commanding him to enter an order permitting petitioner to sue for and represent and act in behalf of such subscribers with respect to the restitution of the sums so collected.

If this cannot be done, then petitioner prays for a rule on said judge to show cause why a mandamus shall not issue to grant petitioner an appeal prayed for from the order of March 10, 1913, and refused by him.

The petition recites the proceedings in the district court substantially as they are recited in the petition in Re Louisville. It adds these details: That while the injunction was in force at least 8,000 of the subscribers of the Telephone Company paid for its service sums in excess of the amounts fixed by the ordinance; that the amounts paid by them ranged from $5 to $100, the majority of the payments being less than $20. The total amount so paid will exceed $100,000. None of the subscribers were parties to the litigation, and petitioner, on September 28, 1912, presented and asked to have filed a bill of intervention in the cause, and that it might be permitted to sue for and represent all of the subscribers who had so paid the Telephone Company. The petition was refused.

That on February 15, 1913, and after the new equity rules had been promulgated by this court, petitioner again moved for leave to file its bill of intervention and for leave to sue in behalf of all of such subscribers. The motion was denied.

A petition for an appeal was presented and denied on April 18, 1913.

That during the time the Telephone Company collected rates from its subscribers in excess of the new ordinance rates, some of the subscribers had business telephones on a direct line, and some on a party line; some had residence telephones on a direct line and others on a party line. All [649] of the subscribers who paid the excess rates paid them under identically similar circumstances, and in the same situation with respect to their right to have the Telephone Company restore the excess. The petitioner had a telephone on a party line and more than 3,000 of the subscribers of the company had the same kind of telephone.

That the effect of the order of the court is to deny the right of the subscribers to be represented in the cause upon the correctness of the master's report, which will be filed in the next thirty days, and their rights will be finally adjudicated without allowing them to appear or have their day in court. There are 8,000 subscribers thus situated who have no adequate remedy against the action of the court, but mandamus.

A copy of the complaint in intervention is attached to the petition. It sets out the facts as in the petition, but more in detail, with additions in an attempt to show a common interest in all of the subscribers to the right of petitioner to appear for

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itself and for them. It prays that petitioner be made a party to the cause for itself and the other subscribers; that the Telephone Company, upon the coming in of the master's report, pay into the court the sums collected in excess of the ordinance rates, with interest at 6 per cent to be distributed for the benefit of those concerned. The bill of intervention was permitted to be filed so far as to permit petitioner to assert its own claim, but so far as it prayed to be permitted to act or claim for any other but itself, its prayer was denied, with the privilege, however, to renew the same upon making it appear to the court that it had authority from "other specifically named claimants" to act for them.

The basis of petitioner's contention is that it has a common interest with the other subscribers of the Telephone Company, and may therefore intervene for itself [650] and for them. Equity rule 38† is cited to sustain the contention. Petitioner is not seeking, however, as it says, "for itself or for anyone the recovery of a specific portion of the fund." The alternative of this would seem to be the assertion of a right to intervene and become a party to all the controversies upon which the fund may depend, and this may mean either in conjunction with the city or independently of it, and, it may be, in exclusion of it. It is said that the city is acting only for the good of the public, but that that is not "the criterion to determine whether the parties in interest have the representation to which they are entitled." It is further said that however earnest the city may be to obtain restitution to the subscribers of the Telephone Company, it might not appeal from an adverse ruling. Who is going to represent the subscribers, it is asked, upon the question of fees to the master and the costs, and the costs on appeal, and who raise the question of interest? This enumeration presents the purpose of the petition for intervention. In other words, the apprehension is expressed and made a basis of the petition for leave to intervene, that the city, which has so far conducted the litigation—and with success—may or will relax its attention and energy to the detriment of petitioner and the other subscribers of the company. This does not present a very strong plea against the discretion the court exercised, supposing the court had discretion to grant or refuse the petition.

It is contended, however, that the court had no discretion but to grant the petition, and that equity rule 38 was peremptory of the right of petitioner. It recognizes the principle, it is said, "that the rights of persons should not be passed upon unless such persons are before the court, or are represented by someone who is interested similarly [651] with them." And cases are cited which, it is urged, also recognize and illustrate the principle.

We have given due consideration to the cited cases and the argument of counsel, and we are of opinion that the district court did not exceed its discretion in making the order under review. The city was the proper party to make defendant in the suit as representative of all interested, and so throughout the whole proceedings. If we may suppose in a case like the present one there can be a distinction between the public interest and private interest, the subscribers of the company being the public, the representation of both interests was adequately fulfilled. It was in consequence of the motion of the city that the telephone company agreed to keep account of charges in excess of the ordinance rates, and, if they should finally be decided to be illegal, to pay into court the excess sums for distribution among its subscribers. It was the representative of all interests to provide for the creation of the fund; it is properly the representative of all interests to see to its proper distribution. This is a necessary deduction from the cases. It is the universal practice, sustained by authority, that the only mode of judicial relief against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them. As was said by Mr. Justice Miller, in Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 460, 33 L. ed. 970, 982, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 702, it was not competent for each individual having dealings with the regulated company "to raise a contest in the courts over the questions which ought to be settled in this general and conclusive way." The rule has been repeated in subsequent cases.

Indeed, what issue is involved except that of the main suit—the character of the rates—that needs the intervention of petitioner? As to who are subscribers of the company, there can be no controversy, nor as to the amounts to be returned to them. Both names and amounts could be, [652] indeed had been, ascertained by the master, under an order made upon motion of the city. Petitioner, however, was not able to produce authority from any subscriber to appear for him, notwithstanding the order of respondent permitted petitioner to renew its motion whenever it should "be made to appear to the court in any appropriate way that other specifically named claimants" desired petitioner to act for them. And yet,

†See 57 L. ed. p. 1643.

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against these facts, against, as counsel for respondent says, the possibility of a presumption that the other subscribers of the telephone company do not desire petitioner to represent them, it prays a mandamus to compel such representation.

We cannot yield to the prayer.

Rule discharged.

CITY OF LOUISVILLE, Appt.,
v.
CUMBERLAND TELEPHONE & TELEGRAPH COMPANY.

(See S. C. Reporter's ed. 652, 653.)

This case is governed by the decision in Re Louisville, ante, 413.

[No. 538.]

Argued November 10, 1913. Decided January 5, 1914.

APPEAL from the District Court of the United States for the Western District of Kentucky to review an order retaining a case for an actual experiment with telephone rates fixed by municipal ordinance after a decree of that court enjoining the enforcement of such ordinance as confiscatory had been reversed by the Supreme Court "without prejudice." Affirmed.

The facts are stated in the opinion.

Mr. Pendleton Beckley argued the cause, and, with Messrs. J. W. S. Clements and Stuart Chevalier, filed a brief for appellant.

Messrs. Alexander Pope Humphrey and William L. Granbery argued the cause, and, with Mr. Hunt Chipley, filed a brief for appellee.

[653] Mr. Justice McKenna delivered the opinion of the court:

Appeal from the order of March 10, 1913, referred to in Nos. 11 and 12, Original [231 U. S. 639, 646, ante, 413, 416, 34 Sup. Ct. Rep. 255, 258], and which order it was the object of the petition for mandamus, passed on in No. 11, to command the judge of the district court to vacate. The appeal also includes certain other orders which preceded the making of that order. The question, which is fundamental of all, is whether the decision and decree of this court set out in No. 11, Original, and the mandate issued thereon, permitted further proceedings in the suit, or necessarily required its dismissal. This is the general basis of the assignments of error, and, as included in it, special objection is made to the instructions given the master in the orders appealed from, to the refusal of the court to order the Telephone Company to pay into court for immediate distribution among those entitled thereto, whatever sums the company collected in excess of the ordinance rates and deciding instead that a bond should be required of the company for the restitution of the amounts if the ordinance rates should ultimately be held not to be confiscatory. These objections are repeated in the usual way of assignments of error.

The discretion vested in the court, we considered in No 11, Original, and repetition would serve no purpose. For the reasons there given the order of the District Court is affirmed.

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[654] UNITED STATES OF AMERICA, Plff. in Err. and Appt.,
v.
ANTIKAMNIA CHEMICAL COMPANY.

(See S. C. Reporter's ed. 654-668.)

Error to District of Columbia court of appeals — jurisdiction — suit involving validity of Federal authority.

1. A decree of the court of appeals of the District of Columbia holding invalid a departmental regulation promulgated to carry into effect the provisions of the food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915, U. S. Comp. Stat. Supp. 1911, p. 1354), is appealable to the Federal Supreme Court as rendered in a suit in which the validity of an authority exercised under the United States is drawn in question.

[For other cases, see Appeal and Error, 1057-1074, in Digest Sup. Ct. 1908.]

Food and drugs — misbranding — administrative regulations.

2. A regulation promulgated by the Secretaries of the Treasury, Agriculture, and Commerce and Labor, requiring the label on a preparation containing a derivative of any of the drugs enumerated in the food and drugs act of June 30, 1906, § 8, not only to show the presence of such derivative, but to state the name of the drug from which it is derived, so as to show clearly that the product is a derivative of that particular drug, is a proper exercise of the power of these officials under § 3 of that act to make uniform rules and enact regulations to carry out the statute, and is not invalid as an attempt to add to the provisions of § 8 that a drug shall be deemed to be misbranded if its label shall be false or misleading in any particular, or shall fail to state the quantity or proportion of certain enumerated

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over the District of Columbia courts—see note to United States ex rel. Taylor v. Taft, 51 L. ed. U. S. 269.

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substances, or any derivative or preparation of any such substances contained therein.
[Pure food laws, see Food and Drugs, in Digest Sup. Ct. 1913 Supp.]

Food and drugs — misbranding — drug derivatives.

3. The requirement in the food and drugs act of June 30, 1906, § 8, that labels on drugs shall state the quantity or proportion of certain enumerated substances or of any derivative or preparation of any such substances contained therein necessarily means that the label shall also state the substance from which such derivative is produced, in order to make the warning of the labels complete.
[Pure food laws, see Food and Drugs, in Digest Sup. Ct. 1913 Supp.]

[No. 118.]

Argued December 9, 1913. Decided January 5, 1914.

IN ERROR to, and APPEAL from, the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, dismissing a libel for the seizure and condemnation of certain drugs under the food and drugs act. Reversed and remanded, with direction to reverse the decree of the Supreme Court, and remand the cause, with direction to overrule the exceptions to the libel.

See same case below, 37 App. D. C. 343.

The facts are stated in the opinion.

Solicitor General Davis argued the cause, and, with Mr. Karl W. Kirchwey, filed a brief for plaintiff in error and appellant:

This court has jurisdiction.

Smoot v. Heyl, 227 U. S. 518, 57 L. ed. 621, 33 Sup. Ct. Rep. 336.

Debates in Congress may be looked to in order to show the evil which Congress sought to remedy.

American Net & Twine Co. v. Worthington, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55; Binns v. United States, 194 U. S. 486, 48 L. ed. 1087, 24 Sup. Ct. Rep. 816; Blake v. National City Bank, 23 Wall. 307, 23 L. ed. 119; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Jennison v. Kirk, 98 U. S. 453, 25 L. ed. 240, 4 Mor. Min. Rep. 504.

This court will recognize well-known scientific facts upon which Congress acted.

Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757.

The act is not penal for purposes of strict construction.

Cliquot's Champagne, 3 Wall. 114, 18 L. ed. 116; 443 Cans of Frozen Egg Product v. United States, 226 U. S. 172, 57 L. ed. 174, 33 Sup. Ct. Rep. 50; Hipolite Egg Co. v. United States, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Smythe v. Fiske, 23 Wall. 374, 23 L. ed. 47; Taylor v. United States, 3 How 197, 11 L. ed. 559; United States v. 5 Boxes of Asafœtida, 181 Fed. 561; United States v. Hodson, 10 Wall. 395, 19 L. ed. 937; United States v. Stowell, 133 U. S. 1, 33 L. ed. 555, 10 Sup. Ct. Rep. 244.

Even penal statutes should be construed to effectuate the legislative intent.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; United States v. Harris, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; United States v. Lacher, 134 U. S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625.

The only alternative to the construction contended for is that § 8 was left incomplete, and the Secretaries were intended and authorized to fill in the outline.

Pickett v. United States, 216 U. S. 456, 54 L. ed. 566, 30 Sup. Ct. Rep. 265; United States v. Hartwell, 6 Wall. 385, 18 L. ed. 830.

The power to make regulations having the force of law may be conferred by general language.

Bong v. Alfred S. Campbell Art Co. 214 U. S. 236, 53 L. ed. 979, 29 Sup. Ct. Rep. 628, 16 Ann. Cas. 1126; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Caha v. United States, 152 U. S. 211, 38 L. ed. 415, 14 Sup. Ct. Rep. 513; Coopersville Co-Op. Creamery Co. v. Lemon, 89 C. C. A. 595, 163 Fed. 145; Re Kollock, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444; Roughton v. Knight, 219 U. S. 537, 55 L. ed. 326, 31 Sup. Ct. Rep. 297; United States v. Bailey, 9 Pet. 238, 9 L. ed. 113; United States ex rel. West v. Hitchcock, 205 U. S. 80, 51 L. ed. 718, 2 Sup. Ct. Rep. 423.

The power delegated to the Secretaries was constitutional.

Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Re Kollock, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 26 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; United States v. Breen, 40 Fed. 402; United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480.

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A statement may be misleading under § 8, although literally true.

Brina v. United States, 105 C. C. A. 558, 179 Fed. 373; Frank v. United States, 113 C. C. A. 188, 192 Fed. 864; Schraubstadter v. United States, 118 C. C. A. 42, 199 Fed. 568; United States v. Morgan, 181 Fed. 587; United States v. 100 Cases of Tepee Apples, 179 Fed. 985; United States v. Scanlon, 180 Fed. 485; United States v. 75 Boxes of Alleged Pepper, 198 Fed. 934; United States v. 10 Barrels of Vinegar, 186 Fed. 399.

Section 8 was intended to cover just such deceptions as to identity.

United States v. Johnson, 221 U. S. 488, 55 L. ed. 823, 31 Sup. Ct. Rep. 627.

Former Solicitor General Lehmann also filed a brief for plaintiff in error and appellant.

Mr. Daniel W. Baker argued the cause, and, with Messrs. Joseph C. Sheehy and Frank J. Hogan, filed a brief for defendant in error and appellee:

The validity of an authority exercised under the United States was not drawn in question.

South Carolina v. Seymour, 153 U. S. 353, 38 L. ed. 742, 14 Sup. Ct. Rep. 871; Snow v. United States, 118 U. S. 346, 353, 30 L. ed. 207, 209, 6 Sup. Ct. Rep. 1059; Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503; Clough v. Curtis, 134 U. S. 361, 370, 33 L. ed. 945, 949, 10 Sup. Ct. Rep. 573; United States v. Lynch, 137 U. S. 280, 285, 286, 34 L. ed. 700, 702, 703, 11 Sup. Ct. Rep. 114; Snow v. United States, 118 U. S. 346, 352–354, 30 L. ed. 207, 209, 210, 6 Sup. Ct. Rep. 1059; Linford v. Ellison, 155 U. S. 503, 39 L. ed. 239, 15 Sup. Ct. Rep. 179; Ferry v. King County, 141 U. S. 668, 673, 35 L. ed. 895, 898, 12 Sup. Ct. Rep. 128; Commercial Bank v. Buckingham, 5 How. 317, 12 L. ed. 169; Lawler v. Walker, 14 How. 149, 14 L. ed. 364; Millingar v. Hartupee, 6 Wall. 258, 261, 262, 18 L. ed. 829, 830; District of Columbia v. Gannon, 130 U. S. 227, 229, 32 L. ed. 922, 923, 9 Sup. Ct. Rep. 508; United States ex rel. Taylor v. Taft, 203 U. S. 461, 51 L. ed. 269, 27 Sup. Ct. Rep. 148; Moore v. United States, 216 U. S. 608, 54 L. ed. 636, 30 Sup. Ct. Rep. 575; Cook County v. Calumet & C. Canal & Dock Co. 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; Re Craft, 124 U. S. 370, 373, 374, 31 L. ed. 449, 8 Sup. Ct. Rep. 509; Cameron v. United States, 146 U. S. 533, 536, 36 L. ed. 1077, 1078, 13 Sup. Ct. Rep. 184; Abbott v. National Bank of Commerce, 175 U. S. 409, 412, 413, 44 L. ed. 217–219, 20 Sup. Ct. Rep. 153.

Messrs. Daniel W. Baker and Wilton J. Lambert also filed a brief for defendant in error and appellee:

The statute creates a new criminal offense.

Hipolite Egg Co. v. United States, 220 U. S. 45–60, 55 L. ed. 364–369, 31 Sup. Ct. Rep. 364; United States v. Johnson, 177 Fed. 313; Huntington v. Attrill, 146 U. S. 667, 668, 669, 36 L. ed. 1127, 1128, 13 Sup. Ct. Rep. 224; United States v. Chouteau, 102 U. S. 603, 26 L. ed. 246; Lagler v. Bye, 42 Ind. App. 592, 85 N. E. 36; Diversey v. Smith, 103 Ill. 390, 42 Am. Rep. 14; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Coffey v. United States, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437; Lees v. United States, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163; Hepner v. United States, 213 U. S. 111, 53 L. ed. 723, 27 L.R.A.(N.S.) 739, 29 Sup. Ct. Rep. 474, 16 Ann. Cas. 960; United States v. Harris, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; United States v. Lacher, 134 U. S. 629, 33 L. ed. 1083, 10 Sup. Ct. Rep. 625; Northern Securities Co. v. United States, 193 U. S. 358, 48 L. ed. 709, 24 Sup. Ct. Rep. 436.

No prosecution can be had under a statute unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may or what he may not do under it.

Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 919; Todd v. United States, 158 U. S. 282, 39 L. ed. 982, 15 Sup. Ct. Rep. 889; United States v. Lacher, 134 U. S. 628, 33 L. ed. 1083, 10 Sup. Ct. Rep. 625; State v. Mann, 2 Or. 241; Brown v. State, 137 Wis. 543, 119 N. W. 338; United States v. Capital Traction Co. 34 App. D. C. 597, 19 Ann. Cas. 68.

The Department, in formulating this regulation, attempts to add to, alter, and amend the statute.

Morrill v. Jones, 106 U. S. 466, 27 L. ed. 267, 1 Sup. Ct. Rep. 423; United States v. 200 Barrels of Whiskey, 95 U. S. 571, 576, 24 L. ed. 491, 492; United States v. 3 Barrels of Whiskey, 77 Fed. 965; United States v. Symonds, 120 U. S. 46, 30 L. ed. 557, 7 Sup. Ct. Rep. 411; Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; Payne v. United States, 20 App. D. C. 581.

A violation of a regulation of the Department is not punishable as a crime, unless the act of Congress itself providing for such regulation also provides for a punishment in case of a violation thereof.

United States v. Eaton, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; United States v. Sandefuhr, 145 Fed. 49; Com. v. Crane, 158 Mass. 219, 33 N. E. 388; United States v. Grimaud, 220 U. S. 506, 55

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. ed. 563, 31 Sup. Ct. Rep. 480; Standard Oil Co. v. United States, 221 U. S. 77, 55 L. ed. 652, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. George, 228 U. S. 14, 57 L. ed. 712, 33 Sup. Ct. Rep. 412; United States v. Frank, 189 Fed. 195; United States v. St. Louis Coffee & Spice Mills, 189 Fed. 191; United States v. 11,150 Pounds of Butter, 115 C. C. A. 463, 195 Fed. 667; St. Louis Merchants' Bridge Terminal R. Co. v. United States, 110 C. C. A. 63, 188 Fed. 191.

The court will not take judicial notice of the alleged intimate relation of acetphenetidin and acetanilid.

17 Am. & Eng. Enc. Law, 2d ed. 909; Brown v. Piper, 91 U. S. 37, 23 L. ed. 200; Eclipse Mfg. Co. v. Adkins, 36 Fed. 556; Kaolatype Engraving Co. v. Hoke, 30 Fed. 446.

Taking the definition of "derivative," whether it be the popular or chemical definition, it cannot be said for a moment that any of the parent substance is in such derivative.

Webster's Int. Dict.; Century Dict.; Elberfeld & Co. v. United States, 42 C. C. A. 525, 102 Fed. 603.

The words in a penal statute are to be construed according to their popular definition.

Sarlls v. United States, 152 U. S. 574, 38 L. ed. 557, 14 Sup. Ct. Rep. 720.

Mr. Justice McKenna delivered the opinion of the court:

Libel for the seizure and condemnation of certain drugs under the provisions of the act of Congress of June 30, 1906, commonly known as the food and drugs act (34 Stat. at L. 768, chap. 3915, U. S. Comp. Stat. Supp. 1911, p. 1354).

The libel alleges that the drugs are in the possession and custody of the Wholesale Drug Exchange, a body corporate, at a numbered place in the city of Washington.

The drugs, it is alleged, are intended to be used for the cure and mitigation and prevention of diseases of man. They are described as follows:

[660] "Twenty packages, more or less, of said drug, labeled and branded as follows: 'Antikamnia Tablets, contain 305 grains of acetphenetidin, U. S. P. per ounce guaranteed by the Antikamnia Chemical Company, under the food and drugs act, June 30, 1906, U. S. Serial Number 10. The Antikamnia tablets in this original ounce package contain no acetanilid, antifebrin, antipyrin, morphin, opium, codein, heroin, [illegible] or beta eucaine, arsenic, [illegible] indica, or grains. One ounce Antikamnia Tablets. Manufactured in the United States of America by the Antikamnia Chemical Co., St. Louis, U. S. A.'

"Also seventy other packages, more or less, of said drug, labeled and branded as follows: 'Antikamnia and Codein Tablets. Contain 296 grains acetphenetidin, U. S. P. per ounce. Contain 18 grains sulp. codein per ounce. Guaranteed by the Antikamnia Chemical Company, under the the food and drugs act, June 30, 1906. U. S. Serial Number 10. The Antikamnia and Codein tablets in this original ounce package contain no acetanilid, antifebrin, antipyrin, morphin, opium, heroin, cocaine, alpha or beta eucaine, arsenic, strychnin, chloroform, cannabis indica, or chloral hydrate. One ounce Antikamnia and Codein Tablets. Manufactured in the United States of America by the Antikamnia Chemical Co., St. Louis, U. S. A.'

"Also ten other packages, more or less, of said drug, labeled and branded as follows: 'Antikamnia and Quinine Tablets. Contain 165 grains acetphenetidin, U. S. P. per ounce. Guaranteed by the Antikamnia Chemical Company under the food and drugs act, June 30, 1906. U. S. Serial Number 10. The Antikamnia and Quinine Tablets in this original ounce package contain no acetanilid, antifebrin, antipyrin, morphin, opium, codein, heroin, cocaine, alpha or beta eucaine, arsenic, strychnin, [661] chloroform, cannabis indica, or chloral hydrate. One ounce Antikamnia and Quinine Tablets. Manufactured in the United States of America by the Antikamnia Chemical Co., St. Louis, U. S. A.'"

The ground of confiscation and condemnation alleged is that all of the packages of the drugs contain a large quantity and proportion of acetphenetidin, which, it is alleged, is a derivative of acetanilid, and that under the provisions of the act of Congress and of the regulations lawfully made thereunder it is provided and required that the label on each of the packages shall bear a statement that the acetphenetidin contained therein is a derivative of acetanilid; and yet it is alleged that each and all of the packages fail to comply with such provisions.

It is also alleged that the packages are further misbranded, in that the labels thereon are false and misleading, for the reason that each and all of them bear the statement that no acetanilid is contained therein, and that the statement imports and signifies that there is no quantity of any derivative of acetanilid contained in the drug.

A warrant of arrest was issued upon which the marshal duly made return that

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he had arrested twenty packages of Antikamnia tablets, ten packages of Antikamnia quinine tablets, and sixty-three packages labeled "Antikamnia and Codein Tablets," and otherwise duly executed the warrant.

The Antikamnia Chemical Company, appellee and defendant in error, alleging itself to be the owner of the drugs, petitioned to be made a defendant in the libel. The petition was granted, and the company thereupon filed the exceptions to the libel. The exceptions negative in detail the charges of the libel, and assert conformity in the labeling of the packages to the act of Congress of June 30, 1906, quoting its 8th section as follows: " . . . or if the package fail to bear a statement on the label of the quantity or proportion of [662] any alcohol, morphin, opium, cocaine, heroin, alpha or beta eucaine, chloroform cannabis indica, chloral hydrate, or acetanilid, or any derivative or preparation of any such substances contained therein." And it is averred that the act does not provide that there should be added to any derivative of any of the substances contained therein the name of the parent substance, and the act cannot be added to or enlarged by requiring the company to add to the name of a known article, the fact that the article is a derivative of any of the substances mentioned in the act. It is averred, therefore, that the packages are not misbranded, and that the statement on the labels that no acetanilid is contained therein is in no way false or misleading, because the libel does not allege that there is acetanilid in the packages, and, therefore, the statement, instead of being false and misleading, is, according to the allegations of the libel, true.

The exceptions were sustained and the libel dismissed.

It was stipulated that Food Inspection Decision No. 112, issued January 27, 1910 by the United States Department of Agriculture, was considered by the court upon the hearing of the cause, and should be included in and be considered part of the record on appeal.

The decision quotes § 8 of the act, states that the Attorney General, in an opinion rendered January 15, 1909, held that a derivative is a substance so related to one of the specified substances "that it would be rightly regarded by recognized authorities in chemistry as obtained from the latter 'by actual or theoretical substitution,' and it is not indispensable that it should be actually produced therefrom as a matter of fact;" further, that the labeling of derivatives, as prescribed by § 8, is a proper subject conferred upon the Department by § 3, and that a rule or regulation requiring the name of the specified substance to follow that of the derivative would be in harmony with the general purpose of the act, and an [663] appropriate method by which to give effect to its provisions.

In conformity to this opinion, Regulation 28 of the Rules and Regulations for the Enforcement of the Food and Drugs Act was amended as follows: " . . . Acetanilide (antifebrine, phenylacetamide). Derivatives—Acetphenetidine, . . . (g) In declaring the quantity or proportion of any of the specified substances the names by which they are designated in the act shall be used, and in declaring the quantity or proportion of the derivatives of any of the specified substances, in addition to the tradename of the derivative, the name of the specified substance shall also be stated, so as to indicate clearly that the product is a derivative of the particular specified substance."

The decree of the supreme court of the District, dismissing the libel, was affirmed by the court of appeals.

The case is not in very broad compass, though the arguments of counsel are somewhat elaborate. The libel is prosecuted for the condemnation of one hundred packages of Antikamnia tablets as being misbranded in violation of the food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915, U. S. Comp. Stat. Supp. 1911, p. 1354). The tablets contain acetphenetidin and the labels so state, and the proportion of the substance. It is a derivative of acetanilid, but the labels do not so state, but do state that the tablets contain no acetanilid. And these omissions, it is contended by the government, constitute a violation of the statute and of Regulation No. 28, as amended. The chemical company contends that the first statement is not required by the law, and that the second statement is true, and therefore cannot be false or misleading.

Preceding the discussion of these contentions a question of jurisdiction is presented by the chemical company, and a motion to dismiss is made on the ground that only the construction of the statute is involved in the decision of [664] the court below. The company also moves for an affirmance of the judgment on the ground that the appeal is frivolous. *Contra*, the government contends that the court of appeals held invalid the regulations requiring the name of the primary substance as well as that of the derivative to be stated on the label; and that there is not only drawn in question, but so far denied, an authority exercised under the United

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States. We concur in this view. The validity of the regulation was and is denied. Its validity may, indeed, rest on the statute, but so did the validity of the rule of the Patent Office passed on in United States ex rel. Steinmetz v. Allen, 192 U. S. 543, 48 L. ed. 555, 24 Sup. Ct. Rep. 416. We there said of a rule of practice established by the Commissioner of Patents under a section of the Revised Statutes: "It thereby became a rule of procedure and constituted, in part, the powers of the primary examiner and commissioner. In other words, it became an authority of those officers, and, necessarily, an authority 'under the United States.' Its validity was and is assailed by the plaintiff in error. We think, therefore, we have jurisdiction, and the motion to dismiss is denied." United States ex rel. Taylor v. Taft, 203 U. S. 461, 51 L. ed. 269, 27 Sup. Ct. Rep. 148, is not in antagonism to this ruling. In that case the relator was dismissed from the public service by an order of the Secretary of War as representative of the President. She sought restoration by mandamus. It was denied and she brought the case to this court on the ground that the validity of an authority exercised under the United States was drawn in question. Dismissing the case, this court said that as she did not question the authority of the President or his representative to dismiss her, but contended only that certain rules and regulations of the civil service had not been observed, the validity of an authority exercised under the United States was not drawn in question, but only the construction and application of regulations of the exercise of such authority. United States ex rel. [665] Steinmetz v. Allen was said not to be contrary, "for there the validity of a rule constituting the authority of certain officers in the Patent Office was drawn in question."

Motion to dismiss is denied.

Joined with the motion to dismiss, we have seen, was a motion to affirm on the ground that the question of the authority of the Secretaries to make the regulation is frivolous in view of the decisions in United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480; Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163, and other cases. How far this contention is tenable will be developed as we proceed with the consideration of the act and the power of the Secretaries under it.

The purpose of the act is to secure the purity of food and drugs, and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it.

Section 3 gives the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor, power to "make uniform rules and regulations for carrying out the provisions" of the act, and the power to collect specimens of foods and drugs offered in interstate and foreign commerce. It adopts the definitions of the United States Pharmacopœia or National Formulary, and provides (§ 8) that the term "misbranded," as used in the act "shall apply to all drugs . . . the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular." And, further, in case of drugs, an article shall be deemed to be misbranded "if the package fail to bear a statement on the label of the quantity or proportion" of certain enumerated substances "or acetanilid, or any derivative or preparation of any such substances contained therein."

These are the applicatory provisions. How are they to be construed?

[666] First, as to the power of the Secretaries. It is undoubtedly one of regulation only,—an administrative power only,—not a power to alter or add to the act. The extent of the power, however, must be determined by the purpose of the act and the difficulties its execution might encounter. The fact that a council of three Secretaries of governmental departments was given power to make the rules and regulations for the execution of the law shows how complex the matters dealt with were considered to be, and the care that was necessary to be taken to guard against their defeat or perversion. The composition of drugs is a matter of technical skill, their denomination often by words of scholastic origin, conveying no meaning to the uninformed, their uses and abuses learned only by experience, beneficial or evil. It was this experience that the law sought to avail itself of and to avail itself against the ever-increasing powers of the laboratory or the disguises of a technical nomenclature. Hence the provision of the law that the term "drug," as used in the act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and hence also the provision that a drug or food product is misbranded in case it fails to bear a statement on the label of the quantity or proportion of certain enumerated substances, including acetanilid, "or any derivative or preparation of any such substance contained therein." Experience had demonstrated the quality of those substances, their effects had become

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common knowledge; their names, therefore, were all the warning it was necessary for the law to give. But derivative of them might, probably would, be of their quality, so derivatives of them were to be guarded against, and the law hence further provided that the labels on them should state the "quantity or proportion" of "any derivative or preparation" of them. This much is clear,—there is no obscurity in the words and purpose of the law. The [667] query then occurs, such being the words and purpose, if the quantity or proportion of the substances or any derivative or preparation of them must be stated, is it administrative of the law or additive to it to require by regulation that not only the name of the derivative or preparation be stated, but from what substance derived or of what it is a preparation? It certainly cannot be said that the purpose of the law is not exactly fulfilled by the regulation. If it fulfils the purpose of the law, it cannot be said to be an addition to the law, unless, indeed, it can be contended that the law provided a means for its defeat by the easy device of mysterious names. There is illustration in the present case. What information does the use of the word "acetphenetidin" convey to anybody of its good or evil origin? If it be said that the like question may be asked of any of the primary substances, we reply that they are the precautions of the law, and adopted as such because they had demonstrated themselves, the value of their use, the detriment of their abuse, and it was believed that their names would carry no deception.

But let us turn from the power of the Secretaries to the law itself, and inquire if it needs the assistance of a regulation. It is the contention of the government that it does not, that its requirement that the primary substances should be labeled and that their derivatives should be labeled means, necessarily, that it should be stated of what they are the derivatives to make the warning of the labels complete. A great deal of what we have said in discussing the power of the Secretaries applies to this contention and supports it. The purpose of the law is the ever-insistent consideration in its interpretation. The purpose is to prevent the surreptitious sale of certain noxious drugs or their derivatives, the latter supposedly partaking of the quality of parent article and as effective of evil consequences. This being the purpose, did the law leave it unexecuted? We cannot attribute to it such [668] defect, and a serious defect it might be. Nor can we consider as a case of omission that which involves so definitely the mischief which was intended to be redressed and which is fairly within the language of the law. And we say this without regard to the various illustrations contained in the government's brief of the deceptions which can be practised by using the name of the derivative alone, for the chemical company insists that we may not, in the absence of allegations and proof, look for knowledge in the encyclopedias, or medical lexicons, or to trade practices for trade disguises, actual or possible. It is not necessary to enter upon the challenged ground. The law furnishes its own tests of what the labels should reveal, and we may grant, for the argument's sake, as contended, that it has penal character; but this does not mean that it should not be given its reasonable intendment. There is no hardship in this, either to the manufacturer or the seller of drugs. They surely know what they make or vend,—know whether it is primary or of what a derivative,—and the law requires only that they put their knowledge on the labels for the information of purchasers. No serious burden is thereby imposed on honest business. Indeed, it makes the label on the packages an assurance as well as a warning, and benefits all concerned, manufacturer, seller, and purchaser. And this in the interest of the public health.

Decree reversed and cause remanded, with directions to reverse the decree of the Supreme Court and remand the cause, with direction to overrule the exceptions to the libel.

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[669] HARRY I. MULCREVY and Fidelity & Deposit Company of Maryland, Plffs. in Err.,

v.

CITY AND COUNTY OF SAN FRANCISCO.

(See S. C. Reporter's ed. 669–675.)

Error to state court — to what court directed.

1. The rule that a writ of error from the Federal Supreme Court must not run to the highest court of the state where the latter court has refused to permit a case to be transferred to that court from a lower state court unless it plainly appears on the face of the record by an affirmance in express terms of the judgment or decree sought to be reviewed that the refusal to permit such transfer was the exercise of jurisdiction to review the cause on the

NOTE.—As to when writ of error may run to inferior state court—see note to Kentucky v. Powers, 50 L. ed. U. S. 633.

As to when judgment sought to be reviewed is that of highest state court—see

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merits, having been adopted in Norfolk & S. Turnp. Co. v. Virginia, 225 U. S. 264, 56 L. ed. 1082, 32 Sup. Ct. Rep. 828, to settle an uncertainty in practice, and to take effect after the opening of the October term, 1912, of the Supreme Court, will not be applied to a writ of error allowed before that term.

[For other cases, see Appeal and Error, 1147, 1167, 2616–2634, in Digest Sup. Ct. 1908.]

Clerks — fees — in naturalization proceedings.

2. The county clerk of the city and county of San Francisco cannot retain, as against the city and county, and for his own personal use, that portion of the fees collected by him as clerk of the superior court in naturalization proceedings which the clerk of any court collecting such fees is authorized, by the naturalization act of June 29, 1906 (34 Stat. at L. 596, chap. 3592, U. S. Comp. Stat. Supp. 1911, p. 124), § 13, to retain, where his salary is fixed at a specified sum by the charter, which further provides that all salaries shall be "in full compensation for all services rendered," and that "every officer shall pay all moneys coming into his hands as such officer, no matter from what source derived or received, into the treasury of the city and county."

[Fees of clerks of state court, see Clerks, II., in Digest Sup. Ct. 1908.]

[No. 133.]

Argued December 12 and 15, 1913. Decided January 5, 1914.

IN ERROR to the Supreme Court of the State of California to review a judgment which affirmed a judgment of the Superior Court of the City and County of San Francisco in favor of said city and county in an action to recover fees in naturalization proceedings, received by one of the defendants in his official capacity as county clerk. Affirmed.

See same case below in District Court of Appeal, 15 Cal. App. 11, 113 Pac. 339.

The facts are stated in the opinion.

Mr. James F. Tevlin argued the cause, and, with Messrs. Samuel M. Shortridge and L. A. Redman, filed a brief for plaintiffs in error:

The question to be argued, with differ-

note to Norfolk & S. Turnp. Co. v. Virginia, 56 L. ed. U. S. 1082.

On the practice and procedure governing transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to Wedding v. Meyler, 66 L. R. A. 833.

Right of clerk on salary basis to retain fees in naturalization proceedings.

MULCREVY v. SAN FRANCISCO answers in the negative a question upon which there has been much contrariety of opinion; *viz.*, whether a clerk of a state court on a salary basis, and required to account for all fees, may retain for his personal use one half of the fees collected by him as such clerk in naturalization proceedings which the clerk of any court collecting such fees is authorized by the naturalization act of June 29, 1906, § 13, to retain.

The view of the Federal Supreme Court that this statute is "easily construed and its purpose entirely accomplished by requiring an accounting of one half of the fees to the United States, leaving the other half to whatever disposition may be provided by the state law," had theretofore been adopted in Franklin County v. Barnes, 68 Wash. 488, 123 Pac. 779, and Barron County v. Beckwith, 142 Wis. 519, 30 L.R.A. (N.S.) 810, 135 Am. St. Rep. 1079, 124 N. W. 1030.

Cases like State ex rel. Marion County v. Quill, — Ind. App. —, 102 N. E. 106; Hampden County v. Morris, 207 Mass. 167, 93 N. E. 579, Ann. Cas. 1912A, 815; Passaic County v. Slater, — N. J. L. —, 88 Atl. 213; Re Beyer, 72 Misc. 443, 130 N. Y. Supp. 281; Fields v. Multnomah County, 64 Or. 117, 44 L.R.A.(N.S.) 322, 128 Pac. 1045, and Eldredge v. Salt Lake City, 37 Utah, 188, 106 Pac. 939, holding the contrary doctrine, must, so far as this question is concerned, be regarded as overruled by the principal case.

Prior to the enactment of the naturalization act of June 29, 1906, it was quite generally held that a clerk under a fixed salary was not entitled to retain as his own the fees received in naturalization cases by virtue of his office. Cowan v. New York, 3 Hun, 632; People ex rel. Whittemore v. Seabury, 23 How. Pr. 121; Eder v. Kreiter, 40 Ind. App. 542, 82 N. E. 552.

But in United States v. Hill, 120 U. S. 169, 30 L. ed. 627, 7 Sup. Ct. Rep. 510, affirming 25 Fed. 375, which was an action on the official bond of the clerk of a district court for failure to account for fees charged by him in naturalization cases, it was held that such fees are not within U. S. Rev. Stat. § 833, U. S. Comp. Stat. 1901, p. 642, requiring such clerks to account for all fees and emoluments of their offices of every name and nature, it appearing that for many years it had been the custom of the clerks of the United States for that district to collect the fees incident to naturalization proceedings, without including them in returns of fees and emoluments, which practice was known and approved by the judge and accounting officers. In the opinion of the circuit court it is stated: "It is for services rendered under these rules and as a special officer of the court, and not as clerk, that these fees have been permitted. They were not duties pertaining to the office of clerk. They could as well have been performed by any other person designated by the court for the purpose,—as, by the district attorney, or a commissioner of the circuit court, or an attorney, or any suitable person not an officer of the court."

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ences as to the local enactments involved, which, it is thought, do not go to the merits, has been presented to the courts of several of the states, and the answers are in conflict. The cases in which it has been passed upon are the following:

Cal.—San Francisco v. Mulcrevy, 15 Cal. App. 11, 113 Pac. 339.

Ind.—State ex rel. Marion County v. Quill, — Ind. App. —, 102 N. E. 106.

Mass.—Hampden County v. Morris, 207 Mass. 167, 93 N. E. 579, Ann. Cas. 1912A, 815.

N. Y.—Re Beyer, 72 Misc. 443, 130 N. Y. Supp. 281.

Or.—Fields v. Multnomah County, 64 Or. 117, 44 L.R.A.(N.S.) 322, 128 Pac. 1045.

Utah.—Eldredge v. Salt Lake City, 37 Utah, 188, 106 Pac. 939.

Wash.—Franklin County v. Barnes, 68 Wash. 488, 123 Pac. 779.

Wis.—Barron County v. Beckwith, 142 Wis. 519, 30 L.R.A.(N.S.) 810, 135 Am. St. Rep. 1079, 124 N. W. 1030.

The Indiana, Massachusetts, New York, Oregon, and Utah courts hold that the clerk retains the fees to his own use; the decisions in California, Washington, and Wisconsin are that the clerk must account pursuant to the state statute.

The powers to regulate immigration and naturalization are vested in the political department of the government, and may be exercised by treaty, special act of Congress, or by general laws.

Nishimura Ekiu v. United States, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; Van Dyne, Citizenship, 266.

When these powers are exercised in a general law, the law has an exclusive operation.

Chirac v. Chirac, 2 Wheat. 259, 4 L. ed. 234; Matthew v. Rae, 3 Cranch, C. C. 699, Fed. Cas. No. 9,284; Minneapolis v. Reum, 6 C. C. A. 31, 12 U. S. App. 446, 56 Fed. 576; Levin v. United States, 63 C. C. A. 476, 128 Fed. 826; Re Ramsden, 13 How. Pr. 429; Lynch v. Clarke, 1 Sandf. Ch. 583; State ex rel. Newman v. Libby, 47 Wash. 481, 92 Pac. 350.

The clauses in state Constitutions, including the Constitution of California, that certain courts shall have the power of naturalization, is not an assertion of inherent state power, but a direction to the state courts to administer the Federal law.

State ex rel. Newman v. Libby, 47 Wash. 481, 92 Pac. 350.

Being vested exclusively in the political department of the government, Congress is independent of the Judicial Department in providing a uniform rule of naturalization; that is: the power vested by the Constitution in the Judicial Department need not be invoked. Nor does the providing a rule of naturalization require the intervention of any judicial tribunal or judicial officer. An act which should ordain that one who makes oath before any officer authorized to administer oaths that he forswears all foreign allegiance and will support the Constitution of the United States shall thereby become naturalized would be a uniform rule. The power to provide the rule being plenary, and the enactment supposed having the note of uniformity, such an act would be within the scope of the power.

Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326; Levin v. United States, 63 C. C. A. 476, 128 Fed. 826.

In naturalization matters, as in the regulation of immigration, Congress is free to provide or adopt such means of carrying out its power as it may deem appropriate to the accomplishment of the intent, scheme, and purposes of the contemplated enactment.

United States v. Dolla, 100 C. C. A. 521, 177 Fed. 101, 21 Ann. Cas. 665; Levin v. United States, 63 C. C. A. 476, 128 Fed. 826; Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060; M'Culloch v. Maryland, 4 Wheat, 316, 4 L. ed. 579; Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; Lem Moon Sing v. United States, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967.

Congress has conferred authority to hear and finally determine as to the fact of citizenship, and the facts upon which an asserted claim of citizenship depends, on executive officers.

Chin Bak Kan v. United States, 186 U. S. 193, 46 L. ed. 1121, 22 Sup. Ct. Rep. 891; United States v. Sing Tuck, 194 U. S. 161, 48 L. ed. 917, 24 Sup. Ct. Rep. 621; United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644.

The courts and clerks of courts on whom the naturalization jurisdiction is conferred, having been freely designated by Congress to serve the purposes of the Federal government, and having all their jurisdiction and authority in the premises from the act of Congress, are instrumentalities, or agencies, of the Federal government.

United States v. Jones, 109 U. S. 513, 27 L. ed. 1015, 3 Sup. Ct. Rep. 346; Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326; Levin v. United States, 63 C. C. A. 476, 128 Fed. 826; People v. Sweetman, 3 Park. Crim. Rep. 358; State ex rel. Marion County v. Quill, — Ind. App. — 102 N. E. 106; Hampden County v. Morris, 207 Mass. 167, 93 N. E. 579, Ann. Cas. 1912A, 815; Fields v. Multnomah County, 64 Or. 117, 44 L.R.A.(N.S.) 322, 128

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Pac. 1045; Eldredge v. Salt Lake City, 37 Utah, 188, 106 Pac. 939.

The states cannot exercise control over, nor interfere with, nor in any way affect to their disadvantage, the agencies or instruments of the Federal government, except in so far as Congress may see proper to permit.

Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 31, 23 L. ed. 198.

A statutory provision awarding compensation to persons acting under the authority of the statute and in furtherance of its purposes is always of the substance.

Dobbins v. Erie County, 16 Pet. 435, 10 L. ed. 1022.

Regarded with reference to the source of their authority the acts of clerks of courts cannot be "strictly official," for their authority comes from a source external to and independent of their office, and of the government which creates the office.

Eldredge v. Salt Lake City, 37 Utah, 188, 106 Pac. 939; State ex rel. Clyatt v. Hocker, 39 Fla. 477, 22 So. 721, 63 Am. St. Rep. 174, note, p. 181.

Regarded in their immediate nature the duties performed are not appurtenant to the office of clerk of court.

United States v. Hill, 120 U. S. 169, 30 L. ed. 627, 7 Sup. Ct. Rep. 510; Hill v. United States, 40 Fed. 441; United States v. McMillan, 165 U. S. 504, 41 L. ed. 805, 17 Sup. Ct. Rep. 395.

Mr. J. F. English argued the cause, and, with Mr. Percy V. Long, filed a brief for defendant in error:

The act of Congress, properly interpreted, does not require that the clerk keep fees for his own use. In the only four decisions where the question was considered, this theory is sustained.

Wash.—Franklin County v. Barnes, 68 Wash. 488, 123 Pac. 779.

Wis.—Barron County v. Beckwith, 142 Wis. 519, 30 L.R.A.(N.S.) 810, 135 Am. St. Rep. 1079, 124 N. W. 1030.

Cal.—San Francisco v. Mulcrevy, 15 Cal. App. 11, 113 Pac. 339.

N. Y.—Re Beyer, 72 Misc. 443, 130 N. Y. Supp. 281.

Courts will, if possible, construe the act as consistent with the San Francisco charter.

Franklin County v. Barnes, 68 Wash. 488, 123 Pac. 779; Leiws's Sutherland, Stat. Constr. 2d. ed. 464–469; Endlich, Interpretation of Statutes, § 211, 36 Cyc. 1146.

Acts allowing fees for public officers are strictly construed.

United States v. Van Duzee, 185 U. S. 278, 46 L. ed. 909, 22 Sup. Ct. Rep. 645; 11 Enc. U. S. Sup. Ct. Rep. 168.

The construction of the charter by the supreme court of California is conclusive, and the United States Supreme Court will not review that interpretation.

Elmendorf v. Taylor, 10 Wheat. 152, 6 L. ed. 289; 4 Enc. U. S. Sup. Ct. Rep. 1066, 1067; 2 Lewis's Sutherland Stat. Constr. §§ 22, 314, p. 39.

The charter was construed by the California supreme court in this case, and in Re Dodge, 135 Cal. 512, 67 Pac. 973.

The clerk acts as an officer of the court, the court acting in a judicial capacity and as a state court.

Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833; United States v. Severino, 125 Fed. 949; Re Loney, 134 U. S. 372, 33 L. ed. 949, 10 Sup. Ct. Rep. 584; Spratt v. Spratt, 4 Pet. 393, 7 L. ed. 897; Van Dyne Citizenship, pp. 9, 17–19; Re Bodek, 63 Fed. 814; Charles Green's Son v. Salas, 31 Fed. 106; Re Coleman, 15 Blatchf. 420, Fed. Cas. No. 2,980; Prentice v. Miller, 82 Cal. 575, 23 Pac. 189; Franklin County v. Barnes, 68 Wash. 488, 123 Pac. 779; Barron County v. Beckwith, 142 Wis. 519, 30 L.R.A.(N.S.) 810, 135 Am. St. Rep. 1079, 124 N. W. 1032; Rhea v. County Comrs. 12 Idaho, 455, 88 Pac. 89.

Congress cannot compel the state courts to exercise naturalization jurisdiction.

Claflin v. Houseman, 93 U. S. 140, 23 L. ed. 840; Hampden County v. Morris, 207 Mass. 167, 93 N. E. 579, Ann. Cas. 1912A, 815; Fields v. Multnomah County, 64 Or. 117, 44 L.R.A.(N.S.) 322, 128 Pac. 1047; 1 Willoughby, Constitution, 282; 2 Cyc. 111.

[670] Mr. Justice McKenna delivered the opinion of the court:

Action brought in the superior court of the city and county of San Francisco against plaintiffs in error, to recover from them the sum of $2,972, with interest from certain dates, received by plaintiff in error Mulcrevy in his official capacity as county clerk and *ex officio* clerk of the superior court of the city and county of San Francisco in certain naturalization proceedings. Judgment was rendered on the pleadings against plaintiffs in error. It was affirmed on appeal.

Mulcrevy was elected county clerk of the city and county of San Francisco at the November election, 1905, for the term of two years, commencing on January 8, 1906. He duly filed his official bond with plaintiff in error the Fidelity & Deposit Company of Maryland, his surety, which was conditioned that he should faithfully perform all official duties which were then or thereafter might be imposed upon him by law, ordinances, or the charter of the city and county. His salary was fixed by the charter at the sum

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of $4,000, and it was provided as follows: "The salaries provided in this charter shall be in full compensation for all services rendered, and every officer shall pay all moneys coming into his hands as such officer, no matter from what source derived or received, into the treasury of the city and county of San Francisco within twenty-four hours after the receipt of the same."

By his election Mulcrevy became *ex officio* the clerk of the superior court. After he had entered upon the discharge of his duties, on the 29th of June, 1906, Congress passed an act entitled, "An Act to Establish a Bureau of Immigration and Naturalization, and to Provide for a Uniform Rule for the Naturalization of Aliens Throughout the United States." [34 Stat. at L. 596, chap. 3592, U. S. Comp. Stat. Supp. 1911, p. 124.] Jurisdiction in naturalization proceedings was conferred by the act on the Federal [671] courts and certain state courts, and the duties of the clerks were set forth. Fees were prescribed, and it was provided that the clerks of the courts collecting them were authorized to retain one half thereof, the other half to be accounted for in their quarterly accounts which they were required to make to the Bureau of Immigration and Naturalization. The amount retained by the clerk, however, it was provided should not exceed in any one fiscal year the sum of $3,000. If fees in excess of $6,000 be collected in any one year, the clerk might be allowed by the Secretary of Commerce and Labor additional compensation for additional clerical assistance out of the moneys received by the United States.†

Under the provisions of the act as clerk of the superior court in naturalization proceedings, Mulcrevy collected $5,944, [672] and accounted for one half thereof, as required by the act. The other half he kept for himself, his contention being that it was intended for himself by the act of Congress as pay for his extra work and clerical assistance, the fees not having been received by him in his official capacity, but merely as an agent designated by the act of Congress to perform services in naturalization proceedings.

It appears from the opinion of the district court of appeal that the total salary list fixed and allowed to Mulcrevy's office amounts to $58,600. And it is provided by the charter that when an officer shall require additional deputies, clerks, or employees, the same may be allowed by supervisors if, upon investigation, the mayor determines the same to be necessary.

A question of jurisdiction is raised. From the judgment of the superior court the case was taken by appeal to the supreme court of the state, and properly taken, the latter court having jurisdiction, the amount involved being over $2,000. The supreme court, exercising the power given to it by the Constitution of the state, ordered the cause to be heard by the district court of appeal of the first appellate district of the state. The record was accordingly transmitted to the latter court, three printed copies, however, being retained in the supreme court. Upon the rendition of the judgment of the district court of appeal, affirming the judgment of the superior court, a petition was filed in the supreme court for transfer of the cause to it. The petition was denied as follows:

By the court: The petition to have the above-entitled cause heard and determined by this court after judgment in the district court of appeal for the first appellate district is denied.

Beatty, C. J.

A petition for writ of error was then presented to the chief justice of the supreme court which recited that that court was the highest court of the state in which

†" Sec. 13. . . . The clerk of any court collecting such fees is hereby authorized to retain one half of the fees collected by him in such naturalization proceeding; the remaining one half of the naturalization fees in each case collected by such clecks, respectively, shall be accounted for in their quarterly accounts, which they are hereby required to render the Bureau of Immigration and Naturalization . . .

"Provided, That the clerks of courts exercising jurisdiction in naturalization proceedings shall be permitted to retain one half of the fees in any fiscal year up to the sum of three thousand dollars, and that all fees received by such clerks in naturalization proceedings in excess of such amount shall be accounted for and paid over to said Bureau as in case of other fees to which the United States may be entitled under the provisions of this act. The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by this act upon the clerks of courts from fees received by such clerks in naturalization proceedings. And in case the clerk of any court collects fees in excess of the sum of six thousand dollars in any one year, the Secretary of Commerce and Labor may allow to such clerk from the money which the United States shall receive additional compensation for the employment of additional clerical assistance, but for no other purpose, if, in the opinion of said Secretary, the business of such clerk warrants such allowance."

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a [673] decision of the cause could be had. The writ was allowed by the chief justice. A question was raised at the time as to which court the writ should run, and it seemed to be the opinion of the chief justice, as it was of counsel, that by the petition for transfer of the cause from the district court of appeal to the supreme court, the order of the latter court made the judgment final in that court. Though both counsel concur in this view, its correctness may be doubted. However, as this writ of error was allowed before the October term, 1912, of this court, the case is brought within Norfolk & S. Turnp. Co. v. Virginia, 225 U. S. 264, 56 L. ed. 1082, 32 Sup. Ct. Rep. 828. In that case, under like circumstances, we did not dismiss the writ on our own motion, but entertained jurisdiction.

On the merits the case presents no difficulty. It involves only the construction of the act of Congress already referred to above. We accept the state court's construction of the charter of the city and county of San Francisco. Indeed, its clearness leaves no room for construction. The salary it provides is declared to be "in full compensation for all services rendered." And it is provided that "every officer shall pay all moneys coming into his hands as such officer, no matter from what source derived or received, into the treasury of the city and county." The provisions are complete and comprehensive, and express Mulcrevy's contract with the city, the performance of which his office imposed upon him; and, of course, the fees received by him in naturalization proceedings, because he was clerk of the superior court, were in compensation for official acts, not personal acts.

But it is contended by plaintiffs in error that the fees having been received officially is not of importance, that nevertheless he acted as the representative of the United States, in execution of the policies of the United States, and being by the act of Congress invested with his powers, he is entitled for himself to the compensation prescribed [674] by the act for their execution without any liability to account for them to the city. The last proposition, however, does not follow from the others, and the others are but confusing. If it be granted that he was made an agent of the national government, his relations to the city were not thereby changed. He was still its officer, receiving fees because he was,—not earning them otherwise or receiving them otherwise, but under compact with the city to pay them into the city treasury within twenty-four hours after their receipt.

Under the contention of plaintiffs in error a rather curious situation is presented. Mulcrevy was elected to an office constituted by the municipality under the authority of the state. He was given a fixed salary of $4,000 with the express limitation that it should be his complete compensation. He agreed that all other moneys received by him officially should be paid into the treasury of the city. He was given office accommodations, clerks to assist him, and yet contends that notwithstanding such equipment and assistance, notwithstanding his compact, he may retain part of the revenues of his office as fees for his own personal use. We cannot yield to the contention. Nor do we think the act of Congress compels it. The act does not purport to deal with the relations of a state officer with the state. To so construe it might raise serious questions of power, and such questions are always to be avoided. We do not have to go to such lengths. The act is entirely satisfied without putting the officers of a state in antagonism to the laws of the state,—the laws which give them their official status. It is easily construed and its purpose entirely accomplished by requiring an accounting of one half of the fees to the United States, leaving the other half to whatever disposition may be provided by the state law. Counsel cite some state decisions which have construed the act of Congress as giving a special agency to the clerks of the state courts, and as receiving [675] their powers and rights from the national enactment. The reports of the Department of Commerce and Labor are quoted from, which, it is contended, exhibit by their statistics and recommendations the necessity of national control. State decisions expressing a contrary view are frankly cited. This contrariety of opinion we need not further exhibit by a review of the cases. We have expressed our construction of the act, and it is entirely consonant with the purpose of the act and national control over naturalization.

Judgment affirmed.

MARY GENEVIEVE PENNELL, Administratrix of the Estate of Jay Allen Pennell, Deceased, Plff. in Err.,

v.

PHILADELPHIA & READING RAILWAY COMPANY.

(See S. C. Reporter's ed. 675-680.)

Safety appliances — automatic coupler between engine and tender.

An automatic coupler between engine and

NOTE.—What are "cars" within the meaning of safety appliance acts.

A steam-shovel car is a "car" within the meaning of the act of Congress of March

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tender is not required by the safety appliance act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), making it unlawful for any railway carrier engaged in interstate commerce to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, nor by the provisions of the amendatory act of March 2, 1903 (32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1911, p. 1314), making the earlier act applicable to "all cases" and to "all trains, locomotives, tenders, cars," etc., since these provisions do not destroy the integrity of the locomotive and tender, and are entirely satisfied if there is an automatic coupler at the rear end of the tender.

[For other cases, see Master and Servant, 36-40, in Digest Sup. Ct. 1908.]

[No. 469.]

Argued December 3, 1913. Decided January 5, 1914.

IN ERROR to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of Pennsylvania in favor of defendant in an action for death by wrongful act. Affirmed.

See same case below, 122 C. C. A. 77, 203 Fed. 681.

The facts are stated in the opinion.

Mr. George Demming argued the cause and filed a brief for plaintiff in error:

In construing these so-called "safety appliance acts," this court has frequently held that these acts are mandatory, and that the duty to have an automatic coupling is an absolute duty, and can be evaded in no way, shape, or form.

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612; Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617.

2, 1893, § 2, requiring any car used in moving interstate traffic to be equipped with an automatic coupler. Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407, reversing 207 Pa. 198, 56 Atl. 417, 15 Am. Neg. Rep. 419.

But a locomotive crane or derrick built upon car trucks, and equipped with a boiler and engine furnishing the power to operate the crane and to move the machine about upon railroad tracks, which is being operated by a railway company for the purpose of unloading heavy materials to be used in the construction of docks, and is not employed by the railway company in its business as a common carrier in moving state traffic, is not, while being so operated, a locomotive, car, tender, or similar vehicle used in moving state traffic," required by Ohio Code, §§ 8950, and 8952, to be equipped with an automatic coupler, and provided with drawbars of standard height, notwithstanding it is used in shifting cars loaded with materials to be used in the construction of such docks, and deposited by the railway company on the temporary tracks built thereon. Lake Shore & M. S. R. Co. v. Benson, 85 Ohio St. 215, 41 L.R.A. (N.S.) 49, 97 N. E. 417, Ann. Cas. 1913A, 945. The court said: "In this case the evidence shows conclusively that this machine is not one that comes within the ordinary equipment of railroads, and is not one designed for railroad use, but, on the contrary, that it is an instrumentality provided and used by the company, not on the line of its road, or upon any part of its system, not in any connection whatever with its railroad business, or its duties as a common carrier, but solely and exclusively for the construction of its dock not then a part of the railway system, and not then being used for any railroad purpose whatever. The use for which this machine was constructed and the one that gives character to it, was that of a crane or derrick used for handling heavy materials in construction work, and there can be no reasonable contention that while it was used as a crane or derrick that it would come within either the language or the meaning of these sections; nor can it reasonably be contended that the fact that a railway company used this machine for construction work—work entirely separate and apart from its business as a common carrier, and entirely separate and apart from its railway system—would bring this machine within the purview of these sections. On the other hand, it is equally apparent that the railway company might have made such use of this machine that both of these sections would apply."

A locomotive (*i. e.*, engine and tender considered as an entirety, PENNELL v. PHILADELPHIA & R. R. Co.) is a "car" which must, under the safety appliance act of March 2, 1893, § 2, be equipped with an automatic coupler which will both couple and uncouple without the necessity of men going between locomotive and car. Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412, reversing 54 C. C. A. 508, 117 Fed. 462, 12 Am. Neg. Rep. 398.

The tender of a switch engine (here again apparently regarding engine and tender as a unit) is also held in Philadelphia & R. R. Co. v. Winkler, 4 Penn. (Del.) 387, 56 Atl. 112, affirming 4 Penn. (Del.) 80, 53 Atl. 90, to be a car within the meaning of the automatic coupler requirement of the Federal safety appliance act.

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To have held the defendant railroad company guilty of negligence upon the evidence in this case would have been the reasonable construction of the statute, and one in line with the object aimed at by Congress.

United States v. Lacher, 134 U. S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625.

A tender is a car, distinct in itself, the same as any other car in a train.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Philadelphia & R. R. Co. v. Winkler, 4 Penn. (Del.) 387, 56 Atl. 112; Fleming v. Southern R. Co. 131 N. C. 476, 42 S. E. 905; East St. Louis Connecting R. Co. v. O'Hara, 150 Ill. 580, 37 N. E. 917, 11 Am. Neg. Cas. 416; Kansas City, M. & B. R. Co. v. Crocker, 95 Ala. 412, 11 So. 262; Thomas v. Georgia R. & Bkg. Co. 38 Ga. 222; New York v. Third Ave. R. Co. 117 N. Y. 404, 646, 22 N. E. 755; Benson v. Chicago, St. P. M. & O. R. Co. 75 Minn. 163, 74 Am. St. Rep. 444, 77 N. W. 798, 5 Am. Neg. Rep. 182.

There is no perplexity as to the definition of the word "car" used in the safety appliance statutes, and it has but one signification.

Standard Dict.; Chamber's 20th Century; Century Dict.; Murray's New English Dict.; Webster's New Int. Dict.

Mr. William Clarke Mason argued the cause, and, with Mr. Charles Heebner, filed a brief for defendant in error:

A tender and engine are to be considered as one for the purposes of operation.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Blanchard v. Detroit & M. R. Co. 139 Mich. 694, 103 N. W. 170, 18 Am. Neg. Rep. 142.

Mr. Justice McKenna delivered the opinion of the court:

Action for $50,000 damages brought by plaintiff in error, herein called plaintiff, against defendant in error, the Philadelphia & Reading Railway Company, herein called defendant, in the district court of the United States, eastern district of Pennsylvania. It was tried to a jury which, under the direction of the court, rendered a verdict for defendant. Judgment was duly entered upon the verdict and it was affirmed by the circuit court of appeals.

Defendant is a common carrier engaged in interstate commerce. The intestate of plaintiff was employed by it in the capacity of fireman on one of its locomotives, and, it is alleged, came to his death by the failure of defendant to comply with the requirements of the safety appliance acts of

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And engine and tender are said to be embraced within the definition "car" as used in the provision of the Federal safety appliance act respecting grab irons and hand holds. United States v. Baltimore & O. R. Co. (U. S. D. C. N. D. W. Va.) reported in Thornton, Federal Employers Liability, 2d ed. 608.

But "locomotive" and "car" are said in Wabash R. Co. v. United States, 97 C. C. A. 284, 172 Fed. 864, not to be synonymous terms in every respect, the court holding that a locomotive need not have an automatic coupler at both ends.

See, however, Chicago, M. & P. S. R. Co. v. United States, 116 C. C. A. 444, 196 Fed. 882, where the use of a locomotive in switching interstate freight cars without a drawbar of standard height on the front end of such engine was held to violate the requirement of the safety appliance act of March 2, 1893, that "freight cars" shall have drawbars of standard height, although after an unsuccessful attempt to use the front drawbar for the transfer of cars, the locomotive was sent to the roundhouse and reversed, and thereafter the other end only was used.

Locomotives are not "cars" within the meaning of the Iowa statute requiring automatic couplers. Bryce v. Burlington, C. R. & N. R. Co. 119 Iowa, 274, 93 N. W. 275.

A locomotive tender is not a "car" within the meaning of the Massachusetts act forbidding any car to be used or hauled which is not equipped with automatic couplers. Larabee v. New York, N. H. & H. R. Co. 182 Mass. 348, 66 N. E. 1032.

Locomotive tenders are not "freight cars" within the meaning of the Michigan statute requiring automatic couplings on such cars. Blanchard v. Detroit & M. R. Co. 139 Mich. 694, 103 N. W. 170, 18 Am. Neg. Rep. 142.

But the caboose attached to a freight train comes within the meaning of the words "freight cars" in the provision of the Federal safety appliance act requiring a standard height of drawbars. Chicago, M. & P. S. R. Co. v. United States, supra.

And a state statute requiring brakes to be placed upon freight cars other than four-wheeled cars applies to a gondola car used for hauling lumber, which has eight wheels. Mew v. Charleston & S. R. Co. 55 S. C. 90, 32 S. E. 828.

A state statute requiring cars to be equipped with automatic couplers does not apply to electric cars nor to cars used in railway construction. Cleveland & E. R. Co. v. Somers, 24 Ohio C. C. 67.

The Federal act applies to empty as well as loaded cars (Luken v. Lake Shore & M. S. R. Co. 248 Ill. 377, 140 Am. St. Rep. 220, 94 N. E. 175, 21 Ann. Cas. 82), and to passenger as well as freight cars (Norfolk & W. R. Co. v. United States, 101 C. C. A. 249, 177 Fed. 623; United States v. Norfolk & W. R. Co. 184 Fed. 99).

Generally as to duty and liability under Federal and state railway safety appliance acts—see notes in 20 L.R.A.(N.S.) 473, and 41 L.R.A.(N.S.) 49.

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Congress and the rules and directions of the Interstate Commerce Commission formulated and proclaimed thereunder, in that defendant failed to affix between the locomotive and its tender an automatic coupling device. The action is prosecuted under the act of April 22, 1908 [35 Stat. at L. 66, chap. 149], as amended April 5, 1910 [36 Stat. at L. 291, chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1324], relating to the liability of common carriers by railroad engaged in interstate commerce to their employees while so engaged.

The train was composed of forty-four cars, some loaded and some empty, and the engine, tender, and caboose. The coupling between the cars was automatic, that between the engine and the tender was a drawbar and pin. The pin broke in consequence of the air hose breaking or parting between the first and second cars from the caboose, thereby setting the brakes on the whole train. By the [677] breaking of the coupling between the tender and the engine, Pennell, plaintiff's intestate, was thrown from the train upon the track and killed on December 31, 1911. The train at the time of the accident was going about 15 miles an hour.

The act of Congress provides: "It shall be unlawful for any such common carrier [railroad engaged in interstate commerce] to haul or permit to be hauled or used on its line any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." [27 Stat. at L. 531, chap. 196, § 2, U. S. Comp. Stat. 1901, p. 3174.]

The first contention of plaintiff is that the primary object of the act is, quoting from its title, "to promote the safety of employees and travelers upon railroads;" and that therefore the language of the act "should be so applied and construed in matters relating to the protection of railroad workmen as to specific railroad accidents." In other words, the purpose of the act, it is contended, is to protect all employees, of whatever class, and the mere absence of an automatic coupler, if accident and injury result to an employee, is enough for liability. But plaintiff does not quote all of the title. The complete title is, "An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip Their Cars with Automatic Couplers and Continuous Brakes, and Their Locomotives with Driving-Wheel Brakes, and for Other Purposes." The provisions of the act correspond to the purpose declared in the title, and may be applied distributively to the protection of employee or traveler, or to employees, according to their employment.

But even if the act has the broad purpose asserted, which we need not decide, we are brought to the question, Is the tender of a locomotive a car within the meaning of the statute?

[678] Plaintiff asserts the affirmative of the question and cites Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412, and a number of state decisions. The case does not so decide. It does decide that the locomotive is a car within the meaning of the act. No distinction was made between it and the tender; the latter was deemed integral with the locomotive. In other words, tender and engine were considered as constituting the locomotive. Necessarily a locomotive thus constituted was decided to be a "car" within the meaning of the act, and necessarily had to be coupled with the cars, which constituted the train. And in this necessity the dangers to employees would occur which the act was intended to prevent. Any other construction would have left the act denuded of some of its value. In other words, there would have been only a partial enforcement of its protection in instances where protection was oftenest needed. To omit the locomotive, composed of engine and tender—and it was considered as so composed in the cited case—was to omit part of a train which was within all the mischiefs of the act, and therefore covered by its remedies. No such conditions exist in the present case. Engine and tender are a single thing; separable, it may be, but never separated in their ordinary and essential use. The connection between them, that is, between the engine and tender, it was testified, was in the nature of a permanent coupling, and it was also testified that there was practically no opening between the engine and tender, and that attached to the engine was a drawbar which fitted in the yoke of the tender, and the pin was dropped down to connect drawbar and yoke. The necessary deduction from this is that no dangerous position was assumed by an employee in coupling the engine and tender for the reason that the pin was dropped through the bar from the tank of the tender. The case at bar, therefore, is not brought either within the mischief or the remedy of the act.

[679] The evidence established that it is not the custom of railroads to use an automatic coupler between the engine and tender. Some roads, however, use two additional or supplemental drawbars, called radial bars, one on each side of the main bar, while on other roads it is almost the stand-

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ard practice, instead of the supplemental bars, to use chains secured to the back heads of the locomotive and hooked to the tender on each side of the center. The record does not disclose whether there were either such bars or chains connecting the engine and tender. But even if their absence may be inferred, it is not relied on as a ground of negligence.

It is further contended by plaintiff that the necessity of an automatic coupler between engine and tender is determined by the amendment of the act of 1893, enacted in 1903 (32 Stat. at L. 943, chap. 976, U. S. Comp. Stat Supp. 1911, p. 1314). It may be necessary, it is said, under the statute of 1893, to "bring the word 'tender' within the definition of the word 'car,'" but that this "is totally unnecessary when we come to consider and apply the subsequent statutes, because here we find the word 'tender' specifically used, and used, too, in evident contradistinction to the words 'locomotives' and 'cars.'" The amendment repeats the title of the prior acts, provides that their provisions "shall apply in *all cases*, whether or not the couplers brought together are of the same kind, make, or type," and that their provisions and requirements, including automatic couplers, "shall be held to apply to all trains, locomotives, *tenders*, cars, and smaller vehicles on any railroad engaged in interstate commerce." But this act does not destroy the integrity of the locomotive and tender. It is entirely satisfied by requiring the automatic coupler between the tender and the cars constituting the train, that is, to the rear end of the tender. And this requirement fulfils the purpose of the statute, which, we have seen, does not regard the [680] strength of the connections between the cars, even if it may be supposed that an automatic coupler is the stronger, but does regard safety in making and unmaking the connections. This being kept in mind, the construction of the statute is not difficult. And the construction of the statute is the main concern. If it is not mandatory, as we think it is not, of an automatic coupler between the engine and the tender, the contentions of plaintiff are without foundation. We need not refer to them with further detail except to say that the custom of the railroads could not, of course, justify a violation of the statute, but that custom, having the acquiescence of the Interstate Commerce Commission, is persuasive of the meaning of the statute.

Under the various safety appliance acts the Commission is charged with the duty of prosecuting violations of them which come to its knowledge, and by the sundry civil appropriation act of June 28, 1902 [32 Stat. at L. 419, chap. 1301], the Commission was authorized to employ inspectors to execute and enforce the requirements of the acts. It is of special significance, therefore, that in its order under the act of April 14, 1910 [36 Stat. at L. 298, chap. 160, U. S. Comp. Stat. Supp. 1911, p. 1327], which was supplemental of the other acts, designating the number, dimensions, location, and manner of application of certain appliances, it provided as follows: "Couplers: Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive." That is, couplers were required where danger might be incurred by the employees.

The state decisions cited by plaintiff to sustain her definition of a car, we do not think it is necessary to review. They are all cited in Johnson v. Southern P. Co. supra. They applied the principle which we have applied, and construed the statutes passed on according to the objects which the statutes were intended to secure.

Judgment affirmed.

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[681] GEORGE E. TINKER, Plff. in Err.,
v.
MIDLAND VALLEY MERCANTILE COMPANY.

(See S. C. Reporter's ed. 681-683.)

Evidence — burden of proof — validity of consideration for Indian note.

A licensed trader upon the Osage Indian reservation, suing upon a note given to him by an Indian, to which a defense is set up based upon the act of June 21, 1906 (34 Stat. at L. 325, chap. 3504), making it unlawful for such a trader to give credit to any individual Indian to an amount greater than 75 per cent of the next quarterly annuity to which such Indian will be entitled, is charged with the burden of proving that the note represented lawful credits.

[For other cases, see Evidence, II. a, 2, in Digest Sup. Ct. 1908.]

[No. 13.]

Submitted October 30, 1913. Decided January 5, 1914.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court for Pawnee County in that state in favor of plaintiff in an action on an Indian note. Reversed.

See same case below, 25 Okla. 160, 105 Pac. 333.

The facts are stated in the opinion.

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Mr. Charles H. Merillat submitted the cause for plaintiff in error:

The case is controlled by the principle laid down in United States v. Denver & R. G. R. Co. 191 U. S. 85, 48 L. ed. 107, 24 Sup. Ct. Rep. 33; United States v. Cook, 19 Wall. 591, 22 L. ed. 210; Northern P. R. Co. v. Lewis, 162 U. S. 366, 40 L. ed. 1002, 16 Sup. Ct. Rep. 831.

The case was analogous to one where the defendant not being a banking corporation, the acceptance of a bill was not within the apparent authority with which the agent was invested, in which case it is for the payee to prove that the acceptance was authorized by the charter, by-laws or resolutions of the corporation.

Mather v. Union Loan & T. Co. 26 N. Y. S. R. 58, 7 N. Y. Supp. 213; Olcott v. Tioga R. Co. 27 N. Y. 546, 84 Am. Dec. 298.

The fact that the decision of the state courts was adverse to the plaintiff in error on the effect of the evidence does not prevent the rights of the plaintiff in error under the applicable statutes and the evidence adduced being fully considered in this court on the merits.

Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Mackay v. Dillon, 4 How. 421, 11 L. ed. 1038.

No appearance for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is an action on a promissory note for $922.50, dated September 1 1906, against an Osage Indian residing on [682] the Osage Reservation. By the Indian appropriation act of June 21, 1906, chap. 3504, 34 Stat. at L. 325, 366, it was made "unlawful hereafter for the traders upon the Osage Indian Reservation to give credit to any individual Indian, head of a family, to an amount greater than seventy-five per centum of the next quarterly annuity to which such Indian will be entitled." This amended the previous act of March 3, 1901, chap. 832, 31 Stat. at L. 1058, 1065, by which the limit was 60 per centum. The defendant demurred, and the demurrer having been overruled, answered that the note was given for a debt in excess of 75 per cent of the next quarterly annuity due to him after the credit was extended, and that the note exceeded that amount. It appeared in evidence that the plaintiff, the defendant in error, was a licensed trader with the Indians, and the defendant testified that he received as his quarterly payment $46 for each of the seven members of his family, which would be $322,—in any event, much less than $922.50. It was not shown when the credits were given. The plaintiff demurred to the evidence, and the demurrer was sustained by both courts below. 25 Okla. 160, 105 Pac. 333.

The supreme court of the state put its decision on the burden of proof, following the analogy of illegal consideration. We hardly need consider whether proof that the note was so largely in excess of the percentage then allowable, especially when coupled with the improbability that the defendant ever had received in the past an annuity so much larger as to warrant such a credit, did not constitute at least a prima facie case. The court is of opinion that, in view of the policy of the statute, the relative position of the parties, and the protection necessarily extended to Indians, the burden was on the plaintiff not only to bring his claim within the permission of the statute in fact, as he was warned by its letter that he must, but also to prove that he had done so, in case of dispute. He occupied [683] the position of advantage, and that, rather than formal logic, determines the burden of proof. It may be that it lay on the defendant to plead the defense. That is a question of convenience. Burnet v. Desmornes y Alvarez, 226 U. S. 145, 147, 57 L. ed. 159, 160, 33 Sup. Ct. Rep. 63. But the order of pleading does not always determine the burden of proof. Generally it is not considered necessary for the payee of a promissory note to allege a consideration in declaring upon it, but if there is conflicting evidence, he has the burden of proof. Delano v. Bartlett, 6 Cush. 364; Burnham v. Allen, 1 Gray, 496.

Judgment reversed.

WILLIAM P. TRIMBLE and Cannie F. Trimble, Plffs. in Err.,
v.
CITY OF SEATTLE.

(See S. C. Reporter's ed. 683-690.)

Error to state court — impairment of contract obligations — construction of lease from state.

1. A ruling of the highest court of a state that, under the policy of the state law, the common-law doctrine of an implied covenant in a lease that the lessor shall pay the taxes is inapplicable to leases of tide lands, will not be disturbed by the Federal Supreme Court in determining on writ of

NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On writs of error to state courts in cases presenting questions of impairment of con-

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error to the state court whether the contract obligations of the state toward its lessees are unconstitutionally impaired by the subsequent enactment of statutes authorizing the assessment of such leaseholds for local improvements specially benefiting them, and the inclusion of them within local improvement districts.

[For other cases, see Appeal and Error, 4994, 4995; Courts, VII. c, 8, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws —local assessments.

2. Lessees of state tide lands are not denied the equal protection of the laws, contrary to U. S. Const., 14th Amend., by state statutes authorizing the assessment of such leaseholds for local improvements specially benefiting them, and the inclusion of them within local improvement districts.

[For other cases, see Constitutional Law, IV. a, 4, in Digest Sup. Ct. 1908.]

[No. 108.]

Argued and submitted December 9, 1913. Decided January 5, 1914.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court of King County, in that State, confirming an assessment of certain leasehold interests in tide lands. Affirmed.

See same case below, 64 Wash. 102, 116 Pac. 647.

The facts are stated in the opinion.

Mr. C. W. Corliss submitted the cause for plaintiffs in error. Mr. George McKay was on the brief:

The lands of the state, in the absence of the state's consent, are not subject to special assessment for local improvements.

St. Louis v. Brown, 155 Mo. 545, 56 S. W. 298; State v. Hartford, 50 Conn. 89, 47 Am. Rep. 622.

At the time the leases involved in this action were made no consent had been given by the state to the levying of special assessments on its land; the making of the leases did not subject the land to special assessment.

Daugherty v. Thompson, 71 Tex. 192, 9 S. W. 99; Davis v. Burnett, 77 Tex. 3, 13 S. W. 613.

In the absence of a covenant or condition to the contrary, it is an implied covenant in every lease that the lessor, not the lessee, shall pay all taxes and assessments levied on the leased land during the term.

Wood, Land. & T. pp. 683, 684, § 417; Taylor, Land. & T. 7th ed. chap. 8, p. 289, ¶ 341, § 6; 18 Am. & Eng. Ency. Law, 2d ed. 650–652.

The state, as a lessor, is bound by the general rule, the same as a private person, that, in the absence of an agreement to the contrary, the landlord is bound by an implied covenant to discharge all assessments levied on the land during the term.

Western & A. R. Co. v. State, — Ga. —, 14 L.R.A. 455.

Where the state contracts, it is bound by the same rules of law as are applied to private persons.

Murray v. Charleston, 96 U. S. 432, 445, 34 L. ed. 760, 763; Hall v. Wisconsin, 103 U. S. 5, 26 L. ed. 302; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Daggett v. Bonewitz, 107 Ind. 279, 7 N. E. 900; Lessieur v. Price, 12 How. 59, 13 L. ed. 893; Gray v. State, 72 Ind. 567; Bond Debt Cases, 12 S. C. 200; United States v. Bank of Metropolis, 15 Pet. 392, 10 L. ed. 779; Floyd Acceptances (Pierce v. United States) 7 Wall. 666, 19 L. ed. 169.

The rule that the state as lessor is bound by the same obligations as a private lessor is not qualified or overthrown by the well-settled rule that a legislative grant is construed most strongly in favor of the state, and against the grantee.

Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773; Slidell v. Grandjean, 111 U. S. 437, 28 L. ed. 329, 4 Sup. Ct. Rep. 475; Rice v. Minnesota & N. W. R. Co. 1 Black, 380, 17 L. ed. 153; Missionary Soc. v. Dalles, 107 U. S. 343, 27 L. ed. 547, 2 Sup. Ct. Rep. 672; Hancock v. McKinney, 7 Tex. 445; Dubuque & P. R. Co. v. Litchfield, 23 How. 88, 16 L. ed. 509.

In Coast-Line R. Co. v. Savannah, 30 Fed. 646, the city had granted a street railroad franchise requiring the grantor to pave between the rails; the agreement to pave between the rails was held to imply an agreement that the grantee should not be required to pave elsewhere, and an attempt to compel it to do other paving or pay for it was in violation of this implied agreement.

As a matter of law, special assessments are against the land.

Chicago, M. & St. P. R. Co. v. Phillips, 111 Iowa, 377, 82 N. W. 787; Macon v. Patty, 57 Miss. 386, 34 Am. Rep. 451.

In New England Mortg. Secur. Co. v. Vader, 12 Sawy. 74, 28 Fed. 274, the court held that a contract by a mortgagor to pay the taxes on the mortgaged premises, and if he did not the mortgagee might pay the

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tract obligations—see note to Osborne v. Clark, 51 L. ed. U. S. 619.

As to the validity of class legislation, generally, see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally, see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

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same and add the amount to his mortgage, would be impaired by a subsequent statute apportioning the tax between the mortgagor and the mortgagee, and that the statute would be invalid for that reason.

The assessments take plaintiff's property without due process of law.

Coast Land Co. v. Seattle, 52 Wash. 383, 100 Pac. 856.

Mr. Howard A. Hanson argued the cause, and, with Messrs. William B. Allison and James E. Bradford, filed a brief for defendant in error:

No Federal question is involved.

Lynde v. Lynde, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555; Remington Paper Co. v. Watson, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456; Rabel v. Seattle, 44 Wash. 482, 87 Pac. 520; Trimble v. Seattle, 64 Wash. 102, 116 Pac. 647; Crowell v. Randell, 10 Pet. 368, 9 L. ed. 458; Israel v. Arthur, 152 U. S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 585; Chapman v. Goodnow (Chapman v. Crane) 123 U. S. 540, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; Wells v. Goodnow (Wells v. Crane) 150 U. S. 84, 37 L. ed. 1007, 14 Sup. Ct. Rep. 22; McManus v. O'Sullivan, 91 U. S. 578, 23 L. ed. 390; Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 42, note; Allen v. Southern P. R. Co. 173 U. S. 479, 43 L. ed. 775, 19 Sup. Ct. Rep. 518; Citizens' Bank v. Board of Liquidation (Louisiana ex rel. Citizens' Bank v. Board of Liquidation) 98 U. S. 140, 25 L. ed. 114; First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904; Marsh v. Nichols, S. & Co. 140 U. S. 344, 35 L. ed. 413, 11 Sup. Ct. Rep. 798; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575; Yesler v. Washington Harbor Line, 146 U. S. 646, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190; Mills v. St. Clair County, 8 How. 569, 12 L. ed. 1201; Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353.

If a Federal question is involved, it has not been properly raised in the lower courts.

Maxwell v. Newbold, 18 How. 511, 15 L. ed. 506; Chapin v. Fye, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71; Hoyt v. Shelden (Hoyt v. Thompson) 1 Black, 518, 17 L. ed. 65; Farney v. Towle, 1 Black, 359, 17 L. ed. 216; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120; Clarke v. McDade, 165 U. S. 168, 41 L. ed. 673, 17 Sup. Ct. Rep. 284; Messenger v. Mason, 10 Wall. 507, 19 L. ed. 1028.

The leases in question are subject to taxation and assessment.

New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705, 4 Ann. Cas. 381; Providence Bank v. Billings, 4 Pet. 514, 7 L. ed. 939; Vicksburg, S. & P. R. Co. v. Dennis, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625; Wells v. Savannah, 181 U. S. 531, 45 L. ed. 986, 21 Sup. Ct. Rep. 697; Chicago Theological Seminary v. Illinois, 188 U. S. 662, 47 L. ed. 641, 23 Sup. Ct. Rep. 386; Erie R. Co. v. Pennsylvania, 21 Wall. 492, 22 L. ed. 595; Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; Ford v. Delta & P. Land Co. 164 U. S. 662, 41 L. ed. 590, 17 Sup. Ct. Rep. 230; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 549, 9 L. ed. 773, 824; Moeller v. Gormley, 44 Wash. 465, 87 Pac. 507; Rabel v. Seattle, 44 Wash. 483, 87 Pac. 520; Coast Land Co. v. Seattle, 52 Wash. 380, 100 Pac. 856.

The state is under no obligation to pay taxes or assessments imposed upon the leaseholds under consideration.

Moeller v. Gormley, 44 Wash. 465, 87 Pac. 507; Rabel v. Seattle, 44 Wash. 482, 87 Pac. 520; Coast Land Co. v. Seattle, 52 Wash. 380, 100 Pac. 856; Chicago Theological Seminary v. Illinois, 188 U. S. 662, 47 L. ed. 641, 23 Sup. Ct. Rep. 386.

Such leases are state grants.

20 Cyc. 1358; Downs v. United States, 51 C. C. A. 100, 113 Fed. 147; Estes Park Toll Road Co. v. Edwards, 3 Colo. App. 74, 32 Pac. 549; Moeller v. Gormley, 44 Wash. 469, 87 Pac. 507; Reilley v. Anderson, 33 Wash. 58, 73 Pac. 799; Chicago Attachment Co. v. Davis Sewing Mach. Co. 142 Ill. 171, 15 L.R.A. 754, 31 N. E. 438; Sanford v. Johnson, 24 Minn. 172; McKee v. Howe, 17 Colo. 538, 31 Pac. 115.

Mr. Justice Holmes delivered the opinion of the court:

This is an attempt to reverse a judgment confirming an assessment on certain leaseholds of tide lands. The leases were executed by the state in 1899. Subsequent statutes of 1905 and 1907, respectively, authorized the assessment of such leaseholds for local improvements specially benefiting them, and the inclusion of them within local improvement districts by cities of the first class. The city of Seattle made a plank roadway, created an improvement district, levied an assessment which failed (Coast Land Co. v. Seattle, 52 Wash. 380, 100 Pac. 856), and then in due form levied the reassessment that is in question here. The plaintiffs in error argue that the leases contained an implied covenant for quiet enjoyment, and that the

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subsequent laws that authorized the assessment impair their constitutional rights. Art. 1, § 10, 14th Amend. § 1. The supreme court of Washington, admitting the general rule as to leases, held that, so far as concerns taxation, it did not apply to leases made by the state. 64 Wash. 102, 116 Pac. 647.

The concession of the court was that in private contracts, "in the absence of a covenant or condition to the contrary, it is an implied covenant in every lease that the lessor shall pay all taxes and assessments levied on the leased land during the term." Stated in this form, the rule appears to be a rule of policy to which special considerations may set a limit. But it might be suggested that if the state should expressly covenant against such [688] assessments, it could not impair the obligation of its contract by a subsequent law. The words used in these leases are "lease, demise, and let;" and from Spencer's Case, 5 Coke, 16*a*, 17*a*, 1 Smith, Lead. Cas. 52, 15 Eng. Rul. Cas. 233, down to the present day, these words have been said to imply a covenant. 1 Wms. Saund. 322, note 2; Mostyn v. West Mostyn Coal & I. Co. [illegible] R. 1 C. P. Div. 145, 152, 45 L. J. C. P. N. S. 401, 34 L. T. N. S. 324, 24 Week. Rep. 401; Mershon v. Williams, 63 N. J. L. 398, 406, 44 Atl. 211. Words express whatever meaning convention has attached to them; and so it may be argued that the state has covenanted against this tax in express terms.

Nevertheless it is obvious that the supposed meaning was not reached by simple interpretation. There is no suggestion of warranty in *dedi* or *demisi* by any usage of speech alone. The warranty was what Lord Coke called a warranty in law (2 Co. Litt. 384*a*),—an institution, not depending upon an expression of intent, not arising because the words mean warrant, but imposed from without by the law. In Butler's note to this page the lessor's obligation is put as reciprocal to the tenant's obligation to pay rent (compare 5 Coke, 17*a*), just as the warranty in *dedi* in some cases was a consequence of tenure. One may wonder whether in fact the warranty incident to a sale in early law before the machinery of implied contracts was thought of (Glanv. VII., chap. 2; X., chap. 15; Lex. Sal. chap. 47; 1 Löning, Vertragsbruch, 103; 2 Co. Inst. 274, 275) was not given a scholastic turn, extended, limited, and embodied in sacremental words,—whether Glanville's *donatores*, grantors, did not suggest the special effect of *dedi* in the Statute de Bigamis, as interpreted by Lord Coke. (The statute itself says that the feoffor is held *ratione doni proprii*. 4 Edw. I., chap. 6.) But whatever may be the history, it is plain, as we have said, that the rule is not the result of interpretation, but of doctrine; and hence it is that very commonly the rule is stated as expressing the general operation of a lease, and not as depending upon the use of a particular word. 64 Wash. 102, 104, 116 Pac. 647; J. W. Perry [689] Co. v. Norfolk, 220 U. S. 472, 477, 55 L. ed. 548, 550, 31 Sup. Ct. Rep. 465; Duncklee v. Webber, 151 Mass. 408, 411, 24 N. E. 1082; and cases cited in 24 Cyc. 1057; 18 Am. & Eng. Enc. Law, 2d ed. 650. It has come back to what it started as being,—a construction of the law; and since, notwithstanding its age, the special effect of *demisi* has not entered into speech so far as to reach popular understanding, the rule still may be construed as extending no further than reason dictates. Indeed, warranties in law always have been dealt with on this principle. See *e. g.*, Brett v. Cumberland, Cro. Jac. 521, 523. Therefore we may consider the question before us on the footing upon which it was discussed by the supreme court of the state.

The question is, then, whether our duty requires us to overthrow a decision that the policy of the state law excludes a constructive obligation to indemnify against the exercise of the sovereign power of taxation from leases by the state. Put in this form, it is not hard to answer. When the law creates an obligation outside of the expressed intent of the parties, it must consider all the circumstances, and the effect with reference to them. In ordinary cases the whole property is taxed, and which party shall bear the burden is not a matter of public concern. But when the state makes the lease, the supposed obligation would be an obligation not to tax,—a restriction of public import not lightly to be imposed. Providence Bank v. Billings, 4 Pet. 514, 561, 7 L. ed. 939, 955; Wells v. Savannah, 181 U. S. 531, 539, 540, 45 L. ed. 986, 991, 992, 21 Sup. Ct. Rep. 697; St. Louis v. United R. Co. 210 U. S. 266, 273, 274, 52 L. ed. 1054, 1057, 1058, 28 Sup. Ct. Rep. 630. J. W. Perry Co. v. Norfolk, 220 U. S. 472, 480, 55 L. ed. 548, 551, 31 Sup. Ct. Rep. 465. It is urged that to deny the state's obligation discriminates unconstitutionally against this class of lessees, since all others are free from the burden. But that is not true. Whether landlord or tenant shall pay a tax is a matter of private arrangement, and the practice one way or the other has no bearing on the matter. The argument from inequality really works the other way. If these leaseholds are not [690] taxable, they are a favored class of property; for ordinarily leaseholds are taxed even if they are lumped and included in the

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value of the fee. When an interest in land, whether freehold or for years, is severed from the public domain and put into private hands, the natural implication is that it goes there with the ordinary incidents of private property, and therefore is subject to being taxed. See New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 38, 50 L. ed. 65, 25 Sup. Ct. Rep. 705, 4 Ann. Cas. 381.

The plaintiffs in error think that thus far there has been a failure to understand their contention that these assessments are against the land, and therefore are met by the supposed contract of the state, that the lessees should have the land free of all charges. The court below appears to us to have decided in direct response to that argument that the contract of the state did not go so far, and we are of opinion that we ought not to pronounce the decision wrong. There was some subsidiary discussion of the meaning and operation of the statutes, but upon those matters we do not go behind the judgment of the supreme court of the state.

Judgment affirmed.

PIZA HERMANOS S. en C., Appt.,
v.
RICARDO A. GANDIA CALDENTEY.

(See S. C. Reporter's ed. 690–692.)

Appeal — review of facts — concurrent findings below.

1. The Federal Supreme Court will not go behind the well-warranted concurrent findings of fact by the two lower courts.

[For other cases, see Appeal and Error, 4931–4959, in Digest Sup. Ct. 1908.]

Appeal — judgment — affirmance without prejudice.

2. An affirmance of a decree in a suit for an accounting, upon suggestion that such decree charges some items twice, will be without prejudice to the reopening of the account for the purpose of correcting errors of calculation if permitted upon application to the court below.

[For other cases, see Appeal and Error, IX. e, in Digest Sup. Ct. 1908.]

[No. 134.]

Submitted December 15, 1913. Decided January 5, 1914.

APPEAL from the Supreme Court of Porto Rico to review a decree which affirmed a decree of the District Court of San Juan, in favor of plaintiff in a suit for an accounting. Affirmed without prejudice to reopening the account for the correction of errors of calculation.

See same case below, 17 P. R. R. 780.

The facts are stated in the opinion.

Messrs. Frederic R. Coudert and Paul Fuller submitted the cause for appellant.

Messrs. Frederic R. Coudert and Charles B. Samuels also filed a brief for appellant.

Mr. Charles F. Carusi submitted the cause for appellee. Mr. A. Sarmiento was on the brief.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit by the appellee to recover the sum alleged by him to be due upon a correct account between the defendants and himself. The facts as found are that the appellee was employed by the defendants, copartners, at a monthly salary and 10 per cent of the net profits, to be credited in his private account; that after about seven years and a half he left the firm on March 11, 1910; that the points of difference as to accounting concern the valuation of an estate bought by the firm and of some unharvested and unsold crops. The firm credited the estate at cost, $20,584.67, but the courts below found that it was worth $80,000, charged the difference, $59,415.33, as profit, and credited the appellee with $5,941.53. They likewise found that the profit on the crops was much greater than the appellee's estimate, and therefore allowed him the $2,000 claimed in his complaint.

It may be that we should adopt a different rule from that followed by the courts below if the question came here as a pure question of law. But it appears that the opinion of both courts that they found the appellants to have admitted the propriety of charging an increase in [692] the value of the estate as a profit, so that the question was narrowed to one of amount. The principle being settled in this way, it was applied to the unsold crops. We do not go behind these well-warranted findings of fact, and really there is nothing else before us. The assignment of errors raised some other points, but these were the only matters that were pressed in the final argument, or that could have been pressed with any hope of success. It is suggested that, if otherwise right, the judgment charged the appellants with some items twice over. We do not see it, but if there has been any oversight in this respect, our affirmance of the judgment will be without prejudice to reopening the account for the single purpose of correcting errors of calculation if permitted upon application to the Supreme Court.

Judgment affirmed.

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NATHANIEL W. HOBBS, Trustee, Appt.,
v.
HEAD & DOWST COMPANY.

(See S. C. Reporter's ed. 692–701.)

Appeal — from circuit court of appeals — bankruptcy case.

1. A decree of a circuit court of appeals which affirmed a decree of a district court, dismissing the petition of a trustee in bankruptcy to prevent the enforcement in a state court of a lien for labor and materials, is appealable to the Federal Supreme Court.

[For other cases, see Appeal and Error, 804, 805, in Digest Sup. Ct. 1908.]

Appeal — review of facts — findings of master.

2. A master's finding, followed by both the district court and the circuit court of appeals, that a building contractor was justified in stopping work before putting on the final touches, will not be disturbed on appeal where there is evidence that such contractor only stopped work when told by the owner of the latter's insolvency, and informed that it must look to its lien to support its claim.

[For other cases, see Appeal and Error, 4920–4930, in Digest Sup. Ct. 1908.]

Bankruptcy — avoiding mechanics' lien.

3. Failure to take the proper steps to secure a hearing on the merits in the highest state court of the exceptions to a judgment enforcing a mechanics' lien against a bankrupt estate does not constitute an equitable ground for going behind the state court's judgment at the instance of the trustee in bankruptcy, in order to defeat the lien, on the ground that the building contract on which the lien was based was entire, and that whatever justification there may have been for stopping work, or ground for a *quantum meruit*, nothing short of complete performance would earn the contract price as such, or establish a lien for the same, where the failure to get the exceptions considered was due to no fault of the lienor, but solely to the conduct of those then representing the estate.

[For other cases, see Bankruptcy, VI. b, 2, in Digest Sup. Ct. 1908.]

[No. 148.]

Argued December 18 and 19, 1913. Decided January 5, 1914.

NOTE.—On the appellate jurisdiction of the Federal Supreme Court in bankruptcy cases—see note to James v. Stone & Co. 57 L. ed. U. S. 573.

On the appellate jurisdiction of the Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

As to excuse for nonperformance of contract generally, see notes to United States v. Peck, 26 L. ed. U. S. 46, and Jacksonville, M. P. R. & Nav. Co. v. Hooper, 40 L. ed. U. S. 515.

APPEAL from the United States Circuit Court of Appeals for the First Circuit to review a decree which affirmed a decree of the District Court for the District of New Hampshire, dismissing the petition of a trustee in bankruptcy to prevent the enforcement in a state court of a lien for labor and materials. Affirmed.

See same case below, 106 C. C. A. 519, 184 Fed. 409; on rehearing, 107 C. C. A. 663, 185 Fed. 1006.

The facts are stated in the opinion.

Mr. Henry F. Hollis argued the cause and filed a brief for appellant:

However the authorities may differ upon the question whether a lien may be created upon an implied contract, they all agree that, in case there is an express contract, there can be no lien unless the claimant shows one of three things:

1. That he has performed the contract.

Rochford v. Rochford, 192 Mass. 232, 78 N. E. 454; General Fire Extinguisher Co. v. Chaplin, 183 Mass. 375, 67 N. E. 321; Rome Hotel Co. v. Warlick, 87 Ga. 34, 13 S. E. 116; Thomas v. Illinois Industrial University, 71 Ill. 310; Bohem v. Seabury, 141 Pa. 594, 21 Atl. 674; Moritz v. Larsen, 70 Wis. 569, 36 N. W. 331; John Pritzlaff Hardware Co. v. Berghoefer, 103 Wis. 359, 79 N. W. 564; Cahill v. Heuser, 2 App. Div. 292, 37 N. Y. Supp. 736; Paturzo v. Shuldiner, 125 App. Div. 636, 110 N. Y. Supp. 137; Gunther v. Bennett, 72 Md. 384, 19 Atl. 1048; Maryland Brick Co. v. Spilman, 76 Md. 337, 17 L.R.A. 599, 35 Am. St. Rep. 431, 25 Atl. 297; Derrickson v. Edwards, 29 N. J. L. 468, 8 Am. Dec. 220; McGraw v. Godfrey, 16 Abb. Pr. N. S. 358.

Or 2. That he has been prevented from doing so by the other party.

Howes v. Reliance Wire-Works Co. 46 Minn. 44, 48 N. W. 448; Knight v. Norris, 13 Minn. 473, Gil. 438; Dennistoun v. McAllister, 4 E. D. Smith, 729; Kinney v. Sherman, 28 Ill. 523; Charnley v. Honig, 74 Wis. 163, 42 N. W. 220; Hutchins v. Bautch, 123 Wis. 394, 107 Am. St. Rep. 1014, 101 N. W. 671; Catlin v. Douglass, 33 Fed. 569; Sproessig v. Keutel, 17 N. Y. Supp. 839.

Or 3. That performance has been waived.

Cahill v. Heuser, 2 App. Div. 292, 37 N. Y. Supp. 736; Floyd v. Rathledge, 41 Ill. App. 370; McCue v. Whitwell, 156 Mass. 205, 30 N. E. 1134; Stewart v. McQuaide, 48 Pa. 191; 20 Am. & Eng. Enc. Law, 2d ed. 366.

Breach by one party is no excuse for failure to perform by the other party.

Geary v. Bangs, 33 Ill. App. 584; Kinney v. Sherman, 28 Ill. 523; West v. Bechtel, 125 Mich. 144, 51 L.R.A. 791, 84 N. W. 69; Winchester v. Newton, 2 Allen, 492; Dox

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v. Dey, 3 Wend. 361; M'Grath v. Horgan, 72 App. Div. 152, 76 N. Y. Supp. 415; Osgood v. Bauder, 75 Iowa, 558, 1 L.R.A. 655, 39 N. W. 887; Myer v. Wheeler, 65 Iowa, 390, 21 N. W. 692; Hanson v. Consumers' Steam Heating Co. 73 Iowa, 79, 34 N. W. 495; Bianchi v. Hughes, 124 Cal. 27, 56 Pac. 610; 3 Page, Contr. § 1490 (7); Mersey Steel & Iron Co. v. Naylor, L. R. 9 App. Cas. 434; Cox v. McLaughlin, 54 Cal. 605; Campbell v. McLeod, 24 N. S. 66; Mill Dam Foundry v. Hovey, 21 Pick. 435; Howe v. Howe & O. Ball Bearing Co. 83 C. C. A. 536, 154 Fed. 826; Kauffman v. Raeder, 54 L.R.A. 247, 47 C. C. A. 278, 108 Fed. 181; Paturzo v. Shuldiner, 125 App. Div. 636, 110 N. Y. Supp. 139; Boon v. Eyre, 1 H. Bl. 273, 2 Revised Rep. 768, 18 Eng. Rul. Cas. 609.

Insolvency of one party is no excuse for abandoning work by the other party.

Phenix Nat. Bank v. Waterbury, 197 N. Y. 161, 90 N. E. 435; Insurance Commission v. People's F. Ins. Co. 68 N. H. 52, 44 Atl. 82; Bank Comrs. v. New Hampshire Trust Co. 69 N. H. 623, 44 Atl. 130; New England Iron Co. v. Gilbert Elev. R. Co. 91 N. Y. 153; Devlin v. New York, 63 N. Y. 8; Merchant v. Rawson, Clarke, Ch. 123; Underhill v. North American Gaslight Co. 31 How. Pr. 34; Re Carter, 21 App. Div. 118, 47 N. Y. Supp. 383; Hobbs v. Columbia Falls Brick Co. 157 Mass. 112, 31 N. E. 756; C. F. Jewett Pub. Co. v. Butler, 159 Mass. 520, 22 L.R.A. 253, 34 N. E. 1087; Southern Lumber Co. v. Mercantile Lumber & Supply Co. 89 Mo. App. 144; Re Edwards, L. R. 8 Ch. 293, 42 L. J. K. B. N. S. 37, 28 L. T. N. S. 325, 21 Week. Rep. 349; McConnell v. Hewes, 50 W. Va. 33, 40 S. E. 436; Brassel v. Troxel, 68 Ill. App. 133; Boorman v. Nash, 9 Barn. & C. 145, 7 L. J. K. B. 150; Wald's Pollock, Contr. 3d ed. 355, note 88; Page, Contr. § 1449, p. 2243; Benjamin, Sales, p. 808; Withrow Lumber Co. v. Glasgow Invest. Co. 101 Fed. 868.

Nothing is due under the contract.

Robinson v. Crowninshield, 1 N. H. 76; Currier v. Boston & M. R. Co. 34 N. H. 498; Danforth v. Freeman, 69 N. H. 469, 43 Atl. 621; Wadleigh v. Sutton, 6 N. H. 15, 23 Am. Dec. 704; Dame v. Woods, 73 N. H. 222, 70 L.R.A. 133, 60 Atl. 744.

Nothing being due under the contract, no recovery can be had in the lien suit.

20 Am. & Eng. Enc. Law, 2d ed. 520; Kendall v. Pickard, 67 N. H. 473, 32 Atl. 763; Kihlburg v. United States, 97 U. S. 398, 24 L. ed. 1106; Martinsburg & P. R. Co. v. March, 114 U. S. 549, 29 L. ed. 255, 5 Sup. Ct. Rep. 1035; Palmer v. Clark, 106 Mass. 373; Chicago, S. F. & C. R. Co. v. Price, 138 U. S. 185, 34 L. ed. 917, 11 Sup. Ct. Rep. 290; Harmon v. Ashmead, 60 Cal. 439; Pitt v. Acosta, 18 Fla. 270; Thomas v. Turner, 16 Md. 105; Lauer v. Dunn, 115 N. Y. 405, 22 N. E. 270; Kinney v. Hudnut, 3 Ill. 472; Preusser v. Florence, 4 Abb. N. C. 136; Schroth v. Black, 50 Ill. App. 168.

As a general rule, if there has been an honest endeavor to complete the contract, and substantial compliance with its terms, a lien may be enforced.

20 Am. & Eng. Enc. Law, 2d ed. 366, 367; 27 Cyc. 85–87.

But the authorities are equally clear that a wilful omission in the performance of the contract, unless trivial, will preclude the assertion of a lien.

20 Am. & Eng. Enc. Law, 2d ed. 367; 27 Cyc. 85, note 27; Van Clief v. Van Vechten, 130 N. Y. 579, 29 N. E. 1017; Elliott v. Caldwell, 43 Minn. 357, 9 L.R.A. 52, 45 N. W. 845; D'Amato v. Gentile, 173 N. Y. 596, 65 N. E. 1116, 54 App. Div. 625, 66 N. Y. Supp. 833; Weeks v. O'Brien, 27 Jones & S. 28, 12 N. Y. Supp. 720; May v. Menton, 18 Misc. 737, 41 N. Y. Supp. 650; Fox v. Davidson, 36 App. Div. 159, 55 N. Y. Supp. 524; Spence v. Ham, 27 App. Div. 379, 50 N. Y. Supp. 960; Anderson v. Todd, 8 N. D. 158, 77 N. W. 599; Federal Trust Co. v. Guingues, 76 N. J. Eq. 495, 74 Atl. 654; Braseth v. State Bank, 12 N. D. 486, 98 N. W. 79; Wade v. Haycock, 25 Pa. 382; Gillespie Tool Co. v. Wilson, 123 Pa. 19, 16 Atl. 36; Sherry v. Madler, 123 Wis. 621, 101 N. W. 1095; Roane v. Murphy, — Tex. Civ. App. —, 96 S. W. 782; Hahn v. Bonacum, 76 Neb. 837, 107 N. W. 1001, 109 N. W. 368; Gillis v. Cobe, 177 Mass. 584, 59 N. E. 455; Burke v. Coyne, 188 Mass. 401, 74 N. E. 942; Schindler v. Green, 7 Cal. Unrep. 229, 82 Pac. 341; Smith v. Ruggiero, 173 N. Y. 614, 66 N. E. 1116; King v. Moore, 61 App. Div. 609, 70 N. Y. Supp. 6; Kohl v. Fleming, 21 Misc. 690, 47 N. Y. Supp. 1092.

This appeal was properly taken.

Hutchinson v. Otis, 190 U. S. 552, 47 L. ed. 1179, 23 Sup. Ct. Rep. 778; Burleigh v. Foreman, 60 C. C. A. 109, 125 Fed. 217; Mason v. Wolkowich, 10 L.R.A.(N.S.) 765, 80 C. C. A. 435, 150 Fed. 699; Remington, Bankr. §§ 2870, 2871, 2882, 2900, 2912, 2918, 2923; Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690, 11 Am. Bankr. Rep. 709; Re Friend, 67 C. C. A. 500, 134 Fed. 778; Plymouth Cordage Co. v. Smith, 194 U. S. 311, 48 L. ed. 992, 24 Sup. Ct. Rep. 725; Re First Nat. Bank, 14 Am. Bankr. Rep. 180; Knapp v. Milwaukee Trust Co. 216 U. S. 545, 54 L. ed. 610, 30 Sup. Ct. Rep. 412; Liddon v. Smith, 67 C. C. A. 517, 135 Fed. 43.

Since the appeal comes within the provisions of § 24a, this court will review both questions of law and questions of fact.

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Elliott v. Toeppner, 187 U. S. 327, 47 L. ed. 200, 23 Sup. Ct. Rep. 133; First Nat. Bank v. Chicago Title & T. Co. 198 U. S. 280, 49 L. ed. 1051, 25 Sup. Ct. Rep. 693; Remington, Bankr. § 2881.

Messrs. George H. Warren and Robert L. Manning argued the cause and filed a brief for appellees:

The correctness of the conclusions of fact below cannot successfully be questioned further in this court.

Page v. Rogers, 211 U. S. 575, 577, 53 L. ed. 332, 333, 29 Sup. Ct. Rep. 159; United States v. Clark, 200 U. S. 601, 608, 50 L. ed. 613, 616, 26 Sup. Ct. Rep. 340; United States v. Stinson, 197 U. S. 200, 207, 49 L. ed. 724, 726, 25 Sup. Ct. Rep. 426; The Germanic (Oceanic Steam Nav. Co. v. Aitken) 196 U. S. 589, 595, 49 L. ed. 610, 613, 25 Sup. Ct. Rep. 317; Illinois v. Illinois C. R. Co. 184 U. S. 77, 98, 46 L. ed. 440, 449, 22 Sup. Ct. Rep. 300; Furrer v. Ferris, 145 U. S. 132, 36 L. ed. 649, 12 Sup. Ct. Rep. 821; Brainard v. Buck, 184 U. S. 99, 104, 46 L. ed. 449, 452, 22 Sup. Ct. Rep. 458; Schwartz v. Duss, 187 U. S. 8, 26, 47 L. ed. 53, 59, 23 Sup. Ct. Rep. 4; Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401, 412, 48 L. ed. 1039, 1045, 24 Sup. Ct. Rep. 676.

When the contract is substantially completed, the contractor is entitled to his lien. This is an application of a rule of common law to suits for the enforcement of mechanics' liens.

Bergfors v. Caron, 190 Mass. 168, 76 N. E. 655; Hobart v. Reeves, 73 Ill. 527; Hankee v. Arundel Realty Co. 98 Minn. 219, 108 N. W. 842; Nolan v. Whitney, 88 N. Y. 648; Phillip v. Gallant, 62 N. Y. 256; McCue v. Whitwell, 156 Mass. 205, 30 N. E. 1134; Dyer v. Lintz. 76 N. J. L. 204, 68 Atl. 908; Sherry v. Madler, 123 Wis. 621, 101 N. W. 1095; Kane v. Stone Co. 39 Ohio St. 1; Rockel, Mechanics' Liens, §§ 49, 127; Horn v. Batchelder, 41 N. H. 86; 27 Cyc. 85; Spence v. Ham, 27 App. Div. 379, 50 N. Y. Supp. 960; Hall v. Long, 34 Misc. 1, 68 N. Y. Supp. 524; Moore v. Carter, 146 Pa. 492, 23 Atl. 243; Moore v. Dugan, 179 Mass. 153, 60 N. E. 488.

While insolvency of itself is not a breach of contract, and does not authorize recission, there may be such an admission of the insolvency as amounts to a declaration of intention not to abide by the contract, and it may operate as a renunciation.

3 Elliott, Contr. p. 226; Re Phœnix Bessemer Steel Co. L. R. 4 Ch. Div. 108, 46 L. J. Ch. N. S. 115, 35 L. T. N. S. 776, 25 Week. Rep. 187; Ex parte Stapleton, L. R. 10 Ch. Div. 586, 40 L. T. N. S. 14, 27 Week. Rep. 327; McKenzie v. Weineman, 116 Ala. 194, 22 So. 508; Freeman v. Topkis, 1 Marv. (Del.) 174, 40 Atl. 948; Dorman v. Weekly, — Tenn. —, 39 S. W. 890; Hallacher v. Henlein, — Tenn. —, 39 S. W. 869; Re Neff, 28 L.R.A.(N.S.) 349, 84 C. C. A. 561, 157 Fed. 61; Lovell v. St. Louis Mut. L. Ins. Co. 111 U. S. 264, 28 L. ed. 423, Sup. Ct. Rep. 390; Bank Comrs. v. New Hampshire Trust Co. 69 N. H. 623, 44 Atl. 130.

Failure to pay instalments due under the contract may amount to a renunciation by the defendant, and justify cessation of work under the contract.

Freeto v. Houghton, 58 N. H. 101; South Fork Canal Co. v. Gordon, 6 Wall. 561, 569, 18 L. ed. 894, 895; Thomas v. Stewart, 132 N. Y. 582, 30 N. E. 577; Woolf v. Schaefer, 103 App. Div. 567, 93 N. Y. Supp. 184; Holl v. Long, 34 Misc. 1, 68 N. Y. Supp. 522; Huetter v. Redhead, 31 Wash. 320, 71 Pac. 1016; Eastern Forge Co. v. Corbin, 182 Mass. 593, 66 N. E. 419; Johnson Forge Co. v. Leonard, 3 Penn. (Del.) 342, 57 L.R.A. 225, 94 Am. St. Rep. 86, 51 Atl. 305; Vandegrift v. Cowles Engineering Co. 161 N. Y. 443, 48 L.R.A. 685, 55 N. E. 941.

If the defendant repudiates or abandons the contract before its completion, that "dispenses" the contractor from his part of the agreement. (Holt v. United Security L. Ins. & T. Co. 74 N. J. L. 801, 11 L.R.A. (N.S.) 100, 67 Atl. 118, 12 Ann. Cas. 1105). This, of course, is elemental. The conflict—or rather discussion, for the doctrine is settled—comes when a remedy is sought by the contractor.

In Hochster v. De La Tour, 2 El. & Bl. 678, 6 Eng. Rul. Cas. 576, Lord Campbell enunciated the doctrine that is now accepted almost universally:

"If it should be held that, upon a contract to do an act upon a future date, renunciation of the contract by one party dispenses with the condition to be performed in the meantime by the other, there seems no reason for requiring the other to wait until the date arrives before seeking his remedy by action, and the only ground upon which the condition can be dispensed with seems to be the renunciation which may be treated as breach of contract."

It is the firmly established law of the Federal forum that in such a case the injured party may, if he desires, sue at once upon the contract and recover damages for the breach.

Roehm v. Horst, 178 U. S 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780; 3 Elliott, Contr. § 2030; O'Neill v. Supreme Council, A. L. H. 70 N. J. L. 410, 57 Atl. 463, 1 Ann. Cas. 422; The Eliza Lines, 199 U. S. 119, 50 L. ed. 115, 26 Sup. Ct. Rep. 8, 4 Ann. Cas. 406; McBath v. Jones Cotton Co. 79 C. C. A.

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203, 149 Fed. 383; Michigan Yacht & Power Co. v. Busch, 75 C. C. A. 109, 143 Fed. 929; Re Stern, 54 C. C. A. 60, 116 Fed. 604; Lovell v. St. Louis Mut. L. Ins. Co. 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. Rep. 390; Carr v. Hamilton, 129 U. S. 253, 32 L. ed. 669, 9 Sup. Ct. Rep. 295; Re Swift, 50 C. C. A. 264, 112 Fed. 315; Re Pettingill, 137 Fed. 143; Re Neff, 28 L.R.A.(N.S.) 349, 84 C. C. A. 561, 157 Fed. 57.

That in case of breach of an executory contract, the injured party may at his election bring an action on the contract to recover damages for its breach, or recover the value of the consideration furnished on a *quantum meruit*, is the law in New Hampshire.

Drew v. Claggett, 39 N. H. 433; Bank Comrs. v. New Hampshire Trust Co. 69 N. H. 623, 44 Atl. 130.

The company had performed labor and furnished materials by virtue of a contract with the owner, *i. e.*, the Club, and was properly adjudged a lien in accordance with the statute for an amount determined by the contract itself as a measure of the value of the services performed and materials or supplies furnished. The damages were in the nature of a debt due under the contract.

McCue v. Whitwell, 156 Mass. 207, 30 N. E. 1134.

The measure of recovery is the contract price, less a deduction for the work undone. The rule is the same wherever the contractor is the righteous party.

3 Sutherland, Damages, p. 2179; 2 Sedgw. Damages, p. 1316; Rockel, Mechanics' Liens, p. 127; Hutt v. Hickey, 67 N. H. 417, 29 Atl. 456; Moore v. Dugan, 179 Mass. 153, 60 N. E. 488; Sherry v. Madler, 123 Wis. 621, 101 N. W. 1095; Moore v. Carter, 146 Pa. 492, 23 Atl. 243; Holl v. Long, 34 Misc. 1, 68 N. Y. Supp. 522; McGrath v. Horgan, 72 App. Div. 152, 76 N. Y. Supp. 415; Burke v. Coyne, 188 Mass. 404, 74 N. E. 942; Norwood v. Lathrop, 178 Mass. 210, 59 N. E. 650; McCue v. Whitwell, 156 Mass. 207, 30 N. E. 1134; Wheeden v. Fiske, 50 N. H. 127; Charnley v. Honig, 74 Wis. 163, 42 N. W. 220.

As a general proposition, the laws relating to the enforcement of liens are given liberal construction.

Trask v. Searle, 121 Mass. 229; Shaw v. Young, 87 Me. 271, 32 Atl. 897; Durling v. Gould, 83 Me. 134, 21 Atl. 833; 20 Am. & Eng. Enc. Law, 2d ed. 277, 373; Morgan v. First Nat. Bank, 76 C. C. A. 236, 145 Fed. 472.

Wherever the contractor is justified in ceasing performance of an uncompleted executory contract, by reason of the owner's interference, failure to make payments, waiver, renunciation, or repudiation of the contract, bankruptcy or voluntary disablement, he may cease work and at once bring an action either on the contract for damages or indebitatus assumpsit for the value rendered. In either event he is entitled to a lien judgment.

Freeto v. Houghton, 58 N. H. 100; Howes v. Reliance Wire-Works Co. 46 Minn. 44, 48 N. W. 448; Knight v. Norris, 13 Minn. 473, Gil. 438; Dennistoun v. McAllister, 4 E. D. Smith, 729; Burke v. Coyne, 188 Mass. 401, 74 N. E. 942; Smith v. Wetmore, 167 N. Y. 239, 60 N. E. 419; Brady v. Oliver, 125 Tenn. 595, 41 L.R.A.(N.S.) 60, 147 S. W. 1135, Ann. Cas. 1913C, 376; Baker v. Waldron, 92 Me. 17, 69 Am. St. Rep. 483, 42 Atl. 225; Woolf v. Schaefer, 103 App. Div. 567, 93 N. Y. Supp. 184; Holl v. Long, 34 Misc. 1, 68 N. Y. Supp. 522; Huetter v. Redhead, 31 Wash. 320, 71 Pac. 1016; McCue v. Whitwell, 156 Mass. 205, 30 N. E. 1134; Federal Trust Co. v. Guigues, 76 N. J. Eq. 502, 74 Atl. 652; South Fork Canal Co. v. Gordon, 6 Wall. 561, 18 L. ed. 894; Anderson v. McDonald, 31 Wash. 274, 71 Pac. 1037.

Waiver of completion is a question of fact.

Danforth v. Freeman, 69 N. H. 467, 43 Atl. 621; Fuller v. Brown, 67 N. H. 188, 34 Atl. 463.

Mr. Robert L. Manning also filed a separate brief for appellees:

The case presents a proceeding in bankruptcy rather than a controversy arising in bankruptcy proceedings.

Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008; Re Jungmann, 108 C. C. A. 380, 186 Fed. 302; Re Rathman, 106 C. C. A. 253, 183 Fed. 918; Whitney v. Wenman, 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. Rep. 778; First Nat. Bank v. Chicago Title & T. Co. 198 U. S. 280, 49 L. ed. 1051, 25 Sup. Ct. Rep. 693; Re Lee, 105 C. C. A. 117, 182 Fed. 579; Re Farrell, 100 C. C. A. 63, 176 Fed. 505; Re McMahon, 77 C. C. A. 668, 147 Fed. 684; Re Streator Metal Stamping Co. 205 Fed. 280; Morgan v. First Nat. Bank, 76 C. C. A. 236, 145 Fed. 466; Re Kellogg, 57 C. C. A. 547, 121 Fed. 333; 1 Loveland, Bankr. 4th ed. p. 91.

Mr. Justice Holmes delivered the opinion of the court:

This case arises upon a petition by a trustee in bankruptcy to prevent the enforcement of a lien for labor and materials in a state court. The proceedings in the state court were begun and had passed to a judgment in the superior court of New Hampshire, subject to exceptions, before the adjudication of bankruptcy. Afterwards the exceptions were overruled on technical

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grounds not touching the merits, the trustee in bankruptcy being heard at this stage. The action upon the matter in the courts of the United States will be seen in 95 C. C. A. 84, 169 Fed. 586, 175 Fed. 501, and 106 C. C. A. 519, 184 Fed. 409; a rehearing being denied upon the last decision in 107 C. C. A. 663, 185 Fed. 1006, and an appeal to this court allowed in 112 C. C. A. 325, 191 Fed. 811. The allowance of the appeal was correct. Knapp v. Milwaukee Trust Co. 216 U. S. 545, 54 L. ed. 610, 30 Sup. Ct. Rep. 412; Greey v. Dockendorff, Dec. 15, 1913 [231 U. S. 513, ante, 339, 34 Sup. Ct. Rep. 166].

The Head & Dowst Company had agreed with the bankrupt to erect a grand stand clubhouse, and other buildings and structures, for $187,644, and had completed the work, with the exception of shutters on the grand stand, that would cost about $1,000 to finish. At this point [700] it was told by the bankrupt of the hopeless insolvency of the latter, and was informed that it must look to its lien to support its claim. Thereupon the company stopped work and began its lien suit. When the present attempt was made to reopen the matter, the case was sent to a master, who reported in great detail the facts just summed up, and concluded that the company was entitled to a lien for $45,095.02, exclusive of interest, that being the part of the contract price remaining unpaid, less $1,000 for the shutters, etc., and being also very nearly the same sum that was found due in the state court. The judge of the district court thereupon dismissed the trustee's petition, and his decree was affirmed by the circuit court of appeals. 175 Fed. 501, supra.

We shall consider such questions only as are sufficient to decide the case, omitting others that would have to be considered before the decree below could be reversed. The trustee argues that the failure to take the proper steps to get exceptions heard by the supreme court of the state on the merits constitutes an equitable ground for going behind the state judgment in order to defeat it by an objection of the most narrowly technical sort. The objection, of course, is that the contract was entire, and that whatever justification there may have been for stopping work, or ground for a *quantum meruit*, nothing short of complete performance would earn the contract price as such, or establish a lien for the same. It is argued in the same connection that the facts did not justify the company in stopping work, but we shall not go behind the finding of the master in this respect, followed as it has been, or say more than that, as we construe the facts and finding, it was quite right, and that putting on the last touches was waived.

We are of opinion that the decision was equally right. The case was tried upon its merits and decided in favor of the lien by the state court. The failure to get the [701] exceptions considered was due to no fault of the appellee, but solely to the conduct of those then representing the interests of the estate. It is a doubtful suggestion that an equity could be founded upon this. Certainly it is an inadequate ground for the intervention of equity to enforce forfeiture of a claim that could not be defeated, if at all, except by a most technical application of the law, and on the assumption that the state court did not know the law of the state. We shall not speculate upon that point, beyond saying that we see no reason to doubt that the state court was right (Bergfors v. Caron, 190 Mass. 168. 76 N. E. 655, and cases in 27 Cyc. 85, 87, and 20 Am. & Eng. Enc. Law, 2d ed. 366-368), as we are satisfied that substantial justice has been done. Some subordinate matters of detail were argued, but they do not seem to us to need mention; the whole strength of the case lay in the matter of which we have disposed.

Decree affirmed.

UNITED STATES, Plff. in Err.,
v.
SAMUEL E. MOIST.

(See S. C. Reporter's ed. 701-703.)

Appeal — review by government in criminal case — jurisdiction.

A judgment of a Federal district court sustaining a demurrer to an indictment under the Criminal Code of March 4, 1909 (35 Stat. at L. 1130, chap. 321, U. S. Comp. Stat. Supp. 1911, p. 1653), § 215, for placing a letter in the postoffice for delivery by the postoffice establishment for the purpose of executing a scheme to defraud, cannot be reviewed in the Supreme Court by writ of error, where it does not appear from the record upon what ground the court below acted.

[For other cases, see Appeal and Error, I. e, in Digest Sup. Ct. 1908.]

[No. 378.]

Submitted October 22, 1913. Decided January 5, 1914.

IN ERROR to the District Court of the United States for the Northern District

NOTE.—On review by government in criminal case—see note to United States v. Stevenson, 54 L. ed. U. S. 153.

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of Illinois to review a judgment sustaining a demurrer to an indictment for using the mails to defraud. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Assistant Attorney General Denison submitted the cause for plaintiff in error.

Mr. Roy D. Keehn submitted the cause for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is an indictment under § 215 of the Criminal Code of March 4, 1909 (35 Stat. at L. 1130, chap. 321, U. S. Comp. Stat. Supp. 1911, p. 1653), for placing a letter in the postoffice for delivery by the postoffice establishment for the purpose of executing a scheme to defraud. The scheme alleged was to send out puzzle pictures, advertising as a prize for the neatest correct answer a credit order for $350 on a certain piano, one for $300 for the next neatest, and others for $200 for correct answers. Persons answering were to be told that they were entitled, for instance, to an order for $200 on a piano sold the world over for $300, which would cost them $75 cash with the order. The credit was to be a pretense, as the piano to be delivered was to be one of a retail price not exceeding the cash received. It was not alleged that the piano was to be worth less than the cash paid, but, as is manifest, people were to be led into the dealing by the delusive apparatus of a promise known to be false when made (Durland v. United States, 161 U. S. 306, 40 L. ed. 709, 16 Sup. Ct. Rep. 508), and false statements as to the value of the piano bought. The indictment was demurred to and the demurrer was sustained.

It will not be necessary to decide whether the facts alleged show a scheme to defraud, since it does not appear on what ground the court acted. As was said in United States v. Carter (Dec. 15, 1913 [231 U. S. 492, ante, 330, 34 Sup. Ct. Rep. 173]): "There is nothing in the record showing any request made to the trial court for an expression of opinion in such form as to manifest clearly whether its action proceeded upon a construction of the statute, or merely upon the meaning which was given to the indictment." As it does not appear that the judgment [703] turned upon any controverted construction of the statute, the writ of error must be dismissed in this case as in that. It is unnecessary to consider whether every determination concerning the common law of fraud taken for granted by the act would be a decision based upon the construction of the statute, within the meaning of the act of March 2, 1907, chap. 2564, 34 Stat. at L. 1246.

Writ of error dismissed.

MARY F. RAINEY, as Administratrix of the Estate of David L. Rainey, Deceased,
v.
W. R. GRACE & COMPANY.

(See S. C. Reporter's ed. 703–709.)

Appeal — clerk's fees for printing record.

The clerk of a Federal circuit court of appeals can make no charge for preparing for the printer the record on an appeal from a final decree of the district court, or for indexing the same, or for supervising the printing and distributing the copies, by virtue of the fee bill prescribed for such services by the Federal Supreme Court under the authority of the act of February 19, 1897 (29 Stat. at L. 536, chap. 263, U. S. Comp. Stat. 1901, p. 557), where, conformably to the act of February 13, 1911 (36 Stat. at L. 901, chap. 47, U. S. Comp. Stat. Supp. 1911, p. 275), the appellant has caused the transcript of record to be printed and indexed, under a rule of the district court, and has caused to be filed with the clerk of the circuit court of appeals twenty-five printed copies thereof, since this later statute by implication sets aside the fee bill authorized by the former statute, so far as it fixes the fee which the clerk of the circuit court of appeals may charge for such services.

[For other cases, see Appeal and Error, IV. n, in Digest Sup. Ct. 1908.]

[No. 119.]

Submitted December 9, 1913. Decided January 5, 1914.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Ninth Circuit presenting questions as to whether the fee of the clerk of a circuit court of appeals for preparing the record on appeal or writ of error for the printer, and for indexing the same, supervising the printing, and distributing the copies, was abolished by the act of February 13, 1911 (36 Stat. at L. 901, chap. 47, U. S. Comp. Stat. Supp. 1911, p. 275), permitting the printing of the transcript under the rules of the court below. Answered in the affirmative.

The facts are stated in the opinion.

Mr. William H. Gorham submitted the cause for Mary F. Rainey.

Mr. Frank D. Monckton, clerk of the circuit court of appeals, submitted a memorandum in reply.

No appearance for W. R. Grace & Company.

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Mr. Justice Day delivered the opinion of the court:

This case is here on certificate from the circuit court of appeals for the ninth circuit. The facts stated show that the appellant caused fifty or more copies of the apostles on appeal in an admiralty case to be printed under the 1st section of the act of Congress of February 13, 1911 (36 Stat. at L. 901, chap. 47, U. S. Comp. Stat. Supp. 1911, p. 275). The appeal was taken from the district court of the United States for the western district of Washington, and the copies of the apostles were printed and indexed under a rule of that court adopted June 13, 1911, in pursuance of the act of February 13, 1911. In due time the appellant filed one of the printed copies, certified by the clerk, and under the seal of the court below, in the circuit court of appeals, and moved that court to hear the case without the payment by the appellant of the fees of the clerk of the circuit court of appeals for indexing the record, as prescribed by § 9 of rule 23 of that court, and without the payment by the appellant of the fees of the clerk for indexing the record and distributing copies, as provided in that section. Section 9 provides:

"In all cases, including cases in which the record may have been printed under the act of Congress approved [705] February 13, 1911, or otherwise, the fee of the clerk of this court for performing the services herein required shall be twenty-five cents for each printed page of the record and index, as provided by law."

On this statement the circuit court of appeals certifies to this court two questions, namely:

"1. When the appellant in a cause in admiralty causes to be printed and presented to this court under said act of February 13, 1911, printed copies of the apostles on appeal, each of which copies contains a printed index of the contents thereof, and is prepared and printed under a rule of the lower court adopted in pursuance of said act, is this court authorized to hear and determine the cause on such copies, and to dispense with the requirement of the payment of fees to the clerk of this court by the appellant, as prescribed by § 9 of rule 23 of this court, which is the fee bill prescribed on February 28, 1898, by the Supreme Court under the act of Congress of February 19, 1897 (29 Stat. at L. 536, chap. 263, U. S. Comp. Stat. 1901, p. 557), which provides as a fee for 'preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index, twenty-five cents'?

"2. Does the 1st section of the act of Congress of February 13, 1911 (36 Stat. at L. 901, chap. 47, U. S. Comp. Stat. Supp. 1911, p. 275), set aside by implication said fee bill so prescribed by the Supreme Court, which is referred to in the first question herein certified?"

The answer to these question requires a construction of the act of Congress of February 13, 1911, which is, in part, as follows:

"That in any cause or proceeding wherein the final judgment or decree is sought to be reviewed on appeal to, or by writ of error from, a United States circuit court of appeals, the appellant or plaintiff in error shall cause to be printed under such rules as the lower court shall prescribe, and shall file in the office of the clerk of such circuit [706] court of appeals at least twenty days before the case is called for argument therein, at least twenty-five printed transcripts of the record of the lower court, and of such part or abstract of the proofs as the rules of such circuit court of appeals may require, and in such form as the Supreme Court of the United States shall by rule prescribe, one of which printed transcripts shall be certified under the hand of the clerk of the lower court and under the seal thereof, and shall furnish three copies of such printed transcript to the adverse party at least twenty days before such argument: Provided, That either the court below or the circuit court of appeals may order any original document or other evidence to be sent up in addition to the printed copies of the record, or in lieu of printed copies of a part thereof; and no written or typewritten transcript of the record shall be required."

And a construction of the act requires a consideration of prior statutes on the subject. On February 19, 1897 (29 Stat. at L. 536, chap. 263, U. S. Comp. Stat. 1901, p. 557), Congress passed an act amending the circuit court of appeals act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 547), providing:

"'The costs and fees in each circuit court of appeals shall be fixed and established by said court in a table of fees, to be adopted within three months after the passage of this act: Provided, That the costs and fees so fixed by any court of appeals shall not, with respect to any item, exceed the costs and fees now charged in the Supreme Court.' Each circuit court of appeals shall, within three months after the fixing and establishing of costs and fees as aforesaid, transmit said table to the Chief Justice of the United States, and within one year thereof the Supreme Court of the United States shall revise said table, making the same, so far as may seem just and reason-

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able, uniform throughout the United States. The table of fees, when so revised, shall thereupon be in force for each circuit."

[707] On February 28, 1898, this court, by order, fixed a table of fees and costs in the circuit courts of appeals, one paragraph providing:

"Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index .....$0.25"

This is the charge provided for in rule 23 of the circuit court of appeals referred to in the certificate.

Before the passage of the act of February 13, 1911, the clerks of the district and circuit courts charged for a transcript of the record in preparing the case for review in the circuit court of appeals, which transcript was usually written or typewritten, and not required to be printed, the fee for such service being fixed (§ 828, Rev. Stat. U. S. Comp. Stat. 1901, p. 635). The printing was done under the supervision of the clerk of the circuit court of appeals after the allowance of appeal or writ of error under the regulations above set forth.

In this state of the law, Congess came to deal with the subject in the act of February 13, 1911. The act is entitled: "An Act to Diminish the Expense of Proceedings on Appeal and Writ of Error or of Certiorari;" and especially when read in the light of the report of the chairman of the Judiciary Committee in the House, which accompanied its introduction into that body, shows that its main purpose is to reduce the expense of records upon which cases may be taken to and considered in the circuit courts of appeals and this court. This was to be accomplished by dispensing with a written or typewritten transcript of the record of the lower court, and substituting therefor a certified copy of the printed record, other copies of which should be available for use in the further consideration of the case in the appellate courts. With these ends in view the act provides that the appellant or plaintiff in error shall cause to be printed under such rules as the lower court (the circuit or district court) shall prescribe, [708] and shall file in the office of the clerk of the circuit court of appeals, twenty-five printed transcripts of the record. The form in which the transcript shall be printed, the act provides, shall be prescribed by this court, which, on March 13, 1911, made the following order:

"It is ordered by the court that the provisions of rule 31 of the rules of this court shall apply to all records to be printed as provided in the act of Congress entitled, 'An Act to Diminish the Expense of Proceedings on Appeal and Writ of Error or of Certiorari,' approved February 13, 1911." Rule 31 prescribes:

"All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume; and, as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper."

Section 2 of the act provides for the use of such printed transcripts of the record, should the case be taken from the circuit court of appeals to this court. The evident purpose of the act is therefore, among other things, to save expenses incurred under the former system in printing records, the clerks' fees for supervising, etc.

In view of this history of the legislation and its manifest purposes we think that, when the court below by its rule had, as in the present case, provided for the printing and indexing of the record, which had been done, and the printed transcript had been filed under the statute with the clerk of the circuit court of appeals, no fee for the like service can be charged by the clerk of the circuit court of appeals. To permit this would be subversive of the purposes of the statute and a continuance of the system which the act was designed to change.

It is true that there is no express repeal of the act of [709] February 19, 1897, granting authority to this court to fix the fees in the circuit courts of appeals, under which the rule referred to in the certificate was adopted, and under which it is contended by the clerk of the circuit court of appeals he is entitled to a fee for indexing, etc., and under which rule, if the clerk performs any of the services designated, he is entitled to the entire fee (Bean v. Patterson, 110 U. S. 401, 28 L. ed. 190, 4 Sup. Ct. Rep. 23). It is equally true that repeals by implication are not favored, and that it is only in cases of clear inconsistency that a later act will be held to repeal a former one on the same subject. We think that in the present case clear inconsistency exists, and that the rule invoked in the certificate of the circuit court of appeals cannot stand consistently with the act of Congress of February 13, 1911, on the same subject. See King v. Cornell, 106 U. S. 395, 27 L. ed. 60, 1 Sup. Ct. Rep. 312.

It may also be true that the supervision by clerks of the circuit courts of appeals will tend to uniformity of printing, better indexing, and consequent greater facility in hearing cases upon appeal and writ of error.

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But Congress, with full authority, has regulated the matter, and it is the duty of the courts to enforce the legislation with a view to effecting the purposes for which it was enacted.

We are therefore of the opinion that the later act, that of February 13, 1911, repeals the table of fees as to the fees of the clerk of the circuit court of appeals in the case mentioned under the facts certified. It follows that the first question certified by the Circuit Court of Appeals must be answered in the affirmative, and the second question also in the affirmative so far as the fee in question to the clerk of the Circuit Court of Appeals is involved.

It is so ordered.

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[710] ALBERT B. CAMERON, Petitioner,
v.
UNITED STATES.

(See S. C. Reporter's ed. 710–724.)

Bankruptcy — examination of bankrupt — necessity of adjudication.

1. The examination of a bankrupt under oath could be ordered by a court of bankruptcy upon the application of the receiver, although the adjudication in bankruptcy had not then been made, since the estate must, nevertheless, be regarded as then "in process of administration," within the meaning of the bankrupt act of July 1, 1898 (30 Stat. at L. 552, chap. 541, U. S. Comp. Stat. 1901, p. 3430), § 21a, empowering a court of bankruptcy to order the examination of a bankrupt whose estate is in process of administration, which section must be read in connection with § 7, subd. 9, authorizing the examination of the bankrupt at such other times than the first meeting of creditors as the court may direct.

[For other cases, see Bankruptcy, II. c, in Digest Sup. Ct. 1908.]

Witnesses — privilege — immunity — perjury by bankrupt.

2. The immunity clause in the bankrupt act of July 1, 1898, § 7, subd. 9, that no testimony given by the bankrupt under the command of that section shall be offered in evidence against him in any criminal proceeding, does not bar a criminal prosecution for perjury for false swearing when giving such testimony.

[For other cases, see Witnesses, V. c, in Digest Sup. Ct. 1908.]

Witnesses — self-crimination — statutory immunity — repeal.

3. The repeal of U. S. Rev. Stat. § 860, U. S. Comp. Stat. 1901, p. 661, after the incriminating testimony was given, does not deprive the witness of the immunity afforded by that section against the use in evidence of such testimony in any criminal proceeding.

[For other cases, see Witnesses, V. c; Statutes, II. v, in Digest Sup. Ct. 1908.]

Witnesses — self-crimination — statutory immunity — perjury.

4. The right to use the previous testimony of the accused for any legitimate purpose in establishing a charge of perjury committed when so testifying was saved by the proviso to the immunity provisions of U. S. Rev. Stat. § 860, U. S. Comp. Stat. 1901, p. 661, that "this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid," and the use of such testimony is therefore not limited to proving that it was in fact given.

[For other cases, see Witnesses, V. c, in Digest Sup. Ct. 1908.]

Witnesses — privilege — immunity — perjury by bankrupt.

5. The immunity afforded by U. S. Rev. Stat. § 860, U. S. Comp. Stat. 1901, p. 661, against the offering in evidence against the accused in any criminal proceeding of any previous testimony given by him, provided that "this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid," prevents the introduction in evidence on the prosecution of a bankrupt for having committed perjury both before the referee and before a special examiner and commissioner of the testimony given in one examination which does not tend to establish perjury on that occasion, in order to establish the perjury alleged to have been committed in the other proceeding.

[For other cases, see Witnesses, V. c, in Digest Sup. Ct. 1908.]

[No. 165.]

Argued October 21, 1913. Decided January 5, 1914.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a conviction of perjury in the Circuit Court for the Southern District of New York. Reversed.

Note.—On the constitutional protection against being forced to furnish evidence to be used against one's self in a civil case—see note to Levy v. Superior Ct. 29 L.R.A. 818.

As to the sufficiency of statutory immunity to satisfy constitutional guaranty against self-crimination—see notes to Re Buskett, 14 L.R.A. 407; United States v. James, 26 L.R.A. 416; and Interstate Commerce Commission v. Baird, 48 L. ed. U. S. 860.

As to false testimony given under statute promising immunity against its use in criminal proceedings—see note to Edelstein v. United States, 9 L.R.A.(N.S.) 237.

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See same case below, 113 C. C. A. 20, 192 Fed. 548.

The facts are stated in the opinion.

Mr. Howard S. Gans argued the cause and filed a brief for petitioner:

When U. S. Rev. Stat. § 860, U. S. Comp. Stat. 1901, p. 661, was enacted, it was deemed to afford a protection as broad as the constitutional guaranty against self-incrimination, and to suffice to render incriminating testimony compellable.

United States v. McCarthy, 21 Blatchf. 469, 18 Fed. 89; Re Counselman, 3 Inters. Com. Rep. 326, 44 Fed. 268; People ex rel. Hackley v. Kelly, 24 N. Y. 74.

It was obviously necessary that the immunity extend to every possibility of self-incrimination; and it would surely have been obvious that a statute which, while forbidding the use of testimony for other incriminating purposes, permitted its general use in prosecutions for perjury, would have failed entirely of this primary purpose. For it has never been questioned that where there is any reasonable possibility of incrimination, the witness's claim of privilege must be allowed (Counselman v. Hitchcock, 142 U. S. 547, 565, 35 L. ed. 1110, 1114, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195); and obviously it is always reasonably probable that a witness called in any proceeding may have been interrogated at a prior stage of that proceeding or in some other proceeding with respect to the matter as to which he is then being interrogated, and that a truthful answer to the question may show that his prior testimony was erroneous, and hence furnished an important link in the chain of proof available for his indictment and prosecution on the basis of his prior erroneous evidence.

It is inconceivable that the legislature intended to limit its prohibition against the use of testimony by permitting its general use in perjury prosecutions, or that it intended by the proviso to do more than to make it clear that perjurious testimony was not to be licensed through the process of rendering it impossible to prove that it had actually been given. The proviso was unnecessary, since in no event would the prohibition of the statute have been ultimately construed so as to prevent such use (Glickstein v. United States, 222 U. S. 139, 56 L. ed. 128, 32 Sup. Ct. Rep. 71). But such a construction was possible (Re Marx, 102 Fed. 676), and it was undoubtedly for the purpose of guarding against the possibility, and for that purpose only, that the proviso was inserted.

Manifestly the statute must be read in the light of its history as an attempt to supply a protection which would be coextensive with that guaranteed by the constitutional prohibition of compulsory self-incrimination. And since the earliest authoritative interpretation of that constitutional provision establishes that it protected the witness not only from revealing the facts constituting the criminal act, but from revealing any fact, however slight, which tended to furnish a link in the chain of his conviction (1 Burr's Trial, 243; Ballmann v. Fagin, 200 U. S. 186, 195, 50 L. ed. 433, 437, 26 Sup. Ct. Rep. 212), it is clear that a statute which was designed to afford a like immunity by compelling testimony and thereafter prohibiting its use must be construed as prohibiting the use of testimony tending to establish the intent as well as the use of that which tends to establish the material elements of the crime.

The right to immunity from the use of this testimony was not affected by the subsequent repeal of § 860 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 661).

Lapham v. Marshall, 51 Hun, 41, 3 N. Y. Supp. 601.

Even in the absence of statutory prohibitions the law forbids the reception of admissions secured by deceptive or coercive methods. Thus it has been held that if a police officer or magistrate, through a deceptive offer of immunity, secures an admission from a prisoner, the courts—though no statute prohibits the use of the admission so secured—will not permit it to be used.

Sorenson v. United States, 74 C. C. A. 468, 143 Fed. 820; Bram v. United States, 168 U. S. 532, 550, 42 L. ed. 568, 576, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547.

Every recognized canon of statutory construction requires that the intent to sanction a breach of faith should not be imputed to Congress, that the repeal should be given a prospective effect, that it should not be so interpreted as to destroy a substantial right previously perfected, and that an exception be read into the repealing act, if necessary, in order to avoid the immoral and unjust—if not unconstitutional—results which would otherwise flow from it.

Whitfield v. Ætna L. Ins. Co. 75 C. C. A. 358, 144 Fed. 356; United States v. Kirby, 7 Wall. 482–486, 19 L. ed. 278–280; Chew Heong v. United States, 112 U. S. 536–554, 28 L. ed. 770–776, 5 Sup. Ct. Rep. 255; Heydenfeldt v. Daney Gold & S. Min. Co. 93 U. S. 634–638, 23 L. ed. 995, 996, 13 Mor. Min. Rep. 204; United States v. Taylor, 104 U. S. 216, 221, 26 L. ed. 721, 722; Red Rock v. Henry, 106 U. S. 596, 604, 27 L. ed. 251, 254, 1 Sup. Ct. Rep. 434; United States v. Central P. R. Co. 118 U. S. 235, 240, 30 L. ed. 173, 175, 6 Sup. Ct. Rep. 1038; United States v. Hosmer, 9 Wall. 432, 435, 19 L. ed. 662, 663; United States v.

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Heth, 3 Cranch, 399, 408, 2 L. ed. 479, 482; White v. United States, 191 U. S. 545, 552, 48 L. ed. 295, 298, 24 Sup. Ct. Rep. 171; Twenty Per Cent Cases, 20 Wall. 179, 187, 22 L. ed. 339, 341; Reynolds v. M'Arthur, 2 Pet. 434, 7 L. ed. 476; Davis v. Bohle, 34 C. C. A. 372, 92 Fed. 328; Carlisle v. United States, 16 Wall. 147, 153, 21 L. ed. 426, 429; Church of the Holy Trinity v. United States, 143 U. S. 457, 460, 461, 26 L. ed. 226, 228, 229, 12 Sup. Ct. Rep. 511; Kennedy v. Gibson, 8 Wall. 498, 506, 507, 19 L. ed. 476, 479; Taylor v. United States, 207 U. S. 120, 125, 52 L. ed. 130, 133, 28 Sup. Ct. Rep. 53; Hawaii v. Mankichi, 190 U. S. 197, 212, 213, 47 L. ed. 1016, 1020, 1021, 23 Sup. Ct. Rep. 787, 12 Am. Crim. Rep. 465; Society for Propagation of the Gospel v. New Haven, 8 Wheat. 464, 494, 5 L. ed. 662, 669; Moore v. State, 43 N. J. L. 227, 39 Am. Rep. 558; Com. v. Duffy, 96 Pa. 514, 42 Am. Rep. 554; State v. Sneed, 25 Tex. Supp. 66; State v. Keith, 63 N. C. 144.

The examination before the commissioner upon which the first indictment was based was without warrant in law, and it was error to receive any evidence under that indictment, or to submit to the jury any charges presented by it.

Podolin v. McGettigan, 113 C. C. A. 668, 193 Fed. 1021; Skubinsky v. Bodek, 24 L.R.A.(N.S.) 985, 97 C. C. A. 116, 172 Fed. 332, 19 Ann. Cas. 1035; Re Thompson, 179 Fed. 874; Re Davidson, 158 Fed. 678; Re Crenshaw, 155 Fed. 271.

Assistant Attorney General Denison argued the cause, and, with Mr. Francis H. McAdoo, filed a brief for respondent:

The petitioner has based his argument mainly upon § 860 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 661), which was repealed without a saving clause before his testimony was used against him, and therefore afforded no protection.

Baltimore & P. R. Co. v. Grant, 98 U. S. 398, 25 L. ed. 231; Ewell v. Daggs, 108 U. S. 143, 150, 27 L. ed. 682, 684, 2 Sup. Ct. Rep. 408; Hopt v. Utah, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; Kansas P. R. Co. v. Twombly, 100 U. S. 78, 81, 25 L. ed. 550; McNulty v. Batty, 10 How. 72, 13 L. ed. 333; Re Hall, 167 U. S. 38, 42 L. ed. 69, 17 Sup. Ct. Rep. 723; South Carolina v. Gaillard, 101 U. S. 433, 25 L. ed. 937; Wilkinson v. Nebraska, 123 U. S. 286, 31 L. ed. 152, 8 Sup. Ct. Rep. 120; Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287.

The immunity granted by § 7, subd. 9, of the bankruptcy act, does not prevent the government from using the bankrupt's testimony to prove other points of the charge than the mere text of the false statement itself.

Daniels v. United States, 116 C. C. A. 233, 196 Fed. 459; Edelstein v. United States, 9 L.R.A.(N.S.) 236, 79 C. C. A. 328, 149 Fed. 636; Glickstein v. United States, 222 U. S. 139, 56 L. ed. 128, 32 Sup. Ct. Rep. 71; United States v. Brod, 176 Fed. 165; People v. Cahill, 126 App. Div. 391, 110 N. Y. Supp. 728; United States v. Smith, 47 Fed. 501.

Nor does it prohibit the admission of testimony before the commissioner to sustain the charge before the referee, and *vice versa*, since both examinations were part of the same proceeding.

Powers v. United States, 223 U. S. 303, 56 L. ed. 448, 32 Sup. Ct. Rep. 281.

The examination by the commissioner as special examiner was duly authorized, and the false testimony there was perjury.

Ex parte Bick, 155 Fed. 908; Ex parte Lee, 1 N. Y. Leg. Obs. 83, Fed. Cas. No. 8,178; Re Fixen & Co. 96 Fed. 749; Re Fleischer, 151 Fed. 81; Re Salkey, 5 Biss. 486, Fed. Cas. No. 12,252; United States v. Wechsler, 16 Am. Bankr. Rep. 1; United States v. Liberman, 176 Fed. 161; 10 Columbia L. Rev. 70; 23 Harvard L. Rev. 221; Loveland, Bankr. 3d ed. § 204.

Even under § 21a of the bankruptcy act the examination was authorized because the estate was in process of administration within the meaning of the section as soon as it came into the jurisdiction of the court by the filing of the petition, and certainly as soon as the receiver was appointed.

Re Fleischer, 151 Fed. 81.

Independently of § 21a, an examination of a bankrupt prior to adjudication is within the general equity powers of a bankruptcy court conferred by § 2, subd. 15, and the concluding paragraph of the section.

Blake v. Francis-Valentine Co. 89 Fed. 691; Re Cohen, 136 Fed. 999; Re Lacov, 74 C. C. A. 130, 142 Fed. 960; Re Union Trust Co. 59 C. C. A. 461, 122 Fed. 937: White v. Schloerb, 178 U. S. 542, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007; Re Levi, 74 C. C. A. 132, 142 Fed. 962

This construction, being therefore possible, both under § 21a and under the general equity power, should be accepted, because the other view leads to the result that no witnesses may be examined before adjudication, thus bringing to a standstill the powers of the bankruptcy courts and their representatives during the twenty-day interval between the filing of the petition and the adjudication.

Craddock-Terry Co. v. Kaufman, 175 Fed. 303; Re Fleischer, supra; United States v. Liberman, 176 Fed. 161.

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Mr. Justice Day delivered the opinion of the court:

This is a writ of certiorari to the circuit court of appeals for the second circuit. The case concerns a prosecution [715] commenced in the circuit court of the United States for the southern district of New York by the finding of two indictments against the petitioner herein, charging perjury in a bankruptcy proceeding. Upon trial the defendant, Cameron, was convicted and sentenced, and upon writ of error the judgment of the circuit court was affirmed by the circuit court of appeals, 113 C. C. A. 20, 192 Fed. 548.

The first indictment, after setting forth the proceedings in bankruptcy against the Knickerbocker Piano Company, of which the defendant was president and treasurer, alleged that he, upon inquiry, under oath before a special examiner and commissioner, appointed under § 21a of the bankruptcy act, prior to adjudication, testified:

"First. That he, the said Albert B. Cameron, the aforesaid witness, shortly prior to the filing of the aforesaid petition in bankruptcy against the said Knickerbocker Piano Company, had sold a number of pianos to William C. Smith, the petitioner in bankruptcy aforesaid.

"Second. That he, the said Albert B. Cameron, the witness aforesaid, had a conversation with the said William C. Smith, concerning the sale to him of pianos by him, the said Albert B. Cameron.

"Third. That he, the said Albert B. Cameron, the aforesaid witness, had sold to the said William C. Smith, eight pianos for the sum of $668."

And it alleged that the defendant thereby committed perjury.

By the second indictment the defendant is said to have committed perjury in a proceeding before the referee in testifying:

"First. That he, the said Albert B. Cameron, had not been able to obtain the address of the said William C. Smith, and had never known the said address.

"Second. That he, the said Albert B. Cameron, had [716] had a conversation or conversations with the said William C. Smith in regard to his, the said William C. Smith's, buying pianos of and from the said alleged bankrupt."

The two indictments were consolidated, and, the defendant pleading not guilty, trial was had, and a verdict of guilty returned upon which judgment was rendered.

The petitioner contends that the bankruptcy act does not authorize the proceeding before the commissioner prior to the adjudication. The record discloses that a receiver had been duly appointed of the assets and effects of the bankrupt, and that he had applied to the court under § 21a of the bankruptcy act of 1898 [30 Stat. at L. 552, chap. 541, U. S. Comp. Stat. 1901, p. 3430] for an order requiring the bankrupt, its officers and directors, to appear before a special examiner and commissioner, to be examined concerning the property of the bankrupt and the acts and conduct of its officials. The court made the order requested, and appointed the special examiner and commissioner, before whom Cameron appeared and testified, giving, in the course of his examination, the testimony charged in the first indictment to be false. This proceeding was prior to the adjudication in bankruptcy, which followed a few days later. Whether the examination of Cameron upon oath at that stage of the proceedings was authorized by the bankruptcy act depends upon a construction of clause *a*, § 21, of the act, which provides, in part, as follows:

"A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act." [As amended, 32 Stat. at L. 798, chap. 487, § 7, U. S. Comp. Stat. Supp. 1911, p. 1498.]

The controversy is over the meaning of the phrase, "a bankrupt whose estate is in process of administration under this act." The construction of this provision differs [717] in the Federal courts, some of them having held that there can be no such examination until after adjudication, as it is only then that the bankrupt can be subjected to such proceeding. Of this class are Skubinsky v. Bodek, 24 L.R.A.(N.S.) 985, 97 C. C. A. 116, 172 Fed. 332, 19 Ann. Cas. 1035; Podolin v. McGettigan, 113 C. C. A. 668, 193 Fed. 1021; Re Thompson, 179 Fed. 874; Re Davidson, 158 Fed. 678; Re Crenshaw, 155 Fed. 271. To the opposite view are Re Fixen & Co. 96 Fed. 748; Re Fleischer, 151 Fed. 81; Ex parte Bick, 155 Fed. 908; Wechsler v. United States, 86 C. C. A. 37, 158 Fed. 579; United States v. Liberman, 176 Fed. 161. We are of opinion that the estate was in process of administration at the time when the examination before the commissioner was ordered, and the testimony of Cameron given. This court has decided that the filing of the petition in bankruptcy operates to place the property of the alleged bankrupt *in custodia legis*, and prevents any creditor from attaching it; and, although, by the terms of the act, the estate does not vest in the trustee until the date of the adjudi-

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cation, it is placed at the time of the filing of the petition under the control of the court with a view to its ultimate distribution among creditors. Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 300, 307, 56 L. ed. 208, 213, 32 Sup. Ct. Rep. 96; and see Mueller v. Nugent, 184 U. S. 1, 14, 46 L. ed. 405, 411, 22 Sup. Ct. Rep. 269; Everett v. Judson, 228 U. S. 474, 478, 479, 57 L. ed. 927, 929, 46 L.R.A.(N.S.) 154, 33 Sup. Ct. Rep. 568. And this is true, notwithstanding, as contended by the petitioner, that should the attempt to obtain an adjudication of bankruptcy fail upon the subsequent hearings, the receivership would necessarily be vacated and the property turned back to the alleged bankrupt.

In order to arrive at the true meaning of § 21a other provisions as well as the purpose of the act must be had in view. The object of the examination of the bankrupt and other witnesses to show the condition of the estate is to enable the court to discover its extent and whereabouts, and to come into possession of it, that the rights of creditors may be preserved. If such examination is postponed [718] until after adjudication, which may not take place for at least twenty days, within which the bankrupt in involuntary bankruptcy is given leave to appear and plead, the estate may be concealed and disposed of, and the purpose of the act to hold it and to distribute it for the benefit of creditors defeated. The importance of such early examination of bankrupts was emphasized in Re Fleischer, 151 Fed. 81. By subdivision 9 of § 7 of the act, it is provided that the bankrupt shall, "when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate." Here is found authority to examine the bankrupt at such other times than the first meeting of creditors as the court may direct. This section should be read with § 21a, and throws light upon its proper construction. In this case the petitioner had invoked the jurisdiction of the court, a receiver had been appointed to take possession of the property, the court was so far in possession of it as to prevent other courts from seizing it, and thus defeating the bankruptcy jurisdiction. We are of opinion that the estate was then in process of administration, and the examination ordered was within the jurisdiction of the court.

Other questions in the case relate to alleged violations of immunity afforded the defendant under statutes of the United States, which were invoked by him at the trial in the circuit court. Records were there offered in evidence showing the testimony given by Cameron before the examiner and before the referee. Cameron claimed that this testimony was incompetent for the purpose of establishing his guilt beyond showing that it was in fact given.

[719] Counsel for petitioner relies upon the immunity clause of § 7 of the bankruptcy act, and upon § 860 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 661) in force at the time the testimony was given, but repealed by the act of May 7, 1910 (36 Stat. at L. 352, chap. 216, U. S. Comp. Stat. Supp. 1911, p. 272). Section 7, subdivision 9, of the bankruptcy act, cited above, concludes: "But no testimony given by him shall be offered in evidence against him in any criminal proceeding." This section was before this court, so far as the immunity provided is concerned, in Glickstein v. United States, 222 U. S. 139, 56 L. ed. 128, 32 Sup. Ct. Rep. 71, where it was held not to prevent a prosecution for perjury in the giving of testimony by a bankrupt, and the immunity was held to apply to past transactions concerning which the bankrupt might be examined. In the opinion in that case, Edelstein v. United States (circuit court of appeals for the eighth circuit) 9 L.R.A.(N.S.) 236, 79 C. C. A. 328, 149 Fed. 636, which had held that the words "any criminal proceeding" in which immunity is provided are limited to such criminal proceedings as arise out of the conduct of the bankrupt's business or the disposition of his property, etc., concerning which he may be examined, was cited with approval. In Ensign v. Pennsylvania, 227 U. S. 592, 600, 57 L. ed. 658, 662, 33 Sup. Ct. Rep. 321, it was held that full effect could be given to the immunity provision by confining it to the testimony given under subdivision 9, to which it was immediately subjoined. As the present prosecution was based upon alleged false swearing in the course of the bankruptcy proceedings, § 7 of the bankruptcy act can have no application.

Petitioner also invokes the protection of § 860 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 661), which reads:

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him of his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement

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of any [720] penalty or forfeiture: Provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

The government contends that the subsequent repeal of this section deprives the petitioner of the immunity afforded. We cannot agree with this contention. It would be subversive of principles of right and justice to give such effect to a statute upon the protection of which the petitioner had the right to rely at the time when called upon to testify in the bankruptcy court, and in consequence of which he may be presumed to have given his testimony. A retrospective operation of statutes is not to be given except in clear cases, unequivocally evidencing the legislative intent to that effect. Union P. R. Co. v. Laramie Stock Yards Co. 231 U. S. 190, 199, ante, 179, 34 Sup. Ct. Rep. 101, and previous cases in this court, cited in the opinion in that case. Summers v. United States, 231 U. S. 92, ante, 137, 34 Sup. Ct. Rep. 38. In the absence of a clearly expressed legislative intent to the contrary, the court will presume that the law-making power is acting for the future, and does not intend to impair obligations incurred or rights relied upon in the past conduct of men when other legislation was in force. White v. United States, 191 U. S. 545, 552, 48 L. ed. 295, 298, 24 Sup. Ct. Rep. 171.

The circuit court of appeals in the instant case was of opinion that the petitioner was entitled to the immunity afforded in § 860 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 661), but failed to find in the record any instance of its violation. Section 860 by its express terms does not exempt a party from prosecution for perjury committed in testifying in the instances named. It was held in Glickstein v. United States, supra, of § 7 of the bankruptcy act, that this immunity was not intended to put a premium upon perjury by giving protection against the use of the testimony in prosecutions for that crime; and we cannot agree with petitioner's contention that the use of such testimony is limited to proving that [721] it was in fact given. In prosecutions for perjury the statute saved the right to use such testimony for any legitimate purpose in establishing the charge made. While this is true, the statute by its terms protects the party from the use of such testimony in any court of the United States in any criminal proceeding.

The subsequent prosecution of Cameron for perjury in the two bankruptcy proceedings was a criminal proceeding in a court of the United States, and the testimony given in the one bankruptcy proceeding, not tending to establish perjury in that proceeding, should not have been received to establish the crime charged in the other proceeding. In this case it will be noted from the statement already made, that the indictment based upon the testimony before the referee charged that Cameron falsely swore that he had not been able to obtain and had never known the address of William C. Smith, the man with whom it was charged the fraudulent transactions regarding the pianos were had. In the first indictment based upon the testimony before the commissioner, there is no such charge. The government having put in evidence the proceedings before the referee showing that Cameron there testified that he did not know Smith's address, and that he was not acquainted with his friends, and that he did not know anyone who knew him, the record of Cameron's testimony before the commissioner was offered in evidence, and, over specific objections calling attention to the lack of such charge in the first indictment based on the proceedings before the commissioner, the government was permitted to read:

"Q. Did you, shortly prior to the filing of the petition, sell some pianos and realize cash on them?

"A. Yes, I did.

"Q. To whom were they sold?

"A. They were sold to W. C. Smith.

"Q. Where is his place of business?

[722] "A. He is not in business.

"Q. Who is he?

"A. Why, an acquaintance of mine.

"Q. Where does he live?

"A. On St. Nicholas avenue, I don't recall the address.

"Q. What number?

"A. I don't remember.

"Q. Between what streets?

"A. Above 125th.

"Q. Is it an apartment or a private house?

"A. Why, I think just a furnished room, or rooms."

Mr. McManus: I object to this as immaterial and not within the issues. There is no allegation in the indictment, or the assignment of perjury, as to the alleged address of William C. Smith, and in the proceedings before the commissioner—

Mr. Smith: I am reading so the jury will get some sort of a comprehensive idea as to what the man testified to. This is the beginning of this alleged transaction with William C. Smith.

The Court: Cut it down closer.

Mr. Smith: I have cut it down to about two pages.

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Objection overruled. Exception by defendant.

Mr. Smith (reading):

"Q. How long have you known him?

"A. Oh, three or four years.

"Q. Do you know whether he is employed by anybody?

"A. Yes, sir, but I don't know where.

"Q. You haven't any idea in what capacity he is employed?

"A. No.

"Q. How often do you meet him?

"A. Not very often.

"Q. How often did you meet him before this last transaction?

"A. Oh, two or three times.

[723] "Q. How long do you know him?

"A. Three or four years, I think.

Mr. McManus: This is another line, subject to the last exception.

"Q. Where did you first meet him?

"A. New York.

"Q. Where?

"A. I don't recall that.

"Q. Do you know anybody else other than yourself who knows Mr. Smith?

"A. He has a number of friends.

"Q. Do you know of anybody?

"A. My brothers.

"Q. Outside of your family?

"A. No.

"Q. Is he related to you?

"A. No.

"Q. Is he related to any member of your family?

"A. No.

"Q. Do you know how he can be located?

"A. Why, yes, I could get hold of him.

"Q. How could you get hold of him today?

"A. I'd go and ask my brother.

"Q. You think he could give you the address?

"A. Yes, sir, I think so.

"Q. Did you send to Mr. Smith to come to the place and buy some pianos?

"A. I had to sell some pianos to get some money.

"Q. Where did you send to get him?

"A. I got him through my brother."

The effect of this testimony was to distinctly contradict the testimony which Cameron had given before the referee, and which was the subject-matter of the indictment based on the proceedings before that officer. It did not tend to establish the charge growing out of his testimony before [724] the commissioner, which related solely to the sale of pianos and conversations between Cameron and Smith concerning the sales. The district attorney contended that this testimony was competent in order that the jury might get some sort of comprehensive idea as to what the man testified to, and, in view of that statement and the expressed view of the court that anything that threw light on the event was admissible, the testimony was admitted. It is contended that it was competent as showing the relations of Cameron to Smith and to identify Smith, but there was no question i. the case as to who Smith was. He was a witness called to establish the charge of perjury, and he was the person with whom it was charged the fraudulent dealings in pianos were had by the bankrupt. The testimony offered as to what Cameron swore to before the examiner, while not tending to establish the charge of perjury based upon testimony in that instance, did contradict the testimony which he had given before the referee, and directly tended to establish the charge under that indictment. We think to permit the use of the testimony for that purpose was to permit the testimony given in the one instance to be used in a criminal proceeding based upon testimony given in the other instance, and therefore to violate the immunity given in § 860 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 661), then in force.

Other errors are alleged, and it is contended that there was no adequate proof of the charges made, but these questions were submitted to the jury and cannot be re-examined here. We are of the opinion that error was committed in the use given to the testimony taken before the commissioner in the manner we have stated, and for that reason the judgment of the Circuit Court of Appeals, affirming the conviction of Cameron in the court below, should be reversed.

Reversed and remanded to the District Court of the United States for the Southern District of New York.

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[725] GEORGE W. RADFORD, Plff. in Err.,

v.

MARY D. MYERS, Executrix of the Estate of Elijah E. Myers, Deceased.

(See S. C. Reporter's ed. 725-733.)

Judgment — res judicata — matters concluded.

An order in an action on a claim under a contract, a one-half interest in which plaintiff had assigned to his attorney by way of security, having previously assigned

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Note.—On conclusiveness of judgments generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San. Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v.

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the other one-half interest to his son, who in turn assigned his interest to such attorney, which upholds the assignment from the son, who had intervened and procured the payment into court of one half of the amount of recovery, and which, dismissing the son's claim, awards to the attorney the fund in court, is not *res judicata* as between the father and the attorney as to the former's right to the one-half interest assigned by the son, and therefore does not bar a suit by the father to compel the attorney to account for the proceeds of the judgment in his hands, on the theory that such attorney held the same in trust under an agreement to pay over the balance remaining after discharging any indebtedness on account of loans, costs, and services.

[For other cases, see Judgment, III. j, in Digest Sup. Ct. 1908.]

[No. 251.]

Submitted December 3, 1913. Decided January 5, 1914.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment which affirmed a judgment of the Circuit Court of Wayne County in that state in favor of plaintiff in a suit by a client to compel his attorney to account for the proceeds of a judgment in his hands. Affirmed.

See same case below, 167 Mich. 135, 132 N. W. 550.

The facts are stated in the opinion.

Mr. Thomas A. E. Weadock submitted the cause for plaintiff in error:

Matters in issue and decided by the judgment of a court having jurisdiction of the parties and the subject-matter of the suit are conclusively settled, and cannot be litigated again between the parties to that suit or their privies.

23 Cyc. 1215; Hopkins v. Lee, 6 Wheat. 109, 5 L. ed. 218; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Johnson Steel Street Rail Co. v. Wharton, 152 U. S. 252, 38 L. ed. 429, 14 Sup. Ct. Rep. 608; Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18.

A right, question, or fact once put in issue and decided is concluded in any future action between the same parties or their privies, whether the subsequent action is for the same or a different cause of action.

New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905.

A judgment is a bar to any future action between the same parties or their privies upon the same cause of action.

Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Dowell v. Applegate, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611; Werlein v. New Orleans, 177 U. S. 390, 44 L. ed. 817, 20 Sup. Ct. Rep. 682.

Or, as this last rule has more recently been very aptly stated, a judgment is conclusive as to all the *media concludendi*.

United States v. California & O. Land Co. 192 U. S. 358, 48 L. ed. 478, 24 Sup. Ct. Rep. 266; American Exp. Co. v. Mullins, 212 U. S. 312, 53 L. ed. 526, 29 Sup. Ct. Rep. 381, 15 Ann. Cas. 536; United States v. Southern P. R. Co. 223 U. S. 565, 56 L. ed. 553, 32 Sup. Ct. Rep. 326; Troxell v. Delaware, L. & W. R. Co. 227 U. S. 434, 57 L. ed. 586, 33 Sup. Ct. Rep. 274; 2 Black, Judgm. 2d ed. p. 808, § 506; 23 Cyc. 1240, 1306; National Foundry & Pipe Works Co. v. Oconto Water Supply Co. 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111; Werlein v. New Orleans, 177 U. S. 390, 44 L. ed. 817, 20 Sup. Ct. Rep. 682; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83; Nalle v. Oyster, 230 U. S. 165, 57 L. ed. 1439, 33 Sup. Ct. Rep. 1043.

The estoppel covers matters which were actually determined, whether technically put in issue by the pleadings or not.

23 Cyc. 1304; 2 Black, Judgm. 2d ed. § 614.

There need be no pleadings between coparties in order that they may, as between themselves, be bound by the judgment, if they were essentially adversary parties, or their respective rights were in issue.

Baldwin v. Hanecy, 204 Ill. 281, 68 N. E. 560, affirming 104 Ill. App. 84; Kohly v. Fernandez, 133 App. Div. 723, 118 N. Y. Supp. 163; affirmed in 201 N. Y. 561, 95 N. E. 1131; Corcoran v. Chesapeake & O. Canal Co. 94 U. S. 741, 24 L. ed. 190; Louis v. Brown Twp. 109 U. S. 163, 27 L. ed. 892, 3 Sup. Ct. Rep. 92.

The above is also the Michigan rule.

Waldo v. Waldo, 52 Mich. 93, 17 N. W. 709; Scripps v. Sweeney, 160 Mich. 177, 125 N. W. 72.

The opinion is the repository of the law of the decision.

Corcoran v. Chesapeake & O. Canal Co. 94 U. S. 741, 24 L. ed. 190; National Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111.

These rules are fundamental and apply to legal proceedings generally.

23 Cyc. 1223; Hopkins v. Lee, 6 Wheat. 109, 5 L. ed. 218.

No appearance for defendant in error.

Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street Rail Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

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Mr. Justice Day delivered the opinion of the court:

Elijah E. Myers brought this suit in the circuit court of Wayne county, state of Michigan, against George W. Radford, the plaintiff in error herein, for an accounting and for a decree for the balance due him from a judgment in a suit of the former in which the latter acted as one of his attorneys and received the amount of the judgment. Myers having died during the pendency of the action, it was revived in the name of his executrix, the defendant in error. The decree of the circuit court in favor of the [728] defendant in error was affirmed by the supreme court of the state of Michigan (167 Mich. 135, 132 N. W. 550), and the case comes here on error.

The record discloses that Myers had entered into a contract with the county of Luzerne, state of Pennsylvania, to furnish the plans and specifications for a courthouse, and had certain claims against the county arising therefrom. Counsel had been employed and suit commenced, but little progress made. Myers had assigned a one-half interest in the contract to his son, George W. Myers. In this state of affairs the elder Myers employed the plaintiff in error, who had theretofore been his attorney, and to whom he was indebted, to prosecute the courthouse claim. To secure his indebtedness to Radford, Myers assigned his remaining one-half interest in the claim to the plaintiff in error. Later, April 2, 1900, George W. Myers assigned his one-half interest to the plaintiff in error, the latter to account to him for the proceeds after deducting a $1,000 attorney's fee and one half of the costs, to which assignment Elijah E. Myers gave his written assent; and shortly thereafter, April 11, 1900, George W. Myers, in consideration of $150, transferred his interest in his prior assignment and in the assignment from his father to him to the plaintiff in error.

The plaintiff in error engaged local counsel in Pennsylvania, who commenced suit in the United States circuit court for the middle district of Pennsylvania, and prosecuted the courthouse claim to a successful termination (Myers v. Luzerne County, 124 Fed. 436). Thereupon George W. Myers intervened in that suit, setting up his right to one half of the judgment, claiming that his assignment to Radford had been fraudulently obtained; and one half of the amount of the judgment was paid into court. Upon the petition of the plaintiff in error to remove the money, the jurat of which was signed by Elijah E. Myers, the court decreed that the [729] assignment was valid, and awarded the fund to Radford, and dismissed George W. Myers's claim.

Elijah E. Myers thereafter brought this suit, alleging, among other things, that Radford, on April 11, 1900, acting on his behalf, purchased the one-half interest assigned by him to George W. Myers, and that at that time it was distinctly understood and agreed between the plaintiff in error and himself that the one-half interest so purchased, with the one-half interest assigned by him to Radford, should be held as security for the payment of all his indebtedness to Radford for loans and services, and for the payment of the $150 given by Radford to George W. Myers, and all costs in the litigation of the courthouse claim, and that, after deducting such amounts from the judgment collected, the plaintiff in error should pay the balance to him. The plaintiff in error contended that the judgment in the United States circuit court was *res judicata* as to his right to the one-half interest in the courthouse claim assigned to him by George W. Myers. He further alleged, however, that, notwithstanding his absolute ownership of the George W. Myers one-half interest, he purchased it with the distinct intention that he would apply for the benefit of Elijah E. Myers the balance, if he succeeded in collecting the claim, after paying expenses and services and all Myers's indebtedness to him. But, he alleged, he did not intend to waive his right as absolute owner, or allow Myers to dictate the amount of expenses, services, or indebtedness. The circuit court entered a decree for the balance due Myers.

The supreme court held that the assignment of April 2, 1900, was merged in the assignment of April 11, 1900, and also held that the Federal decision in Pennsylvania had not determined that the trust relation between the plaintiff in error and Elijah E. Myers had terminated; as to which holdings the plaintiff in error assigns error, upon the failure of the supreme court to give due credit in those [730] respects to the judgment of the United States circuit court.

From the foregoing statement it is evident that the sole Federal question involved arises from the alleged denial in the judgment of the supreme court of Michigan of due effect to the judgment rendered in the United States circuit court in Pennsylvania, which is relied upon by the plaintiff in error as *res judicata* of the matters in controversy. Whether such effect was given as the former judgment required presents a Federal question for determination. National Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 216, 233, 46 L. ed. 157, 169, 22 Sup. Ct. Rep. 111. To determine this issue we examine the judg-

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ment in the former case, the pleadings filed and the issues made, and, if necessary to elucidate the matters decided, the opinion of the court which rendered the judgment. National Foundry & Pipe Works v. Oconto Water Supply Co. supra, 234, and previous cases in this court therein cited.

As the suit in the Michigan court was not upon the identical cause of action litigated in the United States circuit court, the estoppel operates only as to matters in issue or points controverted and actually decided in that suit. Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Southern P. R. Co. v. United States, 168 U. S. 1, 50, 42 L. ed. 355, 377, 18 Sup. Ct. Rep. 18; Troxell v. Delaware, L. & W. R. Co. 227 U. S. 434, 440, 57 L. ed. 586, 589, 33 Sup. Ct. Rep. 274.

Applying these familiar principles, how stands the present case? The elder Myers brought this suit upon the theory that the amount of the judgment which had been paid over to Radford on August 22, 1903, which the supreme court of Michigan found was $12,711.23, was held in trust and to be accounted for by Radford to him because of the agreement set up in the complaint in the state court, already referred to. The record of the proceedings in the United States circuit court shows that one half of the money due upon the claim of Elijah E. Myers against Luzerne county had been paid into court in the original suit of Myers against Luzerne county. [731] Radford had filed a petition asking for the payment of the money to him as the owner of the judgment. George W. Myers, as respondent, filed an answer, claiming the amount in court, and attacking his assignment to Radford. It was upon that petition and answer and testimony that the case was heard and the following order made:

"In the United States Circuit Court for the Middle District of Pennsylvania,

"February Term, 1903.

"No. 3.

"Elijah E. Myers

v.

"County of Luzerne.

"In the Matter of Petition of George W. Radford to Take Money Out of Court.

"At a Session of said Court Held at Scranton, in said district, on the 31st Day of July, One Thousand Nine Hundred and Three.

"Present: Honorable R. W. Archbald, District Judge.

"The above matter having heretofore been heard upon said petition, answers, and proofs, and the same having been argued by counsel for petitioner, as well as for the respondent, respectively, and due consideration had thereon, it is now ordered, adjudged, and decreed that the assignment from respondent to petitioner of the 11th day of April, one thousand nine hundred, is valid, and an absolute assignment of all the interest of said respondent in the said contract between Elijah E. Myers and the county commissioners of Luzerne county of date February 22, 1895, and that the fund in court be awarded to petitioner, George W. Radford; and that the claim of George W. Myers, respondent, be dismissed, with costs to be taxed against said respondent."

A reading of this order, which is said to embody the Federal judgment relied upon by the plaintiff in error as *res judicata* of the present controversy, shows that the only matter adjudged concerned the assignment from the [732] respondent (George W. Myers) to the petitioner (Radford), of date the 11th day of April, 1900, the court holding that it was an absolute assignment of the interest of the respondent in the contract between Elijah E. Myers and the county of Luzerne, awarding the fund in court (which was one half of that recovery) to the petitioner, and decreeing that the claim of the respondent be dismissed and that he pay all the costs. Certainly there is nothing in that judgment to conclude the present suit in the state court between Elijah E. Myers and Radford. The proceeding in the United States circuit court in Pennsylvania is specifically limited to the controversy between Radford and the respondent in that proceeding, George W. Myers. If there could be any doubt as to the effect of the order, the opinion of Judge Archbald, found in the record, shows how the matter was regarded by him. The opinion recites that, a verdict having been rendered in favor of Elijah E. Myers, because of a controversy with respect to one half of it, leave of court had been given to pay one half of the judgment into court, and that the petitioner, Radford, and George W. Myers, by each of whom ownership was asserted, by pleadings and proof, had submitted the matter to that court, and that it had jurisdiction to determine to whom the fund belonged. After referring to the original contract and the various steps to collect the money from the county of Luzerne and the assignment of a one-half interest from the elder Myers to his son in 1896, Judge Archbald said:

"Col. Myers explained to Mr. Radford that one half the contract had already been assigned to George, and it was recognized that if he held on to the assignment there would be little, if anything, coming to Col. Myers after he had settled with Radford. But it was stated by Col. Myers that the assignment was without consider-

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ation, and if he succeeded, as he hoped, in getting George to surrender it, then Radford was to account to him for that [733] interest also, after deducting for expenses and services. The trust relation so established still continues."

The opinion then goes on to consider elaborately the claim of George W. Myers to the one-half interest paid into court, as against Radford, and finds that the assignment of April 11, 1900, was a valid sale from George W. Myers to Radford, and that the assignment was absolute in form, and intended by George W. Myers as a complete disposition to Radford for $150 of the one-half interest derived from his father. The judge concludes his opinion by directing that an order be drawn, awarding the fund to Radford, and dismissing the claim of George W. Myers, with costs. Thereupon the order which we have already set forth was made.

The fact that the order was made in an intervention in the original suit of Myers v. Luzerne County, and that Myers verified the petition filed by Radford, asking to have the fund in court paid over to the latter, did not raise any issue between Elijah E. Myers and Radford as to the alleged agreement that Radford should account to Myers for the fund. And the fact that both Elijah E. Myers and Radford were parties in the same suit did not have the effect to submit the controversy made in the present litigation to the decision of the United States circuit court. Judgments become estoppels because they affect matters upon which the parties have been heard or have had an opportunity to be heard, but are not conclusive upon matters not in question or immaterial. Reynolds v. Stockton, 140 U. S. 254, 268, 269, 35 L. ed. 464, 468, 469, 11 Sup. Ct. Rep. 773.

It seems very clear that there was nothing in this proceeding, in the issues made or the judgment rendered, that in any wise concluded the right of Elijah E. Myers to bring suit, which he subsequently prosecuted in the state court, calling upon Radford for an accounting concerning the proceeds of the judgment in his hands.

Judgment of the Supreme Court of Michigan affirmed.

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MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

EX PARTE: IN THE MATTER OF ASSETS COLLECTING COMPANY, Petitioner. [No. —, Original.]

Motion for leave to file petitions for Writs of Mandamus or Certiorari.

See same case below upon first writ of error, 117 C. C. A. 190, 198 Fed. 82; upon second writ of error, 123 C. C. A. 490, 205 Fed. 362.

Messrs. Ferdinand E. M. Bullowa and Richard S. Harvey for petitioner.

No counsel appeared for respondent.

October 20, 1913. Denied.

EX PARTE: IN THE MATTER OF YOUNG, SMYTHE, FIELD COMPANY, Petitioner. [No. —, Original.]

Motion for leave to file petition for a Writ of Mandamus.

Messrs. A. R. Jackson and Mortimer C. Rhone for petitioner.

No counsel appeared for respondent.

October 20, 1913. Denied.

CHARLES ANDERSON, Petitioner, v. WILLIAM H. MOYER, Warden of the United States Penitentiary at Atlanta, Ga. [No. —.]

Motion for leave to file petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and to proceed *in forma pauperis*.

See same case below, 122 C. C. A. 175, 203 Fed. 881.

Mr. Lamar Hill for petitioner.

No counsel appeared for respondent.

October 27, 1913. Denied.

CARL OLIVER, Plaintiff in Error, v. STATE OF TEXAS. [No. —.]

Motion for leave to docket cause and proceed *in forma pauperis*.

Mr. C. H. Smith for plaintiff in error.

No counsel appeared for defendant in error.

October 27, 1913. Denied.

[735] THE GLENWOOD LIGHT & WATER COMPANY, Appt., v. THE TOWN OF GLENWOOD SPRINGS. [No 575.]

Appeal—from circuit court of appeals—Federal question.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, — L.R.A.(N.S.) —, 121 C. C. A. 88, 202 Fed. 678.

Messrs. W. H. Bryant, George L. Nye, and William P. Malburn for appellant.

Mr. John A. Rush for appellee.

October 27, 1913. *Per Curiam:* Appeal dismissed for want of jurisdiction. Press Pub. Co. v. Monroe, 164 U. S. 105, 111, 112, 41 L. ed. 367, 369, 17 Sup. Ct. Rep. 40; Defiance Water Co. v. Defiance, 191 U. S. 184, 191, 48 L. ed. 140, 143, 24 Sup. Ct. Rep. 63; Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704; Joplin v. Southwest Missouri Light Co. 191 U. S. 150, 157, 48 L. ed. 127, 130, 24 Sup. Ct. Rep. 43; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224; Swope v. Leffingwell, 105 U. S. 3, 4, 26 L. ed. 939.

CHINO LEE, Plaintiff in Error, v. UNITED STATES. [No. 153.]

Opium—prohibiting possession—due process of law.

In Error to the Supreme Court of the Philippine Islands.

See same case below, 20 Philippine, 596.

Mr. A. D. Gibbs for plaintiff in error.

Mr. Assistant Attorney General Denison for defendant in error.

October 27, 1913. *Per Curiam:* Judgment affirmed. Mugler v. Kansas, 123 U. S. 623, 659–663, 31 L. ed. 205, 209–211, 8 Sup. Ct. Rep. 273; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Louisville & N. R. Co. v. F. W. Cook Brewing Co. 223 U. S. 70, 82, 56 L. ed. 355, 358, 32 Sup. Ct. Rep. 189; Price v. United States, 165 U. S. 311, 41 L. ed. 727, 17 Sup. Ct. Rep. 366.

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Henry C. King, Appellant, v. U. B. Buskirk, Trustee, et al. [No. 584.]

Appeal—from circuit court of appeals—Federal question.

Appeal from the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 116 C. C. A. 119, 196 Fed. 299.

Mr. Maynard F. Stiles for appellant.

Messrs. Frank Cox and W. R. Lilly for appellee.

October 27, 1913. *Per Curiam:* Dismissed for want of jurisdiction. Fay v. Crozer, 217 U. S. 455, 456, 54 L. ed. 837, 30 Sup. Ct. Rep. 568; Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 100, 50 L. ed. 107, 25 Sup. Ct. Rep. 727; Waters-[736] Pierce Oil Co. v. Texas, 212 U. S. 112, 117, 118, 53 L. ed. 431, 434, 29 Sup. Ct. Rep. 227.

M. V. Kirkpatrick, Appellant, v. Wyatt A. Harnesberger, Trustee, etc. [No. 516.]

Appeal—from district court—Federal question.

Appeal from the District Court of the United States for the Southern District of Georgia.

Mr. Samuel H. Myers for appellant.

Mr. Wm. H. Fleming for appellee.

November 3, 1913. *Per Curiam:* Dismissed for the want of jurisdiction. Merritt v. Bowdoin College, 169 U. S. 551, 556, 42 L. ed. 850, 852, 18 Sup. Ct. Rep. 415.

Atchison, Topeka, & Santa Fe Railway Company et al., Appellants, v. United States et al. [No. 539.]

Interstate Commerce Commission—review of order fixing rates—commerce court.

Appeal from the United States Commerce Court.

See same case below, 203 Fed. 56.

Messrs. Robert Dunlap and C. W. Durbrow for appellants.

Messrs. Blackburn Esterline, William E. Lamb, and P. J. Farrell for appellees.

November 3, 1913. *Per Curiam:* Decree affirmed on the authority of Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 454, 51 L. ed. 1133, 27 Sup. Ct. Rep. 700, and cases cited; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 110, 54 L. ed. 946, 957, 30 Sup. Ct. Rep. 651; Procter & G. Co. v. United States, 225 U. S. 282, 297, 298, 56 L. ed. 1091, 1096, 1097, 32 Sup. Ct. Rep. 761; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 91, 57 L. ed. 431, 433, 33 Sup. Ct. Rep. 185.

[737] John Roney et al., Plaintiffs in Error, v. H. J. Van Ness. [No. 688.]

Error to state court—time of allowance.

In Error to the Supreme Court of the State of California.

See same case below, 160 Cal. 131, 116 Pac. 392.

Mr. A. E. Bolton for plaintiffs in error.

Mr. Theodore A. Bell for defendant in error.

November 3, 1913. *Per Curiam:* Dismissed for the want of jurisdiction. U. S. Rev. Stat. § 1008, U. S. Comp. Stat. 1901, p. 715; Allen v. Southern P. R. Co. 173 U. S. 479, 484, 43 L. ed. 775, 776, 19 Sup. Ct. Rep. 518; Aspen Min. & Smelting Co. v. Billings, 150 U. S. 31, 36, 37 L. ed. 986, 988, 14 Sup. Ct. Rep. 4; Scarborough v. Pargoud, 108 U. S. 567, 27 L. ed. 824, 2 Sup. Ct. Rep. 877.

Pacific Creosoting Company, Plaintiff in Error, v. United States. [No. 520.]

Error to circuit court of appeals—suit under revenue laws.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 116 C. C. A. 50, 196 Fed. 35.

Mr. George E. de Skiguer for plaintiff in error.

The Solicitor General for defendant in error.

November 3, 1913. *Per Curiam:* Dismissed for the want of jurisdiction. Anglo-Californian Bank v. United States, 175 U. S. 37, 44 L. ed. 64, 20 Sup. Ct. Rep. 19; Macfadden v. United States, 213 U. S. 288, 294, 53 L. ed. 801, 802, 29 Sup. Ct. Rep. 490.

John Zeller, Plaintiff in Error, v. State of New Jersey. [No. 413.]

Error to state court—Federal question.

In Error to the Court of Errors and Appeals of the State of New Jersey.

See same case below, 83 N. J. L. 666, — L.R.A.(N.S.) —, 85 Atl. 237.

Messrs. Gilbert Collins and Marshall Van Winkle for plaintiff in error.

Messrs. Edmund Wilson, Robert H. M. Carter, and Pierre P. Garven for defendant in error.

November 3, 1913. *Per Curiam:* Dismissed for the want of jurisdiction. Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Maxwell v. Dow, 176 U. S. 581, 584, 44 L. ed. 597, 598, 20 Sup. Ct. Rep. 448, 494; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14; Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 100, 50 L. ed. 101, 107, 25 Sup. Ct. Rep. 727.

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[738] WILLIAM S. LOVELL, as Trustee in Bankruptcy, etc., Plaintiff in Error, v. HENRY HEINTZ & COMPANY et al. [No. 221.]

Error to circuit court of appeals—bankruptcy case.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 113 C. C. A. 48, 192 Fed. 762.

Messrs. H. Generes Dufour and Walker Percy for plaintiff in error.

Mr. Phelan Beale for defendants in error.

November 3, 1913. *Per Curiam:* Dismissed for the want of jurisdiction. Lovell v. Newman, 227 U. S. 412, 57 L. ed. 577, 33 Sup. Ct. Rep. 375.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, Plaintiff in Error, v. OLIVER LETOT. [No. 44.]

Error to state court—Federal question.

In Error to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas.

See same case below, — Tex. Civ. App. —, 135 S. W. 656.

Messrs. James Hagerman and Joseph M. Bryson for plaintiff in error.

No counsel appeared for defendant in error.

November 10, 1913. *Per Curiam:* Dismissed for want of jurisdiction on the authority of Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638.

C. F. EASTON, Receiver, etc., Plaintiff in Error, v. CHICAGO HOTEL COMPANY et al. [No. 436.]

Error to circuit court—jurisdiction below.

In Error to the District Court of the United States for the Western District of Washington.

Mr. Stephen A. Keenan for [739] plaintiff in error.

Messrs. Aldis B. Browne, Alexander Britton, Charles W. Dorr, and Evans Browne for defendant in error.

November 17, 1913. *Per Curiam:* Dismissed for want of jurisdiction on the authority of United States v. Congress Constr. Co. 222 U. S. 199, 56 L. ed. 163, 32 Sup. Ct. Rep. 44; Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175, 55 L. ed. 163, 31 Sup. Ct. Rep. 185; Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490.

EX PARTE: IN THE MATTER OF AMERICA CAPO, Petitioner. [No. 8, Original.]

On petition for Writ of Mandamus.

Messrs. F. H. Dexter and F. D. McKenney for petitioner.

Messrs. Malcolm Donald, Charles Hartzell, and M. Rodriguez-Serra for respondent.

November 17, 1913. *Per Curiam:* The rule to show cause hitherto allowed is discharged, and the petition for the allowance of the Writ of Mandamus is dismissed, and the prayer for writ consequently denied. Ex parte Harding, 219 U. S. 363, 55 L. ed. 252, 37 L.R.A.(N.S.) 392, 31 Sup. Ct. Rep. 324.

NEW LOUISVILLE JOCKEY CLUB et al., Plaintiffs in Error, v. CITY OF OAKDALE et al. [No. 9]; and LENNOX LAND COMPANY, Plaintiff in Error, v. CITY OF OAKDALE et al. [No. 10].

Error to state court—Federal question.

In Error to the Court of Appeals of the State of Kentucky.

See same case below, 137 Ky. 484, 125 S. W. 1089, extended opinion, — Ky. —, 127 S. W. 538.

Messrs. William H. Field and Bernard Flexner for plaintiffs in error.

Mr. J. M. Chilton for defendants in error.

November 17, 1913. *Per Curiam:* Dismissed for want of jurisdiction. Mt. Pleasant v. Beckwith, 100 U. S. 531, 25 L. ed. 703; Kelly v. Pittsburgh, 104 U. S. 80, 26 L. ed. 659; Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229.

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, Appellants, v. VICKSBURG WATER WORKS COMPANY. [No. 3.]

Appeal—from circuit court—jurisdiction.

Appeal from the Circuit Court of the United [740] States for the Southern District of Mississippi.

Messrs. T. C. Catchings, O. W. Catchings, and George Anderson for appellants.

Messrs. Joseph Hirsh and J. C. Bryson for appellee.

December 1, 1913. *Per Curiam:* Dismissed for want of jurisdiction, upon the authority of Bayard v. Lombard, 9 How. 530, 13 L. ed. 245; Payne v. Niles, 20 How. 219, 15 L. ed. 895; Indiana Southern R. Co. v. Liverpool, L. & G. Ins. Co. 109 U. S. 168, 27 L. ed. 895, 3 Sup. Ct. Rep. 108, and cause remanded to the district court of the United States for the southern district of Mississippi.

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Jacob Glos et al., Plaintiffs in Error, v. William L. O'Connell, County Treasurer, etc., et al. [No. 332.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Illinois.

See same case below, 255 Ill. 49, 99 N. E. 74.

Jacob Glos, Emma J. Glos, Adam S. Glos, August A. Timke, and D. Arnold, Plaintiffs in Error, *pro sese*.

Mr. George Gillette for defendants in error.

December 1, 1913. *Per Curiam:* Dismissed for the want of jurisdiction on the authority of Glos v. Chicago, 226 U. S. 599, 57 L. ed. 375, 33 Sup. Ct. Rep. 112, and the authorities there cited.

William Rabb, Plaintiff in Error, v. State of Louisiana. [No. 48.]

Commerce—in intoxicating liquors—state regulation.

In Error to the Criminal District Court of the Parish of Orleans, State of Louisiana.

Mr. Paul A. Sompayrac for plaintiff in error.

Mr. Ruffin G. Pleasant for defendant in error.

December 1, 1913. *Per Curiam:* Affirmed, with costs, upon the authority of Foppiano v. Speed, 199 U. S. 501, 50 L. ed. 288, 26 Sup. Ct. Rep. 138.

Ex parte: In the Matter of Banco Territorial y Agricola de Puerto Rico and [741] the Banco Commercial de Puerto Rico, trustees, Petitioners. [No. —, Original.]

Motion for leave to file petition for Writ of Certiorari.

See same case below, 7 Porto Rico Fed. Rep. —.

Messrs. Francis H. Dexter and Frederic D. McKenney for petitioners.

No counsel appeared for respondents.

December 1, 1913. Denied.

Joe Darsey, Plaintiff in Error, v. State of Georgia. [No. 94.]

Error to state court—final judgment.

In Error to the Supreme Court of the State of Georgia.

See same case below, 136 Ga. 501, 71 S. E. 661.

Mr. John Randolph Cooper for plaintiff in error.

Mr. Thomas S. Felder for defendant in error.

December 8, 1913. *Per Curiam:* Dismissed for want of jurisdiction. Heike v. United States, 217 U. S. 423, 54 L. ed. 821, 30 Sup. Ct. Rep. 539.

Atlantic Coast Line Railroad Company, Plaintiff in Error, v. James A. Miller. [No. 588.]

Constitutional law—railway relief—validity of statute forbidding estoppel by accepting benefits.

In Error to the Supreme Court of the State of South Carolina.

See same case below, 90 S. C. 249, 73 S. E. 71, 1 N. C. C. A. 447.

Messrs. P. A. Willcox and Frederic D. McKenney for plaintiff in error.

Mr. L. D. Jennings for defendant in error.

December 8, 1913. *Per Curiam:* Judgment affirmed with costs, on authority of Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259.

Louis Elie Joseph Henry de Galard de Brassac de Bearn, etc., Plaintiff in Error, v. Pierre de Bearn [No. 558]; and Louis Elie Joseph Henry de Galard de Brassac de Bearn, etc., Plaintiff in Error, v. François de Bearn [No. 559]; and Louis Elie Joseph Henry de Galard de Brassac de Bearn, etc., Plaintiff in Error, v. Odon de Bearn [742] [No. 560]; and Louis Elie Joseph Henry de Galard de Brassac de Bearn, etc., Plaintiff in Error, v. Jean Baptiste Chaumet [No. 561.]

Error to state court—Federal question.

In Error to the Court of Appeals of the State of Maryland.

See same cases below, 119 Md. 418, 86 Atl. 1049.

Mr. Maurice Léon for plaintiff in error.

Messrs. J. Kemp Bartlett and Edgar Allan Poe for defendants in error.

December 8, 1913. *Per Curiam:* Dismissed for the want of jurisdiction. Eustis v. Bowles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Wood v. Chesborough, 228 U. S. 672, 57 L. ed. 1018, 33 Sup. Ct. Rep. 706; Adams v. Russell, 229 U. S. 358, 57 L. ed. 1226, 33 Sup. Ct. Rep. 846 and authorities there cited; Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; Deming v. Carlisle Packing Co. 226 U. S. 102, 57 L. ed. 140, 33 Sup. Ct. Rep. 80; De Bearn v. De Bearn, 225 U. S. 695, 57 L. ed. 1261, 32 Sup. Ct. Rep. 834.

Paris & Great Northern Railroad Company, Plaintiff in Error, v. Mrs. Georgia Boston et al. [No. 272.]

Master and servant—employer's liability to servant—Federal statute.

In Error to the Court of Civil Appeals for the Sixth Supreme Judicial District of the State of Texas.

See same case below, — Tex. Civ. App. —, 142 S. W. 944.

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Messrs. W. F. Evans and Edgar Wright for plaintiff in error.

Mr. Fred B. Rhodes for defendants in error.

December 15, 1913. Judgment affirmed with costs and interest by an equally divided court.

WASHINGTON DREDGING & IMPROVEMENT COMPANY, Plaintiff in Error, v. STATE OF WASHINGTON, E. V. Bussell, et al. [No. 127.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Washington.

See same case below, 53 Wash. 346, 101 Pac. 884.

Mr. W. F. Hays for plaintiff in error.

Messrs. Alfred Battle and George B. Cole for defendants in error.

December 15, 1913. *Per Curiam:* [743] Dismissed for want of jurisdiction. Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Preston v. Chicago, 226 U. S. 447, 450, 57 L. ed. 293, 295, 33 Sup. Ct. Rep. 177; Wood v. Chesborough, 228 U. S. 672, 677, 57 L. ed. 1018, 1020, 33 Sup. Ct. Rep. 706; Deming v. Carlisle Packing Co. 226 U. S. 102, 57 L. ed. 140, 33 Sup. Ct. Rep. 80; Standard Oil Co. v. Missouri, 224 U. S. 271, 287, 56 L. ed. 760, 769, 32 Sup. Ct. Rep. 406, Ann. Cas. 1913D, 936.

JOHN E. HEAVNER et al., Plaintiffs in Error, v. CITY OF ELKINS. [No. 103.]

Constitutional law—validity of frontage rule of assessment.

In Error to the Supreme Court of Appeals of the State of West Virginia.

See same case below, 69 W. Va. 255, — L. R. A. (N.S.) —, 71 S. E. 184, Ann. Cas. 1913A, 653.

Mr. James A. Bent for plaintiffs in error.

Mr. R. H. Allen for defendant in error.

December 15, 1913. *Per Curiam:* Judgment affirmed with costs. Schaefer v. Werling, 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449; Detroit v. Parker, 181 U. S. 399, 45 L. ed. 917, 21 Sup. Ct. Rep. 624.

EX PARTE: IN THE MATTER OF ADOLPH GRIMSINGER, Petitioner. [No. ——, Original.]

Motion for leave to file a petition for Writ of Habeas Corpus.

Mr. George F. Curtis for petitioner.

The Solicitor General for respondent.

December 15, 1913. Denied.

EX PARTE: IN THE MATTER OF JONAS JONES, Petitioner. [No. —, Original.]

Motion for leave to file petition for Writ of Habeas Corpus.

Messrs. W. I. Cruce and A. C. Cruce for petitioner.

The Solicitor General for respondent.

[744] December 22, 1913. Denied.

PARKER-WASHINGTON COMPANY, Plaintiff in Error, v. HAROLD CRAMER, a Minor, etc. [No. 449.]

Error to district court—Federal question.

In Error to the District Court of the United States for the Northern District of Illinois.

Messrs. Henry R. Rathbone, P. H. Cullen, Thomas T. Fauntleroy, and Shepard Barclay for plaintiff in error.

Mr. Michael F. Gallagher for defendant in error.

January 5, 1914. *Per Curiam:* Dismissed for want of jurisdiction. Union Trust Co. v. Westhus, 228 U. S. 519, 57 L. ed. 947, 33 Sup. Ct. Rep. 593.

JAMES M. COCKINS, Petitioner, v. ADELAIDE MILLER BLICK and Horace J. Miller. [No. ——, Original.]

Petition for a Writ of Error.

Messrs. Samuel S. Mehard and Harvey A. Miller for petitioner.

Messrs. John S. Ferguson and Joseph N. Ulman for respondent.

January 5, 1914. Denied.

UNITED STATES, Petitioner, v. NIPISSING MINES COMPANY. [No. 709.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 124 C. C. A. 313, 206 Fed. 431.

[745] The Solicitor General and Mr. Assistant Attorney General Harr for petitioner.

Mr. George F. Hurd for respondent.

October 20, 1913. Granted.

JAMES SIM, Petitioner, v. WILLIAM EDENBORN [No. 711]; and THOMAS P. ALDER, Petitioner, v. WILLIAM EDENBORN [No. 712.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Theron G. Strong for petitioners.

Mr. Martin W. Littleton for respondent.

October 20, 1913. Granted.

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PETER W. REHERD, Receiver, etc., Petitioner v. COAL & IRON RAILWAY COMPANY. [No. 578.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 123 C. C. A. 155, 204 Fed. 859.

Mr. Fred O. Blue for petitioner.

Mr. B. M. Ambler for respondent.

October 20, 1913. Denied.

TOLEDO, ST. LOUIS, & WESTERN RAILROAD COMPANY, Petitioner, v. ANNA PERENCHIO. [No. 617.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 123 C. C. A. 540, 205 Fed. 472.

Messrs. Clarence Brown and C. E. Pope for petitioner.

Mr. John L. Flannigan for respondent.

October 20, 1913. Denied.

CADILLAC MOTOR CAR CO., Petitioner, v. GEORGE W. RAY, Judge, etc. [No. 636.]

Petition [746] for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Otto Kirchner for petitioner.

Mr. Andrew J. Nellis for respondent.

October 20, 1913. Denied.

ALLEN H. WALKER, Petitioner, v. IOWA CENTRAL RAILWAY COMPANY et al. [No. 694.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 121 C. C. A. 579, 203 Fed. 685.

Mr. Frank W. Hackett for petitioner.

Mr. W. H. Bremner for respondents.

October 20, 1913. Denied.

PACIFIC LIVESTOCK COMPANY, Petitioner, v. SILVIES RIVER IRRIGATION COMPANY et al. [No. 695.]

Petition for a writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 118 C. C. A. 513, 200 Fed. 487.

Messrs. Edward F. Treadwell, Wirt Minor, Aldis B. Browne, Alex. Britton, and Evans Browne for petitioner.

No counsel appeared for respondents.

October 20, 1913. Denied.

FRANCIS P. B. SANDS, Petitioner, v. HENRIETTA S. ANDERSON. [No. 698.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 40 App. D. C. 447.

Mr. Francis P. B. Sands for petitioner.

Mr. Frank J. Hogan for respondent.

October 20, 1913. Denied.

HENRY BAETZ, Petitioner, v. SCHOENLAU-KUCKKUCK TRUNK TOP & VENEER COMPANY et al. [No. 702.]

Petition for a Writ of Certiorari to the [747] United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 116 C. C. A. 588, 197 Fed. 40.

Mr. Emil Starek for petitioner.

Mr. Charles Howson for respondents.

October 20, 1913. Denied.

LIBERTY BELL GOLD MINING COMPANY, Petitioner, v. SMUGGLER UNION MINING COMPANY. [No. 703.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 122 C. C. A. 113, 203 Fed. 795.

Mr. Moorfield Storey for petitioner.

Messrs. Joel F. Vaile and Henry McAllister, Jr., for respondent.

October 20, 1913. Denied.

DAVID ALLEGAR, Petitioner, v. AMERICAN CAR & FOUNDRY COMPANY. [No. 705.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 124 C. C. A. 319, 206 Fed. 437.

Messrs. Frank W. Hackett and Paul J. Sherwood for petitioner.

Messrs. Fred Keler and C. E. Sprout for respondent.

October 20, 1913. Denied.

CHARLES A. DAVEY, Petitioner, v. UNITED STATES. [No. 706.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 208 Fed. 237.

Mr. Ward H. Watson for petitioner.

The Solicitor General for respondent.

October 20, 1913. Denied.

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MILLARD F. FIELD, Petitioner, v. HOWARD D. COLMAN. [No. 716.]

Petition for a Writ of [748] Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 40 App. D. C. 598.

Mr. Melville Church for petitioner.

Mr. Lincoln B. Smith for respondent.

October 20, 1913. Denied.

WILLIAM W. NILES, Administrator, etc., Petitioner, v. THE LUDLOW VALVE MFG. CO. [No. 718.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 120 C. C. A. 319, 202 Fed. 141.

Messrs. William W. Niles and Hartwell Cabell for petitioner.

Messrs. Samuel Untermyer, Louis Marshal, and Abraham Benedict for respondent.

October 20, 1913. Denied.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION et al., Petitioners, v. FRED STEBLER. [No. 719.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 124 C. C. A. 29, 205 Fed. 735.

Messrs. N. A. Acker and J. J. Scrivner for petitioners.

Messrs. Frederick S. Lyon and William W. Dodge for respondent.

October 20, 1913. Denied.

CHEROKEE TANNING EXTRACT COMPANY et al., Petitioners, v. GEORGE H. LEONARD et al. [No. 734.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. James H. Merrimon and Thomas S. Rollins for petitioners.

Mr. Alfred S. Barnard for respondents.

October 20, 1913. Denied.

LUMBER UNDERWRITERS OF NEW YORK et al., Petitioners, v. O. C. RIFE et al. [No. 753.]

[749] Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Dent Minor and R. Lee Bartels for petitioners.

No counsel appeared for respondents.

October 27, 1913. Granted.

D. J. MCDONALD et al., Petitioners, v. J. W. PLESS et al. [No. 761.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Julius C. Martin, George H. Wright, and Thomas S. Rollins for petitioners.

Mr. E. J. Justice for respondents.

October 27, 1913. Granted.

ST. PAUL FIRE & MARINE INS. CO., Petitioner, v. HACHIROYEMON MITSUI et al. [No. 497.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 120 C. C. A. 280, 202 Fed. 26.

Mr. William Denman for petitioner.

Mr. Howard S. Harrington for respondents.

October 27, 1913. Denied.

CITY OF ST. LOUIS, Petitioner, v. THE NATIONAL SURETY COMPANY. [No. 594.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 118 C. C. A. 539, 200 Fed. 387.

Mr. William E. Baird for petitioner.

Mr. W. C. Marshall for respondent.

October 27, 1913. Denied.

NORFOLK & WESTERN RAILWAY COMPANY, Petitioner, v. CORA E. HAUSER, Administratrix, etc. [No. 602.]

[750] Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 211 Fed. 567.

Mr. Theodore W. Reath for petitioner.

Mr. Lindsay Patterson for respondent.

October 27, 1913. Denied.

CITY OF ST. LOUIS, Petitioner, v. THE CHICAGO HOUSE WRECKING COMPANY. [No. 715.]

Petition for a writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 118 C. C. A. 425, 200 Fed. 239.

Mr. William E. Baird for petitioner.

No counsel appeared for respondent.

October 27, 1913. Denied.

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PHILADELPHIA, BALTIMORE, & WASHINGTON RAILROAD COMPANY, Petitioner, v. SOUTHERN TRANSPORTATION COMPANY. [No. 723.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 124 C. C. A. 26, 205 Fed. 732.

Mr. Shirley Carter for petitioner.

No counsel appeared for respondent.

October 27, 1913. Denied.

THE PACIFIC COAST STEAMSHIP COMPANY, LIMITED, Claimant, etc., Petitioner, v. M. ANDERSON [No. 724]; and THE PACIFIC COAST COMPANY, Claimant, etc., Petitioner, v. N. JORDAN [No. 725.]

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 124 C. C. A. 214, 206 Fed. 148.

Mr. George W. Towle for petitioners.

Mr. William Denman for respondents.

October 27, 1913. Denied.

J. S. HARRISON et al., Petitioners, v. ELIZABETH FOLEY. [No. 748.]

Petition for a [751] Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 124 C. C. A. 191, 206 Fed. 57.

Messrs. W. S. Cowherd and F. D. McKenney for petitioners.

Mr. William F. Guthrie for respondent.

October 27, 1913. Denied.

GRAND TRUNK WESTERN RAILWAY COMPANY, Petitioner, v. GERTRUDE GILPIN, Administratrix etc. [No. 754.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 208 Fed. 126.

Messrs. George W. Kretzinger and George W. Kretzinger, Jr., for petitioner.

Mr. James C. McShane for respondent.

October 27, 1913. Denied.

FIRST NATIONAL BANK OF DEXTER, NEW YORK, Petitioner, v. EDMUND K. FOX. [No. 756.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 40 App. D. C. 430.

Messrs. A. S. Worthington, Charles L. Frailey, and Henry F. Woodard for petitioner.

Mr. J. J. Darlington for respondent.

October 27, 1913. Denied.

BENJAMIN F. EDWARDS, Petitioner, v. EDMUND K. FOX. [No. 757.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 39 App. D. C. 477.

Mr. W. W. Millan for petitioner.

Mr. J. J. Darlington for respondent.

October 27, 1913. Denied.

THE GLENWOOD LIGHT & WATER COMPANY, Petitioner, v. THE TOWN OF GLENWOOD SPRINGS. [No. 575.]

[752] Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, — L.R.A.(N.S.) —, 121 C. C. A. 88, 202 Fed. 678.

Messrs. W. H. Bryant, George L. Nye, and William P. Malburn for petitioner.

Mr. John A. Rush for respondent.

October 27, 1913. Denied.

ELLEN CONNOLLEY, Administratrix, etc., Petitioner, v. PENNSYLVANIA RAILROAD COMPANY. [No. 764.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 47 L.R.A.(N.S.) 867, 119 C. C. A. 392, 201 Fed. 54.

Mr. Francis Rawle for petitioner.

Messrs. J. Hampton Barnes and Frederic D. McKenney for respondent.

November 3, 1913. Granted, and case placed on the summary docket.

JOHN A. S. BROWN et al., Petitioners, v. AUSTIN B. FLETCHER, etc. [No. 766.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Charles H. Burr for petitioners.

Mr. William P. S. Melvin for respondent.

November 3, 1913. Granted.

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EMIL T. PALMENBERG et al., Petitioners, v. W. S. BUTLER & COMPANY. [No. 732]; and MORRIS BLACKSTONE et al., Petitioners, v. EVERYBODY'S STORE, INCORPORATED, et al. [No. 733].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, No. 732, 207 Fed. 705, No. 733, 207 Fed. 752.

Mr. Harvey H. Pratt for petitioners.

Messrs. Charles F. Choate, Jr., Frederick H. Nash, and Boyd B. Jones, for respondents.

November 3, 1913. Denied.

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[753] RUTH KRAMER, Petitioner, v. ERNEST W. KRAMER. [736.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 119 C. C. A. 482, 201 Fed. 248.

Mr. Augustus O. Bacon for petitioner.

Mr. Edgar Watkins for respondent.

November 3, 1913. Denied.

AMERICAN BELL TELEPHONE COMPANY, Petitioner, v. WESTERN UNION TELEGRAPH COMPANY et al. [No. 762.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, first appeal 60 C. C. A. 220, 125 Fed. 342, second appeal, 122 C. C. A. 103, 203 Fed. 785.

Messrs. Charles H. Swan, John C. Gray, and Frederick P. Fish for petitioner.

Messrs. J. H. Benton and Rush Taggart for respondent.

November 10, 1913. Denied.

BELVA A. LOCKWOOD, Petitioner, v. FRANK M. RUCKER, Administrator, etc. [No. 585.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 40 App. D. C. 422.

Messrs. Isaac R. Hitt and Richard P. Evans for petitioner.

No counsel appeared for respondent.

November 10, 1913. Denied.

CITY WATER COMPANY OF CHILLICOTHE, Petitioner, v. CITY OF CHILLICOTHE, MISSOURI. [No. 768.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 207 Fed. 503.

Messrs. James H. Harkless, Clifford Histed, and Morgan M. Mann for petitioner.

Mr. Joseph J. Russell for respondent.

November 10, 1913. Denied.

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[754] ANNIE F. CRAIG, Administratrix, etc., Petitioner, v. EMILY E. PARISH, Executrix, etc. [No. 769.]

Petition for a writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 40 App. D. C. 138.

Messrs. Frank W. Hackett and Chauncey Hackett for petitioner.

Messrs. Holmes Conrad and Leigh Robinson for respondent.

November 10, 1913. Denied.

CARBORUNDUM COMPANY, Petitioner, v. ELECTRIC SMELTING & ALUMINUM COMPANY. [No. 770.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 122 C. C. A. 276, 203 Fed. 976.

Mr. Philander C. Knox for petitioner.

Mr. Francis C. McMillin for respondent.

November 10, 1913. Denied.

SAMUEL B. ARCHER et al., Petitioners, v. IMPERIAL MACHINE COMPANY. [No. 720.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 124 C. C. A. 638, 207 Fed. 81.

Mr. Samuel B. Archer *in propria persona* for petitioners.

Mr. Ernest Wilkinson for respondent.

November 17, 1913. Denied.

ILLINOIS CENTRAL RAILROAD COMPANY, Petitioner, v. UNION RAILWAY COMPANY. [No. 779.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 207 Fed. 745.

Messrs. Dent Minor, Charles N. Burch, and Blewett Lee for petitioner.

No counsel appeared for respondent.

November 17, 1913. Denied.

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[755] STREET & SMITH, a Copartnership, etc., Appellants, v. ATLAS MANUFACTURING COMPANY et al. [No. 618.]

Petition for a Writ of Certiorari herein to the Circuit Court of Appeals for the Eighth Circuit.

See same case below, 47 L.R.A.(N.S.) 1002, 122 C. C. A. 568, 204 Fed. 398.

Mr. Hugh K. Wagner for appellants.

Mr. James Love Hopkins for appellees.

November 17, 1913. Denied.

ELIZABETH S. RUTLAND, Petitioner, v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY. [No. 780.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 207 Fed. 287.

Mr. Caruthers Ewing for petitioner.

No counsel appeared for respondent.

December 8, 1913. Denied.

SARA GYE, Widow of John Gye, Petitioner, v. HAMBURG AMERICANISCHE PACKETSAHRT AKTIEM GESELSCHAFFT. [No. 783.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 124 C. C. A. 517, 207 Fed. 247.

Messrs. H. Garland Dupré, Charles F. Consaul, and I. M. Moyers for petitioner.

No counsel appeared for respondent.

December 8, 1913. Denied.

JOHN BARTON MILLER, Petitioner, v. UNITED STATES. [No. 784.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 41 App. D. C. 52.

Messrs. Henry E. Davis and John E. Laskey for petitioner.

The Solicitor General and Mr. Clarence R. Wilson for respondent.

December 8, 1913. Denied.

HERMAN C. H. HEBOLD, Collector, Petitioner, v. MUTUAL BENEFIT LIFE INSURANCE COMPANY. [No. 808.]

[756] Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 120 C. C. A. 256, 201 Fed. 918.

The Solicitor General for petitioner.

Messrs. John O. H. Pitney and John R. Hardin for respondent.

December 15, 1913. Denied.

HAMILTON-BROWN SHOE COMPANY, Petitioner, v. WOLF BROTHERS & COMPANY. [No. 813.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. H. S. Priest, Morton Jourdan, Joseph W. Bailey, and Luke E. Hart for petitioner.

Messrs. Lawrence Maxwell, Percy Werner, and Simeon M. Johnson for respondent.

December 22, 1913. Granted.

HANOVER STAR MILLING COMPANY, Petitioner, v. D. D. METCALF. [No. 740.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Henry Fitts for petitioner.

Messrs. John C. Higdon, Edward Everett Longan, and J. F. Gilster for respondent.

January 5, 1914. Granted.

CITY OF NEW YORK, Petitioner, v. WILLIAM SAGE, JR. [No. 807.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Louis C. White for petitioner.

Mr. Edward A. Alexander for respondent.

January 5, 1914. Granted.

ANNIE MYERS, Petitioner, v. PITTSBURGH COAL COMPANY. [No. 816.]

Petition for Writ of [757] Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 121 C. C. A. 427, 203 Fed. 221.

Mr. Edward C. Goodwin for petitioner.

Mr. Charles Marshall Johnston for respondent.

January 5, 1914. Granted.

CHARLES S. INTERMELA et al., Petitioners, v. DAVID PERKINS. [No. 795.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 123 C. C. A. 619, 205 Fed. 603.

Mr. Walter S. Penfield for petitioners.

Mr. Charles E. Shepard for respondent.

January 5, 1914. Denied.

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UNION PACIFIC RAILROAD COMPANY, Appellant, v. CITY OF GREELEY et al. [No. 145.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Maxwell Evarts and A. A. Hoehling, Jr., for appellant.

Messrs. John M. Thurston, E. E. Whitted, W. S. Summers, Joseph C. Helm and W. H. Bryant for appellees.

October 14, 1913. Dismissed with costs, on motion of counsel for the appellant.

NORTHWESTERN PACIFIC RAILROAD COMPANY, Plaintiff in Error, v. UNITED STATES. [No. 31.]

In Error to the District Court of the United States for the Northern District of California.

Mr. Edward M. Cleary for plaintiff in error.

The Attorney General for defendant in error.

October 14, 1913. Dismissed on motion of Mr. Evans Browne, in behalf of counsel for the [758] plaintiff in error.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant, v. KING COUNTY, Washington et. al. [No. 331.]

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 116 C. C. A. 143, 196 Fed. 323.

Messrs. C. W. Bunn and A. B. Browne for appellant.

Mr. Hugh M. Caldwell for appellees.

October 14, 1913. Dismissed with costs, per stipulation of counsel, on motion of Mr. Evans Browne for the appellant.

TITLE GUARANTY & SURETY COMPANY, Plaintiff in Error, v. UNITED STATES TO THE USE OF GENERAL ELECTRIC COMPANY. [No. 125.]

In Error to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 109 C. C. A. 106, 187 Fed. 98.

Messrs. Russell H. Robbins and James F. Campbell for plaintiff in error.

Messrs. H. B. Gill and Louis Barcroft Runk for defendants in error.

October 15, 1913. Dismissed per stipulation of counsel.

ADAMS EXPRESS COMPANY, Plaintiff in Error, v. KASKELL SOLOMON et al. [No. 132.]

In Error to the Superior Court of the State of Pennsylvania.

Mr. Charles F. Patterson for plaintiff in error.

Mr. Harry J. Nesbit for defendants in error.

October 15, 1913. Judgment reversed, with costs, per stipulation of counsel, and cause remanded for further proceedings.

JOHN MCKAY, Plaintiff in Error, v. UNITED STATES OF AMERICA. [No. 428.]

In Error to the District [759] Court of the United States for the District of Minnesota.

Mr. Albert R. Moore for plaintiff in error.

The Attorney General for defendant in error.

October 15, 1913. Dismissed per stipulation of counsel.

ROSE MCKAY, Plaintiff in Error, v. UNITED STATES OF AMERICA. [No. 429.]

In Error to the District Court of the United States for the District of Minnesota.

Mr. Albert R. Moore for plaintiff in error.

The Attorney General for defendant in error.

October 15, 1913. Dismissed per stipulation of counsel.

LUCY GRACE MUSICA, Plaintiff in Error, v. THE STATE OF LOUISIANA. [No. 637.]

In Error to the First City Criminal Court of the Parish of Orleans, State of Louisiana.

Mr. Henry L. Lazarus for plaintiff in error.

No counsel appeared for defendant in error.

October 15, 1913. Dismissed with costs, on motion of counsel for the plaintiff in error.

LOUISE MUSICA, Plaintiff in Error, v. THE STATE OF LOUISIANA. [No. 638.]

In Error to the First City Criminal Court of the Parish of Orleans, State of Louisiana.

Mr. Henry L. Lazarus for plaintiff in error.

No counsel appeared for defendant in error.

October 15, 1913. Dismissed with costs, on motion of counsel for the plaintiff in error.

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GEORGE H. BEDDOW, Plaintiff in Error, v. UNITED STATES. [No. 195.]

In Error to the District Court of the [760] United States for the Western District of Michigan.

Mr. M. M. Riley for plaintiff in error.

The Attorney General for defendant in error.

October 15, 1913. Dismissed pursuant to the Tenth Rule.

GEORGE WELSCH, Plaintiff in Error, v. CLEMENT L. RILEY, as Auditor of Licking County, Ohio, et al. [No. 70.]

In Error to the Supreme Court of the State of Ohio.

See same case below, 84 Ohio St. 496, 95 N. E. 1158.

Messrs. R. W. McCoy, Roderic Jones, and J. Howard Jones for plaintiff in error.

Messrs. Timothy S. Hogan and Frank Davis, Junior, for defendants in error.

October 20, 1913. Dismissed per stipulation on motion of counsel for the defendants in error.

JOHN W. BROWN, Plaintiff in Error, v. CLEMENT L. V. HOLTZ, as County Treasurer, etc., et al. [No. 222.]

In Error to the Supreme Court of the State of Ohio.

Mr. Fred C. Rector for plaintiff in error.

Messrs. Timothy S. Hogan and Frank Davis, Junior, for defendants in error.

October 20, 1913. Dismissed per stipulation on motion of counsel for defendants in error.

UNION PACIFIC RAILROAD COMPANY, Appellant, v. DENVER, LARAMIE, & NORTHWESTERN RAILWAY COMPANY. [No. 146.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 110 C. C. A. 571, 189 Fed. 1.

Messrs. Maxwell Evarts and A. A. Hoehling, Jr., for appellant.

Mr. W. H. Bryant for appellee.

October 24, 1913. Dismissed with costs, on motion of counsel for the appellant.

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[761] ST. LOUIS GUNNING ADVERTISING COMPANY, Plaintiff in Error, v. CITY OF ST. LOUIS et al. [No. 51.]

In Error to the Supreme Court of the State of Missouri.

See same case below, 235 Mo. 99, 137 S. W. 929.

Mr. Morton Jourdan for plaintiff in error.

Messrs. William E. Baird and Lambert E. Walther for defendants in error.

October 24, 1913. Dismissed per stipulation.

JAMES TALCOTT, Appellant, v. ALFRED E. OMMEN, as Trustee, etc. [No. 113]; and ALFRED E. OMMEN, as Trustee, etc., Appellant, v. JAMES TALCOTT [No. 114].

Appeals from the United Circuit Court of Appeals for the Second Circuit.

Mr. Arthur C. Rounds for Talcott.

Mr. Frederick M. Czaki for Ommen, Trustee, etc.

October 27, 1913. Dismissed without costs to either party, per stipulation of counsel.

SINGER MANUFACTURING COMPANY, Appellant, v. WIRT ADAMS, State Revenue Agent of Mississippi, et al. [No. 32.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 107 C. C. A. 658, 185 Fed. 768.

Messrs. C. H. Alexander and J. N. Flowers for appellant.

Mr. Edward Mayes for appellee.

October 31, 1913. Dismissed with costs, on joint motion of counsel for both parties.

HENRY C. LOEB, Trustee in Bankruptcy of the Block Mercantile Company, Appellant, v. GERMANIA SAVINGS BANK & TRUST COMPANY. [No. 49.]

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. W. A. Percy for appellant.

Mr. J. Hirsh for appellee.

November 4, 1913. Dismissed with costs, [762] pursuant to the Tenth Rule.

ELVIRA FERNANDEZ BLANCO et al., Appellants, v. JOSÉ ANTONIO FERNANDEZ Y PEREZ et al. [No. 53.]

Appeal from the District Court of the United States for Porto Rico.

Mr. Francis H. Dexter for appellants.

Mr. Willis Sweet for appellees.

November 5, 1913. Dismissed with costs, pursuant to the Tenth Rule.

LENA DUPUIS, Appellant, v. SAMUEL W. BACKUS, Commissioner of Immigration, etc. [No. 387.]

Appeal from the District Court of the United States for the Northern District of California.

Mr. Corry M. Stadden for appellant.

No counsel appeared for appellee.

November 6, 1913. Dismissed, with costs and mandate granted, on motion of counsel for the appellant.

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WILLIAM S. TEVIS et al., Plaintiffs in Error. v. JEFF RYAN et al. [No. 81.]

In Error to the Supreme Court of the Territory of Arizona.

Mr. A. C. Baker for plaintiffs in error.

No counsel appeared for defendants in error.

November 10, 1913. Dismissed with costs, on motion of Mr. Evans Browne, on behalf of counsel for the plaintiffs in error, and cause remanded to the Supreme Court of the State of Arizona.

ATCHISON, TOPEKA, & SANTA FÉ RAILWAY COMPANY, Plaintiff in Error, v. STAR GRAIN & [763] LUMBER COMPANY. [No. 123.]

In Error to the Supreme Court of the State of Kansas.

See same case below, 85 Kan. 281, 116 Pac. 906.

Mr. Robert Dunlap for plaintiff in error.

Mr. Carr W. Taylor for defendant in error.

November 10, 1913. Dismissed with costs, on motion of Mr. Evans Browne on behalf of counsel for the plaintiff in error.

BOOTH FISHERIES COMPANY, Plaintiff in Error, v. PEOPLE OF THE STATE OF ILLINOIS [No. 264]; and BOOTH FISHERIES COMPANY, Plaintiff in Error, v. PEOPLE OF THE STATE OF ILLINOIS [No. 265.]

In Error to the Supreme Court of the State of Illinois.

Messrs. John Barton Payne and Silas H. Strawn for plaintiff in error.

No counsel appeared for defendant in error.

November 10, 1913. Dismissed with costs, on motion for the plaintiff in error.

WESTERN UNION TELEGRAPH COMPANY, Appellant, v. M. E. TRAPP, as Auditor of the State of Oklahoma, et al. [No. 80.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 108 C. C. A. 226, 186 Fed. 114.

Mr. S. T. Bledsoe for appellant.

Mr. Charles West for respondents.

November 12, 1913. Dismissed with costs, per stipulation of counsel.

UNITED STATES OF AMERICA EX RELATIONE GRAND RAPIDS TIMBER COMPANY, Plaintiff in Error, v. WALTER L. FISHER, Secretary of the Interior. [No. 143.]

In Error to the Court of Appeals of the District of Columbia.

Mr. [764] Duane E. Fox for plaintiff in error.

No counsel appeared for defendant in error.

November 10, 1913. Dismissed with costs, on motion of counsel for the plaintiff in error.

CREAMERY PACKAGE MANUFACTURING COMPANY, Plaintiff in Error, v. STATE OF MINNESOTA. [No. 88.]

In Error to the Supreme Court of the State of Minnesota.

Messrs. George C. Fry and Emanuel Cohen for plaintiff in error.

Mr. Lyndon A. Smith for defendant in error.

November 14, 1913. Dismissed with costs, pursuant to the Tenth Rule.

FRED J. BLISS, Petitioner, v. WASHOE COPPER COMPANY et al. [No. 90.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 109 C. C. A. 133, 186 Fed. 789.

Messrs. Robert Lee Clinton, Hannis Taylor, and Caleb M. Sawyer for petitioner.

Messrs. John Garver, James M. Beck, and L. O. Evans for respondents.

November 14, 1913. Dismissed with costs, pursuant to the Tenth Rule.

A. EMERSON CROSS, Administrator, etc., et al., Plaintiffs in Error, v. GRAY'S HARBOR BOOM COMPANY. [No. 91.]

In Error to the Supreme Court of the State of Washington.

See same case below, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267.

Mr. Charles W. Needham for plaintiffs in error.

No counsel appeared for defendant in error.

November 14, 1913. Dismissed with costs, pursuant to the Tenth Rule.

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ELLEN CONNELLEY, Administratrix, etc., Petitioner, v. PENNSYLVANIA RAILROAD COMPANY. [No. 764.]

[765] On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 47 L.R.A.(N.S.) 867, 119 C. C. A. 392, 201 Fed. 54.

Mr. Francis Rawle for petitioner.

Messrs. J. Hampton Barnes and Frederic D. McKenney for respondent.

November 17, 1913. Judgment reversed with costs, upon confession of error, on motion of Frederic D. McKenney for the respondent.

YOSHIRO NAKAYAMA, Appellant, v. W. R. MANSFIELD, Immigration Inspector, etc. [No. 493.]

Appeal from the District Court of the United States for the District of Colorado.

Mr. Samuel H. Crosby for appellant.

No counsel appeared for appellee.

December 1, 1913. Dismissed with costs, pursuant to the Tenth Rule.

MARY B. HERBERT, Plaintiff in Error, v. S. R. WAGG et al. [No. 95.]

In Error to the Supreme Court of the State of Oklahoma.

Mr. I. N. Watson for plaintiff in error.

Mr. Edward Maher for defendants in error.

December 3, 1913. Dismissed with costs, pursuant to the Tenth Rule.

JOHN H. JONES, Plaintiff in Error, v. DAVID MOULD, Judge, etc., et al. [No. 96.]

In Error to the Supreme Court of the State of Iowa.

Mr. Wilbur Owen for plaintiff in error.

No counsel appeared for defendants in error.

December 3, 1913. Dismissed with costs, pursuant to the Tenth Rule.

SELOVER, BATES, & COMPANY, Plaintiff in Error, v. OLE A. FINNES. [No. 101.]

In Error to the Supreme Court of the [766] State of Minnesota.

Messrs. Rome G. Brown and Arthur W. Selover for plaintiff in error.

Mr. Otto N. Davies for defendant in error.

December 4, 1913. Judgment affirmed with costs, per stipulation of counsel.

FRED E. EARNHART, Plaintiff in Error, v. JOHN B. SWITZLER. [No. 106.]

In Error to the Supreme Court of the State of Oregon.

Mr. Henry H. Gilfoy for plaintiff in error.

Messrs. R. J. Slater and Samuel Herrick for defendant in error.

December 5, 1913. Dismissed with costs, pursuant to the Tenth Rule.

QUENTIN GARRETT, by William C. Garrett, His Next Friend, Plaintiff in Error, v. AMERICAN BAPTIST HOME MISSION SOCIETY et al. [No. 110.]

In Error to the Supreme Court of the State of Oklahoma.

Messrs. Joseph C. Stone and Benj. Martin, Jr., for plaintiff in error.

No counsel appeared for defendants in error.

December 5, 1913. Dismissed with costs, pursuant to the Tenth Rule.

KAPIOLANI ESTATE (LIMITED), Plaintiff in Error, v. TERRITORY OF HAWAII, by Marston Campbell, Commissioner of Public Lands. [No. 117.]

In Error to the Supreme Court of the Territory of Hawaii.

Messrs. David L. Withington and C. W. Ashford for plaintiff in error.

Mr. C. R. Hemenway for defendant in error.

December 8, 1913. Dismissed with costs, pursuant to the Tenth Rule.

ISAAC N. BOARTS, Trustee, etc., Appellant, v. J. M. SELDEN & COMPANY. [No. 116.]

Appeal from the United [767] States Circuit Court of Appeals for the Third Circuit.

Messrs. Harry H. Fisher and Joseph Hill Brinton for appellant.

No counsel appeared for appellee.

December 9, 1913. Dismissed with costs, pursuant to the Tenth Rule.

PETER J. O'REILLY, Plaintiff in Error, v. DORA F. NOXON, as Administratrix, etc. [No. 124.]

In Error to the Supreme Court of the State of Colorado.

See same case below, 49 Colo. 362, 113 Pac. 486.

Mr. Henry B. O'Reilly for plaintiff in error.

No counsel appeared for defendant in error.

December 10, 1913. Dismissed with costs, pursuant to the Tenth Rule.

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THEODORE SWENSEN, Plaintiff in Error, v. PEOPLE OF THE STATE OF MICHIGAN. [No. 129.]

In Error to the Supreme Court of the State of Michigan.

Messrs. Lawrence Maxwell and Joseph S. Graydon for plaintiff in error.

Messrs. Franz C. Kuhn and Grant Fellows for defendants in error.

December 10, 1913. Dismissed with costs, pursuant to the Tenth Rule.

LOUIS F. SWIFT et al., Appellants, v. LUMAN T. HOY, United States Marshal in and for the Northern District of Illinois. [No. 131.]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Messrs. John S. Miller and Levy Mayer for appellants.

The Attorney General for appellee.

December 11, 1913. Dismissed without cost to either party, per stipulation of counsel, and cause remanded to the District Court of the United States for the Northern District of Illinois.

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[768] JULIO O. ABRIL, Plaintiff in Error, v. SUCRERIE CENTRALE COLOSO, a Corporation. [No. 139.]

In Error to the District Court of the United States for Porto Rico.

Mr. Willis Sweet for plaintiff in error.

No counsel appeared for defendants in error.

December 12, 1913. Dismissed with costs, pursuant to the Tenth Rule.

JAMES C. YANCEY, Appellant, v. UNITED STATES. [No. 445.]

Appeal from the District Court of the United States for the Southern District of California.

Mr. Frank Fuller for appellant.

The Attorney General for appellee.

December 15, 1913. Dismissed, on motion of counsel for the appellant.

GRAND LODGE KNIGHTS OF PYTHIAS, NORTH AMERICA, etc., et al., Plaintiffs in Error, v. SUPREME LODGE KNIGHTS OF PYTHIAS et al. [No. 261.]

In Error to the Supreme Court of the State of Tennessee.

Messrs. Samuel A. T. Watkins, Benjamin F. Booth, and M. T. Bryan for plaintiffs in error.

Mr. John H. DeWitt for defendants in error.

December 15, 1913. Judgment reversed with costs, on confession of error by defendants in error, and cause remanded for further proceedings.

UNITED STATES TRUST COMPANY OF THE DISTRICT OF COLUMBIA, Ancillary Administrator, etc., Appellant, v. NATIONAL SAVINGS & TRUST COMPANY OF THE DISTRICT OF COLUMBIA, Administrator, etc., [No. 147.]

Appeal from the Court of Appeals of the District of Columbia.

Mr. Jackson H. Ralston for appellant.

Mr. J. J. Darlington for appellee.

[769] December 15, 1913. Dismissed with costs, pursuant to the Tenth Rule.

THOMAS C. PERKINS et al., Plaintiffs in Error, v. ARTHUR D. COFFIN et al. [No. 587.]

In Error to the Supreme Court of Errors of the State of Connecticut.

Mr. Lucius F. Robinson for plaintiffs in error.

Messrs. John R. Buck and John H. Buck for defendants in error.

January 5, 1914. Dismissed, per stipulation of counsel.

W. A. GAINES & COMPANY, Appellant, v. TURNER-LOOKER COMPANY. [No. 778.]

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. James Love Hopkins for appellant.

No counsel appeared for appellee.

January 5, 1914. Dismissed with costs, on motion of counsel for the appellant.

THE RICHMOND, FREDERICKSBURG, & POTOMAC RAILROAD COMPANY, Plaintiff in Error, v. THE COMMONWEALTH OF VIRGINIA. [No. 25.]

In Error to the Supreme Court of Appeals of the State of Virginia.

See same case below, 111 Va. 611, 69 S. E. 1070.

Messrs. A. Caperton Braxton and John S. Eggleston for plaintiff in error.

Mr. Samuel W. Williams for defendant in error.

July 15, 1913. Dismissed pursuant to the Twenty-eighth Rule.

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1913.

Vol. 232.

58 L. ed.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1913.

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[1] TRUMAN R. HAWLEY, Plff. in Err.,
v.
CITY OF MALDEN.

(See S. C. Reporter's ed. 1–13.)

Constitutional law — due process of law — taxation of shares in foreign corporation.

The taxation of a resident of the state, under the authority of Mass. Rev. Laws, chap. 12, §§ 2, 4, 23, upon shares of stock held by him in foreign corporations which do no business and have no property within the state, does not take his property without due process of law.

[For other cases, see Constitutional Law, IV. b, 6; Taxes, I. c, 3, a, in Digest Sup. Ct. 1908.]

[No. 18.]

Argued March 6 and 7, 1913. Decided January 5, 1914.

IN ERROR to the Superior Court of the State of Massachusetts to review a judgment in favor of defendant in an action to recover back taxes paid under protest, entered pursuant to the direction of the Supreme Judicial Court of that state after a demurrer to the declaration had been sustained by the Superior Court. Affirmed.

See same case below, in Supreme Judicial Court, 204 Mass. 138, 90 N. E. 415.

The facts are stated in the opinion.

NOTE.—On personal property having situs for taxation elsewhere as subject of taxation in the state of the owner's domicil—see note to Com. v. West India Oil Ref. Co. 36 L.R.A.(N.S.) 295.

Messers. Courtenay Crocker and Nathan Matthews argued the cause and filed a brief for plaintiff in error:

The question is still an open one in this court.

Sturges v. Carter, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014; Kidd v. Alabama, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401; Wright v. Louisville & N. R. Co. 195 U. S. 219, 49 L. ed. 167, 25 Sup. Ct. Rep. 16; Darnell v. Indiana, 226 U. S. 390, 57 L. ed. 267, 33 Sup. Ct. Rep. 120.

No question can be considered or decided in this court which was not specifically called to the attention of, and decided by, the lower court.

First Nat. Bank v. Kentucky, 9 Wall. 353, 363, 19 L. ed. 701, 704; Edwards v. Elliott, 21 Wall. 532, 557, 22 L. ed. 487, 492; Wilson v. McNamee, 102 U. S. 572, 574, 26 L. ed. 234, 235; Morrison v. Watson, 154 U. S. 111, 115, 38 L. ed. 927, 929, 14 Sup. Ct. Rep. 995; Erie R. Co. v. Purdy, 185 U. S. 148, 151, 46 L. ed. 847, 849, 22 Sup. Ct. Rep. 605; Jacobi v. Alabama, 187 U. S. 133, 136, 47 L. ed. 106, 103, 23 Sup. Ct. Rep. 48; Layton v. Missouri, 187 U. S. 356, 361, 47 L. ed. 214, 216, 23 Sup. Ct. Rep. 137; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 308, 47 L. ed. 480, 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Chicago, I. & L. R. Co. v. McGuire, 196 U. S. 128, 49 L. ed. 413, 25 Sup. Ct. Rep. 200; Hulbert v. Chicago, 202 U. S. 275, 281, 50 L. ed. 1026, 1028, 26 Sup. Ct. Rep. 617; Cox v. Texas, 202 U. S. 446, 451, 452, 50 L. ed. 1099, 1101, 1102, 26 Sup. Ct. Rep. 671; Osborne v. Clark, 204 U. S. 565, 568, 569, 51 L. ed. 619, 625, 626, 27 Sup. Ct. Rep. 319; Kansas

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City Star Co. v. Julian, 215 U. S. 589, 54 L. ed. 340, 30 Sup. Ct. Rep. 406.

It makes no difference whether the case comes up from a state court by writ of error, or from a lower Federal court. In either case the rule is the same.

Robinson v. Belt, 187 U. S. 41, 47 L. ed. 65, 23 Sup. Ct. Rep. 16; Insurance Co. v. Mordecai, 22 How. 111, 117, 16 L. ed. 329, 331; Wheeler v. Sedgwick, 94 U. S. 1, 3, 24 L. ed. 31, 32; Clark v. Fredericks (Davis v. Fredericks) 105 U. S. 4, 26 L. ed. 938; Jones v. United States, 103 C. C. A. 142, 179 Fed. 584.

A state law which violates directly, or by necessary operation, some specific provision of the Federal Constitution, is void.

Almy v. California, 24 How. 169, 16 L. ed. 644; Fairbank v. United States, 181 U. S. 283, 294, 45 L. ed. 862, 867, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; New York ex rel. Bank of Commerce v. Tax & A. Comrs. 2 Black, 620, 17 L. ed. 451; Bank Tax Case (New York ex rel. Bank of Commonwealth v. Tax & A. Comrs.) 2 Wall. 200, 17 L. ed. 793; Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 667, 668, 43 L. ed. 850, 852, 19 Sup. Ct. Rep. 537.

Congress has expressly provided in U. S. Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502, that shares of stock in national banks, wherever held, shall be taxable in the state, and only in the state, where the bank is located; and this court has sustained the validity of that provision, thus recognizing the propriety of taxing shares of stock in the state where the company is organized and does business.

New York v. Tax & A. Comrs. 4 Wall. 244, 18 L. ed. 344; First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 668, 43 L. ed. 850, 852, 19 Sup. Ct. Rep. 537; Third Nat. Bank v. Stone, 174 U. S. 432, 43 L. ed. 1035, 19 Sup. Ct. Rep. 759; Louisville v. Third Nat. Bank, 174 U. S. 435, 43 L. ed. 1037, 19 Sup. Ct. Rep. 874; Louisville v. Citizens' Nat. Bank, 174 U. S. 436, 43 L. ed. 1037, 19 Sup. Ct. Rep. 874; First Nat. Bank v. Louisville, 174 U. S. 438, 43 L. ed. 1038, 19 Sup. Ct. Rep. 876; Louisville v. Bank of Louisville, 174 U. S. 439, 43 L. ed. 1039, 19 Sup. Ct. Rep. 753; Cleveland Trust Co. v. Lander, 184 U. S. 111, 46 L. ed. 456, 22 Sup. Ct. Rep. 394; Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 573, 18 L. ed. 229; Bradley v. Illinois, 4 Wall. 459, 18 L. ed. 433.

Independently of the 14th Amendment, a state law which attempts to tax property situated in another state is void on general principles, as that the state can have no jurisdiction over such property.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Hays v. Pacific Mail S. S. Co. 17 How. 596, 15 L. ed. 254; St. Louis v. Wiggins Ferry Co. 11 Wall. 423, 429, 430, 20 L. ed. 192, 194; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; Morgan v. Parham, 16 Wall. 471, 476, 478, 21 L. ed. 303–305; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 396, 398, 47 L. ed. 513, 518, 519, 23 Sup. Ct. Rep. 463; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 204, 50 L. ed. 150, 153, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493.

Since the adoption of the 14th Amendment it is well established that for a state to tax property beyond its jurisdiction is to violate the due process clause of that Amendment by depriving the owner of his property without due process of law.

Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 398, 47 L. ed. 513, 519, 23 Sup. Ct. Rep. 463; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 358, 49 L. ed. 1077, 1083, 25 Sup. Ct. Rep. 669; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 209, 210, 50 L. ed. 150, 155, 156, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 38, 54 L. ed. 355, 370, 30 Sup. Ct. Rep. 190; Southern P. Co. v. Kentucky, 222 U. S. 63, 74, 56 L. ed. 96, 100, 32 Sup. Ct. Rep. 13.

Taxes cannot be levied on land belonging to a resident, but situated in another state.

Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 398, 47 L. ed. 513, 519, 23 Sup. Ct. Rep. 463; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 360, 49 L. ed. 1077, 1084, 25 Sup. Ct. Rep. 669; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 204, 50 L. ed. 150, 153, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Keeney v. New York, 222 U. S. 525, 537, 56 L. ed. 299, 305, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105.

Taxes cannot be levied on tangible personal property belonging to a resident, but which has acquired a permanent location or situs in another state.

Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Old Dominion S. S. Co. v. Virginia, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686, 3 Ann. Cas. 1100; Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, 44 L. ed. 708, 20 Sup. Ct. Rep. 631; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493.

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Such property may be taxed in the state where it is, although belonging to a nonresident.

Gromer v. Standard Dredging Co. 224 U. S. 362, 56 L. ed. 801, 32 Sup. Ct. Rep. 499; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266; Savings & L. Soc. v. Multnomah County, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; Carstairs v. Cochran, 193 U. S. 10, 48 L. ed. 596, 24 Sup. Ct. Rep. 318; Thompson v. Kentucky, 209 U. S. 340, 52 L. ed. 822, 28 Sup. Ct. Rep. 533; Hannis Distilling Co. v. Baltimore, 216 U. S. 285, 54 L. ed. 482, 30 Sup. Ct. Rep. 326; American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 22, 23, 35 L. ed. 613, 616, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Buck v. Beach, 206 U. S. 392, 400, 401, 51 L. ed. 1106, 1111, 1112, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; Marye v. Baltimore & O. R. Co. 127 U. S. 117, 123, 32 L. ed. 94, 96, 8 Sup. Ct. Rep. 1037; Southern P. Co. v. Kentucky, 222 U. S. 63, 74, 56 L. ed. 96, 100, 32 Sup. Ct. Rep. 13.

Taxes cannot be levied on corporate franchises belonging to a resident, but granted by the United States (California v. Central P. R. Co. 127 U. S. 1, 40, 41, 32 L. ed. 150, 157, 158, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073), or by another state (Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; Delaware, L. & W. R. Co. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Buck v. Beach, 206 U. S. 392, 401, 51 L. ed. 1106, 1111, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732).

State taxes upon the property of a resident have been held not to violate the due-process clause when the property consists:

(a) Of tangible personal property which is not permanently located or used in other states. So held as to vessels not permanently operated in other states (Southern P. Co. v. Kentucky, 222 U. S. 63, 68, 69, 56 L. ed. 96, 98, 99, 32 Sup. Ct. Rep. 13), and railroad cars not permanently employed in other states (New York ex rel. New York C. & H. R. R. Co. v. Miller, 202 U. S. 584, 596, 597, 50 L. ed. 1155, 1159, 1160, 26 Sup. Ct. Rep. 714); or —

(b) Of debts due from residents of other states, whether secured by mortgage on property in another state (Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558) or not (Bonaparte v. Appeal Tax Ct. 104 U. S. 592, 26 L. ed. 845).

The rule *mobilia sequuntur personam* is a legal fiction; it must always give way in matters of taxation to the facts of the case; and it does not authorize the taxation at the domicil of the owner of property which, whether tangible or intangible, is actually located and protected in some other state.

Green v. Van Buskirk, 7 Wall. 139, 150, 19 L. ed. 109, 113; St. Louis v. Wiggins Ferry Co. 11 Wall. 423, 430, 20 L. ed. 192, 194; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 22, 35 L. ed. 613, 616, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 224, 41 L. ed. 965, 978, 17 Sup. Ct. Rep. 604; Eidman v. Martinez, 184 U. S. 578, 581, 582, 46 L. ed. 697, 700, 701, 22 Sup. Ct. Rep. 515; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 208, 50 L. ed. 150, 155, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Buck v. Beach, 206 U. S. 392, 400, 51 L. ed. 1106, 1111, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 354, 55 L. ed. 762, 767, 31 Sup. Ct. Rep. 550.

Some forms of indebtedness may be subject to taxation in two states.

Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; Savings & L. Soc. v. Multnomah County, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; State Assessors v. Comptoir National D'Escompte, 191 U. S. 395, 48 L. ed. 234, 24 Sup. Ct. Rep. 109; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 55 L. ed. 762, 31 Sup. Ct. Rep. 550.

A state cannot reach for taxation property which itself is not subject to taxation by means of a tax upon the documents which represent the property.

Almy v. California, 24 How. 169, 16 L. ed. 644; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; Selliger v. Kentucky, 213 U. S. 200, 53 L. ed. 761, 29 Sup. Ct. Rep. 449; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 402, 51 L. ed. 853, 856, 27 Sup. Ct. Rep. 499.

If the property cannot be taxed specifically because outside the state, it cannot be

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reached indirectly, as by a general tax on the capital stock or property of a domestic corporation which would include the property outside the state.

Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 204, 50 L. ed. 150, 153, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493.

Some of the decisions which may be relied on by defendant in error relate to points which have no bearing upon the case at bar.

(a) The inheritance tax decisions.

Buck v. Beach, 206 U. S. 392, 408, 51 L. ed. 1106, 1114, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; Keeney v. New York, 222 U. S. 525, 56 L. ed. 299, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105.

(b) The taxation of domestic corporations.

State R. Tax Cases, 92 U. S. 575, 23 L. ed. 663; Corry v. Baltimore, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297.

(c) The difference between the property, capital, or stock of a corporation and the shares of stock in the company held by individuals has been the frequent subject of comment by this court. That these differences are many and great may be conceded.

First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; Delaware R. Tax, 18 Wall. 206, 21 L. ed. 888; Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 503, 22 L. ed. 189, 195; Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558; Dewing v. Perdicaries, 96 U. S. 193, 24 L. ed. 654; Gibbons v. Mahon, 136 U. S. 558, 34 L. ed. 527, 10 Sup. Ct. Rep. 1057; Jellenik v. Huron Copper Min. Co. 177 U. S. 1, 44 L. ed. 647, 20 Sup. Ct. Rep. 559.

The reason why property physically situated in one state is not taxable elsewhere is said to be that taxation and protection are correlative incidents, and that if protection can be furnished only in the state where the property is situated, taxation must be confined to that state.

Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 501, 22 L. ed. 189, 194; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 204, 50 L. ed. 150, 153, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 356, 55 L. ed. 762, 768, 31 Sup. Ct. Rep. 550.

Mr. H. L. Boutwell argued the cause and filed a brief for defendant in error:

This form of taxation of shares of the stock of foreign corporations owned by individuals has existed under the laws of Massachusetts for more than seventy years. We find substantially the same provision derived from an earlier enactment, in Revised Statutes, chap. 7, § 3, and it has remained in force ever since. Its validity and constitutionality have been sustained by repeated decisions of the courts of Massachusetts, covering a period of many years.

Great Barrington v. Berkshire, 16 Pick. 572; Dwight v. Boston, 12 Allen, 316, 90 Am. Dec. 149; Frothingham v. Shaw, 175 Mass. 61, 78 Am. St. Rep. 475, 55 N. E. 623; Hawley v. Malden, 204 Mass. 138, 90 N. E. 415.

A similar rule has been laid down in the decisions of the courts of many other states.

State v. Kidd, 125 Ala. 413, 28 So. 480; Greenleaf v. Morgan County, 184 Ill. 226, 75 Am. St. Rep. 168, 56 N. E. 295; Seward v. Rising Sun, 79 Ind. 351; Griffith v. Watson, 19 Kan. 23; Appeal Tax Ct. v. Gill, 50 Md. 377; Bacon v. State Tax Comrs. 126 Mich. 22, 60 L.R.A. 321, 86 Am. St. Rep. 524, 85 N. W. 307; Ogden v. St. Joseph, 90 Mo. 522, 3 S. W. 25; State, Fish, Prosecutor, v. Branin, 23 N. J. L. 484; State, Vail Prosecutor v. Bentley, 23 N. J. L. 532; Worth v. Ashe County, 82 N. C. 420, 33 Am. Rep. 692; Worthington v. Sebastian, 25 Ohio St. 1; Bradley v. Bauder, 36 Ohio St. 28, 38 Am. Rep. 547; Lander v. Burke, 65 Ohio St. 532, 63 N. E. 69; McKeen v. Northampton County, 49 Pa. 519, 88 Am. Dec. 515; Dyer v. Osborne, 11 R. I. 321, 23 Am. Rep. 460; Union Bank v. State, 9 Yerg. 490; Nashville v. Thomas, 5 Coldw. 600; Whitesell v. Northampton County, 49 Pa. 526.

The Supreme Court of the United States has laid down the same rule, the constitutionality of the tax law, however, not being put in issue.

Sturges v. Carter, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014; Kidd v. Alabama, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401; Wright v. Louisville & N. R. Co. 195 U. S. 219, 49 L. ed. 167, 25 Sup. Ct. Rep. 24; Darnell v. Indiana, 226 U. S. 390, 57 L. ed. 267, 33 Sup. Ct. Rep. 120.

The plaintiff's contention implies a broader rule as to the taxation of tangible property than the decisions of this court warrant. The plaintiff apparently deduces his rule from the decisions of this court in cases like Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; but the decision in this case has been explained and the correct rule stated by Mr. Justice Lurton in the case of Southern P. Co. v. Kentucky, 222 U. S. 63, 56 L. ed. 96, 32 Sup. Ct. Rep. 13.

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As a general rule, in the absence of a situs elsewhere, the domicil of the owner is the place where personalty is taxable.

Gromer v. Standard Dredging Co. 224 U. S. 362, 376, 56 L. ed. 801, 807, 32 Sup. Ct. Rep. 499; Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. ed. 189.

In order to obtain a taxable situs in a jurisdiction other than that of the domicil of its owner tangible personal property must have become "commingled" or "intermingled" with the property of the taxing authority, or "permanently located there" or "incorporated in" the local property of such other jurisdiction.

Old Dominion S. S. Co. v. Virginia, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686, 3 Ann. Cas. 1100; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Southern P. Co. v. Kentucky, 222 U. S. 63, 56 L. ed. 96, 32 Sup. Ct. Rep. 13.

There seems to be no distinction between tangible and intangible personal property; both follow the domicil of the owner, except that in some cases tangible personal property has obtained a permanent situs in some other state by reason of its having become "commingled" or "intermingled" with the property of such other state.

Southern P. Co. v. Kentucky, 222 U. S. 63, 68, 69, 56 L. ed. 96, 98, 99, 32 Sup. Ct. Rep. 13.

The property taxed in the case at bar is shares of the capital stock of foreign corporations.

New Orleans v. Houston, 119 U. S. 265, 277, 30 L. ed. 411, 415, 7 Sup. Ct. Rep. 198; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 205, 50 L. ed. 150, 154, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Kidd v. Alabama, 188 U. S. 730, 731, 47 L. ed. 669, 672, 23 Sup. Ct. Rep. 401; Tennessee v. Whitworth, 117 U. S. 129, 136, 29 L. ed. 830, 832, 6 Sup. Ct. Rep. 645; Sturges v. Carter, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014; Dyer v. Osborne, 11 R. I. 321, 23 Am. Rep. 460; Bradley v. Bauder, 36 Ohio St. 35, 38 Am. Rep. 547.

Mr. Justice Hughes delivered the opinion of the court:

The plaintiff in error, a resident of the city of Malden, brought this action to recover the amount of certain taxes which he had paid under protest. The taxes were assessed upon shares which he held in foreign corporations most of which did no business and had no property within the state of Massachusetts. It was alleged that the levy and collection were in violation of the due process and equal protection clauses of the 14th Amendment. Demurrer to the declaration was sustained by the superior court, and the case was reported to the supreme judicial court of the commonwealth, which directed judgment for the defendant. 204 Mass. 138, 90 N. E. 415.

It is conceded that the objection that the statute authorizing the tax (Rev. Laws [Mass.] chap. 12, §§ 2, 4 23) denies to the plaintiff in error the equal protection of the [9] laws is not well taken; but it is contended that the shares were not within the jurisdiction of the state, and hence that the enforcement of the tax constitutes an unconstitutional deprivation of property.

The power thus challenged, as the state court points out, has been continuously exercised by the state of Massachusetts for more than three quarters of a century. Substantially the same statutory provision, derived from an earlier enactment, is found in Rev. Stat. (Mass.) chap. 7, § 4, and its constitutionality has been sustained by repeated state decisions. Great Barrington v. Berkshire County, 16 Pick. 572; Dwight v. Boston, 12 Allen, 316, 90 Am. Dec. 149; Frothingham v. Shaw, 175 Mass. 59, 61, 78 Am. St. Rep. 475, 55 N. E. 623. And other states through a long period of years have asserted a similar authority. Union Bank v. State, 9 Yerg. 490; McKeen v. Northampton County, 49 Pa. 519, 88 Am. Dec. 515; Whitesell v. Northampton County, 49 Pa. 526; State, Fish, Prosecutor, v. Branin, 23 N. J. L. 484; State, Vail, Prosecutor, v. Bentley, 23 N. J. L. 532; Worthington v. Sebastian, 25 Ohio St. 1; Bradley v. Bauder, 36 Ohio St. 28, 38 Am. Rep. 547; Dyer v. Osborne, 11 R. I. 321, 23 Am. Rep. 460; Seward v. Rising Sun, 79 Ind. 351; Ogden v. St. Joseph, 90 Mo. 522, 3 S. W. 25; Worth v. Ashe County, 90 N. C. 409; Jennings v. Com. 98 Va. 80, 34 S. E. 981; Appeal Tax Ct. v. Gill, 50 Md. 377; State v. Nelson, 107 Minn. 319, 119 N. W. 1058; Bacon v. State Tax Comrs. 126 Mich. 22, 60 L.R.A. 321, 86 Am. St. Rep. 524, 85 N. W. 307; State v. Kidd, 125 Ala. 413, 28 So. 480; Com. v. Lovell, 125 Ky. 491, 101 S. W. 970; Stanford v. San Francisco, 131 Cal. 34, 63 Pac. 145; Judy v. Beckwith, 137 Iowa, 24, 15 L.R.A.(N.S.) 142, 114 N. W. 565, 15 Ann. Cas. 890; Greenleaf v. Morgan County, 184 Ill. 226, 75 Am. St. Rep. 168, 56 N. E. 295. It is well settled that the property of the shareholders in their respective shares is distinct from the corporate property, franchises and capital stock, and may be separately taxed (Van Allen v. Assessors [Churchill v. Utica] 3 Wall. 573, 584, 18 L. ed. 229, 234; Farrington v. Tennessee, 95 U. S. 679, 687, 24 L. ed. 558, 560;

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Tennessee v. Whitworth, 117 U. S. 129, 136, 137, 29 L. ed. 830, 832, 6 Sup. Ct. Rep. 645; New Orleans v. Houston, 119 U. S. 265, 277, 30 L. ed. 411, 415, 7 Sup. Ct. Rep. 198); and the rulings in the state cases which we have [10] cited proceed upon the view that shares are personal property, and, having no situs elsewhere, are taxable by the state of the owner's domicil, whether the corporations be foreign or domestic.

It is said that the question of the constitutional validity of such taxation has not hitherto been raised definitely in this court and has not been directly passed upon. There is no doubt, however, that the existence of the state authority has invariably been assumed. In Sturges v. Carter, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014, the action was brought to recover taxes imposed under the law of Ohio upon shares of stock owned by a resident of Ohio in the Western Union Telegraph Company, a New York corporation. The right of the state to tax the shares was not questioned, and as it was found that a statutory exemption which was relied upon in defense did not apply, the recovery of the tax was sustained. Again, in Kidd v. Alabama, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401, it was not disputed that the state was entitled to tax shares owned by its citizens in foreign corporations. The argument was that the statute in that case created an unconstitutional discrimination, and this point being found to be without merit, the tax was upheld. In Wright v. Louisville & N. R. Co. 195 U. S. 219, 49 L. ed. 167, 25 Sup. Ct. Rep. 16, the question was whether shares of stock in a railroad corporation of another state which were owned by a Georgia corporation, were taxable under the Constitution and laws of Georgia. The state's power to tax the shares was not denied, so far as the Constitution of the United States was concerned, but it was contended that this power had not been exercised. The Constitution of Georgia provided that all taxation should "be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax," and should be levied and collected under general laws. The general tax act had authorized a tax on all of the taxable property of the state. It was clear that the [11] state had directed shares in foreign corporations to be taxed, provided these could be considered to be "property subject to be taxed within the territorial limits" of the taxing authority. And such shares, when held by a resident, being deemed to fall within this description, it was decided that the state officer was entitled to collect the tax. "Putting the case at the lowest," said the court, "the above-cited section of the Constitution was adopted in the interest of the state as a tax collector, and authorizes, if it does not require, a tax on the stock." So, also, in Darnell v. Indiana, 226 U. S. 390, 57 L. ed. 267, 33 Sup. Ct. Rep. 120, the authority of the state to tax the shares of its citizens in foreign corporations was recognized, the tax being sustained against objections urged under the commerce clause, art. I., § 8, and the equal protection clause of the 14th Amendment.

To support the contention that this familiar state action, hitherto assumed to be valid, is fundamentally violative of the Federal Constitution, the plaintiff in error invokes the doctrine that a state has no right to tax the property of its citizens when it is permanently located in another jurisdiction. Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep 669; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493. But these decisions did not involve the question of the taxation of intangible personal property (Union Refrigerator Transit Co. v. Kentucky, supra, p. 211); nor do they apply to tangible personal property which, although physically outside the state of the owner's domicil, has not acquired an actual situs elsewhere. Southern P. Co. v. Kentucky, 222 U. S. 63, 68, 56 L. ed. 96, 98, 32 Sup. Ct. Rep. 13. When we are dealing with the intangible interest of the shareholder, there is manifestly no question of physical situs, so far as this distinct property right is concerned, and the jurisdiction to tax it is not dependent upon the location of the lands and chattels of the corporation.

[12] The argument, necessarily, is that shares are to be deemed to be taxable solely in the state of incorporation. It is urged that these rights rest in franchise, and that the principle of the decision in Louisville & J. Ferry Co. v. Kentucky, supra, holding that a ferry franchise granted by Indiana to a Kentucky corporation was not taxable in Kentucky, is applicable to shares of stock. But that case went upon the ground that the franchise was an incorporeal hereditament, and hence had its legal situs in Indiana, id. p. 398. Shares fall within a different category. While the shareholder's rights are those of a member of the corporation entitled to have the corporate enterprise conducted in accordance with its charter, they are still in the nature of contract rights or *choses in action*. Morawetz,

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Priv. Corp. § 225. As such, in the absence of legislation prescribing a different rule, they are appropriately related to the person of the owner, and, being held by him at his domicil, constitute property with respect to which he is under obligation to contribute to the support of the government whose protection he enjoys. Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; Bonaparte v. Appeal Tax Ct. 104 U. S. 592, 26 L. ed. 845; Covington v. First Nat. Bank, 198 U. S. 100, 111, 112. 49 L. ed. 963, 968, 969, 25 Sup. Ct. Rep. 562; Southern P. Co. v. Kentucky, supra; Cooley, Taxn. 3d ed. 26.

Undoubtedly, the state in which a corporation is organized may provide, in creating it, for the taxation in that state of all its shares, whether owned by residents or nonresidents. Corry v. Baltimore, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297. This is by virtue of the authority of the creating state to determine the basis of organization and the liabilities of shareholders. Id, pp. 476, 477; Hannis Distilling Co. v. Baltimore, 216 U. S. 285, 293, 294, 54 L. ed. 482, 485, 486, 30 Sup. Ct. Rep. 326. So, by reason of its dominant power to provide for the organization and conduct of national banks, Congress has fixed the places at which alone shares in those institutions may be taxed. Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502. Whether, in the case of corporations organized [13] under state laws, a provision by the state of incorporation, fixing the situs of shares for the purpose of taxation, by whomever owned, would exclude the taxation of the shares by other states in which their owners reside, is a question which does not arise upon this record and need not be decided. No such provision is here involved, and the present case must be determined by the application of the established principle which has been stated.

The real ground of complaint in this class of cases is not that the shares are taxed in one place rather than in another, but that they are taxed at all, when presumably the property and franchises of the corporation which give to the shares their value are also taxed. As to this we may repeat what was said in Kidd v. Alabama, supra: "No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far."

The judgment is affirmed.

Affirmed.

[14] WILLIAM N. BARRETT, as President of the Adams Express Company, etc., Appt.,

v.

CITY OF NEW YORK et al. (No. 83.)

CITY OF NEW YORK et al., Appts.,

v.

WILLIAM N. BARRETT, as President of the Adams Express Company, etc. (No. 84.)

(See S. C. Reporter's ed. 14-35.)

Commerce — municipal license of express companies — application to interstate business.

1. A municipal ordinance requiring a local license to be obtained as a condition precedent to conducting an express business within the municipality should be construed, in the absence of a controlling decision of the courts of the state, as not applicable to the transaction by an express company of its interstate business, since, construed otherwise, the ordinance would be invalid as an unconstitutional regulation of commerce.

[For other cases, see Commerce, III. d, 10, in Digest Sup. Ct. 1908.]

Commerce — municipal license of express company — validity.

2. A municipality cannot require an express company to obtain a local license as a condition precedent to transacting within the city its interstate business, nor, so far as interstate business is concerned, can it exact an annual license fee from such company.

[For other cases, see Commerce, III. d, 10, in Digest Sup. Ct. 1908.]

Municipal corporations — regulation of express companies — effect of partial invalidity.

3. The requirement of a municipal ordinance that every owner of a public express must give a bond "for each and every vehicle licensed," to be conditioned "for the safe and prompt delivery of all baggage, packages," etc., intrusted to the owner or driver "of any such licensed express," must fall, as applied to the interstate business of an express company, with the invalid provisions of such ordinance, under which the obtaining of a local license may be made a condition precedent to the transaction

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NOTE.—On state licenses or taxes generally as affecting interstate commerce—see notes to Rothermel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburgh & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

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within the city by the express company of its interstate business.

[For other cases, see Municipal Corporations, II. b; Statutes, I. d, 4, in Digest Sup. Ct. 1908.]

Commerce — conflicting state and Federal regulations — express business.

4. Congress has so far occupied, by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), the field of regulation with regard to the obligations to be assumed by interstate express carriers, as to invalidate, as applied to the interstate business of an express company, the provisions of a municipal ordinance requiring every owner of a public express to give a bond "for each and every vehicle licensed," to be conditioned "for the safe and prompt delivery of all baggage, packages," etc., intrusted to the owner or driver "of any such licensed express."

[For other cases, see Commerce, I. c; III. in Digest Sup. Ct. 1908.]

Municipal corporations — regulation of express companies — effect of partial invalidity.

5. The invalidity of the license scheme of a municipal ordinance as applied to the interstate business of an express company doing business in New York city renders invalid also, as applied to the wagons and drivers employed in such commerce, the further provisions of such ordinance for the licensing of drivers of a "licensed hack or express," upon the indorsement of two reputable residents of the city, and for the marking of the vehicles with the designation of the business and with the official license numbers, the exhibition of licenses upon demand, and the inspection of "licensed vehicles and places of business."

[For other cases, see Municipal Corporations, II. b; Statutes, I. d, 4, in Digest Sup. Ct. 1908.]

[Nos. 83 and 84.]

Argued December 3 and 4, 1913. Decided January 5, 1914.

CROSS APPEALS from the Circuit Court of the United States for the Southern District of New York to review a decree enjoining in part the enforcement of certain municipal ordinances as applied to the interstate business of an express company. Reversed and remanded for the entry of a decree in favor of complainant.

See same case below, on motion for preliminary injunction, 183 Fed. 793; on final hearing, 189 Fed. 268.

The facts are stated in the opinion.

Mr. William D. Guthrie argued the cause and filed a brief for William N. Barrett:

No state or municipality can require any party to take out a license or pay license fees or give bonds for the right or privilege of carrying on any business in interstate commerce. It matters not how specious the pretext may be.

Crutcher v. Kentucky, 141 U. S. 47, 58, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851; Brennan v. Titusville, 153 U. S. 289, 302, 38 L. ed. 719, 723, 14 Sup. Ct. Rep. 829; Fairbank v. United States, 181 U. S. 283, 306, 45 L. ed. 862, 872, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; Stockard v. Morgan, 185 U. S. 27, 33, 46 L. ed. 785, 792, 22 Sup. Ct. Rep. 576; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 162, 47 L. ed. 995, 999, 23 Sup. Ct. Rep. 817; St. Clair County v. Interstate Sand & Car Transfer Co. 192 U. S. 454, 468, 48 L. ed. 518, 524, 24 Sup. Ct. Rep. 300; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 21, 54 L. ed. 355, 363, 30 Sup. Ct. Rep. 190; International Text-Book Co. v. Pigg. 217 U. S. 91, 108, 54 L. ed. 678, 686, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Buck Stove & Range Co. v. Vickers, 226 U. S. 205, 215, 57 L. ed. 189, 192, 33 Sup. Ct. Rep. 41; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 401, 57 L. ed. 1511, 1542, 33 Sup. Ct. Rep. 729; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 218, 41 L. ed. 965, 976, 17 Sup. Ct. Rep. 604.

The local transportation of interstate packages is interstate commerce, and so within the exclusive jurisdiction of the Federal government.

Railroad Commission v. Texas & P. R. Co. 229 U. S. 336, 341, 57 L. ed. 1215, 1218, 33 Sup. Ct. Rep. 837; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 161, 57 L. ed. 1129, 1134, 33 Sup. Ct. Rep. 651; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229; United States v. Union Stockyard & Transit Co. 226 U. S. 286, 57 L. ed. 226, 33 Sup. Ct. Rep. 83; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 526, 55 L. ed. 310, 320, 31 Sup. Ct. Rep. 279; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Heyman v. Southern R. Co. 203 U. S. 270, 274, 51 L. ed. 178, 180, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130; Jewel Tea Co. v. Lee's Summit, 189 Fed. 281, 198 Fed. 532.

The interstate commerce clause of the Constitution guarantees the right to ship merchandise from one state into another, and covers and protects the shipment from the time it commences its transit, by whatever means, local or interstate, until the termination of the shipment by delivery at the place of consignment.

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The Daniel Ball, 10 Wall. 557, 565, 19 L. ed. 999, 1002; American Exp. Co. v. Iowa, 196 U. S. 133, 142, 49 L. ed. 417, 421, 25 Sup. Ct. Rep. 182; Adams Exp. Co. v. Iowa, 196 U. S. 147, 49 L. ed. 424, 25 Sup. Ct. Rep. 185; McNeill v. Southern R. Co. 202 U. S. 543, 559, 50 L. ed. 1142, 1147, 26 Sup. Ct. Rep. 722; Adams Exp. Co. v. Kentucky, 206 U. S. 129, 51 L. ed. 987, 27 Sup. Ct. Rep. 606; American Exp. Co. v. Iowa, 196 U. S. 133, 142, 49 L. ed. 417, 421, 25 Sup. Ct. Rep. 182.

It is true that it was once held by this court in Osborne v. Mobile, 16 Wall. 479, 21 L. ed. 470, that an ordinance requiring interstate express companies to be licensed before they could carry on their business in the city of Mobile was valid; but this ruling was recognized to be erroneous in the subsequent case of Leloup v. Mobile, 127 U. S. 640, 647, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380, where the court, speaking of the earlier case, said: "In view of the course of decisions which have been made since that time [*i. e.*, since 1872], it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several states."

The doctrine of the Crutcher Case has repeatedly received the unqualified approval of this court upon every point decided in it.

Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 19, 54 L. ed. 355, 362, 30 Sup. Ct. Rep. 190; International Text-Book Co. v. Pigg, 217 U. S. 91, 108, 54 L. ed. 678, 686, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Buck Stove & Range Co. v. Vickers, 226 U. S. 205, 215, 57 L. ed. 189, 192, 33 Sup. Ct. Rep. 41.

It must be clear that if the interstate express companies were within the scope and operation of that statute, every driver and every wagon employed in collecting and delivering intrastate shipments would clearly be engaged in interstate commerce, even though part of the service related to intrastate shipments.

Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651.

Within the principle of these cases, any railroad employee employed in collecting and delivering interstate shipments in carts or wagons would be engaged in interstate commerce.

Illinois C. R. Co. v. Porter, 207 Fed. 311; Jewel Tea Co. v. Lee's Summit, 189 Fed. 280, 198 Fed. 532; United States v. Colorado & N. W. R. Co. 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 323, 13 Ann. Cas. 893.

The plain intent and purpose of the ordinances in question were to regulate the business of express carriers.

Detroit v. C. H. Little Co. 163 Mich. 448, 128 N. W. 767.

General usage, indeed, long continued and hitherto unquestioned, has great force; and the practical construction of the law by so many public officers, though not given upon adverse litigation, has still much of the weight of judicial decision.

Easton v. Pickersgill, 55 N. Y. 315; Tiffany v. Jamestown, 179 N. Y. 459, 72 N. E. 512; New York v. New York City R. Co. 193 N. Y. 543, 86 N. E. 565; Grimmer v. Tenement House Dept. 205 N. Y. 549, 98 N. E. 332; People ex rel. Werner v. Prendergast, 206 N. Y. 411, 99 N. E. 1047; Fairbank v. United States, 181 U. S. 283, 307, 45 L. ed. 862, 872, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; Studebaker v. Perry, 184 U. S. 258, 268, 46 L. ed. 528, 533, 22 Sup. Ct. Rep. 463; United States v. Sweet, 189 U. S. 471, 473, 47 L. ed. 907, 908, 23 Sup. Ct. Rep. 638; McMichael v. Murphy, 197 U. S. 304, 312, 49 L. ed. 766, 769, 25 Sup. Ct. Rep. 460; Komada v. United States, 215 U. S. 392, 396, 54 L. ed. 249, 252, 30 Sup. Ct. Rep. 136.

The re-enactment by Congress, without change, of a statute which had previously received long-continued executive construction, is an adoption by Congress of such construction.

United States v. Cerecedo Hermanosy Compañia, 209 U. S. 337, 339, 52 L. ed. 821, 822, 28 Sup. Ct. Rep. 532; Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization, 206 U. S. 474, 479, 51 L. ed. 1143, 1146, 27 Sup. Ct. Rep. 695; United States v. Falk, 204 U. S. 143, 152, 51 L. ed. 411, 414, 27 Sup. Ct. Rep. 191; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 401, 50 L. ed. 515, 525, 26 Sup. Ct. Rep. 272.

The same principle should apply to the adoption by a municipal legislature of the executive construction of an ordinance by repeatedly re-enacting it substantially in the form in which it was construed.

People ex rel. Outwater v. Green, 56 N. Y. 466; Pouch v. Prudential Ins. Co. 204 N. Y. 281, 288, 97 N. E. 731, Ann. Cas. 1913C, 1191.

The court cannot remodel or reconstruct the ordinance so as to make it read as if its operation were expressly limited to the wagons and drivers of the interstate carriers who are engaged in local business, and thus compel such carriers, at prohibitive expense and inconvenience, to separate the local from the interstate business.

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Williams v. Talladega, 226 U. S. 404, 419, 57 L. ed. 275, 281, 33 Sup. Ct. Rep. 116; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 529, 51 L. ed. 298, 304, 27 Sup. Ct. Rep. 153; Allen v. Pullman's Palace Car Co. 191 U. S. 171, 179, 48 L. ed. 134, 138, 24 Sup. Ct. Rep. 39.

The right of a state or a city to apply its police power to subjects under the exclusive control of Congress, but in regard to which congress has been silent, ceases as soon as Congress acts on the subject and manifests its purpose to call into effect its exclusive power.

Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140, 222 U. S. 444, 56 L. ed. 263, 32 Sup. Ct. Rep. 145; New York C. & H. R. R. Co. v. Hudson County, 227 U. S. 248, 57 L. ed. 499, 33 Sup. Ct. Rep. 269; St. Louis, I. M. & S. R. Co. v. Edwards, 227 U. S. 265, 57 L. ed. 506, 33 Sup. Ct. Rep. 262; Louisville & N. R. Co. v. Hughes, 201 Fed. 727.

Legislation of Congress in regard to matters of interstate commerce need not be inhibitive, but only to occupy the field, in order to supersede state statutes [or municipal ordinances] on the same subject.

Southern R. Co. v. Reid, 222 U. S. 444, 56 L. ed. 263, 32 Sup. Ct. Rep. 145.

An assertion of power by Congress over a subject within its domain must be treated as coterminous with its authority over the subject, and leaves no element of the subject to the control of the state.

Louisville & N. R. Co. v. Hughes, 201 Fed. 750; New York C. & H. R. R. Co. v. Hudson County, 227 U. S. 248, 57 L. ed. 499, 33 Sup. Ct. Rep. 269.

This court has repeatedly pointed out the limit of the rule of severability and the danger of attempting to enforce part of a statute or ordinance, and thus make by judicial construction an enactment which the particular legislative body did not make and might not be willing to make, if the matter were again before that body.

Trade-Mark Cases, 100 U. S. 82, 99, 25 L. ed. 550, 553; Allen v. Louisiana, 103 U. S. 80, 83, 26 L. ed. 318, 319; Poindexter v. Greenhow, 114 U. S. 270, 304, 29 L. ed. 185, 197, 5 Sup. Ct. Rep. 903, 962; California v. Central P. R. Co. 127 U. S. 1, 29, 32 L. ed. 150, 153, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Baldwin v. Franks, 120 U. S. 678, 685, 30 L. ed. 766, 768, 7 Sup. Ct. Rep. 656, 763; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 635, 39 L. ed. 1108, 1125, 15 Sup. Ct. Rep. 912; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 565, 46 L. ed. 679, 692, 22 Sup. Ct. Rep. 431; United States v. Ju Toy, 198 U. S. 253, 262, 49 L. ed. 1040, 1043, 25 Sup. Ct. Rep. 644; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 529, 51 L. ed. 298, 304, 27 Sup. Ct. Rep. 153; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 501, 52 L. ed. 297, 310, 28 Sup. Ct. Rep. 141; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 97, 54 L. ed. 106, 111, 30 Sup. Ct. Rep. 21; International Textbook Co. v. Pigg, 217 U. S. 91, 113, 54 L. ed. 678, 688, 27 L.R.A. (N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Meyer v. Wells, F. & Co. 223 U. S. 298, 302, 56 L. ed. 445, 448, 32 Sup. Ct. Rep. 218; Butts v. Merchants' & M. Transp. Co. 230 U. S. 126, 133, 57 L. ed. 1422, 1425, 33 Sup. Ct. Rep. 964.

Complainant has the right to relief in equity.

Osborn v. Bank of United States, 9 Wheat. 738, 838, 6 L. ed. 204, 228; Ex parte Young, 209 U. S. 123, 161, 52 L. ed. 714, 729, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; Western U. Teleg. Co. v. Andrews, 216 U. S. 165, 54 L. ed. 430, 30 Sup. Ct. Rep. 286; United States Exp. Co. v. Hemmingway, 39 Fed. 60; Postal Teleg. Cable Co. v. Mobile, 179 Fed. 960; Simpson-Crawford Co. v. Atlantic Highlands, 158 Fed. 372; Hutchinson v. Beckham, 55 C. C. A. 333, 118 Fed. 399; Jewel Tea Co. v. Lee's Summit, 198 Fed. 532; Southern Exp. Co. v. Ensley, 116 Fed. 761; Kansas City Gas Co. v. Kansas City, 198 Fed. 510; Southern R. Co. v. Asheville, 69 Fed. 360.

Mr. Terence Farley argued the cause, and, with Messrs. Archibald R. Watson and William E. C. Mayer, filed a brief for the city of New York:

The ordinances are a valid exercise of the police power of the municipality, which has been delegated to it by the state, and are reasonable and just.

Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Patapsco Guano Co. v. Board

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of Agriculture, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; Olsen v. Smith, 195 U. S. 332, 49 L. ed. 224, 25 Sup. Ct. Rep. 52; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10.

There is in them not a direct regulation of, but only an indirect beneficial assistance to, interstate commerce,—a right long since recognized as remaining with the state in the absence of direct legislation on the subject by Congress.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 402, 57 L. ed. 1511, 1542, 33 Sup. Ct. Rep. 729.

It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested.

Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506.

The license fees of $5 for each express wagon and of 50 cents for each driver thereof, therefore, are merely the necessary sums reasonably fixed to cover the ordinary and usual expenses of administration, supervision, and inspection; and, as such, are sums collected in aid of the exercise of the police powers, and are not an exercise of the taxing power. The distinction between licenses and fees in connection therewith, exacted in the exercise of the police power, and license taxes, levied under the taxing power, has long been recognized.

Western U. Teleg. Co. v. New Hope, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. Rep. 204; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817; Postal Teleg. Cable Co. v. New Hope, 192 U. S. 55, 48 L. ed. 338, 24 Sup. Ct. Rep. 204; Postal Teleg. Cable Co. v. Taylor, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208; Duluth Brewing & Malt. Co. v. Superior, 59 C. C. A. 481, 123 Fed. 358; Barrett v. New York, 183 Fed. 796.

The contention of possible inconvenience or burden upon the express company in case each state or city should enact its own regulations is fully met by the ruling of this court in New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418, wherein it was held that the remedy for such inconvenience lies in Congress alone, which could, by its own regulations, supersede those of the various states. So long as Congress remains inactive, the local regulations prevail, and inconveniences occasioned thereby cannot be deemed an unlawful burden upon interstate commerce.

Mr. Justice Hughes delivered the opinion of the court:

This suit was brought to restrain the enforcement against the Adams Express Company of a group of ordinances of the Board of Aldermen of the city of New York, upon the ground that, as applied to that company, these ordinances constitute an unconstitutional interference with interstate commerce and deny to it the equal protection of the laws. The ordinances are contained in [24] chapter 7 of the Code of Ordinances adopted in the year 1906, as amended (Cosby's ed. 1911), and the material sections, together with portions of the context, are set forth in the margin.†

The chapter relates to specified businesses in which no one is permitted to engage except under an annual license granted by the mayor and revocable by him. Among these is the business of "expressmen" (§§ 305, 306). [25] It is provided that no person is to be licensed "except a citizen of the United States, or one who has regularly declared intention to become a citizen" (§ 307). The license fee is "for each express wagon," $5, and "for each driver of any licensed vehicle," 50 cents, [26] with provision for renewal at one-half these rates (§ 308). Every person driving a licensed "express" is to be "licensed as such driver, and every application for such license shall be indorsed, in writing, by two reputable [27] residents of the city of New York, testifying to the competence of the applicant" (§ 315). Every vehicle "kept or used for the conveyance of baggage, packages, parcels, and other articles within or through the city of New [28] York for pay" is to be deemed a public express (§ 330). It is to bear a designation according with its official number (§ 331). Its owner is to give a bond to the state for "every vehicle licensed in a penal sum of $100, with sufficient surety, approved by the mayor or chief of the Bureau of Licenses, conditioned for the safe and prompt delivery" of all articles (§ 332). Provision is also made for the regular inspection of "all licensed vehicles and places of business"

†Chapter 7.

Title I.—Bureau of Licenses.

(§§ 300-304)

. . . . . .

Title II.—The Granting and Regulation of Licenses.

Article I.—Business Requiring a License.

§ 305. The following businesses must be duly licensed as herein provided; namely,

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(§ 374), the report of any change of residence to the Bureau of Licenses (*id.* the exhibition of licenses upon demand (§ 375), and the display of the prescribed letters and numbers (§ 376). Penalties are provided for the violation of these requirements, and any person carrying on any business regulated by the ordinance, without license, is guilty of a misdemeanor (§§ 307, 315, 379).

The Adams Express Company, an unincorporated association organized under the laws of New York, has been engaged in interstate commerce, as a common carrier of packages, since the year 1854. It transacts its business in many states; and in the city of New York it handles daily about 50,000 interstate shipments, employing 341 wagons and 68 automobiles. About one half of these wagons are stabled in Jersey City. Its shipments from New York City to the south and west are hauled to Jersey City and there loaded on express cars of the Pennsylvania Railroad; those destined to points east are taken to the terminal in New York city of the New York, New Haven, & Hartford Railroad; and there is also traffic for points on the New York, Ontario, & Western Railroad, and tributary thereto, which is carried to the ter-

public cartmen, truckmen, hackmen, cabmen, expressmen, drivers, junk dealers, dealers in secondhand articles, hawkers, peddlers, venders, ticket speculators, coal scalpers, common shows, shooting galleries, bowling alleys, billiard tables, dirt carts, exterior hoists and stands within stooplines and under the stairs of the elevated railroad stations. (Ord. app. May 22, 1899, § 1.)

§ 306. No person shall engage in or carry on any such business without a license therefor under a penalty of not less than $2 nor more than $25 for each offense, and for the purposes of this ordinance the term "person" shall include any human being or lawful association of such. (Id., § 2.)

Article II.—Licenses and License fees.

§ 307. All licenses shall be granted by authority of the mayor and issued by the Bureau of Licenses for a term of one year from the date thereof, unless sooner suspended or revoked by the mayor, and no person shall be licensed except a citizen of the United States, or one who has regularly declared intention to become a citizen.

The mayor shall have power to suspend or revoke any license or permit issued under the provisions of this ordinance. The mayor shall also have power to impose a fine of not more than $5 or less than $1 for any violation of the regulations herein provided, and to suspend the license pending payment of such fine, which, when collected, shall be paid into the sinking fund for the redemption of the city debt. (Id. § 3.)

§ 308. The annual license fees shall be as below enumerated:

. . . . . .

For each express wagon $5.00

. . . . . .

For each driver of any licensed vehicle ..... .50

(Id. § 4.)

§ 309. Any license, before its expiration, or within thirty days thereafter, may be renewed for another term, upon payment of one half the license fee above designated therefor.

All licenses in force when this ordinance takes effect for any business enumerated above may be renewed under the foregoing provisions regulating renewals of licenses hereunder issued. (Id. § 5.)

Article III.—Special Regulations and Rates.

I. Public Carts and Cartmen.

. . . . . .

II. Drivers of Licensed Vehicles.

§ 315. Every person driving a licensed hack, or express, shall be licensed as such driver, and every application for such license shall be indorsed, in writing, by two reputable residents of the city of New York, testifying to the competence of the applicant. No owner of a licensed hack or express shall employ an unlicensed driver under a penalty of $10 for each and every offense. (Amend. app. June 29, 1909.)

III. Public Hacks and Hackmen.

. . . . . .

IV. Public Hack Stands.

. . . . . .

IVa.—Public Porters.

. . . . . .

V. Expresses and Expressmen.

§ 330. Every vehicle of whatever construction kept or used for the conveyance of baggage, packages, parcels, and other articles within or through the city of New York for pay shall be deemed a public express, and the owner thereof shall be deemed a public expressman, and the term "expressman" shall be deemed to include any common carrier of baggage, packages, parcels, or other articles within or through the city of New York. (Ord. app. May 22, 1899, § 18.)

§ 331. Every public express shall show on each outside thereof the word "Express," or the letters "Exp.," together with the figures of its official number. (Id. § 19.)

§ 332. Every owner of a public express shall give a bond to the city of New York for each and every vehicle licensed in a penal sum of $100, with sufficient surety, approved by the mayor or chief of the Bureau of Licenses, conditioned for the safe and prompt

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minal of that road at Weehawken, New Jersey. Shipments received from out of the state for delivery in New York city are taken by the company's vehicles to the consignees either directly from these railroad terminals or through intermediate distributing offices. The company also [29] does a local business in the city of New York, and, in addition, receives packages for transportation between that city and such points within the state of New York as are on the line of the New York, New Haven, & Hartford Railroad. The interstate business, however, in the number of packages, comprises 98 per cent of the total business transacted in New York city, and, it being impracticable to effect a separation, the local and the other intrastate shipments are handled in the same vehicles, and by the same men, that are employed in connection with the interstate transportation. It was not until recently that the city sought to compel the company, in the transaction of this business, to comply with its license ordinances, although there have been ordinances requiring licenses for both express wagons and their drivers for over fifty years (Kent's ed. [1856]; Valentine's ed. [1859] pp. 374, 375; Shepard & Shafer's ed. [1881] §§ 380-386; Laird's ed. [1894]

delivery of all baggage, packages, parcels, and other articles or things intrusted to the owner or driver of any such licensed express. (Id. § 20.)

§ 333. The legal rates for regular deliveries, unless otherwise mutually agreed shall be as follows in the city:

Between points within any borough—

Not more than 5 miles apart, each piece	$0 40
Not more than 10 miles apart, each piece	55
Not more than 15 miles apart, each piece	75

Between points in different boroughs: One half the above rates in addition.

Special deliveries at rates to be mutually agreed upon. (Id. § 21.)

[The succeeding provisions of article III. (subdivisions VI.-XVI.) and article IV., relate to junk dealers, dealers in secondhand articles, peddlers, etc., being the remaining businesses described in § 305.]

Title 3.—General Regulations and Complaints.

§ 373. All license fees received by the Bureau of Licenses shall be regularly paid over to the city treasury, except the license fees received from hackmen, dealers in junk and secondhand articles, and for stands within stoop-lines, which shall be paid into the sinking funds for the redemption of the city debt. (Ord. app. May 22, 1899, § 56.)

§ 374. The mayor shall have power to appoint inspectors in the Bureau of Licenses to see that the provisions of this ordinance are fully and properly complied with; and all licensed vehicles and places of business shall be regularly inspected, and the result of such inspection shall be indorsed on the official license therefor, together with the date of inspection and the signature of the inspector, and all inspections shall be regularly reported to the Bureau of Licenses. (Id. § 57.)

§ 375. Every licensee shall have the official license and exhibit the same upon the demand of any person; and shall report within three days to the Bureau of Licenses any change of residence or place of business; and shall at all times perform the public duties of the business licensed when called upon so to do, if not actually unable. (Id. § 58.)

§ 376. All words, letters, and numbers hereinbefore prescribed for licensed vehicles shall be shown permanently and conspicuously on each outside thereof in colors contrasting strongly with background, and not less than 2 inches high, as directed and approved by the mayor or chief of the Bureau of Licenses, and shall be kept legible and plainly visible at all times during the term of the license; and shall be obliterated or erased upon change of ownership or expiration of the license; and no person shall have or use any vehicle with words, letters, or numbers thereon like those herein prescribed for licensed vehicles without being duly licensed therefor. (Id. § 59.) . . .

§ 378. The chief of the Bureau of Licenses, or deputy chief, shall have power to hear and determine complaints against licensees hereunder, and impose a fine of not more than $5 or less than $1 for any violation of the regulations herein provided, subject to the approval of the mayor, who shall have power to suspend the license pending payment of such fine. All such fines, when collected, shall be paid into the sinking fund for the redemption of the city debt. (Id. § 61.)

Title 4.—Violations.

§ 379. Except as hereinbefore otherwise provided, no person shall violate any of the regulations of this ordinance under a penalty of $10 for each offense. No such violation shall be continued under a penalty of $1 for each day so continued. Any person engaging in or carrying on any business herein regulated without a license therefor, or any person violating any of the regulations of this ordinance, shall be deemed guilty of a misdemeanor, and upon conviction thereof by any magistrate, either upon confession of the party or competent testimony, may be fined not more than $10 for each offense, and in default of payment of such fine may be committed to prison by such magistrate until the same be paid; but such imprisonment shall not exceed ten days. (Id. § 62, as amended June 29, 1909.)

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§§ 380–386; Percy & Collins's ed. §§ 497–504). The provisions here involved (except § 315) received their present form in 1899. (Ord. app. May 22, 1899, ante, p. 204, note.) It is conceded that the company has never been compelled to obtain a license for the conduct of its interstate express business, and that its wagons and drivers employed therein have never been licensed, except "that for several years last past about fourty licenses for wagons and drivers have been taken out." The evidence shows that in 1908 an arrangement was made, by way of compromise, that the forty licenses should be issued (twenty having been taken out the year before). The company agreed to this number, without prejudice, asserting that it was larger in proportion to the total number of wagons than the local business warranted, and also that the latter was merely incidental to the interstate business, and hence not subject to the license requirements. In the fall of 1910, however, at a time when the business of the company was interrupted [30] by a strike of its drivers, and it was endeavoring to replace those who had stopped work, the city, through its officers, undertook to enforce the ordinances with respect to all the wagons and drivers of the company, threatening to arrest unlicensed drivers of unlicensed wagons notwithstanding they might be engaged in interstate transportation, and to remove, if necessary, unlicensed wagons from the streets. This was the occasion of the present suit.

The circuit court held that §§ 305 and 306 were inoperative so far as they purported to require the complainant to obtain a local license for transacting its interstate business, and further, that the requirement of licenses as to express automobiles and chauffeurs had been superseded by a state statute (Laws of 1910, chap. 374). To this extent the city and its officers, who were codefendants, were enjoined. But with respect to the payment of license fees for express wagons and drivers, and the other regulations which we have briefly described, the court held that the enactments were valid and an injunction was refused. 189 Fed. 268. Both parties appeal, the company insisting that it was entitled to the entire relief sought, and the city, that no relief whatever should have been granted.

In restraining the enforcement of §§ 305 and 306, as stated, we think that the court was right. In the absence of a controlling state decision construing the group of ordinances in question and the statute authorizing the city to license businesses (Greater New York charter, § 51), we are not satisfied that they were designed, despite the broad definition contained in § 330, to apply to interstate business. The practical construction which they received before the present controversy arose is very persuasive to the contrary (New York City v. New York City R. Co. 193 N. Y. 543, 549, 86 N. E. 565; United States v. Cerecedo Hermanos y Compañia, 209 U. S. 338, 339, 52 L. ed. 821, 822, 28 Sup. Ct. Rep. 532.) But, if the above-mentioned sections are [31] to be deemed to require that a license must be obtained as a condition precedent to conducting the interstate business of an express company, we are of the opinion that, so construed, they would be clearly unconstitutional. It is insisted that, under the authority of the state, the ordinances were adopted in the exercise of the police power. But that does not justify the imposition of a direct burden upon interstate commerce. Undoubtedly, the exertion of the power essential to assure needed protection to the community may extend incidentally to the operations of a carrier in its interstate business, provided it does not subject that business to unreasonable demands and is not opposed to Federal legislation. Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465. It must, however, be confined to matters which are appropriately of local concern. It must proceed upon the recognition of the right secured by the Federal Constitution. Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege, and prohibit its exercise in the absence of a local license. Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851; Robbins v. Taxing Dist. 120 U. S. 489, 496, 30 L. ed. 694, 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Leloup v. Mobile, 127 U. S. 640, 645, 32 L. ed. 311, 313, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Stoutenburgh v. Hennick, 129 U. S. 141, 148, 32 L. ed. 637, 639, 9 Sup. Ct. Rep. 256; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; International Text Book Co. v. Pigg, 217 U. S. 91, 109, 54 L. ed. 678, 686, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; West v. Kansas Natural Gas Co. 221 U. S. 229, 260, 55 L. ed. 716, 728, 35 L.R.A. (N.S.) 1193, 31 Sup. Ct. Rep. 564; Buck's Stove & Range Co. v. Vickers, 226 U. S. 205, 215, 57 L. ed. 189, 192, 33 Sup. Ct. Rep. 41; Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep.

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294; Minnesota Rate Cases (Simpson v. Shepard), 230 U. S. 352, 401, 57 L. ed. 1511, 1542, 33 Sup. Ct. Rep. 729. As was said by this court in Crutcher v. Kentucky, supra, "a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

The requirements of §§ 305 and 306, with the schedule [32] of fees in § 308, cannot be regarded as imposing a fee, or tax, for the use of the streets; if they were such, the question would at once arise as to the validity of the discrimination involved in such an exaction. Nor can they be considered as a regulation in the interest of safety in street traffic. Other ordinances provide for the "rules of the road" to which wagons of express companies, as well as those of other persons, are subject (Code of Ordinances, chap. 12). The sections now under consideration constitute a regulation of the express "business." Article I. is entitled, "Business Requiring a License;" § 305, containing the enumeration, provides that "the following businesses must be duly licensed;" and § 306, that "no person shall engage in or carry on any such business without a license therefor" under a stated penalty (ante, p. 204, note). The right of public control, in requiring such a license, is asserted by virtue of the character of the employment; but while such a requirement may be proper in the case of local or intrastate business, it cannot be justified as a prerequisite to the conduct of the business that is interstate. Not only is the latter protected from the action of the state, either directly or through its municipalities, in laying direct burdens upon it, but, in the present instance, Congress has exercised its authority and has provided its own scheme of regulation in order to secure the discharge of the public obligations that the business involves. Act of June 29, 1906, chap. 3591, 34 Stat. at L. 584, U. S. Comp. Stat. Supp. 1911, p. 1288; Adams Exp. Co. v. Croninger, 226 U. S. 491, 505, 57 L. ed. 314, 319, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; United States v. Adams Exp. Co. 229 U. S. 381, 57 L. ed. 1237, 33 Sup. Ct. Rep. 878.

It would seem to follow, necessarily, that the annual license fees prescribed by § 308 (ante, p. 205, note) cannot be exacted, so far as the interstate business is concerned. They cannot be regarded as coming within the category of inspection fees, which are sustained when fairly commensurate with the cost of local supervision of such matters as are under local control (Western U. Teleg. Co. v. [33] New Hope, 187 U. S. 419, 425, 47 L. ed. 240, 243, 23 Sup. Ct. Rep. 204; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 164, 47 L. ed. 995, 1000, 23 Sup. Ct. Rep. 817). The provisions of § 308 are inseparably connected with those of §§ 305 and 306. The sums fixed "for each express wagon" and "for each driver" measure the amount to be exacted for the granting of the license required for the carrying on of business. And it is difficult to see how the payment can be enforced as to the interstate business if the taking out of the license therefor cannot be compelled.

Similar considerations are controlling with respect to the provision of § 332 for the giving of license bonds. This in terms is related to the requirement of § 305. It is provided that a bond shall be given "for each and every vehicle licensed," and it is to be conditioned "for the safe and prompt delivery of all baggage, packages," etc., intrusted to the owner or driver "of any such licensed express." As applied to the company's business of interstate transportation, it must fall with the provision regarding the license, and, further, it must be regarded as repugnant to the exclusive control asserted by Congress in occupying the field of regulation with regard to the obligations to be assumed by interstate express carriers. Adams Exp. Co. v. Croninger, supra; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Southern R. Co. v. Reid, 222 U. S. 444, 447, 56 L. ed. 263, 264, 32 Sup. Ct. Rep. 145.

Section 315 provides for separate licenses for drivers. We may assume the propriety of suitable provision to insure careful driving over the city streets, and the existence of ample power to meet this local necessity. It is also clear that regulations for this purpose, when the movement of interstate traffic is involved, should be entirely reasonable and should not arbitrarily restrict the facilities upon which it must depend. If the provision of § 315 could be regarded as severable from the requirement of a license for the conduct of business, we should still have great difficulty in sustaining it as a reasonable regulation [34] with regard to drivers employed in the interstate transportation which has been described. Reading § 315 in connection with § 307, as we understand the city contends it should be read, no driver can be licensed except a citizen of the United States, or one who has regularly declared intention to become a citizen, and the assurance of his qualifications does not depend simply upon the applicant's ability to meet appropriate tests so as to satisfy the official judgment, but the application must be accompanied by the indorsement

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in writing of two reputable residents of the city testifying to his competence. When the importance to the entire country of promptness and facility in the conduct of the business of the express companies in New York City, and the obvious convenience of their being able to secure drivers in Jersey City as well as in New York, are considered, the provision would seem to be unnecessarily burdensome. We are not called upon, however, to decide this point. Section 315 relates exclusively to drivers of a "licensed hack or express." There is no such provision as to drivers of wagons generally. While the driver's license is separate, the ordinance refers only to such drivers as are employed in the business for the carrying on of which a license may be required. Whatever might otherwise be the city's power as to the regulation of drivers, this provision cannot be divorced from the license scheme of which it is a part.

Other requirements, such as the marking of the vehicles with their official numbers, the exhibition of licenses upon demand, and the inspection of "licensed vehicles and places of business" have obvious reference to the same license plan.

We conclude that the complainant was entitled to an injunction restraining the enforcement of the ordinances in question against the company with respect to the conduct of its interstate business and its wagons and drivers [35] employed in interstate commerce. In this view it is unnecessary to consider whether the ordinances have been superseded, as to automobiles, by the state statute.

The decree of the Circuit Court is reversed and the case is remanded to the District Court, with direction to enter a decree in favor of the complainant in conformity with this opinion.

It is so ordered.

EDWARD T. PLATT, as Treasurer of the United States Express Company, etc., Appt.,

v.

CITY OF NEW YORK et al. (No. 85.)

CITY OF NEW YORK et al., Appts.,

v.

EDWARD T. PLATT, as Treasurer of the United States Express Company, etc. (No. 86.)

(See S. C. Reporter's ed. 35–37.)

This case is governed by the decision in Barrett v. New York, ante, 483.

[Nos. 85 and 86.]

Argued December 3 and 4, 1913. Decided January 5, 1914.

CROSS APPEALS from the Circuit Court of the United States for the Southern District of New York to review a decree enjoining in part the enforcement of certain municipal ordinances as applied to the interstate business of an express company. Reversed and remanded for the entry of a decree in favor of complainant.

See same case below, on motion for preliminary injunction, 183 Fed. 793; on final hearing, 189 Fed. 268.

The facts are stated in the opinion.

Mr. Walker D. Hines argued the cause and filed a brief for Edward T. Platt:

The various specific provisions upheld below, even if they could be regarded as regulations as to the use of the streets, are not separable from the remainder of the ordinance.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 395, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Haskell v. Kansas Natural Gas Co. 224 U. S. 217, 222, 56 L. ed. 738, 740, 32 Sup. Ct. Rep. 442.

The reasonableness of the regulation is a question for the court; and the inquiry is broader under the commerce clause than under the 14th Amendment.

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 300, 301, 43 L. ed. 702, 707, 708, 19 Sup. Ct. Rep. 465; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Schollenberger v. Pennsylvania, 171 U. S. 1, 16, 43 L. ed. 49, 55, 18 Sup. Ct. Rep. 757; Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722.

The interstate commerce act requires carriers subject thereto to perform transportation upon reasonable request, and to establish reasonable regulations and practices to secure the safe and prompt delivery of property. Upon the basis of these provisions this court has declared various state regulations to be inoperative, such as requirements that a carrier shall make delivery within a specified time (Yazoo & M. Valley R. Co. v. Greenwood Grocery Co. 227 U. S. 1, 57 L. ed. 389, 33 Sup. Ct. Rep. 213), and requirements that cars shall be furnished for shipment (Hampton v. St. Louis, I. M. & S. R. Co. 227 U. S. 456, 57 L. ed. 596, 33 Sup. Ct. Rep. 263; Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 57 L. ed. 284, 46 L.R.A. (N.S.) 203, 33 Sup. Ct. Rep. 174).

If any considerable number of munici-

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palities should follow this New York city requirement and exact with respect to every vehicle engaged in interstate transportation a bond for the safe delivery of property transported, there would be very serious embarrassment to interstate carriers, in addition to the confusion which would arise as to the extent of liability and as to persons entitled to institute actions. All such local regulations should be regarded as superseded by the Federal legislation.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 505, 506, 57 L. ed. 314, 319, 320, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 649, 57 L. ed. 683, 687, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397.

There are three distinct and important reasons why there is no basis for the view that any part of this ordinance can be sustained as being "in aid of interstate commerce."

1. The cases which have upheld such state legislation have been cases where there was no Federal legislation on the subject. This distinction is pointed out and characterized as important in Southern R. Co. v. Reid, 222 U. S. 424, 436, 56 L. ed. 257, 260, 32 Sup. Ct. Rep. 140. Therefore, no part of this ordinance can be upheld as to interstate commerce upon the view that it is an "aid to interstate commerce" in insuring the proper performance of the duties of interstate express companies to their patrons. Those duties are dealt with by the interstate commerce act.

2. In none of the cases upholding state legislation of this character has the legislation sought to effectuate this regulation through a scheme of licenses. A confusion of ideas is involved in the notion that a state or municipal regulation is "in aid of interstate commerce" when it proceeds upon the theory that interstate commerce will not be permitted unless state or municipal licenses shall be taken out. If the Georgia statutes involved in Western U. Teleg. Co. v. James, 162 U. S. 650, 661, 40 L. ed. 1105, 1108, 16 Sup. Ct. Rep. 934, had required the telegraph companies to take out state licenses before sending interstate messages, such requirement would have violated the Federal Constitution, even though the purpose of the requirement might have been to insure the diligent delivery of messages.

3. In none of the cases upholding state legislation of this character was there any attempt to impose a license fee or any sort of tax in connection with the regulation. There is a confusion of ideas in the notion that a state or municipal regulation is "in aid of interstate commerce" when interstate commerce is taxed for the purpose of paying the expense of the "aid" thus forced upon the public. Both in James Case, supra, and in Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378, the fact that no tax was imposed was referred to.

Mr. Terence Farley argued the cause, and, with Mr. Archibald R. Watson, filed a brief for the city of New York et al.

For contentions of counsel, see their brief as reported in Barrett v. New York, ante, 483.

Mr. Justice Hughes delivered the opinion of the court:

This suit was brought by the complainant as treasurer of the United States Express Company to restrain the enforcement against that company of certain license requirements contained in the ordinances of the city of New York. The ordinances are the same as those which were under consideration in Barrett v. New York, decided this day [232 U. S. 14, ante, 483, 34 Sup. Ct. Rep. 203], and the decree of the circuit court was to the same effect in both cases. 189 Fed. 268.

The United States Express Company is an unincorporated association, organized under the laws of New York, and is extensively engaged in interstate commerce as a common carrier of packages. Over 98 per cent of its total business in New York city consists of the handling of traffic in interstate transportation. The interstate shipments in New York city are hauled by the company's wagons to and from the rail terminals of the Central Railroad of New Jersey, the Lehigh Valley Railroad, and the Delaware, Lackawanna, & Western Railroad, all within the state of New Jersey. It employs in its business 343 express wagons, of which 189 are stabled in and operated exclusively from Jersey City, New Jersey; 123 are similarly kept in Communipaw, New Jersey; and the remainder, or 31, are kept in the borough of Manhattan. Both the local and interstate traffic are handled in these wagons indiscriminately. The company has never taken out any licenses in the city of New York for its wagons or drivers.

The questions are the same as those which were presented in Barrett v. New York supra, and a like [37] decree should be entered restraining the enforcement of the ordinances against the company with respect to the conduct of its interstate business and its wagons and drivers employed in interstate commerce.

The decree of the Circuit Court is reversed and the case is remanded to the District Court, with direction to enter a

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decree in favor of the complainant, in conformity with this opinion.

It is so ordered.

UNITED STATES, Petitioner,
v.
JAMES B. REGAN.

(See S. C. Reporter's ed. 37–50.)

Evidence — in action for penalty — reasonable doubt — civil or criminal proceeding.

The violation by the defendant of the contract labor provisions of the alien immigration act of February 20, 1907 (34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1911, p. 499), § 4, need not be established beyond a reasonable doubt in an action of debt brought by the United States under § 5 of that act, to recover the penalty incurred thereunder for such violation, but a reasonable preponderance of the proof is sufficient, since the action is civil, and not criminal, although the act penalized is by the statute denominated a misdemeanor.

[For other cases, see Evidence, 2552–2554; Action or Suit, 7–9, in Digest Sup. Ct. 1908.]

[No. 503.]

Argued October 22, 1913. Decided January 5, 1914.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which, on a second writ of error, affirmed a judgment of the District Court for the Southern District of New York in favor of defendant in an action to recover a penalty for an alleged violation of the alien immigration act. Reversed with a direction for a new trial.

See same case below, 121 C. C. A. 543, 203 Fed. 433.

The facts are stated in the opinion.

Assistant Attorney General Denison argued the cause, and, with Assistant Attorney General Harr, filed a brief for petitioner:

The rule as to proof beyond a reasonable doubt in criminal prosecutions has no application to civil suits to recover penalties or forfeitures.

Adams v. Woods, 2 Cranch, 336, 2 L. ed. 297; Atchison, T. & S. F. R. Co. v. United States, 101 C. C. A. 140, 178 Fed. 12; Atchison, T. & S. F. R. Co. v. People, 227 Ill. 270, 81 N. E. 342; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Calcraft v. Gibbs, 5 T. R. 19; Campbell v. Burns, 94 Me. 127, 46 Atl. 812; Chaffee v. United States, 18 Wall. 516, 538, 21 L. ed. 908, 911; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612; Coffey v. United States, 116 U. S. 427, 29 L. ed. 681, 6 Sup. Ct. Rep. 432; Counselman v. Hitchcock, 142 U. S. 547, 562, 35 L. ed. 1110, 1113, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; De Veaux v. Clemens, 17 Ohio C. C. 33, 9 Ohio C. D. 647; Ellis v. Buzzell, 60 Me. 209, 11 Am. Rep. 204; Glenwood v. Roberts, 59 Mo. App. 167; Hawlowetz v. Kass, 23 Blatchf. 395, 25 Fed. 765; Hepner v. United States, 213 U. S. 103, 108, 53 L. ed. 720, 722, 27 L.R.A.(N.S.) 739, 29 Sup. Ct. Rep. 474, 16 Ann. Cas. 960; Hitchcock v. Munger, 15 N. H. 97; Houston & T. C. R. Co. v. State, — Tex. Civ. App. —, 103 S. W. 449; Ætna Ins. Co. v. Johnson, 11 Bush, 587, 21 Am. Rep. 223; Lees v. United States, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163; Lilienthal v. United States, 97 U. S. 237, 24 L. ed. 901; Louisville & N. R. Co. v. Hill, 115 Ala. 334, 22 So. 163; Louisville & N. R. Co. v. Com. 112 Ky. 635, 66 S. W. 505; Missouri, K. & T. R. Co. v. United States, 101 C. C. A. 143, 178 Fed. 15; Montana C. R. Co. v. United States, 90 C. C. A. 388, 164 Fed. 403; Munson v. Atwood, 30 Conn. 102; New York C. & H. R. R. Co. v. United States, 91 C. C. A. 519, 165 Fed. 833; Norfolk & W. R. Co. v. United States, 112 C. C. A. 46, 191 Fed. 302; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 53 L. ed. 1013, 29 Sup. Ct. Rep. 671; O'Connell v. O'Leary, 145 Mass. 311, 14 N. E. 143; Palmer v. People, 109 Ill. App. 269; People v. Briggs, 114 N. Y. 56, 20 N. E. 820; Regan v. United States, 31 L.R.A.(N.S.) 1073, 105 C. C. A. 505, 183 Fed. 293; Riker v. Hooper, 35 Vt. 457, 82 Am. Dec. 646; Roberge v. Burnham, 124 Mass. 277; Ruth v. Abingdon, 80 Ill. 418; Sparta v. Lewis, 91 Tenn. 370, 23 S. W. 182; State v. Chicago, M. & St. P. R. Co. 122 Iowa, 22, 101 Am. St. Rep. 254, 96 N. W. 904; State ex rel. Essex v. Kansas City, Ft. S. & M. R. Co. 70 Mo. App. 643; St. Louis Southwestern R. Co. v. United States, 106 C. C. A. 136, 183 Fed. 770; Stockwell v. United States, 13 Wall. 531, 20 L. ed. 491; Toledo, P. & W. R. Co. v. Foster, 43 Ill. 480; United States v. Baltimore & O. R. Co. 170 Fed. 456; United States v. Baltimore & O. S. W. R. Co. 86 C. C. A. 223, 159 Fed. 38; United States v. Boston & M. R. Co. 168 Fed. 148; United States v. Brown, Deady, 566, Fed. Cas. No. 14,662; United States v. Central of Georgia R. Co. 157 Fed. 893; United States v. Chicago G. W. R. Co. 162 Fed. 775; United States v. Chicago, R. I. & P. R. Co. 173 Fed. 684; United States v.

NOTE.—As to whether suit for statutory penalty is a civil or criminal prosecution—see note to Hepner v. United States, 27 L.R.A.(N.S.) 746.

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Halberstadt, Gilpin, 262, Fed. Cas. No. 15,276; United States v. Illinois C. R. Co. 95 C. C. A. 628, 170 Fed. 542; United States v. Illinois C. R. Co. 156 Fed. 182; United States v. Louisville & N. R. Co. 93 C. C. A. 58, 167 Fed. 308; United States v. Louisville & N. R. Co. 162 Fed. 185; United States v. Nevada County Narrow Gauge R. Co. 167 Fed. 695; United States v. Pennsylvania R. Co. 162 Fed. 408; United States v. Philadelphia & R. R. Co. 160 Fed. 696; United States v. Shapleigh, 4 C. C. A. 237, 12 U. S. App. 26, 54 Fed. 126; United States v. Southern P. Co. 157 Fed. 459; United States v. Southern P. Co. 162 Fed. 412; United States v. Southern R. Co. 170 Fed. 1014; United States v. Stevenson, 215 U. S. 190, 54 L. ed. 153, 30 Sup. Ct. Rep. 35; United States v. The Burdett, 9 Pet. 682, 9 L. ed. 273; United States v. Wabash R. Co. 105 C. C. A. 234, 182 Fed. 804; United States v. Zucker, 161 U. S. 475, 40 L. ed. 777, 16 Sup. Ct. Rep. 641; Webster v. People, 14 Ill. 367; 4 Wigmore, Ev. §§ 2497, 2498; Wilson v. Rastall, 4 T. R. 758, 2 Revised Rep. 515.

Assistant Attorney General Denison also filed a separate brief for petitioner:

It is immaterial that the fact to be proved may be a crime, so long as the case itself is not a criminal case.

United States v. Zucker, 161 U. S. 475, 40 L. ed. 777, 16 Sup. Ct. Rep. 641; Lilienthal v. United States, 97 U. S. 237, 271, 24 L. ed. 901, 906; Ætna Ins. Co. v. Johnson, 11 Bush, 593, 21 Am. Rep. 223; Louisville & N. R. Co. v. Hill, 115 Ala. 334, 22 So. 163; Munson v. Atwood, 30 Conn. 102; People v. Briggs, 114 N. Y. 56, 20 N. E. 820; Lyon v. Fleahmann, 34 Ohio St. 151; DeVeaux v. Clemens, 17 Ohio C. C. 33, 9 Ohio C. D. 647; State v. Intoxicating Liquor, 82 Vt. 287, 73 Atl. 586; Bruff v. Northwestern Mut. Fire Asso. 59 Wash. 125, 109 Pac. 280, Ann. Cas. 1912A, 1138; Grella v. Lewis Wharf Co. 211 Mass. 54, 97 N. E. 745, Ann. Cas. 1913A, 1136; Fountain v. Bigham, 235 Pa. 35, 84 Atl. 131, Ann. Cas. 1913D, 1185; Suell v. Derricott, 161 Ala. 259, 23 L.R.A.(N.S.) 996, 49 So. 895, 18 Ann. Cas. 636; Modern Woodmen v. Craiger, 175 Ind. 30, 92 N. E. 113, 93 N. E. 209; Kramer v. Weigand, 91 Neb. 47, 135 N. W. 230; Lay v. Linke, 122 Tenn. 433, 25 L.R.A.(N.S.) 1215, 123 S. W. 746; Kurz v. Doerr, 180 N. Y. 88, 105 Am. St. Rep. 716, 72 N. E. 926, 2 Ann. Cas. 71.

The reason for the rule requiring proof beyond reasonable doubt is founded upon the severities of criminal prosecutions.

United States v. Zucker, 161 U. S. 475, 481, 40 L. ed. 777, 779, 16 Sup. Ct. Rep. 641; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 336, 53 L. ed. 1013, 1020, 29 Sup. Ct. Rep. 671; 10 Am. L. Rev. 642, 651, 659; 4 Wigmore, Ev. § 2498; Ellis v. Buzzell, 60 Me. 209, 11 Am. Rep. 204.

Mr. David L. Podell argued the cause, and Mr. Max D. Steuer filed a brief for respondent:

By the provision of the statute its violation is made a misdemeanor. In order to recover the penalty provided thereby the violation must be proved beyond a reasonable doubt.

Chaffee v. United States, 18 Wall. 516, 21 L. ed. 908; Lilienthal v. United States, 97 U. S. 237, 24 L. ed. 901; United States v. The Burdett, 9 Pet. 682, 9 L. ed. 273; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Lees v. United States, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163.

[40] Mr. Justice Van Devanter delivered the opinion of the court:

This was an action of debt prosecuted by the United States, under § 5 of the act of February 20, 1907 (34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1911, p. 499), known as the alien immigration act, to recover $1,000 as a penalty for an alleged violation by the defendant of § 4 of that act; and the question now to be considered is whether it was essential to a recovery that the evidence should establish the violation beyond a reasonable doubt. The district court instructed the jury that this measure of proof was required, and the instruction was approved by the circuit court of appeals. 31 L.R.A.(N.S.) 1073, 105 C. C. A. 505, 183 Fed. 293, 121 C. C. A. 543, 203 Fed. 433. The two sections are as follows:

"Sec. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this act.

"Sec. 5. That for every violation of any of the provisions of section four of this act the persons, partnership, company, or corporation violating the same by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for

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his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised [41] labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States."

These sections are largely copied from the like-numbered sections of the act of March 3, 1903 (32 Stat. at L. 1213, chap. 1012), the words "shall be unlawful" in § 4 being changed to "shall be a misdemeanor," and the words "shall forfeit and pay for every such offense," § 5, with what follows them, remaining as before.

Whether cases like this are civil or criminal, and whether they are attended by the incidents of the one or the other, have been so often considered by this court that our present duty, as we shall see, is chiefly that of applying settled rules of decision.

In Stockwell v. United States, 13 Wall. 531, 20 L. ed. 491, the question arose whether the United States could maintain a civil action of debt to recover a penalty incurred under the act of March 3, 1823 (3 Stat. at L. 781, chap. 58), providing that any person receiving, concealing, or buying merchandise, knowing that it was illegally imported and subject to seizure, should, "on conviction thereof," forfeit and pay double the value of the merchandise, there being also a provision that the penalty might be "sued for and recovered," in the name of the United States, in any court of competent jurisdiction; and this court held that the civil action was maintainable, saying (p. 542): "But it is insisted that when the government proceeds for a penalty based on an offense against law, it must be by indictment or by information. No authority has been adduced in support of this position, and it is believed that none exists. It cannot be that whether an action of debt is maintainable or not depends upon the question who is the plaintiff. Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty,—a sum requiring no future valuation to settle its amount. [42] It is not necessarily founded upon contract. It is immaterial in what manner the obligation was incurred, or by what it is evidenced, if the sum owing is capable of being definitely ascertained." And again (p. 543): "The expression 'sued for and recovered' is primarily applicable to civil actions, and not to those of a criminal nature."

In United States v. Zucker, 161 U. S. 475, 40 L. ed. 777, 16 Sup. Ct. Rep. 641, the government, by an action of debt, sought to recover, as a penalty, the value of imported merchandise the entry of which had been fraudulently secured in violation of § 9 of the act of June 10, 1890 (26 Stat. at L. 131, chap. 407, U. S. Comp. Stat. 1901, p. 1886), which subjected one committing that offense to a forfeiture of the merchandise, or its value, and to a fine and imprisonment. At the trial the United States sought to read in evidence the deposition of an absent witness, theretofore taken in the cause, but the deposition was excluded upon the theory that the case, though civil in form, was in substance criminal, and therefore that the defendants were entitled, under the 6th Amendment to the Constitution, to be confronted with the witnesses against them. This resulted in a judgment for the defendants, and when the case came here this court pronounced the trial court's theory untenable, sustained the government's right to read the deposition, and reversed the judgment, saying (p. 481): "A witness who proves facts entitling the plaintiff in a proceeding in a court of the United States, even if the plaintiff be the government, to a judgment for money only, and not to a judgment which directly involves the personal safety of the defendant, is not, within the meaning of the 6th Amendment, a witness against an 'accused' in a criminal prosecution; and his evidence may be brought before the jury in the form of a deposition, taken as prescribed by the statutes regulating the mode in which depositions to be used in the courts of the United States may be taken. The defendant, in such a case, is no more entitled to be confronted at the trial with the witnesses [43] of the plaintiff than he would be in a case where the evidence related to a claim for money that could be established without disclosing any facts tending to show the commission of crime."

In Hepner v. United States, 213 U. S. 103, 53 L. ed. 720, 29 Sup. Ct. Rep. 474, 16 Ann. Cas. 960, the government had brought an action of debt, under § 5 of the alien immigration act of 1903, to recover the penalty prescribed for a violation of § 4 of that act,—they being the sections from which those now under consideration are largely copied,—and in the progress of the cause it became necessary for this court to consider whether a verdict for the government could be directed under the rule applicable in civil actions. Upon an extended review of the cases bearing upon the subject, including Atcheson v. Everitt, Cowp. pt. 1, p. 382, the question was answered in the affirmative, and it was said: (p. 108). "It must be taken as settled

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law that a certain sum, or a sum which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by civil action, even if it may also be recovered in a proceeding which is technically criminal. Of course, if the statute by which the penalty was imposed contemplated recovery only by a criminal proceeding, a civil remedy could not be adopted. United States v. Claflin, 97 U. S. 546, 24 L. ed. 1082. But there can be no doubt that the words of the statute on which the present suit is based are broad enough to embrace, and were intended to embrace, a civil action to recover the prescribed penalty. It provides that the penalty of one thousand dollars may be 'sued for' and recovered by the United States or by any 'person' who shall first bring his 'action' therefor 'in his own name and for his own benefit,' 'as debts of like amount are now recovered in the courts of the United States;' and 'separate suits' may be brought for each alien thus promised labor or service of any kind. The district attorney is required to prosecute every such [44] 'suit' when brought by the United States. These references in the statute to the proceeding for recovering the penalty plainly indicate that a civil action is an appropriate mode of proceeding.

. . . . . .

(p. 111) "But the decision in the Zucker Case is important in that it recognizes the right of the government, by a civil action of debt, to recover a statutory penalty, although such penalty arises from the commission of a public offense. It is important also in that it decides that an action of that kind is not of such a criminal nature as to preclude the government from establishing, according to the practice in strictly civil cases, its right to a judgment by depositions taken in the usual form, without confronting the defendant with the witnesses against him.

. . . . . .

(p. 115) "The defendant was, of course, entitled to have a jury summoned in this case, but that right was subject to the condition, fundamental in the conduct of civil actions, that the court may withdraw a case from the jury and direct a verdict, according to the law, if the evidence is uncontradicted and raises only a question of law."

In Atcheson v. Everitt, approvingly cited in that case, the question for decision was whether certain testimony, admissible by statute in civil, but not in criminal, causes, could be received in an action of debt for the pecuniary penalty for bribery at an election of a member of Parliament,—an act not merely prohibited, but indictable as a crime. Notwithstanding the defendant's insistent objection, the testimony was held to be rightly receivable, it being said by Lord Mansfield, who spoke for the entire court (p. 391): "Penal actions were never yet put under the head of criminal law, or crimes. The construction of the statute must be extended by equity to make this a criminal case. It is as much a civil action as an action for money had and received."

[45] In Wilson v. Rastall, 4 T. R. 753, 758, also approvingly cited in the Hepner Case, one of the questions was whether, after a verdict for the defendant, a new trial could be granted, upon the plaintiff's motion, in an action of debt for the pecuniary penalty for bribing voters (an indictable crime). and the court gave an affirmative answer and awarded a new trial, Lord Kenyon, Ch. J., observing: "All the cases of indictments I lay out of the case, because they are criminal cases, and are exceptions to the general rule. But I consider this as a civil action."

In United States v. Stevenson, 215 U. S. 190, 54 L. ed. 153, 30 Sup. Ct. Rep. 35, which was a prosecution by indictment for a violation of § 4 of the present alien immigration act, the question for decision was whether that mode of enforcing the penalty was admissible in view of the provisions of § 5, permitting a civil action. It was held that an indictment would lie, and in the course of the opinion, after observing that, in the absence of some provision to the contrary, a statutory penalty may be recovered by either a criminal prosecution or a civil action of debt, it was said (p. 198): "It is to be noted that this statute (§ 5 of the immigration act) does not in terms undertake to make an action for the penalty an exclusive means of enforcing it, and only provides that it may be thus sued for and recovered. There is nothing in the terms of the act specifically undertaking to restrict the government to this method of enforcing the law. It is not to be presumed, in the absence of language clearly indicating the contrary intention, that it was the purpose of Congress to take from the government the well-recognized method of enforcing such a statute by indictment and criminal proceedings." And then, after commenting upon the change in § 4 whereby the words "shall be unlawful" were replaced by "shall be a misdemeanor," and observing that the only purpose in this was to make clear the right of the government to prosecute as for a crime, it was further said (p. 199): "Congress having [46] declared the acts in question to constitute a misdemeanor, and having provided that an action for a pen-

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alty may be prosecuted, we think there is nothing in the terms of the statute which will cut down the right of the government to prosecute by indictment if it shall choose to resort to that method of seeking to punish an alleged offender against the statute. Nor does this conclusion take away any of the substantial rights of the citizen. He is entitled [meaning in a prosecution by indictment] to the constitutional protection which requires the government to produce the witnesses against him, and no verdict against him can be directed, as might be the case in a civil action for the penalty. Hepner v. United States, 213 U. S. 103, 53 L. ed. 720, 29 Sup. Ct. Rep. 474, 16 Ann. Cas. 960."

The latest case in this court bearing upon the subject is Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612, which was an action to recover penalties incurred by the violation of the safety appliance acts of Congress. In the trial court the government prevailed, and when the judgment came here for review the railway company contended that the action was in effect a criminal prosecution, and in consequence not controlled by the prior decision in St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464,—a strictly civil case arising under the same statutes, and upon which the government relied; but it was held otherwise, the court saying (p. 578): "This contention is unsound, because the present action is a civil one."

It is a necessary conclusion from these cases (1) that, as respects a pecuniary penalty for the commission of a public offense, Congress competently may authorize, and in this instance has authorized, the enforcement of such penalty by either a criminal prosecution or a civil action; (2) that the present action is a civil one and appropriate under the statute; and (3) that, if not directed otherwise, such an action is to be conducted and determined according [47] to the same rules and with the same incidents as are other civil actions.

It is of no moment in this case that the act penalized, which theretofore was declared unlawful and styled an offense, was by the statute of 1907 denominated a misdemeanor, for the purpose in that, as was explained in United States v. Stevenson, was merely to make clear the government's alternative right to prosecute as for a crime. There was no purpose to revoke the existing right to resort to a civil action, or to take from the action any of the usual incidents of a civil case. Indeed, a purpose to the contrary is shown by the re-enactment, without change, of the provision authorizing the action. It not only specifies who shall have the civil right of recovery, but also the mode of its exercise and enforcement; for it declares that the penalty "may be sued for and recovered" by the United States, or by any person, including the alien, who shall first bring the action in his own name and for his own benefit, "as debts of like amount are now recovered in the courts of the United States." This plainly contemplates that the proceedings in the action are to be in conformity with the recognized mode of adjudicating and enforcing debts of like amount in those courts, and this whether the action be by the government or by an individual.

While the defendant was entitled to have the issues tried before a jury, this right did not arise from article 3 of the Constitution or from the 6th Amendment, for both relate to prosecutions which are strictly criminal in their nature (Counselman v. Hitchcock, 142 U. S. 547, 563, 35 L. ed. 1110, 1114, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; United States v. Zucker, 161 U. S. 475, 481, 40 L. ed. 777, 779, 16 Sup. Ct. Rep. 641; Callan v. Wilson, 127 U. S. 540, 549, 32 L. ed. 223, 226, 8 Sup. Ct. Rep. 1301), but it did arise out of the fact that in a civil action of debt involving more than $20 a jury trial is demandable. And while in a strictly criminal prosecution the jury may not return a verdict against the defendant unless the evidence establishes [48] his guilt beyond a reasonable doubt, in civil actions it is the duty of the jury to resolve the issues of fact according to a reasonable preponderance of the evidence, and this although they may involve a penalized or criminal act.

So, in providing that the penalty may be sued for and recovered as debts of like amount are recovered, we think it was intended that a reasonable preponderance of the proof should be sufficient, that being one of the recognized incidents of an action of debt as well as of other civil actions.

This is the view which other Federal courts have generally applied in the administration of statutes authorizing a civil recovery of such penalties. United States v. Brown, Deady, 566, Fed. Cas. No. 14,662; 3880 Boxes of Opium v. United States, 23 Fed. 367; Hawlowetz v. Kass, 23 Blatchf. 395, 25 Fed. 765; The Good Templar, 97 Fed. 651; United States v. Southern P. Co. 162 Fed. 412; New York C. & H. R. R. Co. v. United States, 91 C. C. A. 519, 165 Fed. 833; United States v. Illinois C. R. Co. 95 C. C. A. 628, 170 Fed. 542; Atchison, T. & S. F. R. Co. v. United States, 101 C. C. A. 140, 178 Fed. 12; St. Louis Southwestern R. Co. v. United States,

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106 C. C. A. 136, 183 Fed. 770. And such, also, is the prevalent course of decision in the state courts. 4 Wigmore, Ev. § 2498; People v. Briggs, 114 N. Y. 56, 20 N. E. 820; State v. Chicago, M. & St. P. R. Co. 122 Iowa, 22, 101 Am. St. Rep. 254, 96 N. W. 904; Hitchcock v. Munger, 15 N. H. 97; Sparta v. Lewis, 91 Tenn. 370, 23 S. W. 182; O'Connell v. O'Leary, 145 Mass. 311, 312, 14 N. E. 143; Munson v. Atwood, 30 Conn. 102; State ex rel. Essex v. Kansas City, Ft. S. & M. R. Co. 70 Mo. App. 634; Deveaux v. Clemens, 17 Ohio C. C. 33, 6 Ohio C. D. 647; Semon v. People, 42 Mich. 141, 3 N. W. 304; Walker v. State, 6 Blackf. 1; Roberge v. Burnham, 124 Mass. 277. In the last case the supreme judicial court of Massachusetts, in applying this measure of persuasion in an action for a penalty, said:

[49] "The rule of evidence requiring proof beyond a reasonable doubt is generally applicable only in strictly criminal proceedings. It is founded upon the reason that a greater degree of probability should be required as a ground of judgment in criminal cases, which affect life or liberty, than may safely be adopted in cases where civil rights only are ascertained. 2 Russell, Crimes, 7th Am. ed. 727. It often happens that civil suits involve the proof of acts which expose the party to a criminal prosecution. Such are proceedings under the statute for the maintenance of bastard children, proceedings to obtain a divorce for adultery, actions for assaults, actions for criminal conversation or for seduction, and others which might be named. And in such actions, which are brought for the determination of civil rights, the general rule applicable to civil suits prevails, that proof by a reasonable preponderance of the evidence is sufficient."

The cases upon which the defendant relies do not compel or lead to a different conclusion. While in United States v. The Burdett, 9 Pet. 682, 9 L. ed. 273, language was used giving color to the contention that in an action such as this the true measure of persuasion is that applied in criminal prosecutions, the court was careful in Lilienthal v. United States, 97 U. S. 237, 24 L. ed. 901, to point out (pp. 266, 267) the distinction in this regard between criminal prosecutions and civil cases, and to show (p. 272) that the case of The Burdett is not an authority for disregarding the distinction, and that in an action to enforce a forfeiture the jury, if satisfied of the truth of the charge upon which the forfeiture depends, "may render a verdict for the government, even though the proof falls short of what is required in a criminal case prosecuted by indictment." In Chaffee v. United States, 18 Wall. 516, 21 L. ed. 908, the trial court, probably in deference to what was said in the case of The Burdett, had instructed the jury that proof beyond a reasonable doubt was essential to a recovery; but, as the government [50] had a verdict and judgment, and was not in a position to assign error upon the instruction, the case hardly can be regarded as settling the propriety of such an instruction, especially as in Coffey v. United States, 116 U. S. 436, 443, 29 L. ed. 684, 686, 6 Sup. Ct. Rep. 437, thirteen years later, it was plainly assumed that in such actions the true measure of persuasion is not proof beyond a reasonable doubt, but the preponderating weight of the evidence. The cases of Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, and Lees v. United States, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163, are without present application, for they deal with the guaranty in the 5th Amendment to the Constitution against compulsory self-incrimination, which, as this court has held, embraces proceedings to enforce penalties and forfeitures as well as criminal prosecutions, and is of broader scope than are the guaranties in article 3 and the 6th Amendment governing trials in criminal prosecutions. Counselman v. Hitchcock, 142 U. S. 547, 563, 35 L. ed. 1110, 1114, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; United States v. Zucker, 161 U. S. 475, 481, 40 L. ed. 777, 779, 16 Sup. Ct. Rep. 641; Hepner v. United States, 213 U. S. 103, 112, 53 L. ed. 720, 724, 29 Sup. Ct. Rep. 474, 16 Ann. Cas. 960. See also Callan v. Wilson, 127 U. S. 540, 549, 32 L. ed. 223, 226, 8 Sup. Ct. Rep. 1301; Schick v. United States, 195 U. S. 65, 68, 49 L. ed. 99, 101, 24 Sup. Ct. Rep. 826, 1 Ann. Cas. 585.

We conclude that it was error to apply to this case the standard of persuasion applicable to criminal prosecutions; and the judgment is accordingly reversed, with a direction for a new trial.

Judgment reversed.

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[51] JOSEPH SWIFT, Plff. in Err.,
v.
DONALD A. McPHERSON.

(See S. C. Reporter's ed. 51-57.)

Judgment — res judicata — dismissal.

1. A decree of dismissal was not a final

NOTE.—On judgment as a contract protected by the contract clause of the Federal Constitution—see note to Rockwell v. Butler, 17 L.R.A. 614.

On conclusiveness of judgments, generally

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adjudication upon the merits that plaintiff had no enforceable rights under the contract which forms the basis of the suit, where it was rendered after a demurrer to the bill had been overruled, and defendant had asked leave to withdraw his affirmative defense, offering to submit to a decree in plaintiff's favor, to which plaintiff had responded by a motion to dismiss the bill, asserting in such motion rights under the contract which provided for a future adjustment of profits and liabilities whenever the amount of profits or losses should ultimately be determined by a sale of certain land.

[For other cases, see Judgment, III. f. in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — impairing contract obligations —full faith and credit.

2. The refusal of a state court to treat a decree of dismissal in a Federal court as conclusive of a point which had been left open did not impair the obligation of that decree as a contract, nor deny the full faith and credit to which it was entitled, nor deprive the defendant of it as property without due process of law.

[For other cases, see Constitutional Law 441–499, 1450–1474; Judgment, VIII., in Digest Sup. Ct. 1908.]

[No. 77.]

Argued November 14, 1913. Decided January 5, 1914.

IN ERROR to the Supreme Court of the State of South Dakota to review a decree which, on a second appeal, affirmed a decree of the Circuit Court of Lawrence County, in that state, in favor of plaintiff in an action to enforce rights under a contract relating to real property. Affirmed.

See same case below, on first appeal, 22 S. D. 165, 133 Am. St. Rep. 907, 116 N. W. 76; on second appeal, 27 S. D. 296, 130 N. W. 768.

Statement by Mr. Justice Lamar:

McPherson, as assignee of Miller, brought suit against Swift in a circuit court of South Dakota, seeking to establish his rights to an undivided one-half interest in certain land then in the possession of Swift. The defendant denied that McPherson had any interest in the property. He further claimed that McPherson had once before brought a similar suit which, after being removed to the circuit court of the United States, had been dismissed, and that this dismissal finally adjudicated the matters at issue in favor of Swift and against McPherson. The record in the former suit was set out in the answer; and as the pleadings in the two cases both deal with the same matters, it will conduce to brevity to state the facts in narrative form.

[52] Swift, on May 8, 1888, purchased a tract of land in Deadwood, South Dakota, paying therefor $18,500, and taking the deed in his own name. Miller, who was a resident of Deadwood, had been active in securing the land, and, on May 14, 1888, Swift and he made a contract which recited that Miller "had purchased the land for Swift and for joint account." For his services in collecting the rents and looking after the property, Miller was to receive one half of the net profits, first deducting 8 per cent interest on the purchase price of $18,500. "In consideration of Miller's agreement to pay Swift one half of any ultimate loss that might accrue on said purchase, Swift agreed that Miller should receive one half of the profits ultimately accruing from the sale of the property over and above the purchase price,"—$18,500.

Miller died January 12, 1891, and his administrator obtained an order for the sale of Miller's interest in the land described in the agreement with Swift. After advertisement, this interest was sold to McPherson for $5,005. Thereupon, on May 18, 1893, McPherson filed in the state court a bill against Swift, which was removed to the United States circuit court. In it McPherson set out his purchase of Miller's interest, and alleged that at all times since Miller's death, the land could have been sold for a sum largely in excess of $18,500, but that Swift had neglected to sell or to account for the rents and profits. McPherson, in the bill, tendered Swift $9,250, one-

—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street Rail Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

Generally as to full faith and credit to be given to state records and judicial proceedings—see notes to Lindley v. O'Reilly, 1 L.R.A. 79; Cummington v. Belchertown, 4 L.R.A. 131; Rand v. Hanson, 12 L.R.A. 574; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 578; Darby v. Mayer, 6 L. ed. U. S. 367; Mills v. Duryee, 3 L. ed. U. S. 411; D'Arcy v. Ketchum, 13 L. ed. U. S. 648; and Huntington v. Attrill, 36 L. ed. U. S. 1123.

Generally as to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Henderson v. State, Soldiers' & S. Monument Comrs. 13 L.R.A. 169; and Fletcher v. Peck, 3 L. ed. U. S. 162.

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half of the original purchase price, and demanded a conveyance and an accounting. Swift's demurrer having been overruled, he answers, alleging, among other things, that the original contract had been fraudulently procured by Miller, but claiming that, if originally valid, it was a mere contract of employment which had been revoked by the death of Miller, and which therefore could not pass to McPherson under the administrator's sale.

A replication was filed. Several terms passed without [53] any testimony having been taken, and Swift finally notified McPherson that he would accept the tender of $9,250, and recognized him as a partner and joint owner on the terms stated in the bill. McPherson made no reply to this offer, and thereupon Swift filed a petition in the cause, reciting McPherson's refusal to pay the $9,250 tendered in the bill, renewed his offer to accept the tender, and asked leave to withdraw from his answer those paragraphs which set up an affirmative defense, and "to submit to a decree in plaintiff's favor on such terms as might by the court be found equitable and just."

A copy of this petition was served on McPherson, who was required to show cause why it should not be granted.

At the February term (1896) McPherson appeared in person and by his solicitors, filed a response under oath, in which he moved the court to dismiss his bill of complaint, stating that his tender had been made at a time when the value of the property was such that it could have been sold at a price to net a profit; that Swift had declined to accept the tender, and the property was now much depreciated in value; and that the tender had been withdrawn before the procurement of the order to show cause. McPherson's response concluded by the statement that "the contract does not require this affiant to pay any part of the purchase money for the property, but the same is to be paid at affiant's option out of the proceeds of the sale; and while he was willing to have paid the $9,250 at the time the tender was made, the defendant's refusal for an unreasonable time, and the depreciation of the value was so great that affiant is not willing now to exceed the strict letter of the contract in reference to the mode and manner of reimbursing the defendant for the original purchase price, wherefore he prays the court to discharge the order to show cause, and to dismiss the complaint herein as prayed for in this motion."

After argument by counsel, the court made an order reciting [54] that "the cause coming on to be heard on the application of Swift for leave to withdraw pars. 13 and 14 of his answer, and to submit to a decree in plaintiff's favor on such terms as might be equitable . . . and the resisting affidavit of the plaintiff, who, at the same time, by his solicitors, moved to dismiss the bill . . . and the court having heard the matter upon the affidavit, bill of complaint, verified answer, and replication, it is ordered that Swift's application be denied, and it is further adjudged and decreed that this suit and bill of complaint . . . be and the same is hereby dismissed, and that defendant have and recover of plaintiff, McPherson, the costs of this suit." The defendant excepted, but there is no record of any appeal having been taken by Swift.

In June, 1901, five years later, McPherson brought the present suit in the state court, alleging that Swift had collected large sums by way of rent on the land and the sale of lots, which sums were more than sufficient to reimburse Swift for the purchase price of $18,500, interest and expenses, and that upon an accounting, McPherson would be entitled to one half of these net profits and to an undivided one half of the lots remaining unsold. McPherson prayed for such relief and for partition.

The defendant answered, attacking the validity of the contract. He also set out the proceedings in the former suit, and pleaded that decree of dismissal by the United States circuit court as a bar to the present suit.

The trial resulted in Swift's favor, but the decree was reversed by the supreme court of the state. 22 S. D. 179, 133 Am. St. Rep. 907, 116 N. W. 76. On the second trial the court found that there had been no fraud on Miller's part; that the contract was not one of employment, but created an interest in the property which was assignable; that McPherson was the owner thereof by virtue of the administrator's sale; that Swift had received $103,436 from rental and sale of land, and [55] that after proper deductions there was a net profit of $22,374. A decree was thereupon entered in favor of McPherson for $11,187, and also for an undivided one half of over 100 city lots remaining unsold. On appeal the decree was affirmed (27 S. D. 296, 130 N. W. 768), and the case was then brought here by writ of error.

Mr. Edwin Van Cise argued the cause, and, with Messrs. William H. Beck, Frank L. Grant, and Philip S. Van Cise, filed a brief for plaintiff in error:

The Federal court should have denied the application to dismiss as coming too late, and granted defendant's application as constituting a contract.

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3 Bl. Com. 296; 1 Freeman, Judgm. 4th ed. §§ 262, 478; 2 Black, Judgm. § 700; Minor v. Mechanics' Bank, 1 Pet. 46, 74, 80, 7 L. ed. 47, 59, 61; Evans v. McMahan, 1 Ala. 45; Thomason v. Odum, 31 Ala. 108, 68 Am. Dec. 159; South Branch R. Co. v. Long, 26 W. Va. 692; Wohlford v. Compton, 79 Va. 337; Barnard v. Daggett, 68 Ind. 305; Merritt v. Campbell, 47 Cal. 542; Cunningham v. Schley, 68 Ga. 105; Harris v. Preston, 10 Ark. 201; Hallack v. Loft, 19 Colo. 81, 34 Pac. 568; Waldron v. Angleman, 71 N. J. L. 166, 58 Atl. 568; O'Brien & Cockcroft, Enc. Forms, 531–534; 24 Am. & Eng. Enc. Law, 877; 18 Enc. Pl. & Pr. 898; United States v. Parker, 120 U. S. 89, 95, 30 L. ed. 601, 604, 7 Sup. Ct. Rep. 454; Fraser v. Weller, 6 McLean, 11, Fed. Cas. No. 5,064; Cunningham v. Milwaukee, 13 Wis. 120; Hyatt v. Challiss, 55 Fed. 267, 59 Kan. 422, 53 Pac. 467; Crossman v. Davis, 79 Cal. 603, 21 Pac. 963; Phillpotts v. Blasdel, 10 Nev. 19; Plummer v. Douglas, 14 Iowa, 69, 81 Am. Dec. 456; Ford v. Roberts, 14 Colo. 291, 23 Pac. 322; Axiom Min. Co. v. Little, 6 S. D. 438, 61 N. W. 441; Axiom Min. Co. v. White, 6 S. D. 610, 62 N. W. 956; Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808; American Steel & Wire Co. v. Mayer & E. Co. 123 Fed. 204; Hat-Sweat Mfg. Co. v. Waring, 46 Fed. 87; Pullman's Palace-Car Co. v. Central Transp. Co. 49 Fed. 261; Hershberger v. Blewett, 55 Fed. 170; Callahan v. Hicks, 90 Fed. 539; Welsbach Light Co. v. Mahler, 88 Fed. 427; Chicago & A. R. Co. v. Union Rolling Mill Co. 109 U. S. 713, 716, 27 L. ed. 1085, 1086, 3 Sup. Ct. Rep. 594; Rumbly v. Stainton, 24 Ala. 712; Orphan Asylum Soc. v. M'Cartee, Hopk. Ch. 372; Bank of State v. Rose, 1 Rich. Eq. 292; Bethia v. McKay, Cheves, Eq. 93; Hall v. McPherson, 3 Bland, Ch. 529; Willard v. Wood, 164 U. S. 521, 41 L. ed. 539, 17 Sup. Ct. Rep. 176; 1 Dan. Ch. Pl. & Pr. 6th Am. ed. *791. But as it did not, its action must be construed as a finality,—a dismissal on the merits.

While the effect given a state judgment may be governed by the decisions of the state court (Union & Planters' Bank v. Memphis, 189 U. S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604), another rule prevails as to the construction of a proceeding and decree of the Federal court (Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 290, 291, 50 L. ed. 477, 486, 487, 26 Sup. Ct. Rep. 252; Deposit Bank v. Frankfort, 191 U. S. 499, 516, 517, 48 L. ed. 276, 283, 24 Sup. Ct. Rep. 154; Embry v. Palmer, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25; Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257; Ohio L. Ins. & T. Co. v. Debolt, 16 How. 416, 14 L. ed. 997; McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; Jefferson Branch Bank v. Skelly, 1 Black, 436, 443, 17 L. ed. 173, 177; Douglas v. Kentucky, 168 U. S. 488, 500, 42 L. ed. 553, 557, 18 Sup. Ct. Rep. 199).

The recitals in the decree of February 22, 1896, are useful here as conclusively showing what evidence was used upon the hearing (to wit, the affidavits and the pleadings), and such recitals are sanctioned.

2 Dan. Ch. Pl. & Pr. 6th Am. ed. 1002, 1003; Putnam v. Day, 22 Wall. 60, 67, 22 L. ed. 764, 766.

This decree answers all the requirements of a final judgment. It was rendered (1) after a hearing; (2) upon the pleadings and the affidavits; (3) upon being fully advised; and (4) it is ordered, considered, adjudged, and decreed without qualifying words, and awards costs. It was and is a finality.

1 Freeman, Judgm. § 270; Story, Eq. Jur. § 1523; 1 Dan. Ch. Pl. & Pr. 6th Am. ed. **659, 793; 2 Dan. Ch. Pl. & Pr. *994; Baker v. Cummings, 181 U. S. 117, 125, 45 L. ed. 776, 780, 21 Sup. Ct. Rep. 578; Leary v. Long, 131 U. S. ccxviii Appx. and 26 L. ed. 301; Hubbell v. United States, 171 U. S. 203, 43 L. ed. 136, 18 Sup. Ct. Rep. 828; Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co. 65 Fed. 424; American Exp. Co. v. Mullins, 212 U. S. 311, 314, 53 L. ed. 525, 527, 29 Sup. Ct. Rep. 381, 15 Ann. Cas. 536; Gove v. Lyford, 44 N. H. 525; Taylor v. Yarbrough, 13 Gratt. 183; Foote v. Gibbs, 1 Gray, 412; Borrowscale v. Tuttle, 5 Allen, 377; Edgar v. Buck, 65 Mich. 356, 32 N. W. 644; Schulmeister v. Blendon Twp. 126 Mich. 488, 86 N. W. 237; Scully v. Chicago, B. & Q. R. Co. 46 Iowa, 528; Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. Rep. 430; Fayerweather v. Ritch, 195 U. S. 276, 49 L. ed. 193, 25 Sup. Ct. Rep. 58.

In the absence of the words "without prejudice" or other equivalent qualifications, it is held in the Federal courts, and in those maintaining separate jurisdictions for law and chancery, that the decree is presumptively on the merits. In addition to cases already cited, we refer to the following:

Durant v. Essex Co. 7 Wall. 107, 19 L. ed. 154; Case v. Beauregard (Case v. New Orleans & C. R. Co.) 101 U. S. 688, 25 L. ed. 1004; Lyon v. Perin & G. Mfg. Co. 125 U. S. 698, 31 L. ed. 839, 8 Sup. Ct. Rep. 1024; Lawrence v. Nelson, 143 U. S. 215, 36 L. ed. 130, 12 Sup. Ct. Rep. 440; Bigelow v. Winsor, 1 Gray, 301; Blackinton v. Blackinton, 113 Mass. 231; Knowlton v. Hanbury, 117 Ill. 471, 5 N. E. 581; Stickney v. Goudy, 132 Ill. 213, 23 N. E. 1034; Adams v. Cameron, 40 Mich. 506; Billing v. Gilmer, 8 C. C.

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A. 645, 23 U. S. App. 168, 60 Fed. 336; Thurston v. Thurston, 99 Mass. 39.

Mr. Norman T. Mason argued the cause, and, with Messrs. James G. Stanley and Chambers Kellar, filed a brief for defendant in error:

The complainant, McPherson, in a Federal equity case, had the absolute right to dismiss his bill without prejudice.

Simkins, Fed. Eq. Suit, 2d ed. p. 349 and cases; Langlois v. Matthiessen, 155 Ill. 230, 40 N. E. 496; 6 Enc. Pl. & Pr. 833, and note; The Bainbridge, 118 C. C. A. 88, 199 Fed. 404; Morton Trust Co. v. Keith, 150 Fed. 606; 1 Beach, Eq. Pr. 469-473.

A judgment to be *res judicata* must be on the merits.

Ex parte Loung June, 160 Fed. 254, and cases cited; Haldeman v. United States, 91 U. S. 584, 23 L. ed. 433; Stratton v. Essex County Park Commission, 164 Fed. 901.

Mr. Justice Lamar, after making the foregoing statement of facts, delivered the opinion of the court:

In the record there are sixty assignments of error, involving many rulings of the trial court and the construction of the contract. We can only consider those which present the Federal question that, in failing to sustain the plea of *res judicata*, the court denied plaintiff a right arising under the laws of the United States. The refusal of the state court to treat the decree of the United States court as a bar to the present action is said to have impaired the obligation of that decree as a contract; denied the full faith and credit to which it was entitled, and deprived Swift of it as property without due process of law. But all these contentions finally resolve themselves into the single question as to whether the dismissal was on the merits, finally adjudicating that McPherson had no enforceable rights under the contract which was the basis of that suit.

Ordinarily, such a question is answered by a mere inspection of the decree,—the presumption being that a [56] dismissal in equity, without qualifying words, is a final decision on the merits. That presumption of finality, however, disappears whenever the record shows that the court did not pass upon the merits, but dismissed the bill because of a want of jurisdiction, for want of parties, because the suit was brought prematurely, because the plaintiff had a right to file a subsequent bill on the same subject-matter, or on any other ground not going to the merits. The scope of such decree must in all cases be measured not only by the allegations of the bill, but by the ground of the demurrer or motion on which the dismissal was based. Hughes v. United States, 4 Wall. 237, 18 L. ed. 305; Vicksburg v. Henson, 231 U. S. 259, ante, 209, 34 Sup. Ct. Rep. 95.

From an examination of this record it is evident that the dismissal by the United States court was not for want of merit in the bill, because the demurrer had already been overruled. It was not for insufficiency of the testimony, because none had been taken though answer and replication had been filed. It was not a dismissal after a hearing on bill and answer alone, for the defendant was asking to withdraw his affirmative defense, and insisting that a decree be entered in favor of McPherson. It was not a dismissal as on a *retraxit*, for the plaintiff not only did not renounce his cause of action, but, in his motion asserted his rights under a contract which provided for a future adjustment of profits and liabilities, whenever the amount of profits or losses was ultimately determined by the actual sale of the land.

McPherson seems, at first, to have assumed that it was not necessary to wait until the property had been sold, but that by a then present payment of $9,250, he could at once acquire title to an undivided half interest in the lots. His tender of that sum was, however, declined by Swift, who, a year or more later, finally decided to accept the money, and asked that a decree be entered in McPherson's favor. McPherson then refused to pay what [57] he had previously offered, explaining in his response to Swift's motion, that since the rejection of the tender the land had decreased in value, and asserting that he was not then willing to do more than was required by the contract,—under which he could wait until the ultimate sale of the property to determine what, if anything, he was bound to pay. He thereupon "moved the court to dismiss the bill, as prayed for in this motion." The motion was granted, and Swift excepted.

The record presented an unusual and somewhat ludicrous shifting of positions,—with the defendant insisting that a decree be entered against himself; the complainant resisting a decree in his favor; and the defendant, with no cross bill filed, excepting to a dismissal. Of course, this reversal of position does not change the legal effect of the decree, but it serves to emphasize the fact that it was not a decree against plaintiff on the merits, but one based on McPherson's motion which asserted a contract fixing liability and giving him rights dependent on the ultimate outcome of the investment. The court did not decide what those rights were, nor did it adjudicate that a suit to enforce them could not thereafter

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be filed. The decree, not being on the merits, could not be a bar to such subsequent suit in a state or United States court (Texas Cotton Products Co. v. Starnes, 128 Fed. 183). The refusal to treat the decree as conclusive of a point which had been left open did not deprive Swift of any Federal right, and the judgment of the Supreme Court of South Dakota must be affirmed.

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[58] NATIONAL SAFE DEPOSIT COMPANY, Plff. in Err.,
v.
WILLIAM H. STEAD, Attorney General of the State of Illinois; Andrew Russell, State Treasurer of the State of Illinois; and Walter K. Lincoln, Inheritance Tax Attorney.

(See S. C. Reporter's ed. 58–71.)

Error to state court — questions reviewable — construction of contract.

1. The construction by a state court of the contract relation between a safe deposit company and its box renters as one of l...ilor and bailee is conclusive upon the Federal Supreme Court when determining upon writ of error to the state court the constitutionality of the provisions of the Illinois inheritance tax law of July 1, 1909, which operate to seal safe deposit boxes for a limited period after the death either of a sole renter, or of one of two or more joint renters, unless by such construction the statute is made to violate U. S. Const., 14th Amend., as being an arbitrary attempt to create liabilities arising out of possession where there is no possession in fact.

[For other cases, see Appeal and Error, 2072–2226, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — inheritance tax — sealing safe deposit boxes upon death of renter.

2. A safe deposit company is not arbitrarily charged, without due process of law, with a duty to supervise the delivery and to determine the ownership of property over which it has no control, by the provisions of the Illinois inheritance tax law of July 1, 1909, under which the contents of safe deposit boxes cannot be removed after the death of the renter, whether standing solely in his name or in the joint name of the decedent and others, or in the name of a partnership of which he was a member, except after ten days' notice to the attorney general and state treasurer, and even then, not without retaining possession of enough of the assets to pay the tax, where in law and by contract the safe deposit company stood in such relation to the property as to make it liable for allowing unauthorized persons to take possession.

[For other cases, see Constitutional Law, IV. b, 6, b, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — safe deposit boxes — retaining assets for inheritance tax.

3. Prohibiting a safe deposit company from permitting the removal of the contents of a safe deposit box after the death of the renter, whether standing solely in his name or in the joint name of the deceased and others, or in the name of a partnership of which he was a member, without retaining assets sufficient to pay the state inheritance tax, as is done by Ill. act of July 1, 1909, does not deprive the company of its property without due process of law, nor arbitrarily burden it with a liability.

[For other cases, see Constitutional Law, IV. b, 6, b, in Digest Sup. Ct 1908.]

Constitutional law — impairing contract obligations — charter of safe deposit company.

4. Charter power to do a safe deposit business is not impaired by the provisions of the Illinois inheritance tax law of July 1, 1909, under which the contents of safe deposit boxes cannot be removed after the death of the renter, whether standing solely in his name or in the joint name of the decedent and others, or in the name of a partnership of which he was a member, except after ten days' notice to the attorney general and the state treasurer, and even then not without retaining possession of enough of the assets to pay the tax.

[For other cases, see Constitutional Law, 1379–1383, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — Federal question — searches and seizures.

5. A question respecting an alleged violation of the prohibition of U. S. Const., 4th Amend., against unreasonable searches and seizures, cannot be reviewed by the Federal Supreme Court on writ of error to a state court, since such prohibition does not apply to the states.

[For other cases, see Appeal and Error, 2072–2226, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — sealing safe deposit boxes after death of renter.

6. The obligations of the contract between a safe deposit company and its joint or firm box renters are not impaired by the provisions of the Illinois inheritance tax law of July 1, 1909, under which the contents of safe deposit boxes cannot be removed after the death of the renter, whether standing solely in his name or in the joint name of the decedent and others, or in the name of a partnership of which he was a member, except after ten days' notice to the attorney general and the state treas-

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NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On writs of error to state courts in cases involving questions of due process of law—see note to Burt v. Smith, 51 L. ed. 121.

As to levy upon or garnishment of contents of sealed package or locked receptacle—see note to Tillinghast v. Johnson, 41 L.R.A.(N.S.) 764.

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urer, and even then not without retaining possession of enough of the assets to pay the tax, since the company, joint renters, or firms, each made the contract in the light of the power of the state to legislate for the protection of the estate of any one of the joint renters or partners that might die during the term.

[For other cases, see Constitutional Law, 1450-1474, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — safe deposit box rentals.

7. All renewals of contracts of joint rental of safe deposit boxes, made after the enactment of the Illinois inheritance tax law of July 1, 1909, under which the contents of safe deposit boxes cannot be removed after the death of the renter, whether standing solely in his name or in the joint name of decedent and others, or in the name of a partnership of which he was a member, except after ten days' notice to the attorney general and state treasurer, and even then not without retaining possession of enough of the assets to pay the tax, are made in the light of the provisions of such statute.

[For other cases, see Constitutional Law, 1450-1474, in Digest Sup. Ct. 1908.]

[No. 138.]

Argued December 16, 1913. Decided January 5, 1914.

IN ERROR to the Supreme Court of the State of Illinois to review a decree which affirmed a decree of the Circuit Court of Cook County, in that State, sustaining a demurrer to and dismissing the bill in a suit to enjoin the enforcement of the provisions of the state inheritance tax law, sealing safe deposit boxes after the death of the sole or joint renter. Affirmed.

See same case below, 250 Ill. 584, 95 N. E. 973, Ann. Cas. 1912B, 430.

Statement by Mr. Justice Lamar:

By the act of July 1 1909, the Illinois legislature passed an inheritance tax law like that considered in Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594. The 9th section of the statute provides in substance:

That no safe deposit company, corporation, or person [59] having in possession or under control securities or assets belonging to or standing in the name of a decedent, or in the joint name of the decedent and another person, or in the name of a partnership of which he was a member, shall deliver such assets to the legal representative of the deceased or to the survivor of the joint holders, or to the partnership of which he was a member, without ten days' notice to the attorney general and treasurer of the state, who were authorized to examine the securities at the time of the delivery. It was further provided that no delivery should be made unless such holder should retain a sufficient portion of the assets to pay the state tax thereafter assessed, unless such state officers gave consent in writing. Failure to give the notice or to retain such amount rendered the deposit company, corporation, or person liable for the tax and to a penalty of $1,000.

On March 15, 1910, the National Safe Deposit Company filed in the circuit court of Cook county, Illinois, a bill against the treasurer and attorney general, alleging that the company was incorporated in 1881 to do a safe deposit business, and that, in pursuance of its charter, it had erected a building with large vaults into which 13,291 safe deposit boxes had been built and 9,702 rented,—317 to partnerships and 4,104 were held jointly by more than one person. That prior to July 1, 1909, it had made yearly contracts for the rental of said boxes, most of which were still of force. The rent contracts recited that in consideration of $——— paid, the company "had rented to ——— safe No. ——— in the vaults of this company for the term of one year," and that its liability was limited to the exercise of ordinary diligence in preventing the opening of the safe by any person other than the renter or his duly authorized representative. "No one except the renter, or his deputy, to be designated in writing on the books of the company, or, in case of death, his legal representative, to have access to the safe" . . . No renter will be [60] permitted to enter the vaults except in the presence of the vault keeper. In case of loss of key or combination the lock will be changed at the expense of the renter. . . .

The bill alleged that the safes could be opened only by two keys, or two combinations, one of which keys or combinations was held by or known only to the renter, the other being held or known only by the company's agents. So that it required the joint act of the customer and the company to secure access to the contents,—the company having no right or means of access to the box itself, nor did it possess any knowledge or information as to the ownership of the securities deposited therein.

The bill further alleged that, notwithstanding these facts, the defendants insisted that the Deposit Company had such possession or control of the contents as to make it incumbent upon it to prevent access thereto by all persons for ten days after the death of the sole or joint renter; that this deprived the Deposit Company of the right to do the business for which it had been chartered, made it break its contract that

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it would allow no one except the renter or his agent or representative to have access to the boxes; interfered with its business by depriving the representative and survivor of their right to use the box and contents; imposed upon the Deposit Company the risk of determining who was the owner of the contents of the box, and imposed the duty of acting as a tax-collecting agent for the state. The bill also alleged that the company had been threatened with suits by depositors if it yielded to the command of such void act. In order to prevent a multiplicity of suits, and to avoid the heavy statutory penalties, the company prayed that the defendants be enjoined from enforcing the statute against it.

The defendants' demurrer was sustained. That ruling was affirmed by the supreme court of Illinois, three judges dissenting (250 Ill. 584, 95 N. E. 973, Ann. Cas. 1912 B, 430). The case was then brought here by writ of error.

Messrs. **George Packard** and **John S. Miller** argued the cause, and, with Mr. Merritt Starr, filed a brief for plaintiff in error:

For the purposes of the constitutional question raised here, this court must determine what the true relation between the safety deposit company and its customers is; and we maintain that it clearly is not that of bailment.

Tullock v. Mulvane, 184 U. S. 513, 46 L. ed. 666, 22 Sup. Ct. Rep. 372.

The essential elements of bailment are wholly wanting in the transaction; *i. e.*, receipt, possession, delivery.

Union Trust Co. v. Wilson, 198 U. S. 530, 537, 49 L. ed. 1154, 1156, 25 Sup. Ct. Rep. 766; Moore v. Mansfield, 182 Mass. 302, 94 Am. St. Rep. 657, 65 N. E. 398; 2 Enc. U. S. Sup. Ct. Rep. 783; Story, Bailm. 9th ed. § 2; Jones, Bailm. 1; Schouler, Bailm. § 2; Security Warehousing Co. v. Hand, 206 U. S. 415, 421, 51 L. ed. 1117, 1121, 27 Sup. Ct. Rep. 720, 11 Ann. Cas. 789.

It is argumentatively said in the opinion of the state court that as the state has, upon and from the death of the decedent, a "vested," *i. e.*, an accrued, right, in the tax, which is a tax on the right of succession, and not on the property of a decedent, it therefore has a vested financial right in the estate or property by which the tax is measured. This is an unfounded process of reasoning which only serves to obscure the issue.

Kochersperger v. Drake, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321; Merrifield v. People, 212 Ill. 400, 72 N. E. 446; Knowlton v. Moore, 178 U. S. 41, 47, 44 L. ed. 969, 972, 20 Sup. Ct. Rep. 747; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Flint v. Stone Tracy Co. 220 U. S. 107, 162, 55 L. ed. 389, 417, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312.

Where an impairment of contract or a deprivation of property rights without due process is relied upon, this court will determine for itself the existence and nature of the contract or the property right.

Hoadley v. San Francisco (Clark v. San Francisco) 124 U. S. 645, 31 L. ed. 556, 8 Sup. Ct. Rep. 659; Scott v. McNeal, 154 U. S. 34, 45, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108.

A corporation is a "person" protected by the provision against deprivation of property.

W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 409, 50 L. ed. 246, 249, 26 Sup. Ct. Rep. 66; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; National Council v. State Council, 203 U. S. 162, 51 L. ed. 137, 27 Sup. Ct. Rep. 46.

"Possession" means exercise of power over a corporate thing, at pleasure, to the exclusion of all others.

Union Trust Co. v. Wilson, 198 U. S. 530, 537, 49 L. ed. 1154, 1156, 25 Sup. Ct. Rep. 766; Rice v. Frayser, 24 Fed. 463; Gilkerson-Sloss Commission Co. v. London, 53 Ark. 88, 7 L.R.A. 403, 13 S. W. 513; Smith v. Race, 76 Ill. 491.

"Control" has no legal or technical meaning apart from its popular sense, and is synonymous with "manage."

Ure v. Ure, 185 Ill. 218, 56 N. E. 1087.

Taking possession and control and the right to possession and control from the box lessee's personal representative, and bestowing it on the safe deposit lessor, against its consent, at the same time superimposing a power of delivery and transfer and the power to retain, and so the power to seize in order to retain, in direct conflict with the basic principle of the safety deposit business, is a legislative interference amounting to a deprivation without process of law, of the latter's right to carry on its lawful business, —a deprivation, that is, of its liberty and property rights of contract.

State v. Peel Splint Coal Co. 36 W. Va. 802, 17 L.R.A. 385, 15 S. E. 1000; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; Allgeyer v. Louisiana, 165 U. S. 589, 41 L. ed. 835, 17 Sup. Ct. Rep. 427; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255; Carroll v. Greenwich

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Ins. Co. 199 U. S. 409, 50 L. ed. 249, 26 Sup. Ct. Rep. 66; Braceville Coal Co. v. People, 147 Ill. 69, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62.

A lawful vocation is not to be arbitrarily and vexatiously burdened.

People v. Steele, 231 Ill. 351, 14 L.R.A. (N.S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236.

There is no process of law. The mere passage of the act making interference with plaintiff in error's business possible is not due process of law.

Davidson v. New Orleans, 96 U. S. 97, 102, 24 L. ed. 616, 618; Hurtado v. California, 110 U. S. 516, 535, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292; Smyth v. Ames, 169 U. S. 527, 42 L. ed. 842, 18 Sup. Ct. Rep. 418.

The privilege of contracting is both a liberty and a property right.

Mathews v. People, 202 Ill. 401, 67 N. E. 28; Williams v. Fears, 179 U. S. 270, 274, 45 L. ed. 186, 188, 21 Sup. Ct. Rep. 128; Bailey v. People, 190 Ill. 33, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98.

To impose upon one a trusteeship without his consent deprives him of his property right of contract.

Bethune v. Dougherty, 21 Ga. 257; Underhill, Tr. Am. ed. 190; Perry, Tr. § 259; 28 Am. & Eng. Enc. Law, 971; 39 Cyc. 77, 252; Taylor v. Holmes, 14 Fed. 509; Beckett, Trusts & Trustees, § 548.

There is a forced classification of safe deposit companies who do not have possession or control, with those having in possession and under control the property of another, and the result of the classification and the duties imposed thereby is subversive of the business of safety deposit. They are not so subversive of the business of banks, trust companies, etc., which actually have property in possession and control. Therefore, there is denial of the equal protection of the laws.

Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 31, 25 L. ed. 989, 992; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Hayes v. Missouri, 120 U. S. 68, 71, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 350; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 165, 41 L. ed. 666, 671, 17 Sup. Ct. Rep. 255.

The legislative grant to carry on the business of safety deposit is impaired. That contract consists of the right to continue to lease carefully guarded space in a manner utterly to exclude the relation of bailment. The imposition of the relation of bailor and bailee destroys the business and impairs plaintiff in error's contract with the state. It is not a regulation of the chartered right.

Venner v. Chicago City R. Co. 246 Ill. 176, 138 Am. St. Rep. 229, 92 N. E. 643, 20 Ann. Cas. 607.

The existence, scope, and effect of the contract claimed to be impaired is open for determination by this court, as part of the Federal question involved.

Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 494, 38 L. ed. 793, 796, 14 Sup. Ct. Rep. 968; Douglas v. Kentucky, 168 U. S. 488, 502, 42 L. ed. 553, 557, 18 Sup. Ct. Rep. 199; Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575; Terre Haute & I. R. Co. v. Indiana, 194 U. S. 579, 589, 48 L. ed. 1124, 1129, 24 Sup. Ct. Rep. 767; Powers v. Detroit, G. H. & M. R. Co. 201 U. S. 543, 556, 50 L. ed. 860, 864, 26 Sup. Ct. Rep. 556.

The act complained of deprives safe deposit companies of their property right to pursue a lawful calling by the unconstitutional invasion of their customer's rights. This is not championing the wrongs of an outsider. The company is not a stranger to the grievance of its customers.

Lampasas v. Bell, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368.

The company is directly and certainly affected by the unconstitutional operation of the law. The outrage of its customer's rights destroys its business. The ways in which the act affects the company and its customers are set out at length in the bill as seriously threatening the property rights of the company. Both considerations operate to deprive the company of rights protected by the Federal Constitution.

Chadwick v. Kelley, 187 U. S. 540, 547, 47 L. ed. 293, 296, 23 Sup. Ct. Rep. 175; Hooker v. Burr, 194 U. S. 419, 48 L. ed. 1050, 24 Sup. Ct. Rep. 706; Standard Stock Feed Co. v. Wright, 225 U. S. 540, 550, 56 L. ed. 1197, 1201, 32 Sup. Ct. Rep. 784.

Interference with free access to the property of surviving joint box renters, and examination thereof by ministerial officials, or by a safe deposit company, without notice or judicial hearing, particularly where the object of the inquiry in no wise appertains to that particular property, is deprivation of property without due process of law. It matters not that the inconvenience might be trifling in some instances.

Chicago v. Wells, 236 Ill. 132, 23 L.R.A. (N.S.) 405, 127 Am. St. Rep. 282, 86 N. E. 197.

Where one is clothed with the state's powers, his acts are that of the state.

Raymond v. Chicago Union Traction Co. 207 U. S. 20, 35, 52 L. ed. 78, 87, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Chicago, B. & Q.

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L.R.A. 446, 47 N. E. 321; Re Speed, 216 Ill. 23, 108 Am. St. Rep. 189, 74 N. E. 809; Re Mulford, 217 Ill. 242, 1 L.R.A.(N.S.) 341, 108 Am. St. Rep. 249, 75 N. E. 345, 3 Ann. Cas. 986; Re Graves, 242 Ill. 212, 89 N. E. 978; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

Where there is a succession tax due the state, the state has a vested interest.

National Safe Deposit Co. v. Stead, 250 Ill. 597, 95 N. E. 973, Ann. Cas. 1912B, 430; Re Stanford, 126 Cal. 112, 45 L.R.A. 788, 58 Pac. 462; Re Graves, 242 Ill. 212, 89 N. E. 978; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

As to contracts made after the act complained of was passed, it cannot be urged that the act is contrary to § 10, article 1 of the Federal Constitution, providing that no state shall pass any law impairing the obligation of contracts.

Lehigh Water Co. v. Easton, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277.

The unreasonable search and seizure provision of the 4th Amendment does not prevent a state from adopting effectual means to collect a tax which it has imposed.

Flint v. Stone Tracy Co. 220 U. S. 107, 176, 55 L. ed. 389, 423, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312.

The 4th Amendment does not prohibit the issuing of process to require attendance and testimony of witnesses and the production of books and papers.

Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563.

The 4th Amendment does not prohibit providing for the inspection and surveying of a mine in the possession of another.

Montana Co. v. St. Louis Min. & Mill. Co. 152 U. S. 161, 38 L. ed. 398, 14 Sup. Ct. Rep. 506.

Any legal procedure enforced by public authority, whether sanctioned by age and custom or newly devised in the discretion of the legislature, in furtherance of the general public good, must be held to be due process of law.

Hurtado v. California, 110 U. S. 537, 28 L. ed. 239, 4 Sup. Ct. Rep. 111, 292; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312.

The mere temporary invasion of one's possession to determine a right is not the taking of property without due process of law.

Montana Co. v. St. Louis Min. & Mill. Co. supra.

The liberty of contract guaranteed by the court against deprivation without due process of law is the liberty of natural, and not artificial, persons.

Western Turf Asso. v. Greenberg, 204 U. S. 359, 363, 51 L. ed. 520, 522, 27 Sup. Ct. Rep. 384; Northwestern Nat. L. Ins. Co. v. Riggs, 203 U. S. 243, 255, 51 L. ed. 168, 173, 27 Sup. Ct. Rep. 126, 7 Ann. Cas. 1104.

Mr. Justice Lamar, after making the foregoing statement of facts, delivered the opinion of the court:

The Illinois inheritance tax law operates to seal safe [67] deposit boxes for at least ten days after the death of the renter. In view of the uncertainty as to who might own the contents of boxes standing in the joint name of the deceased and others, the statute sealed their boxes also for a like period. The act further provided that in neither case could the securities be removed except after notice to officers designated by the state, and even then the company was required to retain possession of enough of the assets to pay the state's tax. The Deposit Company insists that this statute violated the 14th Amendment, for that, without due process of law, it imposed upon the company a duty as to property over which it had no control; required it to assume the risk of determining who was the true owner, and forced upon it the obligations and liabilities of a tax-collecting agent of the state. In the court below and on the argument here, the validity of the section under review was said to depend upon the relation between the company and the renter,—it being argued for the state that the contract was one of bailment where, on the death of the bailor, the Deposit Company, as bailee, was bound to surrender the securities to the owner or person having a right thereto, one of whom, in each case, was the state to the extent of its tax. On the other hand, the complainant insisted that if there was no possession in fact, there could be no possession in law; and that if no possession existed, it was beyond the power even of the legislature to charge the company with liabilities that could only arise out of a possession actually existing.

This is one of that class of cases which illustrate the fact that, both in common speech and in legal terminology, there is no word more ambiguous in its meaning than possession. It is interchangeably used to describe actual possession and constructive possession which often so shade into one another that it is difficult to say

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where one ends and the other begins. Union Trust Co. v. Wilson, 198 U. S. 537, 49 L. ed. 1156, 25 Sup. Ct. Rep. 766. Custody may be in the servant and possession [68] in the master; or title and right of control may be in one and the property within the protection of the house of another, as in Bottom v. Clarke, 7 Cush. 489, where such possession of a locked trunk was held not to include possession of the contents. So that, as pointed out by Pollock and Wright in their work on the subject, controversies arising out of mixed possession have inevitably led to many subtle refinements in order to determine the rights of conflicting claimants, or to lay the proper charge of ownership in prosecutions for larceny of goods belonging to one, in the custody of another, or found by the defendant.

In the present case, however, the Federal question presented by the record does not call for a decision as to the exact relation between the parties during the life of the renter,—whether there was a strict bailment; whether the renter was in possession of the box with the Deposit Company as guard over the contents; whether the property was in the custody of the company with the renter having a license to enter the building and remove the securities; or whether, as held in People ex rel. Glynn v. Mercantile Safe Deposit Co. (159 App. Div. 98, 143 N. Y. Supp. 849), construing a similar statute of New York, the relation was that which exists between tenants and landlord of an office building who keeps under his control the general means of access to the building and offices therein, but as to which offices and their contents, the rights of the tenants are exclusive. The Illinois supreme court held that the relation created by the Deposit Company's contract was that of bailor and bailee. That construction by the state court is controlling, unless, as claimed by the complainant, it makes the statute violate the 14th Amendment, as being an arbitrary attempt to create liabilities arising out of possession, where there was no possession in fact.

Certainly the person who rented the box was not in actual possession of its contents. For the valuables were [69] in a safe built into the company's vault, and therefore in a sense "under the protection of the house." The owner could not obtain access to the box without being admitted to the vault, nor could he open the box without the use of the company's master key. Both in law, and by the express provisions of the contract, the company stood in such relation to the property as to make it liable if, during the lifetime of the owner, it negligently permitted unauthorized persons to remove the contents, even though it might be under color of legal process. Roberts v. Stuyvesant Safe Deposit Co. 123 N. Y. 57, 9 L.R.A. 438, 20 Am. St. Rep. 718, 25 N. E. 294, 1 Am. Neg. Cas. 535; Mayer v. Brensinger, 180 Ill. 110, 72 Am. St. Rep. 196, 54 N. E. 159. After his death, it would be likewise liable if it permitted unauthorized persons, be they heirs, legal representatives, or joint renters, to take the property of the decedent. In the exercise of its power to provide for the distribution of his property, the state could make it unlawful, except on conditions named, for his personal representative to receive or the holder to deliver, effects belonging, or apparently belonging, in whole or in part, to the deceased. As the state could provide for the appointment of administrators, for the distribution to heirs or legatees of all the property of the deceased, and for the payment of a tax on the transfer, it could, of course, legislative as to the incidents attending the collection of the tax and the time when the administrator or executor could take possession. If, before representatives were appointed, anyone, having the goods in possession or control, delivered them to an unauthorized person, he would be held liable as an executor *de son tort*. The fixing by this statute of the time and condition on which delivery might be made by a deposit company was also, in effect, a limitation on the right of the heir or representatives to take possession. If they had no right to receive except on compliance with the statutory conditions, neither could the Safe Deposit Company, as bailee or custodian, surrender the contents except upon like compliance with statutory conditions.

[70] The contention that the company could not be arbitrarily charged with the duty of supervising the delivery and determining to whom the securities belonged is answered by the fact that in law and by contract it had such control as to make it liable for allowing unauthorized persons to take possession. Both by the nature of its business and the terms of its contract it had assumed the obligation cast upon those having possession of property claimed by different persons. If the parties could not agree as to who owned the securities, the company had the same remedy by bill of interpleader that was afforded all others confronted with similar conditions. There was certainly nothing arbitrary or unreasonable in compelling one who had received such control of property from another, to surrender it after his death only to those having the right thereto. Nor was there any deprivation of property, nor any arbitrary imposition of a liability, in requiring the company to retain assets sufficient to pay the tax that might be due to

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the state. There are many instances in which, by statute, the amount of the tax due by one is to be reported and paid by another,—as in the case of banks required to pay the tax on the shares of a stockholder. First Nat. Bank v. Kentucky, 9 Wall. 363, 19 L. ed. 704. These conclusions answer the other constitutional objections and make it unnecessary to deal with each of them separately at length.

It is contended that the statute impaired the complainant's charter power to do a safe deposit business. But it no more interferes with the right of the company to do that business than it does with the right of a private person to contract to take possession or control of securities belonging to another. But, having regard to the radical change wrought by the death of the owner, and the subsequent duty to make delivery to one authorized by law to receive possession, the statute points out when and on what conditions such delivery may be made to the personal [71] representative, surviving partners, or persons jointly interested.

The objection that the act, in directing the state officers to inspect the contents of the box, operates as an unreasonable search and seizure, raises no Federal question, since the prohibition on that subject in the 4th Amendment does not apply to the states. Ohio ex rel. Lloyd v. Dollison, 194 U. S. 447, 48 L. ed. 1065, 24 Sup. Ct. Rep. 703.

The claim that the statute compels the company to break its contract with joint renters and deprives the latter, for ten days, of access to the box and the right to use it or remove the contents, is without merit. The company, joint renters, or firms, each made the contract in the light of the state's power to legislate for the protection of the estate of any one of the joint renters or partners that might die during the term. As it now appears that all of the rentals were from year to year, and that all had expired before final hearing, and were renewed after the passage of the law, it can also be said that all such contracts of joint rental are made in the light of the provisions of this particular statute. The boxes were leased with the knowledge that the state had so legislated as not only to protect the interests of one dying after the rental, but also to secure the payment of the state tax out of whatever might be found in the box belonging to the deceased. The inconvenience was one of the not unreasonable incidents of the joint relationship.

Judgment affirmed.

[72] UNITED STATES, Plff. in Err.,
v.
EUGENE BUCHANAN.

(See S. C. Reporter's ed. 72-77.)

Public lands — obstruction to settlement — prior entry.

Land covered by a homestead claim after entry and before patent is not "public land" within the meaning of the act of February 25, 1885 (23 Stat. at L. 322, chap. 149, U. S. Comp. Stat. 1901, p. 1525), § 3, making it unlawful to prevent "any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry."

[For other cases, see Public Lands, I. b, in Digest Sup. Ct. 1908.]

[No. 589.]

Argued December 3, 1913. Decided January 5, 1914.

IN ERROR to the District Court of the United States for the District of Colorado to review a judgment which sustained a demurrer to an indictment charging an attempt to prevent entry upon public land. Affirmed.

Statement by Mr. Justice Lamar:

The grand jury for the district of Colorado indicted Buchanan for a violation of the act "to prevent unlawful occupancy of the public land." The indictment charged that in February, 1907, one Edward Scott made a homestead entry, at the proper office, of a quarter section of land in Colorado, and died, March 28, 1910, leaving the homestead entry in full force and effect; that thereafter "his heirs were in lawful possession of and were engaged in cultivating the said homestead land for the purpose of protecting their right as heirs to the same, until May 9, 1911, when the defendant, Buchanan, wilfully, wickedly, unlawfully, and feloniously did prevent and obstruct said heirs from peaceably entering upon and establishing a settlement and residence on the said homesteaded land of the United States subject to settlement and entry under the public land laws." The defendant demurred on the ground that the facts charged did not constitute an offense punishable under § 3 of the act of February 25, 1885 (23 Stat. at L. 322, chap. 149, U. S. Comp. Stat. 1901, p. 1525), which provides:

[73] "Sec. 3. That no person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, . . . any person from peaceably entering upon or establishing a settlement or residence on any tract of pub-

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lic land subject to settlement or entry under the public land laws of the United States."

The defendant's demurrer was sustained and the government brought the case here under the criminal appeals act.

Assistant Attorney General Knaebel argued the cause, and, with Mr. S. W. Williams, filed a brief for plaintiff in error:

The principal evil which was immediately aimed at by the act of Feb. 25, 1885, was the unlawful inclosures of the public domain, which were erected and maintained upon an enormous scale by cattle raisers in the West. But the underlying purpose struck deeper than the mere vindication of the technical proprietary rights of the government. The inclosures were deemed gravely obnoxious, not so much because they were unauthorized, as because of their results. One of these was interference with the right of pasturage common to all citizens (Buford v. Houtz, 133 U. S. 320, 33 L. ed. 618, 10 Sup. Ct. Rep. 305); another, and by far the most serious, was obstruction of the homestead policy. It is not too much to affirm that, beyond all else, it was to protect and effectuate that policy that this law was enacted. This fact was recognized by the court in Cameron v. United States, 148 U. S. 301, 305, 37 L. ed. 459, 460, 13 Sup. Ct. Rep. 595, where it is said that the act was passed to prevent the practice of inclosing lands by which persons desiring to become settlers upon such lands were driven or frightened away, in some cases by threats of violence.

See also Camfield v. United States, 167 U. S. 518, 524, 42 L. ed. 260, 262, 17 Sup. Ct. Rep. 864; Golconda Cattle Co. v. United States, 119 C. C. A. 519, 201 Fed. 281.

Judging by the opinion, the trial court must have read the word "establishing" in the 3d section as though its only meaning were "initiating." This is an erroneous assumption; but, even if it were correct, it would not justify the narrow construction of the section which the court adopted, since the evident spirit and purpose of a statute, penal or otherwise, is not to be strangled to satisfy the bare letter of a single word.

United States v. Lacher, 134 U. S. 624, 629, 33 L. ed. 1080, 1083, 10 Sup. Ct. Rep. 625.

The ordinary meaning of "establish," as indicated by the derivation and defined by all lexicographers, is "to make stable and firm;" "to settle unalterably."

Black's Law Dict. p. 438; Dickey v. Maysville, W. P. & L. Turnp. Road Co. 7 Dana, 127; State ex rel. Bragg v. Rogers, 107 Ala. 444, 32 L.R.A. 520, 19 So. 909.

The word "made" where it occurs the fourth time in § 1 of the act in interpreted to mean "maintained." In the sense of the statute one who maintains an inclosure makes an inclosure, and as long as he maintains it he makes it.

The obligation of the government is to protect the right of the homesteader to remain on the land while he is earning it.

United States v. Waddell, 112 U. S. 76, 80, 28 L. ed. 673, 674, 5 Sup. Ct. Rep. 35; United States v. Brighton Ranch Co. 25 Fed. 465—a fence case.

A broader meaning should be given to the words "public lands."

United States v. Brighton Ranch Co. supra; Kindred v. Union P. R. Co. 225 U. S. 582, 56 L. ed. 1216, 32 Sup. Ct. Rep. 780; Shiver v. United States, 159 U. S. 491, 494, 40 L. ed. 231, 232, 16 Sup. Ct. Rep. 54; United States v. Blendaur, 63 C. C. A. 636, 128 Fed. 913.

Mr. S. E. Naugle argued the cause, and, with Mr. C. W. Waterman, filed a brief for defendant in error:

An indictment, to be good under § 3 of 23 Stat. at L. 321, chap. 149, U. S. Comp. Stat. 1901, p. 1524, must state that the land upon which entry is prevented is public land of the United States, and subject to entry and settlement as such.

Haynes v. United States, 42 C. C. A. 34, 101 Fed. 819.

The policy of the United States government with respect to public lands has been a liberal one, toward keeping the public lands open for grazing or use of the public generally, and would not permit these lands to be controlled exclusively for the benefit of any person or corporation, as against the public at large.

Buford v. Houtz, 133 U. S. 320, 33 L. ed. 618, 10 Sup. Ct. Rep. 305.

The purpose of the act is so clearly expressed in its title and contents that there can be no doubt that it refers to occupancy of public lands in some manner made unlawful by its provisions, and does not extend to the protection of settlers after they have made entry upon the land and established their residence or settlement thereon. Its provisions cannot be extended by construction beyond the grammatical and natural meaning of the terms employed on any plea of failure of justice.

Remmington v. State, 1 Or. 281.

There can be no constructive crimes.

State v. Lovell, 23 Iowa, 304.

The offense must be both within the spirit and the letter of the law.

Lair v. Killmer, 25 N. J. L. 522.

We are to look to the words in the first instance, and where they are plain we are to decide on them. If they be doubtful, we

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are them to have recourse to the subject-matter; but at all events it is only a secondary rule.

Sedgw. Stat. & Const. Law, 2d ed. p. 282.

The term "public lands," as used in this statute, means the unappropriated public domain of the United States subject to entry and settlement under the land laws of the United States, so that when the land is entered, residence established, possession maintained, and cultivation engaged in for a period of four years, with the entry still in full force and effect, as alleged in the indictment herein, it is severed from the public domain, appropriated to private purposes, no longer subject to entry or settlement, and no longer public land.

Wilcox v. Jackson, 13 Pet. 498–513, 10 L. ed. 264–271; McGuire v. Brown, 106 Cal. 660, 30 L.R.A. 384, 39 Pac. 1060; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112.

The courts and General Land Office have uniformly held that residence under the homestead act is established by the erection of a suitable dwelling house, and taking up residence on the land, and recognize a distinction between establishing a residence and maintaining it. If once established within the required time, it may then be maintained or abandoned, as the entryman may choose. To enter means to acquire an inceptive right to a portion of the unappropriated soil of the United States, by filing a claim with the register of the land office.

Lockwitz v. Larson, 16 Utah, 275, 52 Pac. 279.

The words "enter on" and "occupy" have no synonyms that convey meaning more clearly than they do themselves.

Smith v. Townsend, 148 U. S. 490, 37 L. ed. 533, 13 Sup. Ct. Rep. 634, 1 Okla. 117, 29 Pac. 85.

That the lands are public lands must appear upon the face of the indictment.

Haynes v. United States, 42 C. C. A. 34, 101 Fed. 819.

It is a sufficient defense to a proceeding under this act to show that land inclosed or occupied was not public land.

Cameron v. United States, 148 U. S. 301–305, 37 L. ed. 459–461, 13 Sup. Ct. Rep. 595.

[74] Mr. Justice Lamar, after making the foregoing statement of facts, delivered the opinion of the court:

The statute under which the defendant was indicted makes it unlawful to prevent "any person from peaceably entering upon or establishing a settlement or residence on public land, subject to settlement or entry." The indictment charges that the defendant prevented the heirs of the homesteader "from entering upon and establishing a settlement and residence on homesteaded lands of the United States subject to settlement and entry." This difference between the language of the statute—"public land of the United States"—and the charge in the indictment—"homesteaded land of the United States"—raises the question whether, after entry and before patent, land covered by a homestead claim is public land within the meaning of the act "to prevent unlawful occupancy of the public land."

In construing the statute it must be remembered that at the time of its passage in 1885, by tacit consent of the government, any person could graze sheep and cattle upon any part of the public domain. Buford v. Houtz, 133 U. S. 326, 33 L. ed. 620, 10 Sup. Ct. Rep. 305; Light v. United States, 220 U. S. 535, 55 L. ed. 573, 31 Sup. Ct. Rep. 485. Many availed themselves of this privilege, and the cattle of different owners fed together on the open prairie, no one claiming that thereby any exclusive right had been acquired. The first fences were built only around very small areas. But from this small beginning the practice rapidly grew, until in some cases vast tracts were fenced in by herdsmen who treated the land as though it was their own property. 5 H. R. 1325, 48th Cong. 1st Sess. These unlawful fences not only closed the roads and obstructed the mails, but there were occasions in which citizens were prevented from peaceably taking possession of these inclosed public lands, and by settlement thereon securing the right to enter the same at the register's office.

[75] Under these circumstances Congress passed the act intended to protect the rights of the United States as proprietor, by making unlawful "all inclosures of any public land;" to prevent obstruction of the roads; to create a method for summary removal of fences; and to provide a punishment for those who prevented others from entering upon or establishing a settlement on public land subject to settlement or entry. But all its provisions related to public lands—not to private lands; to land subject to entry—not to land which had been entered in the register's office; to land subject to settlement—not to land on which a settlement had already been established. For, as shown by the context, the word "established" did not mean "to fix unalterably" (Osborne v. San Diego Land & Town Co. 178 U. S. 32, 44 L. ed. 969, 20 Sup. Ct. Rep. 860; but to create or set up the settlement which had to be made prior to entry at the register's office in the case of a pre-emptor, and could be so made in the case of a homesteader. Rev. Stat. § 2289, U. S. Comp. Stat. 1901, p.

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1388, Rev. Stat. §§ 2259, 2263, 2264, act of May 14, 1880, 21 Stat. at L. 140, chap. 89, § 3, U. S. Comp. Stat. 1901, p. 1393. Stearns v. United States, 82 C. C. A. 48, 152 Fed. 902 (10); 4 Ops. Atty. Gen. 493. These provisions refer not to something to be done in the future, but to a settlement already completed, and require that within thirty days after this finished act, proof of such settlement shall be made. When, on that proof, or compliance with other statutory conditions, entry was made, the pre-emptor or homesteader was entitled to possession, and could protect himself by legal proceedings against intrusion by cattlemen or others.†

[76] The indictment here charges that, after having entered this quarter section at the register's office, Scott remained in possession for three years, and that when he died the homestead was in full force and was thereafter maintained by his heirs. This negatives any idea of abandonment. It implies that he not only entered the land at the proper office, but had established a settlement, erected a dwelling, and both acquired and maintained that "inceptive right" which "was the commencement of title." Chotard v. Pope, 12 Wheat. 588, 6 L. ed. 738; Hoofnagle v. Anderson, 7 Wheat. 212, 5 L. ed. 437.

The land covered by the homestead of Scott was therefore not public land of the United States, subject to entry or settlement. For, "in no just sense can land be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public land before the entry, after it they are private property." Wisconsin C. R. Co. v. Price County, 133 U. S. 506, 33 L. ed. 693, 10 Sup. Ct. Rep. 341; Svor v. Morris, 227 U. S. 524-528, 57 L. ed. 623-625, 33 Sup. Ct. Rep. 385. The entry by Scott withdrew the land from entry or settlement by any other, [77] and segregated the quarter section from the public domain. The legal title remained in the government until patent issued; but, as against all except the United States, he was the lawful possessor, clothed with an inceptive title (Sturr v. Beck, 133 U. S. 547, 549, 33 L. ed. 764, 765, 10 Sup. Ct. Rep. 350; Bunker Hill & S. Min. & Concentrating Co. v. United States, 226 U. S. 550, 57 L. ed. 346, 33 Sup. Ct. Rep. 138), which entitled him to maintain suits in equity or actions at law to obtain redress for a violation of his possessory rights (Russian-American Packing Co. v. United States, 199 U. S. 577, 50 L. ed. 315, 26 Sup. Ct. Rep. 157). The homesteader having thus acquired the right to "treat the land as his own" so far as was necessary to carry out the purposes of the statute (Shiver v. United States, 159 U. S. 497, 40 L. ed. 232, 16 Sup. Ct. Rep. 54), it is apparent that this right was in the nature of private property, and entitled to protection as such. Interference with the possession of the homesteader or his heirs living on land thus withdrawn from entry was not punishable under a Federal statute applicable only to public lands subject to entry.

This view is sustained by the terms of the statute, and is in accord with the policy to leave the protection of such possessory claims to the laws of the several states. Congress could have legislated so as to make the statute applicable until patent issued. But instead of doing so, it left the homesteader who had acquired a possessory title to avail himself of the same rights that were open to others holding lands by title absolute or inchoate. In both cases there was right of possession, and in both cases wrongs against possession could be redressed. Such seems to have been the practical construction of the statute since its passage, twenty-eight years ago, for

†Sec. 2289. Every person who is the head of a family . . . shall be entitled to enter one-quarter section . . . of unappropriated public lands . . . .

Sec. 2259. Every person being the head of a family . . . who has made or hereafter makes a settlement in person on the public lands subject to pre-emption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon, is authorized to enter with the register of the land office . . . any number of acres not exceeding 160 . . . upon paying to the United States the minimum price of such land.

Sec. 2263. Prior to any entries being made under and by virtue of the provisions of § 2259, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register . . . .

Sec. 2264. When any person settles or improves a tract of land subject at the time of settlement to private entry, and intends to purchase the same under the preceding provisions of this chapter, he shall, within thirty days after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon, and declaring his intention to claim the same under the pre-emption law; and he shall, moreover, within twelve months after the date of such settlement, make the proof, affidavit, and payment hereinbefore required. If he fails to file such written statement, or to make such affidavit, proof, and payment within the several periods named above, the tract of land so settled and improved shall be subject to the entry of any other purchaser.

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we are cited to no case in which a prosecution has been instituted, in a Federal court, against one interfering with the possession of a homesteader after entry and before patent.

Judgment affirmed.

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[78] ANNA LAPINA, Petitioner,
v.
WILLIAM WILLIAMS, Commissioner of Immigration.

(See S. C. Reporter's ed. 78–93.)

Statutes — construction — committee reports — debates.

1. The Federal Supreme Court ordinarily will not go beyond the reports of congressional committees to the debates in Congress as a source from which to determine the meaning of the language employed in a Federal statute.

[For other cases, see Statutes, II. a, in Digest Sup. Ct. 1908.]

Statutes — construction — title of act.

2. It is only in a doubtful case that the title of an act can control the meaning of the enacting clauses.

[For other cases, see Statutes, II. 1, in Digest Sup. Ct. 1908.]

Aliens — deportation — effect of previous residence.

3. An alien woman found an inmate of a house of prostitution within three years after her return to the United States, following a temporary absence abroad, may, notwithstanding her previous residence in the United States for upwards of three years, be deported under the provisions of the immigration act of February 20, 1907 (34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1911, p. 499), which in enumerating in § 2 the classes of aliens which shall be excluded from admission into the United States, specifically mentions "prostitutes, or women or girls coming into the United States for the purpose of prostitution, or for any other immoral purpose," and in § 3 provides for the deportation of "any alien woman or girl who shall be found an inmate of a house of prostitution, or practising prostitution at any time within three years after she shall have entered the United States."

[For other cases, see Aliens, VI., in Digest Sup. Ct. 1908.]

[No. 7.]

Submitted December 1, 1913. Decided January 5, 1914.

NOTE.—On the right to resort to the views of individual members of legislature as aid to construction of statute—see note to Blake v. National City Bank, 23 L. ed. U. S. 119.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the District Court for the Southern District of New York, dismissing a writ of habeas corpus to inquire into an order for the deportation of an alien. Affirmed.

See same case below, 103 C. C. A. 327, 179 Fed. 839.

The facts are stated in the opinion.

Mr. William Hawkins submitted the cause for petitioner:

The majority of the circuit courts of appeal are in petitioner's favor.

Ex parte Hoffman, 103 C. C. A. 327, 179 Fed. 839; Taylor v. United States, 81 C. C. A. 197, 152 Fed. 1; United States v. Sprung, 110 C. C. A. 37, 187 Fed. 905; Rodgers v. United States, 81 C. C. A. 454, 152 Fed. 346; United States ex rel. Barlin v. Rodgers, 112 C. C. A. 382, 191 Fed. 979; Redfern v. Halpert, 108 C. C. A. 262, 186 Fed. 151; United States v. Aultman, 79 C. C. A. 457, 148 Fed. 1022; United States v. Nakashima, 87 C. C. A. 646, 160 Fed. 842. See also Re Panzara, 51 Fed. 275; Re Maiola, 67 Fed. 114; Moffitt v. United States, 63 C. C. A. 117, 128 Fed. 375; Re Buchsbaum, 141 Fed. 222.

The petitioner, Anna Lapina, in the eye of the law, was a domiciled alien resident, and therefore not within the scope of the immigration act of 1907.

The Venus, 8 Cranch, 280, 3 L. ed. 562; Cesna v. Meyers, H. R. 42d Congr. 2d Sess. Rep. No. 11; McCrary, Elections, 2d ed. 449, 561; Behrensmeyer v. Kreitz, 135 Ill. 591, 26 N. E. 704; Cobb v. Smith, 88 Ill. 201; Wilkins v. Marshall, 80 Ill. 78; State ex rel. Leche v. Fowler, 41 La. Ann. 380, 6 So. 602.

The words "aliens" and "alien," as used in the immigration statutes existing prior to 1903 and 1907, were both construed uniformly by the Federal courts as referring to "alien immigrants" exclusively.

Moffitt v. United States, 63 C. C. A. 117, 128 Fed. 375; United States ex rel. Anderson v. Burke, 99 Fed. 895; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Re Panzara, 51 Fed. 275; Re Martorelli, 63 Fed. 437; Re Maiola, 67 Fed. 114.

The use of the word "aliens" in acts of 1903 and 1907, instead of "alien immigrants," does not indicate any intention on the part of Congress to make the statutes of 1903 and 1907 apply to the case at bar.

United States v. Dauphin, 20 Fed. 628; Goodell v. Jackson, 20 Johns. 722, 11 Am. Dec. 351; Taylor v. Delancey, 2 Cai. Cas. 151; Dominick v. Michael, 4 Sandf. 409.

Where the language of a statute is am-

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biguous or otherwise doubtful; or, being plain, a literal construction would lead to such absurdity, hardship, or injustice as to render it irrational to impute to the law-making power a purpose to produce or permit such result, the title may be resorted to as tending to throw light upon the legislative intent as to its scope or operation.

United States v. Fisher, 2 Cranch, 386, 2 L. ed. 313; Church of the Holy Trinity v. United States, 143 U. S. 462, 36 L. ed. 229, 12 Sup. Ct. Rep. 511; Coosaw Min. Co. v. South Carolina, 144 U. S. 563, 36 L. ed. 542, 12 Sup. Ct. Rep. 689.

It is proper for this court to look at the congressional history of the act.

Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 227, 12 Sup. Ct. Rep. 511; Binns v. United States, 194 U. S. 486, 48 L. ed. 1087, 24 Sup. Ct. Rep. 816.

Assistant Attorney General Denison submitted the cause for respondent. Mr. Francis H. McAdoo was on the brief:

The word "alien," as used in the later immigration statutes, does not mean "alien immigrant," but is intended to cover any "alien" entering the country, whether or not previously here.

United States v. Aultman, 79 C. C. A. 457, 148 Fed. 1022; United States ex rel. Barlin v. Rodgers, 112 C. C. A. 382, 191 Fed. 970; Ex parte Crawford, 165 Fed. 830; Frick v. Lewis, 115 C. C. A. 493, 195 Fed. 693; United States ex rel. Funaro v. Watchorn, 164 Fed. 152; Ex parte Hoffman, 103 C. C. A. 327, 179 Fed. 839; Re Kleibs, 128 Fed. 656; Lem Moon Sing v. United States, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967; Low Wah Suey v. Backus, 225 U. S. 460, 56 L. ed. 1165, 32 Sup. Ct. Rep. 734; Re Maiola, 67 Fed. 114; Re Martorelli, 63 Fed. 437; Moffitt v. United States, 63 C. C. A. 117, 128 Fed. 375; 23 Ops. Atty. Gen. p. 278; Re Ota, 96 Fed. 487; Re Panzara, 51 Fed. 275; Ex parte Petterson, 166 Fed. 536; Prentis v. Stathakos, 112 C. C. A. 607, 192 Fed. 469; Redfern v. Halpert, 108 C. C. A. 262, 186 Fed. 150; Rodgers v. United States, 81 C. C. A. 454, 152 Fed. 346; Sibray v. United States, 107 C. C. A. 483, 185 Fed. 401; Siniscalchi v. Thomas, 115 C. C. A. 501, 195 Fed. 701; Taylor v. United States, 207 U. S. 120, 52 L. ed. 130, 28 Sup. Ct. Rep. 53, 81 C. C. A. 197, 152 Fed. 1; United States v. Aultman Co. 143 Fed. 922; United States v. Nakashima, 87 C. C. A. 646, 160 Fed. 842; United States v. Sprung, 110 C. C. A. 37, 187 Fed. 903; United States v. Villet, 173 Fed. 500; United States ex rel. White v. Hook, 166 Fed. 1007.

If a restriction on the word "alien" is to be implied, it should cover persons bona fide domiciled, and not this petitioner.

United States ex rel. Barlin v. Rodgers, 112 C. C. A. 382, 191 Fed. 971; Ex parte Petterson, 166 Fed. 536.

Mr. Justice Pitney delivered the opinion of the court:

The petitioner, an unmarried woman and a native of Russia, came to the United States in the year 1897 or 1898, at the age of about twelve years, accompanied by [83] a man who had promised to marry her, and during the four years immediately following she practised prostitution in the city of New York, and supported her companion with the proceeds of her prostitution; she then left that city, and thereafter continuously practised prostitution in various parts of the United States, including different towns and cities in the states of Washington, Arizona, and Texas. In the month of March, 1908, she returned to Russia for the purpose of visiting her mother, intending at the same time to return to this country; she re-entered the United States at the port of New York in June, 1908, accompanied by her mother, at which time petitioner falsely represented, for the purpose of facilitating her landing, that she was Mrs. Joseph Fiore, and the wife of an American citizen; at the time of this, her second entry, she intended to continue the practice of prostitution in the United States, and almost immediately upon being admitted she engaged in that practice, and was continually engaged in it until September 21, 1909, on which date she was arrested in a house of prostitution in Phœnix, Arizona, upon a warrant of arrest duly issued by the Acting Secretary of Commerce and Labor under the provisions of the immigration act of February 20, 1907 (34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1911, p. 499). Upon a hearing properly accorded to her, the foregoing facts were established, and an order of deportation was made upon the ground that she was a prostitute, and was such at the time of her entry into the United States; that she entered the United States for the purpose of prostitution; and that she had been found an inmate of a house of prostitution and practising the same within three years after her entry. She obtained a writ of habeas corpus, which, after a hearing, was dismissed by the district court for the southern district of New York. Upon appeal, the circuit court of appeals affirmed the order of dismissal (sub nom. Ex parte Hoffman, 103 C. C. A. 327, 179 Fed. 839) The present writ of certiorari [84] was then allowed because of the division of judicial opinion upon the

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question presented, which is whether the provisions of the immigration act of 1907 respecting admission and deportation apply to an alien such as the petitioner, who, having remained in this country for more than three years (in this instance for more than ten years), after first entry, and having gone abroad for a temporary purpose and with the intention of returning, again seeks and gains admittance into the United States.

The pertinent provisions of the act of 1907 are set forth in the margin.† So far as the present question is concerned, the act is not materially different from—certainly not less stringent than—the act of March 3, 1903 (32 Stat. at L. 1213, chap. 1012). The circuit court of appeals in the present case followed its own decision in Taylor v. United States, 81 C. C. A. 197, 152 Fed. 1, which was based upon the act of 1903, [85] and in which it was held that while the provisions of the act of March 3, 1891 (26 Stat. at L. 1084, chap. 551, U. S. Comp. Stat. 1901, p. 1294), had been construed as restricted to "alien immigrants," the act of 1903 had been so framed as to cover aliens, whether immigrants or not. In behalf of the petitioner it is contended that the court erred in its judgment as to the purpose of Congress in modifying the language of previous acts on adopting the revision of 1903, and that this act and the act of 1907, as well as those that preceded them, when properly construed, refer to "alien immigrants" exclusively.

The Acts of 1903 and 1907 being revisions or compilations (with some modifications) of previous acts pertaining to the same general subject-matter, a reference list, in chronological order, is for convenience set forth in the margin.†

[86] In a number of cases in the Federal district and circuit courts, it was held that the provisions of the act of March 3, 1891, and the acts that preceded it, relating to the exclusion and deportation of persons arriving in the United States from foreign countries, were confined in their operation to "alien immigrants;" and that this term did not include aliens previously resident in this country, who had temporarily departed with the intention of returning. Re Panzara (1892) 51 Fed. 275; Re Martorelli (1894) 63 Fed. 437; Re Maiola (1895) 67 Fed. 114; Re Ota (1899) 96 Fed. 487. The same view was expressed by the circuit court of appeals for the ninth circuit in Moffit v. United States (1904) 63 C. C. A. 117, 128 Fed. 375.

Upon the reasoning and authority of these cases, a similar construction was given to the act of 1903 in United States v. Aultman Co. (1906) 143 Fed. 922 (af-

†Sec. 2. That the following classes of aliens shall be excluded from admission into the United States: . . . prostitutes, or women or girls coming into the United States for the purpose of prostitution, or for any other immoral purpose; . . .

Sec. 3. . . . any alien woman or girl who shall be found an inmate of a house of prostitution or practising prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States, and shall be deported as provided by sections twenty and twenty-one of this act.

Sec. 20. That any alien who shall enter the United States in violation of law, . . . shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States.

Sec. 21. That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act or of any law of the United States, he shall cause such alien, within the period of three years after landing or entry therein, to be taken into custody and returned to the country whence he came, as provided by section twenty of this act. . . .

†Immigration Acts.

Rev. Stat. title, "Immigration," §§ 2158–2164, U. S. Comp. Stat. 1901, pp. 1280–1286.

"An Act Supplementary to the Acts in Relation to Immigration," approved March 3, 1875 (18 Stat. at L. 477, chap. 141, U. S. Comp. Stat. 1901, p. 1285).

"An Act to Regulate Immigration," approved August 3, 1882 (22 Stat. at L. 214, chap. 376, U. S. Comp. Stat. 1901, p. 1288).

"An Act to Prohibit the Importation and Migration of Foreigners and Aliens under Contract or Agreement to Perform Labor in the United States, its Territories, and the District of Columbia," approved February 26, 1885 (23 Stat. at L. 332, chap. 164, U. S. Comp. Stat. 1901, p. 1290).

"An Act to Amend an Act to Prohibit the Importation and Immigration of Foreigners and Aliens under Contract or Agreement to Perform Labor in the United States, its Territories, and the District of Columbia," approved February 23, 1887 (24 Stat. at L. 414, chap. 220).

"An Act Making Appropriations to Supply Deficiencies," etc., approved October 19, 1888, containing clauses amending acts of February 26, 1885, and of February 23, 1887 (25 Stat. at L. 566, 567, chap. 1210, U. S. Comp. Stat. 1901, p. 1294).

"An Act in Amendment to the Various Acts Relative to Immigration and the Importation of Aliens under Contract or Agreement to Perform Labor," approved

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firmed by the circuit court of appeals, 79 C. C. A. 457, 148 Fed. 1022), the attention of the court apparently not having been directed to the question whether any significant change had been made in the law by the revision of 1903.

But in Taylor v. United States (1907) 81 C. C. A. 197, 152 Fed. 1, which was a review by the circuit court of appeals for the second circuit of a judgment of conviction upon an indictment for a misdemeanor for permitting an alien sailor to land in New York, contrary to § 18 of the act of 1903, [87] which made it the duty of the owners, officers, and agents of any vessel bringing an alien to the United States to adopt due precautions to prevent the landing of any such alien, etc., the court reviewed the changes made by Congress in the revision of 1903, "following decisions of the courts which tended to relax the provisions of earlier acts," and, finding that § 18 of the act of 1903 substantially re-enacted a part of § 8 of the act of 1891, employing the term "alien" in the place of the term "alien immigrant," and that similar changes were made in other parts of the act, came to the conclusion that the change evinced an intent of Congress to use the word "alien" in its ordinary and unqualified meaning. This decision was reviewed in this court, and the judgment was reversed, but upon the ground (207 U. S. 120, 124, 52 L. ed. 130, 132, 28 Sup. Ct. Rep. 53) that § 18 did not apply to the ordinary case of a sailor deserting while on shore leave.

Shortly after the decision of the circuit court of appeals in the Taylor Case, the circuit court of appeals for the third circuit, in Rodgers v. United States (1907) 81 C. C. A. 454, 152 Fed. 346, held that the provision of § 2 of the act of 1903, enumerating the classes of aliens to be excluded from admission into the United States, and amongst them "persons afflicted with a loathsome or with a dangerous contagious disease," and the provision of § 19, for the deportation of "aliens brought into this country in violation of law," could not be construed so as to extend to aliens domiciled in this country; affirming Re Buchsbaum, 141 Fed. 221. In United States v. Nakashima (1908) 87 C. C. A. 646, 160 Fed. 842, the circuit court of appeals for the ninth circuit adopted the same view of the act of 1903 expressed in the Aultman and Rodgers Cases, rejecting that adopted by the court of appeals in Taylor v. United States.

On the other hand, the latter decision has been followed in a number of cases arising under the act of 1907, which in this respect does not materially differ from the act of 1903. [88] Ex parte Petterson (1908) 166 Fed. 536; United States ex rel. White v. Hook (1908) 166 Fed. 1007; United States v. Villet (1909) 173 Fed. 500; Ex parte Hoffman (1910) 103 C. C. A. 327, 179 Fed. 839 (being the case now under review); Sibray v. United States (1911) 107 C. C. A. 483, 185 Fed. 401; United States ex rel. Canfora v. Williams (1911) 186 Fed. 354; United States v. Sprung (1910) 110 C. C. A. 37, 187 Fed. 903; Frick v. Lewis (1912) 115 C. C. A. 493, 195 Fed. 693; Siniscalchi v Thomas (1912) 115 C. C. A. 501, 195 Fed. 701. Contra, Redfern v. Halpert (1911) 108 C. C. A. 262, 186 Fed. 150; and see United States ex rel. Barlin v. Rodgers (1911) 112 C. C. A. 382, 191 Fed. 970.

The authority of Congress over the general subject-matter is plenary; it may exclude aliens altogether, or prescribe the terms and conditions upon which they may come into or remain in this country. Chinese Exclusion Case, 130 U. S. 581, 603, 32 L. ed. 1068, 1074, 9 Sup. Ct. Rep. 623; Nishimura Ekiu v. United States, 142 U. S. 651, 659, 35 L. ed. 1146, 1149, 12 Sup. Ct. Rep. 336; Fong Yue Ting v. United States, 149 U. S. 698, 713, 37 L. ed. 905, 913, 13 Sup. Ct. Rep. 1016; Lem Moon Sing v. United States, 158 U. S. 538, 547, 39 L. ed. 1082, 1085, 15 Sup. Ct. Rep. 967.

The question, therefore, is not the power of Congress, but its intent and purpose as expressed in legislation. The cases that have held the immigration acts not to apply to domiciled aliens returning after a temporary absence have been rested in part upon the use of the term "immigration" in the titles of the respective acts, and in part

March 3, 1891 (26 Stat. at L. 1084, chap. 551, U. S. Comp. Stat. 1901, p. 1294).

"An Act to Facilitate the Enforcement of the Immigration and Contract-Labor Laws of the United States," approved March 3, 1893 (27 Stat. at L. 569, chap. 206, U. S. Comp. Stat. 1901, p. 1300).

"An Act Making Appropriations for Sundry Civil Expenses," etc., approved August 18, 1894, containing clauses amending immigration laws (28 Stat. at L. 390, 391, chap. 301, U. S. Comp. Stat. 1901, pp. 1303, 2459).

"An Act to Regulate the Immigration of Aliens into the United States," approved March 3, 1903 (32 Stat. at L. 1213, chap. 1012).

"An Act to Regulate the Immigration of Aliens into the United States," approved February 20, 1907 (34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1911, p. 499).

"An Act to Amend an Act Entitled, 'An Act to Regulate the Immigration of Aliens into the United States,' Approved February Twentieth, Nineteen Hundred and Seven," approved March 26, 1910 (36 Stat. at L. 263, chap. 128, U. S. Comp. Stat. Supp. 1911, p. 501).

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upon the employment of that or similar terms in the enacting clauses.

As authority for a liberal interpretation of the acts, two decisions of this court have at times been referred to, which have, however, little, if any, present pertinency. Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511, held that the contract-labor law of February 26, 1885 (23 Stat. at L. 332, chap. 164, U. S. Comp. Stat. 1901, p. 1290), did not forbid a contract for employing a clergyman. The act was construed according to its spirit rather than its letter, and, in view of its title, the evil intended to be remedied, the circumstances surrounding [89] the appeal to Congress for legislation, and the reports of committees in each House, it was held to be the legislative purpose simply to stay the influx of cheap unskilled labor. Since this decision, an express exception has been made of "ministers of any religious denomination." In Lau Ow Bew v. United States, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517, this court held that the provision of the Chinese restriction act of May 6, 1882 (22 Stat. at L. 58, chap. 126, § 6), as amended by act of July 5, 1884 (23 Stat. at L. 115, chap. 220, U. S. Comp. Stat. 1901, p. 1305), requiring every Chinese merchant coming into this country to procure and produce a certificate from the Chinese government, did not apply to Chinese merchants already domiciled in the United States, who, having left this country for some temporary purpose, sought to re-enter it upon their return to their homes here. But this decision was based in part upon the language of the particular statute, and in part upon the fact that our treaty with China gave to Chinese merchants domiciled in the United States the right of egress and ingress, and the other rights, privileges, and immunities enjoyed in this country by the citizens or subjects of the most favored nation.

The legislative history of the act of 1903 demonstrates that the elimination of the word "immigrant" and other equivalent qualifying phrases was done deliberately. The bill originated in the House of Representatives, where the committee report declared that its general purpose was "to bring together in one act scattered legislation heretofore enacted in regard to the immigration of aliens into the United States; . . . to amend such portions thereof as have been found, either as the result of experience in administering the law *or of judicial decision*, to be inadequate to accomplish the purpose plainly intended thereby; and to add thereto such further provisions as seemed to be demanded by the consensus of enlightened public opinion." H. Rept. 982, 57th Cong. 1st Sess. The report of the Senate Committee likewise explained [90] the bill as being in the main a re-enactment of existing laws on the subject of immigration, stating: "The necessity for such re-enactment is due in part to the fact that, *as a result of judicial decisions*, as well as of administrative experience, the efficiency of such laws to accomplish the evident purpose of their enactment has been shown to be materially less than appeared to be at the case at the time of such enactment, and therefore a new expression of the legislative will upon the subject of immigration has become desirable." The Senate inserted the word "immigrant" in one place, but it was eliminated in conference. S. Rept. 2119, 57th Cong. 1st Sess.; S. Doc. 62, 57th Cong. 2d Sess. Cong. Record, vol. 36, p. 2949, 57th Cong. 2d Sess.

Counsel for petitioner cites the debates in Congress as indicating that the act was not understood to refer to any others than immigrants. But the unreliability of such debates as a source from which to discover the meaning of the language employed in an act of Congress has been frequently pointed out (United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 318, 41 L. ed. 1007, 1019, 17 Sup. Ct. Rep. 540, and cases cited), and we are not disposed to go beyond the reports of the committees. (Church of the Holy Trinity v. United States, 143 U. S. 457, 463, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511; Binns v. United States, 194 U. S. 486, 495, 48 L. ed. 1087, 1090, 24 Sup. Ct. Rep. 816; Johnson v. Southern P. Co. 196 U. S. 1, 19, 49 L. ed. 363, 370, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412).

It is earnestly insisted that the omission of the word "immigrant" is of little consequence, because it does not apply at all to the excluding section. It is said that the words "alien immigrant" did not occur in the Acts of 1875, 1882, 1885, or 1887, and did not occur in the excluding section of the act of 1891, but only in its 8th section,—that which related to manifesting. But in the act of 1893, "To Facilitate the Enforcement," etc., each section was made to apply to "alien immigrants." The force of the argument pretty well disappears when we recall that it was in spite of the absence of the word "immigrant" in the [91] excluding clause that courts had held that because the word occurred in the title and in other provisions of the pertinent acts, the excluding clauses likewise were confined to immigrants, in the sense of aliens who had no domicil in this country. Of course, there were other considerations,—the extreme hardship in individual cases where the aliens had long been resident in this

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country, and the practically uncontrolled authority of the executive officers of the government, being among them. But, whatever considerations may have combined to bring about the judicial interpretation of the acts that preceded the revision of 1903, the committee reports already cited sufficiently show that the language of the new act was chosen not for the purpose of adopting, but in order to avoid, that interpretation.

Upon a review of the whole matter, we are satisfied that Congress, in the act of 1903, sufficiently expressed, and in the act of 1907 reiterated, the purpose of applying its prohibition against the admission of aliens, and its mandate for their deportation, to all aliens whose history, condition, or characteristics brought them within the descriptive clauses, irrespective of any qualification arising out of a previous residence or domicil in this country.

The excluding section as found in the act of 1907 contains in its own language the clearest answer to the entire argument for the petitioner. It reads as follows (34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1911, p. 500): "That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded classes, who are found to be [92] and are certified by the examining surgeon as being mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; polygamists, or persons who admit their belief in the practice of polygamy; anarchists, or persons who believe in or advocate the overthrow by force or violence of the government of the United States, or of all government, or of all forms of law, or the assassination of public officials; prostitutes, or women or girls coming into the United States for the purpose of prostitution, or for any other immoral purpose; persons who procure or attempt to bring in prostitutes, or women or girls for the purpose of prostitution, or for any other immoral purpose; persons hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment, or in consequence of agreements, oral, written, or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled;" etc., etc. None of these excluded classes (with the possible exception of contract laborers, whose exclusion depends upon somewhat different considerations) would be any less undesirable if previously domiciled in the United States. And besides, the section contains its own specific provisos and limitations, and these, on familiar principles, strongly tend to negative any other and implied exception.

There remains, therefore, only the use of the word "immigration" in the title of the act to furnish support for petitioner's contention. But it is only in a doubtful case that the title of an act can control the meaning of the enacting clauses, and there is no such doubt here. United States v. Fisher, 2 Cranch, 358 386, 2 L. ed. 304, 314; Church of The Holy Trinity v. United States, 143 U. S. 457, 462, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 563, 36 L. ed. 537, 542, 12 Sup. Ct. Rep. 689; Patterson v. The [93] Eudora, 190 U. S. 169, 173, 47 L. ed. 1002, 1005, 23 Sup. Ct. Rep. 821; Cornell v. Coyne, 192 U S. 418, 430, 48 L. ed. 504, 509, 24 Sup. Ct. Rep. 383.

It was not intended, in the opinion of this court in the Taylor Case, 207 U. S. 120, 126, 52 L. ed. 130, 133, 28 Sup. Ct. Rep. 53, to intimate an opinion with respect to the construction of § 18 of the act of 1903 that is inconsistent with the result now reached. There the circuit court of appeals (one judge dissenting) had construed that section as excluding even the ordinary sailor, if an alien; basing this construction upon the changes wrought by Congress in the revision of 1903. This court, speaking by Mr. Justice Holmes, said: "A reason for the construction adopted below was found in the omission of the word 'immigrant' which had followed 'alien' in the earlier acts. No doubt that may have been intended to widen the reach of the statute, but we see no reason to suppose that the omission meant to do more than to avoid the suggestion that no one was within the act who did not come here with intent to remain. It is not necessary to regard the change as a mere abbreviation, although the title of the statute is 'An Act to Regulate the Immigration of Aliens into the United States.'" Of course, this language was employed with reference to the facts of that case, and was not intended to negative a purpose on the part of Congress to bring within the reach of the statute aliens who had previously resided in this country. In

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that case there was no element of previous residence.

Judgment affirmed.

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[94] GILA VALLEY, GLOBE, & NORTHERN RAILWAY COMPANY, M. P. Freeman and Frank H. Hereford, Executors of H. B. Tenney, Deceased, Plffs. in Err.,

v.

JOHN HALL.

(See S. C. Reporter's ed. 94–105.)

Appeal — scope of review — questions not raised in intermediate appellate court.

1. The Federal Supreme Court cannot consider on writ of error to a territorial supreme court errors not fundamental in their character which might have been, but, so far as the record discloses, were not, brought under review in that court.

[For other cases, see Appeal and Error, VIII. j, in Digest Sup. Ct. 1908.]

Trial — directing verdict — question for jury — cause of accident.

2. The question whether a defect in the flange of the "pony wheel" on the left side of a three-wheeled railway gasolene car could have caused a derailment throwing the car towards the left cannot be taken from the jury by directing a verdict in favor of the railway company in an action for personal injuries, brought by an employee who was riding on the car, because such car, which had interior flanges on its right-hand wheels, was, at the time of the accident, traveling on a curve to the left at a speed of from 8 to 12 miles an hour,—especially where there is evidence from which the jury may infer that at the point where the car left the track it was just leaving the curve and going upon a tangent.

[For other cases, see Trial, VI. c, 1; VI. d, 3, in Digest Sup. Ct. 1908.]

Master and servant — assumption of risk — defective appliance — knowledge of defect or danger.

3. A railway employee who has been employed for not more than three or four days in work that requires him to ride on a three-wheeled gasolene car cannot be said as a matter of law to have assumed the risk of accident from a defective flange on the "pony wheel" of such car, where there is no direct evidence that he knew of the defect, and it does not appear to have been a part of his duty to inspect the machine or the wheel, or to look after their condition, and where the question whether the defect was such as to render the use of the car dangerous is in dispute at the trial.

[For other cases, see Master and Servant, II. b, 3; II. b, 4, in Digest Sup. Ct. 1908.]

Master and servant — assumption of risk — defective appliance — knowledge of defect or danger.

4. An employee is not chargeable with the assumption of a risk arising out of a defect in an appliance attributable to his employer's negligence unless he not only knew (or is presumed from its obviousness to have known) of the defect, but also knew (or else the danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it) that it endangered his safety.

[For other cases, see Master and Servant, II. b, 3; II. b, 4, in Digest Sup. Ct. 1908.]

Trial — province of court and jury — admissibility of evidence — preliminary question of fact.

5. The court, not the jury, is to determine whether a remark made within hearing distance of an employee with reference to the condition of an appliance was actually heard by him so as to render it admissible on the issue of his knowledge of such condition.

[For other cases, see Trial, VI. a, in Digest Sup. Ct. 1908.]

Appeal — review of finding — evidence — preliminary question of fact.

6. The finding of a trial judge upon a preliminary question of fact upon the decision of which depends the admissibility of certain proffered testimony is not subject to reversal on appeal or error if it be fairly supported by the evidence.

[For other cases, see Appeal and Error, VIII. l, 3, in Digest Sup. Ct. 1908.]

Error to territorial supreme court — following decision below — remitting part of excessive verdict.

7. The Federal Supreme Court will not revise the refusal of a territorial supreme court to control the discretion of the trial court in remitting a part of an excessive verdict in a negligence suit instead of granting a new trial on the ground that the verdict is tainted with prejudice or passion.

[For other cases, see Appeal and Error, VIII. m, 1; Courts, VII. d; New Trial, V. c, in Digest Sup. Ct. 1908.]

[No. 68.]

NOTE.—Generally, as to servant's assumption of risk—see note to Southern P. Co. v. Seley, 38 L. ed. U. S. 391.

On *volenti non fit injuria* as a defense to actions by injured servants—see note to O'Maley v. South Boston Gaslight Co. 47 L.R.A. 161.

As to whether a servant may assume the risk of dangers created by the master's negligence, generally—see note to Scheurer v. Banner Rubber Co. 28 L.R.A.(N.S.) 1215.

On servant's assumption of dangers created by master's negligence which might have been avoided by the exercise of ordinary care on the part of the servant—see note to St. Louis, I. M. & S. R. Co. v. Birch, 28 L.R.A.(N.S.) 1250.

On the power of the trial court to cure an excessive verdict by requiring or permitting a reduction where the true measure of damages is not ascertainable by mere computation—see note to Tunnel Min. & Leasing Co. v. Cooper, 39 L.R.A.(N.S.) 1064.

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Submitted November 13, 1913. Decided January 5, 1914.

IN ERROR to the Supreme Court of the Territory of Arizona to review a judgment which affirmed a judgment of the District Court of Gila County in that territory in favor of plaintiff in an action to recover damages for personal injuries. Affirmed.

See same case below, 13 Ariz. 270, 112 Pac. 845, 1 N. C. C. A. 362.

The facts are stated in the opinion.

Mr. Eugene S. Ives submitted the cause for plaintiffs in error:

In order to justify the court in sending the case to the jury a scintilla of evidence is insufficient. The evidence must clearly tend to sustain a verdict for the plaintiff.

Root v. Fay, 5 Ariz. 19, 43 Pac. 527; Randall v. Baltimore & O. R. Co. 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; Richardson v. Powers, 11 Ariz. 31, 89 Pac. 542.

Where the facts proved are equally as consistent with the absence of negligence as with its existence, the question should not be submitted to the jury.

McFadden v. Campbell, 13 Misc. 158, 34 N. Y. Supp. 136; Baulec v. New York & H. R. Co. 59 N. Y. 366, 17 Am. Rep. 325.

If the injury may have resulted from one of two causes for only one of which the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result.

Warner v. St. Louis & M. River R. Co. 178 Mo. 134, 77 S. W. 67; Peirce v. Kile, 26 C. C. A. 201, 53 U. S. App. 291, 80 Fed. 865; Ellison v. Truesdale, 49 Minn. 240, 51 N. W. 918.

A verdict based on conjecture will not be permitted.

Wheelan v. Chicago, M. & St. P. R. Co. 85 Iowa, 167, 52 N. W. 119; Baltimore & O. R. Co. v. State, 71 Md. 599, 18 Atl. 969; Cumberland & P. R. Co. v. State, 73 Md. 74, 25 Am. St. Rep. 571, 20 Atl. 785.

Evidence offered by the defendant as to a conversation which the plaintiff might have heard is admissible, and it is for the jury to determine whether the plaintiff actually overheard such conversation.

Bush v. McCarty Co. 127 Ga. 308, 56 S. E. 430, 9 Ann. Cas. 240; Berry v. House, 1 Tex. Civ. App. 562, 21 S. W. 711; Wright v. Stewart, 130 Fed. 905; 1 Wigmore, Ev. § 261.

Where the servant had the opportunity to know, or, in the exercise of reasonable or ordinary care, should have known, the risks to which he is exposed in the course of his employment, he will be held to have assumed them.

26 Cyc. p. 1196, note 99, p. 1204, note 17; Thomas v. Missouri P. R. Co. 109 Mo. 187, 18 S. W. 980; Thomp. Neg. 1008; Houston & T. C. R. Co. v. Fowler, 56 Tex. 452; Larson v. St. Paul, M. & M. R. Co. 43 Minn. 423, 45 N. W. 722; Ragon v. Toledo, A. A. & N. M. R. Co. 97 Mich. 265, 37 Am. St. Rep. 336, 56 N. W. 612; Perigo v. Chicago, R. I. & P. R. Co. 52 Iowa, 276, 3 N. W. 43; Evansville & R. R. Co. v. Henderson, 134 Ind. 636, 33 N. E. 1021; Linton Coal & Min. Co. v. Persons, 15 Ind. App. 69, 43 N. E. 651.

Mr. Edward H. Thomas submitted the cause for defendant in error:

The evidence was sufficient to sustain the verdict, and therefore the judgment should be affirmed.

Texas & P. R. Co. Harvey, 228 U. S. 325, 57 L. ed. 856, 33 Sup. Ct. Rep. 518; Richmond & D. R. Co. v. Powers, 149 U. S. 43, 45, 37 L. ed. 642, 643, 13 Sup. Ct. Rep. 748, 7 Am. Neg. Cas. 369.

The situation and condition of the car at the time of accident shows that the proximate cause of injury was the defective wheel, as no other intervening cause is shown.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; Choctaw, O. & G. R. Co. v. Holloway, 191 U. S. 334, 339, 48 L. ed. 207, 210, 24 Sup. Ct. Rep. 102, 15 Am. Neg. Rep. 235.

The servant has the right to assume that the master has used diligence to provide suitable appliances in the operations of his business, and does not assume the risk of the employer's negligence in performing such duties. Besides, in view of the ignorance of the employee, in the case at bar, it was the duty of the master to instruct the servant as to any dangers that were not plainly observable or obvious.

Texas & P. R. Co. v. Harvey, 228 U. S. 319, 321, 57 L. ed. 852, 855, 33 Sup. Ct. Rep. 518; Texas & P. R. Co. v. Archibald, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777, 4 Am. Neg. Rep. 746; Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 596, 55 L. ed. 600, 31 Sup. Ct. Rep. 561; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230.

Mr. Justice Pitney delivered the opinion of the court:

This is a review of a judgment of the supreme court of Arizona, rendered prior to statehood, affirming the judgment of one of the territorial district courts, in an action brought by Hall against the railway

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company, to recover damages for personal injuries. Hall was in the employ of the company as chainman, and on April 23, 1907, was engaged, with another employee named Ryan, in measuring distances for locating mileposts along the line of its railway. For purposes of transportation they used a three-wheeled gasolene car or "velocipede" furnished by the company. This car had two wheels on the right-hand side, over which were the engine, a seat for the use of the operator, and a seat in front for another person; the third wheel —or "pony wheel," as it was called—was a small wheel on the left-hand side nearly opposite the front wheel on the right-hand side, and fastened to the machine by a bar extending across. The wheels, like the ordinary car wheel, had inside flanges designed to keep the treads of the wheels upon the tracks. On the day mentioned, Hall and Ryan were upon this car, traveling upon the line of railway, Ryan operating the machine and Hall sitting in front. While running at a speed of from 8 to 12 miles an hour, the car suddenly left the track, going to the left, the side on which the "pony wheel" was located. Hall was thrown in front and run over, sustaining severe injuries. The ground relied upon to support a recovery of damages from the employer was that the flange upon the third wheel was worn and cracked in a manner that rendered its use dangerous; that the defect was of such a [98] character that it would have been discovered in the course of reasonable inspection; and that by reason of this defect the machine left the track. The company denied negligence on its part, set up contributory negligence, and averred that Hall knew or had opportunity to know the condition of the car, and that he assumed the risk of injury resulting from the alleged defect. Upon the trial the jury returned a verdict in his favor for $10,000. The company moved for a new trial, and, pending this motion, Hall voluntarily remitted $5,000 from the amount of the verdict. Thereafter the trial court denied the motion, and entered judgment in Hall's favor for $5,000 and costs. From this judgment and from the order denying the motion for a new trial the company appealed to the territorial supreme court which affirmed the judgment, as already stated. 13 Ariz. 270, 112 Pac. 845, 1 N. C. C. A. 362.

This writ of error is sued out by the railway company and the sureties upon the supersedeas bond that was given for the purposes of the appeal to the territorial supreme court. A reversal of the judgment is sought because of alleged trial errors.

At the outset we lay aside certain assignments of error filed in this court that are designed to raise various questions which do not appear, from anything in the record before us, to have been presented to the territorial supreme court for its consideration. It is inadmissible for this court to consider errors, not fundamental in their character, which might have been, but were not, brought under review in the appellate court below; for it is that court's judgment which is alone subject to our review. The impropriety of allowing a party, conceiving himself to have suffered from an erroneous ruling of a trial court in a matter not jurisdictional, nor essential to the foundation of the action, but involving a mere matter of procedure, to invoke the judgment of this court thereon, without availing himself of the opportunity for a review [99] thereof in the appropriate appellate court of the territory, has been repeatedly pointed out. Montana R. Co. v. Warren, 137 U. S. 348, 351, 34 L. ed. 681, 682, 11 Sup. Ct. Rep. 96; San Pedro & C. del A. Co. v. United States, 146 U. S. 120, 136, 36 L. ed. 912, 916, 13 Sup. Ct. Rep. 94; Old Jordan Min. & Mill Co. v. Société Anonyme des Mines, 164 U. S. 261, 264, 41 L. ed. 427, 428, 17 Sup. Ct. Rep. 113.

The local practice required specific assignments of error, and treated errors not thus assigned as being waived. Arizona Rev. Stat. 1901, ¶¶ 1523 and 1586; Supreme Court Rules 3 and 6; 4 Ariz. ix. and xi., 35 Pac. vi. and vii.; Daggs v. Phœnix Nat. Bank, 5 Ariz. 409, 415, 53 Pac. 201; Santa Cruz County v. Barnes, 9 Ariz. 42, 49, 76 Pac. 621; Bail v. Hartman, 9 Ariz. 321, 327, 83 Pac. 358. The transcript filed here does not contain the assignments of error below, so that there is nothing to show what errors were assigned or relied upon in the territorial supreme court, except as they receive particular mention in its opinion. Confining our attention to these, the questions presented are the following:

First, it is contended that the trial court ought to have instructed the jury to return a verdict in favor of the defendant, and this upon the ground that there was no evidence to sustain a recovery, unless it could be found in the proof of the defective condition of the flange of the "pony wheel;" it being at the same time contended to be a physical impossibility that this defect in the flange could have caused the accident. The wheel itself was in evidence as an exhibit, and it was testified that the inside of the flange, where it came next to the rail, was irregularly worn; or, as a witness put it,—"cut in different places so that it is very rough, and it would have a tendency (for a person to look at it) to show hard and soft places in the wheel.' This witness declared that this condition of the

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wheel would cause it to "bounce and leave the track." Another witness testified that there were "three gouged-out places" in the flange, and (in effect) that if one of these should strike a protruding joint between rails [100] "the sharp edge of the flange would mount that rail and go off." It is insisted, however, that by the uncontroverted testimony the car, at the time of the accident, was traveling upon a curve towards the left, and was therefore necessarily impelled by centrifugal force towards the right, so that the defective flange was drawn away from the rail and was performing no function. The theory is that the centrifugal force must have kept the right-hand wheels constantly bearing upon the inside of the outer or right-hand rail, and that therefore, in the absence of some extraneous cause, it was impossible for the car to be thrown toward the left. We are unable to say as a conclusion of law, that such a car, while running upon a curve towards the left, at a speed of from 8 to 12 miles an hour, and with interior flanges upon the right-hand wheels preventing it from leaving the track on that side, would not be occasionally thrown with a lurch away from the right-hand rail and against the opposite rail, even were the car at the time traveling upon a constant curve. But however this may be, there was evidence from which the jury might reasonably infer that at the point where the car left the track it was just leaving the curve and going upon a tangent. At this point it might naturally be subjected to a lurch that would throw its weight with momentum against the left-hand rail, and thus bring into operation the tendency of the "pony wheel" to mount the rail because of the worn condition of the inside of the flange. And, as already mentioned, the car in fact went off the track towards the left. Therefore, upon this question, the case was properly submitted to the jury.

The motion for direction of a verdict seems to have been rested upon the additional ground that the alleged defect was so obvious that its existence must have been known to the plaintiff, and that he therefore assumed the risk. There was no direct evidence that he knew of the defect, [101] and it does not appear to have been a part of his duties to inspect the machine or the wheel, or to look after their condition. He had been employed for only three or four days in work that required him to ride upon the car, and at the utmost it was a question for the jury whether the defective condition of the wheel was so patent that he should be presumed to have known of it. And then, the question whether the defect was such as to render the use of the car dangerous was in dispute at the trial; hence, it could not be properly held that the risk was indisputably obvious, even to one who knew of the defect. It is quite clear, therefore, that a verdict could not properly have been directed in favor of the defendant upon the ground that the plaintiff, in using the car, had assumed an obvious risk.

There was a request for instructions to the effect that the plaintiff assumed the risk of injury from defects which he knew, or by the exercise of ordinary care in the discharge of his duties might have known, or which he had opportunity to know. These instructions the court refused to give, but charged the jury upon this question:

"The true test is not in the exercise of ordinary care to discover dangers, by the employee, but whether the defect is known or plainly observable by him. An employee is not charged by law with the assumption of a risk arising out of defective appliances provided by his employer, unless his employment was of such a nature as to bring to his attention and cause him to realize and comprehend the dangers incident to the use of such appliances." This, we think, was a correct instruction under the circumstances of the case. An employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employee has a right to assume that his employer has exercised proper care with respect to providing a safe [102] place of work, and suitable and safe appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employee becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. Moreover, in order to charge an employee with the assumption of a risk attributable to a defect due to the employer's negligence it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person, under the circumstances, would have appreciated it. Union P. R. Co. v. O'Brien, 161 U. S. 451, 457, 40 L. ed. 766, 770, 16 Sup. Ct. Rep. 618; Texas & P. R. Co. v. Archibald, 170 U. S. 665, 671, 42 L. ed. 1188, 1191, 18 Sup. Ct. Rep. 777; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 68, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24; Texas & P. R. Co. v. Swearingen, 196 U. S. 51, 62, 49 L. ed. 382, 387, 25 Sup. Ct. Rep. 164, 17 Am. Neg. Rep. 422; Burns v.

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Delaware & A. Teleg. & Teleph. Co. 70 N. J. L. 745, 752, 67 L.R.A. 956, 59 Atl. 220, 592, 17 Am. Neg. Rep. 673.

The next error alleged is the refusal of the trial court to permit Ryan, the operator of the car, to testify to a remark made, concerning the condition of the wheel, on the day before the accident. Ryan had testified that he noticed the alleged defect at the time referred to; that he, and Hall, and one Regna, and somebody else, were present; that a conversation was had in which Regna made a remark with respect to the crack in the wheel; and that this remark was made in his natural tone of voice while Hall was less than 20 yards away and within hearing distance, and so that he could have heard it if he had been listening. It was not shown that Hall made any comment upon the car or the wheel, or made any answer to Regna's remark, or took any part in the conversation. Plaintiff's counsel objected to the admission of the conversation on the ground that it had not been established that Hall heard it, and this objection was sustained.

It is insisted that the conversation was admissible as [103] proving notice to Hall of the condition of the wheel; and so it was, provided it appeared that he heard it. Whether he did hear it was, of course, a question of fact. Plaintiff in error contends that this should have been submitted to the jury, with an instruction that if they believed Hall heard the conversation, they might take that into consideration in determining whether he knew the condition of the wheel and the effect of using it in that condition.

We agree that the testimony was such as to render it a matter of doubtful inference whether Hall heard the conversation; but we think this question of fact was one to be determined by the trial court, and not by the jury. Questions of the admissibility of evidence are for the determination of the court; and this is so whether its admission depend upon matter of law or upon matter of fact. And the finding of the trial judge upon such a preliminary question of fact is not subject to be reversed on appeal or error if it be fairly supported by the evidence, as it is in the case before us. Bartlett v. Smith, 11 Mees. & W. 483, 485, 12 L. J. Exch. N. S. 287, 7 Jur. 448, 11 Eng. Rul. Cas. 177; Doe ex dem. Jenkins v. Davies, 10 Q. B. 314, 323, 16 L. J. Q. B. N. S. 218, 11 Jur. 607; Congress & E. Spring Co. v. Edgar, 99 U. S. 648, 658, 25 L. ed. 487, 490; Stillwell & B. Mfg. Co. v. Phelps, 130 U. S. 520, 527, 32 L. ed. 1035, 1037, 9 Sup. Ct. Rep. 601; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 559, 35 L. ed. 270, 273, 11 Sup. Ct. Rep. 653; State v. Monich, 74 N. J. L. 522, 526, 64 Atl. 1016; State v. Tomassi, 75 N. J. L. 739, 743, 69 Atl. 214; Gorton v. Hadsell, 9 Cush. 508, 511. And see Tayloe v. Riggs, 1 Pet. 591, 597, 7 L. ed. 275, 277.

Finally, it is insisted that there was error in entering judgment in favor of the plaintiff for $5,000, after the residue of the verdict of $10,000 was remitted pending the motion for new trial. The argument is that the voluntary remission of so large an amount by the plaintiff was an admission that the verdict was excessive; that an excessive verdict may not be cured by a remitter where the amount of the damages cannot be measured by any fixed standard or determined with certainty; that a verdict so excessive [104] is conclusive evidence that it was the product of prejudice on the part of the jury, and that this vice goes to the entire verdict, and not merely to the excess. The practice, however, is recognized by the Civil Code (Ariz. Rev. Stat. 1901, ¶¶ 1450 and 1451), which permit any party in whose favor a verdict or judgment has been rendered to remit any part thereof, after which execution shall issue for the balance only of such judgment. In Northern P. R. Co. v. Herbert, 116 U. S. 642, 646, 29 L. ed. 755, 758, 6 Sup. Ct. Rep. 590, an action in a territorial court to recover damages for personal injuries that necessitated the amputation of a leg, there was a verdict in favor of the plaintiff for $25,000, a motion for a new trial on various grounds, among others that the damages were excessive, and the court ordered that a new trial be granted unless plaintiff remitted $15,000 of the verdict, and, in case he did so, that the motion should be denied. He remitted the amount, and judgment was entered in his favor for the balance, which the supreme court of the territory affirmed. This court held that the matter was within the discretion of the court; and this even without the sanction of a statute. The constitutional question involved was re-examined in Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69, 73, 32 L. ed. 854, 855, 9 Sup. Ct. Rep. 458, and the decision in the Herbert Case was adhered to, it being held that the practice under criticism did not in any just sense impair the right of trial by jury.

In Southern P. Co. v. Tomlinson, 4 Ariz. 126, 132, 33 Pac. 710, and in Southern P. Co. v. Fitchett, 9 Ariz. 128, 134, 80 Pac. 359, the general practice was sustained by the territorial supreme court. In the former case, however, it was said (4 Ariz. 132) that "if it is apparent to the trial court that the verdict was the result of passion or prejudice, a *remittitur* should not be allowed, but the verdict should be set aside. In passing upon this question

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the court should not look alone to the amount of the damages awarded, but to the whole case." In the Fitchett [105] Case, it appearing that the trial court was of the opinion that more than half of the damages awarded for the appellee's injured feelings were excessive, the supreme court held that evidently the verdict was not the result of cool and dispassionate consideration, and that the question of the proper sum to be awarded ought not to have been determined by the trial court, but should have been submitted to the determination of another jury. In the present case (13 Ariz. 276, 112 Pac. 845, 1 N. C. C. A. 362) the majority of the court declared they were not prepared to adhere to the views expressed in the Fitchett Case; that while there is authority for the position that in no case of unliquidated damages should the court permit a remission where the verdict is excessive, without the consent of the defendant, the great weight of authority supports the practice; citing the decisions of this court already referred to; and declaring that while, if it appears that the verdict is tainted with prejudice or passion, and does not represent the dispassionate judgment of the jury upon the question of the right of the plaintiff to recover, a new trial should be granted, yet the trial court is in a better position to determine this than the appellate court, so that its determination should ordinarily be accepted. We see no ground for disturbing this decision.

Judgment affirmed.

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[106] BANK OF ARIZONA, Hugo Richards, and Moses D. Hazeltine, Plffs. in Err.,

v.

THOMAS HAVERTY COMPANY.

(See S. C. Reporter's ed. 106–110.)

Assignment — of mechanics' lien — construction.

1. Neither the exact amount of the judgment which should be recovered nor the precise status of the lien was guaranteed by an agreement between a mechanic's lienor and a mortgagee under which, if the former would prosecute its suit to judgment, the latter was to buy the claim and pay therefor, upon receiving an assignment of the judgment, a specified sum which was the amount of the claim, less the value of certain tools and heating apparatus which the lienor was at liberty to remove if the removal could be accomplished without injury to the building.

Appeal — scope of review — question not raised in intermediate appellate court.

2. A defense founded on the statute of frauds is not available in the Federal Supreme Court on writ of error to a territorial supreme court, even though it may have been brought to the attention of the trial court, if there is nothing in the record to show that the question was raised in the territorial supreme court.

[For other cases, see Appeal and Error, VIII. j, in Digest Sup. Ct. 1908.]

[No. 87.]

Submitted December 4, 1913. Decided January 5, 1914.

IN ERROR to the Supreme Court of the Territory of Arizona to review a judgment which affirmed a judgment of the District Court of Maricopa County in that territory in favor of plaintiff in an action on a contract. Affirmed.

See same case below, 13 Ariz. 418, 115 Pac. 73.

The facts are stated in the opinion.

Mr. Walter Bennett submitted the cause for plaintiffs in error.

Messrs. Aldis B. Browne, Alexander Britton, Evans Browne, J. L. B. Alexander, and George D. Christy submitted the cause for defendant in error.

Mr. Justice Pitney delivered the opinion of the court:

The Thomas Haverty Company, defendant in error, sued the Bank of Arizona in a district court of the territory of Arizona to recover $9,313.90 upon a special agreement set out in the complaint substantially as follows: That in February, 1908, the company had a claim against one John Noble for $14,306, for materials furnished and work done in the construction of the Noble Building, in Phœnix, Arizona; that the company had taken the necessary steps, under the provisions of the mechanics' lien statutes, to fix a lien upon the building and the lands on which it stood; that in March, 1908, the company instituted a suit to enforce the lien and the payment of the claim; that Noble, one Hugo Richards, and others, were joined as defendants in that action; that Richards at the time held a mortgage upon the premises, which had been given to him for the use and benefit of the Bank of Arizona, the bank being the real party in interest; that while the action was pending, and on or about November 30, 1908, it was agreed between the bank and the Haverty Company that if the

NOTE.—As to review by the United States Supreme Court of territorial decisions—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

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company would prosecute its suit to judgment, the bank would buy its demand and claim of [108] lien and pay the company for it the sum of $9,313.90 upon assignment of the judgment to the bank; the sum just mentioned being the amount claimed by the company ($14,306) less the sum of $4,992.10, which was the value of two boilers and a certain heating apparatus and certain tools, furnished by the Haverty Company and used in the construction of the building, and for which the company claimed a lien; which boilers, heating apparatus, and tools the company was to be at liberty to remove from the building if this could be done without injury thereto; that thereupon the company agreed to sell to the bank its demand against Noble and its claim for a lien upon the premises, and agreed to prosecute the action thereon to judgment, and to assign the judgment to the bank; that the company proceeded with its action, and recovered therein a judgment for $12,429.22, with a foreclosure of its lien; and that thereafter the company was ready and offered to assign the judgment to the bank, but the bank refused to receive it or to pay the agreed sum of $9,313.90 for it.

The bank, by demurrer to the complaint, and afterwards by answer, interposed the defense that the company had failed to perform the agreement, in that it had recovered a judgment for only $12,429.22, and that although the claim for lien set up by the company in its suit against Noble was one alleged to be prior and superior to the lien of the mortgage held by Richards for the benefit of the bank, it was by the judgment in that suit determined to be inferior and subordinate to the bank's lien.

There was a trial by jury, in the course of which it appeared that the alleged agreement, if made at all, was made between attorneys representing the Haverty Company, and attorneys representing the bank. The principal questions of fact were whether the agreement was made substantially as alleged, and, if so, then whether the bank's attorneys were specially authorized to make it, [109] or whether the bank afterwards ratified their action with knowledge of the facts. There was a verdict for the plaintiff for the full amount claimed, and, on appeal, the resulting judgment was affirmed by the supreme court of the territory (13 Ariz. 418, 115 Pac. 73); whereupon the present writ of error was sued out.

It is insisted that the evidence fails to show that the attorneys who acted for the bank were authorized by it to enter into the alleged agreement to purchase the Haverty claim. But we think there was sufficient evidence to support the verdict of the jury in favor of plaintiff upon this question.

It is also insisted that the parties never in fact came to an agreement, because an item of about $100 for certain freight charges was left open for further consideration. But the jury was warranted by the evidence in finding that an agreement had in fact been reached before the question respecting freight was raised.

The principal contention here, as in the court below, is that the agreement alleged and proved was not performed, in that the Haverty Company did not prosecute its claim to judgment; the claim having been for $14,306, with a prior lien upon the building and lots, but subject to a deduction of $4,992.10, provided the boilers and tools could be removed without injury to the building; while the judgment recovered was for $12,429.22, with a lien subordinate to the bank's mortgage. We agree with the court below that neither the averments of the complaint nor the evidence at the trial imported a guaranty on the part of the Haverty Company as to the exact amount of the judgment or the precise status of the lien. The evidence tended to show that the agreement was made as a compromise between the bank and the Haverty Company, in view of doubts that had arisen whether in law the lien of the Haverty Company was entitled to priority over the bank's mortgage.

[110] Error is assigned respecting certain remarks made by counsel for plaintiff in addressing the jury; but if there was any impropriety it was cured by the instructions of the trial judge.

The only other point deserving notice is the contention that the motion of plaintiff in error (defendant below) for a direction of a verdict in its favor ought to have been granted because of § 4, chap. 99, p. 230, Session Laws 1907 of Arizona, which is in effect that a contract for sale of any chose in action of the value of $500 or upwards shall not be enforceable unless some note or memorandum in writing be signed by the party to be charged, or his agent. Assuming—what is not clear—that the point was brought to the attention of the trial court, it is sufficient for present purposes to say that there is nothing in the record to show that the question was raised upon the appeal to the territorial supreme court. Gila Valley Globe & N. R. Co. v. Hall, 232 U. S. 94, ante, 521, 34 Sup. Ct. Rep. 229, and cases cited.

Judgment affirmed.

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ROBERT B. ROSS and Fannie D. Ross, Plffs. in Err.,
v.
JAMES DAY.

(See S. C. Reporter's ed. 110-117.)

Courts — conclusiveness of decisions of Land Department — question of mixed law and fact.

Whether the contestants in a Cherokee allotment contest had improved the lands in such sense as to give them a preferential right of selection under the act of July 1, 1902 (32 Stat. at L. 716, chap. 1375), § 11, is a question of mixed law and fact the decision of which by the Secretary of the Interior is conclusive upon the courts in the absence of fraud or clear mistake of law.

[For other cases, see Courts, I. e, 6, in Digest Sup. Ct. 1908.]

[No. 122.]

Argued December 11, 1913. Decided January 5, 1914.

IN ERROR to the Supreme Court of the State of Oklahoma to review a decree which affirmed a decree of the District Court of Washington County, in that state, in favor of defendant in a suit to have him declared to be a trustee for the plaintiffs with respect to lands in the Cherokee Nation. Affirmed.

See same case below, 29 Okla. 186, 116 Pac. 949.

The facts are stated in the opinion.

Mr. Kenneth S. Murchison argued the cause and filed a brief for plaintiffs in error.

Mr. Jerre P. O'Meara argued the cause, and Mr. James A. Veasey filed a brief for defendant in error.

Mr. Justice Pitney delivered the opinion of the court:

This action was brought by the present plaintiffs in error for the purpose of obtaining a decree declaring the defendant in error to be a trustee for the plaintiffs with respect to the title to certain lands in the Cherokee Nation (a tract of 20 acres, and a separate tract of 10 acres within the same quarter section) that were allotted to defendant in error under the act of July 1, 1902 (32 Stat. at L. 716, chap. 1375). The decision of the Oklahoma supreme court in favor of the latter is reported in 29 Okla. 186, 116 Pac. 949.

Plaintiffs are citizens by blood of the Cherokee Nation, and entitled to allotments under § 11 of the act; defendant is a registered Delaware, entitled to allotment under § 23. Defendant filed applications in the Cherokee Land Office for the lands in controversy on May 5, 1904, and they were set apart to him as portions of his allotment selection. Later, and on July 1 in the same year, the plaintiff, Robert B. Ross, appeared at the Land Office and made application for the same lands, a portion to be set apart to himself and a portion for his wife. These applications being refused because the lands had already been selected by defendant, plaintiffs immediately brought contests, which were consolidated and heard together by [113] the Commissioner of the Five Civilized Tribes, and he decided in favor of contestants. Upon appeal to the Commissioner of Indian Affairs this decision was affirmed. But upon a further appeal to the Secretary of the Interior there was a decision against the plaintiffs and in favor of defendant. The contests were based upon the same alleged equity upon which the present action is founded: that is, contestants, admitting the prior allotments to contestee, insisted that his application was subject to their prior right of selection upon the ground that they were the owners of improvements that were upon the property at the time contestee entered upon it. The question turns upon the effect of § 11 of the act of July 1, 1902, already referred to, which reads as follows: "There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrolment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the government survey, *which land may be selected by each allottee so as to include his improvements.*"

The findings of the Secretary were as follows: That the lands in question were claimed prior to 1902 by a firm of Johnstone & Keeler, Cherokee citizens, and constituted portions of a large tract which was at one time wholly or partially inclosed by wire fence; that the members of the firm divided their holdings between them, and Keeler took that part which included the lands in contest; that on November 1, 1902, Keeler transferred his possessory interest in this land, with the improvements thereon, to the contestants by bill of sale; but at this time the fencing was pretty well down, and the land contained no improvements of material value, except that about 1½ [114] acres were under cultivation by one Bixler, a noncitizen who farmed adjacent lands, but whose improvement was not to be credited to contestants; that contestants did nothing in the way of placing improvements upon the property until March 1, 1904, when their

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son, Dr. Ross, visited the land, and with the assistance of a surveyor and two other persons, located the lines, and indicated them by setting posts or stakes; that these posts were cut and set by two men in about five hours; that some of the posts were about the size of a man's arm, and others were mere stakes or poles; that they were placed from 50 to 100 feet apart, except at the corners, where five posts were set in comparative proximity; the posts bounding the tracts were not joined, by wire or otherwise, so as to make a connected fence; and no further act of improvement or occupation was done in behalf of the contestants. That, on the other hand, the contestee, who had lived in the neighborhood of the land for about thirty years, and claimed to have cut timber, posts, and fuel upon it for twenty-five years past, when he learned on March 1, 1904, of the efforts made by Dr. Ross and his party to survey and inclose it, immediately purchased the necessary wire and proceeded to fence the property, cutting a part of the posts and buying part; that, he being assisted by his son, the work required about two and a half days; that in constructing this fence two wires were used for the greater part of its length, and the controverted tracts were substantially inclosed; that after thus fencing the land, and before filing thereon, he erected a three-room house at a cost of about $250 upon one of the tracts, and immediately took up his residence therein.

The Secretary of the Interior concluded that the fences upon the tracts in question at the time of the alleged purchase by the plaintiffs from Keeler were not of sufficient consequence or value in connection with the land to be entitled to be classed as improvements; that the [115] posts established by Dr. Ross, March 1, 1904, did not constitute a lawful improvement, but were merely set for the purpose of marking or defining a prospective allotment; and further, that the improvements erected by contestee, while built possibly later than the former, were of material value to the land, and also that contestee actually entered into possession.

The contention of the plaintiffs in error here, as in the court below, is that under the laws of the Cherokee Nation and the act of Congress they acquired the right of possession of the lands in controversy by virtue of the bill of sale from Keeler, dated November 1, 1902, and thereby succeeded to the same right to allot these lands that Keeler had before; that this right was made exclusive by what was done on March 1, 1904, looking to the placing of improvements upon the tracts; that this was sufficient to give notice to other citizens of the Cherokee Nation of the intention of plaintiffs to locate the lands, and that defendant was present at the time and had actual notice of the work done by Dr. Ross. Reference is made to the Constitution of the Cherokee Nation, art. I., § 2, and to its Laws (1892) §§ 706, 761, and 762. It will not be necessary to recite them at length, because all that is claimed with respect to their effect upon the present controversy was conceded or assumed in the decision of the Secretary of the Interior; that is, that citizens of the Cherokee Nation might improve portions of the public domain within the Nation, and thereby establish a prior right to the possession of the improved lands, which right might be transferred to another citizen by a sale of the improvements. The Secretary evidently construed § 11 of the act of Congress of July 1, 1902, as recognizing and confirming this right. But he held that no valuable interest was acquired by plaintiffs under the purchase from Keeler, because Keeler owned no improvements of material value. He found plaintiffs were not entitled to credit for the [116] small improvement of the noncitizen Bixler, and there is nothing before us to show that the Keeler bill of sale included the Bixler improvements, or that Bixler held as tenant either of Keeler or of plaintiffs. And he held in effect that the question of the sufficiency of what was done by contestants on March 1, 1904, depended not upon whether it was sufficient to give notice to contestee, but whether it was sufficient to constitute an improvement within the meaning of the act of Congress. And so the whole controversy in effect depended upon whether the allotment to defendant was in accord with the ownership of the actual improvements upon the land, and the fact respecting the improvements was the principal matter to be determined in the contest proceedings, wherein the final appeal was to the Secretary of the Interior.

In order to obviate the established rule that the decisions of the Executive Departments in matters confided to them by the acts of Congress are not to be disturbed by the courts unless there be allegations of fraud raised in the pleadings and established at the trial, it is contended that this rule extends only to findings upon mere questions of fact, and that the decision of the Secretary of the Interior upon the contest here in question was based solely upon an erroneous conclusion of law.

But, in our opinion, whether plaintiffs had improved the lands in such sense as to give them a preferential right under the statute was not a mere question of law, but rather a mixed question of law and fact. So far as it involved an appreciation of the term "improvements," as employed in

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the statute, it was a question of law; so far as it involved the drawing of correct inferences from the evidence, it was a question of fact. At best, it was a close question, about which reasonablee men might well differ.

In Whitcomb v. White, 214 U. S. 15, 16, 53 L. ed. 889, 890, 29 Sup. Ct. Rep. 599, this court, speaking by Mr. Justice Brewer, said: "The decision of the [117] Land Department was not rested solely upon the fact that White's formal application was filed a few hours before that of the trustee for the occupants of the town site, but rather chiefly upon the priority of the former's equitable rights. So far as such decision involves questions of fact, it is conclusive upon the courts [citing cases]. And this rule is applied in cases where there is a mixed question of law and fact, unless the court is able to so separate the question as to see clearly what and where the mistake of law is. As said by Mr. Justice Miller in Marquez v. Frisbie, 101 U. S. p. 476, 25 L. ed. 800: 'This means, and it is a sound principle, that where there is a mixed question of law and of fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive.'" And see Moore v. Robbins, 96 U. S. 530, 535, 24 L. ed. 848, 850; Quinby v. Conlan, 104 U. S. 420, 426, 26 L. ed. 800, 802; Gonzales v. French, 164 U. S. 338, 41 L. ed. 458, 17 Sup. Ct. Rep. 102.

There being no fraud, and no clear mistake of law in the decision of the Secretary of the Interior, his findings are conclusive upon the parties in the present controversy.

Judgment affirmed.

BELLE J. BARNES, L. H. Manning, and Epes Randolph, Appellants,
v.
J. L. B. ALEXANDER and Mary E. Street, Executrix of Webster Street, Deceased.

(See S. C. Reporter's ed. 117–123.)

Attorneys — lien for compensation.

An agreement by a lawyer who was prosecuting a case for a contingent fee, which was to be one fourth of the amount recovered by his clients, to give certain other lawyers one third of such fee, if and when he should receive it, if they would do certain work for him, creates a lien upon the fund as soon as received by him, in favor of such attorneys, where they had performed the agreed services.

[For other cases, see Attorneys, III. c; Liens, I., in Digest Sup. Ct. 1908.]

[No. 109.]

Submitted December 1, 1913. Decided January 12, 1914.

APPEAL from the Supreme Court of the Territory of Arizona to review a decree which affirmed a decree of the District Court of Cochise County, in that territory, enforcing an attorneys' lien. Affirmed.

See same case below, 13 Ariz. 338, 114 Pac. 952.

The facts are stated in the opinion.

Mr. Eugene S. Ives submitted the cause for appellants:

Unless the facts alleged amounted to an equitable assignment, the interveners cannot recover.

Horn v. Volcano Water Co. 13 Cal. 62, 73 Am. Dec. 569; Yetzer v. Young, 3 S. D. 263, 52 N. W. 1054; Lewis v. Harwood, 28 Minn. 428, 10 N. W. 586; McClurg v. State Bindery Co. 3 S. D. 362, 44 Am. St. Rep. 799, 53 N. W. 428; Chapman v. Forbes, 123 N. Y. 532, 26 N. E. 3.

The test of an assignment, legal or equitable, is the right of the assignee to bring a direct action against the primary debtor to recover the interest claimed by him to have been assigned.

Christmas v. Russell (Christmas v. Gaines) 14 Wall. 69, 84, 20 L. ed. 762, 764; Dillon v. Barnard, 21 Wall. 430, 22 L. ed. 673; Trist v. Child (Burke v. Child) 21 Wall. 441, 22 L. ed. 623; Smedley v. Speckman, 85 C. C. A. 179, 157 Fed. 815; Canty v. Latterner, 31 Minn. 239, 17 N. W. 385; Silent Friend Min. Co. v. Abbot, 7 Colo. App. 76, 42 Pac. 318; Kelley v. Newman, 79 Ill. App. 285; 3 Pom. Eq. Jur. pp. 2567, 2568, note 1; Ingersoll v. Coram, 211 U. S. 365, 53 L. ed. 228, 29 Sup. Ct. Rep. 92; Walker v. Brown, 165 U. S. 654, 41 L. ed. 865, 17 Sup. Ct. Rep. 453.

The claim of the interveners is a personal one against the firm of Barnes & Martin, and their failure to present it against the estate of Barnes bars them from asserting it against his legatee, the plaintiff, the estate being closed.

Nagle v. Ball, 71 Miss. 330, 13 So. 929; Hill v. Nichols, 47 Minn. 382, 50 N. W. 367.

It was error to allow proof of payments made to plaintiff subsequent to the filing of the complaint in intervention.

Todd v. Meding, 56 N. J. Eq. 83, 38 Atl. 349; Tone Bros. v. Shankland, 110 Iowa, 525, 81 N. W. 789; 21 Enc. Pl. & Pr. 9; Wisner v. Ocumpaugh, 71 N. Y. 113; Styles v. Full-

NOTE.—On attorneys' liens—see note to Texas v. White, 19 L. ed. U. S. 992.

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er, 101 N. Y. 622, 4 N. E. 348; Mellor v. Smither, 52 C. C. A. 64, 114 Fed. 116.

The ordinary rule is that where an attorney employs another to assist him, the client is under no obligation to compensate the latter, in the absence of an agreement, express or implied, to that effect. And no inference can be drawn that there is such an agreement from the mere fact that the attorney so employed appears in court and assists in the conduct of litigation, with the knowledge of the client, and without objection.

Porter v. Elizalde, 125 Cal. 204, 57 Pac. 899; Price v. Hay, 132 Ill. 543, 24 N. E. 620.

The familiar agreement between real estate brokers to act together in making a sale, and to divide the commissions, furnishes an analogy. In such cases the principal is liable only to the broker originally employed, and the other must look to his fellow broker for his compensation.

J. B. Watkins Land Mortg. Co. v. Thetford, 43 Tex. Civ. App. 536, 93 S. W. 72; Morse v. Traynor, 26 Neb. 594, 42 N. W. 719; Carroll v. Tucker, 2 Misc. 397, 21 N. Y. Supp. 952.

Messrs. J. L. B. Alexander, William M. Seabury, Aldis B. Browne, Alexander Britton, and Evans Browne submitted the cause for appellees:

The granting of the right to intervene is purely discretionary with the trial court.

London, P. & A. Bank v. Abrams, 6 Ariz. 90, 53 Pac. 588.

The construction placed upon a local statute by a territorial supreme court will be adopted by this court and will not be disturbed in the absence of manifest error in such construction.

Sweeney v. Lomme, 22 Wall. 208, 213, 22 L. ed. 727, 728; Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization, 206 U. S. 474, 51 L. ed. 1143, 27 Sup. Ct. Rep. 695; Kealoha v. Castle, 210 U. S. 149, 153, 154, 52 L. ed. 998, 1001, 1002, 28 Sup. Ct. Rep. 684; Treat v. Grand Canyon R. Co. 222 U. S. 448, 452, 56 L. ed. 265, 266, 32 Sup. Ct. Rep. 125; English v. Arizona, 214 U. S. 359, 361, 363, 53 L. ed. 1030, 1032, 1033, 29 Sup. Ct. Rep. 658; Fox v. Haarstick, 156 U. S. 674, 39 L. ed. 576, 15 Sup. Ct. Rep. 457; Clason v. Matko, 223 U. S. 646, 653, 56 L. ed. 588, 593, 32 Sup. Ct. Rep. 392; Armijo v. Armijo, 181 U. S. 558, 561, 45 L. ed. 1000, 1002, 21 Sup. Ct. Rep. 707; Santa Fe County v. New Mexico, 215 U. S. 296, 305, 54 L. ed. 202, 207, 30 Sup. Ct. Rep. 111; Albright v. Sandoval, 216 U. S. 331, 339, 54 L. ed. 502, 508, 30 Sup. Ct. Rep. 318; Sandoval v. Randolph, 222 U. S. 161, 164, 56 L. ed. 143, 144, 32 Sup. Ct. Rep. 48.

Jurisdiction upon appeals taken under the act of April 7, 1874, is confined and limited to an inspection of findings of fact to see if the findings support the judgment, and to a review of the exceptions which were duly taken to the rulings of the trial court upon the admission and exclusion of evidence.

Young v. Amy, 171 U. S. 179, 183, 43 L. ed. 127, 128, 18 Sup. Ct. Rep. 802; Harrison v. Perea, 168 U. S. 311, 323, 42 L. ed. 478, 482, 18 Sup. Ct. Rep. 129; Mammoth Min. Co. v. Salt Lake Foundry & Mach. Co. 151 U. S. 447, 450, 38 L. ed. 229, 230, 14 Sup. Ct. Rep. 384; San Pedro & C. del A. Co. v. United States, 146 U. S. 120, 131, 36 L. ed. 911, 914, 13 Sup. Ct. Rep. 94; Apache County v. Barth, 177 U. S. 538, 542, 44 L. ed. 878, 879, 20 Sup. Ct. Rep. 718; Bear Lake & River Waterworks & Irrig. Co. v. Garland, 164 U. S. 1, 18, 41 L. ed. 327, 334, 17 Sup. Ct. Rep. 7; Grayson v. Lynch, 163 U. S. 468, 473, 41 L. ed. 230, 232, 16 Sup. Ct. Rep. 1064; Haws v. Victoria Copper Min. Co. 160 U. S. 303, 312, 313, 40 L. ed. 436, 439, 16 Sup. Ct. Rep. 282; Stringfellow v. Cain, 99 U. S. 610, 25 L. ed. 421; Neslin v. Wells, F. & Co. 104 U. S. 428, 429, 26 L. ed. 802, 803; Idaho & O. Land Improv. Co. v. Bradbury, 132 U. S. 509, 514, 515, 33 L. ed. 433, 436, 437, 10 Sup. Ct. Rep. 177; Eagle Min. & Improv. Co. v. Hamilton, 218 U. S. 513, 515, 54 L. ed. 1131, 1132, 31 Sup. Ct. Rep. 27.

The interveners had an interest in the subject-matter of the suit, and such interest consisted in an ownership of a part of the subject-matter of the litigation. Under such circumstances it is well settled that, irrespective of statute, the interveners had a right to intervene in this cause.

Gulf, C. & S. F. R. Co. v. Eldredge, 35 Tex. Civ. App. 467, 80 S. W. 556; Lewis v. Harwood, 28 Minn. 428, 10 N. W. 586; Yetzer v. Young, 3 S. D. 263, 52 N. W. 1054; McClurg v. State Bindery Co. 3 S. D. 362, 44 Am. St. Rep. 799, 53 N. W. 428.

There was no agreement to pay personally in the future, no agreement to pay a sum equal to one third, but an offer to give (presently, of course, although to be enjoyed in the future) one third of the fee itself if the interveners would agree to do certain things. They accepted the offer and fully performed its terms, and thereupon and thereby there was a completed, finished, and executed agreement which made the interveners the equitable owners of one third of the fee.

Fairbanks v. Sargent, 104 N. Y. 108, 58 Am. Rep. 490, 9 N. E. 870, 117 N. Y. 320, 6 L.R.A. 475, 22 N. E. 1039; Williams v.

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Ingersoll, 89 N. Y. 508; Boyle v. Boyle, 106 N. Y. 654, 12 N. E. 709; Thomas v. New York & G. L. R. Co. 139 N. Y. 179, 34 N. E. 880; Chester v. Jumel, 125 N. Y. 237, 26 N. E. 297; Holmes v. Evans, 129 N. Y. 140, 29 N. E. 233; Wright v. Wright, 70 N. Y. 98; Ingersoll v. Coram, 211 U. S. 365, 53 L. ed. 228, 29 Sup. Ct. Rep. 92; Wylie v. Coxe, 15 How. 415, 14 L. ed. 753. See Seymour v. Freer, 8 Wall. 214, 19 L. ed. 310; Louisville ex rel. Cary, E. & St. L. R. Co. v. Wilson, 138 U. S. 501, 506, 507, 34 L. ed. 1023, 1025, 1026, 11 Sup. Ct. Rep. 405; Walker v. Brown, 165 U. S. 654, 664, 41 L. ed. 865, 870, 17 Sup. Ct. Rep. 453; Fourth Street Nat. Bank v. Yardley, 165 U. S. 634, 644, 41 L. ed. 855, 861, 17 Sup. Ct. Rep. 439; Ketchum v. St. Louis, 101 U. S. 306, 25 L. ed. 999; Cowdrey v. Galveston, H. & H. R. Co. 93 U. S. 352, 355, 23 L. ed. 950, 952; Central R. & Bkg. Co. v. Pettus, 113 U. S. 116, 127, 128, 28 L. ed. 915, 919, 5 Sup. Ct. Rep. 387; Semmes v. Whitney, 50 Fed. 666; Mahone v. Southern Teleg. Co. 33 Fed. 702; Louisville ex rel. Carey, E. & St. L. R. Co. v. Wilson, 138 U. S. 507, 34 L. ed. 1025, 11 Sup. Ct. Rep. 405; Frink v. McComb, 60 Fed. 486; Smith v. Young, 62 Ill. 210; Cooke v. Thresher, 51 Conn. 105; Hoffman v. Vallejo, 45 Cal. 564; Blakey v. New York L. Ins. Co. 28 Ind. App. 428, 63 N E. 47; Bogert v. Adams, 8 Colo. App. 185, 45 Pac. 235; Patten v. Wilson, 34 Pa. 299; Wilson v. Seeber, 72 N. J. Eq. 523, 66 Atl. 909; Bank of New Hanover v. Williams, 79 N. C. 136; Gulf, C. & S. F. R. Co. v. Eldredge, 35 Tex. Civ. App. 467, 80 S. W. 556; Harwood v. La Grange, 137 N. Y. 538, 32 N. E. 1000.

Attorneys, being equitable assignees of a fund or the proceeds of litigation charged with their lien, may pursue the subject of the lien wherever it may be found. The right to pursue the fund is elementary when it is found to be in the hands of a person who, like the plaintiff here, took the subject thereof with full notice and knowledge of the existence of the lien.

Hoffman v. Vallejo, 45 Cal. 564; Templeman v. Gresham, 61 Tex. 53; Peticolas v. Carpenter, 53 Tex. 23.

Mr. Justice Holmes delivered the opinion of the court:

The proceeding out of which this case arises was brought by the appellant, Mrs. Barnes, for an account of the property [119] received in settlement of certain mining suits and for a recovery of one fourth of the same. The defendants, Shattuck, Hanninger, and Marks, were parties to these suits, and employed as their attorneys the firm of Barnes & Martin and one O'Connell under an agreement that the lawyers should have as their compensation one fourth of all that was received by the said defendants. It may be assumed that Mrs. Barnes represented this claim. While the present suit was pending another firm, whose claim now is represented by the appellees, intervened and claimed one third of this contingent fee of one fourth. At the trial it appeared that the original defendants had paid to O'Connell the amount due; $18,750. Pending the suit O'Connell paid over $10,625 of this to Mrs. Barnes, retaining $6,250, and paying Martin, the junior member of the firm of Barnes & Martin, $1,875. The court entered no decree against the original defendants, but did decree that Mrs. Barnes was liable to the appellees for $6,250, being one third of the contingent fee. She appealed to the supreme court of the territory, but it affirmed the judgment below. 13 Ariz. 338, 114 Pac. 952. The other two appellants in this court are the sureties on her supersedeas bond.

The main question is whether the facts set forth in the findings certified justify the conclusion of the courts below. The whole matter rests on conversations, in one of which Barnes said to Street and Alexander: "If you will attend to this case I will give you one third of the fee which I have coming to me on a contingent fee from Shattuck, Hanninger, and Marks. Mr. O'Connell, who is associated with me, is entitled to the other third." In others also he explained what his firm was to have, and told Street and Alexander that they should get one third of that if they would do certain work that he had not time to attend to. Street and Alexander did the work required, it does not matter whether it was more or less;—there [120] was some attempt to raise a question about the fact, but we regard it as beyond dispute. The only serious argument is that, whatever they did, their compensation depended upon a personal promise that gave them no specific claim against the fund. For this proposition reliance is placed upon Trist v. Child (Burke v. Child) 21 Wall. 441, 22 L. ed. 623. In that case Child had an agreement with Trist that Child should take charge of a claim of Trist before Congress, and should receive 25 per cent of whatever sum Congress might allow. The suit alleged a lien on the sum allowed, and prayed that Trist might be enjoined from withdrawing the money from the Treasury, and might be decreed to pay the amount due. The bill was dismissed on the ground that the contract was illegal, but it was added that Child had no lien because it was forbidden by act of Congress, and also, it was said, because there was no sufficient appropriation of the fund, so that the only

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remedy, if there had been one, would have been at law. Wright v. Ellison, 1 Wall. 16, 17 L. ed. 555; Christmas v. Russell, 14 Wall. 69, 20 L. ed. 762. This decision, so far as it concerns us here, seems to have overlooked Wylie v. Coxe, 15 How. 415, 14 L. ed. 753, which decided that a contract for a contingent fee out of a fund awarded constituted a lien upon the fund. The remarks in Trist v. Child were not necessary to the decision, which was placed mainly on other grounds, so that at least we are warranted in treating the question as it large.

It would be a strong thing to decide that there was nothing to warrant the conclusion, whether of law or fact, sanctioned by the highest court of a territory that since has become a state, upon a matter no longer subject to review by us. See Phœnix R. Co. v. Landis (Dec. 22, 1913 [231 U. S. 578, ante, 377, 34 Sup. Ct. Rep. 179]), But it might be our duty, and we pass that consideration by. We start, however, with the principle that an informal business transaction should be construed as adopting whatever form consistent with the facts is most fitted to reach the result seemingly desired. Sexton v. [121] Kessler & Co. 225 U. S. 90, 96, 97, 56 L. ed. 995, 999, 1000, 32 Sup. Ct. Rep. 657. Obviously the only thing intended or desired was to give the appellees a claim to one third of the fund received by Barnes if and when he should receive it. It is true that there was in a sense a *res* as to which present words of transfer might have been used. There was a right vested in Barnes, unless discharged, to try to earn a fee contingent upon success. But in a speculation of this sort the parties naturally turned their eyes toward the future and aimed at the fruits when they should be gained. They therefore used words of contract rather than of conveyance; but the important thing is not whether they used the present or the future tense, but the scope of the contract. In this case it aimed only at the fund. Barnes gave no general promise of reward; he did not even give a promise qualified and measured by success to pay anything out of his own property, referring to the fund simply as the means that would enable him to do it. See National City Bank v. Hotchkiss, 231 U. S. 50, 57, ante, 115, 34 Sup. Ct. Rep. 20. He promised only that if, when, and as soon as he should receive an identified fund, one third of it should go to the appellees. But he promised that. At the latest, the moment the fund was received the contract attached to it as if made at that moment. It is an ancient principle even of the common law that words of covenant may be construed as a grant when they concern a present right. Sharington v. Strotton, 1 Plowd. 298, 308; Hogan v. Barry, 143 Mass. 538, 10 N. E. 253; Ladd v. Boston, 151 Mass. 585, 588, 21 Am. St. Rep. 481, 24 N. E. 858. And it is one of the familiar rules of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing. Mornington v. Keane, 2 DeG. & J. 292, 313, 27 L. J. Ch. N. S. 791 4 Jur. N. S. 981, 6 Week. Rep. 434; Holroyd v. Marshall, 10 H. L. Cas. 191, 211, 33 L. J. Ch. N. S. 193, 9 Jur. N. S. 213, 7 L. T. N. S. 172, 11 Week. Rep. 171, 10 Eng. Rul. Cas. 420.

The obligation of Barnes was as definitely limited to payment out of the fund as if the limitation had been stated in words, and therefore creates a lien upon the [122] principle not only of Wylie v. Coxe, supra, but of Ingersoll v. Coram, 211 U. S. 335, 365–368, 53 L. ed. 208, 229, 230, 29 Sup. Ct. Rep. 92, which cites it and later cases. See further to the same point, Burn v. Carvalho, 4 Myl. & C. 690, 702, 703, 3 Jur. 1141; Rodick v. Gandell, 1 DeG. M. & G. 763, 777, 778, 12 Beav. 325, 19 L. J. Ch. N. S. 113, 13 Jur. 1087; Harwood v. La Grange, 137 N. Y. 538, 540, 32 N. E. 1000. It is suggested that there is an American doctrine opposed to that which is established in England. We know of no such opposition. There is or ought to be but one rule,—that suggested by plain good sense.

After making their contracts the parties seem to have construed them as we have done. Barnes wrote to his partner, when they had succeeded in the cases concerned, in terms showing that he regarded their own claim as specific, "to have one fourth of the ground," the principle on which this suit was brought; and when a settlement was to be made he went to Phœnix and notified Street and Alexander. For the same reason the latter firm filed no claim against the estate of Barnes, thinking that it owed them nothing, but that they had one third of the contingent fee. It is not necessary to consider whether the lien attached to what we have called the *res*, before the fund was received, as a covenant to set apart rents and profits creates a lien upon the land. Legard v. Hodges, 1 Ves. Jr. 477, 4 Bro. Ch. 421. It is enough that it attached not later than that moment. We have considered the case upon the merits. The argument upon them for the appellants is mixed with others as to the sufficiency of the complaint in intervention. Upon the point of pleading we see no occasion to go behind the decision below. Phœnix R. Co. v. Landis, No. 61. Dec. 22, 1913 [231 U. S. 578, ante, 377, 34 Sup. Ct. Rep. 179].

Another matter argued is that the appellees should not have been allowed to prove

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the payment made after the suit was begun. But the appellees properly were allowed to intervene in a suit to recover the fund. Rev. Stat. (Ariz.) 1901, § 1278; London, P. & A. Bank v. Abrams, 6 Ariz. 87, 90, 53 Pac. 588; Louisville, E. & St. [123] L. R. Co. v. Wilson, 138 U. S. 501, 34 L. ed. 1023, 11 Sup. Ct. Rep. 405. Even if their lien was only inchoate when the suit was begun (which we do not intimate), they had a right to protect their interest, and of course were not deprived of it by the plaintiff's reaching the result that they also desired. Having a lien upon the fund, as soon as it was identified they could follow it into the hands of the appellant Barnes. On this point also we shall go into no question of pleading or procedure, but shall accept the decision of the territorial supreme court.

The only remaining objection that seems to us to need a word of answer is that, as Mrs. Barnes only received $10,625, she should not have been charged with the whole third, $6,250. As the lien of the appellees attached to the whole two thirds of the quarter remaining to Barnes and Martin after taking out O'Connell's third, we do not see on what ground she could complain, if the objection is open. It seems probable that it is only an after-thought of counsel, and that the sum retained by Martin was what would come to him after deducting the share of Street and Alexander's fee that properly fell upon him as between him and his former partner's estate.

Judgment affirmed.

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[124] JOHN W. CAIN, Plff. in Err.,
v.
COMMERCIAL PUBLISHING COMPANY.

(See S. C. Reporter's ed. 124-134.)

Removal of causes — question open in Federal court — service of process.

1. The validity of the service of process upon a foreign corporate defendant may be raised in a Federal district court by a special plea to the jurisdiction after the cause has been removed to that court from a state court on the petition of such defendant, since the requirement of the Judicial Code (36 Stat. at L. 1095, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 142), § 29, that the party removing the cause shall, within thirty days, "plead, answer, or demur to the declaration or complaint," must be deemed to include a plea to the jurisdiction,—especially in view of the provision of § 38 of the Code, that in all suits removed the district court shall proceed therein as if the suit had been originally commenced in that court, "and the same proceedings had been taken in such suit in said district court as shall have been had therein in said state court prior to its removal."

[For other cases, see Removal of Causes, IX., in Digest Sup. Ct. 1908.]

Appearance — waiver of illegal service — case removed from state court to Federal court.

2. The filing by defendant of a petition for a removal of the cause from a Mississippi court to a Federal district court, and a special appearance in the Federal court by a plea to the jurisdiction over the person of the defendant, raising the question of the validity of the service of process, do not, because of the conformity act (U. S. Rev. Stat. § 914, U. S. Comp. Stat. 1901, p. 684), amount to a general appearance which shall be considered a waiver of any objection to the jurisdiction, although, by Miss. Code 1906, § 3946, all appearances are general, even though process be invalidly served.

[For other cases, see Appearance, II., in Digest Sup. Ct. 1908.]

[No. 797.]

Submitted January 6, 1914. Decided January 19, 1914.

IN ERROR to the District Court of the United States for the Southern District of Mississippi to review a judgment quashing service of process in an action for libel which had been removed to that court from the Circuit Court of Hinds County, in the State of Mississippi. Affirmed.

The facts are stated in the opinion.

Mr. Marcellus Green submitted the cause for plaintiff in error. Messrs. Garner Wynn Green and Marcellus Green, Jr., were on the brief:

The words, "plead, answer, or demur to the declaration or complaint," cover both common-law, code, and equity proceedings, and mean a plea or demurrer to the declaration, and cannot mean a plea in abatement to the service of the writ.

A plea in abatement to the jurisdiction of the court for want of service upon the defendant is a plea in abatement to the writ, and is not a plea to the declaration.

Thornton v. Fitzhugh, 10 Smedes & M. 438; United States v. American Bell Teleph. Co. 29 Fed. 17; Chamberlain v. Lake, 36 Me. 388.

If the defect appears upon the face of the record, a motion to dismiss the suit for want of service of the writ is a proper remedy.

Wabash Western R. Co. v. Brow, 164 U. S. 271.

NOTE.—On appearance to give jurisdiction over foreign corporation—see notes to [illegible] v. Southern R. Co. 70 L.R.A. 536, [illegible]thern P. R. Co. 70 L.R.A.

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S. 280, 41 L. ed. 435, 17 Sup. Ct. Rep. 126; Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559.

The evils of delay and expense in the proceedings in removed causes under the former removal acts had grown up, and the amendment by the Judicial Code, §§ 29 and 38, was to expedite and compel a speedy hearing on the merits, and to abolish delay in removal proceedings under the practice theretofore prevailing, whereby a party could appear, either generally or specially, in his petition to remove (Wabash Western R. Co. v. Brow and Goldey v. Morning News, supra), in answer to the service of the summons, and apparently be in court, and file his petition for removal on the ground of diverse citizenship, and thus defeat a speedy trial in the state court, and then, after much delay, upon removal, defeat a trial in the United States court on the ground that while he had appeared before the state court and had consumed its time and expense and the exercise of its jurisdiction in his behalf, he was really not in court because not properly served with process, and then consume the time and expense and exercise of jurisdiction of the Federal court by invoking, by motion, the court's jurisdiction to dismiss the cause, and thus compel plaintiff to go upon a fool's errand.

The statutes of pleading, practice, and procedure of the state of Mississippi constitute a part of the jurisprudence of the United States courts when not in conflict therewith, and under Miss. Code 1906, § 3946, the filing of the petition for removal in the state court, even though a special entry of appearance, constituted a general entry of appearance, and upon removal, under §§ 29 and 38 of the Judicial Code, the defendant was compelled to plead to the declaration within thirty days after the filing of the record.

Boston & M. R. Co. v. Gokey, 210 U. S. 155, 162, 163, 52 L. ed. 1002, 1004, 1005, 28 Sup. Ct. Rep. 657.

And with the same construction as is given by the state court.

Iowa C. R. Co. v. Hampton Electric Light & P. Co. 123 C. C. A. 283, 204 Fed. 966.

A special is a general entry of appearance under Miss. Code 1906, § 3946.

Illinois C. R. Co. v. Swanson, 92 Miss. 492, 46 So. 83.

A Texas statute of similar import as § 3946 was held to be constitutional and its application given effect in York v. Texas, 137 U. S. 15, 34 L. ed. 604, 11 Sup. Ct. Rep. 9.

This Texas statute conflicted with the express provisions of the Federal statutes, especially as to the venue of the jurisdiction in the Federal court, and the Federal statutes were held to prevail, but only to the extent of the conflict.

Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44; Galveston, H. & S. A. R. Co. v. Gonzales, 151 U. S. 496, 38 L. ed. 248, 14 Sup. Ct. Rep. 401.

The rule followed in Wabash Western R. Co. v. Brow, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126, and Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559, obtained in states other than states in which a statute like § 3946 of the Code of 1906 prevailed, and these cases are distinguishable because of this fact, as well as because they arose before the amendment by the Judicial Code.

Mr. Lovick P. Miles submitted the cause for defendant in error. Messrs. Luke E. Wright, Roane Waring, and Sam P. Walker were on the brief:

The construction of the Judicial Code insisted upon by plaintiff in error would be not only in conflict with the express language of § 38 of that Code, but would overrule a long-established practice and destroy a great right which, by repeated decisions of the Supreme Court of the United States, has become fixed in our people.

Mechanical Appliance Co. v. Castleman, 215 U. S. 439, 54 L. ed. 274, 30 Sup. Ct. Rep. 125; Wabash Western R. Co. v. Brow, 164 U. S. 271, 278, 41 L. ed. 431, 434, 17 Sup. Ct. Rep. 126; Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559.

It has been expressly recognized that just such plea to the jurisdiction as was filed in the instant case raised a question of jurisdiction reviewable by the Supreme Court of the United States.

Remington v. Central P. R. Co. 198 U. S. 95, 49 L. ed. 959, 25 Sup. Ct. Rep. 577; Mechanical Appliance Co. v. Castleman, 215 U. S. 440, 54 L. ed. 275, 30 Sup. Ct. Rep. 125.

The statutes of Mississippi and the decisions of its courts are not conclusive upon Federal courts in determining whether the defendant was suable in the state of Mississippi, or whether Earl K. Williams or A. C. Walthall were persons upon whom service of summons could be had, so as to give jurisdiction of the defendant. Nor would any statute of the state of Mississippi give jurisdiction where facts necessary to give a Federal court jurisdiction did not exist.

Mechanical Appliance Co. v. Castleman, 215 U. S. 440, 54 L. ed. 275, 30 Sup. Ct. Rep. 125; Peterson v. Chicago, R. I. & P. R. Co. 205 U. S. 364, 51 L. ed. 841, 27 Sup. Ct. Rep. 513; Green v. Chicago, B. & Q. R. Co. 205 U. S. 530, 51 L. ed. 916, 27 Sup.

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Ct. Rep. 595; Wold v. J. B. Colt Co. 102 Minn. 518, 114 N. W. 244.

[128] Mr. Justice McKenna delivered the opinion of the court:

Action for libel brought in the circuit court of Hinds county, first district, state of Mississippi. Plaintiff in error (as he was plaintiff in the action, we will so refer to him), alleged himself to be a citizen of the state of Mississippi; that defendant in error, Commercial Publishing Company (referred to herein as defendant), published a libel against him in its "newspaper called the Commercial Appeal, in the city of Memphis, state of Tennessee, but that the said Commercial Appeal has a large circulation throughout the state of Mississippi and of adjoining states and among foreign cities, and also in foreign countries." $10,000 actual damages were prayed and $10,000 punitive damages.

Summons was issued and returned, served by the sheriff of the county, as: "Executed personally on the Commercial Publishing Company" by delivering a copy to E. K. Williams, described as "its agent, at Jackson, Mississippi," and to A. C. Walthall, described as "its correspondent, at Jackson, Mississippi."

Defendant filed a petition for removal of the action to the district court of the United States, which petition stated the nature of the action, that plaintiff was a resident and citizen of Mississippi, that defendant was a corporation chartered under and by virtue of the laws of Tennessee, that the time for answering or pleading to the declaration had not expired, that defendant had not appeared therein, and that defendant appeared only specially, and for the sole purpose of requesting the removal of the cause to the district court of the United States, and that it did not waive any objections or exceptions to the jurisdiction. A bond, as required by law, was duly given, which was approved, and an order of removal was duly made. The copy of the record was duly filed in the [129] district court of the United States. The defendant then filed in the latter court a plea to the jurisdiction over the person of defendant, appearing specially for that purpose. The plea alleged that the state court had not acquired jurisdiction of the defendant, because (a) it was a corporation of the state of Tennessee, and that it had never taken out a license to do business in Mississippi, nor, at the time of the service of the summons, did it have an agent, office, or place of business in Hinds county, state of Mississippi; (b) the persons upon whom service was made were neither agents nor officers of, nor in any relation to, defendant, for the reason that defendant was not doing business in the state of Mississippi.

Plaintiff demurred to the plea, stating as grounds (1) that it was directed to the service of process, and not to the declaration, as required under § 29 of the Judicial Code [36 Stat. at L. 1095, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 142]; (2) no right exists to enter a special appearance in the Hinds county circuit court under the laws of the state of Mississippi, all appearances being general, even though process be invalidly served.

The demurrer was overruled and issue joined on the plea to the jurisdiction, and the court, having heard the evidence, decided that neither of the persons upon whom summons was served was such an agent of defendant that service upon him would give jurisdiction over the person of defendant, and thereupon found the issue for defendant.

Before judgment was entered, plaintiff called up his motion for judgment for default because defendant had not pleaded or demurred to the declaration within thirty days after the filing of the copy of the record of removal, as required by § 29 of the Judicial Code. The motion was overruled, the court reciting in its order that it was of "opinion that defendant was not required to plead or demur to the declaration unless the process of summons in the state court was duly served upon an agent of defendant [130] upon whom service of process was authorized to be made."

Judgment was then entered, quashing the service of process and dismissing the action "without prejudice to the right of plaintiff to sue upon the causes of action set up in the declaration."

Plaintiff prayed a writ of error to this court upon the question of jurisdiction. It was allowed in open court, the court reciting that it was allowed on the question of jurisdiction only, the court having dismissed the action "on the sole question that the court had no jurisdiction of the action."

The question in the case is the simple one of what is the effect of §§ 29 and 38 of the Judicial Code. Section 29 provides for the filing of a petition for the removal of a suit from a state court to the district court of the United States at any time before the defendant is required by the laws of the state to answer or plead, and the filing therewith of a bond for "entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit." It provides that, this being done, the state court shall accept the petition and bond and "proceed no further in such suit." It provides

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further that notice of the petition and bond shall be given to the adverse party, and that "the said copy being entered within said thirty days, as aforesaid, in said district court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court."

Section 38 provides that the district court, in suits so removed, shall "proceed therein as if the suit had been originally commenced in said district court and the same proceedings had been taken in such suit in said [131] district court as shall have been had therein in said state court prior to its removal."

The argument is that these sections abolish the practice declared in Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559, and Wabash Western R. Co. v. Brow, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126. In the former case the following propositions were laid down: (1) The right and procedure of removal of actions from a state court are to be determined by the Federal law. (2) The legislature or the judiciary of a state can neither defeat the right nor limit its effect. (3) The act of Congress by which the practice, pleadings, and forms and modes of proceeding in actions at law in the courts of the United States are required to conform as near as may be to those existing in the state courts applies only to cases of which the court has jurisdiction according to the Constitution and laws of the United States. (4) A suit must be actually pending in a state court before it can be removed, but its removal to the court of the United States does not admit that it was rightfully pending in the state court, or that the defendant could have been compelled to answer therein; but enables the defendant to avail himself in the United States court of any and every defense duly and seasonably reserved and pleaded to the action "'in the same manner as if it had been originally commenced in said circuit court.'" The words quoted, it will be observed, are repeated in § 29, "district court" being substituted for "circuit court."

In Wabash Western R. Co. v. Brow, 164 U. S. 271, 279, 41 L. ed. 431, 434, 17 Sup. Ct. Rep. 126, it is said: "By the exercise of the right of removal, the petitioner refuses to permit the state court to deal with the case in any way, because he prefers another forum to which the law gives him the right to resort. This may be said to challenge the jurisdiction of the state court, in the sense of declining to submit to it, and not necessarily otherwise.

"We are of opinion that the filing of a petition for [132] removal does not amount to a general appearance, but to a special appearance only."

Subsequent cases have applied this ruling. Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 54 L. ed. 272, 30 Sup. Ct. Rep. 125, and cases cited therein.

It is contended, however, as we have seen, that §§ 29 and 38 of the Judicial Code have instituted a new and more expeditious practice. This is deduced from that part of § 29 which provides that the party desiring to remove a case shall make and file with his petition a bond for entering in the district court, within thirty days from the date of filing his petition, a certified copy of the record, written notice thereof to be given the adverse party, and the copy of the record being so entered, "*the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause. . . .*"

The purpose of these provisions, which are an amendment to the prior law, it is contended, is to expedite trials and preclude a defendant from preventing a speedy trial in the state court by removal proceedings and "then consume the time and expense and exercise of jurisdiction of the Federal court by invoking, by motion, the court's jurisdiction to dismiss the cause, and thus compel plaintiff to go upon a fool's errand." To prevent this consequence, it is further insisted, the record was required to be filed within thirty days from the date of filing the petition for removal, which, necessarily, it is said, would be in vacation, and that therefore the requirement that within thirty days after it is filed the defendant "shall plead, answer, or demur to the declaration or complaint in said cause" necessarily means "a plea or demurrer to the declaration, and cannot mean a plea in abatement to the service of the writ."

It may be conceded that the purpose of the amendment was to secure expedition in the disposition of the [133] case, but a revolution in the practice and efficacy of the right of removal is not lightly to be inferred. And a revolution it would be. It would take from the Federal courts the power they have possessed under the cases cited,—a power not only to pass upon the merits of the case, but upon the validity of the service of process; that is, upon the question of jurisdiction over the person of the defendant. How essential this power is to the right of removal is obvious. Without

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it a state could prescribe any process or notice, or a plaintiff, as in the pending case, serve process on a person having no relation with a defendant, and compel him to submit to it and to a jurisdiction not of his residence, or give up his right to take the case to what, in contemplation of law, may be a more impartial tribunal for the determination of the action instituted against him, and which it is the purpose of the removal proceedings to secure to him; and, it must be assumed, completely, not by surrender of any of his rights, but in protection and security of all of them.

The weakness of plaintiff's contention is demonstrated not only when we consider all of the language of § 29, but the language of § 38, which provides that in all suits removed the district court shall proceed therein as if the suit had been originally commenced in the district court, "and the same proceedings had been taken in such suit in said district court as shall have been had therein in said state court prior to its removal." In other words, the cause is transferred to the district court as it stands in the state court and the defendant is enabled to avail himself in the latter court of any defenses, and, within the time designated, plead to the action "in the same manner as if it had been originally commenced in said district court." And these words, we have seen, were explicitly given such effect in the cited cases.

It is clear, therefore, that plaintiff gives too restrictive a meaning to the word "plead" in § 29. It must be construed [134] to include a plea to the jurisdiction, and, so construing it, all of the provisions for removal of causes become accordant and their purposes fulfilled,—the right of a speedy disposition of the suit to the plaintiff, and the right of the defendant to have all questions determined by the Federal tribunal.

Plaintiff further contends that, under the Mississippi Code, the filing of the petition for removal constitutes a general entry of appearance; that therefore, if § 29 does not compel the removing party to plead to the declaration within thirty days, "then, under § 914, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 684, the 'practice, pleadings, forms, and modes of proceeding' in the state court, adopted in the Federal Court, would make the plea to the jurisdiction here in the district court a general entry of appearance, and would require a plea to the merits at the next term of the district court under the Code of the state," because "a special is a general entry of appearance under § 3946, Code of 1906."

The contention is untenable. Goldey v. Morning News, and Mechanical Appliance Co. v. Castleman, supra.

Judgment affirmed.

ROBERT C. BACON, William R. Warner, Park H. Pollard, Public Service Commission of the State of Vermont, Appts.,

v.

RUTLAND RAILROAD COMPANY.

(See S. C. Reporter's ed. 134–138.)

Federal courts — enjoining order of public service commission — exhausting remedy in state court.

A Federal district court may entertain a suit by a railway company to restrain the Vermont public service commission from enforcing its order concerning a passenger station as violative of the Federal Constitution, although the company has not taken the appeal from the order to the supreme court of the state that is provided for by Vt. Pub. Stat. 1906, §§ 4599, 4600, since it is apparent on the face of these sections that they do not attempt to confer legislative powers upon the court, but only provide an alternative and more expeditious way of doing what might be done by a bill in equity.

[For other cases, see Courts, VI. d, 2, in Digest Sup. Ct. 1908.]

[No. 760.]

Argued January 9, 1914. Decided January 19, 1914.

APPEAL from the District Court of the United States for the District of Vermont to review a decree enjoining the enforcement of an order of the state public service commission. Affirmed.

The facts are stated in the opinion.

Mr. Frederic D. McKenney argued the cause, and, with Messrs. John Spalding Flannery, William Hitz, and Robert C. Bacon, filed a brief for appellants.

Mr. Edwin W. Lawrence argued the cause and filed a brief for appellee.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity, brought by the appellee, the railroad company, to restrain the Public Service Commission of Vermont from enforcing an order concerning a passenger station of the company at Vergennes. The order is alleged to violate the 14th Amendment. The commission moved to dismiss the bill on the ground that until the appellee had taken the appeal from the order to the supreme court of the state that is provided [137] for by Pub. Stat. (Vt.) 1906, §§ 4599, 4600, it ought not to be heard to complain elsewhere. The motion was overruled, and the defendants not desiring to plead, an injunction was issued as prayed.

The defendants rely upon Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 229, 230, 53 L. ed. 150, 160, 29 Sup. Ct. Rep. 67.

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The ground of that decision was that by the state Constitution an appeal to the supreme court of appeals from an order of the state corporation commission, fixing rates, was granted, with power to the court to substitute such order as, in its opinion, the commission should have made. The court was given legislative powers, and it was held that in the circumstances it was proper, before resorting to the circuit court of the United States, to make sure that the officials of the state would try to establish an unconstitutional rule. But it was laid down expressly that at the judicial stage the railroads had a right to resort to the courts of the United States at once. p. 228. Therefore before that case can apply it must be established at least that legislative powers are conferred upon the supreme court of the state of Vermont.

The appeal in Vermont is given by statute, not by the Constitution, which separates legislative, executive, and judicial powers. Chap. 2, § 6. The material provisions are as follows: § 4599. "Any party to a cause who feels himself aggrieved by the final order, judgment, or decree of said . . . [commission] shall have the right to take the cause to the supreme court by appeal, for the correction of any errors excepted to in its proceedings, or in the form or substance of its orders, judgments, and decrees, on the facts found and reported by said . . . [commission]." By § 4600 appeals are to be taken in the manner and under the laws and rules of procedure that govern appeals from the court of chancery. "The supreme court shall have the same power therein as it has over appeals from such court. It may reverse or affirm the judgments, orders, or decrees of said . . . [commission] [138] and may remand a cause to said . . . [commission] with such mandates as law or equity shall require; and said . . . [commission] shall enter judgment, order, or decree in accordance with such mandates." Pub. Stat. 1906. It is apparent on the face of these sections that they do not attempt to confer legislative powers upon the court. They only provide an alternative and more expeditious way of doing what might be done by a bill in equity. Whether the alternative is exclusive or concurrent, whether it opens matters that would not be open upon a bill or not, if exceptions are taken (which does not appear in this case), is immaterial; the remedy in any event is purely judicial: to exonerate the appellant from an order that exceeds the law. This, we understand, is the view taken by the supreme court of the state (Bacon v. Boston & M. R. Co. 83 Vt. 421, 457, 76 Atl. 128; Sabre v. Rutland R. Co. 86 Vt. 347, 368, 369, 85 Atl. 693; and this being so, by the rule laid down in Prentis v. Atlantic Coast Line Co., the railroad company was free to assert its rights in the district court of the United States.

Decree affirmed.

JOSEPH PATSONE, Plff. in Err.,
v.
COMMONWEALTH OF PENNSYLVANIA.

(See S. C. Reporter's ed. 138–146.)

Constitutional law — due process of law — possession of firearms by alien.

1. Unnaturalized foreign-born residents are not deprived of property without due process of law, contrary to U. S. Const., 14th Amend., by Pa. Laws 1909, No. 261, p. 466, prohibiting the killing of any wild bird or animal by any such foreign-born person except in defense of person or property, and "to that end" making it unlawful for any such person to own or be possessed of a shotgun or rifle.

[For other cases, see Constitutional Law, IV. b, 4; IV. b, 5, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — protecting wild life — possession of firearms by alien.

2. The legislative assumption that unnaturalized foreign-born residents are peculiarly a source of danger to wild life cannot be said to be so unwarranted as to invalidate, as denying the equal protection of the laws, the provisions of Pa. Laws 1909, No. 261, p. 466, prohibiting the killing of any wild bird or animal by any such foreign-born person except in defense of person or property, and "to that end" making it unlawful for any such person to own or be possessed of a shotgun or rifle.

[For other cases, see Constitutional Law, IV. a, 2, in Digest Sup. Ct. 1908.]

Statutes — who may assail validity.

3. A resident unnaturalized Italian not trading in firearms cannot claim that his right under the treaty with Italy of February 26, 1871 (17 Stat. at L. 845), art. 2, to carry on trade and to do anything incident to it upon the same terms as the natives of this country, is infringed by Pa. Laws 1909, No. 261, p. 466, prohibiting the killing of any wild bird or animal by any such foreign-born person except in defense of person or property, and "to that end" making it unlawful for any such person to own or be possessed of a shotgun or rifle.

[For other cases, see Statutes, I. d, 3, in Digest Sup. Ct. 1908.]

NOTE.—On the constitutional right to bear arms—see notes to Salina v. Blaksley, 3 L.R.A.(N.S.) 168; Ex parte Thomas, 20 L.R.A.(N.S.) 1007; and Strickland v. State, 36 L.R.A.(N.S.) 115.

As to construction and operation of treaties—see note to United States v. The Amistad, 10 L. ed. U. S. 826.

On treaty guaranties to aliens—see note to Gandolfo v. Hartman, 16 L.R.A. 277.

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Aliens — treaty rights — state regulations.

4. The equality of rights and privileges with natives of the United States with respect to security for persons and property which citizens of Italy are assured by the Italian treaty of February 26, 1871, art. 3, is not infringed by the provisions of Pa. Laws 1909, No. 261, p. 466, prohibiting the killing of any wild bird or animal by any such foreign-born person except in defense of person or property, and "to that end" making it unlawful for any such person to own or be possessed of a shotgun or rifle. [For other cases, see Treaties, I., in Digest Sup. Ct. 1908.]

[No. 38.]

Argued November 4, 1913. Decided January 19, 1914.

IN ERROR to the Supreme Court of the Commonwealth of Pennsylvania to review a judgment which affirmed a judgment of the Superior Court, affirming a conviction of an alien in the Court of Quarter Sessions of Allegheny County, for owning or having in his possession a shotgun. Affirmed.

See same case below, 231 Pa. 46, 79 Atl. 928.

The facts are stated in the opinion.

Mr. Marcel A. Viti argued the cause and filed a brief for plaintiff in error:

The Pennsylvania act of May 8, 1909, deprives persons of liberty and property without due process of law.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

It is freely admitted that the preservation of game and fish falls within the proper limits of the police power, and that their capture is a privilege that may be limited by legislation to the citizens of any state, provided the power is exercised in a reasonable manner and by proper means.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; People v. Buffalo Fish Co. 164 N. Y. 93, 52 L.R.A. 803, 79 Am. St. Rep. 622, 58 N. E. 34; People v. West, 106 N. Y. 297, 60 Am. Rep. 452, 12 N. E. 610; Osborn v. Charlevoix Circuit Judge, 114 Mich. 655, 72 N. W. 982; Mon Luck v. Sears, 29 Or. 421, 32 L.R.A. 738, 54 Am. St. Rep. 804, 44 Pac. 693; State v. Lewis, 134 Ind. 250, 20 L.R.A. 52, 33 N. E. 1024; McConnell v. McKillip, 71 Neb. 717, 65 L.R.A. 610, 115 Am. St. Rep. 614, 99 N. W. 505, 8 Ann. Cas. 898.

None of the cases holds that the possession of property harmless in itself, and which is necessary for lawful purposes, may be prohibited and the property itself confiscated merely because it is also capable of being put to an illegal use.

The act deprives persons of the equal protection of the law.

Duncan v. Missouri, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 31, 25 L. ed. 989, 992; Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; State v. Montgomery, 94 Me. 192, 80 Am. St. Rep. 386, 47 Atl. 165, 15 Am. Crim. Rep. 117; Templar v. State Examiners, 131 Mich. 254, 100 Am. St. Rep. 610, 90 N. W. 1058; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 41 L. ed. 666, 668, 17 Sup. Ct. Rep. 255; Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064.

An alien merchant or manufacturer who may have spent most of his lifetime in Pennsylvania, adding to its wealth as well as his own, not only may not shoot game upon his own land, which has been held a right of property in State v. Mallory, 73 Ark. 236, 67 L.R.A. 773, 83 S. W. 955, 3 Ann. Cas. 852, but he is not allowed the possession of a shotgun or rifle upon such property for the protection thereof, or for use in hunting game in other states where he might lawfully shoot under regulations applying to nonresident aliens.

The act in question goes further than the subject of game, and prevents resident aliens as a class from collecting and exhibiting rare specimens of such arms, whether for pleasure or for sale; or from using them for the innocent diversion of shooting clay pigeons, or the instructive occupation of marksmanship. In fact, in the case of Com. v. Maloof, 49 Pa. Super. Ct. 581, it was held that the defendant (nationality not stated), who was agent of a licensee of a shooting gallery, in the management of that business, was guilty under the act, and the confiscation of a Winchester and a Remington rifle that were used at the time of seizure for target practice in the gallery was permitted.

In a case like the one at bar, where there is no question of the public safety, public health, or public morals, and where the prohibited act is in no respect *malum in se*, the absolute prohibition of the use of one's own property on his own land cannot be held to be a reasonable exercise of the police power, when regulation will plainly attain the end desired by the legislation in question.

Re Marshall, 102 Fed. 323.

It does not necessarily follow that because the states and the people have certain reserved rights in respect to subjects which

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have been delegated to Congress that the power of the Federal government is restricted or qualified in the same manner in respect to treaties.

Kansas v. Colorado, 206 U. S. 46, 80, 51 L. ed. 956, 967, 27 Sup. Ct. Rep. 655; Hauenstein v. Lynham, 100 U. S. 484, 25 L. ed. 628.

It is absolutely immaterial under what guise of authority interference with a national treaty may be attempted, as all state power must yield *pro tanto* when it comes in contact with any treaty provision.

Jacobson v. Massachusetts, 197 U. S. 11, 24, 49 L. ed. 643, 649, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Re Heff, 197 U. S. 488, 505, 49 L. ed. 848, 855, 25 Sup. Ct. Rep. 506.

Protection and security of persons and property and the liberty to carry on commerce have been the subjects of international treaties from the earliest times.

Hauenstein v. Lynham, 100 U. S. 484, 25 L. ed. 628; Re Wyman, 191 Mass. 276, 77 N. E. 379; Re Scutella, 69 Misc. 514, 127 N. Y. Supp. 874; Carpigiani v. Hall, 172 Ala. 287, 55 So. 248, Ann. Cas. 1913D, 651; Re Ghio, 157 Cal. 552, 37 L.R.A.(N.S.) 549, 137 Am. St. Rep. 145, 108 Pac. 516; Rocca v. Thompson, 223 U. S. 317, 56 L. ed. 453, 32 Sup. Ct. Rep. 207.

Mr. John C. Bell, Attorney General of Pennsylvania, and Mr. William M. Hargest, argued the cause, and, with Mr. W. H. Lemon, filed a brief for defendant in error:

If a statute purporting to be passed to protect public health, public morals, public safety, and public welfare has real and substantial relation to those objects, it is a proper exercise of the police power, and the courts have been liberal in sustaining such statutes.

Mugler v. Kansas, 123 U. S. 623, 660, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394.

The preservation of game is within the police power of the state, and any law which tends to that preservation is a valid exercise of the police power, if it has reasonable relation to that subject.

Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; Lawton v. Steele, 152 U. S. 133, 136, 138, 38 L. ed. 385, 388, 389, 14 Sup. Ct. Rep. 499; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; Kyle v. People, 226 Ill. 619, 80 N. E. 1081; Com. v. Vincent, 108 Mass. 441; People v. Martin, 123 App. Div. 335, 107 N. Y. Supp. 1076; State v. Nergaard, 124 Wis. 420, 102 N. W. 899; Dieterich v. Fargo, 194 N. Y. 359, 22 L.R.A.(N.S.) 696, 87 N. E. 518; People v. Setunsky, 161 Mich. 624, 126 N. W. 844; Rupert v. United States, 104 C. C. A. 255, 181 Fed. 87; Smith v. State, 155 Ind. 611, 51 L.R.A. 404, 58 N. E. 1044; State v. Snowman, 94 Me. 99, 50 L.R.A. 544, 80 Am. St. Rep. 380, 46 Atl. 815; State v. Heger, 194 Mo. 707, 93 S. W. 252; State v. Roberts, 59 N. H. 256, 47 Am. Rep. 199.

The state not only has the right to prohibit the killing of game, but also the right to prohibit the possession of the instruments of killing, even though harmless in themselves.

5 Am. & Eng. Enc. Law, 2d ed. 729; English v. State, 35 Tex. 473, 14 Am. Rep. 374; Ex parte Cheney, 90 Cal. 617, 27 Pac. 436; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 999, 1257; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; Mugler v. Kansas, 123 U. S. 663, 31 L. ed. 211, 8 Sup. Ct. Rep. 273; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; Fisher v. McGirr, 1 Gray, 1, 61 Am. Dec. 381.

This Pennsylvania statute is preventive as well as remedial. It has one general purpose,— to preserve game; and two modes of effecting the purpose,—one to forbid the killing, and one to forbid, in that class of persons who have no respect for the game laws, the possession of the means of killing.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; People v. West, 106 N. Y. 295, 60 Am. Rep. 452, 12 N. E. 610; Frost v. People, 193 Ill. 635, 86 Am. St. Rep. 352, 61 N. E. 1054, 15 Am. Crim. Rep. 689; Train v. Boston Disinfecting Co. 144 Mass. 530, 59 Am. Rep. 113, 11 N. E. 929; Gentile v. State, 29 Ind. 409; Mon Luck v. Sears, 29 Or. 421, 32 L.R.A. 738, 54 Am. St. Rep. 804, 44 Pac. 693; Smith v. Maryland, 18 How. 71, 15 L. ed. 269; State v. Lewis, 134 Ind. 250, 20 L.R.A. 52, 33 N. E. 1024.

If the legislature can limit the purpose for which harmless property can be owned, it may certainly prohibit the owning of a kind of property by a certain class, the ownership of which tends and tempts to violations of law.

State v. Robbins, 124 Ind. 308, 8 L.R.A. 438, 24 N. E. 978; McConnell v. McKillip, 71 Neb. 712, 65 L.R.A. 610, 115 Am. St. Rep. 614, 99 N. W. 505, 8 Ann. Cas. 898; Woods v. Cottrell, 55 W. Va. 476, 65 L.R.A.

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616, 104 Am. St. Rep. 1004, 47 S. E. 275, 2 Ann. Cas. 933.

An act of assembly passed in the exercise of the police power is not invalid, even though it lessens or destroys the value of property upon which it operates.

Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100.

A state has the right to classify its subjects for the purpose of exercising the police power, and if the classification is based upon some difference which bears a just and proper relation to the attempted classification, and is not an arbitrary selection, it does not deny the equal protection of the law.

Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 47 L.R.A.(N.S.) 84, 30 Sup. Ct. Rep. 676; Mager v. Grima, 8 How. 490, 12 L. ed. 1168; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; Owen County Burley Tobacco Soc. v. Brumback, 128 Ky. 141, 107 S. W. 710; St. Louis, I. M. & S. R. Co. v. State, 86 Ark. 518, 112 S. W. 150; Badenoch v. Chicago, 222 Ill. 71, 78 N. E. 31; Com. use of Titusville v. Clark, 195 Pa. 634, 57 L.R.A. 348, 86 Am. St. Rep. 694, 46 Atl. 286; Trageser v. Gray, 73 Md. 250, 9 L.R.A. 780, 25 Am. St. Rep. 587, 20 Atl. 905; Com. v. Hana, 195 Mass. 262, 11 L.R.A.(N.S.) 799, 122 Am. St. Rep. 251, 81 N. E. 149, 11 Ann. Cas. 514; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248.

Classification may be properly based upon the "degree of evil" designed to be remedied.

Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Chicago Dock & Canal Co. v. Fraley, 228 U. S. 680, 686, 57 L. ed. 1022, 1024, 33 Sup. Ct. Rep. 715.

As to the time of residence, the legislature fixed ten days as necessary to bring the alien within the class made subject to the provisions of this act. This is a reasonable period, and hence, a reasonable classification in this regard.

State v. Niles, 78 Vt. 266, 112 Am. St. Rep. 917, 62 Atl. 795; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; Allen v. Wyckoff, 48 N. J. L. 90, 57 Am. Rep. 548, 2 Atl. 659.

That the statute might cover cases which would make it violative of the treaty is no defense to a person who is not affected by those cases.

Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40.

The right of a subject of the King of Italy to possess shotguns and rifles in the states of the United States is not intended to be secured by the stipulations of the treaty with Italy, any more than the right to have and sell intoxicating liquor would be secured to such subject by the provisions of that treaty; and plaintiff in error concedes that the right to sell liquor is not guaranteed by the treaty.

Crowley v. Christensen, 137 U. S. 86, 91, 34 L. ed. 620, 623, 11 Sup. Ct. Rep. 13; Bartemeyer v. Iowa, 18 Wall. 129, 21 L. ed. 929.

Even if a distinction could properly be made between the right to sell liquor and the right to sell or possess firearms (*i. e.*, shotguns and rifles), yet the United States has no power to contract away by a treaty the reserved police power of the several states, essential to their self-preservation as sovereign states, to regulate their own internal affairs, since a state without police power cannot exist.

License Cases, 5 How. 504, 12 L. ed. 255; New York v. Miln, 11 Pet. 102, 9 L. ed. 648; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989.

Neither the due process of law clause nor the equal protection of the laws clause of the 14th Amendment to the National Constitution in any wise affects a valid exercise of this police power by the several states. As a measure for protecting the food supply of a state, the latter has the full police power to regulate the hunting of its game, of which it is the owner in trust for the whole people of such state. In the exercise of this power the state of Pennsylvania has, by the statute in question, determined, upon reasonable grounds and from experience, that the prohibition of the possession of shotguns and rifles by aliens is necessary for the adequate protection of said food supply. The prohibition of possession of such shotguns and rifles by aliens is, there-

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fore, due process of law, within the meaning of the 14th Amendment.

Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; Chicago Dock & Canal Co. v. Fraley, 228 U. S. 680, 57 L. ed. 1022, 33 Sup. Ct. Rep. 715; Com. v. Hana, 195 Mass. 262, 11 L.R.A. (N.S.) 799, 122 Am. St. Rep. 251, 81 N. E. 149, 11 Ann. Cas. 514.

Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties, to be valid, must be made within the scope of the same powers; for there can be no "authority of the United States" save what is derived mediately or immediately, and regularly and legitimately, from the Constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a state or of any citizen of a state.

License Cases, 5 How. 540, 613, 12 L. ed. 272, 305.

The treaty power of the Federal government is not unlimited.

Geofroy v. Riggs, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295.

Even if it were within the treaty-making power of the Federal government to guarantee to subjects of the Kingdom of Italy personal rights and rights of property and rights to carry on trade superior to the right of a sovereign state to exercise its inalienable police power, and superior to the right of a citizen of the state, under the 14th Amendment, the treaty between the United States and Italy invoked by the plaintiff in error was not intended to have any such effect.

Jacobson v. Massachusetts, 197 U. S. 11, L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. s. 765; Chicago, R. I. & P. R. Co. v. kansas, 219 U. S. 453, 55 L. ed. 290, 31 p. Ct. Rep. 275; Purity Extract & Tonic . v. Lynch, 226 U. S. 192, 57 L. ed. 184, Sup. Ct. Rep. 44; Re Ghio, 157 Cal. 552, L.R.A.(N.S.) 549, 137 Am. St. Rep. 145, Pac. 516; Compagnie Française de avigation à Vapeur v. State Bd. of Health, 6 U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. ep. 811; Trageser v. Gray, 73 Md. 250, L.R.A. 780, 25 Am. St. Rep. 587, 20 tl. 905.

[143] Mr. Justice Holmes delivered the opinion of the court:

The plaintiff in error was an unnaturalized foreign-born resident of Pennsylvania, and was complained of for owning or having in his possession a shotgun, contrary to an act of May 8, 1909. Laws 1909, No. 261, p. 466. This statute makes it unlawful for any unnaturalized foreign-born resident to kill any wild bird or animal except in defense of person or property, and "to that end" makes it unlawful for such foreign-born person to own or be possessed of a shotgun or rifle; with a penalty of $25 and a forfeiture of the gun or guns. The plaintiff in error was found guilty and was sentenced to pay the above-mentioned fine. The judgment was affirmed on successive appeals. 231 Pa. 46, 79 Atl. 928. He brings the case to this court on the ground that the statute is contrary to the 14th Amendment and also is in contravention of the treaty between the United States and Italy, to which latter country the plaintiff in error belongs.

Under the 14th Amendment the objection is two fold; unjustifiably depriving the alien of property, and discrimination against such aliens as a class. But the former really depends upon the latter, since it hardly can be disputed that if the lawful object. the protection of wild life (Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600), warrants the discrimination, the means adopted for making it effective also might be adopted. The possession of rifles and shotguns is not necessary for other purposes not within the statute. It is so peculiarly appropriated to the forbidden use that if such a use may be denied to this class, the possession of the instruments desired chiefly for that end also may be. The prohibition does not extend to weapons such as pistols that may be supposed to be needed occasionally for self-defense. So far, the case is within the principle of Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499. [144] See further, New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44.

The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. Lindsley v. National Carbonic Gas Co. 220 U. S. 61, 80, 81,

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55 L. ed. 369, 378, 379, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912 C, 160. The state "may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses." Central Lumber Co. v. South Dakota, 226 U. S. 157, 160, 57 L. ed. 164, 169, 33 Sup. Ct. Rep. 66; Rosenthal v. New York, 226 U. S. 260, 270, 57 L. ed. 212, 216, 33 Sup. Ct. Rep. 27; L'Hote v. New Orleans, 177 U. S. 587, 44 L. ed. 899, 20 Sup. Ct. Rep. 788. See further Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 47 L.R.A.(N.S.) 84, 30 Sup. Ct. Rep. 676. The question therefore narrows itself to whether this court can say that the legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent. Barrett v. Indiana, 229 U. S. 26, 29, 57 L. ed. 1050, 1052, 33 Sup. Ct. Rep. 692.

Obviously the question, so stated, is one of local experience, on which this court ought to be very slow to declare that the state legislature was wrong in its facts. Adams v. Milwaukee, 228 U. S. 572, 583, 57 L. ed. 971, 977, 33 Sup. Ct. Rep. 610. If we might trust popular speech in some states it was right; but it is enough that this court has no such knowledge of local conditions as to be able to say that it was manifestly [145] wrong. See Trageser v. Gray, 73 Md. 250, 9 L.R.A. 780, 25 Am. St. Rep. 587, 20 Atl. 905; Com. v. Hana, 195 Mass. 262, 11 L.R.A.(N.S.) 799, 122 Am. St. Rep. 251, 81 N. E. 149, 11 Ann. Cas. 514.

The defense under the treaty with Italy of February 26, 1871 (17 Stat. at L. 845), appears to us to present less difficulty. The provisions relied upon are those in article 2, giving to citizens of Italy the right to carry on trade and to do anything incident to it upon the same terms as the natives of this country; in article 3, assuring them security for persons and property, and that they "shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives;" and in article 24, promising to the Kingdom of Italy the same favors in respect to commerce and navigation that may be granted to other nations. We will say a word about each.

The last article is supposed to make applicable a convention with Switzerland providing against more burdensome conditions being imposed upon the residence of Swiss than upon that of citizens. But article 24 refers only to commerce and navigation, and the case must stand wholly upon articles 2 and 3. As to article 2, it will be time enough to consider whether the statute can be construed or upheld as precluding Italians from possessing a stock of guns for purposes of trade when such a case is presented. The act was passed for an object with which possession in the way of trade has nothing to do, and well might be interpreted as not extending to it. There remains, then, only article 3. With regard to that it was pointed out below that the equality of rights that it assures is equality only in respect of protection and security for persons and property. The prohibition of a particular kind of destruction and of acquiring property in instruments intended for that purpose establishes no inequality in either respect. It is to be remembered that the subject of this whole discussion is wild game, which the state may preserve for [146] its own citizens if it pleases. Geer v. Connecticut, 161 U. S. 519, 529, 40 L. ed. 793, 797, 16 Sup. Ct. Rep. 600. We see nothing in the treaty that purports or attempts to cut off the exercise of their powers over the matter by the states to the full extent. Compagnie Française de Navigation à Vapeur v. State Bd. of Health, 186 U. S. 380, 394, 395, 46 L. ed. 1209, 1216, 1217, 22 Sup. Ct. Rep. 811.

Judgment affirmed.

The Chief Justice dissents.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plff. in Err.,
v.
L. B. COCKRELL, as Administrator, etc.

(See S. C. Reporter's ed. 146-155.)

Removal of causes — fraudulent joinder — sufficiency of petition.

1. Allegations in the removal petition that the charges of negligence against the resident railway employees in charge of the movement of the train doing the injuries complained of, who were joined as defendants with the nonresident railway company, were false and untrue, and were made solely for the fraudulent purpose of preventing the railway company from removing the cause

Note.—On fraud in joining a resident as codefendant with a nonresident defendant for the purpose of preventing a removal to the Federal courts on the ground of diverse citizenship—see Boatmen's Bank v. Fritzlen, 22 L.R.A.(N.S.) 1235.

As to removal of causes in cases of separable controversy—see notes to Miller v. Clifford, 5 L.R.A.(N.S.) 50; Sloane v. Anderson, 29 L. ed. U. S. 899; Butler v. National Home, 36 L. ed. U. S. 346; Torrence v. Shedd, 36 L. ed. U. S. 528; and Merchants Cotton Press & Storage Co. v. Insurance Co. of N. A. 38 L. ed. U. S. 346.

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to a Federal court for diverse citizenship, and that none of these charges could be proved at the trial, are not sufficient to entitle the petitioner to remove the cause, where no negligent act or omission personal to the railway company was charged in the complaint, which, tested by the local law, stated a case of joint liability, the company's liability, like that of the employees, being in effect based upon their alleged negligence.

[For other cases, see Removal of Causes, IV. b; VI. d, in Digest Sup. Ct. 1908.]

Removal of causes — determining issues — state or Federal court.

2. Issues of fact arising upon a petition for removal of a cause from a state to a Federal court are to be determined in the Federal court, and the state court, for the purpose of determining for itself whether it will surrender jurisdiction, must accept as true the allegations of fact in such petition.

[For other cases, see Removal of Causes, VI. d, 1, in Digest Sup. Ct. 1908.]

[No. 100.]

Argued December 5, 1913. Decided January 19, 1914.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Clark County, in that state, in an action for death, which defendant had attempted to remove to a Federal court. Affirmed.

See same case below, 144 Ky. 137, 137 S. W. 1066.

The facts are stated in the opinion.

Mr. **John T. Shelby** argued the cause, and, with Messrs. Henry T. Wickham, Henry Taylor, Jr., and D. L. Pendleton, filed a brief for plaintiff in error:

While a plaintiff, if he in good faith and reasonably believing to be true the facts upon which the joint liability depends, may unite joint tort feasors as defendants, without regard to his motive in so doing, he will yet not be allowed to deprive a defendant of a right secured to him by the Constitution and laws of the United States by the averment of a palpably false statement of fact, made for the purpose of working such deprivation.

Wecker v. National Enameling & Stamping Co. 204 U. S. 176, 51 L. ed. 430, 27 Sup. Ct. Rep. 184, 9 Ann. Cas. 757.

Where a nonresident defendant in a petition for removal appropriately attacks as false and fraudulent the averments of fact upon which, in the plaintiff's petition, the charge of joint liability is based, the allegations of the removal petition must, for the purpose of determining the right of removal, be taken as true by the state court, and if the plaintiff desires to make an issue as to their truth, he must do this, not in the state court, but in the Federal court, which latter alone has jurisdiction to try such issue. And it follows as a necessary corollary from this proposition that where, admitting the averments of fact made in the removal petition to be true, they make a proper case for removal, the application *ipso facto* works the transfer to the Federal court, and deprives the state court of its jurisdiction to proceed further.

Stone v. South Carolina, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; Carson v. Hyatt, 118 U. S. 279, 30 L. ed. 167, 6 Sup. Ct. Rep. 1050; Carson v. Dunham, 121 U. S. 421, 30 L. ed. 992, 7 Sup. Ct. Rep. 1030; Burlington, C. R. & N. R. Co. v. Dunn, 122 U. S. 513, 30 L. ed. 1159, 7 Sup. Ct. Rep. 1262; Crehore v. Ohio & M. R. Co. 131 U. S. 240, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; Kansas City, Ft. S. & M. R. Co. v. Daughtry, 138 U. S. 298, 34 L. ed. 963, 11 Sup. Ct. Rep. 306; Texas & P. R. Co. v. Eastin, 214 U. S. 153, 53 L. ed. 946, 29 Sup. Ct. Rep. 564; Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 316, 54 L. ed. 208, 211, 30 Sup. Ct. Rep. 101.

Mr. **Edward S. Jouett** argued the cause, and, with Messrs. Beverley R. Jouett and A. F. Byrd, filed a brief for defendant in error:

The state court is not bound to surrender its jurisdiction unless the face of the record shows the defendant entitled to remove.

Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147; Carson v. Hyatt, 118 U. S. 279, 30 L. ed. 167, 6 Sup. Ct. Rep. 1054; Crehore v. Ohio & M. R. Co. 131 U. S. 240, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; Louisville & N. R. Co. v. Wangelin, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; Stone v. South Carolina, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799.

A joint action is maintainable against the corporation and its employee.

Central Pass. R. Co. v. Kuhn, 86 Ky. 578, 9 Am. St. Rep. 309, 6 S. W. 441; Cincinnati, N. O. & T. P. R. Co. v. Bohon, 200 U. S. 221, 50 L. ed. 448, 26 Sup. Ct. Rep. 166, 4 Ann. Cas. 1152; Chesapeake & O. R. Co. v. Dixon, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; Illinois C. R. Co. v. Coley, 121 Ky. 385, 1 L.R.A.(N.S.) 370, 89 S. W. 234; Pugh v. Chesapeake & O. R. Co. 101 Ky. 77, 72 Am. St. Rep. 392, 39 S. W. 895, 2 Am. Neg. Rep. 159; Rutherford v. Illinois C. R. Co. 120 Ky. 15, 85 S. W. 199; Illinois C. R. Co. v. Jones, 118 Ky. 158, 80 S. W. 484.

The mere allegation that the joinder is fraudulent is not sufficient to authorize

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removal. Facts showing actual fraud in connection with the joinder must be alleged.

Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147; Chesapeake & O. R. Co. v. McCabe, 213 U. S. 215, 53 L. ed. 768, 29 Sup. Ct. Rep. 430; Cincinnati, N. O. & T. P. R. Co. v. Bohon, 200 U. S. 221, 50 L. ed. 448, 26 Sup. Ct. Rep. 166, 4 Ann. Cas. 1152; Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 413, 55 L. ed. 521, 31 Sup. Ct. Rep. 460; Chicago, R. I. & P. R. Co. v. Schwyhart, 227 U. S. 184, 57 L. ed. 473, 33 Sup. Ct. Rep. 250; Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 54 L. ed. 208, 30 Sup. Ct. Rep. 101; Chesapeake & O. R. Co. v. Dixon, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67.

A removal petition which, as in this case, alleges no extraneous facts in connection with the joinder, but merely enumerates the plaintiff's charges of negligence against the resident defendant, and declares that each such allegation is false, was known so to be by plaintiff, and was made for the fraudulent purpose of defeating removal, is insufficient.

Enos v. Kentucky Distilleries & Warehouse Co. 111 C. C. A. 74, 189 Fed. 342; Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 54 L. ed. 208, 30 Sup. Ct. Rep. 101.

Long before this suit was filed the Kentucky court of appeals had decided that the fact, admitted here, of the fireman not looking ahead upon approaching a crossing, constituted negligence; and also that, notwithstanding a traveler's negligence in going upon the track, he could recover if, after his peril was discovered, or by ordinary care should have been discovered, by those in charge of the train, the injury might have been avoided by ordinary care.

Louisville & N. R. Co. v. Gilmore, — Ky. —, 114 S. W. 752; Louisville & N. R. Co. v. Taylor, 31 Ky. L. Rep. 1142, 104 S. W. 776.

Mr. Justice Van Devanter delivered the opinion of the court:

This was an action begun in the circuit court of Clark county, Kentucky, by an administrator, to recover [150] damages for the death of his intestate, the defendants being a railway company and the engineer and fireman of one of its trains which struck and fatally injured the intestate at or near a public crossing in Winchester, Kentucky. The administrator, engineer, and fireman were citizens of Kentucky, and the railway company was a Virginia corporation. The latter in due time presented to the court a verified petition and proper bond for the removal of the cause into the circuit court of the United States, but the court declined to surrender its jurisdiction, and, over the company's protest, proceeded to a trial which resulted in a judgment against the company, and the court of appeals of the state affirmed the judgment, including the ruling upon the petition for removal. 144 Ky. 137, 137 S. W. 1066.

The sole question for decision here is, whether it was error thus to proceed to an adjudication of the cause notwithstanding the company's effort to remove it into the Federal court.

Rightly understood and much abbreviated, the plaintiff's petition, after stating that the train was being operated by the engineer and fireman as employees of the railway company, charged that the injury and death of the intestate were caused by the negligence of the defendants (a) in failing to maintain an adequate lookout ahead of the engine, (b) in failing to maintain any lookout upon the left or fireman's side, from which the intestate went upon the track, (c) in failing to give any warning of the approach of the train, and (d) in continuing to run the train forward after it struck the intestate, and was pushing her along, until it eventually ran over and fatally injured her, when it easily could have been stopped in time to avoid material injury. There was a prayer for a judgment against the three defendants for $25,000, the amount of damages alleged.

The railway company's petition for removal, while not [151] denying that the engineer and fireman were in the employ of the company, or that they were operating the train when it struck and injured the intestate, did allege that the charges of negligence (all being specifically repeated) against the defendants were each and all "false and untrue, and were known by the plaintiff, or could have been known by the exercise of ordinary diligence, to be false and untrue, and were made for the sole and fraudulent purpose of affording a basis, if possible, for the fraudulent joinder" of the engineer and fireman with the railway company, and of "thereby fraudulently depriving" the latter of its right to have the action removed into the Federal court; and that none of the charges of negligence on the part of the engineer or fireman could be sustained on the trial.

It will be perceived that but for the joinder of the two employees as codefendants with the railway company, the latter undoubtedly would have been entitled to remove the cause into the Federal court on the ground of diverse citizenship, there being the requisite amount in controversy; and that the railway company attempted in the petition for removal to overcome the

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apparent obstacle arising from the joinder. Whether the petition was sufficient in that regard is the subject of opposing contentions.

The right of removal from a state to a Federal court, as is well understood, exists only in certain enumerated classes of cases. To the exercise of the right, therefore, it is essential that the case be shown to be within one of those classes; and this must be done by a verified petition setting forth, agreeably to the ordinary rules of pleading, the particular facts, not already appearing, out of which the right arises. It is not enough to allege in terms that the case is removable or belongs to one of the enumerated classes, or otherwise to rest the right upon mere legal conclusions. As in other pleadings, there must be a statement of the facts relied upon, and not otherwise appearing, [152] in order that the court may draw the proper conclusion from all the facts, and that, in the event of a removal, the opposing party may take issue, by a motion to remand, with what is alleged in the petition. Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 202, 24 L. ed. 656, 658; Carson v. Dunham, 121 U. S. 421, 426, 30 L. ed. 992, 993, 7 Sup. Ct. Rep. 1030; Crehore v. Ohio & M. R. Co. 131 U. S. 240, 244, 33 L. ed. 144, 145, 9 Sup. Ct. Rep. 692; Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 101, 42 L. ed. 673, 676, 18 Sup. Ct. Rep. 264.

A civil case, at law or in equity, presenting a controversy between citizens of different states, and involving the requisite jurisdictional amount, is one which may be removed by the defendant, if not a resident of the state in which the case is brought; and this right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy. Louisville & N. R. Co. v. Wangelin, 132 U. S. 599, 601, 33 L. ed. 474, 475, 10 Sup. Ct. Rep. 203; Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 218, 50 L. ed. 441, 447, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147; Wecker v. National Enameling & Stamping Co. 204 U. S. 176, 51 L. ed. 430, 27 Sup. Ct. Rep. 184, 9 Ann. Cas. 757; Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 316, 54 L. ed. 208, 211, 30 Sup. Ct. Rep. 101. So, when in such a case a resident defendant is joined with the nonresident, the joinder, even although fair upon its face, may be shown by a petition for removal to be only a fraudulent device to prevent a removal; but the showing must consist of a statement of facts rightly engendering that conclusion. Merely to traverse the allegations upon which the liability of the resident defendant is rested, or to apply the epithet "fraudulent" to the joinder, will not suffice: the showing must be such as compels the conclusion that the joinder is without right and made in bad faith, as was the case in Wecker v. National Enameling & Stamping Co. 204 U. S. 176, 51 L. ed. 430, 27 Sup. Ct. Rep. 184, 9 Ann. Cas. 757. See Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 316, 54 L. ed. 208, 211, 30 Sup. Ct. Rep. 101; Chicago, R. I. & P. R. Co. v. Dowell, 229 U. S. 102, 114, 57 L. ed. 1090, 1096, 33 Sup. Ct. Rep. 684.

Here the plaintiff's petition, as is expressly conceded, not only stated a good cause of action against the resident defendants, but, tested by the laws of Kentucky, as it [153] should be, stated a case of joint liability on the part of all the defendants. As thus stated the case was not removable, the joinder of the resident defendants being apparently the exercise of a lawful right. And while the plaintiff's statement was not conclusive upon the railway company, it did operate to lay upon the latter, as a condition to a removal, the duty of showing that the joinder of the engineer and fireman was merely a fraudulent device to prevent a removal. Of course, it was not such unless it was without any reasonable basis.

Putting out of view, as must be done, the epithets and mere legal conclusions in the petition for removal, it may have disclosed an absence of good faith on the part of the plaintiff in bringing the action at all, but it did not show a fraudulent joinder of the engineer and fireman. With the allegation that they were operating the train which did the injury standing unchallenged, the showing amounted to nothing more than a traverse of the charges of negligence, with an added statement that they were falsely or recklessly made and could not be proved to the engineer or fireman. As no negligent act or omission personal to the railway company was charged, and its liability, like that of the two employees, was, in effect, predicated upon the alleged negligence of the latter, the showing manifestly went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants. Plainly, this was not such a showing as to engender or compel the conclusion that the two employees were wrongfully brought into a controversy which did not concern them. As they admittedly were in charge of the movement of the train, and their negligence was apparently the principal matter in dispute, the plaintiff had the same right, under the laws of Kentucky, to insist upon their presence as real defendants as upon that of the railway company. We conclude, therefore, that the petition for [154] removal was not

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such as to require the state court to surrender its jurisdiction.

While this conclusion requires an affirmance of the judgment, we would not be understood as approving the reasoning upon which the action of the trial court was sustained by the court of appeals of the state. That court, apparently assuming that the petition for removal contained a sufficient showing of a fraudulent joinder, held that the questions of fact arising upon the petition were open to examination and determination in the state court, and that no error was committed in refusing to surrender jurisdiction, because, upon the subsequent trial, the evidence indicated that the showing in the petition was not true as to the fireman. In so holding the court of appeals fell into manifest error, for it is thoroughly settled that issues of fact arising upon a petition for removal are to be determined in the Federal court, and that the state court, for the purpose of determining for itself whether it will surrender jurisdiction, must accept as true the allegations of fact in such petition. Stone v. South Carolina, 117 U. S. 430, 432, 29 L. ed. 962, 963, 6 Sup. Ct. Rep. 799; Crehore v. Ohio & M. R. Co. 131 U. S. 240, 244, 33 L. ed. 144, 145, 9 Sup. Ct. Rep. 692; Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 316, 54 L. ed. 208, 211, 30 Sup. Ct. Rep. 101. and Chicago, R. I. & P. R. Co. v. Dowell, 229 U. S. 102, 114, 57 L. ed. 1090, 1096, 33 Sup. Ct. Rep. 684. In this case had the petition contained a sufficient showing of a fraudulent joinder, accompanied as it was by a proper bond, the state court would have been in duty bound to give effect to the petition and surrender jurisdiction, leaving any issue of fact arising upon the petition to the decision of the Federal court, as was done in Wecker v. National Enameling & Stamping Co. 204 U. S. 176, 51 L. ed. 430, 27 Sup. Ct. Rep. 184, 9 Ann. Cas. 757. And had the state court refused to give effect to the petition, it and the bond being sufficient, the railway company might have obtained a certified transcript of the record, resorting, if necessary, to a writ of certiorari for that purpose, and, upon filing the transcript in the Federal court, might have invoked the authority of the latter to protect its jurisdiction by enjoining the plaintiff from taking [155] further proceedings in the state court, unless the cause should be remanded. Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 245, 49 L. ed. 462, 464, 25 Sup. Ct. Rep. 251; Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 217, 219, 53 L. ed. 765, 769, 770, 29 Sup. Ct. Rep. 430; Chesapeake & O. R. Co. v. McDonald, 214 U. S. 191, 195, 53 L. ed. 963, 965, 29 Sup. Ct. Rep. 546; French v. Hay (French v. Stewart) 22 Wall. 250, 22 L. ed. 857; Dietzsch v. Huidekoper (Kern v. Huidekoper) 103 U. S. 494, 26 L. ed. 497.

Judgment affirmed.

UNITED STATES, Plff. in Err.,
v.
HARDAWAY YOUNG.

(See S. C. Reporter's ed. 155–162.)

Indictment — sufficiency — use of mails to defraud.

An indictment under the Criminal Code of March 4, 1909 (35 Stat. at L. 1130, chap. 321, U. S. Comp. Stat. Supp. 1911, p. 1653), § 215, providing for the punishment of anyone who, having devised, or intending to devise, any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, shall, for the purpose of executing such scheme or artifice, or attempting so to do, place any letter in any postoffice of the United States, to be sent or delivered by the postoffice establishment, need only aver the scheme and its attempted execution by placing a letter in the postoffice, and need not allege that the scheme was to be executed by the use of the mails. [For other cases, see Indictment, II. e, 3, d, in Digest Sup. Ct. 1908.]

[No. 710.]

Submitted January 8, 1914. Decided January 26, 1914.

IN ERROR to the District Court of the United States for the Southern District of Alabama to review a judgment sustaining a demurrer to an indictment charging the use of the mails to defraud. Reversed and remanded, with directions to overrule the demurrer.

The facts are stated in the opinion.

Solicitor General Davis submitted the cause for plaintiff in error:

Under the U. S. Rev. Stat. § 5480, U. S. Comp. Stat. 1901, p. 3696, it was necessary to charge not only that the defendants devised a scheme to defraud, but that they intended to effect this scheme by opening or intending to open correspondence with some other persons by means of the postoffice establishment, or by inciting such other persons to open communication with them, and that in carrying out such scheme they either deposited a letter or packet in the postoffice, or took or received one therefrom.

Stokes v. United States, 157 U. S. 187, 39 L. ed. 667, 15 Sup. Ct. Rep. 617.

The later act is broader than the old law in that it is only necessary that the

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scheme to defraud should be devised or intended to be devised, and the letter placed in the postoffice for the purpose of effecting such scheme or artifice, or attempting so to do. The amendment was deliberate and the legislative intent quite clear.

Ex parte King, 200 Fed. 622; United States v. Maxey, 200 Fed. 997; Stockton v. United States, 46 L.R.A.(N.S.) 936, 123 C. C. A. 530, 205 Fed. 462; United States v. Goldman, 207 Fed. 1002.

No appearance for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

Indictment under § 215 of the Criminal Code [35 Stat. at L. 1130, chap. 321, U. S. Comp. Stat. Supp. 1911, p. 1653], charging the use of the mails in furtherance of a scheme to defraud. [156] It consists of two counts to which demurrer was filed, which, in specific objections, challenged the sufficiency of the indictment. The demurrer was sustained and judgment entered, quashing the indictment. The charges of the indictment, condensed, are as follows:

On the 5th of May, 1911, within the county of Mobile and the jurisdiction of the court, defendant devised a scheme and artifice to defraud various banks, persons, and corporations, particularly such as could be induced, through the firm of Hollingshead & Campbell, of New York city, to purchase or lend money upon the notes of the Southern Hardware & Supply Company, engaged in the mercantile business at Mobile, Alabama, and of which defendant was the president.

Hollingshead & Campbell were money brokers engaged in the business of inducing banks, persons, and corporations to purchase and lend money upon commercial paper, and it was the intention and purpose of defendant in his negotiations with said firm to induce and cause it to sell and dispose of the notes of the Hardware & Supply Company, and to obtain money and credit for its notes and other evidences of indebtedness. The defendant was authorized to sign such notes and other evidences of indebtedness, and to prepare statements of the financial and business condition of the company.

It was a part of the scheme for defendant to induce Hollingshead & Campbell to sell and dispose of the notes of the Hardware & Supply Company, and to persuade and influence the various banks, etc., to lend money upon the notes of that company, to prepare and cause to be prepared and sent through the United States mails to Hollingshead & Campbell false and fraudulent statements of the business affairs and financial condition of the Hardware & Supply Company, and which defendant was to, and did, represent to be statements showing the correct and true condition of the business affairs and financial condition [157] of the Hardware & Supply Company. These statements did not show the true condition of the company's affairs, but were to show and did show its assets to be greatly in excess of those actually had and owned by it, and its liabilities to be much less than their true amount, and "falsely and fraudulently showed the company to be in a much better financial condition than it was in fact at the time such statements were made and were to be made."

Part of the scheme was to make Hollingshead & Campbell believe the statements were correct, and they did make that firm so believe, and to rely upon them; and, so relying upon their truth, to recommend the purchase of the Hardware & Supply Company's notes and the lending of money upon them, defendant knowing that that company "was not then and there in a strong financial condition."

Defendant caused the statements to be sent through the United States mails to Hollingshead and Campbell. Hollingshead & Campbell believed them, and, relying upon their truth, recommended various banks, persons, and corporations to purchase the notes and lend money upon the notes of the Hardware & Supply Company. The names of certain banks and the amounts they loaned are given.

For the purpose of executing the scheme and artifice, defendant deposited in the United States postoffice at Mobile, Alabama, a letter, dated June 27, 1911, addressed to Hollingshead & Campbell at New York. The letter contained a statement of the financial condition of the company, showing the assets, liabilities, and profits of the Hardware & Supply Company. It also contained comments upon the business of the company and its relations with Hollingshead & Campbell. It was sent through the mails and delivered to the latter at New York. The letter and the statements are charged to have shown the assets of the Hardware & Supply Company to be greater [158] and its liabilities to be less than they actually were. And it is charged that defendant, having devised a scheme and artifice to defraud, and for the purpose of their execution, placed and caused to be placed in the United States postoffice at Mobile, Alabama, the letter above stated, and that it was sent and delivered by the Postoffice Establishment of the United States.

The second count in the indictment charges defendant with having devised "a

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scheme and artifice for obtaining moneys, goods, and chattels by means of false and fraudulent representations and promises from various banks, persons, firms, and corporations." The manner and means are charged as in the first count.

The scheme, it will be observed, was to defraud certain banks and persons, and it was to be accomplished by deception practised on Hollingshead & Campbell, money brokers, through false statements sent to that company through the mails, whereby they would be induced to recommend the commercial value of the notes and other evidences of indebtedness of the Southern Hardware & Supply Company, of which defendant was the president. The first count charges a scheme to defraud various banks, etc., through the representations of Hollingshead & Campbell, "out of their's, the said banks', and persons', firms', and corporations' moneys, goods, and chattels." In the second count the scheme is alleged to be "for obtaining moneys, goods, and chattels by means of false and fraudulent representations and promises" from the various banks and persons.

Commenting on the indictment, the district court said: "The first count of the indictment does not clearly set out the scheme to defraud. It fails to allege that the scheme devised to defraud said banks, etc., was by means of false or fraudulent pretenses, representations, or promises. And it fails to allege how the scheme was to be executed. It does not allege that the scheme devised was to be executed [159] by the use of the Postoffice Establishment or mails of the United States." The conclusion of the court was that the "said first count of the indictment" was "defective and insufficient."

Further commenting, the court said: "The second count of the indictment is subject to the same defects and objections as are found in the first count, except that the second count does allege that the scheme to defraud was by means of false and fraudulent representations and promises. It does not directly allege that the scheme to defraud was to be executed by the use of the Postoffice Establishment or mails of the United States. In some part of the second count it is implied in an allegation in this way: That it was a part of the said scheme that the defendant was to and did prepare statements of the business affairs and financial condition of the Southern Hardware & Supply Company, and sent the same to Hollingshead & Campbell to induce them to do certain things, etc. The gist of the offense is the use of the United States mails in the execution of the scheme, *or* in attempting so to do. It is not an unlawful scheme unless the use of the mails was a part of the scheme, and the indictment must affirmatively allege every fact necessary to constitute the offense sought to be charged, that the court may see that an unlawful scheme has been devised. It is alleged that said statements were false and fraudulent, and that they were sent through the mails to Hollingshead & Campbell, from which it might be implied that such was a part and intention of the scheme." The court further said that implication of a material and essential fact could not supply the place of its direct averment; that there was no allegation that the banks and others to be defrauded had seen the statements sent Hollingshead & Campbell, or had knowledge of them or of their contents, or that they were intended to deceive the banks, and to induce them to lend their money, except as this might be implied from [160] sending the statements to Hollingshead & Campbell. The court expressed the opinion that while "the second count is better than the first, it is insufficient in the particulars mentioned."

We have made these quotations from the court's opinion as the case is here by direct appeal under the criminal appeals act as involving the construction of the statute, and not of the indictment. And this is the contention of the government, and that the court erred in failing to "note the essential differences between § 5480 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3696), and § 215 of the Criminal Code (act of March 4, 1909 [35 Stat. at L. 1130, chap. 321, U. S. Comp. Stat. Supp. 1911, p. 1653]) which succeeded it."

Section 5480 provided: "If any person having devised, or intending to devise, any scheme or artifice to defraud . . . to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the Postoffice Establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in [effecting] and for executing such scheme . . . place or cause to be placed any letter . . . in any postoffice . . . to be sent or delivered by the said Postoffice Establishment, . . . such person so misusing the Postoffice Establishment shall, upon conviction, be punishable . . . ."

Section 215 of the Criminal Code is as follows: "Whoever having devised, or intending to devise, any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, ...

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shall, for the purpose of executing such scheme or artifice, or attempting so to do, place . . . any letter, . . . whether addressed to any person within or outside the United States, in any postoffice, . . . [161] to be sent or delivered by the Postoffice Establishment of the United States, . . . shall be fined. . . ."

It is contended by the government that these provisions are broader than those of § 5480 of the Revised Statutes; that under the latter it was necessary to charge not only a scheme to defraud was devised, but that it was intended to be effected by opening or intending to open correspondence with some other person by means of the Postoffice Establishment. Under § 215 of the Criminal Code it is only necessary that the scheme should be devised or intended to be devised, and a letter be placed in the postoffice for the purpose of executing the scheme or attempting to do so. And as declaring the elements of the offense under § 215, and its distinction from an offense under § 5480 of the Revised Statutes, the following cases are cited: Ex parte King, 200 Fed. 622; United States v. Maxey, 200 Fed. 997; Stockton v. United States (C. C. A. 7th C.) 46 L.R.A.(N.S.) 936, 205 Fed. 462; United States v. Goldman, 207 Fed. 1002.

There is a distinction between the sections, and the elements of an offense under § 215 are (a) a scheme devised or intended to be devised to defraud, or for obtaining money or property by means of false pretenses, and (b) for the purpose of executing such scheme or attempting to do so, the placing of any letter in any postoffice of the United States, to be sent or delivered by the Postoffice Establishment. The district court apparently overlooked the distinction between the sections, and was of opinion that something more was necessary to an offense under § 215 than the averment of the scheme, and its attempted execution in the manner stated. The court expressed the view, we have seen, that the indictment did not clearly set out the scheme to defraud; that it did not allege the scheme devised or attempted was by means of false or fraudulent pretenses, representations, or promises, or that [162] the scheme was to be executed by the use of the Postoffice Establishment or mails of the United States. And the court said that it was a necessary element of the offense that the false statements sent to Hollingshead & Campbell by defendant were to be used by the latter company to induce the person intended to be defrauded to purchase the notes of the Southern Hardware & Supply Company, or to lend money upon them, or that such person had knowledge of the contents of the statements. It is manifest that the court considered these facts were necessary to be averred in order to constitute an offense under § 215. In this the court was in error.

Judgment reversed and cause remanded, with direction to overrule the demurrer.

ANNA M. BURBANK, Wife of James M. Woodson, and James M. Woodson, Executors of the Last Will of T. Scott Burbank, and Individually, Plffs. in Err.,

v.

MRS. JOSEPHINE ERNST, Legal Tutrix of the Minor, Mary Springer Burbank, et al.

(See S. C. Reporter's ed. 162-165.)

Error to state court — record — headnotes by the court.

1. It is to the opinion, and not to the headnotes, that the Federal Supreme Court will turn upon writ of error to a state court

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NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; Kipley v. Illinois, 42 L. ed. U. S. 998.

As to what is the record for the purpose of showing the jurisdiction of the Supreme Court of the United States of a writ of error to a state court—see note to Home for Incurables v. New York, 63 L.R.A. 329.

On opinion of the court below as part of the record on appeal—see note to Loeb v. Columbia Twp. 45 L. ed. U. S. 281.

On the effect of probate of a will in another state—see note to Martin v. Stovall, 48 L.R.A. 131.

On conclusiveness of foreign judgment—see note to Dunstan v. Higgins, 20 L.R.A. 668.

On the conclusiveness of probate as *res judicata*—see note to Sly v. Hunt, 21 L.R.A. 680.

On conclusiveness of judgments generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street R. Co. v. Wharton, 38 L. ed. U. S. 429; Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

Generally, as to full faith and credit to be given to state records and judicial proceedings—see notes to Lindley v. O'Reilly, 1 L.R.A. 79; Cummington v. Belchertown, 4 L.R.A. 131; Rand v. Hanson, 12 L.R.A. 574; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 578; D'Arcy v. Ketchum, 13 L. ed. U. S. 648; Huntington v. Attrill, 36 L. ed. U. S. 1123.

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for the original and authentic statement of the grounds of the decision under review, where such headnotes, though written by the court itself, are given no special force by statute or rule of court.

[Record on appeal, see Appeal and Error, V., in Digest Sup. Ct. 1908.]

Judgment — full faith and credit — probate of will — domicil.

2. A decree of a Texas court admitting a will to probate is not denied full faith and credit by a judgment of a Louisiana court, annulling the will on the grounds that the testator died domiciled in Louisiana, and that, by the laws of that state, the will was void, although it may be that the conduct of the testator in Louisiana, as evidenced by his notarial declaration of a Louisiana domicil, and by his official acts as executor resident in that state, was given greater effect by reason of the Louisiana statutes to counterbalance the testator's declarations that Texas was his permanent home than others might give it.

[For other cases, see Judgment, VI. b, 2 in Digest Sup. Ct. 1908.]

[No. 151.]

Argued January 15 and 16, 1914. Decided January 26, 1914.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which, amending a judgment of the Civil District Court for the Parish of Orleans, in that state, ordered the dismissal as of nonsuit of an application for the registration of a foreign will. Affirmed.

See same case below, 129 La. 528, 56 So. 430.

The facts are stated in the opinion.

Messrs. Charles S. Rice and Sam Streetman argued the cause, and, with Mr. Richard B. Montgomery, filed a brief for plaintiffs in error:

The judgment of a competent court of a sister state in probate of the will of a person domiciled within its jurisdiction, duly exemplified according to the laws of the United States, is entitled to the full faith and credit it would have where rendered.

Wedderburn's Succession, 1 Rob. (La.) 266; Dupre v. Reggio, 6 La. 653; Caperton v. Ballard, 14 Wall. 238, 20 L. ed. 885; Carpenter v. Strange, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; Lynde v. Lynde, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555; Crapo v. Kelly, 16 Wall. 610, 21 L. ed. 430; Christmas v. Russell, 5 Wall. 290, 18 L. ed. 475; Green v. Van Buskirk, 5 Wall. 307, 18 L. ed. 599; Mutual L. Ins. Co. v. Harris, 97 U. S. 331, 24 L. ed. 959; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; St. Louis, I. M. & S. R. Co. v. Taylor. 210 U. S. 281, 293, 52 L. ed. 1061, 1067, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; American Exp. Co. v. Mullins, 212 U. S. 311, 53 L. ed. 525, 29 Sup. Ct. Rep. 381, 15 Ann. Cas. 536; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 47, 51 L. ed. 78, 84, 27 Sup. Ct. Rep. 1; Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 50 L. ed. 101, 25 Sup. Ct. Rep. 727; Gaines's Succession, 45 La. Ann. 1237, 14 So. 233; Willoughby, Const. § 95.

On producing an exemplified copy of such judgment to the judge of the Louisiana court, where property of the testator's succession is situated, it is the duty of such judge to order the registry and execution of the will by the executors named.

Wedderburn's Succession, 1 Rob. (La.) 266; State v. Probate Judge, 18 La. 570; Dixon v. D'Armond, 23 La. Ann. 200; State v. Probate Judge, 17 La. 486; Robert's Succession, 2 Rob. (La.) 427; State v. Bermudez, 13 La. 224; Re Newcomb, 192 N. Y. 242, 84 N. E. 950; Bonella v. Maduel, 26 La. Ann. 112; Ennis v. Smith, 14 How. 430, 14 L. ed. 485; Gaines's Succession, 45 La. Ann. 1237, 14 So. 233.

The right to change domicil at will is a right unrestricted and unrestrictable as to every person *sui generis;* and to judicially deny such right is in violation of the 14th Amendment to the Constitution of the United States, and of art. 4, § 2, thereof.

Re Newcomb, 192 N. Y. 252, 84 N. E. 950; Schouler, Exrs. pp. 29, 30; Bonvillain v. Verret, 33 La. Ann. 1306; Gravillon v. Richard, 13 La. 297, 33 Am. Dec. 563.

A person's domicil is where he has honestly established himself with intent to live; and the domicil is established instanter the intent and the actual living coincide; length of residence is not an essential element.

Gravillon v. Richard, 13 La. 293, 33 Am. Dec. 563; Schouler, Exrs. pp. 29, 30; Bonvillain v. Verret, 33 La. Ann. 1307.

Judgments of probate courts come within the meaning of those judgments entitled to full faith and credit in other states under the Federal Constitution.

Simmons v. Saul, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369.

This is subject, of course, to the rule that inquiry may be made into the jurisdiction of the court rendering the judgment.

Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897.

If Burbank was domiciled in Texas at the date of his death, the Texas court had jurisdiction to probate his will; and it is his domicil at the date of his death, not the date of the execution of his will, which determines the jurisdiction.

40 Cyc. 1245.

The right to acquire a domicil in a state

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is guaranteed by the Federal Constitution, and is one of the privileges and immunities which may not be abridged by the states.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394.

The acquisition of such domicil depends solely upon residence in a state, accompanied with intent or "volition" to make such residence the domicil.

Ibid.; Ennis v. Smith, 14 How. 400, 14 L. ed. 473; Sharon v. Hill, 26 Fed. 337; Harding v. Standard Oil Co. 182 Fed. 421; Wright v. Schneider, 32 Fed. 705; Mitchell v. United States, 21 Wall. 352, 22 L. ed. 587; Pacific Mut. L. Ins. Co. v. Tompkins, 41 C. C. A. 488, 101 Fed. 539.

Mr. Henry P. Dart argued the cause and filed a brief for defendants in error:

The Louisiana court did not fail to give full faith and credit to the judgment of the probate court of Bell county, Texas.

Andrews v. Andrews, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237; Rose v. Himely, 4 Cranch, 241–269, 2 L. ed. 608–617.

The only appellate jurisdiction conferred by Congress upon the Supreme Court to review the judgments or decrees, at law or in equity, of the highest court of a state, is by writ of error; and on writ of error nothing is removed for re-examination but questions of law arising upon the record. The findings of fact made in the supreme court of the state will be the basis of the decision of the Supreme Court.

Quimby v. Boyd, 128 U. S. 489, 32 L. ed. 503, 9 Sup. Ct. Rep. 147; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Thayer v. Spratt, 189 U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576; Adams v. Church, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512; Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632; Republican River Bridge Co. v. Kansas P. R. Co. 92 U. S. 315, 23 L. ed. 515; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704.

Mr. Justice Holmes delivered the opinion of the court:

This case arises in the matter of the succession of T. Scott Burbank. He died in Texas on May 10, 1910, leaving a will dated March 22, 1910, which was admitted to probate there. The executors sought to have the will registered in Louisiana, but the tutrix of Burbank's minor daughter and sole heir filed in the succession record a direct action to annul the will on the ground that the testator died domiciled in Louisiana, and that, by the laws of that state, the will was void. The supreme court of Louisiana gave judgment against the will, and ordered the application for registry to be dismissed "as of nonsuit." 129 La. 528, 56 So. 430. The error assigned is that full faith and credit were not given to the Texas decree.

Of course, the jurisdiction of the Texas court depended upon the domicil of Burbank, which therefore was open to re-examination. Andrews v. Andrews, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237. The objection urged is that the Louisiana court attributed conclusive effect to Burbank's conduct in Louisiana, taken [164] in connection with the laws there, instead of recognizing that no statute of that state could prevent his acquiring a domicil wherever he actually might be, elsewhere, and instead of treating the question as one of intent and fact. Burbank was one of the executors under his father's will, and as such, on April 8, 1909, at that time being a resident of New Orleans, declared before a notary that then being about to absent himself temporarily from Louisiana, and in order to comply with the law, especially article 1154 of the Revised Civil Code, he constituted one Billings his attorney. If he left the state permanently, his duty, we are told by the supreme court, was to surrender his trust, render an account, and pay over any balance due. It is true that in his Texas will he declared that Texas was his permanent home, and that he made similar declarations orally and in writing; but, on the other hand, it is found that his agent continued to represent him, and it seems that he continued to act, as an executor temporarily absent. He had made a will in Louisiana just before leaving, but ten days before making the Texas will he had consulted a lawyer as to making a will that would be valid by the law of Texas, which law allowed dispositions not valid by the law of Louisiana, where most of his property was. The supreme court not unnaturally suspected, from the declaration of domicil in the will and the circumstances, that Burbank was making up a fictitious case in the hope of avoiding the restrictions of his real domicil before he killed himself, as it is said that he did, in May; and found that the Texas declarations were more than counterbalanced by his declaration of record and his official acts as executor resident in Louisiana. There can be no question that the evidence was conflicting and that the court was warranted in finding as it did.

It is not for us to retry the facts. The ground of the argument here is a statement in the opinion of the court that the recital in the notarial act was conclusive evidence [165] that Burbank left the state

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intention of returning; but that
import a failure to recognize, as the
early did recognize, that he might
his mind. Reliance also is placed
he headnote of the decision, which
that the intent to leave only tempo-
is conclusively presumed to continue
the notarial procuration is recalled,
that the executors are concluded from
rting a change of domicil. But the
dnote is given no special force by stat-
or rule of court, as in some states.
inaccurately represents the reasoning of
e judgment. In 129 La. it is said to
ave been made by the court. However
hat may be, we look to the opinion for the
original and authentic statement of the
grounds of decision. It may be that in
fact the conduct of the testator in Louisi-
ana was given greater weight, because of
the statutes of the state, than others might
give it, but no error of law appears that
would warrant a reversal of the judgment
below. German Sav. & L. Soc. v. Dormit-
zer, 192 U. S. 125, 128, 48 L. ed. 373, 376,
24 Sup. Ct. Rep. 221.

Judgment affirmed.

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, Plff. in Err.,

v.

J. F. POLT.

(See S. C. Reporter's ed. 165–168.)

Constitutional law — due process of law — penalizing refusal to pay claim.

The exaction of a double liability from a railway company failing to pay, within sixty days, a claim for the damage caused by fire set by a locomotive, as is done by S. D. Laws 1907, chap. 215, except where the owner recovers a less sum as damages than the amount of any tender by the railway company, in which case the latter is to recover its costs, is a taking of the company's property without due process of law.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

[No. 161.]

Argued January 16, 1914. Decided January 26, 1914.

IN ERROR to the Supreme Court of the State of South Dakota to review a judgment which affirmed a judgment of the Circuit Court awarding double damages for a railway company for the loss caused by a fire set by a locomotive. Reversed.

See same case below, 26 S. D. 378, 128 N. W. 472.

The facts are stated in the opinion.

Mr. **William G. Porter** argued the cause, and, with Messrs. Burton Hanson, Ed. L. Grantham, and Harrison C. Preston, filed a brief for plaintiff in error:

The law is unconstitutional. It imposes a penalty for delinquency in payment of debt.

San Mateo County v. Southern P. R. Co. 8 Sawy. 238, 13 Fed. 782; Hurtado v. California, 110 U. S. 535, 537, 28 L. ed. 238, 239, 4 Sup. Ct. Rep. 111, 292; St. Louis, I. M. & S. R. Co. v. Wynne, 224 U. S. 358, 56 L. ed. 800, 32 Sup. Ct. Rep. 493, 42 L.R.A. (N.S.) 102; Stupeck v. Union P. R. Co. 200 Fed. 192; Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Black v. Minneapolis & St. L. R. Co. 122 Iowa, 32, 96 N. W. 984; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Jolliffe v. Brown, 14 Wash. 155, 53 Am. St. Rep. 868, 44 Pac. 149; Grand Island & W. C. R. Co. v. Swinbank, 51 Neb. 521, 71 N. W. 48; Denver & R. G. R. Co. v. Outcalt, 2 Colo. App. 395, 31 Pac. 177.

It discriminates against one class of litigants in favor of another, denying to plaintiff in error the equal protection of the laws.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Williamson v. Liverpool, L. & G. Ins. Co. 105 Fed. 31; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Jolliffe v. Brown, 14 Wash. 155, 53 Am. St. Rep. 868, 44 Pac. 149; Wilder v. Chicago & N. W. R. Co. 70 Mich. 382, 38 N. W. 289; Chicago, St. L. & N. O. R. Co. v. Moss, Miss. 641; Hocking Valley Coal Co. v. Rosser, 53 Ohio St. 12, 29 L.R.A. 386, 53 Am. St. Rep. 622, 41 N. E. 263; Calder v. Bull, 3 Dall. 387, 388, 1 L. ed. 648, Builders' Supply Depot v. O'Connor, 150 265, 17 L.R.A.(N.S.) 909, 119 Am. St. 193, 88 Pac. 982, 11 Ann. Cas. 712; & North Ala. R. Co. v. Morris, 65 Al Hocking Valley Coal Co. v. Rosser, St. 22, 29 L.R.A. 386, 53 Am. St. R 41 N. E. 263.

The law in its operation is pernic works a rank injustice.

No appearance for defendant i

NOTE.—On constitutionality of statute ...ing penalty or added liability for ...way company to pay claim—
... M. & S. R. Co. v.

Mr. Justice Holmes delivered the opinion of the court:

This was a suit against the plaintiff in error for loss of property destroyed by fire communicated from its locomotive engine. A statute of South Dakota, after making the railroad company absolutely responsible in such cases, goes on to make it liable for double the amount of damage actually sustained unless it pays the full amount within sixty days from notice. If, within sixty days, it shall "offer in writing to pay a fixed sum, being the full amount of the damages sustained, and the owner shall refuse to accept the same, then in any action thereafter brought for such damages, when such owner recovers a less sum as damages than the amount so offered, then such owner shall recover only his damages, and the railway company shall recover its costs." S. D. Laws 1907, chap. 215. The plaintiff got a verdict for $780. The railroad had offered $500; less, that is, than the amount of the verdict, while the plaintiff, on the other hand, demanded more. In his demand, his declaration, and his testimony, he set the damage at $838.20. A judgment for double damages was affirmed by the supreme court of the state. 26 S. D. 378, 128 N. W. 472.

The defendant in error presented no argument, probably because he realized that under the recent decisions [168] of this court the judgment could not be sustained. No doubt the states have a large latitude in the policy that they will pursue and enforce, but the rudiments of fair play required by the 14th Amendment are wanting when a defendant is required to guess rightly what a jury will find, or pay double if that body sees fit to add 1 cent to the amount that was tendered, although the tender was obviously futile because of an excessive demand. The case is covered by St. Louis, I. M. & S. R. Co. v. Wynne, 224 U. S. 354, 56 L. ed. 799, 42 L.R.A.(N.S.) 102, 32 Sup. Ct. Rep. 493. It is not like those in which a moderate penalty is imposed for failure to satisfy a demand found to be just. Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40.

Judgment reversed.

STATE OF ALABAMA, Plff. in Err.,
v.
SUDIE SCHMIDT.

(See S. C. Reporter's ed. 168–174.)

Adverse possession — public lands — school sections.

The title of the state of Alabama to the 16th section school lands, given to such state by the act of March 2, 1819 (3 Stat. at L. 489, 491, chap. 47), § 6, may be extinguished by adverse possession for the length of time prescribed by the state statute of limitations.

[For other cases, see Adverse Possession, I. h, in Digest Sup. Ct. 1908.]

[No. 595.]

Argued January 12, 1914. Decided January 26, 1914.

IN ERROR to the Supreme Court of the State of Alabama to review a judgment which affirmed a judgment of the Talladega City Court in favor of defendant in an action of ejectment. Affirmed.

See same case below, — Ala. —, 61 So. 293.

The facts are stated in the opinion.

Mr. Robert C. Brickell, Attorney General of Alabama, argued the cause, and, with Mr. R. B. Evins, filed a brief for plaintiff in error:

By the grant of these lands for the particular use, the United States retained title for all other purposes or uses.

Northern P. R. Co. v. Townsend, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671.

The state of Alabama, in accepting the proposals upon which its admission into the Union was made contingent, disclaimed all right and title to waste or unappropriated lands lying within said territory. All other uses or purposes to which 16th section lands might be put, except the use for schools, being unappropriated by the United States, came within the above disclaimer.

Ibid.

A state statute of limitations, whereby lands granted by the United States to a specific use are diverted from that use into private ownership, is in conflict with the act of Congress making the grant, and void.

Ibid.

The state has no power to divert 16th section lands from the specific use for schools to which they were dedicated by the act of Congress.

Ibid.; Vincennes University v. Indiana, 14 How. 269, 14 L. ed. 416; State v. Springfield Twp. 6 Ind. 83, 22 How. 56, 16 L. ed. 256; Davis v. Indiana, 94 U. S. 792, 24 L. ed. 320; Morton v. Grenada Male & Female Academies, 16 Miss. 773.

The acceptance of the proposals of the act of Congress of March 2; 1819, created a contract between the United States and the state of Alabama, and the attempted diversion of these lands from the use to which granted, by a state statute of limitations, violates the obligation of this contract, and is void.

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Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Fenn v. Kinsey, 45 Mich. 446, 8 N. W. 64; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1089; United States use of Washington Acqueduct v. Great Falls Mfg. Co. 21 Md. 119; Lowry v. Francis, 2 Yerg. 534.

The acts of Congress making the grant are construed most strongly against the grantee, and in favor of the United States.

United States v. Michigan, 190 U. S. 379, 47 L. ed. 1103, 23 Sup. Ct. Rep. 742.

The acts of Congress approved March 2, 1819, and March 2, 1827, are *in pari materia*, and must be construed as if passed at the same time.

Plummer v. Murray, 51 Barb. 201; People v. Aitchinson, 7 How. Pr. 241.

The grant of 16th sections for the use of schools is a part of the land system of the United States.

2 Kent, Com. 13th ed. 196, note e.

Mr. J. K. Dixon argued the cause and filed a brief for defendant in error:

The grant of 16th sections by the act of Congress of March 2, 1819, is in perpetuity to the inhabitants of the several townships, but the legal title to the land is in the state, in trust for the inhabitants of the respective townships in which the lands lie, and a sale of a 16th section, pursuant to the act of the legislature, is valid and binding on the inhabitants of the township.

Long v. Brown, 4 Ala. 622.

This grant by Congress cannot properly be called a donation; it was the performance merely of a solemn obligation created by the compact with Georgia.

Ibid.

Congress, after the enactment of such law, did not have any right whatever to interfere in regard to the manner in which these lands were disposed of by the state, and therefore the petition of the state for authority to sell, and the act approved March 2, 1827, were unnecessary and unauthorized.

36 Cyc. 874–876; Long v. Brown, supra. Cooper v. Roberts, 18 How. 173, 182, 15 L. ed. 338, 341; Beecher v. Wetherby, 95 U. S. 517, 24 L. ed. 440.

The trusts created by these compacts (referring to this grant of 16th section land) relate to a subject certainly of universal interest, but of municipal concern, over which the power of the state is plenary and exclusive.

Cooper v. Roberts, 18 How. 173, 182, 15 [illegible] 341; Van Santvoord v. Roethler, [illegible] Ran. 472, 57 Pac. [illegible] 75 Miss. 822, 23 So. 773; Daggett v. Bonewitz, 107 Ind. 276, 7 N. E. 900.

When by act of Congress 16th sections of public lands were dedicated to the states for the support of schools, and the same were selected, the title thereto vested in the state and inhabitants of the township, and a claimant entering into possession of any portion of such land while the title was in the United States did not prevent his holding from being adverse to the township as soon as the title vested in it.

Hargis v. Congressional Twp. 29 Ind. 70; Schneider v. Hutchinson, 35 Or. 253, 76 Am. St. Rep. 486, 57 Pac. 324.

A purchaser of school lands derives his title from the state, and not from the United States, and the laws of the state authorizing the acquiring of title by adverse possession would be valid.

32 Cyc. 895; 1 Cyc. 1113.

The statute of limitations runs against the title to the land as far as the inhabitants of the township are concerned even if it did not run against the state, the title vesting in them as trustees upon the organization of such township.

Miller v. State, 38 Ala. 600.

The authority of the legislature to make the statute of limitations apply to suits by the state, or for the recovery of 16th section lands, is not doubted, and there is no reason why a different construction should be given the statute by a different principle applied when the suit is by the state, or one claming through the state, than that applied to private persons.

Wyatt v. Tisdale, 97 Ala. 594, 12 So. 233; Prestwood v. Watson, 111 Ala. 604, 20 So. 600; Tennessee Coal, Iron & R. Co. v. Linn, 123 Ala. 112, 82 Am. St. Rep. 108, 26 So. 245; Gaston v. State, 88 Ala. 459, 7 So. 340; State v. Schmidt, — Ala. —, 61 So. 293; Schneider v. Hutchinson, 76 Am. St. Rep. 486, note.

Adverse possession which is sufficient to bar the legal title of the trustee also bars the equitable estate of the *cestui que trust*. And this is so even though the *cestui que trust* is under some disability, such as infancy or coverture.

1 Cyc. 1121; Cox v. University of Alabama, 161 Ala. 639, 49 So. 814; Meeks v. Olpherts, 100 U. S. 564, 25 L. ed. 735.

Where a suit is prosecuted in the name of the United States only, on behalf of private persons, it is barred by laches and by the statute of limitations, if such are so barred.

Curtner v. United States, 149 U. S. 664, 37 L. ed. 890, 13 Sup. Ct. Rep. 985, 1041.

If, through erroneous action of its officers, the bounty of the government in the particular instance has not reached those for

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whom it was intended, but has reached beneficiaries who were not intended to have these particular lands, the government may be relied on to effectuate its own designs, and to make good any moral obligation that rests upon it; but it had not such pecuniary or other interest in this litigation as entitled it to ask the suspension of the beneficent rules applied by the courts in the administration of justice between individuals.

Curtner v. United States, 149 U. S. 664, 37 L. ed. 890, 13 Sup. Ct. Rep. 985, 1041; Shaffer v. Scudday, 19 How. 18, 15 L. ed. 593.

Messrs. John P. Tillman and William B. White also filed a brief for defendant in error:

The grant of the sections numbered 16 to the inhabitants of the townships for the use of schools in the state of Alabama, and the acceptance of the proposal contained in § 6 of the act for the admission of Alabama by the convention, operated as a present grant, and immediately devested the title of the United States to the 16th sections.

Cooper v. Roberts, 18 How. 173, 15 L. ed. 338; Hedrick v. Hughes, 15 Wall. 123, 21 L. ed. 52; Kissell v. St. Louis Public Schools, 18 How. 19, 15 L. ed. 324; Campbell v. Doe, 13 How. 244, 14 L. ed. 130; McNee v. Donahue, 142 U. S. 587, 35 L. ed. 1122, 12 Sup. Ct. Rep. 211; Johanson v. Washington, 190 U. S. 179, 47 L. ed. 1008, 23 Sup. Ct. Rep. 825; Beecher v. Wetherby, 95 U. S. 517, 24 L. ed. 440; United States v. Tully, 140 Fed. 899.

The Alabama grant of sections numbered 16 in the various townships being a grant of the entire title thereto, without reservation, vests in the grantee or grantees an indefeasible fee-simple title, and is not governed by the rules of law laid down with reference to grants of rights of way to railroads.

Cooper v. Roberts, 18 How. 173, 15 L. ed. 338; Hedrick v. Hughes, 15 Wall. 123, 21 L. ed. 52; Kissell v. St. Louis Public Schools, 18 How. 19, 15 L. ed. 324; Campbell v. Doe, 13 How. 244, 14 L. ed. 130; McNee v. Donahue, 142 U. S. 587, 35 L. ed. 1122, 12 Sup. Ct. Rep. 211; Johanson v. Washington, 190 U. S. 179, 47 L. ed. 1008, 23 Sup. Ct. Rep. 825; Beecher v. Wetherby, 95 U. S. 517, 24 L. ed. 440; United States v. Tully, 140 Fed. 899; Deseret Salt Co. v. Tarpey, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158; Rutherford v. Greene, 2 Wheat. 196, 4 L. ed. 218; Toltec Ranch Co. v. Cook, 191 U. S. 532, 48 L. ed. 291, 24 Sup. Ct. Rep. 166; Iowa R. Land Co. v. Blumer, 206 U. S. 482, 51 L. ed. 1148, 27 Sup. Ct. Rep. 769; Missouri Valley Land Co. v. Wiese, 208 U. S. 234, 52 L. ed. 466, 28 Sup. Ct. Rep. 294; Northern P. R. Co. v. Ely, 197 U. S. 1, 49 L. ed. 639, 25 Sup. Ct. Rep. 302.

No one can take advantage of the nonperformance of a condition subsequent annexed to an estate in fee except the grantor or its successors. The same rule applies to a grant upon condition proceeding from the government.

Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551; Spokane & B. C. R. Co. v. Washington & G. N. R. Co. 219 U. S. 166, 55 L. ed. 159, 31 Sup. Ct. Rep. 182; United States v. Northern P. R. Co. 152 U. S. 284, 38 L. ed. 443, 14 Sup. Ct. Rep. 598.

Nothing in the Alabama grant of the 16th section school lands imports a limitation of the fee.

Stuart v. Easton, 170 U. S. 383, 42 L. ed. 1078, 18 Sup. Ct. Rep. 650.

Adverse possession as against a trustee operates as well against the beneficiaries of the trust.

Meeks v. Olpherts, 100 U. S. 564, 25 L. ed. 735.

Adverse possession against any party in which title is so vested that such party may grant an indefeasible estate in fee simple ripens into a fee-simple title by the operation of the statute of limitations.

Northern P. R. Co. v. Ely, 197 U. S. 1, 49 L. ed. 639, 25 Sup. Ct. Rep. 302; Cox v. University of Alabama, 161 Ala. 639, 49 So. 814.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit brought by the state of Alabama to recover possession of a specified part of section 16, township 17, range 5, Talladega county. It was agreed that the land was a part of the 16th section school lands given to the state by the act of March 2, 1819, chap. 47, § 6, 3 Stat. at L. 489, 491, and still belonged to the state if the defendant had not got a title by adverse possession, which it was agreed the defendant had if the statutes of Alabama, limiting suits like the present to twenty years, were valid. The trial court ruled that the statutes were valid, and ordered judgment for the defendant, and this judgment was affirmed by the supreme court of the state. — Ala. —, 61 So. 293.

We are of opinion that the judgment must be affirmed. The above-mentioned act of Congress, under which Alabama became a state, provided that section 16 in every township "shall be granted to the inhabitants of such township for the use of schools." Of course the state must admit, as it expressly agreed, that these words vested the legal title in it, since it relies

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upon them for recovery in the present case. Any other interpretation hardly would be reasonable. In some cases the grant has been to the state in terms; but in whichever way expressed, probably it means the same thing, so far as the legal title is concerned. Certainly it has the same effect with regard to the scope of the state's legal control.

The argument for the plaintiff in error relies mainly upon Northern P. R. Co. v. Townsend, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671, which held that a right of way over public land [173] granted by the United States for railway purposes could not be extinguished by adverse possession under the statute of limitations of the state in which the land lay. The ground of that decision was that the grant to the railroad was not a conveyance of the land in fee simple absolute, but a limited grant "on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted." This decision has been met for some similar cases elsewhere by the act of June 24, 1912, chap. 181, 37 Stat. at L. 138. Union P. R. Co. v. Laramie Stock Yards Co. 231 U. S. 190, ante, 179, 34 Sup. Ct. Rep. 101; Union P. R. Co. v. Snow, 231 U. S. 204, ante, 184, 34 Sup. Ct. Rep. 104. But it does not apply to a gift to a state for a public purpose of which that state is the sole guardian and minister. As long ago as 1856 it was decided "the trusts created by these compacts relate to a subject certainly of universal interest, but of municipal concern, over which the power of the state is plenary and exclusive;" and it was held that the state of Michigan could sell its school lands without the consent of Congress. Cooper v. Roberts, 18 How. 173, 15 L. ed. 338. This decision adverted to the fact that it had been usual for Congress to authorize the sale of lands if the state should desire it, but suggested that it was unnecessary (which, indeed, followed from what was decided) and thus met the further argument here pressed that a qualified permission to sell was given to Alabama by a much later act of March 2, 1827, chap. 59, 4 Stat. at L. 237. It also disposes of other forms of the same contention, that the state law impairs the obligation of its contract, or involves a breach of trust, supposing that such positions are open to the state to take. American Emigrant Co. v. Adams County, 100 U. S. 61, 25 L. ed. 563; Spokane & B. C. R. Co. v. Washington & G. N. R. Co. 219 U. S. 166, 55 L. ed. 159, 31 Sup Ct. Rep. 182. The gift to the state is absolute, although, no doubt, as said in Cooper v. Roberts, "there is a sacred obligation imposed on its public faith." But that [174] obligation is honorary, like the one discussed in Conley v. Ballinger, 216 U. S. 84, 54 L. ed. 393, 30 Sup. Ct. Rep. 224, and even in honor would not be broken by a sale and substitution of a fund, as in that case; a course, we believe, that has not been uncommon among the states. See further Stuart v. Easton, 170 U. S. 383, 394, 42 L. ed. 1078, 1082, 18 Sup. Ct. Rep. 650.

Some reliance was placed upon Vincennes University v. Indiana, 14 How. 268, 14 L. ed. 416, but the decision of the majority in that case rested upon the grant having been made to a private corporation, of which the rights could not be impaired by the state.

The result of Cooper v. Roberts and of what we have said is that the state has authority to subject this land in its hands to the ordinary incidents of other titles in the state, and that the judgment must be affirmed. Northern P. R. Co. v. Ely, 197 U. S. 1, 8, 49 L. ed. 639, 642, 25 Sup. Ct. Rep. 302.

Judgment affirmed.

JOSEPH A. TANEY, Trustee of the Estate of Miller Pure Rye Distilling Company, Appt.,

v.

PENN NATIONAL BANK OF READING.

(See S. C. Reporter's ed. 174–186.)

Fraudulent conveyances — retention of physical possession.

1. The rule that the retention of a physical possession by the vendor is fraud *per se*, and not merely evidence of fraud, even though there be nothing inconsistent with the most perfect honesty, is not applicable, in Pennsylvania, where the inherent nature of the transaction and the attendant circum-

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NOTE.—As to presumption of fraud arising out of retention of possession by vendor of chattel—see note to Wilson v. Walrath, 24 L.R.A.(N.S.) 1131.

As to whether mere inconvenience as to delivery is a satisfactory explanation of the retention of possession by the vendors—see note to W. P. Chamberlain Co. v. Tuttle, 25 L.R.A.(N.S.) 604.

On issuance and delivery by warehouseman of receipt for his own property as a constructive transfer of possession essential to a valid pledge—see notes to State v. Robb-Lawrence Co. 16 L.R.A.(N.S.) 227; Fourth Street Nat. Bank v. Taylor, 30 L.R.A. (N.S.) 552.

Generally, as to delivery and possession of property pledged—see note to Yeatman v. New Orleans Sav. Inst. 24 L. ed. U. S. 589.

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stances are such as to preclude the possibility of a delivery by the vendor that would be consistent with the avowed and fair purpose of the sale, or where the absence of a physical delivery is excused by the usages of the trade or business in which the sale is made.

[For other cases, see Fraudulent Conveyances, V., in Digest Sup. Ct. 1908.]

Pledge — of distillery warehouse receipts — change of possession.

2. Physical delivery to the pledgee is not essential, in Pennsylvania, to validate, as against the creditors of the pledgeor, a pledge by a distilling company of a specified number of barrels of whisky stored in its own bonded distillery warehouse, accompanied by the issuance and transfer to the pledgee, conformably to trade usage, of the distilling company's warehouse receipts representing such whisky, which, though stored in the company's own warehouse, is in the control of the Federal government, and cannot be removed without payment of the internal revenue tax.

[For other cases, see Pledge, 13–21, in Digest Sup. Ct. 1908.]

[No. 115.]

Argued December 9 and 10, 1913. Decided January 26, 1914.

APPEAL from the United States Circuit Court of Appeals for the Third Circuit to review a decree which affirmed a decree of the District Court for the Western District of Pennsylvania, sustaining a pledge as against the trustee in bankruptcy of the pledgeor's estate. Affirmed.

See same case below, 109 C. C. A. 437, 187 Fed. 689.

The facts are stated in the opinion.

Mr. **Joseph Hill Brinton** argued the cause and filed a brief for appellant:

It is necessary not only that appearances should agree with the real state of things, but also that the real state of things should be honest and consistent with public policy, and that it afford no unnecessary facility for deception.

Clow v. Woods, 5 Serg. & R. 277; 9 Am. Dec. 346.

A man may not be his own warehouseman.

Tradesmen's Nat. Bank v. Thomas Kent Mfg. Co. 186 Pa. 556, 65 Am. St. Rep. 876, 40 Atl. 1018; Moors v. Jagode, 195 Pa. 163, 45 Atl. 723; Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 Ann. Cas. 789; Re Millbourne Mills Co. 30 L.R.A.(N.S.) 552, 96 C. C. A. 629, 172 Fed. 177.

Possession of the subject of the pledge is an almost universal requirement of the law of pledge to perfect the pledgee's title.

Collins's Appeal, 107 Pa. 590, 52 Am. Rep. 479.

The convenience of the parties is not of moment.

Jenkins v. Eichelberger, 4 Watts, 121, 28 Am. Dec. 691.

Delivery must be actual, and not merely symbolical, where actual delivery is practicable, and if it is not practicable, the party should leave nothing undone to secure the public from deception.

Barlow v. Fox, 203 Pa. 114, 52 Atl. 57.

If a purchaser pays the price for the goods purchased by him, without taking possession of them, he takes the risk of the integrity and solvency of his vendor when the rights of a subsequent bona fide purchaser or an execution creditor arise.

White v. Gunn, 205 Pa. 229, 54 Atl. 901; Clow v. Woods, 5 Serg. & R. 275, 9 Am. Dec. 346.

A distiller cannot pass title to whisky in his own warehouse by delivery of receipts merely.

Union Trust Co. v. Trumbull, 137 Ill. 146, 27 N. E. 24.

In Pennsylvania, at least, the question as to the validity of such warehouse receipts is open.

Keil v. Harris, 4 Sadler (Pa.) 201, 6 Atl. 750; Miller v. Browarsky, 130 Pa. 372, 18 Atl. 643; Rosenbaum v. Batjer, 154 Pa. 544, 25 Atl. 754; Sloan v. Johnson, 20 Pa. Super. Ct. 643.

Messrs. **A. Leo Weil, Lawrence Maxwell, and Philip S. Zieber** argued the cause, and, with Mr. Thomas Iaeger Snyder, filed a brief for appellee:

The validity of a pledge or contract of sale, or what constitutes delivery under the laws of any state, must be determined by the local law of the state in which the transaction took place.

First Nat. Bank v. Guarantee Title & T. Co. 101 C. C. A. 507, 178 Fed. 189; Bryant v. Swofford Bros. Dry Goods Co. 214 U. S. 279, 53 L. ed. 997, 29 Sup. Ct. Rep. 614; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; Dooley v. Pease, 180 U. S. 126, 45 L. ed. 457, 21 Sup. Ct. Rep. 329; Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 Ann. Cas. 789.

No unbending test of the sufficiency of delivery and retention of possession can be applied to all cases; in passing upon the sufficiency of possession taken by the purchaser in any particular case there must be taken into consideration: (a) the character of the property; (b) the use to be made of it; (c) the nature and object of the transaction; (d) the position of the parties; and (e) the usages of trade or business.

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Clow v. Woods, 5 Serg. & R. 275, 9 Am. Dec. 346; McKibbin v. Martin, 64 Pa. 352, 3 Am. Rep. 588; Twyne's Case, 3 Coke, 80, 1 Smith, Lead. Cas. 8th ed. 1, 5 Eng. Rul. Cas. 2; Hugus v. Robinson, 24 Pa. 9; Barr v. Reitz, 53 Pa. 256; Crawford v. Davis, 99 Pa. 576; Cessna v. Nimick, 113 Pa. 70, 4 Atl. 193; Stephens v. Gifford, 137 Pa. 219, 21 Am. St. Rep. 868, 20 Atl. 542; Pressel v. Bice, 142 Pa. 263, 21 Atl. 813; Garretson v. Hackenberg, 144 Pa. 107, 22 Atl. 875; Bell v. McCloskey, 155 Pa. 319, 26 Atl. 547; Goddard v. Weil, 165 Pa. 419, 30 Atl. 1000; Keystone Watch Case Co. v. Fourth Street Nat. Bank, 194 Pa. 535, 45 Atl. 328; Barlow v. Fox, 203 Pa. 114, 52 Atl. 57; White v. Gunn, 205 Pa. 229, 54 Atl. 901; Babb v. Clemson, 10 Serg. & R. 419, 13 Am. Dec. 684; Martin v. Mathiot, 14 Serg. & R. 214, 16 Am. Dec. 491; Hower v. Geesaman, 17 Serg. & R. 251; Shaw v. Levy, 17 Serg. & R. 99; Wilbur v. Strickland, 1 Rawle, 458; Herron v. Fry, 2 Penr. & W. 263; Carpenter v. Mayer, 5 Watts, 483; Trovillo v. Shingles, 10 Watts, 438; Hoofsmith v. Cope, 6 Whart. 53; Young v. M'Clure, 2 Watts & S. 147; Cadbury v. Nolen, 5 Pa. 320; Haynes v. Hunsicker, 26 Pa. 58; Born v. Shaw, 29 Pa. 288, 72 Am. Dec. 633; Milne v. Henry, 40 Pa. 352; Graham v. McCreary, 40 Pa. 515, 80 Am. Dec. 591; Brawn v. Keller, 43 Pa. 104, 82 Am. Dec. 554; Steelwagon v. Jeffries, 44 Pa. 407; Fry v. Miller, 45 Pa. 441; Dewart v. Clement, 48 Pa. 413; Long v. Knapp, 54 Pa. 514; Smith v. Crisman, 91 Pa. 428; Stadtfeld v. Huntsman, 92 Pa. 53, 37 Am. Rep. 661; Parks v. Smith, 94 Pa. 46; Pearson v. Carter, 94 Pa. 156; Brunswick & B. County v. Hoover, 95 Pa. 508, 40 Am. Rep. 674; Ziegler v. Handrick, 106 Pa. 87; Buckley v. Duff, 114 Pa. 596, 8 Atl. 188; Ditman v. Raule, 124 Pa. 225, 16 Atl. 819; Peek v. Heim, 127 Pa. 500, 14 Am. St. Rep. 865, 17 Atl. 984; Renninger v. Spatz, 128 Pa. 524, 15 Am. St. Rep. 692, 18 Atl. 405; Ayers v. McCandless, 147 Pa. 49, 23 Atl. 344; Caulfield v. Van Brunt, 173 Pa. 428, 34 Atl. 230; Lehr v. Brodbeck, 192 Pa. 535, 73 Am. St. Rep. 828, 43 Atl. 1006; Riggs v. Bair, 213 Pa. 402, 62 Atl. 1086; Hill v. Leibig Mfg. Co. 3 Pa. Super. Ct. 398; Gattle Bros. v. Kremp, 6 Pa. Super. Ct. 514; Jones v. Harvey, 9 Pa. Super. Ct. 326; Kendig v. Binkley, 10 Pa. Super. Ct. 463.

For some purpose, the government had the control and a joint possession of the whisky stored in the warehouse.

United States v. 36 Barrels of High Wines, 7 Blatchf. 459, Fed. Cas. No. 16,468; United States v. Witten, 143 U. S. 76, 36 L. ed. 81, 12 Sup. Ct. Rep. 372; McCullough v. Large, 20 Fed. 309.

A transfer of property in the hands of a bailee is good against the creditors of the owner without actual delivery.

Linton v. Butz, 7 Pa. 89, 47 Am. Dec. 501; Worman v. Kramer, 73 Pa. 385; Woods v. Hull, 81 *Pa. 453; Caulfield v. Van Brunt, 173 Pa. 433, 34 Atl. 230.

Possession may be held by a third person for the pledgee, when such person will be considered as the pledgee's agent.

Brown v. Warren, 43 N. H. 430; Tibbetts v. Flanders, 18 N. H. 285; McCready v. Haslock, 3 Tenn. Ch. 13; Johnson v. Smith, 11 Humph. 396; Weems v. Delta Moss Co. 33 La. Ann. 973; First Nat. Bank v. Harkness, 42 W. Va. 156, 32 L.R.A. 408, 24 S. E. 548; Lewis v. Dillard, 22 C. C. A. 488, 40 U. S. App. 404, 76 Fed. 688.

As between the parties themselves, an actual delivery may not be necessary, and the possession may be regarded as constructive where the contract places it.

Huntington v. Sherman, 60 Conn. 467, 22 Atl. 769; Tuttle v. Robinson, 78 Ill. 332; Martin v. Reid, 11 C. B. N. S. 730, 31 L. J. C. P. N. S. 126, 5 L. T. N. S. 727.

Where personal property is pledged, the pledgee acquires the legal title and the possession. If it remain in the apparent possession of the pledgeor, he holds as agent of the pledgee.

Easton v. German-American Bank, 127 U. S. 532, 32 L. ed. 210, 8 Sup. Ct. Rep. 1297.

Established trade customs, when long continued and unbroken, bring with them strong presumptions of their legality and validity.

12 Cyc. 1053, 1061, 1084; Priestley v. Pratt, L. R. 2 Exch. 102, 36 L. J. Exch. N. S. 89, 16 L. T. N. S. 64, 15 Week. Rep. 639; Ghen v. Rich, 8 Fed. 159; Tyson v. Smith, 9 Ad. & El. 406, 8 Eng. Rul. Cas. 316; Cox v. Charleston F. & M. Ins. Co. 3 Rich. L. 333, 45 Am. Dec. 771; Horton v. Beckman, 6 T. R. 760; Miller v. Browarsky, 130 Pa. 372, 18 Atl. 643; Guillon v. Earnshaw, 169 Pa. 463, 34 Atl. 545; White v. Gunn, 205 Pa. 229, 54 Atl. 901.

The property could not have been levied upon and sold under judicial process against the bankrupt, because whisky in a distillery bonded warehouse is not subject to levy.

Fischer v. Dandistal, 9 Fed. 145; McCullough v. Large, 20 Fed. 309.

There was no constructive fraud.

White v. Gunn, 205 Pa. 229, 54 Atl. 901; McCullough v. Willey, 200 Pa. 172, 49 Atl. 944; Williams v. Bristol Rolling Mill Co. 174 Pa. 299, 34 Atl. 442; Goddard v.

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Weil, 165 Pa. 419, 30 Atl. 1000; Davies v. Oxenreider, 43 Pa. Super. Ct. 506; Gibson v. Stevens, 8 How. 384, 12 L. ed. 1123; Whittle v. Phelps, 181 Mass. 317, 63 N. E. 907; Northern Mercantile Co. v. Schultz, 56 Wash. 393, 105 Pac. 850; Kingsley v. White, 57 Vt. 565.

The bank, being a bona fide pledgee for value in due course of business, by the delivery of the warehouse receipts for the whisky in controversy for a loan obtained from it before the adjudication in bankruptcy, is entitled to the whisky as against the bankrupt, his trustee, and his creditors.

Pattison v. Dale, 115 C. C. A. 639, 196 Fed. 5; Merchants' Nat. Bank v. Roxbury Distilling Co. 196 Fed. 76.

[179] Mr. Justice Hughes delivered the opinion of the court:

On February 3, 1908, a petition in bankruptcy was filed against the Miller Pure Rye Distilling Company; it was adjudicated a bankrupt on February 19, 1908, and the appellant was appointed trustee. The Penn National Bank of Reading, Pennsylvania, the appellee, intervened in the bankruptcy proceeding with a petition asking for the delivery to it of 200 barrels of whisky stored in the bonded warehouse of the distilling company, upon the ground that the property had been lawfully pledged by the company to the bank. The district court sustained the lien and accordingly held the claimant entitled to the delivery sought (176 Fed. 606); and, on appeal, this decree was affirmed by the circuit court of appeals (109 C. C. A. 437, 187 Fed. 689).

The pertinent facts are these: On August 27, 1907, the bank lent to the distilling company $2,500, for which the company gave its four months' note, reciting the deposit with the bank, as collateral security, of "200 bbls. whisky in bonded warehouse at Womelsdorf, Pa., as per Warehouse Rects. gauger's ctf. etc. accompanying." The form of the receipts is shown by the following copy of one of them:

No. 5454. 25 Bbls.

First District of Pennsylvania.

United States Internal Revenue Distillery Bonded Warehouse of Miller Pure Rye Distilling Company.

Ryeland, Berks Co., Pa., August 26th, 1907.

Received on Storage from Ourselves Twenty-five (25) Barrels of Miller Pure Rye Whiskey Distilled, Marked and Numbered as per Record Attached, Subject to our Order and Risk of Loss or Damage by Fire, The Elements, Leakage, Evaporation or Accident, Deliverable only upon Surrender of this Certificate, Payment of Tax and other [180] Charges due Thereon, and Storage at the Rate of Five Cents per Barrel per month, from August 26th, 1907.

Inspection Spring 1907.

Stored in Warehouse No. 2.

Serial Nos. of Packages 7964/7988.

Miller Pure Rye Distilling Co.,
S. V. Nagle, President.

Address all Communications to Miller Pure Rye Distilling Company, Philadelphia, Pa.

Special Notice—Particular care should be taken of this Certificate as the whisky cannot be delivered without its surrender.

These receipts were indorsed by the company, and, with the gauger's certificates, were delivered to the bank. The whisky itself was not actually delivered, and remained in the bonded warehouse. The note not being paid at maturity, the bank, upon notice, sold the warehouse receipts at public sale on February 5, 1908, and became the purchaser. This sale, however, is not material to the present question, which turns upon the validity of the lien.

There is no doubt as to the intention and actual good faith of the parties. The loan was made in reliance upon the designated security, and the ground of attack is that the lien failed for want of delivery of possession.

The legal effect of the transaction depends upon the local law. Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; Hiscock v. Varick Bank, 206 U. S. 28, 51 L. ed. 945, 27 Sup. Ct. Rep. 681; Security Warehousing Co. v. Hand, 206 U. S. 415, 425, 51 L. ed. 1117, 1123, 27 Sup. Ct. Rep. 720, 11 Ann. Cas. 789; Bryant v. Swofford Bros. Dry Goods Co. 214 U. S. 279, 53 L. ed. 997, 29 Sup. Ct. Rep. 614. Reviewing the decisions of the supreme court of Pennsylvania with respect to sales,—the principles of which were deemed to be applicable,—the circuit court of appeals reached the following conclusion: "It suffices to say that the law of [181] Pennsylvania, in respect of the question we are now considering, is settled by a line of cases extending through nearly a century. Starting with the policy of the statute of Elizabeth, for the circumvention of fraud and deceit in sales of personal property (which nowhere in terms refers to retention of possession by a vendor, it has wisely developed the spirit of that statute and evolved the salutary rule, that where there is nothing in the case but the retention of a physical possession by the vendor, which he is capable of delivering to the

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vendee, such retention is fraud *per se*, and not merely evidence of fraud, even though there be nothing inconsistent with the most perfect honesty. But this rule is not applied by the courts of Pennsylvania to cases where the inherent nature of the transaction and the attendant circumstances are such as to preclude the possibility of a delivery by the vendor, that would be consistent with the avowed and fair purpose of the sale, or where the absence of a physical delivery is excused by the usages of the trade or business in which the sale was made." 109 C. C. A. 437, 444, 187 Fed. 689, 696.

We entertain no doubt as to the correctness of this statement (Clow v. Woods, 5 Serg. & R. 277, 9 Am. Dec. 346; Barr v. Reitz, 53 Pa. 256; McKibbin v. Martin, 64 Pa. 352, 3 Am. Rep. 588; Crawford v. Davis, 99 Pa. 576; Stephens v. Gifford, 137 Pa. 219, 21 Am. St. Rep. 286, 20 Atl. 542; Pressel v. Bice, 142 Pa. 263, 21 Atl. 813; Garretson v. Hackenberg, 144 Pa. 107, 22 Atl. 875; Barlow v. Fox, 203 Pa. 114, 52 Atl. 57; White v. Gunn, 205 Pa. 229, 54 Atl. 901), and it was in the light of these principles that the court below held that, considering the situation of the property and the usages of the business, the transaction in question was valid.

To insure collection of the heavy tax that is laid upon distilled spirits, the production is carefully supervised and the product is impounded. Rev. Stat. §§ 3247-3334, U. S. Comp. Stat. 1901, pp. 2107-2183, as amended; act of May 28, 1880, chap. 108, 21 Stat. at L. 145; act of August 27, 1894, chap. 349, §§ 48-67, 28 Stat. at L. 509, 563-568, U. S. Comp. Stat. 1901, pp. 2109, 2141-2146, 2102, 2052, 2166, 2117. Every distiller [182] is required to provide, at his own expense, "a warehouse, to be situated on and to constitute a part of his distillery premises, and to be used only for the storage of distilled spirits of his own manufacture until the tax thereon shall have been paid." This warehouse, when approved, by the Commissioner of Internal Revenue, is declared by the statute to be "a bonded warehouse of the United States, to be known as a distillery warehouse," and is "under the direction and control of the collector of the district, and in charge of an internal-revenue storekeeper, assigned thereto by the Commissioner" (§ 3271). While the statute provides that "every distillery warehouse shall be in the joint custody of the storekeeper and the proprietor thereof," the control of the government's representative is made dominant, as in the nature of the case it must be in order to fulfil the purposes of the act. The warehouse, the statute continues, "shall be kept securely locked, and shall at no time be unlocked, or opened, or remain open, unless in the presence of such storekeeper, or other person who may be designated to act for him, as provided by law; and no articles shall be received in or delivered from such warehouse except on an order or permit addressed to the storekeeper and signed by the collector having control of the warehouse" (§ 3274). Under the departmental regulations "the only lock to the warehouse door must be the government lock, the key of which must at all times be in charge of the storekeeper." There must be an immediate removal of the distilled spirits to the distillery warehouse as soon as they are drawn into casks or packages and gauged, proved, and marked, as required, and thereupon the internal revenue gauger "shall, in the presence of the storekeeper of the warehouse, place upon the head of the cask or package an engraved stamp, which shall be signed by the collector of the district and storekeeper and gauger; and shall have written thereon the number of proof-gallons contained [183] therein, the name of the distiller, the date of the receipt in the warehouse, and the serial number of each cask or package, in progressive order, as the same are received from the distillery" (§ 3287; act of May 28, 1880, 21 Stat. at L. 147, chap. 108, § 6, U. S. Comp. Stat. 1901, p. 2130). The spirits must be entered for deposit in the warehouse under the regulations prescribed by the commissioner, and bond must be given for the payment of the tax. The statute gives the form of the entry which, made in triplicate and duly verified, must set forth the name of the person making it, the designation of the warehouse, the specification of the spirits deposited, with the marks and serial numbers of the packages, etc., and a statement of the amount of tax. Withdrawal may be made on payment of the tax—which is payable within eight years—by application to the collector in charge of the warehouse, and the making of a withdrawal entry (§§ 3293, 3294 act of May 28, 1880, 21 Stat. at L. 145, 146, chap. 108, §§ 4, 5, U. S. Comp. Stat. 1901, pp. 2133, 2135; act of August 27, 1894, 28 Stat. at L. 563, chap. 349, § 49, U. S. Comp. Stat. 1901, p. 2141). Provision is made for regauging and for an allowance for loss from leakage or evaporation (id. § 50; act of March 3, 1899, chap. 435, 30 Stat. at L. 1349, U. S. Comp. Stat. 1901, p. 2147; act of Jan. 13, 1903, chap. 134, 32 Stat. at L. 770, U. S. Comp. Stat. Supp. 1911, p. 955); and after four years the spirits may be bottled in bond, in a separate portion of the warehouse, set apart for that purpose, under the supervision of

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the government official (act of March 3, 1897, chap. 379, 29 Stat. at L. 626, U. S. Comp. Stat. 1901, p. 2150). The storekeeper is to keep "a warehouse-book" in which all deposits and deliveries are to be entered with appropriate description, including marks and serial numbers (§ 3301). And the removal "of any distilled spirits from a distillery warehouse . . . in any manner other than is provided by law" is punishable by fine and imprisonment (§ 3296).

The minute regulations of the statute, and the provision for prolonged governmental control, proceed upon a recognition of the exigencies of the business. It is a [184] matter of common knowledge that the product is not ready to be marketed for consumption when it is drawn from the still. It must undergo an aging process, and for this purpose it is kept in store for several years. In laying the tax, Congress has taken this necessity into consideration, permitting a long postponement of the required payment, the spirits meanwhile being held in charge of the government's representative. It is, however, a matter of obvious business importance that the distiller should be able to release the capital represented in the cost of production of the spirits in store, and to make it available for further production; and hence the practice is well established to deal with the product in the bonded warehouse by sale or pledge, storage certificate suitably identifying the property being delivered in lieu of the actual transfer of possession. The district court found as a fact that it is "the unbroken custom of the trade to treat storage receipts for spirits as completely equivalent to the spirits themselves, and to sell or pledge them freely without question." This finding is approved by the circuit court of appeals, and the fact that this custom exists we understand to be undisputed.

It is argued for the appellant that one cannot make himself a warehouseman of his own goods, and isues so-called receipts to take the place of the delivery which the law requires to give effect to his sale or pledge (Security Warehousing Co. v. Hand, 206 U. S. 415, 422, 51 L. ed. 1117, 1122, 27 Sup. Ct. Rep. 720, 11 Ann. Cas. 789; Trademen's Nat. Bank v. Thomas Kent Mfg. Co. 186 Pa. 556, 65 Am. St. Rep. 876, 40 Atl. 1018). The argument ignores the special circumstances of the case and the restrictions imposed by law upon the distiller. The building is his, but the government is in complete control. The spirits are his, but he is subject to fine and imprisonment if he attempts to remove them. It is undoubtedly true that the government is not strictly a bailee. It assumes no responsibility to the distiller for the safekeeping of the goods (United States v. Witten, 143 U. S. 76, 78, 36 L. ed. 81, 82, 12 Sup. Ct. Rep. 372). But the immunity [185] which is incident to the exercise of governmental power in no way limits its effect upon the distiller's relation to the goods. They are effectually taken out of his power, so that he is absolutely unable to make a physical delivery of them until the tax is paid. On the other hand, to pay the tax and remove the property before the aging process is completed would defeat the object of the deposit for which the statute provides, and would frustrate the purpose of a transfer of spirits in bond, which is an entirely lawful transaction. In these circumstances, the certificates—such as were here used—appropriately represent the property.

It is said that the distiller need not use his own warehouse, but may place the goods in one of he general bonded warehouses established under the act of 1894 (28 Stat. at L. 564, 565, chap. 349). The appellee asserts that this would be impracticable; that no general bonded warehouse had been established in the collection district in question; that there are only twelve in the entire country, with a capacity that is extremely small in comparison with the output of the distilleries. But, aside from this, the distillery warehouse is equally recognized by law; it is "a bonded warehouse of the United States." If it is a fit place for storage, the distiller is not obliged to remove the spirits elsewhere. And while they are thus deposited in conformity with law, he is not debarred from passing title or creating a special interest by way of pledge.

The fundamental objection is that the custom, to which the entire trade is adjusted, is opposed to public policy. But we know of no ground for thus condemning honest transactions which grow out of the recognized necessities of a lawful business. The case is not one where credit may be assumed to be given upon the faith of the ostensible ownership of goods in the debtor's possession. Everyone dealing with distillers is familiar with the established practice in accordance with which spirits are held in store, [186] under governmental control, and are transferred by the delivery of such documents as we have here. There is no warrant for saying that creditors are misled by delusive appearance. The usage serves a fair purpose and there is no public policy which requires that the trade should be thrown into disorder by a refusal to uphold it. It is urged that frauds may be perpetrated by the duplication of such

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documents; but the present dispute does not call for the determination of the equities as between two innocent purchasers. We are concerned here simply with the rights of creditors represented by a trustee in bankruptcy, and we agree with the court below in its conclusion that, in the circumstances disclosed, his right is inferior to that of the appellee.

The decree is affirmed.

Affirmed.

CHAPMAN & DEWEY LUMBER COMPANY and Chapman & Dewey Land Company, Plffs. in Err.,

v.

ST. FRANCIS LEVEE DISTRICT.

(See S. C. Reporter's ed. 186–198.)

Public lands — swamp and overflowed lands — unsurveyed areas — sunk lands.

1. The unsurveyed area within the exterior lines of a township, designated upon the official plat as a meandered body of water called "Sunk Lands," was not conveyed to the state of Arkansas by a patent from the United States, issued under the swamp land act of September 28, 1850 (9 Stat. at L. 519, chap. 84), which described the land conveyed as the whole of the township, containing a specified number of acres (which corresponded to the total acreage of the surveyed areas), according to the official survey, although at the time of the survey and the date of the swamp land act such unsurveyed area was in fact not a lake or permanent body of water, but was only temporarily overflowed, and was not distinctly lower or materially different from the adjoining lands.

[For other cases, see Public Lands, I. c, 4, in Digest Sup. Ct. 1908.]

Public lands — swamp and overflowed lands — passing of title.

2. The states acquired only an inchoate title under the swamp land act of September 28, 1850, to lands which were never listed as swamp lands, although they may have been such in fact.

[For other cases, see Public Lands, I. c, 4, in Digest Sup. Ct. 1908.]

Public lands — swamp and overflowed lands — extinguishing inchoate title.

3. The inchoate title of the state of Arkansas to unidentified swamp and overflowed lands under the swamp land act of September 28, 1850, was extinguished by a compromise and settlement between the state and the United States, approved by the state legislature in Ark. Laws 1897, p. 88, and by Congress in the act of April 29, 1898 (30 Stat. at L. 367, chap. 229), by which the state accepted the lands theretofore patented, approved, or confirmed to it under the swamp land act as the full measure of lands due to it thereunder, and relinquished to the United States all other claims or demands, adjusted or unadjusted, growing out of that act.

[For other cases, see Public Lands, I. c, 4, in Digest Sup. Ct. 1908.]

Public lands — swamp and overflowed lands — relinquishment — effect on levee district.

4. A levee district to which had passed, under Ark. Laws 1893, p. 172, the state's inchoate title to listed lands under the swamp land act of September 28, 1850, is bound, as a subordinate agency of the state, by the subsequent action of the state in relinquishing its inchoate title to the United States as part of a compromise and settlement.

[For other cases, see Public Lands, I. c, 4, in Digest Sup. Ct. 1908.]

[No. 82.]

Argued December 12, 1913. Decided January 26, 1914.

IN ERROR to the Supreme Court of the State of Arkansas to review a decree which affirmed a decree of the Chancery Court of Poinsett County, in that state, in favor of plaintiff in a suit by a levee district to recover for timber alleged to have been wrongfully cut from unsurveyed lands. Reversed.[1]

See same case below, 100 Ark. 94, 139 S. W. 625.

The facts are stated in the opinion.

Mr. Henry D. Ashley argued the cause, and, with Mr. William S. Gilbert, filed a brief for plaintiffs in error:

The whole township theory is the only one which would put the title in the plaintiff levee board. This theory is against numerous decisions of this court and against the rulings of the Land Department of the United States and the entire system for the survey and disposition of the public lands.

Re Arkansas Sunk Lands, 37 Land Dec. 345, 462; Cragin v. Powell, 128 U. S. 691, 32 L. ed. 566, 9 Sup. Ct. Rep. 203; Little v. Williams, 88 Ark. 37, 113 S. W. 340; Gazzam v. Phillips, 20 How. 372, 15 L. ed. 958.

When, in the extension of lines of public surveys, a lake is meandered, its area is segregated from the public domain, and beds of inland non-navigable meandered lakes or lands uncovered by the rescission of the waters of such lakes from natural or

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NOTE.—On the effect of meander line upon boundary of Federal grant—see note to Security Land & Exploration Co. v. Burns, 48 L. ed. U. S. 662.

On effect of bounding grant on river or tide water—see note to Hanlon v. Hobson, 42 L.R.A. 510.

[1] Rehearing denied June 22, 1914. See post, —.

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artificial causes, since the survey and disposition of the adjacent shore lands, do not belong to the United States, but to the riparian owners.

Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; Kean v. Calumet Canal & Improv. Co. 190 U. S. 466, 47 L. ed. 1139, 23 Sup. Ct. Rep. 651; Whitaker v. McBride, 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. Rep. 530; Harrison v. Fite, 78 C. C. A. 447, 148 Fed. 781.

The doctrine above announced is the *lex naturæ* and common law applied to grants by the United States of public lands bounded and meandered on inland streams, lakes, and ponds, without reservation or restriction of terms; and such grants are to be construed, as to their effect, according to the laws of the state where the land lies.

Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991.

The common-law doctrine of riparian rights is fully recognized in Arkansas.

Harrison v. Fite, 78 C. C. A. 447, 148 Fed. 781; Warren v. Chambers, 25 Ark. 120, 4 Am. Rep. 23, 91 Am. Dec. 538; Rhodes v. Cissel, 82 Ark. 367, 101 S. W. 758; Little v. Williams, 88 Ark. 37, 113 S. W. 340.

While we believe the courts have generally held the doctrine of estoppel as not applicable to the United States, we certainly think that where private rights have accrued and parties have changed their condition on the faith of the ruling of the Land Department, there should be some consistent continuity to such rulings.

Noble v. Union River Logging R. Co. 147 U. S. 176, 37 L. ed. 127, 13 Sup. Ct. Rep. 271; United States v. Stone, 2 Wall. 525, 535, 17 L. ed. 765, 767; Re G. A. Burns, 23 Land Dec. 430; Re Denody, 11 Land Dec. 504; United States v. Bank of Metropolis, 15 Pet. 377, 10 L. ed. 774; United States v. Stone, 2 Wall. 525, 17 L. ed. 765.

The mistake in the surveys which prevented the doctrine of Hardin v. Jordan and cases following from being applied in cases of Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988, and Niles v. Cedar Point Club, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124, would equally apply to mistake in a metes and bounds description which was based on a private survey or on no survey at all, but called for ancient monuments, such as trees and so forth, and failed in its courses and distances to go to the water-covered area for which the description called.

Mr. Samuel Adams argued the cause, and, with Messrs. H. F. Roleson, J. C. Hawthorne, and N. F. Lamb, filed a brief for defendant in error:

In spite of the fact that these lands had not been surveyed even into townships, the Land Department repeatedly held that a description identifying the lands would be sufficient for patenting.

Re Florida, 8 Land Dec. 65, 18 Land Dec. 26, 19 Land Dec. 251, 24 Land Dec. 147.

Where the description of lands in a conveyance is clear, the entire area within the description will pass, and no exception exists unless that exception is clearly stated.

2 Devlin, Deeds, § 979; Wendall v. Fisher, 187 Mass. 81, 72 N. E. 322.

The government was without authority by express exception to exclude these sunk lands and non-navigable rivers or lakes, because they were included in the grant.

Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840.

No exception of such nature could possibly be implied.

Kean v. Calumet Canal & Improv. Co. 190 U. S. 452, 459, 47 L. ed. 1134, 1137, 23 Sup. Ct. Rep. 651.

The statement of area in the approved list and patent is immaterial.

Warvelle, Abstracts, § 207; Bishop v. Morgan, 82 Ill. 352, 25 Am. Rep. 327; Ufford v. Wilkins, 33 Iowa, 110; Fuller v. Carr, 33 N. J. L. 157; Veve y Diaz v. Sanchez, 226 U. S. 234, 240, 57 L. ed. 201, 203, 33 Sup. Ct. Rep. 36; Powell v. Clark, 5 Mass. 355, 4 Am. Dec. 67; 3 Washb. Real Prop. 6th ed. § 2322, p. 386; 2 Devlin, Deeds, § 1044; Vowles v. Craig, 8 Cranch, 371, 3 L. ed. 593; Spreckels v. Brown, 212 U. S. 208, 53 L. ed. 476, 29 Sup. Ct. Rep. 256; Hyde v. Phillips, 61 Wash. 314, 112 Pac. 257; Wright v. Wright, 34 Ala. 194; Dalton v. Rust, 22 Tex. 133; Hall v. Mayhew, 15 Md. 551; Pierce v. Faunce, 37 Me. 63; Reddick v. Leggat, 7 N. C. 539; Hunter v. Morse, 49 Tex. 219; Jackson ex dem. Livingston v. Barringer, 15 Johns. 471; Kruse v. Scripps, 11 Ill. 98; Petts v. Gaw, 15 Pa. 218; Doe ex dem. Phillips v. Porter, 3 Ark. 60, 36 Am. Dec. 448; Towell v. Etter, 69 Ark. 34, 59 S. W. 1096, 63 S. W. 53.

It has been repeatedly decided by this and other courts, that inasmuch as the areas shown on plats of surveys made before the swamp land acts were passed were made primarily for the purpose of ascertaining the quantity of upland for which a purchaser from the government should pay, they had no effect in restricting patents under either the swamp land act of 1849, applying to Louisiana alone, or the swamp land act of 1850, which is concerned in this case.

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Kean v. Calumet Canal & Improv. Co. 190 U. S. 452, 47 L. ed. 1134, 23 Sup. Ct. Rep. 651; McDade v. Bossier Levee Board, 109 La. 626, 33 So. 628; Tolleston Club v. State, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690; Kean v. Roby, 145 Ind. 221, 42 N. E. 1011; Stoner v. Rice, 121 Ind. 51, 6 L.R.A. 387, 22 N. E. 968; People v. Warner, 116 Mich. 228, 74 N. W. 705.

Meander lines in government surveys and plats are principally intended not as boundary lines, but to assist in fixing the acreage of uplands for which a purchaser is expected to pay.

McDade v. Bossier Levee Board, 109 La. 626, 33 So. 628; Tolleston Club v. State, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690; Kean v. Roby, 145 Ind. 221, 42 N. E. 1011; Kean v. Calumet Canal & Improv. Co. 190 U. S. 459, 47 L. ed. 1137, 23 Sup. Ct. Rep. 651; Hardin v. Jordan, 140 U. S. 371, 380, 35 L. ed. 428, 432, 11 Sup. Ct. Rep. 808, 838; Niles v. Cedar Point Club, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124.

Yet where lands are sold by the acre, and an outside meander line, taken with the other boundaries of the tract conveyed, in fact incloses the acreage bought, paid for, and intended to be conveyed, and, as found to be the fact in this case, the meander line does not mark the shore of a permanent body of water, in such cases the courts have held the meander line to be part of the boundary, and the acreage sold and recited to be material.

Security Land & Exploration Co. v. Burns, 193 U. S. 167, 48 L. ed. 662, 24 Sup. Ct. Rep. 425; French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563; Niles v. Cedar Point Club, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124; Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988; Western Invest. Co. v. Farmers' Nat. Bank, 35 Or. 298, 57 Pac. 912.

The distinction which we think exists between the effect of meander lines and a statement of acreage in a patent where the right is grounded upon the character of the land, and one where the right is grounded on a purchase at an acre price, is clearly recognized in McDade v. Bossier Levee Board, 109 La. 635, 33 So. 628.

Even if the notation "sunk lands" were to be taken as proving the existence of a permanent body of water in 1850, this would only result in an additional reason why title to the sunk lands passed to the state of Arkansas under its approved list and patents.

Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; Kean v. Calumet Canal & Improv. Co. 190 U. S. 452, 47 L ed. 1134, 23 Sup. Ct. Rep. 651.

The swamp and overflow land act of September 28, 1850, was a grant *in præsenti*, and passed equitable title to the state. This title the state conveyed to the levee district. The levee district, having at least equitable title, and there being nothing further to be done by the government, even on the supposition that the legal title had not passed to the state, and so to the district, except the ministerial duty of issuing a patent, was entitled to assert its ownership as against all third persons.

Wright v. Roseberry, 121 U. S. 488, 30 L. ed. 1039, 7 Sup. Ct. Rep. 985; Tubbs v. Wilhoit, 138 U. S. 134, 34 L. ed. 887, 11 Sup. Ct. Rep. 279; Iowa R. Land Co. v. Blumer, 206 U. S. 482, 51 L. ed. 1148, 27 Sup. Ct. Rep. 769.

The property rights of municipal corporations cannot be taken away by legislative action, without compensation.

Grogan v. San Francisco, 18 Cal. 590; Franklin County Grammar School v. Bailey, 62 Vt. 467, 10 L.R.A. 405, 20 Atl. 820; Mt. Hope Cemetery v. Boston, 158 Mass. 509, 35 Am. St. Rep. 515, 33 N. E. 695; Jackson v. Dilworth, 39 Miss. 772; Higginson v. The Treasurer (Higginson v. Slattery) 212 Mass. 583, 42 L.R.A.(N.S.) 215, 99 N. E. 523; Webb v. New York, 64 How. Pr. 10; Dill. Mun. Corp. 3d ed. p. 91; Board of Education v. Blodgett, 155 Ill. 450, 31 L.R.A. 70, 46 Am. St. Rep. 348, 40 N. E. 1025.

This court has been obliged repeatedly, in guarding the rights of owners of real estate under early patents from the government, to overrule the Land Department when it has misconstrued government surveys and patents, and has acted on the assumption that a meander line was intended primarily as a boundary line.

Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; Kean v. Calumet Canal & Improv. Co. 190 U. S. 452, 47 L. ed. 1134, 22 Sup. Ct. Rep. 651.

Solicitor General Davis filed a suggestion on behalf of the United States.

[194] Mr. Justice Van Devanter delivered the opinion of the court:

The chief controversy in this case is over the title to about 1,500 acres of unsurveyed lands in Poinsett county, Arkansas, which were part of the public domain at the date of the swamp-land act of September 28, 1850 (9 Stat. at L. 519, chap. 84), and the Federal question to be considered is whether, under the operation and adminis-

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tration of that act, these lands have passed from the United States, or are still its property.

Although within the exterior lines of a township surveyed in 1840 and 1841, they, with other lands, were excluded from the survey, were meandered as if they were a lake, and were designated upon the official plat as a meandered body of water called "Sunk Lands,"—a name frequently applied in that region to areas which subsided during the New Madrid earthquake, a little more than a century ago, and subsequently became submerged. Other unsurveyed areas, designated as meandered bodies of water, were also shown upon the plat. The township was approximately 6 miles square, and the plat bore an inscription to the effect that the total of the surveyed areas was 14,329.97 acres, so the unsurveyed areas represented as water must have amounted to 8,000 acres or more.

After the enactment of the swamp-land act, the state requested that the township be listed as swamp lands, and patented to it under that act, both of which were done, the former in 1853 and the latter in 1858. In requesting the listing, the state described the township as containing 14,329.97 acres, the total of the surveyed areas as inscribed upon the plat, and in making the list, the Secretary of the Interior took the same total and deducted 514.30 acres in fractional section 16, which already had passed to the state under the school-land grant, [195] thereby making the listed area 13,815.67 acres. The patent embraced lands in several townships, the portion of the description material here being: "Township 12 north of range 7 east. The whole of the township (except section 16), containing thirteen thousand, eight hundred and fifteen acres and sixty-seven hundredths of an acre . . . according to the official plats of survey of said lands returned to the General Land Office by the Surveyor General."

In the state courts the levee district, the plaintiff, claimed title to the lands in controversy under the swamp-land act and an act of the state legislature in 1893 (Laws [Ark.] 1893, p. 172), granting to the levee district "all the lands of this state" lying within the boundaries of the district; and the defendants opposed this claim upon two grounds: One, that if these lands had passed to the state, the defendants had succeeded to the title by riparian right in virtue of their ownership, under conveyances from the state in 1871, of the fractional sections and subdivisions abutting on the meandered area called "Sunk Lands;" and the other, that the lands in controversy had not passed to the state, but were still the property of the United States. The trial court sustained the plaintiff's claim and entered a decree accordingly, which was affirmed by the supreme court of the state, the chief justice dissenting. 100 Ark. 94, 139 S. W. 625.

Both courts found as matter of fact from the evidence produced at the trial that at the time of the survey and at the date of the swamp-land act the unsurveyed area designated upon the plat as "Sunk Lands" was not a lake or permanent body of water, but only temporarily overflowed, and was not distinctly lower or materially different from the adjoining lands; and with this as a premise it was held that the lands in controversy did not pass to the state or to the defendants with the adjoining lands as an incident of riparian ownership, but were conveyed [196] to the state by the patent issued in 1858, and thence to the levee district by the state act of 1893.

If the patent conveyed these lands to the state, we are not concerned with their subsequent disposal, for that is a question of local law. But did the patent include them? This, of course, is a Federal question. In answering it in the affirmative, the state courts regarded the words "Sunk Lands," shown upon the plat, as meaning that unsurveyed area to which they were applied was land, and not water, and also regarded the words, "The whole of the township (except section 16)," as used in the patent, as embracing all that was within the exterior lines of the township, except section 16, whether surveyed or unsurveyed, and even although meandered and excluded from the survey. We are unable to accede to this view of either the plat or the patent.

Had the plat shown that all the lands were surveyed, it doubtless is true that the words "Sunk Lands" would not have indicated the presence of a body of water, but would have been taken in much the same way as would such words as "valley," "broken hills," or "level plateau." But the plat showed, as did also the field notes, that the area to which the words were applied was not included in the survey, but was excluded therefrom, and meandered as a body of water, and also that the adjoining sections and subdivisions were surveyed as fractional, as is usual with lands abutting on a lake or similar body of water. Thus, what appeared upon the plat had the same meaning as if this area had been called "Sunk Lands Lake." And that the officers of the state and of the United States so understood is shown by the fact that in the proceedings preliminary to the issuance of the patent, as also in the patent, this and similar areas were excluded in specifying the amount of land in the township.

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Of course, the words in the patent, "The whole of the township (except section 16)," are comprehensive, [197] but they are only one element in the description, and must be read in the light of the others. The explanatory words, "according to the official plats of survey of said lands, returned to the General Land Office by the Surveyor General," constitute another element, and a very important one; for it is a familiar rule that where lands are patented according to such a plat, the notes, lines, landmarks, and other particulars appearing thereon become as much a part of the patent, and are as much to be considered in determining what it is intended to include, as if they were set forth in the patent. Cragin v. Powell, 128 U. S. 691, 696, 32 L. ed. 566, 9 Sup. Ct. Rep. 203; Jefferis v. East Omaha Land Co. 134 U. S. 178, 194, 33 L. ed. 872, 878, 10 Sup. Ct. Rep. 518. The specification of the acreage is still another element; and, while of less influence than either of the others, it is yet an aid in ascertaining what was intended; for a purpose to convey upwards of 22,000 acres is hardly consistent with a specification of 13,815.67 acres. Ainsa v. United States, 161 U. S. 208, 229, 40 L. ed. 673, 680, 16 Sup. Ct. Rep. 544; Security Land & Exploration Co. v. Burns, 193 U. S. 167, 180, 48 L. ed. 662, 671, 24 Sup. Ct. Rep. 425; 3 Washb. Real Prop. 5th ed. 427. Giving to each of these elements its appropriate influence, and bearing in mind that the terms of description are all such as are usually employed in designating surveyed lands, we are of opinion that the purpose was to patent the whole of the lands surveyed, except fractional section 16, and not the areas meandered and returned, as shown upon the plat, as bodies of water. That it is now found, as shown by the decisions below, that these areas ought not to have been so meandered and returned, but should have been surveyed and returned as land, does not detract from the effect which must be given to the plat in determining what was intended to pass under the patent. Niles v. Cedar Point Club, 175 U. S. 300, 306, 44 L. ed. 171, 173, 20 Sup. Ct. Rep. 124; Hardin v. Shedd, 190 U. S. 508, 520, 47 L. ed. 1156, 1158, 23 Sup. Ct. Rep. 685.

As, then, the lands in controversy were not included in the patent, and, under the findings below, did not pass to the state or to the defendants by riparian right with the [198] adjoining fractional sections and subdivisions, it follows that they remain the property of the United States. Niles v. Cedar Point Club, supra; French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563; Security Land & Exploration Co. v. Burns, supra.

But it is said on behalf of the levee district that, even though the lands were not included in the patent, they passed to the state under the swamp-land act independently of any patent, and passed thence to the district under the state act of 1893. The contention is not tenable. The lands were never listed as swamp lands, and their listing does not appear to have been even requested; doubtless because they were not surveyed. Assuming that in fact they were swamp lands, the state's title under the swamp-land act was at most inchoate, and never was perfected. Not only so, but the state relinquished its inchoate title to the United States as part of a compromise and settlement negotiated in 1895, and the relinquishment is binding upon the levee district as a subordinate agency of the state. Little v. Williams, 231 U. S. 335, ante, 256, 34 Sup. Ct. Rep. 68. See Carson v. St. Francis Levee Dist. 59 Ark. 513, 533–535, 27 S. W. 590.

The levee district was therefore not entitled to prevail in respect of the unsurveyed lands.

Decree reversed.

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[199] ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Southern Pacific Company, and San Pedro, Los Angeles, & Salt Lake Railroad Company, Appts.,

v.

UNITED STATES, Interstate Commerce Commission, and Arlington Heights Fruit Exchange.

(See S. C. Reporter's ed. 199–221.)

Interstate Commerce Commission — regulation of carrier — pre-icing of fruit by consignor.

1. Carriers transporting citrus fruits from California to Eastern points may be compelled by the Interstate Commerce Commission to permit the consignors of pre-cooled shipments to ice the car bunkers at their warehouses so as to fit the freight for proper transportation,—at least, until the carriers shall offer under tariffs regularly filed to furnish the ice at the time and place needed in pre-cooled shipments, or to substitute a service of equal value at practically the same cost.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — powers — rate regulation.

2. The withdrawal by carriers' tariffs of shippers' pre-cooling privileges formerly recognized by the carriers themselves and approved by an order of the Interstate Commerce Commission, fixing a charge for the service rendered by the carriers in connection with pre-cooled shipments, affects a

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practice and a rate within the meaning of the act of February 4, 1887 (24 Stat. at L. 384, chap. 104, U. S. Comp. Stat. 1901, p. 3165), § 15, as amended by the act of June 29, 1906 (34 Stat. at L. 589, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1297), § 4, authorizing the Commission, after a hearing, to determine whether rates and practices affecting rates are unreasonable, and what practice in respect to transportation is just, and to require the carrier to conform to the regulations or practice which the Commission may prescribe, and the Commission is therefore acting within its powers in ordering the cancelation of such tariffs and requiring the carriers to conform to its prior order.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — rate regulation — judicial review.

3. An order of the Interstate Commerce Commission fixing at $7.50 per car the charge which carriers may make for services rendered in connection with shipments of citrus fruit from California to the East, which, being pre-cooled and pre-iced by the consignors, require no re-icing *en route*, will not be disturbed by the courts on the theory that the carriers were thereby required to haul the ice without reasonable compensation, where the Commission evidently considered that the hauling of the ice was so much a part of the haul of the pre-cooled freight that the expense could properly be treated as included or absorbed in the rate on the fruit itself, and the revenue received by the carriers is more than that derived from a car of standard refrigeration, without corresponding increase in cost.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

[No. 590.]

Argued December 1 and 2, 1913. Decided January 26, 1914.

APPEAL from the United States Commerce Court to review a decree dismissing the petition in a suit attacking an order of the Interstate Commerce Commission with reference to the transportation of pre-cooled citrus fruits. Affirmed.

See same case below, 204 Fed. 647.

Statement by Mr. Justice Lamar:

In 1909, associations, representing California fruit growers, filed with the Commerce Commission complaints against numerous railroad companies, attacking the freight and refrigeration charges on citrus fruit shipped from California to Eastern points. Much testimony was taken, from which it appeared that the orange crop amounted to about 50,000 cars per annum, of which the 20,000 shipped in warm weather required some form of refrigeration in order to keep the fruit in condition for use at the end of the journey. At the close of the first hearing, June 11, 1910, the Commission held (19 Inters. Com. Rep. 148) that $1.15 per cwt. was a reasonable freight rate on oranges. Other questions in the case were postponed until January 14, 1911, when the Commission made a report (20 Inters. Com. Rep. 106) as to the reasonableness of the carriers' charges of $62.50 per car for refrigeration and $30 for services in shipments pre-cooled by the consignor.

The Commission found that in refrigeration by the carriers they furnished all the ice and performed all of the services, including re-icing *en route*. It found that there was a total of about 11 tons of ice furnished, but, owing to the melting, the average weight of the ice hauled was 8,000 lbs., the freight on which to Chicago was $.25 per 100. It cost something to repair the bunkers, and the Commission recognized the right to include an additional sum to cover risk and profit.

[201] The total revenue of $345.30 from such shipments was made up of the following items:

Freight on 27,200 lbs. of oranges @ $1.15		$312.80
Cost of 11 tons of ice	$30	
Freight on 8,000 lbs. average weight of ice hauled @ $ .25	20	
Damage to bunkers	5	
Sum to cover risk and profit	7.50	
		62.50
Gross receipts		$375.30
Less cost of ice		30.00
Freight and refrigeration charges		$345.30

The Commission found that the charge of $62.50 for refrigeration services was reasonable.

It further appeared that the government had conducted certain experiments with a view of determining whether an advantage would not de derived from pre-cooling the fruit before the bunkers were filled with ice. There was testimony that the carriers had reached the conclusion that if the fruit was pre-cooled before the movement of the car began, there would be a corresponding saving in the amount of ice needed in the bunkers. They accordingly had erected plants at which the fruit could be pre-cooled, and included such pre-cooling service in the regular refrigeration charge of $62.50.

Certain shippers claimed that better results were obtained where the fruit was pre-cooled immediately after it was taken from the grove and before it was placed in the

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car. They therefore adopted a method in which the shipper chills the fruit, cools the car, furnishes the ice, and fills the bunkers at a cost to himself of $32.50. The carrier, for its services in connection with hauling such pre-cooled shipment, charged $30, intending thereby to make the rates on pre-cooled fruits the same, whether the [202] pre-cooling was by the shipper or the carrier. In determining whether this $30 was a reasonable charge for service rendered by the carrier in hauling fruit pre-cooled by the shipper, the Commission said (20 Inters. Com. Rep. 120) that no re-icing was necessary *en route*, and that "it would be a liberal estimate to put the average weight of ice during the entire journey at 5,000 lbs. For the hauling of this ice the carriers are entitled to fair compensation, as they are in the case of standard refrigeration." There is also an "expense in providing and keeping in repair the ice bunkers. . . . The carrier is, therefore, entitled to this additional cost, which is about $5 per car per trip one way." (Ibid.)

Where the fruit is pre-cooled by the shipper, the boxes are packed so much closer together that the load is one sixth greater than in case of shipments pre-cooled and refrigerated by the carrier. The result is that the revenue from a car of fruit pre-cooled by the shipper would be—

Freight on 33,000 lbs. of oranges at $1.15	$379.50
Freight on 5,000 lbs. of ice at 25 cents per hundred	12.50
Damages to bunkers (and profit allowed?)	7.50
	$399.50

or, $54 more than the revenue of $345.30 from a car pre-cooled and refrigerated by the carrier.

The Commission further said: "As bearing upon the reasonableness of the rate, the carriers showed the cost of the movement of these oranges per gross ton,—that is, per ton of combined weight of car and of contents, as compared with other articles,—claiming that this was the true basis upon which to fix rates. So treating these pre-cooled shipments, it will be found that the carrier receives more per gross ton for handling the pre-cooled car than for either the ventilated or the refrigerated shipment. By every canon of ratemaking which has been applied by carriers in the past, or which is relied upon by them now, [203] these pre-cooled shipments, at the standard rate, without additional compensation, are better business than either the ventilated or the refrigerated movement. Clearly, these growers who have devised and perfected this system of shipment should not be compelled to pay for the privilege of using it more than the fair cost to the carrier of providing the additional facilities which are not included in the ventilated rate, with a fair profit."

The report concluded as follows: "We are of the opinion that the pre-cooling charge of $30 per car is unreasonable, and that this charge should not exceed $7.50 per car, . . . but the defendants may, as a condition of making this charge, require that pre-cooled cars be loaded seven tiers wide and two tiers high, and may provide by their tariffs a proper minimum to accomplish this result, the amount of which would depend upon the length of the car." 20 Inters. Com. Rep. 121, 123.

The carriers, in obedience to this order, put in a tariff of $7.50 for pre-cooling services, but at once filed another tariff, effective July, 1911, reciting that "the privilege heretofore permitted to shippers of citrus fruit to pre-ice carload shipments is withdrawn, the carriers retaining and exercising the exclusive right and control of furnishing and doing all icing and refrigeration of citrus fruit in all cases where shipper does not specifically request or direct shipments to move solely under ventilation."

Immediately thereafter the orange-growers associations filed proceeedings to cancel this withdrawal tariff, and to compel the carriers to continue to extend to shippers the old privilege of pre-cooling at the new rate of $7.50 At the hearing the evidence and report of the Commission in the former case were stipulated into the record, and, on April 8, 1912 (23 Inters. Com. Rep. 267, 271), the Commission held that the shippers had the right to the pre-cooling [204] privilege, and again ruled that $7.50 was a reasonable charge for the service rendered by the carriers.

The railroad companies then filed a petition in the commerce court attacking the original order of January 14, 1911 (fixing $7.50 as a reasonable charge on pre-cooled shipments), and the last order of April 8, 1912 (requiring the roads to permit pre-cooled shipments at that sum), contending that shippers had no right to ice the bunkers. They also insisted that the $7.50 rate was confiscatory, and did not equal the $17.50, which the Commission itself had found to be the actual cost of services rendered in connection with pre-cooled shipments. The carriers thereupon prayed that both orders should be annulled and set aside.

The commerce court (204 Fed. 647) adopted the finding of the Commission that in pre-cooled shipments the revenue was $54 greater than in the railroad's method

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of refrigeration, and concluded by saying that, in view of that fact, "we do not think that the petitioners have any valid complaint to make of the charge of $7.50 per car, established by the Commission." It further held that under the facts appearing in the record, the shipper had the right to furnish the ice in pre-cooled shipments, and thereupon it dismissed the petition. The case was then brought here by appeal.

Mr. Gardiner Lathrop argued the cause, and, with Messrs. W. F. Herrin, Robert Dunlap, T. J. Norton, A. S. Halsted, and C. W. Durbrow, filed a brief for appellants:

Icing of the carrier's equipment for the purpose of furnishing refrigerated cars is a part of the transportation service.

Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; Re Charges for Transportation of Fruit, 11 Inters. Com. Rep. 129; Truck Farmers' Asso v. Northeastern R. Co. 6 I. C. C. Rep. 295; Florida Fruit & Vegetable Shippers' Protective Asso. v. Atlantic Coast Line R. Co. 14 Inters. Com. Rep. 476; Albree v. Boston & M. R. Co. 22 Inters. Com. Rep. 303; Waxelbaum & Co. v. Atlantic Coast Line R. Co. 12 Inters. Com. Rep. 178; Johnson v. Toledo, S. & M. R. Co. 133 Mich. 596, 103 Am. St. Rep. 464, 95 N. W. 724; 4 Elliott, Railroads, § 1474, p. 162; 2 Hutchinson, Carr. 3d ed. § 505, pp. 549 et seq.; C. C. Taft Co. v. American Exp. Co. 133 Iowa, 522, 10 L.R.A.(N.S.) 614, 119 Am. St. Rep. 642, 110 N. W. 897; New York, P. & N. R. Co. v. Cromwell, 98 Va. 227, 49 L.R.A. 462, 81 Am. St. Rep. 722, 35 S. E. 444, 7 Am. Neg. Rep. 508; St. Louis, I. M. & S. R. Co. v. Renfroe, 82 Ark. 143, 10 L.R.A.(N.S.) 317, 118 Am. St. Rep. 58, 100 S. W. 889; St. Louis S. W. R. Co. v. A. A. Jackson & Co. 55 Tex. Civ. App. 407, 118 S. W. 853; McLean v. Gulf & I. R. Co. — Tex. Civ. App. —, 118 S. W. 578; Missouri, K. & T. R. Co. v. McLean, 55 Tex. Civ. App. 130, 118 S. W. 161.

The shipper is not legally entitled to perform any part of refrigeration without the carrier's consent.

Re Charges for Transportation of Fruit, 11 Inters. Com. Rep. 140; Louisville & N. R. Co. v. West Coast Naval Stores Co. 198 U. S. 483, 497, 498, 49 L. ed. 1135, 1140, 1141, 25 Sup. Ct. Rep. 745; Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; Arlington Heights Fruit Exch. v. Southern P. Co. 20 Inters. Com. Rep. 106.

Carriers, in undertaking to transport perishable commodities such as citrus fruit, have, under the law, imposed upon them the duty to provide suitable equipment and to provide proper appliances, and to actually discharge the duty of refrigerating these shipments in a proper manner. If they are lacking in any of these respects, or have at any time failed to discharge these obligations, the shipper's right to relief is found in the courts, because the Commission has not been vested with judicial power to determine these questions, or to enforce the shipper's rights in these respects.

Interstate Commerce Commission v. Northern P. R. Co. 216 U. S. 538, 54 L. ed. 608, 30 Sup. Ct. Rep. 417.

The Commission is not given the power to make unduly discriminating orders or regulations, or such as would require the carrier to violate the spirit of the law. Such an order would be invalid and therefore not binding, and such invalidity might be set up by the carrier, as its business would be injuriously affected.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 698, 699, 43 L. ed. 858, 864, 865, 19 Sup. Ct. Rep. 565.

Pre-icing the car is a part of "transportation."

Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 47, 56 L. ed. 83, 87, 32 Sup. Ct. Rep. 22; Consolidated Forwarding Co. v. Southern P. Co. 9 Inters. Com. Rep. 182; Re Charges for Transportation of Fruit, 10 Inters. Com. Rep. 360, 11 Inters. Com. Rep. 129.

Would a shipper have the right to force his own car or equipment upon the carrier without the carrier's consent, and demand an allowance therefor? Clearly not.

Central Stock Yards Co. v. Louisville & N. R. Co. 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113, 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339.

The law enjoins upon the carrier the obligation of furnishing services necessary in the refrigeration of the car, and imposes upon the carrier the obligation of answering to the shipper in the event the services are not properly performed. Therefore, it cannot be held that the shippers must assume this responsibility, because the law says they do not assume the same, and the carriers cannot shirk the responsibility, but must accept it, and therefore must necessarily perform these services themselves in order to insure that they will be properly performed, and the risk of liability where the services are performed by another thus eliminated.

1 Wyman, Pub. Service Corp. § 796, p. 669, note 1, and cases cited; Atlantic Coast Line R. Co. v. Geraty, 20 L.R.A.(N.S.) 310, 91 C. C. A. 602, 166 Fed. 10; Calender-Vanderhoof Co. v. Chicago, B. & Q. R. Co. 99 Minn. 295, 109 N. W. 402; Udell v. Illinois C. R. Co. 13 Mo. App. 254; Mathis v. Southern R. Co. 65 S. C. 271, 61 L.R.A.

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824, 43 S. E. 684; Chicago & A. R. Co. v. Davis, 159 Ill. 53, 50 Am. St. Rep. 143, 42 N. E. 382; International & G. N. R. Co. v. Welbourne, — Tex. Civ. App. —, 113 S. W. 780; St. Louis, I. M. & S. R. Co. v. Cumbie, 101 Ark. 172, 141 S. W. 939; Pennsylvania R. Co. v. Orem Fruit & Produce Co. 111 Md. 356, 73 Atl. 571; McConnell Bros. v. Southern R. Co. 144 N. C. 87, 56 S. E. 559; St. Louis, I. M. & S. R. Co. v. Renfroe, 82 Ark. 143, 10 L.R.A.(N.S.) 317, 118 Am. St. Rep. 58, 100 S. W. 889.

Common carriers have the right to make reasonable rules and regulations for the conduct of their business, governing the use of their cars, and the manner of receipt, transportation, delivery, and care of freight while in their custody.

Harp v. Choctaw, O. & G. R. Co. 61 C. C. A. 405, 125 Fed. 445; Robinson v. Baltimore & O. R. Co. 64 C. C. A. 281, 129 Fed. 753; Platt v. Lecocq, 15 L.R.A.(N.S.) 558, 85 C. C. A. 621, 158 Fed. 724; 2 Hutchinson, Carr. 3d ed. §§ 1033, 1077.

There is always a presumption in favor of the reasonableness of such rules and regulations, and that they are for the public advantage, and do not conduce to the prejudice of particular individuals.

2 Hutchinson, Carr. 3d ed. § 943; Platt v. Lecocq, 15 L.R.A.(N.S.) 558, 85 C. C. A. 621, 158 Fed. 730.

The reasonableness of any rule or regulation of a carrier is a question of law, to be determined by the court.

Pullman Car. Co. v. Krauss, 145 Ala. 395, 4 L.R.A.(N.S.) 103, 40 So. 399, 8 Ann. Cas. 218; Gregory v. Chicago & N. W. R. Co. 100 Iowa, 345, 69 N. W. 532; Central of Georgia R. Co. v. Motes, 117 Ga. 923, 62 L.R.A. 507, 97 Am. St. Rep. 223, 43 S. E. 990, 14 Am. Neg. Rep. 13; Illinois C. R. Co. v. Whittemore, 43 Ill. 423, 92 Am. Dec. 138, 8 Am. Neg. Cas. 157; Vedder v. Fellows, 20 N. Y. 130; Louisville, N. & G. S. R. Co. v. Fleming, 14 Lea, 145.

In order that there might be uniformity and certainty, the interstate commerce law was so amended in 1910 as to enable shippers and others to secure a ruling from the Commission and a final judicial determination, through the commerce court and this court, if necessary, of the justness and reasonableness of any rule, regulation, or practice of the carrier which might be drawn in question. But such legislation was for the purpose of insuring certainty and uniformity in respect to the rules and regulations of the carrier, and enforcement of the same.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 505, 57 L. ed. 314, 319, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 649, 57 L. ed. 683, 687, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397.

Inasmuch as Congress could not vest the Commission with arbitrary power to proceed to make a new rule or regulation for the carriers except such as would be in accordance with principles of the common or statutory law, it is also obvious that when the rule or regulation prescribed by the Commission is challenged in a direct proceeding in court, the reasonableness or validity of such rule or regulation becomes also a question of law which the courts alone are competent ultimately and finally to decide. This would follow even if the statute had not provided therefor.

Sabre v. Rutland R. Co. 86 Vt. 347, 85 Atl. 693; Bessette v. Goddard, — Vt. —, 88 Atl. 1.

To say that the Commission is the final judge of the controversy, and that it has the power to determine for itself, according to its own notions, whether a regulation of a carrier, involving the use of its property or the performance of its duty, is reasonable or not, and in conformity to the standard fixed by the statute or not, and that the courts, which, under the Constitution, are specially vested and intrusted with the power of construing and applying the law, have no authority or power to review the action or determination of the Commission, is simply to say that the Commission is supreme when determining its own authority and functions. The court proceedings authorized by the statute to set aside or annul an order of the Commission would then be wholly useless and unnecessary, and the provision would be entirely illusory.

United States v. Dickson, 15 Pet. 162, 10 L. ed. 697.

If the Commission has misconceived or misapplied the law or any principle thereof, in condemning an existing rule or regulation of the carrier, or in substituting a new rule or regulation of its own therefor, its order would be clearly subject to challenge as being unauthorized and unlawful.

Interstate Commerce Commission v. Northern P. R. Co. 216 U. S. 538, 544, 54 L. ed. 608, 609, 30 Sup. Ct. Rep. 417; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185.

The determination of an executive or administrative board or commission could not, under the Constitution, be made conclusive upon the courts on legal questions, at least, and operate as *res judicata* so as to prevent a Federal court, in an appropriate proceeding, from determining the matter it-

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self when presented, and the rights of the parties before it.

Prentis v. Atlantic Coast Line R. Co. 211 U. S. 211, 227, 230, 53 L. ed. 150, 159, 160, 29 Sup. Ct. Rep. 67.

It is not the function or office of an executive or administrative board to ignore, amend, or replace the law, whether common or statutory.

Morrill v. Jones, 106 U. S. 466, 27 L. ed. 267, 1 Sup. Ct. Rep. 423.

The question submitted resolves itself into one of law. The Commission has committed an error of law in rendering its decision, and has entered an order which transcends its power and authority. The court should have determined these questions of law as an original proposition, and not have felt constrained to accept the conclusions, findings, and order of the Commission as final.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108.

Carriers are entitled to a reasonable profit for each particular service rendered.

Southern R. Co. v. St. Louis Hay & Grain Co. 214 U. S. 297, 53 L. ed. 1004, 29 Sup. Ct. Rep. 678; Interstate Commerce Commission v. Stickney, 215 U. S. 98, 54 L. ed. 112, 30 Sup. Ct. Rep. 66; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 93, 94, 46 L. ed. 92, 102, 103, 22 Sup. Ct. Rep. 30.

Mr. F. H. Wood also argued the cause for appellants.

Mr. Blackburn Esterline argued the cause, and, with Solicitor General Davis, filed a brief for the United States:

The commerce court promptly and rightly rejected appellants' argument to the effect that the Commission's order would result in gross discrimination against the small shipper.

Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 54 L. ed. 946, 30 Sup. Ct. Rep. 651.

The action of the Commission is in favor of, rather than against, the carriers' interests.

Ibid.

Mr. Patrick J. Farrell argued the cause and filed a brief for the Interstate Commerce Commission.

Mr. William E. Lamb argued the cause, and, with Messrs. George E. Farrand, Rush C. Butler, and Stephen A. Foster, filed a brief for the Arlington Heights Fruit Exchange:

If the services are in fact transportation services, the carrier cannot compel the shipper to permit the performance thereof by the carrier unless the shipper makes reasonable request therefor.

Chicago, I. & L. R. Co. v. Reyman, — Ind. —, 73 N. E. 587, 166 Ind. 278, 76 N. E. 970; Texas C. R. Co. v. Dorsey, 30 Tex. Civ. App. 377, 70 S. W. 575; Densmore Commission Co. v. Duluth, S. S. & A. R. Co. 101 Wis. 563, 77 N. W. 904; Davenport Co. v. Pennsylvania R. Co. 173 Pa. 398, 34 Atl. 59; Hutchinson, Carr. 3d ed. § 505.

The orders of the Commission were fully supported by substantial evidence.

Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 547, 56 L. ed. 311, 32 Sup. Ct. Rep. 108; Southern P. Co. v. Interstate Commerce Commission 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 470, 54 L. ed. 287, 30 Sup. Ct. Rep. 155; Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441–464, 51 L. ed. 1128–1137, 27 Sup. Ct. Rep. 700.

Mr. Justice Lamar, after making the foregoing statement of facts, delivered the opinion of the court:

There are many cases between shipper and carrier in which each insists that the other is bound to furnish service or facilities connected with the transportation of freight. The present record, however, presents an instance where both parties are contending for the privilege of supplying an article needed in the proper shipment of fruit,—the consignor claiming that icing is a necessary part of the loading, which he is authorized to supply; while the carriers insist that icing is a part of refrigeration, by statute made transportation, which they are bound to provide and for which they are entitled to collect reasonable compensation. The determination of these conflicting [213] claims necessitates an examination of the two methods under which, in warm weather, oranges are shipped from California to the East.

In what is called standard refrigeration, the boxes, of the aggregate weight of 27,200 pounds, are so placed as to leave spaces between them wide enough to admit of a free circulation of air chilled by ice in the bunkers. Subsequently the carriers put in a system of pre-cooling, under which, after the cars had been loaded, they were taken from the point of shipment to refrigerating plants owned by the carriers, where whole

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trainloads are pre-cooled at one time by means of blasts of very cold air driven into the car through and around the boxes. At the end of three or four hours the fruit is sufficiently chilled, the bunkers are then filled with about 10 tons of ice, furnished by the carrier, and the train is started on its journey to the East,—the bunkers being re-iced from time to time as needed at stations along the route. For this entire service the Commission held that the carrier's charge of $62.50 was reasonable.

A different method obtains where the icing of the car is done by the shipper at his own expense. In that class of cases the oranges are taken from the grove directly to a cold room having a temperature of about 33 F. There the boxes are allowed to remain for periods of from twenty-four to forty-eight hours, and until the fruit is chilled to the center. When thus pre-cooled, the boxes are ready for shipment. A refrigerator car is then placed on the track opposite the door of the cold room of the warehouse with which it is connected by a collapsible inclosed passageway, so arranged as to exclude the outside air, while at the same time allowing that from the cold room to enter and cool the interior of the car. Through this passageway the oranges are trucked from the warehouse to the car, and, as they have been chilled to the center, the boxes are packed close together, forming a solid mass weighing [214] 33,000 lbs., with a temperature of about 35 F. The doors and vents of the car are promptly and tightly closed, the bunkers are immediately filled with unusually large cakes of ice, in order to reduce the rate of melting, and the fruit is then forwarded under a filed tariff which provides that re-icing is unnecessary, and that the shipper will make no claim for damage occasioned by failure to re-ice in transit. For their services in connection with such pre-cooled shipments the carriers were allowed to charge $7.50, but the Commission refused to permit them to charge for the ice needed to keep the fruit cool between warehouse and destination.

1. This ruling is attacked by the appellants, who contend that icing is a part of refrigeration, which § 1 of the Hepburn bill† makes a part of the transportation they are bound to furnish upon reasonable request. They insist that in order to meet the duty thus imposed by statute, they have been compelled at great expense to erect immense plants where trainloads of fruit can be cooled, and where an enormous quantity of ice is manufactured for refrigeration purposes. They argue that, being bound to furnish all necessary icing and re-icing, and having at great cost prepared to furnish the supply, it is not only just, but a right given by statute, that they should be allowed to provide all needed icing or refrigeration at a rate to be approved by the Commission.

Whatever transportation service or facility the law requires the carrier to supply they have the right to furnish. They can therefore use their own cars, and cannot be compelled to accept those tendered by the shipper on [215] condition that a lower freight rate be charged. So, too, they can furnish all the ice needed in refrigeration; for this is not only a duty and a right, under § 1 of the Hepburn bill, but an economic necessity, due to the fact that the carriers cannot be expected to prepare to meet the demand, and then let the use of their plants depend upon haphazard calls, under which refrigeration can be demanded by all shippers at one time and by only a few at another.

This contention was sustained by the Commission, which recognized that "the shipper has no right to provide refrigeration himself to-day and call upon the railroad company for that service to-morrow. To permit such a course is to demoralize the service of the defendants, and to prevent them from discharging their duty with economy and efficiency. . . . It is the duty of the carrier to furnish refrigeration upon reasonable demand, and in so far as the furnishing of that refrigeration is a part of the service rendered by the carrier, the carrier may insist upon its right to furnish that service exclusively."

2. But of course this does not mean, that because the carriers have ice on hand, they can compel the shipper to have his fruit refrigerated, when, on account of the state of the weather, or for other cause, he prefers to have it forwarded under ventilation only. When, however, ice is actually needed and is actually used, the question arises as to whether icing is a part of preparation which can be done by the shipper, or a part of refrigeration (transportation) which, by statute, the carrier has the exclusive right to furnish.

To this question no answer can be given that will apply in all cases. For in the shipment of fruit, as in that of other articles, it is impossible to lay down a rule

†. . . The term "transportation" shall include . . . all services in connection with the receipt, delivery, . . . ventilation, refrigeration, or icing . . . of property transported; and it shall be the duty of every carrier . . . to provide and furnish such transportation upon reasonable request therefor. (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1285.)

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which definitely fixes what loading includes and by whom it must be done. Nor is there any consistent practice on this subject, since from reported cases it appears that the [216] claims of the parties are based rather on interest than on some definite principle. Sometimes the shipper, as here, insists on the right to load and provide necessary appliances. At other times he demands that such service and appliances be furnished by the railroad company. Conversely, the carriers sometimes claim, as here, the right to furnish service and facilities, while in other cases insisting that one or both must be supplied by the consignor. Cf. National Wholesale Lumber Dealers' Asso. v. Atlantic Coast Line R. Co. 14 Inters. Com. Rep. 154; Schultz-Hanson Co. v. Southern P. Co. 18 Inters. Com. Rep. 234; Re Allowance for Stoves & Lining of Cars, 26 Inters. Com. Rep. 681; Re Western Classification, 25 Inters. Com. Rep. 497.

These inconsistent and conflicting demands serve to emphasize the fact that, before the haul actually begins, the right or duty of each party, where not absolutely fixed by statute, must be decided with reference to the special facts of each case.

As a general rule, the carrier loads all freight tendered in less than carload lots, while the consignor loads in all cases where, for his convenience, the car is placed at his warehouse or on public team tracks. This practice has grown up not only because the work can be more satisfactorily performed by the owner, but also because it is impossible for railroad companies economically to load cars at private warehouses or on those tracks where vehicles of the consignor or consignee come and go at the direction of the owner. 25 Inters. Com. Rep. 490.

3. But loading may involve more than the mere placing of the freight on the car, since the character of the shipment may be such as to require the furnishing and placing of stakes, racks, blocks, and binders needed to make the transportation safe; or, the freight may be such as to require special covering, packing, icing, or heating, in order to preserve the merchandise in condition fit for use at the end of the journey. Who is to furnish these needed facilities may be quite as uncertain as who is to place the [217] freight on the car; and can only be determined by considering the character of the shipment, the place where the loading begins, and who can most economically perform the service required.

Neither party has a right to insist upon a wasteful or expensive service for which the consumer must ultimately pay. The interest of the public is to be considered as well as that of shippers and carriers,—their rights in turn having been adjusted by a reduction in the rate, if the loading is done in whole or in part by the shipper; and by an increase in the rate where the loading is done in whole or in part by the carrier. But, by whomsoever done, the loading must be such as to fit the freight for shipment; and when—by statutory requirement, by valid order of the Commission, or by the carriers' voluntary act—the car is placed at the consignor's warehouse to be loaded by the shipper, he may not only put the freight on the car, but may do all other acts required to fit the freight for its proper shipment,—at least, until, under a tariff regularly filed, the carrier offers to do what is necessary to secure or preserve what has thus been placed on its car for transportation. The refrigeration and pre-cooling offered by the carrier to shippers of pre-cooled fruit were found not to be the equivalent of the method adopted by the shipper.

4. In the present case the carriers concede that in pre-cooling shipments the consignor had the right to take all of the steps for preparation except the last. They concede that he had the right to pre-cool the fruit, to pre-cool the car, to place the boxes on board the car, to stop the vents, and seal the doors. But they deny that he could ice the bunkers, even though that was necessary to the complete preparation, or loading, needed in that particular class of shipments, and without which the fruit would be damaged by the rise in temperature, occurring during the time the car is being hauled from the warehouse of the shipper to the icing station of the carrier. Such delay in [218] filling bunkers would nullify most of the advantage of the expensive chilling of fruit and car necessary in the pre-cooling shipments,—permitted, if not originally encouraged, by the carrier. The privilege was withdrawn,—not because the railroad companies were in position to furnish the ice at the proper time and place, but solely because the Commission had reduced the carriers' charge on pre-cooled oranges from $30 to $7.50 per car.

The icing may have been so related to refrigeration as to authorize the carriers to render that service. But manifestly they could not be expected to build refrigerating plants near each warehouse; and, the carrier not being in a position to do such icing, the consignor had the same right to provide the necessary supply that he would have had to ice a shipment of fish, to furnish and place standards to secure lumber on an open car, or to fasten to the floor articles which otherwise might be damaged by the jerks and jolts of a moving train. In the absence, therefore, of the car-

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riers' offer, under a filed tariff, to furnish ice at the time and place needed in pre-cooled shipments, or to substitute a service of equal value at practically the same cost, they had no right to prevent the consignor from filling the bunkers so as to fit the freight for proper transportation.

5. The tariffs, withdrawing the pre-cooling privilege after July, 1911, would have changed the practice, recognized by the carriers themselves and actually approved by the Commission's order fixing $7.50 for the carrier's services in connection with such practice. As the withdrawal "affected a practice and a rate," the Commision had power to cancel that tariff and to require the carriers to conform to the order establishing the $7.50 charge in pre-cooled shipments. Such an order was justified by the provisions of § 15 [of 1887, 24 Stat. at L. 384, chap. 104, U. S. Comp. Stat. 1901, p. 3165 as amended by § 4] of the Hepburn act (34 Stat. at L. 589, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1297), which authorizes the Commission, after a hearing, to determine whether rates, or practices affecting rates, are unreasonable, to determine what practice in respect to transportation [219] is just, and to require the carrier to conform to those prescribed by the Commission.†

6. The appellants insist, however, that even if the shippers are entitled to furnish the ice, the carriers are entitled to pay for hauling it. They claim that the charge of $7.50 is confiscatory because it does not cover what the Commission found to be the actual cost of the carriers' pre-cooling service. They point to the fact that the rate of $1.15 per cwt. on oranges was found to be reasonable, without regard to the character of the shipment, and whether the fruit moved under ventilation, standard refrigeration, or pre-cooling shipment,—additional sums being allowed for furnishing or hauling ice needed in transportation of the fruit. They admit that more revenue is derived from a carload of pre-cooled fruit, weighing 33,000 lbs., than from a car where the load weighs 27,200, but insist that the greater revenue is because of a greater service rendered and a greater weight hauled. On the authority of Interstate Commerce Commission v. Stickney, 215 U. S. 98, 105, 54 L. ed. 112, 113 30 Sup. Ct. Rep. 66, they contend that the receipt of a fair return for carrying 33,000 lbs. of fruit affords no reason for compelling them to haul 5,000 lbs. of ice 2,000 miles for nothing, when, as found by the Commission, the actual cost of the haul is $12.50.

The order does not show the items going to make up the $7.50 charge. In the brief for the Commission it was [220] said to include $5 for damage to the bunkers and $2.50 for profit. And since the report shows that the carriers were also entitled to $12.50 for hauling the ice, a charge of only $7.50 for a $20 service would at first blush appear to be not only unreasonable, but confiscatory. But the order is to be read in connection with the report of which it forms a part. When so read, it is evident that the Commission did not intend to require the carriers to haul 5,000 lbs. of ice without reasonable compensation, but considered that the haul of the ice was so much a part of the haul of the pre-cooled freight, that the expense could properly be treated as included or absorbed in the rate on the fruit itself. Cf. Farrar Lumber Co. v. Nashville, C. & St. L. R. Co. 25 Inters. Com. Rep. 25; Swift & Co. v. Missouri P. R. Co. 22 Inters. Com. Rep. 385.

The cost of such haul was $12.50,—equivalent to 3.8 on the 33,000 lbs. of oranges in a pre-cooled shipment, and as a mere matter of figures, it was immaterial to the carriers whether they were permitted to charge $1.11.2 on the fruit and $12.50 for the ice, or $1.15 on the fruit alone without any distinct charge for transporting the ice. In either event, the revenue received was more than that derived from a car of standard refrigeration, without corresponding increase of cost.

7. The claim that the order modifies the established rate of $1.15, and reduces it to $1.11.2 in pre-cooled shipments, thereby discriminating against the small fruit grower and those who forward under ventilation, or under the carriers' method of refrigeration, is not an issue presented by any assignment of error in this record, even if the carriers were in position to make such a contention. Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 109, 54 L. ed. 946, 957, 30 Sup. Ct. Rep. 651. There is no claim in this case that such rate, thus distributed, is unreasonable.

8. What is a proper rate on fruit in pre-cooling shipments, or a fair charge for

†Sec. 15. The Commission is authorized . . . whenever, after full hearing . . . it shall be of the opinion that any of the rates or charges . . . for the transportation of persons or property . . . or that any regulations or practices . . . affecting such rates are unjust or unreasonable . . . to determine and prescribe what will be the just and reasonable rate . . . and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, . . . and shall conform to the regulation or practice so prescribed.

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hauling necessary ice or rendering other transportation services, are all rate-making [221] matters committed to the Commission. It may determine what shall be the difference in rate between carload and less than carload lots; it may decide whether the difference in revenue, due to a difference in method of loading, warrants a difference in the rate on carload shipments of the same article. It may prescribe the form in which schedules shall be prepared and arranged (§ 6), and may approve tariffs stating that the single rate includes both the line haul and accessorial services absorbed in the rate. Conversely, it may prescribe a tariff fixing a through rate which includes not only the haul of the fruit, but the haul of the ice necessary to keep the fruit in condition. All these are matters committed to the decision of the administrative body, which, in each instance, is required to fix reasonable rates and establish reasonable practices. The courts have not been vested with any such power. They cannot make rates. They cannot interfere with rates fixed or practices established by the Commission unless it is made plainly to appear that those ordered are void. Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 547, 56 L. ed. 311, 32 Sup. Ct. Rep. 108. No such showing is made in this case. The decree must therefore be affirmed.

FRANK N. THOMAS, Petitioner,
v.
CONRAD H. MATTHIESSEN.

(See S. C. Reporter's ed. 221–236.)

Foreign corporations — liability of nonresident stockholder.

1. A New York stockholder in an Arizona corporation formed to carry on business in both Arizona and California, who, before incorporation, signed a writing reciting the intent of the subscribers to form such corporation for the purpose of acquiring a site in California, and building a hotel thereon, must be deemed to have assented to be bound by the provisions of Cal. Civ. Code, § 322, making each stockholder in a corporation, domestic or foreign, doing business in the state, personally liable for such proportion of the corporate debts contracted while he is such stockholder as the amount of his stock bears to the whole subscribed, although at the time of subscribing he agreed with the company that he should be exempt from personal liability, and that neither the corporation nor its officers should have power to subject him or the other stockholders to it, and such exemption was expressed also in the certificate of incorporation.

[For other cases, see Corporations, XII. d, in Digest Sup. Ct. 1908.]

Foreign corporations — liability of nonresident stockholder — where enforceable.

2. The personal liability of a nonresident stockholder of a foreign corporation doing business in California, under Cal. Civ. Code, § 322, which makes him individually and personally liable for such proportion of the corporate debts contracted while he is such stockholder as the amount of his stock bears to the whole subscribed, and supposes the action against him to be brought "upon such debt," may be enforced outside of the California courts.

[For other cases, see Corporations, XII. d, in Digest Sup. Ct. 1908.]

Corporations — liability of stockholders — principal debtor or surety.

3. Liability as a principal debtor, and not as surety, is what is imposed upon stockholders of corporations doing business in California, by Cal. Civ. Code, § 322, making them individually and personally liable for such proportion of the corporate debts contracted while they are such stockholders as the amount of their stock bears to the whole subscribed.

[For other cases, see Corporations, IX. e, 1, in Digest Sup. Ct. 1908.]

Bills and notes — payment — application of bank deposit.

4. Corporate notes are not discharged *pro tanto* by the fact that the corporation has deposits in the bank that holds the notes.

[For other cases, see Bills and Notes, VII. b, 2; Banks, I. d; Payment, III., in Digest Sup. Ct. 1908.]

[No. 171.]

Argued January 19, 1914. Decided February 2, 1914.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of New York, dismissing the complaint in a suit to enforce the statutory liability of a stockholder in a foreign corporation. Reversed.

See same case below, 113 C. C. A. 101, 192 Fed. 495.

The facts are stated in the opinion.

Mr. **Alfred Adams Wheat** argued the cause, and, with Mr. Philip Ashton Rollins, filed a brief for petitioner:

This case is controlled by the decision in

NOTE.—On the right to enforce stockholder's liability outside of state of incorporation—see notes to Cushing v. Perot, 34 L.R.A. 737, and Edwards v. Schillinger, 33 L.R.A.(N.S.) 895.

On the effect upon surety or indorser of bank's failure to apply principal's deposit account upon note, see note to Davenport v. State Bkg. Co. 8 L.R.A.(N.S.) 944.

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Pinney v. Nelson, 183 U. S. 144, 46 L. ed. 125, 22 Sup. Ct. Rep. 52, unless a valid ground for distinction be furnished by one of the following facts: (1) That the freedom of the stockholders from individual liability was in this case, pursuant to the provision of the Arizona law, declared in the articles of incorporation, whereas in Pinney v. Nelson it was established by the general law of the state where the corporation was organized; (2) that defendant is not a resident of California; (3) that it was defendant's purpose and intent that his liability as a stockholder be controlled by the law of Arizona.

See also State v. New Orleans Warehouse Co. 109 La. 72, 33 So. 81; Peck v. Noee, 154 Cal. 351, 97 Pac. 865; Thomas v. Wentworth Hotel Co. 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942.

The fact that the articles of incorporation in this case contain a declaration, as authorized by the Arizona law, that the stockholders shall not be personally liable for the debts of the corporation, does not distinguish this case from Pinney v. Nelson.

Terry v. Little, 101 U. S. 216, 25 L. ed. 864; Thomas v. Wentworth Hotel Co. supra; Citizens' Sav. Bank v. Owensboro, 173 U. S. 636, 644, 43 L. ed. 840, 843, 19 Sup. Ct. Rep. 530, 571; Knights of Pythias v. Weller, 93 Va. 613, 25 S. E. 891; Danville v. Danville Water Co. 178 Ill. 306, 69 Am. St. Rep. 304, 53 N. E. 118.

The fact that in this case there is a finding that it was the purpose and intent of the stockholders that their obligations should be controlled by the articles of incorporation and by the laws of Arizona does not distinguish this case from Pinney v. Nelson.

Thomas v. Wentworth Hotel Co. 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942.

The question is: Did defendant contract to assume the liabilities imposed by the California law for debts incurred by the corporation in that state? If so, the place of his residence is not material.

Ibid.

The stockholders' liability imposed by the law of California is contractual in nature.

Kennedy v. California Sav. Bank, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846; Flash v. Conn, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; 26 Am. & Eng. Enc. Law 2d ed. 1020.

Plaintiff pursued the proper remedy in a court of adequate jurisdiction.

Bernheimer v. Converse, 206 U. S. 516, 529, 51 L. ed. 1163, 1174, 27 Sup. Ct. Rep. 755; Whitman v. National Bank, 176 U. S. 559, 563, 44 L. ed. 587, 590, 20 Sup. Ct. Rep. 477; Flash v. Conn, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; Cook, Corp. § 223, note 2; Ferguson v. Sherman, 116 Cal. 173, 37 L.R.A. 622, 47 Pac. 1023; Mills v. Scott, 99 U. S. 25, 25 L. ed. 294; National Park Bank v. Peavey, 64 Fed. 912; Aldrich v. Anchor Coal & Development Co. 24 Or. 32, 41 Am. St. Rep. 831, 32 Pac. 756.

The liability is primary, and not that of a surety.

Mokelumne Hill Canal & Min. Co. v. Woodbury, 14 Cal. 265, 12 Mor. Min. Rep. 6; Davidson v. Rankin, 34 Cal. 503, 13 Mor. Min. Rep. 472; Young v. Rosenbaum, 39 Cal. 646; Sonoma Valley Bank v. Hill, 59 Cal. 107; Faymonville v. McCollough, 59 Cal. 285; Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110; Morrow v. Superior Ct. 64 Cal. 383, 1 Pac. 354; Re California Mut. L. Ins. Co. 81 Cal. 364, 22 Pac. 869; Hyman v. Coleman, 82 Cal. 650, 16 Am. St. Rep. 178, 23 Pac. 62; Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047; Herman v. Hecht, 116 Cal. 553, 48 Pac. 611; Sacramento Bank v. Pacific Bank, 124 Cal. 147, 45 L.R.A. 863, 71 Am. St. Rep. 36, 56 Pac. 787.

A bank, the payee or holder of a note, does not discharge a surety by failing to apply money of the maker which happens to be on deposit at or after the time the note matures.

Strong v. Foster, 17 C. B. 217, 25 L. J. C. P. N. S. 106, 4 Week. Rep. 151; Citizens' Bank v. Elliott, 9 Kan. App. 797, 59 Pac. 1102; Martin v. Mechanics' Bank, 6 Harr. & J. 235; McShane v. Howard Bank, 73 Md. 135, 10 L.R.A. 552, 20 Atl. 776; Citizens' Bank v. Booze, 75 Mo. App. 189; Houston v. Braden, — Tex. Civ. App. —, 37 S. W. 467; Bank of British Columbia v. Jeffs, 15 Wash. 230, 46 Pac. 247; National Mahaiwe Bank v. Peck, 127 Mass. 301, 34 Am. Rep. 368; Voss v. German American Bank, 83 Ill. 599, 25 Am. Rep. 415; National Bank v. Smith, 66 N. Y. 271, 23 Am. Rep. 48; Glazier v. Douglass, 32 Conn. 393.

Plaintiff's failure to prosecute diligently his action against the corporation did not release defendant, even though his liability was merely that of a surety.

Lowman v. Yates, 37 N. Y. 601; Douglass v. Ferris, 138 N. Y. 192, 34 Am. St. Rep. 435, 33 N. E. 1041; McKim v. Williams, 134 Mass. 136; Greenway v. William D. Orthwein Grain Co. 29 C. C. A. 330, 56 U. S. App. 523, 85 Fed. 536; Hunt v. Purdy, 82 N. Y. 486, 37 Am. Rep. 587; Jones v. Allen, 29 C. C. A. 318, 56 U. S. App. 529, 85 Fed. 523; Biggins v. Raisch, 107 Cal. 210, 40 Pac. 333; Monroe County v. Otis, 62 N. Y. 88; Clark v. Sickler, 64 N. Y. 231, 21 Am. Rep. 606.

The judgment should be reversed; and as all the material facts have been stipulat-

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ed and the damages recoverable are a liquidated sum, no new trial should be awarded, and the court below should be directed to render the proper judgment against defendant.

Rathbone v. Kiowa County, 27 C. C. A. 477, 49 U. S. App. 577, 83 Fed. 125; Irvine v. Angus, 35 C. C. A. 501, 93 Fed. 629; Churchill v. Buck, 42 C. C. A. 148, 102 Fed. 38; Ft. Scott v. Hickman, 112 U. S. 150, 28 L. ed. 636, 5 Sup. Ct. Rep. 56; Allen v. St. Louis Nat. Bank, 120 U. S. 20, 30 L. ed. 573, 7 Sup. Ct. Rep. 460; Saltonstall v. Russell, 152 U. S. 628, 38 L. ed. 576, 14 Sup. Ct. Rep. 733.

Mr. Arthur C. Rounds argued the cause, and, with Mr. Harold Otis, filed a brief for respondent:

The decision in Pinney v. Nelson, 183 U. S. 144, 46 L. ed. 125, 22 Sup. Ct. Rep. 52, does not establish the right of the petitioner, the plaintiff below, to a recovery.

The sole question presented to the Supreme Court for its determination was the Federal question whether the state statute was in violation of any of the provisions of the United States Constitution which had been relied upon in the court below. The state court had decided no other question, and had it done so its decision in that respect would not have been open to review.

Mobile, J. & K. C. R. Co. v. Mississippi, 210 U. S. 187, 204, 205, 52 L. ed. 1016, 1024, 1025, 28 Sup. Ct. Rep. 650; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Leonard v. Vicksburg, S. & P. R. Co. 198 U. S. 416, 422, 423, 49 L. ed. 1108, 1111, 25 Sup. Ct. Rep. 750.

General expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.

Carroll v. Carroll, 16 How. 275, 286, 287, 14 L. ed. 936, 941; Northern Nat. Bank v. Porter Twp. 110 U. S. 608, 615, 28 L. ed. 258, 260, 4 Sup. Ct. Rep. 254; Hans v. Louisiana, 134 U. S. 1, 20, 33 L. ed. 842, 849, 10 Sup. Ct. Rep. 504; Leisy v. Hardin, 135 U. S. 100, 135, 34 L. ed. 128, 140, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 574, 575, 39 L. ed. 759, 816, 817, 15 Sup. Ct. Rep. 673; United States v. Wong Kim Ark, 169 U. S. 649, 678, 679, 42 L. ed. 890, 901, 18 Sup. Ct. Rep. 456; Harriman v. Northern Securities Co. 197 U. S. 244, 291, 49 L. ed. 739, 761, 25 Sup. Ct. Rep. 493.

As we read the opinion in the Pinney Case, however, it is not inconsistent with, but rather supports, the decision of the court below upon the present record. As we understand it, the court in that case sought merely to apply to the particular facts there presented the principles relating to conflict of laws which had been elaborately discussed and expounded in the leading cases of Pritchard v. Norton, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102, and Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469, upon which the court relied.

If the parties expressly stipulate that their contract is to be governed by the laws of the jurisdiction in which it is made, or if the contract contains a provision valid under those laws, but invalid under the laws of a neighboring jurisdiction, it cannot fairly be inferred or presumed that the parties intended their contract to be governed by the laws of the other jurisdiction.

Lloyd v. Guibert, L. R. 1 Q. B. 120, 6 Best. & S. 100, 35 L. J. Q. B. N. S. 74, 13 L. T. N. S. 602, 5 Eng. Rul. Cas. 870; Pritchard v. Norton, 106 U. S. 124, 137, 27 L. ed. 104, 108, 1 Sup. Ct. Rep. 102; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. supra.

The court did not hold in Pinney v. Nelson, 183 U. S. 144, 46 L. ed. 125, 22 Sup. Ct. Rep. 52; that the stockholders would have been liable in the absence of such an express charter provision; nor, we submit, did they hold that if such an inference or assumption were inconsistent with the other provisions of the charter, or if it clearly appeared, upon a fair construction of the charter, that the parties in fact contracted "with a view to" or "with reference to" the laws of the incorporating state, the court must nevertheless assume the contrary in order to impose upon the stockholders a liability which they never agreed to assume, and from which they were exempt by the laws of the incorporating state, and by the company's express charter provisions.

See Risdon Iron & Locomotive Works v. Furness [1905] 1 K. B. 314, 74 L. J. K. B. N. S. 243, 21 Times L. R. 179, 10 Com. Cas. 53, 12 Manson, 109, [1906] 1 K. B. 57, 75 L. J. K. B. N. S. 83, 54 Week. Rep. 324, 93 L. T. N. S. 687, 22 Times L. R. 45, 11 Com. Cas. 35; Thomas v. Matthiessen, 113 C. C. A. 101, 192 Fed. 497.

If, upon the principles announced in Pritchard v. Norton, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102, and Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469, the court was justified in the Pinney Case in assuming an intent

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on the part of the stockholders to contract with reference to the California law, upon the same principles, in view of the difference in the provisions of the charter in the present case, the court below (even had the parties not stipulated the fact), would have been bound to find, as it did, that the stockholders in Wentworth Hotel Company intended their obligations to be governed by the laws of Arizona, and by the provisions of the charter of the company, framed thereunder.

In a case like the present, the trial below having been by the court without a jury, these findings of fact, like a special verdict under the common-law practice, are findings of the ultimate facts, and no inferences of fact to the contrary, or which have not been expressly found, are permissible. If these findings support the conclusions of the court, its judgment must stand.

Norris v. Jackson, 9 Wall. 125, 127, 128, 19 L. ed. 608, 609; Miller v. Brooklyn L. Ins. Co. 12 Wall. 285, 297, 20 L. ed. 398, 400; Raimond v. Terrebonne Parish, 132 U. S. 192, 194, 33 L. ed. 309, 310, 10 Sup. Ct. Rep. 57; Collins v. Riley, 104 U. S. 322, 327, 26 L. ed. 752, 754.

The court in New York was not entitled in this case, any more than in any other case involving the construction of a contract, to "read into the contract" an agreement which obviously the parties did not contemplate or make, and which would flatly contradict the express terms of the written charter.

Grover & B. Sewing Mach. Co. v. Radcliffe, 137 U. S. 287, 299, 34 L. ed. 670, 673, 11 Sup. Ct. Rep. 92.

It does not help to refer to the obligation as quasi contractual. Obligations imposed by law are sometimes so described, but with the exception of the common-law duty of a defendant who has been unjustly enriched, to make amends, quasi contractual obligations are dependent on the mandate of a court as evidenced by its judgment, or upon a statutory duty which a sovereign imposes upon those who are subject to its command. (Keener, Quasi Contr. p. 16). Here there is no suggestion of unjust enrichment, and no judgment or statute could reach the defendant to impose a duty upon him unless he was subject to the jurisdiction of the court rendering the judgment, or of the state which enacted the statute.

Buchanan v. Rucker, 9 East, 192, 1 Campb. 65, 9 Revised Rep. 531; Pennoyer v. Neff, 95 U. S. 714, 722, 24 L. ed. 565, 568; Huntington v. Attrill, 146 U. S. 657, 669, 36 L. ed. 1123, 1128, 13 Sup. Ct. Rep. 224; Freeman v. Alderson, 119 U. S. 185, 188, 30 L. ed. 372, 373, 7 Sup. Ct. Rep. 165.

The suggestion that the incorporators of the Wentworth Hotel Company may have proceeded with a view to "evading" the California law requires little consideration. Such a suggestion adds nothing to nor does it detract anything from the force of our argument.

United States v. Isham, 17 Wall. 496, 506, 21 L. ed. 728, 731.

No court outside of California has ever considered that the Pinney Case declared or was authority for any such rule of liability as that for which plaintiff contends.

Risdon Iron & Locomotive Works v. Furness [1905] 1 K. B. 304, 74 L. J. K. B. N. S. 243, 21 Times L. R. 179, 10 Com. Cas. 53, 12 Manson, 109, [1906] 1 K. B. 49, 75 L. J. K. B. N. S. 83, 54 Week. Rep. 324, 93 L. T. N. S. 687, 22 Times L. R. 45, 11 Com. Cas. 35; Coulter Dry Goods Co. v. Rosenbaum, 74 Misc. 579, 134 N. Y. Supp. 487; Thomas v. Matthiessen, 170 Fed. 363, 113 C. C. A. 101, 192 Fed. 495; Thomas v. Wentworth Hotel Co. 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942; Peck v. Noee, 154 Cal. 351, 97 Pac. 865.

If, under any such rule of liability as the plaintiff here contends for, innocent stockholders are chargeable not merely with the liabilities imposed by the law of the domicil of the corporation, but as well with the varying liabilities prescribed by the laws of the various states where the corporation, under its charter powers, may engage in business, then, as the court below well said: "Corporate stock is liable to become in this country an uncertain and even dangerous asset."

Thomas v. Matthiessen, 113 C. C. A. 101, 192 Fed. 495; Leyner Engineering Works v. Kempner, 163 Fed. 608.

The defendant, when he subscribed for his stock, contracted with reference to the laws of Arizona. He did not agree to assume any liabilities under the California law. And the debts which the Hotel Company subsequently contracted in California were not binding upon or enforceable against him as contractual obligations.

Christopher v. Norvell, 201 U. S. 216, 226–230, 50 L. ed. 732, 736–738, 26 Sup. Ct. Rep. 502, 5 Ann. Cas. 740; Relfe v. Rundle (Life Asso. of America v. Rundle) 103 U. S. 222, 226, 26 L. ed. 337, 339; Chicago City R. Co. v. Allerton, 18 Wall. 233, 235, 236, 21 L. ed. 902–904; Morawetz, Priv. Corp. § 874; Nashua Sav. Bank v. Anglo-American Land, Mortg. & Agency Co. 189 U. S. 221, 230, 47 L. ed. 782, 786, 23 Sup. Ct. Rep. 517; Canada Southern R. Co. v. Gebhard, 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363; Glenn v. Liggett, 135 U. S. 533, 548, 34 L. ed. 262, 268, 10 Sup. Ct. Rep. 867; Hawkins v. Glenn, 131 U. S. 319, 322, 33 L. ed. 184, 187, 9 Sup. Ct. Rep. 739;

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Converse v. Hamilton, 224 U. S. 243, 253, 56 L. ed. 749, 752, 32 Sup. Ct. Rep. 415; O'Connor v. Witherby, 111 Cal. 527, 44 Pac. 227; Merrick v. Van Santvoord, 34 N. Y. 216; Converse v. Ætna Nat. Bank, 79 Conn. 169, — L.R.A.(N.S.) —, 64 Atl. 341, 7 Ann. Cas. 75; Leyner Engineering Works v. Kempner, 163 Fed. 605; Risdon Iron & Locomotive Works v. Furness [1905] 1 K. B. 304, 74 L. J. K. B. N. S. 243, 21 Times L. R. 179, 10 Com. Cas. 53, 12 Manson, 109, affirmed in the Court of Appeal in [1906] 1 K. B. 49, 75 L. J. K. B. N. S. 83, 54 Week. Rep. 324, 93 L. T. N. S. 687, 22 Times L. R. 45, 11 Com. Cas. 35; Miles v. Woodward, 115 Cal. 311, 46 Pac. 1076.

It was competent for the creditors to waive their right of recourse against the stockholders.

Robinson v. Bidwell, 22 Cal. 388; French v. Teschemaker, 24 Cal. 556; Wells v. Black, 117 Cal. 161, 37 L.R.A. 619, 59 Am. St. Rep. 162, 48 Pac. 1090; United States v. Stanford, 161 U. S. 412, 40 L. ed. 751, 16 Sup. Ct. Rep. 576.

Moreover, the power of the company and its officers to bind the defendant for the debts of the company as defined and limited in the charter and by the agreement of the parties could not, as against him, a nonresident of California, be enlarged by the statutes of that state.

Pope v. Nickerson, 3 Story, 480, Fed. Cas. No. 11,274; Liverpool & S. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 449, 454, 32 L. ed. 788, 795, 796, 9 Sup. Ct. Rep. 469; King v. Sarria, 69 N. Y. 33, 25 Am. Rep. 128; Grover & B. Sewing Mach. Co. v. Radcliffe, 137 U. S. 287, 299, 34 L. ed. 670, 673, 11 Sup. Ct. Rep. 92; Risdon Iron & Locomotive Works v. Furness [1906] 1 K. B. 59, 75 L. J. K. B. N. S. 83, 54 Week. Rep. 324, 93 L. T. N. S. 687, 22 Times L. R. 45, 11 Com. Cas. 35.

It is fundamental in the law of agency that when a third party deals with an agent with notice that he has no authority to make a contract imposing personal liability upon the principal, he is bound by the notice, and the principal comes under no liability to him upon the contract.

Johnson v. Haws, 47 App. Div. 597, 62 N. Y. Supp. 641, affirmed in 168 N. Y. 654, 61 N. E. 1130; Ensign v. Wands, 1 Johns. Cas. 171; King v. Sarria, 69 N. Y. 24, 25 Am. Rep. 128; Ward v. Joslin, 186 U. S. 142, 46 L. ed. 1093, 22 Sup. Ct. Rep. 807; Boyd v. Heron, 125 Cal. 455, 58 Pac. 64; Thomas v. Wentworth Hotel Co. 16 Cal. App. 414, 117 Pac. 1041, 1046; Story, Partn. § 130.

A stockholder's statutory liability enforceable in foreign jurisdictions always sounds in contract. If the nonresident stockholder acquire stock in a corporation organized under laws which impose such a liability, he necessarily assumes the liability which is attached to his stock interest by the law which creates it, and may properly be held to have intended to do so.

Flash v. Conn, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; Christopher v. Norvell, 201 U. S. 216, 229, 50 L. ed. 732, 737, 26 Sup. Ct. Rep. 502, 5 Ann. Cas. 740; Richmond v. Irons, 121 U. S. 27, 56, 30 L. ed. 864, 873, 7 Sup. Ct. Rep. 788; Whitman v. National Bank, 176 U. S. 559, 564, 44 L. ed. 587, 590, 20 Sup. Ct. Rep. 477; Bernheimer v. Converse, 206 U. S. 516, 530, 51 L. ed. 1163, 1174, 27 Sup. Ct. Rep. 755; Hawthorne v. Calef, 2 Wall. 10, 22, 17 L. ed. 776, 778; Howarth v. Lombard, 175 Mass. 575, 49 L.R.A. 301, 56 N. E. 888; Kennedy v. California Sav. Bank, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846; Howarth v. Angle, 162 N. Y. 187, 47 L.R.A. 725, 56 N. E. 489.

No state can by its law prescribe the terms and conditions upon which a nonresident may become a stockholder in a foreign corporation, or impose liabilities upon him as such; for neither the corporation when organized nor the nonresident stockholder then or thereafter is subject to the jurisdiction of the foreign state.

Morawetz, Priv. Corp. § 874; Pennoyer v. Neff, 95 U. S. 714, 722, 24 L. ed. 565, 568; Huntington v. Attrill, 146 U. S. 657, 669, 36 L. ed. 1123, 1128, 13 Sup. Ct. Rep. 224; Freeman v. Anderson, 119 U. S. 185, 188, 30 L. ed. 372, 373, 7 Sup. Ct. Rep. 165; Buchanan v. Rucker, 9 East, 192, 1 Campb. 65, 9 Revised Rep. 531; Story, Confl. L. 8th ed. §§ 7, 20; Cooley, Const. Lim. 7th ed. p. 176.

Upon similar grounds a state cannot enlarge the authority of an agent for a nonresident principal beyond that actually conferred.

Pope v. Nickerson, 3 Story, 480, Fed. Cas. No. 11,274; King v. Sarria, 69 N. Y. 33, 25 Am. Rep. 128; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 454, 32 L. ed. 788, 796, 9 Sup. Ct. Rep. 469; Grover & B. Sewing Mach. Co. v. Radcliffe, 137 U. S. 287, 299, 34 L. ed. 670, 673, 11 Sup. Ct. Rep. 92; Leyner Engineering Works v. Kempner, 163 Fed. 605.

The fact that the Wentworth Hotel Company owned property and did business and contracted debts in California is immaterial. The defendant was not and is not the Wentworth Hotel Company. That company is a distinct legal entity, having its own property, its own rights and powers, and subject to its own liabilities. When the company bought the property, Mr. Matthiessen took no title to it, and when it

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did business it acted in its own behalf, and its acts did not bring the defendant within the jurisdiction or subject him to the laws of the state.

Conley v. Mathieson Alkali Works, 190 U. S. 406, 409, 47 L. ed. 1113, 1115, 23 Sup. Ct. Rep. 728; People v. American Bell Teleph Co. 117 N. Y. 255, 22 N. E. 1057; Peterson v. Chicago, R. I. & P. R. Co. 205 U. S. 364, 391, 51 L. ed. 841, 852, 27 Sup. Ct. Rep. 513; Risdon Iron & Locomotive Works v. Furness [1906] 1 K. B. 59, 75 L. J. K. B. N. S. 83, 54 Week. Rep. 324, 93 L. T. N. S. 687, 22 Times L. R. 45, 11 Com. Cas. 35; United States v. American Bell Teleph. Co. 29 Fed. 17; Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co. 34 L.R.A. 625, 15 C. C. A. 289, 31 U. S. App. 704, 68 Fed. 108.

Of course, when the Wentworth Hotel Company did business in California, the company, in the conduct of that business, was subject to the California law. California could limit the exercise of its powers and impose upon the conduct of its business the same conditions which were in force with reference to domestic corporations. This was all that the constitutional provision in California did or purported to do. Its provision that no foreign corporation should be "allowed to transact business within this state on more favorable conditions than are prescribed to similar corporations organized under the laws of this state" applied only to the corporation. Properly construed it did not extend or purport to extend to the stockholders of the corporation.

National Park Bank v. Remsen, 158 U. S. 337, 344, 346, 39 L. ed. 1008, 1010, 1011, 15 Sup. Ct. Rep. 891; Young v. Moore, 162 Mich. 60, 127 N. W. 29, Williams v. Gaylord, 186 U. S. 157, 165, 46 L. ed. 1102, 1106, 22 Sup. Ct. Rep. 798; Miles v. Woodward, 115 Cal. 311, 46 Pac. 1076; London, P. & A. Bank v. Aronstein, 54 C. C. A. 663, 117 Fed. 609.

The adoption of the contrary rule would obviously lead to startling results.

Leyner Engineering Works v. Kempner, 163 Fed. 605.

Statutes imposing liability upon stockholders are in derogation of the common law and are to be strictly construed.

Brunswick Terminal Co. v. National Bank, 192 U. S. 386, 390, 48 L. ed. 491, 493, 24 Sup. Ct. Rep. 314; Davidson v. Rankin, 34 Cal. 503, 13 Mor. Min. Rep. 472; Buchanan v. Rucker, 9 East, 194, 1 Campb. 65, 9 Revised Rep. 531.

The notes here in question having been payable at the banking houses of the First National Bank and Union Savings Bank, respectively, the plaintiff's assignors, those banks were bound to apply to their payment at maturity the deposits then or thereafter on hand and applicable thereto. Having failed to do so, the plaintiff is not entitled to charge the defendant for the resulting loss.

Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 88, 7 Am. Rep. 314; Indig v. National City Bank, 80 N. Y. 106; 5 Cyc. 554, 555; 2 Morse, Banks & Bkg. 4th ed. §§ 557, 563, pp. 949, 956; Fullerton v. Bank of United States, 1 Pet. 604, 617, 7 L. ed. 280, 286; Bank of United States v. Carneal, 2 Pet. 543, 548, 7 L. ed. 514, 516; Pursifull v. Pineville Bkg. Co. 97 Ky. 154, 53 Am. St. Rep. 409, 30 S. W. 203; Commercial Nat. Bank v. Henninger, 105 Pa. 496; German Nat. Bank v. Foreman, 138 Pa. 474, 21 Am. St. Rep. 908, 21 Atl. 20; First Nat. Bank v. Peltz, 176 Pa. 513, 36 L.R.A. 832, 53 Am. St. Rep. 686, 35 Atl. 218; Dawson v. Real Estate Bank, 5 Ark. 283; McDowell v. Bank of Wilmington & Brandywine, 1 Harr. (Del.) 369.

The plaintiff argues that this principle is not applicable here because, under the California law, a stockholder is primarily liable to the creditors. Of course the liability is primary in the sense that the stockholder can be sued in the first instance even though no effort has been made to enforce the claim against the company; but this does not mean that a stockholder in a solvent company, who has been sued by a creditor and compelled to pay his proportion of the debt, is not, as against the company and his fellow stockholders, entitled to be reimbursed from its assets. His equitable right to such reimbursement is clear and is recognized by the California courts.

Re California Mut. L. Ins. Co. 81 Cal. 365, 22 Pac. 869; Prince v. Lynch, 38 Cal. 538, 99 Am. Dec. 427.

Counsel argue that a bank holding a note does not discharge a surety by failing to apply money of the maker which it holds on deposit at or after the time the note matures. If, however, the note by its terms is payable at the bank which holds it, the better authorities are to the contrary.

Pursifull v. Pineville Bkg. Co. 97 Ky. 154, 53 Am. St. Rep. 409, 30 S. W. 203.

And the authorities counsel rely upon are distinguishable upon this or other grounds. Thus, in National Mahaiwe Bank v. Peck, 127 Mass. 298, 34 Am. Rep. 368, the note under consideration was given by the treasurer of the town and was regarded as a town obligation, while the deposit was to the credit of the individual. In Strong v. Foster, 17 C. B. 201, 25 L. J. C. P. N. S. 106, 4 Week. Rep. 151; National Bank v. Smith, 66 N. Y. 271, 23 Am. Rep. 48;

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Citizens' Bank v. Booze, 75 Mo. App. 189; Bank of British Columbia v. Jeffs, 15 Wash. 230, 46 Pac. 247; Voss v. German American Bank, 83 Ill. 599, 25 Am. Rep. 415; Citizens' Bank v. Elliott, 9 Kan. App. 797, 59 Pac. 1102; Martin v. Mechanics' Bank, 6 Harr. & J. 235, the notes were not, or did not appear to have been, made payable at the bank. In Houston v. Braden, — Tex. Civ. App. —, 37 S. W. 467, no deposit was made until after the maturity of the note; and in Glazier v. Douglass, 32 Conn. 393, and McShane v. Howard Bank, 73 Md. 135, 10 L.R.A. 552, 20 Atl. 776, there was no question of bank deposits at all.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit by a citizen of California, the holder of two notes made in California by the Wentworth Hotel Company, to recover from a stockholder in that corporation, a citizen of New York, a proportionate share of the sums due upon the same. The facts as agreed and found are as follows: The corporation was formed under the laws of the territory of Arizona, among many other things, to buy and sell real estate, "to build, maintain, operate, and carry on, in all its branches, the business of hotel keeping," and to build or purchase gas or electric works in Arizona or California, "both for its use in the hotel business and for the purpose of selling and disposing of the same." The principal place of business in Arizona was Tucson, and that outside of it was Los Angeles, California, with power to change to Pasadena, in that state. Before the incorporation, the defendant, residing [233] in New York, signed a writing reciting the intent of the subscribers to form a corporation in Arizona for the purpose of acquiring a portion of the Oak Knoll, and building a first-class hotel thereon; and he thereby subscribed for a certain number of shares. Later he took and paid for one thousand shares. The Oak Knoll is near Pasadena, in California, and the defendant and his associates intended the corporation to have the power to build and manage a hotel in that neighborhood, and expected that it would do so, but intended their liability to be controlled by the laws of Arizona.

The corporation complied with the laws of California, bought the land, built the hotel, went into business, and finally was adjudged insolvent. The notes in question were given for loans to the company. At the time of subscribing the defendant agreed with the company that he should be exempt from personal liability, and that neither the corporation nor its officers should have power to subject him or the other stockholders to it. Such exemption was expressed also in the certificate of incorporation. But by the statutes of California each stockholder of a corporation is personally liable for such proportion of the debts contracted while he is such, as the amount of his stock bears to the whole subscribed, and the liability of each stockholder of a corporation formed under the laws of any other state or territory of the United States, but doing business in California, is the same. Civil Code, § 322. The courts below ruled that the defendant could not be held, the circuit court of appeals citing Risdon Iron & Locomotive Works v. Furness [1906] 1 K. B. 49, 75 L. J. K. B. N. S. 83, 54 Week. Rep. 324, 93 L. T. N. S. 687, 22 Times L. R. 45, 11 Com. Cas. 35, in which it was held that the law of California could not impose liability upon an English shareholder in an English corporation, without his assent. 113 C. C. A. 101, 192 Fed. 495.

We agree that without authority from the stockholder a corporation cannot make him answerable in a way not [234] contemplated by the charter. We will assume for purposes of decision, although we express no opinion upon the point, that a provision for doing business in other states without any express reference to the possible difference in their laws would not be enough to change the rule. But a provision exempting the stockholder alongside of one authorizing the doing of business elsewhere cannot be taken to limit the latter authority to those states that grant a like exemption, or be deemed an attempt to override the law of the place where the business is to be done. That law may fail to operate for want of power over the person sought to be affected; but the charter leaves it open to that person to come in under it by assent. If the law of California forbade a foreign corporation to do business there unless all the stockholders filed a written assent to its conditions, the Arizona charter would not make such an agreement void. If this be true, then a particular stockholder may give such assent outside of the instrument of incorporation, and be bound by it.

In this case the defendant expressed in writing his wish that the corporation should set up a hotel in California. It is true that he also desired and stipulated that he should be free from personal charge. But that is merely the not infrequent occurrence of a party bringing about the facts and attempting to prohibit their legal consequence to which we lately had occasion to advert in National City Bank v. Hotchkiss, 231 U. S. 50, 56, ante, 20, 34 Sup. Ct. Rep. 20. See also Butler v. Farnsworth, 4 Wash. C. C. 101, 103, 104, Fed. Cas. No. 2,240. This, of course, he cannot do. In such cases the

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only question is which of two inconsistent orders is the dominant command. Here the usual prevalence of the specific over the general is fortified by the consideration that the building and carrying on of the California hotel was the main object for which the parties came together. When the defendant authorized that, he could not avoid the consequences by saying that he did not foresee or intend, or that he forbade [235] them. He knew that California had laws, and he took his risk of what they might be, when, as we must hold, he gave his assent to doing business there. We cannot interpret his words as giving merely a conditional assent. We follow the language of Pinney v. Nelson, 183 U. S. 144, 46 L. ed. 125, 22 Sup. Ct. Rep. 52, so far as it sanctions the views that we have expressed. See also Thomas v. Wentworth Hotel Co. 158 Cal. 275, 280, 139 Am. St. Rep. 120, 110 Pac. 942.

There remains only the question whether the liability is of a kind that will be enforced outside of the California courts. Analysis on this point often is blurred by the vague statement that the liability is "contractual." An obligation to pay money generally is enforced by an action of assumpsit, and to that extent is referred to a contract, even though it be one existing only by fiction of law. But such obligations when imposed upon the members of a corporation may vary very largely. The incorporation may create a chartered partnership the members of which are primary contractors, or it may go no farther than to impose a penalty; or again, it may create a secondary remedy for a debt treated as that of the corporation alone, like the right to attach the corporation's real estate; or the liability may be inseparable from the local procedure; or the law may be so ambiguous as to leave it doubtful whether the liability is matter of remedy, and local, or creates a contract on the part of the members that will go with them wherever they are found. McClaine v. Rankin, 197 U. S. 154, 161 49 L. ed. 702, 705, 25 Sup. Ct. Rep. 410, 3 Ann. Cas. 500; Christopher v. Norvell, 201 U. S. 216, 225, 226, 50 L. ed. 732, 736, 26 Sup. Ct. Rep. 502, 5 Ann. Cas. 740. In the present case we think that there can be no doubt of the meaning of the California statute. It reads: "Each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities," etc., as we have stated, and supposes the action against him to be brought "upon such debt." Civil Code, § 322. This means that by force of the statute, if the corporation incurs a debt within the jurisdiction, [236] the stockholder is a party to it, and joins in the contract in the proportion of his shares. And while the statutes of California cannot force an agent upon a foreign principal, still, if he has created such an agency in advance, he has come within the jurisdiction by his agent, as in other cases of contract made within a state from outside, and will be bound. Flash v. Conn, 109 U. S. 371, 27 L. ed 966, 3 Sup. Ct. Rep. 263; Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477.

The defendant was a principal debtor. Hyman v. Coleman, 82 Cal. 650, 16 Am. St. Rep. 178, 23 Pac. 62. The fact that the corporation had deposits in the banks that held the notes did not discharge the notes *pro tanto*. Strong v. Foster, 17 C. B. 201, 25 L. J. C. P. N. S. 106, 4 Week. Rep. 151; National Mahaiwe Bank v. Peck, 127 Mass. 298, 34 Am. Rep. 368. The judgment must be reversed, and judgment entered for the plaintiff on the agreed facts.

Judgment reversed.

The Chief Justice dissents.

Mr. Justice Hughes took no part in the decision.

FRANCES A. MIEDREICH, Plff. in Err.,
v.
CONSTANZE LAUENSTEIN.

(See S. C. Reporter's ed. 236-247.)

Error to state court — Federal question — how raised.

1. A Federal question which the highest state court regards as duly before it for consideration, and which it proceeds to determine, will be regarded by the Federal Supreme Court, on writ of error to the state court, as duly made.

[For other cases, see Appeal and Error, 1168-1248, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — facts.

2. The Federal Supreme Court will not revise the findings of the highest state court upon the issue of whether service of process was fraudulently procured, where evidence in support of the state court's conclusion is not entirely lacking.

[For other cases, see Appeal and Error, 1596-1600, 2175-2208, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — foreclosure proceedings — false return by sheriff.

3. Upholding a sale under a decree for

Note.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts

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the foreclosure of a mortgage against an attack based on the ground that the owner was not served with process in the foreclosure proceedings does not deprive her of her property without due process of law, contrary to U. S. Const., 14th Amend., where the state had made provision for the service of process, and the original party in the foreclosure proceeding did all that the law required in the issue of and attempt to serve process, and the sheriff made a return to the court, contrary to fact, that the service had been duly made, although, under the circumstances, the recovery upon the sheriff's bond, authorized by the state law, may not be an adequate remedy.

[For other cases, see Constitutional Law, IV. b, 8, in Digest Sup. Ct. 1908.]

[No. 20.]

Argued and submitted October 31, 1913. Decided February 2, 1914.

IN ERROR to the Supreme Court of the State of Indiana to review a decree which affirmed a decree of the Superior Court of Vanderburgh County, in that state, in favor of defendant in a suit to vacate a decree of foreclosure. Affirmed.

See same case below, 172 Ind. 140, 86 N. E. 963, 87 N. E. 1029.

The facts are stated in the opinion.

Mr. George K. Denton submitted the cause for plaintiff in error:

A Federal question was stated in the decision of the supreme court of the state of Indiana in deciding this cause.

Miedreich v. Lauenstein, 172 Ind. 140, 86 N. E. 963, 87 N. E. 1029.

The Federal questions were necessarily involved in this case, and, as the supreme court of the state of Indiana decided them, it is not material whether that court stated them as Federal questions or not.

Carpenter v. Strange, 141 U. S. 87, 103, 35 L. ed. 640, 646, 11 Sup. Ct. Rep. 960; Huntington v. Attrill, 146 U. S. 657, 683, 36 L. ed. 1123, 1133, 13 Sup. Ct. Rep. 224; Atherton v. Atherton, 181 U. S. 155, 160, 45 L. ed. 794, 797, 21 Sup. Ct. Rep. 544; Jacobs v. Marks, 182 U. S. 583, 587, 45 L. ed. 1241, 1244, 21 Sup. Ct. Rep. 865; Stearns v. Minnesota, 179 U. S. 223, 233, 45 L. ed. 162, 170, 21 Sup. Ct. Rep. 73; Wilson v. Standefer, 184 U. S. 399, 411, 46 L. ed. 612, 617, 22 Sup. Ct. Rep. 384.

No state shall deprive any person of life, liberty, or property without due process of law.

Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897.

"Due process of law" implies a tribunal of competent jurisdiction, and a sufficient service on the defendant, or an appearance on his part, to render him amenable to that jurisdiction.

Pennoyer v. Neff, 95 U. S. 714, 731, 24 L. ed. 565, 572.

An opportunity to be heard is essential to due process of law.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372.

By the general law of the land, no court is authorized to render a judgment or decree against anyone, or his estate, until after due notice by service of process to appear and defend.

Hollingsworth v. Barbour, 4 Pet. 466, 7 L. ed. 922; Knowles v. Logansport Gaslight & Coke Co. 19 Wall. 58, 22 L. ed. 70; Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897.

In its restricted sense, jurisdiction means the power to decide. Without this any judgment is subject to direct or collateral attack as an absolute nullity. Jurisdiction of this kind is twofold: (1) Of the subject-matter, (2) of the person. If either is wanting, there is no jurisdiction.

Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740; Shepard v. Adams, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214; Remington v. Central P. R. Co. 198 U. S. 95, 49 L. ed. 959, 25 Sup. Ct. Rep. 577.

It is an elementary principle of jurisprudence that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice, within the jurisdiction, upon him, or upon someone authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service.

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can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On review of questions of fact on writ of error to state court—see note to Smiley v. Kansas, 49 L. ed. U. S. 546.

As to what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to what service of process is sufficient to constitute due process of law—see note to Pinney v. Providence Loan & Invest. Co. 50 L.R.A. 577.

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D'Arcy v. Ketchum, 11 How. 165, 13 L. ed. 648; Knowles v. Logansport Gaslight & Coke Co. 19 Wall. 58, 22 L. ed. 70; Hall v. Lanning, 91 U. S. 160, 23 L. ed. 271; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; York v. Texas, 137 U. S. 15, 34 L. ed. 604, 11 Sup. Ct. Rep. 9; Wilson v. Seligman, 144 U. S. 41, 36 L. ed. 338, 12 Sup. Ct. Rep. 541; Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559.

Service of a mesne process from a court of a state, not made upon a defendant or his authorized agent within the state, although there made in some other manner recognized as valid by its legislative acts and judicial decisions, can be allowed no validity in the circuit court of the United States after the removal of the cause into that court, pursuant to the acts of Congress, unless the defendant can be held, by virtue of a general appearance or otherwise, to have waived the defect in the service, and to have submitted himself to the jurisdiction of the court.

Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559.

Process must be personally served on minors in order that jurisdiction may be acquired, and no guardian *ad litem* can be appointed by the court for an infant defendant who has not been personally served with process, if a resident, or, if a nonresident, with notice by publication.

Carver v. Carver, 64 Ind. 194; Galpin v. Page, 18 Wall. 350, 364, 21 L. ed. 959, 962.

The Federal courts will not give effect to a judgment in a state court, unless the state court has lawfully acquired jurisdiction of the defendant, even despite recitals in the judgment of the state court of facts which, if true, would have given it jurisdiction.

Thompson v. Whitman, 18 Wall. 457, 21 L. ed 897; Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 54 L. ed. 272, 30 Sup. Ct. Rep. 125.

Returns of officers of service of process may be impeached.

Hauswirth v. Sullivan, 6 Mont. 203, 9 Pac. 798; Smith v. Morrill, 11 Colo. App. 284, 52 Pac. 1110; McClung v. McWhorter, 47 W. Va. 150, 81 Am. St. Rep. 785, 34 S. E. 740; Campbell Printing Press & Mfg. Co. v. Marder, L. & Co. 50 Neb. 283, 61 Am. St. Rep. 573, 69 N. W. 774; Murrer v. Security Co. 131 Ind. 35, 30 N. E. 879; Johnson v. H. P. Gregory & Co. 4 Wash. 111, 31 Am. St. Rep. 907, 29 Pac. 831; Wabash Western R. Co. v. Brow, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126; Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 54 L. ed. 272, 30 Sup. Ct. Rep. 125.

A domestic judgment is open to jurisdictional inquiries.

Needham v. Thayer, 147 Mass. 536, 18 N. E. 429; Nations v. Johnson, 24 How. 195, 203, 16 L. ed. 628, 631; Earle v. McVeigh, 91 U. S. 503, 507, 23 L. ed. 398, 400; Starbuck v. Murray, 5 Wend. 148, 21 Am. Dec. 172; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931; Wonderly v. Lafayette County, 150 Mo. 635, 45 L.R.A. 386, 73 Am. St. Rep. 474, 51 S. W. 745; Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 601; Hauswirth v. Sullivan, 6 Mont. 203, 9 Pac. 798; Johnson v. H. P. Gregory & Co. 4 Wash. 111, 31 Am. St. Rep. 907, 29 Pac. 831.

A judgment rendered without jurisdiction can be reviewed on a writ of error sued out to the Supreme Court of the United States.

Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740; Shepard v. Adams, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214; Remington v. Central P. R. Co. 198 U. S. 95, 49 L. ed. 959, 25 Sup. Ct. Rep. 577; Davis v. Cleveland, C. C. & St. L. R. Co. 84 C. C. A. 453, 156 Fed. 775; United States v. Jahn, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; St. Louis Cotton Compress Co. v. American Cotton Co. 60 C. C. A. 80, 125 Fed. 196; Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 54 L. ed. 272, 30 Sup. Ct. Rep. 125.

Neither the finding nor the rulings of the state court should be permitted to prevent the determination of the right asserted under the Constitution and laws of the United States.

St. Louis Southwestern R. Co. v. Arkansas, 217 U. S. 136, 54 L. ed. 698, 29 L.R.A. (N.S.) 802, 30 Sup. Ct. Rep. 476; Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316.

The United States Supreme Court may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a general finding of facts against one party necessarily involves the decision of questions of law bearing upon a Federal right claimed by such party in the state court.

Kansas City Southern R. Co. v. C. H. Albers Commission Co. supra; Mackay v. Dillon, 4 How. 421, 447, 11 L. ed. 1038, 1050; Dower v. Richards, 151 U. S. 658, 667, 38 L. ed. 305, 308, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Stanley v. Schwalby, 162 U. S. 255, 274, 277-279, 40 L. ed. 960, 967, 968, 16 Sup. Ct. Rep. 754; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683, 697, 29 L. ed. 510, 515, 6 Sup. Ct. Rep. 265; Huntington v.

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Attrill, 146 U. S. 657, 683, 36 L. ed. 1123, 1133, 13 Sup. Ct. Rep. 224.

Parties interested in the premises, who were not served with process, are not bound by a decree of foreclosure of a mortgage thereon, and may redeem from sale thereunder, the same as if no decree had been made.

Noyes v. Hall, 97 U. S. 34, 24 L. ed. 909; Dawson v. Overmyer, 141 Ind. 438, 40 N. E. 1065; Johnson v. Hosford, 110 Ind. 572, 10 N. E. 407.

The right of redemption is a favored right.

Russell v. Southard, 12 How. 139, 13 L. ed. 927; Villa v. Rodriguez (Alexander v. Rodriguez) 12 Wall. 323, 20 L. ed. 406; Bigler v. Waller, 14 Wall. 297, 20 L. ed. 891; Noyes v. Hall, 97 U. S. 34, 24 L. ed. 909; Bryan v. Brasius, 162 U. S. 415, 40 L. ed. 1022, 16 Sup. Ct. Rep. 803; Romig v. Gillett, 187 U. S. 111, 47 L. ed. 97, 23 Sup. Ct. Rep. 40.

The appropriate remedy for relief against judgments at law wrongfully obtained is a bill in equity.

Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 3 L. ed. 362; Hendrickson v. Hinckley, 17 How. 443, 15 L. ed. 123; Phillips v. Negley, 117 U. S. 665, 673, 29 L. ed. 1013, 1015, 6 Sup. Ct. Rep. 901; Butler v. Thornburgh, 153 Ind. 530, 55 N. E. 417.

Equity may vacate or enjoin a judgment in an action of which defendant had no legal notice, the trial court assuming jurisdiction on the strength of a false return of service of process by the sheriff or other officer.

Willman v. Willman, 57 Ind. 500; Martin v. Barney, 20 Ala. 369; Ryan v. Boyd, 33 Ark. 778; Lapham v. Campbell, 61 Cal. 296; Du Bois v. Clark, 12 Colo. App. 220, 55 Pac. 750; Cassidy v. Automatic Time Stamp Co. 185 Ill. 431, 56 N. E. 1116; Wolf v. Shenandoah Nat. Bank, 84 Iowa, 138, 50 N. W. 561; McNeill v. Edie, 24 Kan. 108; Bramlett v. McVey, 91 Ky. 151, 15 S. W. 49; Hernandez v. James, 23 La. Ann. 483; Jones v. Commercial Bank, 5 How. (Miss.) 43, 35 Am. Dec. 419; Hauswirth v. Sullivan, 6 Mont. 203, 9 Pac. 798; Mather v. Parsons, 32 Hun, 338; Huntington v. Crouter, 33 Or. 408, 72 Am. St. Rep. 726, 54 Pac. 208; Miller v. Gorman, 38 Pa. 309; Dowell v. Goodwin, 22 R. I. 287, 51 L.R.A. 873, 84 Am. St. Rep. 842, 47 Atl. 693; Ruff v. Elkin, 40 S. C. 69, 18 S. E. 220; Ingle v. McCurry, 1 Heisk. 26; State v. Dashiell, 32 Tex. Civ. App. 454, 74 S. W. 779; Wardsboro v. Whitingham, 45 Vt. 450; Johnson v. H. P. Gregory & Co. 4 Wash. 109, 31 Am. St. Rep. 907, 29 Pac. 831; Johnson v. Coleman, 23 Wis. 452, 99 Am. Dec. 193; Dobbins v. McNamara, 113 Ind. 54, 3 Am. St. Rep. 626, 14 N. E. 887.

Plaintiff in error has pursued her only remedy for relief under the facts of the case.

Bruce v. Osgood, 154 Ind. 375, 56 N. E. 25; Emerick v. Miller, 159 Ind. 328, 64 N. E. 28; Walker v. Robbins, 14 How. 584, 14 L. ed. 552.

Mr. **Louis T. Michener** argued the cause, and, with Messrs. Perry G. Michener and Peter Maier, filed a brief for defendant in error:

The Federal question was not specially set up or claimed in the pleadings, or in objections to evidence, or in exceptions, or request for findings; and the record does not show, either by the words used or by clear and necessary intendment therefrom, that the right was specifically claimed or put in issue in any manner.

Capital Nat. Bank v. First Nat. Bank, 172 U. S. 425, 430, 43 L. ed. 502, 503, 19 Sup. Ct. Rep. 202; Marvin v. Trout, 199 U. S. 212, 222, 223, 50 L. ed. 157, 161, 26 Sup. Ct. Rep. 31; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 310, 47 L. ed. 480, 485, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 487, 56 L. ed. 1171, 1176, 32 Sup. Ct. Rep. 790; Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 465, 48 L. ed. 749, 751, 24 Sup. Ct. Rep. 489.

The motion for a new trial does not raise or present a Federal question.

Johnson v. New York L. Ins. Co. 187 U. S. 491, 495, 47 L. ed. 273, 274, 23 Sup. Ct. Rep. 194; Capital Nat. Bank v. First Nat. Bank, 172 U. S. 425, 431, 43 L. ed. 502, 504, 19 Sup. Ct. Rep. 202.

The Federal question was not raised by assignment of error in the supreme court of the state, as it might have been.

Johnson v. New York L. Ins. Co. 187 U. S. 491, 495, 47 L. ed. 273, 274, 23 Sup. Ct. Rep. 194.

It is not sufficient to present the Federal question by brief or by oral argument in the state court.

Zadig v. Baldwin, 166 U. S. 485, 41 L. ed. 1087, 17 Sup. Ct. Rep. 639; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Chapin v. Fye, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 308, 47 L. ed. 480, 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375.

Presenting the Federal question for the first time by petition for a rehearing to the supreme court of the state would not have availed the plaintiff in error.

Mutual L. Ins. Co. v. McGrew, supra.

Nor is it sufficient to raise the Federal

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question for the first time in the petition for the writ of error.

Johnson v. New York L. Ins. Co. 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; Simmerman v. Nebraska, 116 U. S. 54, 29 L. ed. 535, 6 Sup. Ct. Rep. 333; Leeper v. Texas, 139 U. S. 462, 467, 35 L. ed. 225, 226, 11 Sup. Ct. Rep. 577; Warfield v. Chaffe, 91 U. S. 690, 692, 23 L. ed. 383, 384; Clark v. Pennsylvania, 128 U. S. 395, 397, 32 L. ed. 487, 488, 9 Sup. Ct. Rep. 113; Manning v. French, 133 U. S. 186, 192, 193, 33 L. ed. 582, 585, 586, 10 Sup. Ct. Rep. 258; Butler v. Gage, 138 U. S. 52, 56, 34 L. ed. 869, 871, 11 Sup. Ct. Rep. 235.

The statement of the court below in allowing the writ of error does not aid plaintiff in error in the attempt to present the Federal question.

Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 481, 56 L. ed. 1171, 1173, 32 Sup. Ct. Rep. 790; Home for Incurables v. New York, 187 U. S. 155, 47 L. ed. 117, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84; Allen v. Arguimbau, 198 U. S. 149, 156, 49 L. ed. 990, 993, 25 Sup. Ct. Rep. 622; Marvin v. Trout, 199 U. S. 212, 217, 223, 50 L. ed. 157, 159, 161, 26 Sup. Ct. Rep. 31.

If any constitutional questions were involved in this litigation below, it would seem that they must have rested on the Constitution of the state of Indiana.

Endowment Benev. Asso. v. Kansas, 120 U. S. 103, 30 L. ed. 593, 7 Sup. Ct. Rep. 499; Jacobi v. Alabama, 187 U. S. 133, 135, 47 L. ed. 106, 107, 23 Sup. Ct. Rep. 48; Burt v. Smith, 203 U. S. 129, 135, 51 L. ed. 121, 126, 27 Sup. Ct. Rep. 37; French v. Taylor, 199 U. S. 274, 277, 50 L. ed. 189, 191, 26 Sup. Ct. Rep. 76; Leeper v. Texas, 139 U. S. 462, 467, 35 L. ed. 225, 226, 11 Sup. Ct. Rep. 577; Rawlins v. Georgia, 201 U. S. 638, 639, 50 L. ed. 899, 900, 26 Sup. Ct. Rep. 560; Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 471, 472, 48 L. ed. 749, 753, 754, 24 Sup. Ct. Rep. 489.

Only questions of fact and local or general law are involved here, and the decision of the court below is not reviewable on writ of error to this court.

Capital Nat. Bank v. First Nat. Bank, 172 U. S. 425, 430, 43 L. ed. 502, 503, 19 Sup. Ct. Rep. 202; McQuade v. Trenton, 172 U. S. 636, 43 L. ed. 581, 19 Sup. Ct. Rep. 292; Iowa Central R. Co. v. Iowa, 160 U. S. 389, 393, 40 L. ed. 467, 469, 16 Sup. Ct. Rep. 344; Kring v. Missouri, 107 U. S. 221, 231, 27 L. ed. 506, 509, 2 Sup. Ct. Rep. 443; Antoni v. Greenhow, 107 U. S. 769, 27 L. ed. 468, 2 Sup. Ct. Rep. 91: York v. Texas, 137 U. S. 15, 20, 34 L. ed. 604, 605, 11 Sup. Ct. Rep. 9; Wood v. Chesborough, 228 U. S. 672, 677, 57 L. ed. 1018, 1020, 33 Sup. Ct. Rep. 706; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 599, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 471, 472, 48 L. ed. 749, 753, 754, 24 Sup. Ct. Rep. 489; Ludeling v. Chaffe, 143 U. S. 301, 36 L. ed. 313, 12 Sup. Ct. Rep. 439; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Vandalia R. Co. v. Indiana, 207 U. S. 359, 367, 52 L. ed. 246, 248, 28 Sup. Ct. Rep. 130; 4 Fed. Stat. Anno. 489.

The assignment of errors made for this court, but filed in the court below at the time the petition for the allowance of the writ of error was filed, cannot avail to import a Federal question, or any other, into the case, which the record does not show to have been raised and passed on in the court below.

Ansbro v. United States, 159 U. S. 695, 697, 698, 40 L. ed. 310, 311, 16 Sup. Ct. Rep. 187; Cornell v. Green, 163 U. S. 75, 80, 41 L. ed. 76, 78, 16 Sup. Ct. Rep. 969.

The opinions show affirmatively that the court below decided the case against the plaintiff in error on the evidence and on questions of local or general law broad enough to sustain the judgment, and the effect was to deprive this court of jurisdiction.

Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 486, 48 L. ed. 268, 271, 24 Sup. Ct. Rep. 132; San Francisco v. Scott, 111 U. S. 768, 28 L. ed. 593, 4 Sup. Ct. Rep. 688; Garr, S. & Co. v. Shannon, 223 U. S. 468, 470, 56 L. ed. 510, 512, 32 Sup. Ct. Rep. 236; Brinkmeier v. Missouri P. R. Co. 224 U. S. 268, 270, 56 L. ed. 758, 760, 32 Sup. Ct. Rep. 412; Standard Oil Co. v. Missouri, 224 U. S. 270, 280, 281, 56 L. ed. 760, 767, 768, 32 Sup. Ct. Rep. 406, Ann. Cas. 1913D, 936; Sayward v. Denny, 158 U. S. 180, 186, 39 L. ed. 941, 943, 15 Sup. Ct. Rep. 777.

This court will not revise the concurrent judgments of the two courts below on the evidence.

First Nat. Bank v. Littlefield, 226 U. S. 110, 57 L. ed. 145, 33 Sup. Ct. Rep. 78; Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 465–467, 471, 472, 48 L. ed. 749, 751–754, 24 Sup. Ct. Rep. 489; Capital Nat. Bank v. First Nat. Bank, 172 U. S. 425, 427, 432, 433, 43 L. ed. 502–505, 19 Sup. Ct. Rep. 202; McQuade v. Trenton, 172 U. S. 636, 637, 639, 43 L. ed. 581, 582, 19 Sup. Ct. Rep. 292.

The decisions of the state courts as to what are the laws of the state are binding upon the courts of the United States.

Iowa C. R. Co. v. Iowa, 160 U. S. 389, 393, 40 L. ed. 467, 469, 16 Sup. Ct. Rep. 344; Leeper v. Texas, 139 U. S. 462, 467, 468, 35 L. ed. 225–227, 11 Sup. Ct. Rep. 577.

Law in its regular course of administra-

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tion through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied. Due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.

Ibid.

Mr. Justice Day delivered the opinion of the court:

The plaintiff in error, by complaint filed in the superior court of Vanderburgh county, state of Indiana, sought to vacate a judgment of foreclosure rendered by that court in a prior case, and to be permitted to redeem the property therein involved, and prays for other relief; and, judgment having been entered in favor of the defendant in error, which was affirmed by the supreme court of Indiana (172 Ind. 140, 86 N. E. 963, 87 N. E. 1029), this writ of error was sued out.

The facts, so far as pertinent to our review, are: The complaint, in the fourth paragraph, alleged that the plaintiff in error was the owner of certain property, subject to a mortgage foreclosed in a former suit; that she was a minor when the foreclosure proceedings were had; that she was not a resident of Vanderburgh county, where the action was brought, but was and had been for many years [242] a resident of Gibson county, and that she was not summoned in such action, had no knowledge of its pendency, and did not waive service or enter her appearance therein. It was further alleged that the plaintiff in error was not amenable to the jurisdiction of the sheriff of Vanderburgh county, but that, although she was not served with process, he made a false return of a pretended summons, by which the court was wrongfully imposed upon, and, being so advised, at the instance of attorneys for the predecessor of defendant in error, the court appointed a guardian *ad litem* for her, who answered in the suit, and that a decree was rendered, her property sold, and bid in by the predecessor of the defendant in error. The demurrer of the defendant in error to this paragraph, thus construed, was sustained by the lower court, and its decision affirmed by the supreme court. Other paragraphs of the complaint alleged fraud on the part of the predecessor of the defendant in error and her attorneys. The lower court found against this charge, and the supreme court, after stating that there was legal evidence to support the finding, refused to disturb it.

The record is meager of attempts to raise a Federal question by reason of alleged violations of rights secured by the Constitution of the United States, aptly set forth and referred to in some proper way, and it is contended by the defendant in error that the writ should be dismissed for that reason. We find in the opinion of the supreme court of Indiana a statement that "both parties have treated this suit as one arising under the provisions of the 14th Amendment to the Federal Constitution, and as presenting the questions of due process of law and rights guaranteed by article 1, § 21, of the state Constitution," and the court, after making this statement, takes up the various grounds of attack upon the original decree for alleged fraudulent service or want of service upon the minor defendant in the foreclosure proceedings, [243] and disposes of them against the contention of the plaintiff in error. There is no repudiation of the position of both parties that questions were raised under the 14th Amendment to the United States Constitution, and we think the court may be fairly taken to have regarded such questions as duly before it for consideration. Where a state court holds that a Federal question is made before it, according to its practice, and proceeds to determine it, this court will regard the question as duly made. San José Land & Water Co. v. San José Ranch Co. 189 U. S. 177, 179-180, 47 L. ed. 765, 766, 768, 23 Sup. Ct. Rep. 487; Montana ex rel. Haire v. Rice, 204 U. S. 291, 299, 51 L. ed. 490, 494, 27 Sup. Ct. Rep. 281; Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 148, 52 L. ed. 143, 146, 28 Sup. Ct. Rep. 34; Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 62, 53 L. ed. 695, 697, 29 Sup. Ct. Rep. 397.

In the opinion of the supreme court upon rehearing, the charge that the service of process was fraudulently procured by the predecessor in title of the defendant in error or her attorneys was held to be foreclosed by the findings of the court below, and the supreme court held that the findings were supported by testimony in the record showing competent evidence to that end. It is urged that upon this writ of error this court should re-examine the conclusions of fact just referred to and the rulings of the supreme court of Indiana in respect thereto. This court has repeatedly held that in cases coming to it from the supreme court of a state, it accepts as binding the findings upon issues of fact duly made in that court. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 107, 53 L. ed. 417, 428, 29 Sup. Ct. Rep. 220; Rankin v. Emigh, 218 U. S. 27, 34, 54 L. ed. 915, 920, 30 Sup. Ct. Rep. 672; Kerfoot v. Farmers' & M. Bank, 218 U. S. 281, 288, 54 L. ed. 1042, 1043, 31 Sup. Ct. Rep. 14. That

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principle is applicable here. The case does not come within the exceptional class of cases where what purports to be a finding of fact is not strictly such, but is so involved with and dependent upon questions of law bearing upon the alleged Federal right as to be a decision of those questions rather than of a pure question of fact, or where there is that entire lack of evidence to [244] support the conclusion upon the Federal question that gives this court the right of review. Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 591, 56 L. ed. 556, 565, 32 Sup. Ct. Rep. 316; Creswill v. Grand Lodge K. P. 225 U. S. 246, 261, 56 L. ed. 1074, 1080, 32 Sup. Ct. Rep. 822; Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. ed. 662, 669, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277; Portland R. Light & P. Co. v. Railroad Commission, 229 U. S. 397, 411, 412, 57 L. ed. 1248, 1258, 1259, 33 Sup. Ct. Rep. 820.

The supreme court of Indiana stated the question upon the decision of which the Federal question of due process arises as follows:

"The question is then presented whether the allegations that appellant was a minor, was not a resident of Vanderburgh county, was a resident of Gibson county, and had been for many years, that no summons was served on her, that she had no knowledge of the proceedings, did not waive service, nor did anyone for her, or in her behalf or with her consent, enter appearance for her, that she was not amenable to the jurisdiction of the sheriff of Vanderburgh county, that, notwithstanding that she was not served with process, the sheriff of Vanderburgh county made a false return of a summons, and the court was wrongfully imposed upon by such false return, and, being thus falsely advised, at the instance of appellant's attorneys [*i. e.*, the attorneys for the predecessor of the defendant in error], appointed a guardian *ad litem* for her,—constitute a charge of fraud. The return was regular on its face. The court had jurisdiction of the subject-matter. and apparently jurisdiction of the person of appellant. The false return was not procured by the fraud, collusion, or imposition of the plaintiff or his [her] attorneys [in the foreclosure suit]. It is not alleged that either knew of the fact that there had been no service on appellant. The allegations practically present this question: If, without any fraud, or any act on the part of a party to an action or his attorney, a return is made by a sheriff showing service, regular on its face, without knowledge of the party that there was in fact no service, and no act is done [245] or thing said to mislead the sheriff, is it an imposition or fraud upon the court to present such summons and return and obtain a judgment upon it, and is it a charge of fraud or imposition upon the court to allege that the court was wrongfully imposed upon by such false return, and was thus falsely advised? The whole allegations must be taken together, and the scope and theory of the paragraph, as we construe it, is that the court was misled by a false return of the sheriff. The court had a right to rely and act upon the return. It imports verity to the court. The sheriff assumes the responsibility, in taking the office, of seeing to it that he does make the right service. Nichols v. Nichols (1884) 96 Ind. 433; State ex rel Robinson v. Leach (1858) 10 Ind. 308; State ex rel. Chapman v. Lines (1853) 4 Ind. 351.

"If this were not true, no litigant could ever know when his rights were adjudicated and set at rest; and, to the end that the party may be made whole, an action for a false return will lie. Splahn v. Gillespie (1874) 48 Ind. 397; Rowell v. Klein (1873) 44 Ind. 290, 15 Am. Rep. 235.

"If it be said that the amount of bond a sheriff is required to give might not cover the damage in any or every case, it is sufficient to say that that is a legislative matter, and not a judicial one."

The question then is, does the ruling predicated upon the principles thus stated, made in the state court wherein the party has been duly heard, amount to a denial of due process of law within the meaning of the Federal Constitution?

This court has recognized the difficulty of satisfactorily defining in general terms which shall apply to all cases what is meant by the term "due process of law," and the desirability of judicial determination upon each case as the question arises. Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616. If the exercise of judicial power be such "as the settled maxims of law permit and sanction, and under such [246] safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs," there has been no deprivation of due process of law. Cooley, Const. Lim. 7th ed. 506; Leigh v. Green, 193 U. S. 79, 87, 48 L. ed. 623, 626, 24 Sup. Ct. Rep. 390. And this court, speaking by Mr. Chief Justice Fuller, in Leeper v. Texas, 139 U. S. 462, 468, 35 L. ed. 225, 227, 11 Sup. Ct. Rep. 577, said: "Law in its regular course of administration through courts of justice is due process, and when secured by the law of the state, the constitutional requirement is satisfied." This language was quoted with approval in Iowa C. R. Co. v. Iowa, 160 U. S.

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389, 393, 40 L. ed. 467, 469, 16 Sup. Ct. Rep. 344.

In the present case the state has made provision for the service of process, and the original party in the foreclosure proceeding did all that the law required in the issue of and attempt to serve process; and, without fraud or collusion, the sheriff made a return to the court that service had been duly made. The duty of making such service and return by the law of the state is delegated to the sheriff, and, although contrary to the fact, in the absence of any attack upon it, the court was justified in acting upon such return as upon a true return. If the return is false, the law of the state, as set forth by its supreme court, permitted a recovery against the sheriff upon his bond. We are of the opinion that this system of jurisprudence, with its provisions for safeguarding the rights of litigants, is due process of law. It may result, unfortunately, as is said to be the fact in this case, that the recovery upon the sheriff's bond will not be an adequate remedy, but statutes must be framed and laws administered so as to protect as far as may be all litigants and other persons who derive rights from the judgments of courts. So far as this record discloses, the purchaser at the sheriff's sale had a right to rely upon the record, which imported verity as to the nature of the service upon the plaintiff in error. If this were not true, as the supreme court of [247] Indiana points out, there would be no protection to parties who have relied upon judicial proceedings importing verity, upon the faith of which rights have been adjudicated and value parted with. In a case of this character the law must have in view, not only the rights of the defendant who has been a victim of a false return on the part of the sheriff, but of persons who have relied upon the regularity of the return of officials necessarily trusted by law with the responsibility of advising the court as to the performance of such duties as are here involved. Were the law otherwise, titles might be attacked many years after they were acquired, where the party had been guilty of no fraud, and had acted upon the faith of judicial proceedings apparently perfect in every respect.

This has been the rule of law applied to a similar situation in the courts of other states. Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639; Stites v. Knapp, Ga. Dec. pt. 2, p. 36; Taylor v. Lewis, 2 J. J. Marsh. 400, 19 Am. Dec. 135; Gardner v. Jenkins, 14 Md. 58; Smoot v. Judd, 184 Mo. 508, 83 S. W. 481; Johnson v. Jones, 2 Neb. 126; Wardsboro v. Whitingham, 45 Vt. 450; Preston v. Kindrick, 94 Va. 760, 64 Am. St. Rep. 777, 27 S. E. 588. And see in this connection Walker v. Robbins, 14 How. 584, 585, 14 L. ed. 552; Knox County v. Harshman, 133 U. S. 152, 156, 33 L. ed. 586, 588, 10 Sup. Ct. Rep. 257.

Without the necessity of deciding more in the present case, it is enough to say that the decision of the supreme court of Indiana, made under the circumstances detailed, did not, in our opinion, deprive the plaintiff in error of due process of law within the meaning of the 14th Amendment.

It follows that the judgment of the Supreme Court of Indiana should be affirmed.

Judgment affirmed.

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[248] NORTH CAROLINA RAILROAD COMPANY, Plff. in Err.,

v.

JAMES A. ZACHARY, Administrator of Herbert H. Burgess.

(See S. C. Reporter's ed. 248-261.)

Error to state court — Federal question — how raised.

1. An immunity from liability under the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp.

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884, and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

As to when Federal question is raised in time to sustain the appellate jurisdiction of the Supreme Court over state courts—see note to Chicago, I. & L. R. Co. v. McGuire, 49 L. ed. U. S. 414.

On liability of lessor of railroad for injuries caused by negligence of another company using the road under a lease—see note to Caruthers v. Kansas City, Ft. S. & M. R. Co. 44 L.R.A. 737.

On the constitutionality, application, and effect of the Federal employers' liability act —see note to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38.

On review of questions of fact on writ of error to a state court—see note to Smiley v. Kansas, 49 L. ed. U. S. 546.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

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Stat. Supp. 1911, p. 1322), must be regarded as sufficiently asserted for the purpose of sustaining a writ of error from the Federal Supreme Court to the highest court of a state, whether the question was properly raised in the trial court, according to the local practice, or not, where such immunity was expressly claimed, and the highest court of the state either decided or assumed that the record sufficiently presented a question of Federal right, and decided against the party asserting that right.

[For other cases, see Appeal and Error, 1168–1270, in Digest Sup. Ct. 1908.]

Master and servant — employers' liability — interstate railway carrier — liability of lessor railway company.

2. The lessor of an intrastate railway to an interstate railway carrier is, through its lessee, a "common carrier by railroad engaging in commerce between the states" within the meaning of the employers' liability act of April 22, 1908, where, under the local law, the lessor is responsible for all acts of negligence of its lessee occurring in the conduct of the business upon the lessor's road.

[For other cases, see Master and Servant, II., in Digest Sup. Ct. 1908.]

Master and servant — employers' liability — employment of firemen in interstate commerce — liability of lessor railway company.

3. A railway fireman killed while employed in interstate commerce by a lessee interstate railway carrier must be regarded as employed also by the lessor railway company in such commerce, within the meaning of the act of April 22, 1908, although the leased railway is an intrastate one, where, under the local law, the lessor is responsible for all acts of negligence of its lessee occurring in the conduct of the business upon the lessor's road.

[For other cases, see Master and Servant, II., in Digest Sup. Ct. 1908.]

Error to state court — scope of review — facts.

4. The evidence will be analyzed by the Federal Supreme Court on a writ of error to a state court to the extent necessary to give the plaintiff in error the benefit of its asserted Federal right.

[For other cases, see Appeal and Error, 1436–1445, in Digest Sup. Ct. 1908.]

Master and servant — employers' liability — interstate commerce — hauling empty cars.

5. The hauling of empty cars from one state to another is interstate commerce within the meaning of the employers' liability act of April 22, 1908, giving a right of recovery against an interstate railway carrier for the death of an employee while engaged in interstate commerce.

[For other cases, see Master and Servant, II., in Digest Sup. Ct. 1908.]

Trial — question for jury — employers' liability.

6. Evidence that a fireman in the employ of an interstate railway carrier after inspecting, oiling, firing, and preparing his engine for the intrastate haul of a train containing some cars that had come from another state was killed by a switching engine while he was attempting to cross the tracks intervening between the engine and his boarding house is at least sufficient to require the submission to the jury of the question of the carrier's liability under the employers' liability act of April 22, 1908, giving a right of recovery against an interstate railway carrier for the death of an employee while engaged in interstate commerce.

[For other cases, see Trial, VI. b, in Digest Sup. Ct. 1908.]

[No. 144.]

Argued December 17 and 18, 1913. Decided February 2, 1914.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which affirmed a judgment of the Superior Court of Guilford County, in that state, in favor of plaintiff in an action to recover damages from a carrier for the negligent killing of an employee. Reversed and remanded for further proceedings.

See same case below, 156 N. C. 496, 72 S. E. 858.

The facts are stated in the opinion.

Mr. John K. Graves argued the cause and filed a brief for plaintiff in error:

The record discloses neither allegation nor proof of the existence of any beneficiary or beneficiaries designated in the Federal act.

Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806.

The question of the applicability of the Federal act narrows itself into the question whether the deceased at the time he was struck was employed in interstate commerce. If he was so employed at that time, the railroad company must have been engaged in interstate commerce through him.

Colasurdo v. Central R. Co. 180 Fed. 832.

The testimony clearly shows that the cars were in the course of a through interstate journey, and the natural inference from the testimony is that some, at least, of the cars were loaded with interstate freight, though that feature is immaterial, the cars being employed in interstate commerce, regardless of whether they were loaded or empty.

Johnson v. Southern P. Co. 196 U. S. 1, 21, 49 L. ed. 363, 371, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Northern P. R. Co. v. Maerkl, 117 C. C. A. 237, 198 Fed. 1; Pedersen v. Delaware, L. & W. R. Co. 229

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U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, 3 N. C. C. A. 779.

The defendant in error's intestate was employed in interstate commerce while on the engine preparing it for its interstate service, which was about to begin.

Pederson v. Delaware, L. & W. R. Co. supra; Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 1, 116 C. C. A. 156, 196 Fed. 336; St. Louis S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651; Neil v. Idaho & W. N. R. Co. — Idaho, —, 125 Pac. 336; Horton v. Oregon-Washington R. & Nav. Co. 72 Wash. 503, 47 L.R.A.(N.S.) 8, 130 Pac. 897; Freeman v. Powell, — Tex. Civ. App. —, 144 S. W. 1033; Montgomery v. Southern P. Co. 64 Or. 597, 47 L.R.A.(N.S.) 13, 131 Pac. 507; Kansas City, M. & O. R. Co. v. Pope, — Tex. Civ. App. —, 152 S. W. 185.

Even if it be assumed that the deceased was going to his boarding house on a personal errand, it was a "trifling interruption" (United States v. Atchison, T. & S. F. R. Co. 220 U. S. 44, 55 L. ed. 363, 31 Sup. Ct. Rep. 362), which could not change the status of the deceased as "on duty."

Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 1, 116 C. C. A. 156, 196 Fed. 336; Kitchenham v. The Johannesburg [1911] A. C. 417, 80 L. J. Q. B. N. S. 1102, 105 L. T. N. S. 118, 27 Times L. R. 504, 55 Sol. Jo. 599, 4 B. W. Comp. Cas. 311; Philadelphia, B. & W. R. Co. v. Tucker, 35 App. D. C. 123, — L.R.A.(N.S.) —; Ewald v. Chicago & N. W. R. Co. 70 Wis. 420, 5 Am. St. Rep. 178, 36 N. W. 12, 591; Boldt v. New York C. R. Co. 18 N. Y. 432; Missouri, K. & T. R. Co. v. United States, 231 U. S. 112, ante, 144, 34 Sup. Ct. Rep. 26; United States v. Chicago M. & P. S. R. Co. 197 Fed. 624; United States v. Atchison, T. & S. F. R. Co. 220 U. S. 37, 55 L. ed. 361, 31 Sup. Ct. Rep. 362; United States v. Denver & R. G. R. Co. 197 Fed. 629; United States v. Kansas City Southern R. Co. 189 Fed. 471; United States v. St. Louis Southwestern R. Co. 189 Fed. 954.

Is the situation affected by the fact that the lessor, and not the lessee, operating the railroad, is sued?

Logan v. North Carolina R. Co. 116 N. C. 941, 21 S. E. 959.

It is as true to say that Congress intended to go to the limit of its constitutional power *quoad* everyone in fact occupying the position or relation of master with respect to injuries to servants employed in interstate commerce on railroads engaging in interstate commerce, as to say that Congress intended to include within the term "person employed in such commerce" all those persons who could be so included within the constitutional power of Congress.

Colasurdo v. Central R. Co. 180 Fed. 832.

Mr. **Thomas H. Calvert** argued the cause, and, with Messrs. John A. Barringer and George S. Bradshaw, filed a brief for defendant in error:

On the pleadings, if there had been any evidence tending to show that the deceased was engaged in interstate service, it would have been the province of the jury to determine that fact.

Marks v. Harriet Cotton Mills, 138 N. C. 401, 50 S. E. 769, 3 Ann. Cas. 812; Ramsbottom v. Atlantic Coast Line R. Co. 138 N. C. 38, 50 S. E. 448; Stewart v. Raleigh & A. Air Line R. Co. 137 N. C. 687, 50 S. E. 312; Gwyn Harper Mfg. Co. v. Carolina C. R. Co. 128 N. C. 285, 83 Am. St. Rep. 675, 38 S. E. 894; Haltom v. Southern R. Co. 127 N. C. 255, 37 S. E. 262; Cox v. Norfolk & C. R. Co. 123 N. C. 604, 31 S. E. 848; Bolden v. Southern R. Co. 123 N. C. 614, 31 S. E. 851; Simonton v. Winter, 5 Pet. 141, 8 L. ed. 75.

The original act of 1906 was held to be invalid because the statute in terms declared that a common carrier engaged in interstate commerce should be liable "to any of its employees," the court holding that the liability under the statute must be limited to employees engaged in such commerce.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

The prayers for instructions, being predicated on a state of facts upon which there was not sufficient evidence to submit the question to the jury, were properly refused.

Stewart v. Van Deventer Carpet Co. 138 N. C. 60, 50 S. E. 562; Stewart v. North Carolina R. Co. 136 N. C. 385, 48 S. E. 793; Bryan v. Southern R. Co. 134 N. C. 538, 47 S. E. 15; Joines v. Johnson, 133 N. C. 487, 45 S. E. 828; Southern Loan & T. Co. v. Benbow, 131 N. C. 413, 42 S. E. 896; Burton v. Rosemary Mfg. Co. 132 N. C. 17, 43 S. E. 480; Carson v. Norfolk & C. R. Co. 128 N. C. 95, 38 S. E. 287.

If the plaintiff in error desired to insist on its further defense that the deceased was engaged in interstate commerce, it was its duty to tender an issue on which that fact could properly be inquired into.

Gwyn-Harper Mfg. Co. v. Cloer, 140 N. C. 128, 52 S. E. 305; Pollock v. Warwick, 104 N. C. 638, 10 S. E. 699; Silver Valley Min. Co. v. Baltimore Gold & Silver Min. & Smelting Co. 99 N. C. 445, 6 S. E. 735; Oakley v. Van Noppen, 95 N. C. 60; Simmons v. Mann, 92 N. C. 12; Piedmont Wagon Co. v. Byrd, 119 N. C. 460, 26 S. E. 144; Womble v. Merchants' Grocery Co.

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135 N. C. 474, 47 S. E. 493; Walker v. Scott, 106 N. C. 56, 11 S. E. 364; Baltimore & O. R. Co. v. Darr, 47 L.R.A.(N.S.) 4, 124 C. C. A. 565, 204 Fed. 751.

Mr. Justice Pitney delivered the opinion of the court:

This action was brought in the superior court of Guilford county, North Carolina, to recover damages for the negligent killing of Burgess a locomotive fireman in the employ of the Southern Railway Company, lessee of the defendant, which occurred at Selma, North Carolina, on April 29, 1909. Under the local law, as laid down in Logan v. North Carolina R. Co. 116 N. C. 940, 21 S. E. 959, the lessor is responsible for all acts of negligence of its lessee occurring in the conduct of business upon the lessor's road; and this upon the ground that a railroad corporation cannot evade its public duty and responsibility by leasing its road to another corporation, in the absence of a statute expressly exempting it. The responsibility is held to extend to employees of the lessee, injured through the negligence of the latter.

The complaint set forth in substance that plaintiff's intestate, being in the employ of defendant's lessee, and engaged at the Selma switchyards in the discharge of his duties as fireman upon engine No. 862, about 8 o'clock, P. M., on the date mentioned, after inspecting, oiling, firing, and preparing the engine for starting on a trip from Selma to Spencer, North Carolina, attempted to cross certain tracks that intervened between the engine and his [255] boarding house, which was located a short distance away; that another engine, No. 716, was standing upon a side track in such position as to shut off intestate's view of the main track; that No. 716 had its blower on, and was making a noise so loud that intestate could not hear a third engine,—No. 1551, the shifting engine used in the yards,—which at this time was running backward at a reckless and dangerous rate of speed, without headlight and without an adequate and competent crew; and that as intestate stepped from the track in the rear of engine No. 716, and was about to step upon the main line in the attempt to cross it, he was struck and killed by the shifting engine. Defendant's answer, besides denying the allegations of negligence, set up as a special defense that at the time plaintiff's intestate was killed, he was engaged in interstate commerce as an employee upon a train of defendant's lessee which was moving from Selma, North Carolina, to Spencer, in the same state, and carrying cars loaded with freight from the state of Virginia to the state of North Carolina and other states; that the liability of the defendant to him or to the plaintiff as his representative was fixed and regulated by the Federal employers' liability act of April 22, 1908 [35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322], and that under that act the plaintiff was not entitled to recover.

Upon the trial, at the close of plaintiff's evidence, which tended generally to support the averments of the complaint, defendant moved for a nonsuit, and among other grounds assigned the following:—that from the uncontradicted evidence it appeared that at the time of the occurrence in question defendant, through its lessee, was a common carrier by railroad, engaged in interstate commerce, and plaintiff's intestate was at that time a person employed by such carrier in such commerce; that the act of Congress already referred to exclusively regulated the liability of defendant to plaintiff's intestate, and that upon all the evidence plaintiff had failed to make out a [256] case of liability under that act. The court, in denying the motion, held that the action was brought under the statute of North Carolina, that the Federal act had no application, and that the cause was triable under the statutes of the state. To this ruling, defendant excepted. At the close of the case, defendant again undertook to invoke the protection of the Federal act by requested instructions to the jury, which were refused and exceptions allowed.

There was a verdict for plaintiff and judgment thereon, followed by an appeal to the supreme court of the state. That court overruled the contention of defendant that the Federal employers' liability act of April 22, 1908, applied, and held that the action was properly tried under the state law. The result was an affirmance (156 N. C. 496, 72 S. E. 858), and the case comes here under § 709, Rev. Stat. U. S. Comp. Stat. 1901, p. 575 (Judicial Code, § 237 [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227]).

In order to bring the case within the terms of the Federal act (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322, printed in full in 223 U. S. p. 6, 56 L. ed. 329, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875), defendant must have been, at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and plaintiff's intestate must have been employed by said carrier in such commerce. If these facts appeared, the Federal act governed, to the exclusion of the statutes of the state. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 55, 56 L. ed. 327, 348, 38 L.R.A.

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(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 158, 57 L. ed. 1129, 1133, 33 Sup. Ct. Rep. 651.

It is not disputed that if the provisions of the Federal act had been applied, the result of the action might have been different. To mention only one matter: there was neither averment in the pleadings nor evidence at the trial that deceased left a widow, child, parent, or dependent next of kin. Persons thus related to deceased are the respective beneficiaries of the action prescribed by the act of Congress, and the damages are to be based upon the [257] pecuniary loss sustained by the beneficiary. Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 68, 57 L. ed. 417, 420, 33 Sup. Ct. Rep. 192; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426. The state law (Revisal 1908, § 2646) seems not to recognize this limitation upon the measure of recovery; certainly the damages in the present case were assessed without regard to it.

In support of the judgment, it is earnestly argued that the question whether deceased was employed in interstate commerce was not properly raised in the trial court, in accordance with the pertinent provisions of the local Code of Civil Procedure. But this is a question of state practice; and since it appears that defendant expressly claimed immunity by reason of the act of Congress, and the highest court of the state either decided or assumed that the record sufficiently presented a question of Federal right, and decided against the party asserting that right, the decisions of this court render it clear that it is our duty to pass upon the merits of the Federal question. Home for Incurables v. New York, 187 U. S. 155, 157, 47 L. ed. 117, 118, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84; San José Land & Water Co. v. San José Ranch Co. 189 U. S. 177, 179, 47 L. ed. 765, 766, 23 Sup. Ct. Rep. 487; Montana ex rel. Haire v. Rice, 204 U. S. 291, 299, 51 L. ed. 490, 494, 27 Sup. Ct. Rep. 281; Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 148, 52 L. ed. 143, 146, 28 Sup. Ct. Rep. 34; Miedreich v. Lauenstein, No. 20, 232 U. S. 236, ante, 584, 34 Sup. Ct. Rep. 309.

The court based its decision that the Federal act did not apply, in part upon the ground that the North Carolina Railroad is not an interstate railroad,—its tracks and property lying wholly within the state,—and that the corporation itself is not, although its lessee is, engaged in interstate commerce; the lessor's activities being confined to receiving annual rents and distributing them among its stockholders. The responsibility of the lessor for all acts of negligence of the lessee occurring in the conduct of business on the lessor's road, as established by the same court in Logan v. North Carolina R. Co. 116 N. C. 941, 21 S. E. 959, was recognized—indeed, reasserted. "But," it was said, "that is because a railroad corporation cannot escape its responsibility [258] by leasing its road. It is still liable for its lessee's acts of commission and omission, whether they occur in interstate or intrastate commerce, although the lessor is not actually engaged in either." [156 N. C. 500, 72 S. E. 858.]

It is plain enough, however, that the effect of the rule thus laid down, especially in view of the grounds upon which it is based, is, that although a railroad lease as between the parties may have the force and effect of an ordinary lease, yet with respect to the railroad operations conducted under it, and everything that relates to the performance of the public duties assumed by the lessor under its charter, such a lease—certainly so far as concerns the rights of third parties, including employees as well as patrons—constitutes the lessee the lessor's substitute or agent, so that for whatever the lessee does or fails to do, whether in interstate or in intrastate commerce, the lessor is responsible. This being the legal situation under the local law, it seems to us that it must and does result, in the the case before us, that the lessor is a "common carrier by railroad, engaging in commerce between the states," and that the deceased was "employed by such carrier in such commerce," within the meaning of the Federal act; provided, of course, he was employed by the lessee in such commerce at the time he was killed.

It was, however, further held by the supreme court of North Carolina that deceased, at the time he was killed, was not in fact employed by the Southern Railway, the lessee, in interstate commerce. There are several grounds upon which this decision was based, or upon which it is said to be supportable; and these will be separately noticed. Of course, if, upon the evidence, any essential matter of fact was in doubt, it should have been submitted to the jury under proper instructions. The rulings of the trial court deprived plaintiff in error of the opportunity to go to the jury upon the question. But it is now insisted that there was no evidence tending to show that [259] deceased was engaged in interstate commerce. This renders it incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted Federal right. Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. ed. 662, 669, 43

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L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277, and cases cited.

The evidence tended to show that train No. 72 of the Southern Railway had come into Selma, North Carolina, from Pinners Point, Virginia and other places, and that a shifting crew was "working" this train so as to take two cars from it and put them into a train that was to include these and other cars to be hauled from Selma to Spencer, North Carolina by engine No. 862, and that deceased was employed on this engine as fireman for the trip that was about to begin, and had already prepared his engine for the purpose. It is contended that the evidence failed to show that the two cars thus taken from train No. 72 had come in from Virginia, rather than from the "other places," which it is said might be intermediate North Carolina points. We find, however, evidence that the train which was to be hauled from Selma to Spencer by engine No. 862 was being made up in part from cars that had come in from Pinners Point; and it was at least a reasonable inference that the two cars referred to were being put into the Spencer train in order to be carried forward as a part of a through movement of interstate commerce.

There seems to be no clear evidence as to the contents of these cars, and it is argued that, in the absence of evidence, it is as reasonable to infer that they were empty as that they were loaded; and that it was incumbent upon defendant to show that they contained interstate freight. We hardly deem it so probable that empty freight cars would be hauled from the Virginia point to Spencer. But were it so, the hauling of empty cars from one state to another is, in our opinion, interstate commerce within the meaning of the act. Such is the view that has obtained with respect to empty cars in action based upon the [260] safety appliance act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174). Johnson v. Southern P. Co. 196 U. S. 1, 21, 49 L. ed. 363, 371, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Voelker v. Chicago, M. & St. P. R. Co. 116 Fed. 867, 873. And the like reason applies, as we think, to actions founded upon the employers' liability act, which, indeed, is *in pari materia* with the other

It is argued that because, so far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still *in futuro*. It seems to us, however, that his acts in inspecting, oiling, firing, and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce and the circumstance that the interstate freight cars had not as yet been coupled up is legally insignificant. See Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 151, 57 L. ed. 1125, 1127, 33 Sup. Ct. Rep. 648; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 161, 57 L. ed. 1129, 1134, 33 Sup. Ct. Rep. 651.

Again, it is said that because deceased had left his enine and was going to his boarding house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence fairly tended to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still "on duty," and employed in commerce, notwithstanding his temporary absence from the locomotive engine. See Missouri, K. & T. R. Co. v. United States, 231 U. S. 112, 119, ante, 144, 147, 34 Sup. Ct. Rep. 26.

We conclude that, with respect to the facts necessary to bring the case within the Federal act, there was evidence [261] that at least was sufficient to go to the jury. It is doubtful whether there was substantial contradiction respecting any of these facts; but this we need not consider.

From what has been said, it follows that the state courts erred in holding that the Federal act had no application. As the case stands, we are not called upon to determine the validity of the several contentions that were raised by defendant at the trial on the strength of that act, nor to pass upon the mode in which they were raised. Upon these matters, therefore, we express no opinion.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

CORNELIUS K. G. BILLINGS, Plff. in Err.,
v.
UNITED STATES. (No. 66.)

UNITED STATES
v.
CORNELIUS K. G. BILLINGS. (No. 625.)

(See S. C. Reporter's ed. 261-288.)

Error to circuit court — effect of taking case to circuit court of appeals — certified question — cross writ of error.

1. A writ of error sued out of a Federal

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circuit court of appeals on behalf of the United States because of the disallowance of interest by the circuit court's decree in a suit for the recovery of a tax will be treated by the Federal Supreme Court, to which the circuit court of appeals has certified the question of interest, as in substance pending in the Supreme Court on a cross writ of error, where the defendant has brought the case up to the Supreme Court by a direct writ of error to the circuit court, sued out on constitutional grounds.

[For other cases, see Appeal and Error, 944, 990-993, in Digest Sup. Ct. 1908.]

Internal revenue — excise on foreign-built yacht — when due.

2. The excise tax based on gross tonnage, which, under the tariff act of August 5, 1909 (36 Stat. at L. 112, chap. 6, U. S. Comp. Stat. Supp. 1911, p. 1197), § 37, shall be levied and collected annually on the 1st day of September upon the use of every foreign-built pleasure yacht now or hereafter owned or chartered for more than six months by any citizen of the United States, became due on the 1st day of September following the passage of the act.

[Federal taxation, see Internal Revenue, in Digest Sup. Ct. 1908.]

Internal revenue — excise on foreign-built yacht — charterer or owner.

3. The six-months clause in the tariff act of August 5, 1909, § 37, imposing an annual excise tax to be levied and collected upon the use of every foreign-built pleasure yacht now or hereafter owned or chartered for more than six months by any citizen of the United States, applies only to charterers, not to owners.

[Federal taxation, see Internal Revenue, in Digest Sup. Ct. 1908.]

Internal revenue — excise on foreign-built yacht — use or ownership.

4. Actual use for any time during the taxing year, as distinguished from potential use involved in ownership, is the test of liability for the excise tax based upon gross tonnage which, under the act of August 5, 1909, § 37, shall be levied and collected annually upon the use of every foreign-built pleasure yacht now or hereafter owned by any citizen of the United States.

[Federal taxation, see Internal Revenue, in Digest Sup. Ct. 1908.]

Constitutional law — retrospective law — excise tax.

5. The retroactive effect given to the act of August 5, 1909, § 37, levying an annual excise tax upon the use of every foreign-built pleasure yacht now or hereafter owned by any citizen of the United States, by construing it as causing the tax for the first annual period to become due on September 1, 1909, does not cause the act to be one beyond the power of Congress, under the Constitution, to enact.

[For other cases, see Constitutional Law, IV. f. 2, in Digest Sup. Ct. 1908.]

Internal revenue — uniformity — excise tax.

6. The uniformity clause of U. S. Const. art. 1, § 8, is not violated by the excise tax based upon gross tonnage levied by the act of August 5, 1909, § 37, upon the use of foreign-built pleasure yachts owned by citizens of the United States, because a like tax is not imposed upon the use of a domestic yacht under similar circumstances.

[For other cases, see Internal Revenue, I. b, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — excise tax — discrimination.

7. The imposition of an excise tax based upon gross tonnage upon the use of foreign-built pleasure yachts owned by citizens of the United States without imposing a like tax upon the use of a domestic yacht under similar circumstances, as is done by the act of August 5, 1909, § 37, does not render that statute repugnant to the due process of law clause of the 5th Amendment to the Federal Constitution, as being so beyond the power of classification, abhorrent to the sense of justice, and so repugnant to the conceptions of free government, as to be void even in the absence of express constitutional limitation.

[For other cases, see Constitutional Law, IV. b. 6, a, in Digest Sup. Ct. 1908.]

Interest — on delinquent taxes.

8. Delinquent taxes due to the Federal government bear interest, although no statute expressly so directs.

[Nos. 66 and 625.]

Argued January 6 and 7, 1914. Decided February 24, 1914.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment enforcing, without interest, a claim of the United States for an excise tax upon a foreign-built pleasure yacht. Modified by awarding interest, and as modified affirmed. Also

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit, presenting the question of the right of the United States to recover interest on the amount of the tax. Unanswered.

See same case below, No. 66, on demurrer, 190 Fed. 359.

The facts are stated in the opinion.

Mr. **William D. Guthrie** argued the cause and filed a brief for Cornelius K. G. Billings:

The classification in § 37 of the tariff act violates the 5th Amendment to the Constitution of the United States.

Cooley, Taxn. 3d ed. pp. 4, 260; Knowlton v. Moore, 178 U. S. 41, 77, 44 L. ed. 969, 984, 20 Sup. Ct. Rep. 747; American Sugar

NOTE.—On implied right to interest on taxes or assessments—see note to Rochester v. Bloss, 6 L.R.A.(N.S.) 694.

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Ref. Co. v. Louisiana, 179 U. S. 89, 92, 45 L. ed. 102, 103, 21 Sup. Ct. Rep. 43; The Conqueror, 166 U. S. 110, 115, 41 L. ed. 937, 940, 17 Sup. Ct. Rep. 510; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 165, 41 L. ed. 666, 671, 17 Sup. Ct. Rep. 255; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 301, 42 L. ed. 1037, 1045, 18 Sup. Ct. Rep. 594; Home Ins. Co. v. New York, 134 U. S. 594, 606, 607, 33 L. ed. 1025, 1031, 1032, 10 Sup. Ct. Rep. 593; Giozza v. Tiernan, 148 U. S. 657, 662, 37 L. ed. 599, 601, 13 Sup. Ct. Rep. 721; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 599, 39 L. ed. 759, 825, 15 Sup. Ct. Rep. 673; Southwestern Oil Co. v. Texas, 217 U. S. 114, 121, 54 L. ed. 688, 692, 30 Sup. Ct. Rep. 496; Detroit, G. H. & M. R. Co. v. Fuller, 205 Fed. 89; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 11 Ann. Cas. 1247; People ex rel. Phillips v. Raynes, 136 App. Div. 417, 120 N. Y. Supp. 1053, affirmed in 198 N. Y. 539, 92 N. E. 1097; People ex rel. Farrington v. Mensching, 187 N. Y. 17, 10 L.R.A.(N.S.) 625, 79 N. E. 884, 10 Ann. Cas. 101; People v. Hawkins, 157 N. Y. 9, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; Knowlton v. Rock County, 9 Wis. 422.

There is no substantial difference between the requirement of due process of law contained in the 5th Amendment and that in the 14th Amendment.

Carroll v. Greenwich Ins. Co. 199 U. S. 401, 410, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66; Twining v. New Jersey, 211 U. S. 78, 101, 53 L. ed. 97, 107, 29 Sup. Ct. Rep. 14.

They are alike in terms and alike in meaning. The provision for the equal protection of the law in the 14th Amendment no doubt emphasizes the necessity for proper classification in state taxation, but it does not create this requirement. The due process clause alone would be equally effective for this purpose.

McGehee, Due Process of Law, pp. 60–64, 311.

Tax statutes, especially when attempting to impose special, novel, and extraordinary taxes, should be strictly construed; and if any ambiguity be found to exist, it must be resolved in favor of the citizen.

Eidman v. Martinez, 184 U. S. 578, 583, 46 L. ed. 697, 701, 22 Sup. Ct. Rep. 515; United States v. Wigglesworth, 2 Story, 374, Fed. Cas. No. 16,690; Mutual Ben. L. Ins. Co. v. Herold, 198 Fed. 201, affirmed in 120 C. C. A. 256, 201 Fed. 918; Parkview Bldg. & L. Asso. v. Herold, 203 Fed. 880; People ex rel. Mutual Trust Co. v. Miller, 177 N. Y. 57, 69 N. E. 124.

The language of the statute plainly indicates that it was the intention of Congress to levy a tax not upon yachts as property, but solely "upon the use of every foreign-built yacht." The test thus provided by the act itself is use, which means "to put to a purpose," "to employ," "to make use of."

The Anjer Head, 46 Fed. 664.

It would violate all the long-established and well-settled canons for the construction of tax statutes to strain the meaning of the common and well-understood term "use" to include mere ownership without any use whatever.

United States v. Wigglesworth, 2 Story, 373, Fed. Cas. No. 16,690; McCoach v. Minehill & S. H. R. Co. 228 U. S. 295, 57 L. ed. 842, 33 Sup. Ct. Rep. 419; United States v. Nipissing Mines Co. 124 C. C. A. 313, 206 Fed. 431; Abrast Realty Co. v. Maxwell, 206 Fed. 333.

It is well known, or at any rate highly probable, that the word "use" was advisedly employed in order to avoid creating what might be held to be a direct tax on the property, and as such necessary to be apportioned.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; McCoach v. Minehill & S. H. R. Co. 228 U. S. 295, 306, 57 L. ed. 842, 847, 33 Sup. Ct. Rep. 419.

The court will not, therefore, now adopt a construction of the statute which would create grave doubts as to its constitutionality, when another construction which avoids all constitutional difficulties is not only equally consistent with the terms of the act, but more consonant with its plain intent.

United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 408, 53 L. ed. 836, 849, 29 Sup. Ct. Rep. 527; The Abby Dodge, 223 U. S. 166, 175, 56 L. ed. 390, 393, 32 Sup. Ct. Rep. 310.

The tax is not leviable in respect of foreign-built yachts not within the jurisdiction of the United States.

Buck v. Beach, 206 U. S. 392, 400, 51 L. ed. 1106, 1111, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; United States v. Erie R. Co. 106 U. S. 327, 332, 27 L. ed. 151, 154, 1 Sup. Ct. Rep. 223; Northern C. R. Co. v. Jackson, 7 Wall. 262, 267, 19 L. ed. 88, 89; State Tax on Foreign-held Bonds, 15 Wall. 300, 319, 21 L. ed. 179, 186; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 22, 35 L. ed. 613, 616, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 398, 47 L. ed. 513, 519, 23 Sup. Ct. Rep. 468; Old Dominion S. S. Co. v. Virginia, 198 U. S. 299, 307, 49 L. ed. 1059, 1062, 25 Sup.

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Ct. Rep. 686, 3 Ann. Cas. 1100; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 353, 49 L. ed. 1077, 1081, 25 Sup. Ct. Rep. 669; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 209, 50 L. ed. 150, 156, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 592, 51 L. ed. 636, 638, 27 Sup. Ct. Rep. 326; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 399, 51 L. ed. 853, 855, 27 Sup. Ct. Rep. 499; Selliger v. Kentucky, 213 U. S. 200, 203, 53 L. ed. 761, 763, 29 Sup. Ct. Rep. 449; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 38, 54 L. ed. 355, 370, 30 Sup. Ct. Rep. 190; Southern P. Co. v. Kentucky, 222 U. S. 63, 73, 56 L. ed. 96, 100, 32 Sup. Ct. Rep. 13; Gromer v. Standard Dredging Co. 224 U. S. 362, 372, 376, 377, 56 L. ed. 801, 806–808, 32 Sup. Ct. Rep. 499; Detroit, G. H. & M. R. Co. v. Fuller, 205 Fed. 90.

The taxable situs of a vessel which has no permanent location is the domicil of the owner.

Southern P. Co. v. Kentucky, 222 U. S. 63, 69, 56 L. ed. 96, 98, 32 Sup. Ct. Rep. 13; Ayer & L. Tie Co. v. Kentucky, 202 U. S. 409, 421, 50 L. ed. 1082, 1086, 26 Sup. Ct. Rep. 679, 6 Ann. Cas. 205; Hays v. Pacific Mail S. S. Co. 17 How. 596, 15 L. ed. 254.

The action of the Treasury Department cannot make these yachts American vessels, or classify them otherwise than Congress has done.

White's Bank v. Smith (White's Bank v. The Robert) 7 Wall. 646, 655, 656, 19 L. ed. 211, 213.

If Congress intended to compass the imposition of such a novel tax burden, the duty devolved upon it to express the intent to do so in plain terms, free from doubt or ambiguity.

Eidman v. Martinez, 184 U. S. 578, 583, 46 L. ed. 697, 701, 22 Sup. Ct. Rep. 515; Lynch v. Union Trust Co. 90 C. C. A. 147, 164 Fed. 163.

It is a principle of law, as it is of justice, in taxation, that one who has owned property, or exercised or enjoyed a right or privilege, or carried on a vocation, at a time and under circumstances when such ownership or acts were not taxable, ought not to be subjected to a special, novel, and extraordinary tax by a subsequent statute operating retroactively upon his past ownership or acts. A citizen ought not to have a demand thus created against him in respect of past transactions by mere legislative edict. Ownership of property may be taxed as of a certain date, or license fees may be required as of a certain date, and be measured by past transactions, but generally such taxes are payable in advance.

People ex rel. New York C. & H. R. R. Co. v. Gaus, 200 N. Y. 330, 93 N. E. 988.

The general rule is that a tax should not be levied upon past ownership so as to cover a period when the property was not subject to taxation.

People v. Trust Co. of America, 205 N. Y. 77, 98 N. E. 207.

A fortiori, a statute imposing a tax upon use should not be construed retrospectively, unless the language imperatively requires it.

People ex rel. Provident Sav. Life Assur. Soc. v. Miller, 179 N. Y. 227, 71 N. E. 930, 180 N. Y. 526, 72 N. E. 931; Metz v. Hagerty, 51 Ohio St. 521, 38 N. E. 11; United States v. Burr, 159 U. S. 78, 82, 40 L. ed. 82, 83, 15 Sup. Ct. Rep. 1002; United States v. American Sugar Ref. Co. 202 U. S. 563, 577, 50 L. ed. 1149, 1152, 26 Sup. Ct. Rep. 717; Holliday v. Atlanta, 96 Ga. 377, 23 S. E. 406; Young v. Henderson, 76 N. C. 420; 2 Lewis's Sutherland, Stat. Constr. 2d ed. p. 640.

Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.

United States Fidelity & G. Co. v. United States, 209 U. S. 306, 314, 52 L. ed. 804, 807, 28 Sup. Ct. Rep. 537; United States v. Heth, 3 Cranch, 399, 413, 2 L. ed. 479, 483.

However, if it be held that it must be presumed that Congress intended that the obligation to pay the tax should begin to accrue from the date when the act took effect, namely, from August 5, 1909, then this annual tax on use should be apportioned according to the period of actual use during the year ending September 1, 1909, while the tax law was in force and operation.

People ex rel. Mutual Trust Co. v. Miller, 177 N. Y. 54, 69 N. E. 124; People ex rel. Lincoln Trust Co. v. Glynn, 132 App. Div. 547, 116 N. Y. Supp. 1078, affirmed in 198 N. Y. 501, 92 N. E. 1097; People ex rel. New York C. & H. R. R. Co. v. Gaus, 200 N. Y. 331, 93 N. E. 988.

The citizen is exempt from taxation, unless the same is imposed by clear and unequivocal language; and where the construction of a tax is doubtful, the doubt is to be resolved in favor of those upon whom the tax is sought to be laid.

Eidman v. Martinez, 184 U. S. 578, 583, 46 L. ed. 697, 701, 22 Sup. Ct. Rep. 515; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 416, 48 L. ed. 496, 503, 24 Sup. Ct. Rep. 376; Mutual Ben. L. Ins. Co. v. Herold, 198 Fed. 201, affirmed in 120 C. C.

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A. 256, 201 Fed. 918; Parkview Bldg. & L. Asso. v. Herold, 203 Fed. 880.

Courts may not find an intention to impose interest as a penalty for delay in payment of taxes, and cannot award interest on taxes unless there be some express statutory provision to that effect.

Hartford v. Hills, 72 Conn. 600, 45 Atl. 433; People v. Gold & Stock Teleg. Co. 98 N. Y. 80; Crabtree v. Madden, 4 C. C. A. 408, 12 U. S. App. 159, 54 Fed. 431; Rochester v. Bloss, 185 N. Y. 52, 6 L.R.A.(N.S.) 694, 77 N. E. 794, 7 Ann. Cas. 15; Camden v. Allen, 26 N. J. L. 399; Belvidere v. Warren R. Co. 34 N. J. L. 199; Paterson Ave. & S. Road Comrs. v. Hudson County, 44 N. J. L. 571, affirmed in 45 N. J. L. 173; State ex rel. Brennert v. Farrier, 47 N. J. L. 75; Shaw v. Peckett, 26 Vt. 486; Hughes v. Kelley, 69 Vt. 445, 38 Atl. 91; Perry v. Washburn, 20 Cal. 350; People v. Central P. R. Co. 105 Cal. 595, 38 Pac. 905, affirmed in 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766; Sargent v. Tuttle, 67 Conn. 167, 32 L.R.A. 822, 34 Atl. 1028; Cromwell v. Savage, 85 Conn. 377, 82 Atl. 972; Stitt v. Stringham, 55 Or. 94, 105 Pac. 252; State v. Mutual L. Ins. Co. 175 Ind. 85, 42 L.R.A.(N.S.) 256, 93 N. E. 213; State v. Southwestern R. Co. 70 Ga. 32; Georgia R. & Bkg. Co. v. Wright, 124 Ga. 618, 53 S. E. 251, 125 Ga. 610, 54 S. E. 52, reversed on other grounds in 207 U. S. 127, 52 L. ed. 134, 28 Sup. Ct. Rep. 47, 12 Ann. Cas. 463; McWilliams v. Jacobs, 128 Ga. 378, 57 S. E. 509; Louisville & N. R. Co. v. Com. 89 Ky. 538; Illinois C. R. Co. v. Adams, 78 Miss. 895, 29 So. 997; New Whatcom v. Roeder, 22 Wash. 575, 61 Pac. 767; State v. New England Furniture & Carpet Co. 107 Minn. 53, 119 N. W. 427, 16 Ann. Cas. 470; Perry County v. Selma, M. & M. R. Co. 65 Ala. 401; Edmonson v. Galveston, 53 Tex. 161; Western U. Teleg. Co. v. State, 55 Tex. 319, reversed in 105 U. S. 460, 26 L. ed. 1067; Cave v. Houston, 65 Tex. 622; Brooks v. State, — Tex. Civ. App. —, 58 S. W. 1035; Rockland v. Ulmer, 87 Me. 361, 32 Atl. 972; Danforth v. Williams, 9 Mass. 324; Greer v. Richards, 3 Ariz. 235, 32 Pac. 266; 1 Cooley, Taxn. 3d ed. pp. 19, 20; 27 Am. & Eng. Enc. Law, 2d ed. p. 777; 37 Cyc. 1165.

Expressio unius est exclusio alterius.

People v. Central P. R. Co. 105 Cal. 595, 38 Pac. 905, affirmed in 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766.

The force of these authorities is not at all weakened by the fact that it has been held proper for the United States to sue for the recovery of taxes in an action in the nature of debt (Meredith v. United States, 13 Pet. 486, 10 L. ed. 258; United States v. Chamberlin, 219 U. S. 250, 55 L. ed. 204, 31 Sup. Ct. Rep. 155). Such an action may be brought to recover sums which are not debts in any sense of the word.

The mere form of procedure cannot change the nature of the obligation, or create a penalty for delay in payment.

Meriwether v. Garrett, 102 U. S. 472, 513, 514, 26 L. ed. 197, 204, 205; Lane County v. Oregon, 7 Wall. 71, 19 L. ed. 101; Boston v. Turner, 201 Mass. 193, 87 N. E. 634; Gautier v. Ditmar, 204 N. Y. 27, 97 N. E. 464, Ann. Cas. 1913C, 960.

In nearly all of the tax cases cited by the government in the court below, the question of interest was not before the court.

Litchfield v. Webster County, 101 U. S. 773, 25 L. ed. 925; United States v. Erie R. Co. 106 U. S. 327, 27 L. ed. 151, 1 Sup. Ct. Rep. 223; Western Union R. Co. v. United States, 101 U. S. 543, 25 L. ed. 1068; Arnold v. United States, 9 Cranch, 104, 3 L. ed. 671; Sun Cheang-Kee v. United States, 3 Wall. 320, 18 L. ed. 72; United States v. Cobb, 11 Fed. 76; United States v. Phelps, 17 Blatchf. 312, Fed. Cas. No. 16,039; United States v. Dodge, Deady, 124, Fed. Cas. No. 14,973.

In some of these cases, there was no assignment of error which presented the point; in others the amount of the interest was too trifling to invite controversy; in none of them was there any consideration of the subject, either by the court or counsel, and in none was the court required to decide the point. The whole matter merely passed *sub silentio*. It is familiar law that cases in which a particular point is so passed are entitled to no weight whatever as authority upon that point.

Entick v. Carrington, 19 How. St. Tr. 1029, 1068; United States v. More, 3 Cranch, 159, 172, 2 L. ed. 397, 401; New v. Oklahoma, 195 U. S. 252, 256, 49 L. ed. 182, 183, 25 Sup. Ct. Rep. 68.

If this rule applies to cases upon the question of jurisdiction,—a question which the court is bound to ask and answer for itself, even when not otherwise suggested (Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 382, 28 L. ed. 462, 463, 4 Sup. Ct. Rep. 510),—how much more strongly must it govern cases upon such a minor and incidental matter as interest upon taxes.

No importance, of course, can be attached to the case of United States v. Washington Mills, 2 Cliff. 607, Fed. Cas. No. 16,647, where interest was allowed under the agreement of the parties; and the case of Dollar Sav. Bank v. United States, 19 Wall. 227, 231, 22 L. ed. 80, cannot aid the government, because interest was there refused. Arnold v. United States, 9 Cranch, 104, 3 L. ed. 671, is pointless, since that decision proceeded upon the act of

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March 2, 1799, chap. 22, § 65 (now U. S. Rev. Stat. § 963, U. S. Comp. Stat. 1901, p. 700), which expressly provided for the allowance of interest upon all bonds for duties.

In Litchfield v. Webster County, 101 U. S. 773, 25 L. ed. 925, the citizen tendered to the state treasurer the amount of the taxes, together with interest thereon, which the latter refused to receive because he claimed more. The court was not called upon to say whether Litchfield could or should have offered even less than he did. Litchfield was willing to pay interest, and there was, therefore, no controversy on that score. Under such a state of facts, it cannot be presumed that the court intended, unnecessarily and without consideration, to make a ruling wholly opposed to the weight of authority.

If People v. New York County, 5 Cow. 331, affords any support to the contention that interest can be imposed for delay in payment of taxes by a New York court in the absence of a statute to that effect, then it must be considered as having been overruled by the subsequent decisions of the court of appeals in People v. Gold & Stock Teleg. Co. 98 N. Y. 79, and Rochester v. Bloss, 185 N. Y. 52, 6 L.R.A.(N.S.) 694, 77 N. E. 794, 7 Ann. Cas. 15.

In some of the cases cited in the court below by the government in support of its claim for interest, the cause of action was based on an implied contract, or other common-law right, and interest was awarded as damages.

Redfield v. Ystalyfera Iron Co. 110 U. S. 174, 176, 28 L. ed. 109, 110, 3 Sup. Ct. Rep. 570; Young v. Godbe, 15 Wall. 562, 21 L. ed. 250; New Dunderberg Min. Co. v. Old, 38 C. C. A. 89, 97 Fed. 150.

Use, and not merely potential use, must be shown before there can be any liability to pay the tax.

Flint v. Stone Tracy Co. 220 U. S. 108, 145, 150, 55 L. ed. 389, 411, 413, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Zonne v. Minneapolis Syndicate, 220 U. S. 187, 55 L. ed. 428, 31 Sup. Ct. Rep. 361; McCoach v. Minehill & S. H. R. Co. 228 U. S. 295, 305, 57 L. ed. 842, 846, 33 Sup. Ct. Rep. 419.

A general act of Congress levying a tax upon property or the use of property should be presumed to relate only to property or use within the territorial jurisdiction of the United States.

Eidman v. Martinez, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; Thomson v. Advocate-General, 12 Clark & F. 1, 9 Jur. 217.

American nationality is denied to foreign-built yachts although owned by American citizens.

White's Bank v. Smith (White's Bank v. The Robert) 7 Wall. 646, 656, 19 L. ed. 211, 213; The Merritt (Murray v. United States) 17 Wall. 582, 585, 21 L. ed. 682, 683; The Alta, 78 C. C. A. 415, 148 Fed. 665.

There is serious doubt as to whether property or the use of property located in other countries and owned by persons there permanently domiciled can be taxed by Congress.

United States v. Erie R. Co. 106 U. S. 327, 332, 27 L. ed. 151, 154, 1 Sup. Ct. Rep. 223, 9 Ben. 73, Fed. Cas. No. 15,056; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179.

The consent of the people to the adoption of the Constitution in the necessary number of states was secured only upon the pledge that amendments protecting the individual against the abuse of the powers granted to the Federal government would be forthwith submitted.

Barron v. Baltimore, 7 Pet. 243, 250, 8 L. ed. 672, 675.

The first ten articles of Amendment to the Constitution are to be regarded as of equal force and validity with the provisions of the Constitution itself.

Prout v. Starr, 188 U. S. 537, 543, 544, 47 L. ed. 584, 587, 588, 23 Sup. Ct. Rep. 398.

The constitutional right against unjust taxation is given for the protection of private property.

Wight v. Davidson, 181 U. S. 371, 377, 45 L. ed. 900, 903, 21 Sup. Ct. Rep. 616.

Even if it could be shown that the abuse of the taxing power was not in the minds of the people of the United States at the time the 5th Amendment was adopted, and that the framers perceived and apprehended no danger from the abuse of that power, this fact would not limit the scope of the Amendment, if the case now presented came fairly within its spirit and letter.

Dartmouth College v. Woodward, 4 Wheat. 518, 644, 4 L. ed. 629, 661.

The cases in this court which have applied to taxation the constitutional requirement of "due process of law" all arose under the 14th Amendment and related to state laws; but no reason has been suggested why the very same provision in the Federal Constitution should have one meaning when applied to the state governments and to a state tax law, and a narrower meaning and more limited scope when applied to the Federal government.

Sinking-Fund Cases, 99 U. S. 700, 718, 25 L. ed. 496, 501.

Logically, if there should be in reason any difference, it should exist against the Fed-

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eral government, which is indisputably one of limited and enumerated powers.

Cooley, Taxn. p. 12.

The only sound principle must be that the provision is the same in both cases as applied to the taxing power.

French v. Barber Asphalt Paving Co. 181 U. S. 324, 355, 45 L. ed. 879, 894, 21 Sup. Ct. Rep. 625; Twining v. New Jersey, 211 U. S. 78, 100, 101, 53 L. ed. 97, 106, 107, 29 Sup. Ct. Rep. 14.

Assistant Attorney General Adkins argued the cause, and, with Mr. Karl W. Kirchwey, filed a brief for the United States:

A statute is not retrospective because a part of the requisites for its action is drawn from a time antecedent to its passing.

Endlich, Interpretation of Statutes, § 280; Johnston v. United States, 17 Ct. Cl. 171; People v. Spring Valley Hydraulic Gold Co. 92 N. Y. 390; Frellsen v. Mahan, 21 La. Ann. 103; Locke v. New Orleans, 4 Wall. 172, 18 L. ed. 334.

In taxes upon real and personal property the annual tax is collected from the owner of the property at the time the tax is due, without regard to whether he has owned it for a year, or for only a day, preceding the levy.

McClellan v. Memphis & C. R. Co. 11 Lea, 336; State ex rel. Little River County v. Certain Lands, 40 Ark. 34; Litson v. Smith, 68 Mo. App. 402; Fennell v. Pauley, 112 Iowa, 94, 83 N. W. 799; Hudson v. Miller, 10 Kan. App. 532, 63 Pac. 21; Hardesty v. Fleming, 57 Tex. 395; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091.

Even if such construction does give the statute a retroactive effect, it is clear that Congress intended the tax to be paid September 1st, 1909.

1. It cannot be seriously questioned that Congress has the power to lay a retrospective tax.

Locke v. New Orleans, 4 Wall. 172, 18 L. ed. 334; Stockdale v. Atlantic Ins. Co. 20 Wall. 323, 331, 22 L. ed. 348, 351; Lake Shore & M. S. R. Co. v. Rose, 95 U. S. 78, 80, 24 L. ed. 376, 377; Flint v. Stone Tracy Co. 220 U. S. 108, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Cooley, Taxn. 3d ed. 492–494.

Nor can it be doubted that courts will construe a statute retrospectively when that is clearly the legislative intent.

Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; Lamb v. Powder River Live Stock Co. 67 L.R.A. 558, 65 C. C. A. 570, 132 Fed. 434.

2. The language of this act shows a clear intention to make it immediately effective.

Pauley Jail Bldg. & Mfg. Co. v. Crawford County, 28 C. C. A. 579, 56 U. S. App. 53, 84 Fed. 942.

3. The length of ownership is immaterial; the phrase, "for more than six months," qualifies only charters, and not ownership.

Punctuation is to be given little weight in determining the legislative intent.

Hammock v. Farmers' Loan & T. Co. 105 U. S. 77, 84, 26 L. ed. 1111, 1113; Stephens v. Cherokee Nation, 174 U. S. 445, 480, 43 L. ed. 1041, 1053, 19 Sup. Ct. Rep. 722.

A construction which leads to absurd and unjust consequences is to be avoided if possible.

Pickett v. United States, 216 U. S. 456, 461, 54 L. ed. 566, 569, 30 Sup. Ct. Rep. 265.

The tax cannot be apportioned.

McClellan v. Memphis & C. R. Co. 11 Lea, 336.

The tax is upon consumption, or upon the privilege of using, and is not avoided by failure to employ the yacht on cruises.

Flint v. Stone Tracy Co. 220 U. S. 107, 166, 55 L. ed. 389, 419, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; United States v. Singer, 15 Wall. 111, 21 L. ed. 49; Hylton v. United States, 3 Dall. 171, 1 L. ed. 556; Knowlton v. Moore, 178 U. S. 81–83, 44 L. ed. 985, 986, 20 Sup. Ct. Rep. 747; Missouri, K. & T. R. Co. v. United States, 231 U. S. 112, ante, —, 144, 34 Sup. Ct. Rep. 26.

Every statute is to be construed sensibly, and to accomplish the legislative intent.

Johnson v. Southern P. Co. 196 U. S. 17, 49 L. ed. 369, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412.

The present statute was undoubtedly drawn in view of the decision of this court in Eidman v. Martinez. The language here used, "district nearest the residence of the managing owner," applies even more appropriately to nonresidents than to persons residing in the United States. Every citizen of the United States comes within this description. There is a customs district nearest his residence, the ascertainment of which is a mere matter of geography. It is immaterial whether New York is the nearest district. That fact is admitted by the demurrer in two of the suits. And the assessment by the statute is sufficient.

United States v. Chamberlin, 219 U. S. 263, 55 L. ed. 210, 31 Sup. Ct. Rep. 155.

Admittedly, the tax is an excise.

Hylton v. United States, 3 Dall. 171, 1 L. ed. 556.

An excise requires only geographical uniformity, and when this exists the tax is not a deprivation of property without due process of law, even though it apply unequally to different classes of taxpayers.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed.

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969, 20 Sup. Ct. Rep. 747; Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312.

The classification of the statute is reasonable within the "equal protection of the laws" clause of the 14th Amendment.

District of Columbia v. Brooke, 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. Rep. 560; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Citizens' Teleph. Co. v. Fuller, 229 U. S. 322, 57 L. ed. 1206, 33 Sup. Ct. Rep. 833; Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; Metropolis Theatre Co. v. Chicago, 228 U. S. 61, 69, 57 L. ed. 730, 733, 33 Sup. Ct. Rep. 441; Chicago Dock & Canal Co. v. Fraley, 228 U. S. 680, 686, 57 L. ed. 1022, 1024, 33 Sup. Ct. Rep. 715; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Barrett v. Indiana, 229 U. S. 26, 30, 57 L. ed. 1050, 1052, 33 Sup. Ct. Rep. 692; Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192; Travellers' Ins. Co. v. Connecticut, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; St. John v. New York, 201 U. S. 633, 50 L. ed. 896, 26 Sup. Ct. Rep. 554, 5 Ann. Cas. 909; Adams v. Milwaukee, 228 U. S. 572, 57 L. ed. 971, 33 Sup. Ct. Rep. 610.

Treaties have been made with foreign nations, permitting the punishment by this country of certain offenses committed on vessels in foreign ports, belonging in whole or in part to the United States, "or any citizen thereof."

Wildenhus's Case (Mali v. Keeper of Common Jail) 120 U. S. 1, 12, 30 L. ed. 565, 567, 7 Sup. Ct. Rep. 383.

Additional privileges within the waters of the United States are extended to these yachts.

The Miranda, 47 Fed. 815, affirmed in 2 C. C. A. 362, 1 U. S. App. 228, 51 Fed. 523; The Conqueror, 166 U. S. 119, 41 L. ed. 942, 17 Sup. Ct. Rep. 510; The Alta, 69 C. C. A. 289, 136 Fed. 513.

The right to tax may be supported by analogy to the right of a nation to punish its citizens for crimes committed abroad.

Clark & M. Crimes, p. 743; Beale, Crim. Pl. & Pr. p. 2; 2 Moore, Int. Law Dig. 255 et seq.

Section 37 is not unconstitutional because it originated in an amendment first proposed in the Senate.

Flint v. Stone Tracy Co. 220 U. S. 143, 55 L. ed. 410, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312.

A suit *in personam* lies to recover the duty.

United States v. Chamberlin, 219 U. S. 250, 258, 55 L. ed. 204, 208, 31 Sup. Ct. Rep. 155.

The United States is entitled to interest on the several taxes from the time they became due.

Young v. Godbe, 15 Wall. 562, 565, 21 L. ed. 250, 251; People v. New York County, 5 Cow. 334; United States v. Lyman, 1 Mason, 482, Fed. Cas. No. 15,647; Meredith v. United States, 13 Pet. 486, 10 L. ed. 258; Sun Cheang-Kee v. United States, 3 Wall. 320, 18 L. ed. 72; United States v. Dodge, Deady, 124, Fed. Cas. No. 14,973; United States v. Cobb, 11 Fed. 76; United States v. Mexican International R. Co. 154 Fed. 519; Western Union R. Co. v. United States, 101 U. S. 550, 25 L. ed. 1070; Litchfield v. Webster County, 101 U. S. 773, 25 L. ed. 925; United States v. Erie R. Co. 106 U. S. 327, 27 L. ed. 151, 1 Sup. Ct. Rep. 223.

Mr. Chief Justice White delivered the opinion of the court:

It is necessary to determine whether these two cases from different courts are not virtually one and to be considered in that aspect.

The United States sued for the amount of a tax with interest. The alleged liability under the statute was challenged, and if it existed the statute was alleged to be repugnant to the Constitution of the United States, and right to interest was denied. The court held the statute to be constitutional, and judgment was awarded for the sum claimed, but the prayer for interest was rejected. Error was prosecuted directly from this court by the defendant, and from the circuit court of appeals by the United States; the first because of the constitutional questions, and the second because of the disallowance of interest. The circuit court of appeals certified a question concerning the right to recover interest, and the two cases before us consist of the direct writ of error on the one hand and the certificate on the other. Both writs of error when taken were authorized. Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; Macfadden v. United States, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490. Our jurisdiction, however, on the direct writ of error, is not confined to the constitutional questions, but embraces every issue in the case. Williamson v. United States, 207 U.

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S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163. The circuit court of appeals, however, has no power to ask instructions upon an issue which it has no right to decide, and we have no authority to instruct on such a subject, or to refuse to decide issues which are properly before us for judgment.

Under these conditions, we think the better practice is [277] as regards the controversy as to interest, which was taken to the circuit court of appeals by writ of error, and in which cases the certificates now before us were drawn, to treat the writ of error from the circuit court of appeals as in substance pending here on a cross writ by the United States; and as without further orders the record is in such a condition as to enable us to decide the whole case, we proceed to do so.

Section 37 of the tariff act of August 5, 1909, chap. 6, 36 Stat. at L. 112, U. S. Comp. Stat. Supp. 1911, p. 1197, provided in part as follows:

"There shall be levied and collected annually on the first day of September by the collector of customs of the district nearest the residence of the managing owner, upon the use of every foreign-built yacht, pleasure boat, or vessel, not used or intended to be used for trade, now or hereafter owned or chartered for more than six months by any citizen or citizens of the United States, a sum equivalent to a tonnage tax of seven dollars per gross ton."

The second paragraph of the provision, which we need not quote, gives the right to the owner of any "foreign-built yacht, pleasure boat, or vessel above described" to pay a duty of 35 per cent ad valorem, and thus secure an exemption from the tax provided by the first paragraph.

The act went into effect on August 6, 1909, and the collector of the port of New York thereafter made a demand upon C. K. G. Billings, the plaintiff in error, for the payment of $7,644; that is, of the sum produced by calculating $7 per ton on 1,091.71 tons, the tonnage of the foreign-built yacht Vanadis, owned and controlled by him.

Failing to pay, in January, 1911, the United States sued in the court below to recover the tax. The defendant was alleged to be a citizen of the United States, and the suit was averred to have been brought in the district nearest his residence. The ownership and use by him of the pleasure yacht Vanadis, an English foreign-built vessel, [278] the levy based upon her tonnage according to the statute of the amount of $7,644, the demand for payment, the failure to pay on the 1st day of September, 1909, under the statute, were all alleged, and recovery of the tax as well as of interest was prayed. The answer admitted citizenship and the ownership of the yacht, and that she was a foreign-built pleasure craft, but set up three distinct defenses; the first, that the vessel was not enrolled, registered, or documented as a vessel of the United States, and enjoyed no privileges because she was of that character. It was expressly admitted that "during the year preceding the 1st day of September, 1909," the said yacht "has been used by the defendant outside of the waters and territorial limits or jurisdiction of the United States from time to time and at various times . . . and was not used for six months during such year within the waters and territorial limits or jurisdiction of the United States or elsewhere."

The second defense expressly averred that the tax imposed by the statute was intended by Congress to be "an annual tax, that it should be prospective, and operate only upon the future use of any such foreign-built yacht, pleasure boat, or vessel, and that said annual tax did not accrue and could not be duly levied and collected prior to the 1st day of September in the year 1910."

The third defense after fully averring that there were within the United States many pleasure yachts not foreign built which were in use, and whose use was identical with that of a foreign-built yacht like the one which the defendant used, charged that the law imposing the burden sought to be enforced was void because repugnant to the due process clause of the 5th Amendment. The case was submitted to the court on bill and answer; and as we at the outset said, there was a judgment holding that the sum claimed was due by the defendant as an excise or duty upon the use of his yacht, and that the act imposing [279] the tax was not repugnant to the Constitution, but that the government was not entitled to recover interest.

To avoid, if it may be, the necessity of determining the constitutional question, we shall first decide what, if any, burden the statute imposes, and then, if necessary, consider its asserted repugnancy to the Constitution. In view of the requirement that direct taxes be apportioned, and assuming, as we do assume, that the act before us was adopted by Congress in the light of the ruling in Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912, it is certain that the tax levied by the provision was intended to be an excise tax upon "the use of every foreign-built yacht, pleasure boat, or vessel . . . now or hereafter owned or chartered for more than six months by any

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citizen or citizens of the United States." This is not seriously, if at all, disputed in argument, the controversy turning first upon the period when the tax provided for is to take effect, and the nature and character of the use which is taxed. These subjects are so interwoven that we consider and dispose of them together.

Was the tax due on the 1st day of September, 1909, or was it only due on the same day in September, 1910? In view of the positive direction that the tax shall be levied and collected on the 1st day of September, we can see no escape from the conclusion that the court below was right in holding that it became due on the 1st day of September after the passage of the act. The word "annually," upon which so much reliance to the contrary is placed, is manifestly used not for the purpose of postponing the time of payment, but rather as provision for continuity; that is, the word but shows the purpose of fixing the annual duty of levying and collecting the tax on the designated day. This becomes quite apparent when it is observed that if the word "annually" be removed, there would be room for the implication that the tax was to be but sporadic, and would therefore cease to [280] be collectible after one payment. And it is equally clear that the six months clause is concerned not with the period when the tax imposed shall be levied and collected, but addresses itself to the subject-matter upon which the tax is placed; in other words, it qualifies the word "charter," and therefore only indicates when the use of a chartered vessel shall become subject to the duty imposed. The tax being leviable and collectible on the 1st of September in each year after the passage of the act, upon what was it assessed is the question. It seems difficult to answer it in clearer terms than does the text of the act when it provides that it shall be upon the use of the yachts with which the provision is concerned. But it is said to respond in the language of the act leaves the question virtually unanswered, since the extent of the use and its essential period are left wholly undetermined. But this is a misconception based upon a disregard of the fact that the word "use" in the text is unqualified, from which it results that the recurrence of the tax is annual and depends upon two elements,—ownership or charter rights, as specified in the act, and use for any time during the year. It is to be observed that the provision deals with ownership, and distinguishes between ownership and use, since it bases the tax not upon the former, but upon the latter. From this it follows that it is not ownership, but the election during the taxing period of the owner to take advantage of one of the elements which are involved in ownership,—the right to use which is the subject upon which the statute places the excise duty. In this view the fact of use, not its extent or its frequency, becomes the test, as distinguished from mere ownership, for that, in the statutory sense, could exist without use having taken place. The words of the statute under this construction were used in an every-day sense, and not in a technical one: in other words, but convey the distinction without reference to nice analysis of the nature of things which is [281] commonly conceived to exist between ownership and use. Let it be conceded that the ownership of property includes the right to use; plainly we think, as use and ownership are distinguished one from the other in the provision, the word "use," as there employed, means more than the mere privilege of using which the owner enjoys, and relates to its primary signification, as defined by Webster: "The act of employing anything or of applying it to one's service; the state of being so employed or applied." If the use which arises from the fact of ownership, without more, was what the statute proposed, then it is inconceivable why the difference between use and ownership was marked in the provision and made the basis of the tax which it imposed. While this construction in this case leads to the same conclusion as does that which the court below affixed to the statute, that is, that it taxed the privilege of use, or, in other words, the potentiality of using involved in ownership, inherently there is this fundamental difference between the interpretation we give and that which the lower court adopted, since the privilege of use is purely passive (or subjective),—a right which necessarily pertains to ownership and must exist where there is ownership, as one may not obtain ownership without acquiring the privileges of use which ownership gives. The other, on the contrary, that is, use in the statutory sense, although it arises from ownership, is active (objective); that is, it is the outward and distinct exercise of a right which ownership confers, but which would not necessarily be exerted by the mere fact of ownership. The contention that inequality must be the result from making the tax depend upon mere use without reference to the extent of its duration addresses itself not to the question of power, and is therefore beyond the scope of judicial cognizance. But it is to be observed that it may well have been that the character of the property with which the statute deals and the mere element of [282] caprice as to its use and the uncertainties of the subject led to the fact of making the use alone the criterion as the wiser and

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juster method of operating equally upon all. Again let it be conceded that the causing the tax for the annual period to become due in September, 1909, is to give it in some respects a retroactive effect, such concession does not cause the act to be beyond the power of Congress under the Constitution to adopt. Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312, and authorities there cited. While the rule is that statutes should be so construed as to prevent them from operating retroactively, that principle is one of construction, and not of reconstruction, and therefore does not authorize a judicial re-enactment by interpretation of a statute to save it from producing a retroactive effect.

As under the meaning which we thus give the statute the admitted use of the vessel was within its provision, and therefore the amount due for excise was rightfully imposed, and under our interpretation was due when demanded, we must consider whether the asserted repugnancy of the statute to the Constitution is well founded.

It has been conclusively determined that the requirement of uniformity which the Constitution imposes upon Congress in the levy of excise taxes is not an intrinsic uniformity, but merely a geographical one. Flint v. Stone Tracy Co. supra; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747. It is also settled beyond dispute that the Constitution is not self-destructive. In other words, that the powers which it confers on the one hand it does not immediately take away on the other; that is to say, that the authority to tax which is given in express terms is not limited or restricted by the subsequent provisions of the Constitution or the Amendments thereto, especially by the due process clause of the 5th Amendment. McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561, and authorities there cited. [283] Nor is there anything in Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. Rep. 66, or Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14, which in the remotest degree nullifies or restricts the principle thus stated. Indeed it is apparent, if the suggestion as to the meaning of those cases were assented to, it would result in rendering the Constitution unconstitutional. This certainly was the view entertained by the pleader when the answer in the case was prepared, since the sole attack on the constitutionality of the statute was based upon the assertion that it was repugnant to the due process clause of the 5th Amendment. And such also is the line of the argument at bar where the fundamental rights secured by the 5th Amendment are constantly referred to as the basis upon which the unconstitutionality of the statute is urged. Is there foundation for this claim under the 5th Amendment, is then the issue, and that, of course, requires a statement of the grievances which it is asserted result from upholding the tax. They all come to this,—that to impose a burden in the shape of a tax upon the use of a foreign-built yacht when a like tax is not imposed on the use of a domestic yacht under similar circumstances is so beyond the power of classification, so abhorrent to the sense of justice, and so repugnant to the conceptions of free government, as to be void even in the absence of express constitutional limitation. We do not stop to point out the obvious unsoundness of the contentions, nor, indeed, to direct attention to the self-evident demonstration of their want of merit even from the point of view of the power to classify, since the differences between things domestic and things foreign, and their use, are apparent on the face of things, and are expressly manifested by the text of the Constitution. We say we do not stop to do these things because in any event we are of opinion the conclusion cannot be escaped that the propositions, each and all of them, whatever may be their form of expression, are in substance and effect but an [284] assertion that the tax which the statute imposes is void because of a want of intrinsic uniformity; and therefore all the contentions are adversely disposed of by the previous decisions of this court on that subject. That which is settled beyond dispute may not be disregarded and be brought into the realm of that which is controvertible and questionable by the mere garb in which propositions are clothed.

Was the government entitled to interest? is then the remaining question which we must decide in view of the purpose which we at the outset expressed of treating the United States as here present, and urging its right to interest on a cross writ of error. The cyclopedias and textbooks state the doctrine to be that in the absence of a statute expressly so directing, taxes bear no interest. The principle is thus announced in 37 Cyc. p. 1165: "Delinquent taxes do not bear interest unless it is expressly so provided by statute. But it is competent for the legislature to prescribe the payment of interest as a penalty for delay in the payment of taxes, and to regulate its rate. This however, can be effected only by an act plainly manifesting the legislative intention as to the right to recover interest, its

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amount, and the date from which it shall begin, the latter being ordinarily the time when the assessment is complete and the taxes become payable." Cooley Taxn. p. 17; Sedgwick, Damages, 9th ed. § 332; Sutherland, Damages, 3d ed. § 337; Black, Tax Titles, 2d ed. § 236, and see note in 6 L.R.A. (N.S.) p. 694. And the statement of the text is borne out by the decided cases in nearly all of the state courts of last resort. On the other hand, the government relies upon four cases in this court where interest was allowed as a matter of course on taxes due the United States. Sun Cheang-Kee v. United States, 3 Wall. 320, 18 L. ed. 72; Western Union R. Co. v. United States, 101 U. S. 543, 25 L. ed. 1068; Litchfield v. Webster County, 101 U. S. 773, 25 L. ed. 925; United States v. Erie R. Co. 106 U. S. 327, 27 L. ed. 151, 1 Sup. Ct. Rep. 223. [285] We say as a matter of course, because in the cases referred to, the subject was not discussed and the liability for interest was practically admitted. The government also relies on a careful and clear opinion by Maxey, Judge, in the circuit court for the western district of Texas, holding that interest was due to the United States on customs duties. United States v. Mexican International R. Co. 154 Fed. 519. Whether the practice applied in the previous decisions of this court should be now followed, or the theory established by the state cases adopted and made the rule as to taxes due the United States, is therefore the question. Its solution must depend not upon the mere authority of the state cases, but upon the conclusiveness of the principles upon which such cases rest, and their concurrence with the principles by which interest is allowed in the courts of the United States,—considerations which require us to determine the nature of the duty which arises from the liability for a tax imposed by the United States, not only inherently, but as well from the practice which has obtained in the past in the enforcement of the law of the United States, and the implication of legislative sanction, if any, to such practice which may have arisen. It would serve no purpose to refer to the abhorrence which obtained in early times concerning the payment of interest, and the evolution by which the legitimate character of interest was gradually understood, and it came to be recognized that its payment was, as a general principle, but the compensation due for the use of money, or that its allowance was merely for damages caused by delay in discharging a duty, and therefore in default on a contract to pay money, even without express legislation so directing, interest would be allowed. The subject was explained in National Bank v. Mechanics' Nat. Bank, 94 U. S. 437, 24 L. ed. 176, and was reviewed in Reid v. Rensselaer Glass Factory, 3 Cow. 393, 5 Cow. 587. To avoid prolixity we do not not review the [286] state cases as to nonliability for interest on default for taxes, but content ourselves with stating that we think it is apparent that the conclusion which they sustain, leaving aside minor differences, rests upon two fundamental propositions: First, the necessity for an express statute providing for interest except in cases of contract, and second, that even where there is a statute providing for interest on all debts, such statute is not applicable to taxes because they are not debts, and therefore must be enforced alone by virtue of express legislative penalties, except where a provision exists giving *eo nomine* interest on taxes. But both of these propositions are in conflict with the settled doctrine established by the decision of this court. Thus, as to the necessity for a statute, it was long ago here decided, in view of the true conception of interest, that a statute was not necessary to compel its payment where, in accordance with the principles of equity and justice in the enforcement of an obligation, interest should be allowed. Young v. Godbe, 15 Wall. 562, 565, 21 L. ed. 250, 251:

"It is said there is no law in the territory of Utah prescribing a rate of interest in transactions like the one in controversy in this suit, and that, therefore, no interest can be recovered. But this result does not follow. If there is no statute on the subject, interest will be allowed by way of damages for unreasonably withholding payment of an overdue account. The rate must be reasonable, and conform to the custom which obtains in the community in dealings of this character."

And the decisions of this court have often since exemplified the principle by considering the question of the responsibility for interest from the point of view of reason and justice, even though no express statute existed for compelling this payment. So, also, as to the nature and character of the obligation to pay taxes. As long ago as Meredith v. United States, 13 Pet. 486, 10 L. ed. 258, it was decided, the court speaking by Mr. Justice Story (p. 493):

[287] "It appears to us clear upon principle, as well as upon the obvious import of the provisions of the various acts of Congress on this subject, that the duties due upon all goods imported constitute a personal debt due to the United States from the importer."

Again, in United States v. Chamberlin, 219 U. S. 250, 55 L. ed. 204, 31 Sup. Ct. Rep. 155, the nature and character of an obligation to pay a stamp duty was con-

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sidered, and the right to collect it by action of debt was passed upon, and it was held that the obligation to pay was a debt, and that it could be enforced by suit in the absence of an exclusive remedy created by the statute by which the obligation was imposed. In the course of the opinion, various decisions of this court recognizing the right of the United States to enforce internal revenue duties by suit were referred to, and the statute to the same end was cited, and its application to the case in hand was pointed out upon grounds which in reason may well be said to cause the statute to be applicable to the case here before us. In addition, in repeated adjudications in this court it has been settled that in a suit to recover taxes which have been illegally assessed, interest would be allowed against the official, although the real responsibility was on the government. The concluded doctrine on this subject was thus stated in a recent case after referring to the exemption of the United States from liability for interest (National Home v. Parrish, 229 U. S. 494, 496, 57 L. ed. 1296, 1298, 33 Sup. Ct. Rep. 944):

"On the contrary, in suits against collectors to recover moneys illegally exacted as taxes and paid under protest, the settled rule is, that interest is recoverable without any statute to that effect, and this although the judgment is not to be paid by the collector, but directly from the Treasury. Erskine v. Van Arsdale, 15 Wall. 75, 21 L. ed. 63; Redfield v. Bartels, 139 U. S. 694, 35 L. ed. 310, 11 Sup. Ct. Rep. 683."

The conflict between the systems is pronounced and fundamental. In the one, the state rule, except as to [288] contract, no interest without statute; in the United States rule, interest in all cases where equitably due unless forbidden by statute. In one no suit for taxes as a debt without express statutory authority; in the other, the right to sue for taxes as for a debt in every case where not prohibited by statute.

From this review it results that the doctrine as to nonliability to pay interest for taxes which have become due which prevails in the state courts is absolutely in conflict with the doctrine applied to the same subject in this court, and cannot now be made the rule without repudiating settled principles which have been here applied for many years in various aspects, and without in effect disregarding the sanction either expressly or impliedly given by Congress to such rules. From this it follows that although in the cases in this court to which we at the outset made reference which enforced the liability for interest, and which are here controlling if they be not now overruled, there was no controversy as to the liability for interest, this was presumably because the matter was deemed not disputable as the direct result of the then-settled doctrine that interest could be recovered by the United States on a default in payment of import duties. Under this condition we can see no ground for departing from the rule which the cases enforced, and we are therefore constrained to the conclusion that the court below was wrong in rejecting the prayer of the government for interest, and its action in that respect must be reversed, while in others it must be affirmed.

Modified and affirmed.

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[289] UNITED STATES
v.
CORNELIUS K. G. BILLINGS. (No. 626.)

CORNELIUS K. G. BILLINGS, Plff. in Err.,
v.
UNITED STATES. (No. 67.)

(See S. C. Reporter's ed. 289, 290.)

This case is governed by the decision in Billings v. United States, ante, 596.

[Nos. 626 and 67.]

Argued January 6 and 7, 1914. Decided February 24, 1914.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment enforcing, without interest, a claim of the United States for an excise tax upon a foreign-built pleasure yacht. Modified by awarding interest, and as modified affirmed. Also

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit, presenting the question of the right of the United States to recover interest on the amount of the tax. Unanswered.

See 190 Fed. 372, for the decision below, in a consolidation of the present case, No. 67, with those of other parties named in that report.

The facts are stated in the opinion.

Assistant Attorney General Adkins argued the cause, and, with Mr. Karl W. Kirchwey, filed a brief for the United States.

Mr. William D. Guthrie argued the cause and filed a brief for Cornelius K. G. Billings.

For contentions of counsel, see their briefs as reported in Billings v. United States, ante, 596.

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Mr. Chief Justice White delivered the opinion of the court:

These two cases are controlled by the two cases between the same parties, just decided. In the case which is here on error, the suit was brought by the United States to recover the amount of the tax which became due upon the yacht Vanadis, on the 1st day of September, 1910, under the act of August 5th, 1909 [36 Stat. at L. 11, chap. 6, U. S. Comp. Stat. Supp. 1911, p. 741], which was under consideration in the previous cases. The complaint, leaving aside some additional averments which it is unnecessary to refer to, was the same as the one in the cases already passed upon, and this is true also of the answer. The case [290] by stipulation was submitted to the court without a jury, and the steps essential to save all the questions in the case were properly taken. The use of the vessel during the taxing period was shown. There was a judgment in favor of the United States for the amount of the tax, but against it for interest, and error was prosecuted from the circuit court of appeals to review that subject, and such case is here on certificate. Taking jurisdiction of both cases and treating them as one, as was done in the previous cases, and applying the conclusions in those cases expressed, to this, it results that the judgment below must be modified, so far as the interest is concerned, by allowing the claim of the United States in that respect, and in other respects it must be affirmed.

And it is so ordered.

H. CLAY PIERCE, Plff. in Err.,
v.
UNITED STATES. (No. 64.)

UNITED STATES
v.
H. CLAY PIERCE. (No. 623.)

(See S. C. Reporter's ed. 290, 291.)

Internal revenue — excise on foreign-built yacht — nonuse.

The nonuse of a foreign-built pleasure yacht during the entire taxing year relieves the owner from liability for the annual excise imposed by the act of August 5, 1909 (36 Stat. at L. 112, chap. 6), § 37, upon the use of every such yacht now or hereafter owned or chartered for more than six months by any citizen of the United States.

[Federal taxation, see Internal Revenue, in Digest Sup. Ct. 1908.]

[Nos. 64 and 623.]

Argued January 6 and 7, 1914. Decided February 24, 1914.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment enforcing, without interest, a claim of the United States for an excise tax upon a foreign-built pleasure yacht. Reversed, with directions to dismiss the complaint. Also

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting the question of the right of the United States to recover interest on the amount of the tax. Unanswered.

See same case below, No. 64, on demurrer, 190 Fed. 359.

The facts are stated in the opinion.

Mr. William D. Guthrie argued the cause and filed a brief for H. Clay Pierce.

Assistant Attorney General Adkins argued the cause, and, with Mr. Karl W. Kirchwey, filed a brief for the United States.

For contentions of counsel, see their briefs as reported in Billings v. United States, ante, 596.

Mr. Chief Justice White delivered the opinion of the court:

These two cases involve the liability of the plaintiff in error in No. 64 for a tax on the foreign-built yacht Yacona, which became due on the 1st of September, 1909. The complaint in every substantial particular was identical with that filed in the Billings Case this day decided [232 U. S. 261, ante, 596, 34 Sup. Ct. Rep. 421], and this is true also of the defenses set up in the answer, except that the answer in this case contained this distinct averment which was not in the Billings Case: "That the said yacht Yacona was not in use by the defendant or by any other person at any time during the year next preceding the 1st day of September, 1909, but was out of commission and laid up unused at Brooklyn, in the state of New York, throughout the whole of such year." The case was submitted on bill and answer, and the liability for the tax, which was upheld by the court below, was rested upon the construction as to potential use,—that is, a tax on the privilege of using,—which we decided in the Billings Case to be unsound. In this case, as in that, the certificate is concerned with a writ of error prosecuted by the United States to the circuit court of appeals because of the rejection of a prayer for interest. Treating both the cases in this instance as one, as we did in the previous cases, and applying to this the construction which we have given the statute in those cases, it follows that the judgment below was wrong and must be reversed, with direction to dismiss the complaint.

And it is so ordered.

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[292] H. CLAY PIERCE, Plff. in Err.,
v.
UNITED STATES. (No. 65.)

UNITED STATES
v.
H. CLAY PIERCE. (No. 624.)

(See S. C. Reporter's ed. 292, 293.)

This case is governed by the decision in Pierce v. United States, ante, 609.

[Nos. 65 and 624.]

Argued January 6 and 7, 1914. Decided February 24, 1914.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment enforcing, without interest, a claim of the United States for an excise tax upon a foreign-built pleasure yacht. Reversed, with directions to dismiss the complaint. Also

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit, presenting the question of the right of the United States to recover interest on the amount of the tax. Unanswered.

See 190 Fed. 372, for the decision below, in a consolidation of the present case, No. 65, with those of other parties named in that report.

The facts are stated in the opinion.

Mr. William D. Guthrie argued the cause and filed a brief for H. Clay Pierce.

Assistant Attorney General Adkins argued the cause, and, with Mr. Karl W. Kirchwey, filed a brief for the United States.

For contentions of counsel, see their briefs as reported in Billings v. United States, 596.

Mr. Chief Justice White delivered the opinion of the court:

These cases concern the right to recover a tax on the yacht Yacona, becoming due on the 1st of September, 1910. The complaint filed by the United States in No. 65 was in substance like that filed in the previous cases, and the answer in effect set up the same defenses, especially the defense relating to the nonuse of the yacht. The case, by stipulation, was submitted to the court without a jury, a finding of facts was made which distinctly established [293] the nonuse during the taxing year, and the court gave a judgment for the tax, although it rejected the interest, upon the same construction of the act which it applied in the previous cases. The certificate in this as in the other cases is here in consequence of error prosecuted by the United States to the circuit court of appeals, because of the rejection of the interest claimed. Treating this case as we treated the others, and applying the construction in those cases given, it follows that the judgment in this case must be reversed.

And it is so ordered.

UNITED STATES
v.
HARRIET GOELET.† (No. 631.)

UNITED STATES
v.
HARRIET GOELET.† (No. 632.)

(See S. C. Reporter's ed. 293–298.)

Internal revenue — excise on foreign-built yacht — owner domiciled abroad.

A citizen of the United States who has a permanent residence and domicil abroad is not liable for the excise tax based upon gross tonnage which, under the tariff act of August 5, 1909 (36 Stat. at L. 112, chap. 6, U. S. Comp. Stat. Supp. 1911, p. 1197), § 37, shall be levied and collected annually "by the collector of customs of the district nearest the residence of the managing owner" upon the use of every foreign-built pleasure yacht now or hereafter owned or chartered for more than six months by any citizen of the United States.

[Federal taxation, see Internal Revenue, in Digest Sup. Ct. 1908.]

[Nos. 631 and 632.]

Argued January 6 and 7, 1914. Decided February 24, 1914.

TWO CERTIFICATES from the United States Circuit Court of Appeals for the Second Circuit presenting, *inter alia*, the question whether the excise on the use of foreign-built pleasure yachts may be collected from an owner permanently domiciled in another country. Answered in the negative. Other questions unanswered.

The facts are stated in the opinion.

Assistant Attorney General Adkins argued the cause, and, with Mr. Karl W. Kirchwey, filed a brief for the United States.

Mr. William D. Guthrie argued the cause and filed a brief for Harriet Goelet.

For contentions of counsel see their briefs as reported in Billings v. United States, ante, 596.

†Death of Harriet Goelet suggested, and appearance of Robert Walton Goelet, as executor under the last will and testament of Harriet Goelet, filed and entered January 7, 1914, as a party herein.

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Mr. Chief Justice White delivered the opinion of the court:

The questions asked in both of these cases relate to § 37 of the tariff act of 1909 [36 Stat. at L. 112, chap. 6, U. S. Comp. Stat. Supp. 1911, p. 1197], which we have construed in several opinions just announced. They both concern the sum of excise duties levied on the foreign-built yacht Nahma, the one assessed for the year ending on the 1st of September, 1909, and the other on the 1st of September, 1910. The cases were decided by the trial court at the same time with other cases for a like period, the case relating to the tax for 1909 having been submitted on bill and answer as a result of the overruling a demurrer filed by the government to the answer of the defendant and the election to plead no further, and the case involving the levy for 1910 having been decided by the court along with other cases without the intervention of a jury, as the result of a stipulation between the parties. The certificate fully states the situation as to both periods of taxation, conforming to the conditions of fact which we have recapitulated in the opinions in the two Billings Cases [232 U. S. 261, 289, ante, 596, 608, 34 Sup. Ct. Rep. 421, 428,] [295] and the questions asked concerning the construction of the statute, its operation and its constitutionality, involve all the subject-matters which we have disposed of in the previous opinions. In both of these cases, however, differing from those which we have previously decided, in the pleadings concerning the 1909 tax it was expressly averred, and by the demurrer conceded, that the owner of the yacht, at least for a year prior to the levy of the tax, was domiciled in a foreign country, and that the yacht whose use was taxed had a permanent situs in such country, and, so far as the levy for 1910 is concerned, that state of things, as shown by the certificate, was expressly covered by the findings of fact; and if the opinion of the trial court be considered, it will appear that it was one of these peculiarities of fact, that is, the permanent domicil abroad, which led that court, instead of deciding in favor of the tax, to hold that as to both periods it was unauthorized by the statute. To make the situation perfectly clear we quote from the certificate in the case concerning the 1909 tax (No. 631) the exact language of the answer on the subjects just stated, the equivalent of which is embraced in the case involving the 1910 tax (No. 632), as follows:

"That the defendant was, on September 1, 1909, and for several years prior thereto had been, permanently a resident of and domiciled at Paris, in the Republic of France; and that since 1901 her said yacht had not been within the jurisdiction of the United States, but had had a permanent situs within the jurisdiction of Great Britain."

For the purpose of enabling it to determine the influence of the facts thus stated upon the decision of these two cases, the court, in its certificate, in addition to many questions involving the issues of construction and constitutionality which we have disposed of in the other cases, asks two questions whose order of statement we rearrange as follows:

[296] "II. Does the tax purporting to be imposed by said act of Congress apply to the use of a foreign-built yacht owned by a citizen of the United States who was permanently resident and domiciled in a foreign country for more than one year prior to September 1, 1909, and to the levy of such tax?

"I. Does the tax purporting to be imposed by § 37 of the act of Congress, approved August 5, 1909, apply to the use of a foreign-built yacht owned by a citizen of the United States, when such yacht, for a period of more than one year prior to September 1, 1909, and to the levy of such tax, was used wholly outside of the limits and territorial jurisdiction of the United States?"

It is manifest from what we have said that the response to these two questions will be substantially determinative of all the questions which the certificate propounds, since if we answer either of them in the negative, the case will be disposed of and there will be no occasion to reply to the others; and if, on the contrary, we answer both of them in the affirmative, there will be no need to do anything but state our reply to the other questions, since the reasons for such reply will be controlled by the opinions which we have previously announced. We come then to consider the questions in the order stated.

Not in the slightest degree questioning that there was power to impose the excise duty on the citizen owning a foreign-built yacht wholly irrespective of the fact that he was permanently domiciled in a foreign country, and putting out of view all questions concerning the nonapplication of the statute to the case in hand purely because of the situs of the yacht itself, the single matter for decision is, Do the terms of the statute provide for the payment by a citizen of the United States who has a permanent residence and domicil abroad of an excise duty because of the use by him as owner or charterer under the terms of the statute of a foreign-built yacht? It may not [297] be doubted, as observed by the trial court in these cases (omitting the consideration of

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taxes imposed on property having a situs within the jurisdiction of the taxing authority), speaking in a general sense, that the taxing power, when exerted, is not usually applied to those even albeit they are citizens, who have a permanent domicil or residence outside of the country levying the tax. Indeed, we think it must be conceded that the levy of such a tax is so beyond the normal and usual exercise of the taxing power as to cause it to be, when exerted, of rare occurrence and in the fullest sense exceptional. This being true, we must approach the statute for the purpose of ascertaining whether its provisions sanction such rare and exceptional taxation. Considering the text, we search in vain for the express declaration of such authority. True, it is argued by the United States, that as the tax is levied on any citizen using a foreign-built yacht, and as any includes all, therefore the statute expressly embraces a citizen permanently domiciled and residing abroad. But this argument in effect begs the question for decision, which is whether the use of the general words "any citizen," without more, should be considered as expressing more than the general rule of taxation; or, in other words, can be treated without the expression of more as embracing the exceptional exertion of the power to tax one permanently residing abroad. As illustrative and throwing light on the real question for decision, action taken by Congress in exerting its taxing power is at least worthy of note. For instance the provisions of the income tax law of June 30th, 1864 (13 Stat. at L. 281, chap. 173), expressly extended that tax to those domiciled abroad, and a like purpose is beyond doubt expressed in the income tax of 1913 (subdivision 1 of the tariff act of October 3, 1913). But without resting this case upon the implication against the conferring of the authority here claimed from the mere want of express statement in the statute of the giving of such exceptional [298] power, and treating such implication as not, in and of itself, absolutely conclusive, we think when to the force of such inference, even though it be limited, there is added the weight arising from that which is expressly stated in the statute, the conclusion against want of power conferred to levy the tax here asserted is established. This arises from the command of the statute that the tax shall be levied "by the collector of customs of the district nearest the residence of the managing owner," etc., since the consequence of such command is to associate residence with citizenship, and establishes such a relationship between them as to bring about the result which we have just stated. Nor do we think there is anything as suggested by the argument of the United States in the case of Eidman v. Martinez, 184 U. S. 591, 46 L. ed. 704, 22 Sup. Ct. Rep. 515, which militates against the views just stated; and this also is true of the suggestion made in argument concerning the circulation by those interested in the enactment of the provision of a list of yachts which would become subject to the tax if the provision was enacted, which list included the yacht taxed in this case. The expectations of those who sought the enactment of legislation may not be used for the purpose of affixing to legislation when enacted a meaning which it does not express.

For the reasons just stated we conclude to answer the second question in the negative, and not to reply to the others, as it becomes unnecessary to do so.

And it will be so certified.

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[299] UNITED STATES v. JAMES GORDON BENNETT.

(See S. C. Reporter's ed. 299-308.)

Internal revenue — excise on foreign-built yacht — use outside United States.

1. Use for the taxing period wholly outside the territorial limits of the United States is comprehended by the provision of the tariff act of August 5, 1909 (36 Stat. at L. 112, chap. 6, U. S. Comp. Stat. Supp. 1911, p. 1197), § 37, imposing an annual excise tax based upon gross tonnage upon the use of every foreign-built pleasure yacht now or hereafter owned or chartered for more than six months by any citizen of the United States.

[Federal taxation, see Internal Revenue, in Digest Sup. Ct. 1908.]

Internal revenue — excise on foreign-built yacht — when due.

2. The excise tax based on gross tonnage, which, under the tariff act of August 5, 1909, § 37, shall be levied and collected annually on the 1st day of September upon the use of every foreign-built pleasure yacht now or hereafter owned or chartered for more than six months by any citizen of the United States, became due on the 1st day of September following the passage of the act.

[Federal taxation, see Internal Revenue, in Digest Sup. Ct. 1908.]

Note.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On implied right to interest on taxes or assessments—see note to Rochester v. Bloss, 6 L.R.A.(N.S.) 694.

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Internal revenue — validity of excise tax — territorial limitations.

3. The rule that the power to tax depends upon jurisdiction of the subject-matter of the tax has no application to Federal taxation.

[For other cases, see Internal Revenue I. b; Taxes, I. c, 6, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — excise tax — territorial limitations.

4. Construing as applicable to the use of a yacht wholly beyond the territorial limits of the United States the provisions of the tariff act of August 5, 1909, § 37, imposing an annual excise tax upon the use of a foreign-built pleasure yacht owned or chartered for more than six months by any citizen of the United States, does not render the statute repugnant to the due process of law clause of the 5th Amendment to the Federal Constitution as being in conflict with obvious principles of justice, and inconsistent with the conception of representative and free government.

[For other cases, see Constitutional Law, IV. b, 6, a; Internal Revenue, I. b, in Digest Sup. Ct. 1908.]

Internal revenue — uniformity — excise tax.

5. The uniformity clause of U. S. Const. art. 1, § 8, is not violated by the excise tax based upon gross tonnage levied by the act of August 5, 1909, § 37, upon the use of foreign-built pleasure yachts owned by citizens of the United States because a like tax is not imposed upon the use of a domestic yacht under similar circumstances.

[For other cases, see Internal Revenue, I. b, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — excise tax — discrimination.

6. The imposition of an excise tax based upon gross tonnage upon the use of foreign-built pleasure yachts owned by citizens of the United States without imposing a like tax upon the use of a domestic yacht under similar circumstances, as is done by the act of August 5, 1909, § 37, does not render that statute repugnant to the due process of law clause of the 5th Amendment to the Federal Constitution as being so beyond the power of classification abhorrent to the sense of justice, and so repugnant to the conceptions of free government as to be void even in the absence of express constitutional limitation.

[For other cases, see Constitutional Law, IV. b, 6, a, in Digest Sup. Ct. 1908.]

Interest — on delinquent taxes.

7. Delinquent taxes due to the Federal government bear interest, although no statute expressly so directs.

[No. 629.]

Argued January 6 and 7, 1914. Decided February 24, 1914.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting the following questions:

I. Does the tax purporting to be imposed by § 37 of the act of Congress, approved August 5, 1909, apply to the use of a foreign-built yacht owned by a citizen of the United States, when such yacht, for a period of more than one year prior to September 1, 1909, and to the levy of such tax, was used wholly outside of the limits and territorial jurisdiction of the United States. Answered in the affirmative.

II. Did the tax purporting to be imposed by said act of Congress operate retrospectively, so as to be payable on September 1, 1909, in respect of the year then ended, or only prospectively, so as to become first due and payable on September 1, 1910? Answered in the affirmative.

III. Did the whole amount of the tax purporting to be imposed by said act of Congress become due and payable on September 1, 1909, or only such proportion thereof as the time during which the act was in force at that date bears to the whole year? Answered in the affirmative; the whole tax.

IV. Has Congress the power to levy a tax upon the use by a citizen of the United States of a yacht which is not actually, and since the year 1904 was not at any time, used within the territorial jurisdiction of the United States, and which has its permanent situs in a foreign country? Answered in the affirmative.

V. Does said act of Congress, by purporting to impose a tax upon the use of foreign-built yachts alone, provide a valid tax, or a valid classification for purposes of taxation, within the power to lay and collect taxes delegated to Congress by the Constitution of the United States? Answered in the affirmative.

VI. Is the tax purporting to be imposed by said act of Congress in conflict with the requirement of due process of law contained in the 5th article of Amendment to the Constitution of the United States? Answered in the negative.

VII. Is the United States entitled to recover interest upon the tax imposed upon the use of foreign-built yachts in and by § 37 of the tariff act of August 5, 1909? Answered in the affirmative.

Assistant Attorney General Adkins argued the cause, and, with Mr. Karl W. Kirchwey, filed a brief for the United States.

Mr. William D. Guthrie argued the cause and filed a brief for James Gordon Bennett.

For contentions of counsel see their briefs as reported in Billings v. United States, ante, 596.

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Mr. Chief Justice White delivered the opinion of the court:

So far as we deem it material to the question we are called upon to answer, the certificate in this case is as follows:

[301] "The United States, plaintiff below, sued out a writ of error to this court to review a judgment of the United States circuit court for the southern district of New York in the above-entitled cause, entered on July 6, 1911, dismissing the amended complaint of the United States in an action brought against the defendant below to recover the tax imposed by § 37 of the tariff act of August 5, 1909 (chap. 6, 36 Stat. at L. 112, U. S. Comp. Stat. Supp. 1911, p. 1197), for the year ended September 1, 1909, upon the use of the foreign-built yacht 'Lysistrata,' owned by the defendant."

After reciting the averment as to the assessment of the tax by the collector, amounting to $13,601, and the failure of the defendant to pay, his citizenship and ownership of the yacht, and the conformity of the assessment to the statute, the certificate states that there was a prayer for the recovery of the amount with interest. It then proceeds to state the answer of the defendant, setting up the nonregistry and nonenrolment of the yacht, that she enjoyed no protection or privileges of any kind under the laws of the United States, and that the yacht since 1904 "had not been within the jurisdiction of the United States, but had had a permanent situs within the jurisdiction of the Republic of France." The certificate then proceeds to state the facts as to ownership of other yachts in the United States in the exact words used in the answers in previous cases which we have this day decided, and upon which the want of due process of law was set up. Then the certificate declares the United States demurred to this answer, and that this demurrer was overruled, and the United States electing to plead no further, there was judgment rejecting its claim, and that error was then prosecuted to the circuit court of appeals by the United States. The seven questions propounded are the equivalent of the questions in the Goelet Cases, just decided [232 U. S. 293, ante, 610, 34 Sup. Ct. Rep. 431], except there is no question asked concerning the power to tax under the statute in case of the permanent domicil of [302] the owner in a foreign country, which was the basis of the decision in the Goelet Cases because, as is shown by the certificate, there was no assertion or proof that there was a permanent foreign domicil of the owner in this case. So that the first question in this case concerns the liability of a citizen of the United States having a domicil therein, for a tax on a yacht owned and used during the taxing period outside of the United States, and is as follows: "I. Does the tax purporting to be imposed by § 37 of the act of Congress, approved August 5, 1909, apply to the use of a foreign-built yacht owned by a citizen of the United States, when such yacht, for a period of more than one year prior to September 1, 1909, and to the levy of such tax, was used wholly outside of the limits and territorial jurisdiction of the United States?" And if this question is answered in the affirmative, then the duty will arise of deciding whether, because of that aspect, the act is repugnant to the due process clause of the Constitution, since in determining the constitutionality of the act in the previous cases we were not called upon to decide whether the due process clause of the 5th Amendment operates to prevent the levy of such a tax.

The statute applies, since, under the construction we have given it, it clearly establishes three standards as the basis of the excise duty which it imposes; citizenship and domicil within the United States, control by ownership or charter of a foreign-built yacht within the terms of the statute, and its use by the owner during the taxing period. But it said that as in any event the use which the statute taxes is solely a use within the United States, therefore the statute does not embrace this case, since the finding establishes that the yacht whose use is here taxed was wholly used and located outside of the territorial limits of the United States. We fail, however, to find in the provisions of the statute any language which would justify our affixing to the word "use" the restricted sense upon which [303] the proposition is based. On the contrary, the use provided for in the statute is unqualified, is generic, and must be enforced in that sense if the statute is to be given its plain meaning. It is true that in deciding a previous case we held that the statute would not be construed without clear intendment manifested to that effect as including a tax on a citizen permanently domiciled outside of the geographical limits of the United States. But that ruling was based upon the proposition that as a taxing statute was usually confined to persons within the territorial jurisdiction of a taxing authority, and to do otherwise would be exceptional, unless such view was compelled by its terms, the statute here involved ought not to be construed as having been adopted to accomplish such unusual and strange result. The directly opposite is here applicable, since it is usual, where the taxing power is called into play as to an individual domiciled within the territorial limits of the taxing authority, to

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cause the manifestation of taxing power to be coterminous with the taxing authority of the government levying the tax. Therefore it follows that the principle of interpretation previously applied has no possible application to the construction of the word "use," which we are now considering. The difference between the two rules is that which must exist between not assuming in the one case that something exceptional has been done, and taking for granted in the other that a power expressed embraces that which is usual and incidental to its exertion. The argument that the statute should not be construed as applying to the use of a yacht wholly beyond the territorial limits of the United States, since if so interpreted it would be repugnant to the Constitution, rests upon what in effect is a misconception of the elementary rule of interpretation that where there are two possible constructions of a statute, one of which will give rise to grave doubt as to its constitutionality, and the other avoids such question, the latter will be adopted. [304] The foundation of this rule is the possibility of two constructions, and the existence of the grave doubt as to constitutionality. To apply the rule in a case like this, where neither of such conditions exists, would be to cause an imaginary doubt as to the constitutionality of a statute to render it necessary to give to the statute a wholly fictitious and unauthorized meaning; that is to say, the effect of adopting the contention would be but to declare that in every case where the construction of a statute was in issue its misconstruction would become necessary if only it was asserted that, if rightly construed, repugnancy to the Constitution would result. We come, then, to consider the contention that when the statute is correctly interpreted there will arise a conflict between its provisions and the safeguards of the Constitution, not only for the purpose of demonstrating the unsoundness of the assertion of constitutional right, but also with the object of making it clear that even if the statute were susceptible of a different construction by resort to subtlety of reasoning or refinement of distinction, there is nothing of such gravity in the asserted constitutional question as to lead us to resort to such means in order to avoid giving to the statute the meaning which we have affixed to it, resulting from its unambiguous text.

As not even an intimation is made in the argument that any limitation on the taxing power of Congress in this regard can be deduced from the provisions of the Constitution concerning the taxing authority, and as the only limiting provision relied upon is the due process clause of the 5th Amendment, it follows in this case, as it did in the Billings Case [232 U. S. 261, ante, 596, 34 Sup. Ct. Rep. 421], that, after all, the assertion of want of power must rest upon the assumption that an attempt by the United States to tax the property of a citizen residing within its jurisdiction, where such property is beyond the territorial limits of the United States, is so in conflict with obvious principles of justice, and so inconsistent with [305] every conception of representative and free government, as to cause the exertion of power to come within the limitations of the due process clause of the 5th Amendment. We might well leave the answer to the contention when it is thus rightly understood to result from its mere statement, from the obvious misconceptions as to the nature and extent of the authority of a sovereign although it be a representative government, and from a true appreciation of the privileges as well as the duties arising from citizenship, and the past and recent exertions by Congress of the very taxing authority which is now challenged. (See act of June 30, 1864, 13 Stat. at L. 281, chap. 173.) We do not, however, leave the contentions to be destroyed by their own weakness, but come briefly to consider the authorities which it is insisted maintain their correctness, and to point out the error of the reasoning upon which their asserted applicability is based. We do not cite or review the cases relied on because we concede that the doctrine which it is asserted they decided is elementary, and in fact is the settled rule in this court. The principle of the cases is thus stated in the argument: "It is a settled rule of constitutional law that the power to tax depends upon jurisdiction of the subject-matter of the tax. A long line of unbroken authority illustrates this firmly established doctrine in its various aspects, and although the cases have all arisen under state tax laws, their reasoning is applicable to and controlling in the case of a Federal tax act." But the misapprehension consists not in a misconception as to what the cases relied on decided, but in taking for granted that because the doctrine stated has been applied and enforced in many decisions with respect to the taxing power of the states, that the same principle is applicable to and controlling as to the United States in the exercise of its powers. The confusion results from not observing that the rule applied in the cases relied upon to many forms

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of exertion of state taxing power is based on [306] the limitations on state authority to tax resulting from the distribution of powers ordained by the Constitution. In other words, the whole argument proceeds upon the mistaken supposition, which is sometimes indulged in, that the calling into being of the government under the Constitution had the effect of destroying obvious powers of government instead of preserving and distributing such powers. The application to the states of the rule of due process relied upon comes from the fact that their spheres of activity are enforced and protected by the Constitution, and therefore it is impossible for one state to reach out and tax property in another without violating the Constitution, for where the power of the one ends the authority of the other begins. But this has no application to the government of the United States so far as its admitted taxing power is concerned. It is coextensive with the limits of the United States; it knows no restriction except where one is expressed in or arises from the Constitution, and therefore embraces all the attributes which appertain to sovereignty in the fullest sense. Indeed, the existence of such a wide power is the essential resultant of the limitation restricting the states within their allotted spheres, for if it were not so, then government in the plenary and usual acceptation of that word would have no existence. Because the limitations of the Constitution are barriers bordering the states and preventing them from transcending the limits of their authority, and thus destroying the rights of other states, and at the same time saving their rights from destruction by the other states, in other words, of maintaining and preserving the rights of all the states, affords no ground for constructing an imaginary constitutional barrier around the exterior confines of the United States for the purpose of shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty. But it is said in the decided cases relied upon, the principle which was announced [307] was that the power to tax was limited by the capacity of the taxing government to afford that benefit and protection which is the true basis of the right to tax, and which causes, therefore, taxation, where such capacity to confer benefit and afford protection does not exist, to be a mere arbitrary and unwarranted burden. But here again the confusion of thought consists in mistaking the scope and extent of the sovereign power of the United States as a nation, and its relation to its citizens, and their relations to it. It presumes that government does not, by its very nature, benefit the citizen and his property wherever found. Indeed, the argument, while holding on to citizenship, belittles and destroys its advantages and blessings by denying the possession by government of an essential power required to make cittizenship completely beneficial.

Concluding from what we have just said that the first question must be answered in the affirmative, it follows from the considerations just stated and the views which we have expressed in the previous cases as to the operation and constitutionality of the act in other respects, that the remaining questions must be answered as follows: The second, Yes; the third, Yes, the whole tax; the fourth, Yes; the fifth, Yes; the sixth, No; the seventh, relating to interest, Yes.

[308] As by these answers the right to impose and collect the tax under the facts stated will be established, in view of what we shall say in a case between the same parties which follows this we think it proper, to observe that nothing in our reply to these questions is to be so construed as to deprive the court below of the power to take such steps as it may deem necessary to avoid injustice if it should be deemed that by some mistake of fact such a result might occur. The answers to the questions will be certified in accordance with the directions above given.

And it is so ordered.

UNITED STATES
v.
JAMES GORDON BENNETT.

(See S. C. Reporter's ed. 308-310.)

This case is governed by the decision in United States v. Goelet, ante, 610.

[No. 630.]

Argued January 6 and 7, 1914. Decided February 24, 1914.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting, *inter alia*, the question whether the excise on the use of foreign-built pleasure yachts may be collected from an owner permanently domiciled in another country. Answered in the negative. Other questions unanswered.

The facts are stated in the opinion.

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Assistant Attorney General Adkins argued the cause, and, with Mr. Karl W. Kirchwey, filed a brief for the United States.

Mr. William D. Guthrie argued the cause and filed a brief for James Gordon Bennett.

For contentions of counsel see their briefs as reported in Billings v. United States, ante, 596.

Mr. Chief Justice White delivered the opinion of the court:

The certificate discloses that this case involves the right of the United States to recover an excise duty levied under § 37 of the tariff act of 1909 [36 Stat. at L. 112, chap. 6, U. S. Comp. Stat. Supp. 1911, p. 1197], which became due on the 1st of September, 1910, on the same yacht which was the subject of the duty becoming due in 1909, and which we have passed upon in the case just decided. All the statements as to the complaint and answer, the submission of the case by stipulation to the court without a jury, the judgment rejecting the claim of the United States, and the prosecution of error from the court below, are in substance like those stated in the case concerning the tax for 1910 between the United States and Goelet, this day decided [232 U. S. 293, ante, 610, 34 Sup. Ct. Rep. 431]. As the result of this situation the certificate recites, differing in that respect from the Bennett Case just previously decided [232 U. S. 299, ante, 612, 34 Sup. Ct. Rep. 433], the trial court made the following finding: "Defendant is a citizen of the United States, and for some years past has been domiciled in and resident of the Republic of France."

Conformably to this finding the second question propounded by the court below in this case asks whether the act applies where the owner of the yacht, although a citizen, was permanently domiciled and residing in a foreign country for more than two years prior to September 1, 1910, [310] and to the levy of such tax. As for the reasons stated in the Goelet Case, such question was answered in the negative, it follows that a like reply must be made here, and therefore there is no need of replying to any of the other questions. In deciding the previous case between the same parties, we made a reservation concerning the power of the court below to deal with the former case in the future, because of the fact that the findings in this case are absolutely in conflict with the state of things exhibited in the previous Bennett Case. Our order will be, second question answered in the negative, and the other questions not answered.

And it will be so certified.

ROY A. RAINEY, Plff. in Err.,
v.
UNITED STATES. (No. 74.)

UNITED STATES
v.
ROY A. RAINEY. (No. 627.)

ROY A. RAINEY, Plff. in Err.,
v.
UNITED STATES. (No. 73.)

UNITED STATES
v.
ROY A. RAINEY. (No. 628.)

(See S. C. Reporter's ed. 310–317.)

Debt — action in personam for tax.

1. An action *in personam* will lie against the owner for the recovery of the excise tax imposed by the act of August 5, 1909 (36 Stat. at L. 112, chap. 6, U. S. Comp. Stat. Supp. 1911, p. 1197), § 37, upon the use of foreign-built pleasure yachts.

[For other cases, see Debt, II.; Judgment, II. b. in Digest Sup. Ct. 1908.]

Internal revenue — excise on foreign-built yacht — when due.

2. The excise tax based on gross tonnage, which, under the tariff act of August 5, 1909, § 37, shall be levied and collected annually on the 1st day of September upon the use of every foreign-built pleasure yacht now or hereafter owned or chartered for more than six months by any citizen of the United States, became due on the 1st day of September following the passage of the act.

[Federal taxation, see Internal Revenue, in Digest Sup. Ct. 1908.]

Internal revenue — excise on foreign-built yacht — charterer or owner.

3. The six months clause in the tariff act of August 5, 1909, § 37, imposing an annual excise tax to be levied and collected upon the use of every foreign-built pleasure yacht now or hereafter owned or chartered for more than six months by any citizen of the United States, applies only to charterers, not to owners.

[Federal taxation, see Internal Revenue, in Digest Sup. Ct. 1908.]

NOTE.—As to what constitutes due process of law, generally,—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

Generally, on statutes part valid and part invalid—see notes to Titusville Iron Works v. Keystone Oil Co. 1 L.R.A. 363, and Fayette County v. People's & D. Bank, 10 L.R.A. 196.

As to what are acts for raising revenue which must originate in the lower branch of the legislature—see note to Northern Counties Invest. Trust v. Sears, 35 L.R.A. 188.

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Internal revenue — uniformity — excise tax.

4. The uniformity clause of U. S. Const. art. 1, § 8, is not violated by the excise tax based upon gross tonnage levied by the act of August 5, 1909, § 37, upon the use of foreign-built pleasure yachts owned by citizens of the United States because a like tax is not imposed upon the use of a domestic yacht under similar circumstances.

[For other cases, see Internal Revenue, I. b, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law —excise tax — discrimination.

5. The imposition of an excise tax based upon gross tonnage upon the use of foreign-built pleasure yachts owned by citizens of the United States without imposing a like tax upon the use of a domestic yacht under similar circumstances, as is done by the act of August 5, 1909, § 37, does not render that statute repugnant to the due process of law clause of the 5th Amendment to the Federal Constitution, as being so beyond the power of classification, abhorrent to the sense of justice, and so repugnant to the conceptions of free government as to be void even in the absence of express constitutional limitation.

[For other cases, see Constitutional Law, IV. b, 6, a, in Digest Sup. Ct. 1908.]

Statutes — when validity may be assailed — invalid in part.

6. The question of the possible invalidity of the ad valorem duty of 35 per cent prescribed by the act of August 5, 1909, § 37, as an optional alternative to the annual excise tax based upon gross tonnage imposed by that section upon the use of foreign-built pleasure yachts, will not be considered in an action for the recovery of the annual tonnage tax, since the provisions concerning the ad valorem tax are separable from those concerning the annual tax.

[For other cases, see Statutes, I. d, 3; I. d. 4, in Digest Sup. Ct. 1908.]

Treaties — conflict with subsequent statute — vested rights.

7. The enforcement of the annual excise tax based upon gross tonnage imposed by the tariff act of August 5, 1909, § 37, upon the use of foreign-built pleasure yachts owned by citizens of the United States, even if destructive of rights vested in the owner by the treaty of July 3, 1815 (8 Stat. at L. 228), with Great Britain, does not for that reason deprive the owner of his property without due process of law.

[For other cases, see Treaties, 20-25, 73, 74; Constitutional Law, IV. e, in Digest Sup. Ct. 1908.]

Statutes — validity — revenue bill — amendment by Senate.

8. The requirement of U. S. Const. art. 1, § 7, that revenue bills must originate in the House of Representatives, does not invalidate the provision of the tariff act of August 5, 1909, § 37, imposing an excise tax based on gross tonnage upon the use of foreign-built pleasure yachts, which was proposed by the Senate as an amendment,—the bill itself originating in the House of Representatives.

[For other cases, see Statutes, I. a, in Digest Sup. Ct. 1908.]

[Nos. 74, 627, 73, and 628.]

Argued January 6 and 7, 1914. Decided February 24, 1914.

TWO WRITS OF ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment enforcing without interest a claim of the United States for an excise tax upon a foreign-built pleasure yacht. Modified by awarding interest, and as modified affirmed. Also

TWO CERTIFICATES from the United States Circuit Court of Appeals for the Second Circuit, presenting the question of the right of the United States to recover interest on the amount of the tax. Unanswered.

See same case below, No. 74, 190 Fed. 359; and see 190 Fed. 372, for the decision below, in a consolidation of the present case, No. 73, with those of other parties named in that report.

The facts are stated in the opinion.

Mr. C. Andrade, Jr., argued the cause and filed a brief for Roy A. Rainey:

Statutes levying taxes or duties on subjects or citizens are to be construed most strongly against the government.

United States v. Wigglesworth, 2 Story, 369, Fed. Cas. No. 16,690; American Net & Twine Co. v. Worthington, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55; Benziger v. United States, 192 U. S. 38, 48 L. ed. 331, 24 Sup. Ct. Rep. 189.

An act of Congress will always be construed prospectively if possible, and not retroactively.

United States v. Heth, 3 Cranch, 399, 2 L. ed. 479; Murray v. Gibson, 15 How. 421, 14 L. ed. 755; McEwen v. Den, 24 How. 242, 16 L. ed. 672; Harvey v. Tyler, 2 Wall. 328, 17 L. ed. 871; Sohn v. Waterson, 17 Wall. 596, 21 L. ed. 737; Twenty Per Cent Cases, 20 Wall. 179, 22 L. ed. 339.

The 35 per cent duty is a direct tax, and void because not apportioned.

Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912.

An excise tax is an indirect tax.

Hylton v. United States, 3 Dall. 171, 1 L. ed. 556.

Indirect taxes are subject to the requirement of territorial uniformity.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

"The use and enjoyment of property"

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is practically an interchangeable term with "property" itself. Property is of value only as it is used and enjoyed.

Pollock v. Farmers' Loan & T. Co. supra.

A legal exemption from a demand made by another is a vested right, which the legislature may not interfere with. Even an expressed purpose that an act shall have such retroactive effect is without avail.

Lewis v. Pennsylvania R. Co. 220 Pa. 323, 18 L.R.A.(N.S.) 279, 69 Atl. 821, 13 Ann. Cas. 1142; Cooley, Const. Lim. p. 528.

Congress has no power to retroactively annul a treaty, if in so doing it destroys vested rights.

United States v. Reese, 5 Dill. 405, Fed. Cas. No. 16,137; Chew Heong v. United States, 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255; Hamilton, Madison & Jay, Federalist, No. 64.

The interpolation of § 37 was not an "amendment" by the Senate.

Re Pennsylvania Teleph. Co. 2 Chester, Co. Rep. 131; Warren v. Crosby, 24 Or. 558, 34 Pac. 661; State ex rel. Rice v. Smith, 35 Minn. 257, 28 N. W. 241; Story, Const. 4th ed. p. 622, note.

Assistant Attorney General Adkins argued the cause, and, with Mr. Karl W. Kirchwey, filed a brief for the United States.

For their contentions, see their brief as reported in Billings v. United States, ante, 596.

Mr. Chief Justice White delivered the opinion of the court:

The first two of the foregoing cases relate to a tax becoming due on the 1st of September, 1909, and the other two to a tax becoming due on the 1st of September, 1910, the taxes in all cases having been levied, pursuant to § 37 of the tariff act of 1909 [36 Stat. at L. 112, chap. 6, U. S. Comp. Stat. Supp. 1911, p. 1197], on the British built yacht Cassandra, owned by the plaintiff in error. In these cases, as in those arising under the same act, which we have just decided, the certificates of the circuit court of appeals are here because of writs of error from that court prosecuted by the United States for the purpose of reviewing the action of the trial court in rejecting a demand for interest, and the two other cases are here on direct writ of error to the court below, to review its action in upholding the tax. In both the cases brought directly here, the pleadings of the government asserted the citizenship of the defendant, the use of the yacht during the taxing period, and the other statutory [314] essentials to fix liability. The answers not traversing citizenship, ownership, or use, set up the same defenses as were urged in the cases we have just decided, somewhat however, reiterated and changed in form of statement, and other defenses not made in the previous cases. In the first direct case, judgment was rendered in favor of the government for the tax by submission on bill and answer. In the second a like judgment was rendered, the case having been submitted by stipulation to the court without a jury; and in that case the finding of fact made by the court as to the use of the yacht is as follows: "During the period from the said 25th day of June, 1908, the date when the defendant purchased the said yacht, to the 1st day of September, 1910, the yacht was used by the defendant both in the waters of the United States and in the waters of foreign countries, as well as on the high seas; and in the year immediately preceding the first day of September, 1910, the said yacht was used by the defendant continuously in the waters of the United States, except for the period from June 20, 1910, to July 30, 1910, when she was used by the defendant on a cruise to the Gulf of St. Lawrence."

Separate assignments of error were made in the two cases which are here on direct review, and are referred to and discussed in the arguments at bar. They are all, in both cases, however, embraced in the ten separate propositions stated in the argument, and both cases will therefore be disposed of by briefly considering and deciding them. In doing so we shall bring the several assignments under common headings, for the purpose of avoiding repetition. First, that the court erred in holding there was authority to bring an action *in personam* against the owner for the recovery of the tax. This is disposed of by the reasoning adopted in the Billings Case [232 U. S. 261, ante, 596, 34 Sup. Ct. Rep. 421], in passing on the question of liability for interest. Second, that error was committed in holding the first instalment of [315] the tax was due in September, 1909, and in deciding that the six months' clause, under the section in question, "applied only to the charterer, and did not apply to the owner of a foreign-built yacht." Third, that error was committed in deciding that the tax did not violate the due process clause of the 5th Amendment, and was not in conflict with the uniformity clause of article 1, § 8, of the Constitution. These grounds also are disposed of by the opinion in the Billings Case. Fourth, that error was committed in not deciding that § 37 of the act of 1909, "in so far as it lays a duty of 35 per cent ad valorem, is a direct tax and void because not apportioned, in contravention of article 1, § 2, and article 1, § 9, of the

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Constitution of the United States." This proposition is concerned with the second paragraph of the act in question, which gives a right to the owner of foreign-built yachts to commutation, as follows:

"In lieu of the annual tax above prescribed the owner of any foreign-built yacht, pleasure boat, or vessel above described may pay a duty of thirty-five per centum ad valorem thereon, and such yacht, pleasure boat or vessel shall thereupon be entitled to all the privileges and shall be subject to all the requirements prescribed by sections forty-two hundred and fourteen, forty-two hundred and fifteen, forty-two hundred and seventeen, and forty-two hundred and eighteen of the Revised Statutes U. S. Comp. Stat. 1901, pp. 2845-2847, and act amendatory thereto, in the same manner as if said yacht had been built in the United States, and shall be subject to tonnage duty and light money only in the same manner as if said yacht had been built in the United States."

We think the reasons given in the comprehensive opinion of the lower court in ruling adversely on this proposition are so conclusive that we adopt them and make them our own. The court said:

"The owner is not required to pay this duty. He is merely given the option to pay it. In its nature it would [316] seem to be a duty on imports, and such duties are not held to be direct taxes requiring apportionment. But it is unnecessary to pass upon this question. These actions are for the recovery of the annual tonnage tax, and the validity of the ad valorem tax is not involved. The provisions concerning that tax are separable from those concerning the annual tax. The one is not dependent upon the other, and there is no indication that Congress would not have adopted the one without the other. Under such conditions it is well settled that unconstitutional provisions may be separated from legal provisions, and effect be given to the latter." [190 Fed. 362.]

Fifth, that error was committed in not holding that enforcement of the tax "would destroy rights vested in the defendant under the British treaty of July 3d, 1815 [8 Stat. at L. 228]," and would for such reason "deprive the defendant of his property without due process of law." The court below adequately disposed of this contention upon reasons which we also approve and adopt.

The court said:

"The defendant does not claim to be a British subject, and it is by no means clear that he is entitled to invoke the protection of the treaty. But, however that may be, it is well settled that when a treaty is inconsistent with a subsequent act of Congress, the latter will prevail. Taylor v. Morton, 2 Curt. C. C. 454, Fed. Cas. No. 13,799; and see Whitney v. Robertson, 124 U. S. 190, 31 L. ed. 386, 8 Sup. Ct. Rep. 456; Head Money Cases (Edye v. Robertson), 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; Cherokee Tobacco (Boudinot v. United States), 11 Wall. 616, 20 L. ed. 227; Ropes v. Clinch, 8 Blatchf. 304, Fed. Cas. No. 12,041.

"Treaties are contracts between nations, and by the Constitution are made the law of the land. But the Constitution does not declare that the law so established shall never be altered or repealed by Congress. Good faith toward the other contracting nation might require Congress to refrain from making any change, but if it does act, its enactment becomes the controlling law in this country. The other nation may have ground for complaint, but [317] every person is bound to obey the law. And as a corollary it follows that no person acquires any vested right to the continued operation of a treaty."

Sixth, that error was committed in not deciding that § 37 of the act was void, "as it is a bill for raising revenue, and it originated in the Senate and not in the House of Representatives, in contravention to article 1, § 7, of the Constitution of the United States." Without intimating that there is judicial power, after an act of Congress has been duly promulgated, to inquire in which House it originated, for the purpose of determining its validity, and upon the assumption, for the sake of the argument, that such power may be invoked, again we think the court below disposed of the contention upon a ground entirely satisfactory, which we adopt and approve, the court saying:

"I am also satisfied that the section in question is not void as a bill for raising revenue originating in the Senate, and not in the House of Representatives. It appears that the section was proposed by the Senate as an amendment to a bill for raising revenue which originated in the House. That is sufficient. Having become an enrolled and duly authenticated act of Congress, it is not for this court to determine whether the amendment was or was not outside the purposes of the original bill."

Following the practice adopted in the cases previously decided, and treating, as we did in these cases, the United States as here on a cross writ of error complaining of the refusal to allow interest, it follows that the questions asked by the circuit court of appeals, covered by the certificates, need not be answered, and that the judgments of the court below in the cases on direct

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writ of error in so far as they rejected the claim of interest will be modified to the extent necessary to allow such claim, and in other respects will be affirmed. Therefore our order will be, modified and affirmed.

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[318] BENJAMIN F. HARRISON, Secretary of State of the State of Oklahoma, Appt.,

v.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

(See S. C. Reporter's ed. 318-334.)

Removal of causes — restriction of right by state — foreign interstate carrier.

1. The right of a foreign interstate railway carrier doing business in Oklahoma to remove to a Federal court a suit brought against it in an Oklahoma court by a citizen and resident of that state is unconstitutionally abridged by the provisions of Okla. act of May 26, 1908, for the immediate revocation of the license or charter to do business within the state of every person, firm, or corporation who shall assert in any court of that state a domicil within another state or foreign country, and for the punishment by extraordinary penalties of the doing of business within the state after the license or charter shall have been so revoked.

[For other cases, see Removal of Causes, II. a; Corporations, XII. b, 2, in Digest Sup. Ct. 1908.]

States — immunity from suit — suit against officers.

2. A suit to enjoin state officers from violating, under the sanction of a state statute, the constitutional rights of the complainant, is not a suit against the state.

[For other cases, see States, IX. c, 2, in Digest Sup. Ct. 1908.]

Statutes — invalid in part.

3. The unconstitutionality of the attempt to prevent access to the Federal courts, made by the provisions of Okla. act of May 26, 1908, for the immediate revocation of the license or charter to do business within the state of every person, firm, or corporation who shall assert in any court of that state a domicil within another state or foreign country, and for the punishment by extraordinary penalties of the doing of business within the state after the license or charter shall have been so revoked, renders invalid also that part of the statute which imposes a local citizenship and domicil upon every person, firm, or corporation doing business within the state.

[For other cases, see Statutes, I. d, 4, in Digest Sup. Ct. 1908.]

Pleading — striking out — matters irrelevant to issues.

4. Averments challenging the foreign citizenship of a corporation are properly stricken from the answer in a suit brought by such corporation in a Federal court to enjoin state officials from enforcing a forfeiture of its right to do business in the state because of its assertion of a right to remove an action against it from a state court to a Federal court, since such matters are properly cognizable only where presented in an appropriate manner and at the proper time to the Federal tribunal, which has a right to pass upon them when considering the propriety of the removal which is prayed.

[For other cases, see Pleading, I. a, in Digest Sup. Ct. 1908.]

[No. 34.]

Submitted November 4, 1913. Decided February 24, 1914.

APPEAL from the Circuit Court of the United States for the Western District of Oklahoma to review a decree enjoining state officials from enforcing a forfeiture of the right of a foreign corporation to do business in the state, incurred by its assertion of the right to remove an action against it from a state to a Federal court. Affirmed.

See same case below, 171 Fed. 480.

Statement by Mr. Chief Justice White:

The St. Louis & San Francisco Railroad Company, a corporation chartered under the laws of Missouri, and a citizen and resident of that state, owned, controlled, or operated, for the purpose of interstate and intrastate commerce, many hundreds of miles of railway in Oklahoma, and extending into adjoining states and beyond. These lines existed and were operated by the company; some, it may be, before the territory of Oklahoma was organized, and most, if not all, before Oklahoma was endowed with statehood. The lines composing the system originated in various charters, some enacted by Congress, accompanied with

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NOTE.—On recognition or exclusion of foreign corporation—see note to Cone Export & Commission Co. v. Poole, 24 L.R.A. 289.

On revocation of corporate license for removal of cause to Federal court—see note to Prewitt v. Security Mut. L. Ins. Co. 1 L.R.A.(N.S.) 1019.

On suits against state officers as suits against state—see notes to Sanders v. Saxton, 1 L.R.A.(N.S.) 727; Ex parte Young, 13 L.R.A.(N.S.) 932; Louisville & N. R. Co. v. Burr, 44 L.R.A.(N.S.) 189; and Beers v. Arkansas, 15 L. ed. U. S. 991.

On suits against Federal officers or agents as suits against United States—see note to Louisiana v. Garfield, 53 L. ed. U. S. 92.

Generally, on statutes part valid and part invalid—see notes to Titusville Iron Works v. Keystone Oil Co. 1 L.R.A. 363, and Fayette County v. People's & D. Bank, 10 L.R.A. 196.

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grant of land, and others by territorial grant. The unified system resulted from foreclosures, consolidations, etc. In 1908 the company was sued by a citizen and resident of Oklahoma, in a court of that state. On the ground of diversity of citizenship a petition and bond in due form and seasonable time were filed by the company for removal to the circuit court of the United States for the western district of Oklahoma. What action was taken by the state court does not appear, but presumably the petition was denied,—the following document having been issued by the secretary of state:

[320] State of Oklahoma.

Revocation of Charter of St. Louis & San Francisco Railroad Company in Oklahoma.

Guthrie, Oklahoma, August 29th, 1908.

In the District Court.

Gertrude Goode, Administratrix of the Estate of Frank R. Goode, Deceased, Plaintiff,

vs.

St. Louis & San Francisco Railroad Company, a Corporation, Defendant.

Petition for Removal and to the Circuit Court of the United States.

State of Oklahoma,
Comanche County:

Having received due and legal notice from J. T. Johnson, judge of the district court of Comanche county, that the above-named corporation defendant, St. Louis & San Francisco Railroad Company, has filed a petition for removal to the United States court, a certified copy of which is on record in the office of the secretary of state at the Capitol in the city of Guthrie, in the state of Oklahoma.

Therefore, I, Leo Meyer, assistant secretary of state and now acting secretary of state of the state of Oklahoma, by authority invested in me under § 4 of house bill No. 131, approved by the governor of the state of Oklahoma, C. N. Haskell, May 26th, 1908, do hereby declare the license of the said St. Louis & San Francisco Railroad Company to transact business in the state of Oklahoma forfeited and revoked.

In testimony whereof, I have set my hand and caused to be affixed the great seal of the state.

Done at the city of Guthrie this 29th day of August, A. D., 1908.

[Seal.] Leo Meyer,
Acting Secretary of State.

[321] Thereupon the suit which is now before us was commenced by the railroad company against the secretary of state and his assistant, seeking to enjoin them from giving effect to the certificate, or in any way disturbing or interfering with the company in carrying on business in the state. With much amplitude of statement the source and history of the title of the various railroads forming part of the complainant's system in Oklahoma were enumerated. In addition to asserting that rights secured to the corporation by the state Constitution had been denied by the action complained of, violations of the Constitution of the United States were specifically asserted on the following grounds: First, because the state law under which the secretary of state had purported to act, and the action taken thereunder, constituted an unwarranted interference on the part of the state and its officers with the judicial power of the United States; second, because the attempt to exclude the company from the state, and prevent it from doing business therein, under the circumstances stated, was repugnant to the commerce clause of the Constitution, the due process clause of the 14th Amendment, and the contract clause, the latter being based on the assertion that the congressional and legislative acts by which the roads forming part of the system of the company had been incorporated constituted contracts giving a right to do business in Oklahoma which that state had no power to impair. The court allowed a restraining order. The bill was demurred to on the ground of want of jurisdiction and want of equity. The demurrer was overruled. The court, in an elaborate opinion, expounded its reasons for so doing, holding that it had jurisdiction because of diversity of citizenship, the complainant being a citizen of Missouri, and the defendants, citizens and residents of Oklahoma. In reaching this conclusion, the court analyzed the various transactions, foreclosure, and consolidations, etc., by which the railroad company had acquired the lines [322] composing its system, and held that there was nothing in any of them which destroyed the Missouri citizenship of the complainant. It moreover held in any event there was ample ground for jurisdiction because of the constitutional rights asserted.

As to the alleged want of equity in the bill, the court, after stating that the obvious purpose of the legislation under which the secretary of state had acted as deduced from its text, was to prevent the removal of causes from the state to a court of the United States, declared that the defendant in argument had so conceded. It was decided that the state was without authority to legislate to that effect, and therefore the law in question and the action of the secretary of state taken under it were void because of repugnancy to the Constitution of the United States. The answer, which

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was then filed, admitted the incorporation of the complainant in Missouri, and the citizenship in Oklahoma of the defendants, as well as the jurisdictional amount. The allegations of the complaint as to interference with the authority of the courts of the United States as to the commerce and contract clauses of the Constitution and the due process and equal protection clauses of the 14th Amendment were sought to be traversed by copious averments concerning the subject. Finally it was asserted, 1, that the Missouri corporation was never authorized to acquire any railroad in either the Indian or Oklahoma territory, and it therefore had no standing to assert as a Missouri corporation, its ownership and control of such roads as a basis for removal; 2, that in forming the line or lines of railway which constituted its system, the complainant had consolidated parallel and competing roads, in violation of the anti-trust laws of the territory and of the state of Oklahoma, as well as the law of the United States, and therefore the corporation was not in a position to assert its Missouri citizenship; and 3, that the acquisition by the complainant of various [323] roads forming parts of its system, which were covered by charters granted by Congress or by Oklahoma territory, was in conflict with such charters, and for this reason, moreover, the corporation could not be heard to assert its Missouri citizenship. An exception of the complainant to the relevancy of the three grounds just stated was maintained, and they were stricken from the answer. By agreement between the parties, the present appellant, the successor in office as secretary of state, was substituted as defendant. Thereupon, the case having been submitted to the court on bill and answer, a decree was entered perpetually enjoining the secretary of state from giving effect to the order of revocation, or interfering with or disturbing the complainant in the transaction of its business in the state. It was expressly decreed that the act of the legislature of Oklahoma upon which the action of the secretary of state was taken was void and unenforceable because of its repugnancy to the Constitution of the United States. This appeal was then taken.

Mr. Charles West, Attorney General of Oklahoma, and Mr. Ben F. Harrison, submitted the cause for appellant:

The best reason for believing the act did not intend to hinder the Federal courts is because it must necessarily fail to accomplish that purpose.

Southern R. Co. v. Allison, 190 U. S. 330, 47 L. ed. 1080, 23 Sup. Ct. Rep. 713.

It will be claimed that the Oklahoma act is within the reasoning of Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. Rep. 633; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 19 Ann. Cas. 1247; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190.

In all of those cases the statute was held to be either a direct interference with interstate commerce, or else to discriminate against companies doing interstate commerce, and in each instance was held to violate the obligation of a contract. It will be noticed that the other acts operated upon foreign corporations differently than upon the domestic corporations, and thus caused a discrimination against the foreign corporations engaged in interstate commerce. The Oklahoma act works no such discrimination, and therefore is to be decided under the authority of Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 248, 50 L. ed. 1014, 26 Sup. Ct. Rep. 619, 6 Ann. Cas. 317; Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148; National Council v. State Council, 203 U. S. 163, 51 L. ed. 137, 27 Sup. Ct. Rep. 46.

As far as jurisdiction in the Federal courts is concerned, there is an indisputable presumption of law that the citizenship of corporations is in the state which originally created them.

St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621.

But this does not in any way interfere with the requirement that corporations be domiciled in the state, or the prohibition against such corporations having two domicils, one in and one out of the state, and the requirement that residence should not be subject to change, and the provision that the effect of an attempt to migrate might be the forfeiture of the rights in this state.

Thomp. Corp. 493–495; Martine v. International L. Ins. Co. 53 N. Y. 339, 13 Am. Rep. 529; State ex rel. Safford v. Topeka Water Co. 59 Kan. 151, 52 Pac. 422; Aspinwall v. Ohio & M. R. Co. 20 Ind. 492, 83 Am. Dec. 329; State ex rel. Childs v. Park & N. Lumber Co. 58 Minn. 330, 49 Am. St. Rep. 516, 59 N. W. 1048; Simmons v. Norfolk & B. S. B. Co. 113 N. C. 147, 22 L.R.A. 677, 37 Am. St. Rep. 614, 18 S. E. 117; State ex rel. Atty. Gen. v. Milwaukee, L. S. & W. R. Co. 45 Wis. 579; Com. ex rel. Atty. Gen. v. Pittsburg & C. R. Co. 58 Pa. 26; North & South Rolling Stock Co. v. People, 147 Ill. 234, 24 L.R.A. 462, 35 N. E. 608; State v. Southern P. R. Co. 24 Tex. 80;

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People ex rel. Platt v. Oakland County Bank, 1 Dougl. (Mich.) 282; Huylar v. Cragin Cattle Co. 40 N. J. Eq. 392, 2 Atl. 274.

The statute is not an interference with interstate commerce.

Waters-Pierce Oil Co. v. Texas, 177 U. S. 45; 44 L. ed. 664, 20 Sup. Ct. Rep. 518; Louisville & N. R. Co. v. Kentucky, 183 U. S. 512, 518, 46 L. ed. 304, 306, 22 Sup. Ct. Rep. 95.

Messrs. W. F. Evans and E. T. Miller submitted the cause for appellee:

The evident purpose of the Oklahoma act of 1908 is to prevent foreign corporations doing business in Oklahoma from invoking jurisdiction of the Federal courts in that state. If such be the purpose of the act, it is ineffectual to that end.

Buck Stove & Range Co. v. Vickers, 226 U. S. 205, 57 L. ed. 189, 33 Sup. Ct. Rep. 41; Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. Rep. 633; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 19 Ann. Cas. 1247; Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44; Southern R. Co. v. Allison, 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190.

The statute in question is void because it is an indirect interference with, and imposes a direct burden upon, interstate commerce.

Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121; Buck Stove & Range Co. v. Vickers, 226 U. S. 205, 57 L. ed. 189, 33 Sup. Ct. Rep. 41; I. M. Darnell & Son Co. v. Memphis, 208 U. S. 113, 52 L. ed. 413, 28 Sup. Ct. Rep. 247; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Heyman v. Southern R. Co. 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190.

Mr. Chief Justice White, after making the foregoing statement, delivered the opinion of the court:

We have stated the case only to the extent necessary to make clear the questions essential to be decided.

The assignments of error in general terms assail the overruling of the demurrer, the striking of matter from the answer, and the final decree. The propositions, however, which are urged at bar to sustain these general assignments, are numerous and we think in some aspects redundant. To consider them in the order in which they are urged would, besides giving rise to repetition, tend to produce confusion. We hence disregard the mere order in which they are stated in the argument, and come to consider the fundamental propositions necessary to be taken [328] into view in order to determine whether the court below was right in holding that the law under which the secretary of state acted, as well as the action of that officer, was void because inconsistent with the judicial power of the United States, reserving until that is done such separate consideration of the propositions relied on as we may deem it necessary to make.

It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority is a power wholly independent of state action, and which therefore the several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render ineffacious. The doctrine is so elementary as to require no citation of authority to sustain it. Indeeed, it stands out so plainly as one of the essential and fundamental conceptions upon which our constitutional system rests, and the lines which define it are so broad and so obvious, that, unlike some of the other powers delegated by the Constitution, where the lines of distinction are less clearly defined, the attempts to transgress or forget them have been so infrequent as to call for few occasions for their statement and application. However, though infrequent, occasions have not been wanting, especially on the subject of the removal of causes with which we are now dealing, where the general principle has been expounded and applied so as to cause the subject, even from the mere point of view of authority, to be beyond the domain of all possible controversy.

See for general question, Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 391, 38 L. ed. 1014, 1021,

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4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Hess v. Reynolds, 113 U. S. 73, 77, 28 L. ed. 927, 928, 5 Sup. Ct. Rep. 377; Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 252, 49 L. ed. 462, 467, 25 Sup. Ct. Rep. 251, and on subject of removal, Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44; St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621; [329] Southern R. Co. v. Allison, 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713; Herndon v. Chicago R. I. & P. R. Co. 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. Rep. 633.

With this general principle in hand let us come to fix one or more of the essentials of the right to remove as a prelude to testing the assailed statute and the action taken under it. In the first place, the right, unrestrained and unpenalized by state action, on compliance with the forms required by the law of the United States, to ask the removal of a cause pending in a state to a United States court, is obviously of the very essence of the right to remove conferred by the law of the United States. In the second place, as the right given to remove by the United States law is paramount, it results that it is also of the essence of the right to remove, that when an issue of whether a prayer for removal was rightfully asked arises, a Federal question results which is determinable by the courts of the United States free from limitation or interference arising from an exertion of state power. In the third place, as the right freely exists to seek removal unchecked or unburdened by state authority, and the duty to determine the adequacy of a prayed removal is a Federal, and not a state, question, it follows that the states are, in the nature of things, without authority to penalize or punish one who has sought to avail himself of the Federal right of removal on the ground that the removal asked was unauthorized or illegal. Let us come, then, to the text of the statute, with the object of determining its constitutionality.

Its 1st section provides "that the domicil of every person, firm, or corporation conducting a business in person, by agent, through an office, or otherwise transacting business within the state of Oklahoma, and which has complied with or may comply with the Constitution and laws of the state of Oklahoma, shall be for all purposes deemed and held to be the state of Oklahoma." The 2d section provides for the immediate revocation of "the license or charter to do business within the state of [330] Oklahoma of every person, firm, or corporation conducting a business in person, by agent, through an office, or otherwise transacting business within said state of Oklahoma, who shall claim or declare in writing before any court of law or equity within said state of Oklahoma, domicil within another state or foreign country." [Okla. Laws of May 26, 1908.] The 3d section makes it the duty of the judge of any court before which any claim of foreign domicil is made within the contemplation of the 2d section to at once make report of the fact to the secretary of state, and to transmit to that officer a copy of the claim; and the 4th section imposes on the secretary of state the duty immediately, on the receipt of such report and copy of the declaration, to "declare the license or charter of any person, firm, or corporation so filing said claim or declaration forfeited and revoked;" and the 5th causes it to be a misdemeanor subjecting to a penalty of not less than one thousand nor more than five thousand dollars each day or part of day, for any person whose license or charter is revoked, to do business in Oklahoma in conflict with the prohibitions of the statute.

While the provisions of the statute are dependent one upon the other, and are unified in the sense that they all are components of a common purpose, that is, tend to the realization of one and the same legislative intent, its provisions, nevertheless, for the purpose of analysis, are plainly twofold in character; that is, one, the compulsory citizenship and domicil within the state which the 1st section imposes, and the other, the prohibition which the statute pronounces against any assertion in a court of the existence of any other citizenship and domicil than that which the statute ordains, and the means and penalties provided for sanctioning such prohibition. Although theoretically, the first would seem to be the more primary and fundamental of the two, since the second, after all, consists but of methods provided for making the first [331] operative, the second, from the point of view we are examining, is the primal consideration, since it directly deals with the assertion in a state court of a right to remove, and provides the mechanism which was deemed to be effectual to render the assertion of such right impossible. In other words, the difference between its two provisions is that which exists between an attempt on the one hand to render the enjoyment of a Federal right impossible by arbitrarily creating a fictitious legal status incompatible with the existence of the right, and on the other hand the formulation of such prohibitions and the establishment of such penalties against the attempt to avail of the Federal right as to cause it to be impossible to assert it.

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Coming, then, to consider the statute from the second or latter point of view, we think it is clear that it plainly and obviously forbids a resort to the Federal courts on the ground of diversity of citizenship in the contingency contemplated, punishes by extraordinary penalties any assertion of a right to remove under the laws of the United States, and attempts to divest the Federal courts of their power to determine, if issue arises on the subject, whether there is a right to remove. Indeed, the statute goes much further, since, when an application to remove is made, in order to prevent a judicial consideration of its merits even by the state court, it in effect commands the judge of such court, on the making of the application, to refuse the same, and to certify the fact that it was made to a state executive officer to the end that such officer should, without judicial action, strip the petitioning corporation of its right to do business, besides subjecting it to penalties of the most destructive character as a means of compelling acquiescence. When the nature of the statute is thus properly appreciated, nothing need be further said to manifest its obvious repugnancy to the Constitution, or to demonstrate the correctness of the decree of the court below.

The conclusion just stated leaves us only the duty of [332] separately and briefly referring to some of the propositions pressed in argument; (a) the contention that because the object of the suit was to enjoin state officers from violating the constitutional rights of the complainant, it was therefore a suit against the state, and not maintainable, is so plainly in conflict with the settled doctrine to the contrary that we do not further notice it. (b) The contention so much insisted upon, that the act should not be declared unconstitutional because it does not discriminate, we assume refers to the provision of the statute creating an arbitrary standard of state citizenship and domicil; but, as we see no possibility of separating that provision from the unconstitutional attempt to prevent access to the courts of the United States, there is no occasion to further deal with the subject of discrimination. If, however, we were to separately consider it, at once it is to be observed that the contention proceeds upon a self-evident misconception, which is this: that if only wrong be indiscriminately done, it becomes rightful. (c) The proposition that the constitutionality of the statute and the action taken under it is supported by the decisions in Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148, and Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 248, 50 L. ed. 1014, 26 Sup. Ct. Rep. 619, 6 Ann. Cas. 317, is, we think plainly unfounded. Those cases involved state legislation as to a subject over which there was complete state authority; that is, the exclusion from the state of a corporation which was so organized that it had no authority to do anything but a purely intrastate business, and the decisions rested upon the want of power to deprive a state of its right to deal with a subject which was in its complete control, even though an unlawful motive might have impelled the state to exert its lawful power. But that the application of those cases to a situation where complete power in a state over the subject dealt with does not exist has since been so repeatedly passed upon as to cause the question not to be open. Western U. Teleg. Co. v. Kansas, 216 [333] U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Buck Stove & Range Co. v. Vickers, 226 U. S. 205, 57 L. ed. 189, 33 Sup. Ct. Rep. 41; and Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. Rep. 633. The grounds of the decision in the last case show the extremely narrow scope of the rulings in the Doyle and Prewitt Cases, and render their inapplicability to this case certain. Indeed, the ruling in the Herndon Case and in those subsequent to the Doyle and Prewitt Cases, most of which were reviewed in the Herndon Case, demonstrates that no authority is afforded by those two cases for the conception that it is within the power of a state in any form, directly or indirectly, to destroy or deprive of a right conferred by the Constitution and laws of the United States. (d) The matters which the court below ordered stricken from the answer were irrelevant to the issue for decision, even if it be conceded hypothetically that they had merit; because, under that assumption, they would have only been properly cognizable if presented in an appropriate manner and at the proper time to the Federal tribunal which had a right to pass upon them when considering the propriety of the removal which was prayed.

(e) We consider that the plain text of the statute, the meaning affixed to it by the state court when the application to remove was made, the subsequent action taken by the state officers, the character of the pleadings, the concession as stated by the court below, which was made in the argument, all leave no room for the contention that, at all events, the statute should be construed not as an attempt on the part of the state to prevent the removal of causes,

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but simply as an effort on the part of the state to exert reasonable control over corporations within its borders. The argument that the statute, if understood as we understand it, is so flagrantly repugnant to the Constitution as to suggest the impossibility of believing that it was enacted with that end in view, but repudiates, as we have seen, the action of the state court and of the [334] state officers under it, and the whole course of the trial, and comes at last to the contention that the more plainly an enactment violates the Constitution, the more urgent the duty of deciding that it does not do so.

Affirmed.

J. C. BACCUS, Plff. in Err.,
v.
STATE OF LOUISIANA.

(See S. C. Reporter's ed. 334-338.)

Constitutional law — equal protection of the laws — sales by itinerant venders.

Prohibiting the sale by itinerant venders of "any drug, nostrum, ointment, or application of any kind intended for the treatment of disease or injury," as is done by La. Laws 1894, act No. 49, § 12, does not violate the equal protection or due process of law clauses of the 14th Amendment to the Federal Constitution, although the sale of such articles by other persons is permitted.

[For other cases, see Constitutional Law, IV. a, 5, d; IV. b, 4, in Digest Sup. Ct. 1908.]

[No. 170.]

Argued and submitted January 19, 1914.
Decided February 24, 1914.

IN ERROR to the Third Judicial District Court of the Parish of Claiborne, State of Louisiana, to review a conviction of an itinerant vender for selling drugs or medicinal compounds. Affirmed.

Statement by Mr. Chief Justice White:

This writ of error was directed to a district court of the state of Louisiana, as that court had jurisdiction, in last resort, over the conviction sought to be reviewed. The information upon which the conviction was based charged that the accused had, in violation of § 12 of act 49 of the Laws of Louisiana for 1894, illegally, as an itinerant vender or peddler, "sold drugs, ointments, nostrums, and applications intended for the treatment of diseases and deformity." A motion was made to quash on the following [335] grounds: First, because the statute upon which the charge was based provided for no offense; second, because if it did, the acts charged were not, generally speaking, within the statute, and especially were not embraced by its provisions because the sale of drugs or proprietary preparations put up in sealed packages with directions for use did not constitute the practice of medicine; third, because if the statute embraced, as asserted, the acts charged, it was in conflict with the state Constitution, since it permitted all persons to sell drugs, ointments, etc., except itinerant venders; fourth, because if the statute operated as contended for, it was repugnant to the 14th Amendment to the Constitution of the United States "(a) because it prevents a citizen from pursuing a lawful vocation; (b) it denies to other citizens rights enjoyed by all others in the state, and . . . is class legislation in its effect, as it gives to the local dealer a monopoly in the sale of such drugs, etc., and deprives the itinerant vender or dealer of the privilege to sell such articles . . ." The motion to quash having been overruled, the case was submitted to the court without a jury, upon an agreed statement of facts to the following effect: 1st, "that the defendant was an itinerant vender of drugs, nostrums," etc., and as such had sold the articles "intended for the treatment of diseases, as alleged in the information." 2d, "that the drugs so sold by the defendant as an itinerant vender were compounded and prepared by the Rawleigh Medical Company of the state of Illinois, and that said remedies, drugs, nostrums, ointments, and applications were put up in sealed packages or bottles ready

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NOTE.—On the right to discriminate between harmless articles, in legislation regulating peddlers—see notes to State v. Wright, 21 L.R.A.(N.S.) 349 and People ex rel. Moskowitz v. Jenkins, 35 L.R.A. (N.S.) 1079.

As to validity of ordinance regulating conduct of licensed street hucksters or peddlers—see note to Shreveport v. Dantes, 8 L.R.A.(N.S.) 304.

On the validity of license tax on peddlers, so high as to be prohibitory in effect—see note to People use of State Bd. of Health v. Wilson, 35 L.R.A.(N.S.) 1074.

On the validity of license or occupation tax on hawkers and peddlers and persons engaged in soliciting orders by sample or otherwise, as an exercise of the police power—see notes to State v. Bayer, 19 L.R.A. (N.S.) 301, and Dozier v. State, 28 L.R.A. (N.S.) 265.

On discrimination against nonresidents by statute or municipal ordinance imposing license or occupation tax—see note to State v. Williams, 40 L.R.A.(N.S.) 286.

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for use, with printed directions on the packages or bottles, and that defendant was an itinerant vender of same in original packages and bottles, and prepared by the proprietors." 3d, "that all persons except itinerant venders have the right to sell said remedies; that is, patent and proprietary drugs, nostrums, ointments, and applications, intended for the cure [336] of diseases." By requests to charge which were overruled, and to which exceptions were reserved, the defenses based both upon the state and the United States Constitution, embodied in the motion to quash, were reiterated, and on conviction and sentence after an unsuccessful effort by certiorari to procure as an act of grace, a review of the case by the supreme court of the state, this writ of error was sued out.

Mr. Thomas D. O'Brien argued the cause, and, with Mr. John A. Barnes, filed a brief for plaintiff in error:

The validity of the statute must be determined by this court as it has been construed, interpreted, and applied by the district court in this particular case.

Ex parte Virginia, 100 U. S. 347, 25 L. ed. 679, 3 Am. Crim. Rep. 547; Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

The selling and distribution of drugs is a proper subject for regulation. They may be classed by themselves, and be the subject of special regulations. So also peddlers may be licensed, regulated, and controlled; but a statute which makes no attempt to protect the public by defining what drugs may be put upon the market, or defining the qualifications to be possessed by those authorized to sell and distribute such drugs, and which merely prohibits itinerant vending, neither protects the public health nor morals, and is an arbitrary classification of persons, which violates the 14th Amendment.

People use of State Bd. of Health v. Wilson, 249 Ill. 195, 35 L.R.A.(N.S.) 1074, 94 N. E. 141; Com. v. Payne Medicine Co. 138 Ky. 164, 127 S. W. 760; State v. Donaldson, 41 Minn. 74, 42 N. W. 781.

The enforcement of the statute would unwarrantably deprive plaintiff in error of liberty.

Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

The business and occupation attempted to be prohibited is lawful.

Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; State v. Donaldson, 41 Minn. 81, 42 N. W. 781; Westervelt, Pure Food & Drug Laws; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Noel v. People, 187 Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; People use of State Bd. of Health v. Wilson, 249 Ill. 195, 35 L.R.A. (N.S.) 1074, 94 N. E. 141.

Whatever may be said as to how far courts may go in questioning the motives actuating legislation, the purpose and effect of a statute are always proper subjects for judicial investigation, and, if the purpose is plainly unlawful, and the statute will only effectuate that unlawful purpose, the court will refuse its sanction.

Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Civil Rights Cases, 109 U. S. 23, 27 L. ed. 843, 3 Sup. Ct. Rep. 18; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Butchers' Union S. H. & L. S. L. Co. v. Crescent City, L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People use of State Bd. of Health v. Wilson, 249 Ill. 195, 35 L.R.A.(N.S.) 1074, 94 N. E. 141; Noel v. People, 187 Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; State v. Donaldson, 41 Minn. 74, 42 N. W. 781; Chicago v. Netcher, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; Carrollton v. Bazzette, 159 Ill. 284, 31 L.R.A. 522, 42 N. E. 837; Price v. People, 193 Ill. 114, 55 L.R.A. 588, 86 Am. St. Rep. 306, 61 N. E. 844; Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718; State v. Loomis, 115 Mo. 312, 21 L.R.A. 789, 22 S. W. 350; State v. Scougal, 3 S. D. 55, 15 L.R.A. 477, 44 Am. St. Rep. 756, 51 N. W. 858; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S.

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W. 627; State v. Bayer, 34 Utah, 257, 19 L.R.A.(N.S.) 297, 97 Pac. 129.

The Louisiana statute here called in question favors monopoly, and is against competition, and is against the declared policy of the Federal, as well as of every state, government.

National Cotton Oil Co. v. Texas, 197 U. S. 129, 49 L. ed. 694, 25 Sup. Ct. Rep. 379.

And such statutes have been almost universally condemned as being arbitrary and unwarranted classifications of persons or things, interfering with individual liberty, and intended to benefit some favored class.

Williams v. State, 99 Ark. 149, 137 S. W. 927, Ann. Cas. 1913A, 1056; People use of State Bd. of Health v. Wilson, 249 Ill. 195, 35 L.R.A.(N.S.) 1074, 94 N. E. 141; State v. Donaldson, 41 Minn. 74, 42 N. W. 781; Com. v. Payne Medicine Co. 138 Ky. 164, 127 S. W. 760; 1 Tiedeman, State & Federal Control of Persons & Property, 505.

Since under the Louisiana statute "all others" except "itinerant venders" are permitted to do the acts for the doing of which the plaintiff in error has been adjudged criminally liable, all that we have said as to the deprivation of liberty is equally applicable to our claim that he has been denied equal protection of the law; and this court, as well as many of the state courts, have held that this cannot be done.

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; State v. Loomis, 115 Mo. 313, 21 L.R.A. 789, 22 S. W. 350; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

The claim made by defendant in error that it is necessary, in the interest of the public health, to confine the sale of proprietary medicines to local dealers, is without force.

Noel v. People, 187 Ill. 593, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; State v. Donaldson, 41 Minn. 74, 42 N. W. 781; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 97, 43 L. ed. 910, 19 Sup. Ct. Rep. 609.

Mr. Ruffin G. Pleasant, Attorney General of Louisiana, submitted the cause for defendant in error. Mr. G. A. Gondran was on the brief:

The statute assailed has reference to the regulations of the practice of medicine by the itinerant venders therein mentioned, and they are to be treated as persons practising medicine, and not merely to be considered as mere sellers and venders.

State ex rel. Wynne v. Lee, 106 La. 400, 31 So. 14; People use of State Bd. of Health v. Blue Mountain Joe, 129 Ill. 370, 21 N. E. 923.

The construction of the statute by the supreme court of that state, while perhaps not conclusive upon this court, is one towards which the courts will lean.

Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 101, 43 L. ed. 911, 19 Sup. Ct. Rep. 609; Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; Baltimore Traction Co. v. Baltimore Belt R. Co. 151 U. S. 137, 38 L. ed. 102, 14 Sup. Ct. Rep. 294; Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396; Collins v. Texas, 223 U. S. 294, 56 L. ed. 443, 32 Sup. Ct. Rep. 286.

Consideration must be given to the purpose of the legislature, and to the mischief intended to be guarded against; whether it is a fair and a reasonably valid exercise of the police power, or arbitrary and capricious, must be determined in the light of the object sought to be attained by the act.

Sutherland, Stat. Constr. 2d ed. ¶¶ 370, 376, 456.

There is no vested right to practise the medical profession, free from supervision and regulation of the state.

Bradwell v. Illinois, 16 Wall. 130, 21 L. ed. 442; Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; Hawker v. New York, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; State v. Harrington, 68 Vt. 622, 34 L.R.A. 100, 35 Atl. 515.

There is no arbitrary violation or discrimination made by this statute.

Bachtel v. Wilson, 204 U. S. 36, 51 L. ed. 357, 27 Sup. Ct. Rep. 243.

Mr. Chief Justice White, after making the foregoing statement, delivered the opinion of the court:

We accept the construction affixed by the court below to the statute, and upon which alone it could in reason have held that the acts charged were embraced by its provisions. We hence disregard an intimation made in the argument of the defendant in error, that the statute is susceptible of a different interpretation, and therefore that the claim of Federal right which was made below, and which was necessarily passed upon, need not be here considered. It is inconceivable that the statute should mean one thing for the purpose of determining whether the acts charged were within its terms, and should then be held to mean another, for the purpose of escaping the Federal question. Thus considering the case in its true aspect, the single issue to be de-

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cided is, Did the state have power, without violating the equal protection or due process of [338] law clause of the 14th Amendment, to forbid the sale by itinerant venders of "any drug, nostrum, ointment, or application of any kind, intended for the treatment of disease or injury," although allowing the sale of such articles by other persons? That it did have such authority is so clearly the result of a previous ruling of this court (Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367), or, at all events, is so persuasively made manifest by the authorities cited and the reasoning which sustained the ruling of the court in the case just stated, as to leave no room for controversy on the subject (pp. 306, 307). Moreover, the power which the state government possessed to classify and regulate itinerant venders or peddlers, exerted in the statute under consideration, is cumulatively sustained and made, if possible, more obviously lawful by the fact that the regulation in question deals with the selling by itinerant venders or peddlers of drugs or medicinal compounds,—objects plainly within the power of government to regulate.

Affirmed.

TEXAS & PACIFIC RAILWAY COMPANY, Appt.,
v.
RAILROAD COMMISSION OF LOUISIANA and the Individual Members Thereof.

(See S. C. Reporter's ed. 338, 339.)

Appeal — review of facts — concurrent findings.

Findings of fact concurred in by the two lower courts will not be disturbed by the Federal Supreme Court on appeal unless shown to be clearly erroneous.

[For other cases, see Appeal and Error, VIII. 1, 5, in Digest Sup. Ct. 1908.]

[No. 186.]

Argued and submitted January 23, 1914. Decided February 24, 1914.

APPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which affirmed a decree of the Circuit Court for the Eastern District of Louisiana, dismissing the bill in a suit to restrain the enforcement of an order of the Louisiana Railroad Commission, fixing freight rates. Affirmed.

See same case below, 112 C. C. A. 538, 192 Fed. 280.

The facts are stated in the opinion.

Mr. Thomas J. Freeman submitted the cause for appellant.

Mr. Wylie M. Barrow argued the cause, and, with Mr. Ruffin G. Pleasant, Attorney General of Louisiana, filed a brief for appellees.

Mr. Chief Justice White delivered the opinion of the court:

Appellant, a corporation organized under the laws of the United States, filed its bill in equity in the circuit court for the eastern district of Louisiana to restrain the enforcement of an order of the Louisiana Railroad Commission fixing rates for the carriage of cottonseed and its products, on the ground that the order exceeded the powers conferred upon the commission by the state law; indeed, was so unreasonably low as to be a violation of the due process clause of the state Constitution. After issue joined the testimony was heard by a special master, who found for complainant. The circuit court, on exceptions filed by respondents to the master's report, after reviewing the facts, gave judgment sustaining the exceptions, setting aside the report, and dismissing the bill on the ground that the evidence did not support the master's report,—in other words, that the complainant had failed to prove its case. On appeal to the circuit court of appeals the evidence was again reviewed, and the judgment affirmed. 112 C. C. A. 538, 192 Fed. 280. This appeal was then taken.

Both the courts below passed on the facts, and agreed in holding that appellant failed to establish by the evidence its right to the relief demanded, and the rule is well settled that findings of fact concurred in by two lower courts will not be disturbed by this court unless shown to be clearly erroneous. Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; Dun v. Lumbermen's Credit Asso. 209 U. S. 20, 52 L. ed. 663, 28 Sup. Ct. Rep. 335, 14 Ann. Cas. 501. As from an examination of the record we find no ground for concluding that there was plain error, the decree must be and is affirmed.

Affirmed.

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

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[340] LEROY FIBRE COMPANY,
v.
CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY.

(See S. C. Reporter's ed. 340-354.)

Trial — question for jury — contributory negligence.

1. No question for the jury as to whether the owner of flax straw which he lawfully stored on his own premises, and which was destroyed by fire caused by the negligent operation of a railway locomotive, was himself negligent, is presented by evidence that the railway company preceded the owner in the establishment of its business, that the property was inflammable in character, and that it was stored near the railway right of way and track.

[For other cases, see Trial, 398-417, in Digest Sup. Ct. 1908.]

Railroads — negligent operation — fires — contributory negligence.

2. An owner who lawfully stores his property on his own premises adjacent to a railway right of way and track is not held to the exercise of reasonable care to protect it from fire set by negligence of the railway company, and not resulting from unavoidable accident, or the reasonably careful conduct of its business.

[For other cases, see Railroads, VII. d, in Digest Sup. Ct. 1908.]

Railroads — negligent operation — fires — contributory negligence.

3. The owner of property lawfully stored on private premises adjacent to a railway right of way and track discharges his full legal duty for its protection against fire set by the railway company's locomotives if he exercises that care which a reasonably prudent man would exercise under like circumstances to protect it from the dangers incident to the operation of a railway conducted with reasonable care.

[For other cases, see Railroads, VIII. d, in Digest Sup. Ct. 1908.]

[No. 175.]

Submitted January 19, 1914. Decided February 24, 1914.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit, presenting questions as to the contributory negligence of the owner of property stored near a railway right of way which was destroyed by fire caused by the negligent operation of a locomotive. Answered by holding that there is no room for the application of the doctrine of contributory negligence.

Statement by Mr. Justice McKenna:

The following questions are certified:

"1. In an action at law by the owner of a natural product of the soil, such as flax straw, which he lawfully stored on his own premises, and which was destroyed by fire caused by the negligent operation of a locomotive engine, to recover the value thereof from the railroad company operating the engine, is it a question for the jury whether the owner was also negligent, without other evidence than [341] that the railroad company preceded the owner in the establishment of its business, that the property was inflammable in character, and that it was stored near the railroad right of way and track?

"2. Is it a question for the jury whether an owner who lawfully stores his property on his own premises adjacent to a railroad right of way and track is held to the exercise of reasonable care to protect it from fire set by the negligence of the railroad company, and not resulting from unavoidable accident or the reasonably careful conduct of its business?

"3. As respects liability for the destruction by fire of property lawfully held on private premises adjacent to a railroad right of way and track, does the owner discharge his full legal duty for its protection if he exercises that care which a reasonably prudent man would exercise under like circumstances to protect it from the dangers incident to the operation of the railroad, conducted with reasonable care?"

The LeRoy Fibre Company, plaintiff in error (we will refer to it as plaintiff), brought an action against defendant in error (referred to herein as defendant) in a state court of Minnesota to recover the value of certain flax straw alleged to have been negligently burned and destroyed by defendant. The cause was removed to the circuit court for the district of Minnesota, where it was tried. One of the grounds of negligence set forth was that a locomotive engine of defendant, while passing the premises of plaintiff, was so negligently managed and operated by defendant's employees that it emitted and threw sparks and coals of unusual size upon the stacks of flax straw, and thereby set fire to and destroyed them.

The evidence at the trial showed the following without dispute:

"Some years after defendant had constructed and commenced operating its line of railroad through Grand Meadow, Minnesota, the plaintiff established at [342] that village a factory for the manufacture of tow from flax straw. The plaintiff had adja-

NOTE.—On the duty of owner of property adjoining railroad right of way to protect it from fires set by passing locomotive—see notes to Hawley v. Sumpter Valley R. Co. 12 L.R.A.(N.S.) 526, and Brunner v. Minneapolis, St. P. & S. Ste. M. R. Co. 49 L.R.A. (N.S.) 166.

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cent to its factory premises, a tract of ground abutting upon the railroad right of way and approximately 250 by 400 feet in dimension, upon which it stored flax straw it purchased for use in its manufacturing business. There were about 230 stacks, arranged in two rows, parallel with the right of way. Each stack contained from 3 to 3½ tons of straw. The distance from the center of the railroad track to the fence along the line of the right of way was 50 feet, from the fence to the nearest row of stacks, 20 or 25 feet, and from the fence to the second row of stacks, about 35 feet. A wagon road ran between the fence and the first row. On April 2, 1907, during a high wind, a fire started upon one of the stacks in the second row, and as a result all were consumed. The fire did not reach the stack through the intervening growth or refuse, but first appeared on the side of the stack above the ground. The flax straw was inflammable in character. It was easily ignited and easily burned.

"There was substantial evidence at the trial tending to show that the fire was started by a locomotive engine of defendant which had just passed, and that through the negligent operation of defendant's employees in charge, it emitted large quantities of sparks and live cinders, which were carried to the straw stack by a high wind then prevailing. It was contended at the trial by defendant, that plaintiff itself was negligent, and that its negligence contributed to the destruction of its property. There was no evidence that plaintiff was negligent save that it had placed its property of an inflammable character upon its own premises so near the railroad tracks, that is to say, the first row of stacks, 70 or 75 feet, and the second row, in which the fire started, about 85 feet from the center of the railroad track. In other words, the character of the property and its proximity [343] to an operated railroad, for which plaintiff was responsible, was the sole evidence of plaintiff's contributory negligence.

"The trial court charged the jury that though the destruction of the straw was caused by defendant's negligence, yet if the plaintiff, in placing and maintaining two rows of stacks of flax straw within a hundred feet of the center line of the railroad, failed to exercise that ordinary care to avoid danger of firing its straw from sparks from engines passing on the railroad that a person of ordinary prudence would have exercised, under like circumstances, and that the failure contributed to cause the accident, the plaintiff could not recover. The trial court also submitted two questions to the jury, as follows:

"1. Did the Fibre Company, in placing and keeping two rows of flax straw within 100 feet of the center line of the railroad, fail to use the care to avoid danger to its straw from sparks of fire from engines operating on that railroad, that a person of ordinary prudence would have used under like circumstances? 2. Did the engineer McDonald fail to use that degree of care to prevent sparks from his engine from firing the stacks as he passed them, on April 2, 1907, that a person of ordinary prudence would have used under like circumstances?

"The jury answered both questions in the affirmative and found a general verdict for the defendant. Judgment was accordingly entered for defendant. The plaintiff duly saved exceptions to the charge of the court regarding its contributory negligence and to the submission of the first question to the jury, and has assigned the action of the court as error."

Mr. John F. Fitzpatrick submitted the cause for the LeRoy Fibre Company. Messrs. Edward P. Sanborn and F. M. Catlin were on the brief:

Evidence that the railroad company preceded the owner in establishing its business, and that the property destroyed by its negligence was inflammable in character, but lawfully stored on the owner's own premises, near the right of way, is not evidence of negligence of the owner in such a case.

Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 473, 23 L. ed. 356, 363; Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co. 1 L.R.A.(N.S.) 533, 71 C. C. A. 316, 139 Fed. 530; Thomp. Neg. § 2314; Shearm. & Redf. Neg. § 680; Richmond & D. R. Co. v. Medley, 75 Va. 499, 40 Am. Rep. 734; Louisville & N. R. Co. v. Marbury Lumber Co. 125 Ala. 235, 50 L.R.A. 620, 28 So. 438; Patton v. St. Louis & S. F. R. Co. 87 Mo. 117, 56 Am. Rep. 446; Kellogg v. Chicago & N. W. R. Co. 26 Wis. 223, 7 Am. Rep. 69; Salmon v. Delaware, L. & W. R. Co. 38 N. J. L. 5, 20 Am. Rep. 356; Louisville, N. A. & C. R. Co. v. Richardson, 66 Ind. 43, 32 Am. Rep. 94; Pittsburgh, C. & St. L. R. Co. v. Jones, 86 Ind. 496, 44 Am. Rep. 334; Louisville & N. R. Co. v. Beeler, 126 Ky. 328, 11 L.R.A. (N.S.) 930, 128 Am. St. Rep. 291, 103 S. W. 300, 15 Ann. Cas. 913; Cleveland, C. C. & St. L. R. Co. v. Scantland, 151 Ind. 488, 51 N. E. 1068; Philadelphia & R. R. Co. v. Hendrickson, 80 Pa. 182, 21 Am. Rep. 97; Reed v. Missouri P. R. Co. 50 Mo. App. 504; Rutherford v. Texas & P. R. Co. — Tex. Civ. App. —, 61 S. W. 422, 9 Am. Neg. Rep. 620; Gulf, C. & S. F. R. Co. v. Fields, 2 Tex. App. Civ. Cas. (Willson) 700; Kimball v. Borden, 97 Va. 477, 34 S. E. 45; Kalbfleisch v. Long

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Island R. Co. 102 N. Y. 520, 55 Am. Rep. 832, 7 N. E. 557; Louisville & N. R. Co. v. Malone, 116 Ala. 600, 22 So. 897; 3 Elliott, Railroads, § 1228.

The doctrine of contributory negligence of the owner has no application.

Louisville & N. R. Co. v. Marbury Lumber Co. 125 Ala. 237, 50 L.R.A. 620, 28 So. 438; Philadelphia & R. R. Co. v. Hendrickson, 80 Pa. 182, 21 Am. Rep. 97; 13 Am. & Eng. Enc. Law, 482; 2 Thomp. Neg. § 2314; Kendrick v. Towle, 60 Mich. 363, 1 Am. St. Rep. 526, 27 N. W. 567; Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co. 70 Miss. 119, 12 So. 156; Louisville & N. R. Co. v. Beeler, 126 Ky. 328, 11 L.R.A.(N.S.) 930, 128 Am. St. Rep. 291, 103 S. W. 800, 15 Ann. Cas. 913.

In no event is there any duty resting upon the owner to protect his property from injury by the negligence of the railroad company.

Fero v. Buffalo & State Line R. Co. 22 N. Y. 209, 78 Am. Dec. 178; Cook v. Champlain Transp. Co. 1 Denio, 91.

The negligence of the railroad company is the proximate cause of the loss.

Reed v. Missouri P. R. Co. 50 Mo. App. 504; Louisville & N. R. Co. v. East Tennessee, V. & G. R. Co. 9 C. C. A. 314, 22 U. S. App. 102, 60 Fed. 996; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 558, 35 L. ed. 270, 272, 11 Sup. Ct. Rep. 653; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; Kendrick v. Towle, 60 Mich. 363, 1 Am. St. Rep. 526, 27 N. W. 567.

Mr. H. H. Field submitted the cause for the Chicago, Milwaukee, & St. Paul Railway Company. Mr. M. B. Webber was on the brief:

The gist of the authorities is that the mere fact that the owner leaves his land in its natural state, near or next to a railroad, does not charge him with contributory negligence. Neither is he prevented from making legitimate use of his property because near a railroad right of way; but where he affirmatively does some act which renders the situation more hazardous, and that act is one that a person of ordinary prudence and care would not have committed, he cannot recover; and the question as to whether or not his conduct is that of a person of ordinary care and prudence is a question of fact for a jury.

Gulf, C. & S. F. R. Co. v. Johnson, 4 C. C. A. 447, 10 U. S. App. 629, 54 Fed. 474; Clark v. Kansas City, Ft. S. & M. R. Co. 64 C. C. A. 19, 129 Fed. 341; Shearm. & Redf. Neg. § 679; Murphy v. Chicago & N. W. R. Co. 45 Wis. 222, 30 Am. Rep. 721; Ward v. Milwaukee & St. P. R. Co. 29 Wis. 144; Collins v. New York C. & H. R. R. Co. 5 Hun, 499, 71 N. Y. 609; Niskern v. Chicago, M. & St. P. R. Co. 22 Fed. 811; Ohio & M. R. Co. v. Shanefelt, 47 Ill. 497, 95 Am. Dec. 504; Hoffman v. Milwaukee, M. & St. P. R. Co. 40 Minn. 60, 41 N. W. 301; Karsen v. Milwaukee & St. P. R. Co. 29 Minn. 12, 11 N. W. 122; Schell v. Second Nat. Bank, 14 Minn. 43, Gil. 34; Fero v. Buffalo & State Line R. Co. 22 N. Y. 209, 78 Am. Dec. 178; Omaha Fair & Exposition Asso. v. Missouri P. R. Co. 42 Neb. 105, 60 N. W. 330; Toledo, W. & W. R. Co. v. Larmon, 67 Ill. 68; Chicago & A. R. Co. v. Pennell, 94 Ill. 448; Kansas City, Ft. S. & G. R. Co. v. Owen, 25 Kan. 419; Kansas P. R. Co. v. Brady, 17 Kan. 380; Missouri P. R. Co. v. Cornell, 30 Kan. 35, 1 Pac. 312; Great Western R. Co. v. Haworth, 39 Ill. 347; Kesee v. Chicago & N. W. R. Co. 30 Iowa, 78, 6 Am. Rep. 643; Garrett v. Chicago & N. W. R. Co. 36 Iowa, 121; Slossen v. Burlington, C. R. & N. R. Co. 60 Iowa, 215, 14 N. W. 244; Bryant v. Central Vermont R. Co. 56 Vt. 710.

Mr. Justice McKenna delivered the opinion of the court:

The questions certified present two facts —(1) The negligence of the railroad was the immediate cause of the destruction of the property. (2) The property was placed [349] by its owner near the right of way of the railroad, but on the owner's own land.

The query is made in the first two questions whether the latter fact constituted evidence of negligence of the owner, to be submitted to the jury. It will be observed, the use of the land was of itself a proper use,—it did not interfere with nor embarrass the rightful operation of the railroad. It is manifest, therefore, the questions certified, including the third question, are but phases of the broader one, whether one is limited in the use of one's property by its proximity to a railroad; or, to limit the proposition to the case under review, whether one is subject in its use to the careless as well as to the careful operation of the road. We might not doubt that an immediate answer in the negative should be given if it were not for the hesitation of the circuit court of appeals, evinced by its questions, and the decisions of some courts in the affirmative. That one's uses of his property may be subject to the servitude of the wrongful use by another of his property seems an anomaly. It upsets the presumptions of law, and takes from him the assumption, and the freedom which comes from the assumption, that the other will obey the law, not violate it. It casts upon him the duty of not only using his own property so as not to injure another, but so to use his own property that it may not

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be injured by the wrongs of another. How far can this subjection be carried? Or, confining the question to railroads, what limits shall be put upon their immunity from the result of their wrongful operation? In the case at bar, the property destroyed is described as inflammable, but there are degrees of that quality; and how wrongful must be the operation? In this case, large quantities of sparks and "live cinders" were emitted from the passing engine. Houses may be said to be inflammable, and may be, as they have been, set on fire by sparks and cinders from defective or carelessly handled locomotives. Are they to be subject as well as [350] stacks of flax straw, to such lawless operation? And is the use of farms also, the cultivation of which the building of the railroad has preceded? Or is that a use which the railroad must have anticipated, and to which it hence owes a duty, which it does not owe to other uses? And why? The question is especially pertinent and immediately shows that the rights of one man in the use of his property cannot be limited by the wrongs of another. The doctrine of contributory negligence is entirely out of place. Depart from the simple requirement of the law, that everyone must use his property so as not to injure others, and you pass to refinements and confusing considerations. There is no embarrassment in the principle even to the operation of a railroad. Such operation is a legitimate use of property; other property in its vicinity may suffer inconveniences and be subject to risks by it, but a risk from wrongful operation is not one of them.

The legal conception of property is of rights. When you attempt to limit them by wrongs, you venture a solecism. If you declare a right is subject to a wrong, you confound the meaning of both. It is difficult to deal with the opposing contention. There are some principles that have axiomatic character. The tangibility of property is in its uses, and that the uses by one owner of his property may be limited by the wrongful use of another owner of his is a contradiction. But let us pass from principle to authority.

Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. ed. 356, was an action for damages for the destruction of a sawmill, lumber shed, and other buildings and manufactured lumber, by fire communicated by a locomotive engine of a railroad. Some of the buildings were erected in part on the company's land near its track, and the railroad company requested the court to charge the jury that the erection of the buildings or the storing of lumber so near the company's track, as the evidence showed, was an [351] improvident or careless act, and that if such location contributed in any degree to the loss which ensued, then the plaintiffs could not recover, even though the fire was communicated by the railroad company's locomotive. The court refused the request and its action was sustained. Mr. Justice Strong, speaking for the court, said: "Such a location, if there was a license [for it, it not then being a trespass], was a lawful use of its property by the plaintiffs; and they did not lose their right to compensation for its loss occasioned by the negligence of the defendant. Cook v. Champlain Transp. Co. 1 Denio, 91; Fero v. Buffalo & State Line R. Co. 22 N. Y. 215, 78 Am. Dec. 178."

In Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co. 1 L.R.A.(N.S.) 533, 71 C. C. A. 316, 139 Fed. 530, there was the destruction of lumber placed on the railroad's right of way by permission of the railroad. It was destroyed by fire occurring through the negligent operation of the railroad's trains. Contributory negligence was urged against the right of recovery. The court (circuit court of appeals for the sixth circuit), commenting on the cases cited by the railroad, said: "But in so far as the opinions go upon the theory that a plaintiff must lose his right of compensation for the negligent destruction of his own property, situated upon his own premises, because he had exposed it to dangers which could come to it only through the negligence of the railroad company, they do not meet our approval."

After citing cases, the court continued: "The rights of persons to the use and enjoyment of their own property are held upon no such tenure as this. The principle would forbid the use of property for many purposes if in such proximity to a railroad track as to expose it to dangers attributable to the negligent management of its business." Other cases might be adduced. They are cited in Thompson on Negligence, § 2314, and Shearman and Redfield on Negligence, § 680, for the principle that an owner of property is not limited in the uses of his property by its [352] proximity to a railroad, or subject to other risks than those which come from the careful operation of the road or unavoidable accident.

The first and second questions we answer in the negative, and the third question in the affirmative.

So ordered.

Mr. Justice Holmes, partially concurring:

The first two questions concern a standard of conduct, and therefore that which, in its nature and in theory, is a question of law. In this, I gather, we all agree,

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although the proposition often is forgotten or denied. But while the standard is external to the judgment of the party concerned, and must be known and conformed to by him at his peril (The Germanic [Oceanic Steam Nav. Co. v. Aitken] 196 U. S. 589, 596, 49 L. ed. 610, 613, 25 Sup. Ct. Rep. 317), courts, by a practice that seems at first sight an abdication of their function where it is most needed, but that I dare say is justified by good sense, in nice cases leave the standard to the jury as well as the facts. In the questions before us, however, the elements supposed are few and frequently recurring, so that but for what I have to say I should be very content to find that we were able to lay down the proper rule without a jury's aid. Furthermore, with regard to what that rule should be, I agree, for the purposes of argument, that as a general proposition people are entitled to assume that their neighbors will conform to the law; that a negligent tort is unlawful in as full a sense as a malicious one, and therefore that they are entitled to assume that their neighbors will not be negligent.

Nevertheless, I am not prepared to answer the first question, No, if it is to be answered at all. We are bound to consider that at a trial the case would be presented with more facts,—that this case was presented with at least one more fact bearing upon the right to recover,—I mean the distance. If a man stacked his flax so near to a railroad [353] that it obviously was likely to be set fire to by a well-managed train, I should say that he could not throw the loss upon the railroad by the oscillating result of an inquiry by the jury whether the road had used due care. I should say that, although of course he had a right to put his flax where he liked upon his own land, the liability of the railroad for a fire was absolutely conditioned upon the stacks being at a reasonably safe distance from the train. I take it that probably many, certainly some, rules of law based on less than universal considerations are made absolute and universal in order to limit those over-refined speculations that we all deprecate, especially where such rules are based upon or affect the continuous physical relations of material things. The right that is given to inflict various inconveniences upon neighboring lands by building or digging is given, I presume, because of the public interest in making improvement free, yet it generally is made absolute by the common law. It is not thought worth while to let the right to build or maintain a barn depend upon the speculations of a jury as to motives. A defect in the highway, declared a defect in the interest of the least competent travelers that can travel unattended without taking legal risks, or in the interest of the average man, I suppose to be a defect as to all. And as in this case the distinction between the inevitable and the negligent escape of sparks is one of the most refined in the world, I think that I must be right so far, as to the law in the case supposed.

If I am right so far, a very important element in determining the right to recover is whether the plaintiff's flax was so near to the track as to be in danger from even a prudently managed engine. Here certainly, except in a clear case, we should call in the jury. I do not suppose that anyone would call it prudent to stack flax within 5 feet of the engines, or imprudent to do it at a distance of half a mile, and it would not be absurd if the law ultimately [354] should formulate an exact measure, as it has tended to in other instances (Martin v. District of Columbia, 205 U. S. 135, 139, 51 L. ed. 743, 744, 27 Sup. Ct. Rep. 440); but at present I take it that if the question I suggest be material, we should let the jury decide whether 70 feet was too near by the criterion that I have proposed. Therefore, while the majority answer the first question, No, on the ground that the railroad is liable upon the facts stated as matter of law, I should answer it Yes, with the proviso that it was to be answered No, in case the jury found that the flax, although near, was not near enough to the trains to endanger it if the engines were prudently managed, or else I should decline to answer the question because it fails to state the distance of the stacks.

I do not think we need trouble ourselves with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized. See Nash v. United States, 229 U. S. 373, 376, 377, 57 L. ed. 1232, 1235, 1236, 33 Sup. Ct. Rep. 780. Negligence is all degree,—that of the defendant here degree of the nicest sort; and between the variations according to distance that I suppose to exist, and the simple universality of the rules in the Twelve Tables, or the Leges Barbarorum, there lies the culture of two thousand years.

I am authorized to say that the CHIEF JUSTICE concurs in the opinion that I express.

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[355] ANDRIEUS A. JONES, Receiver, Appt.,
v.
ST. LOUIS LAND & CATTLE COMPANY.

(See S. C. Reporter's ed. 355–363.)

Private land claims — overlapping grants — confirmation by Congress.

Land common to two overlapping Mexican grants, one of which preceded the other in all the steps prior to the confirmation of both by Congress in the act of June 21, 1860 (12 Stat. at L. 71, chap. 167), which in § 4 saved to each grant its rights against the other, belongs to the earlier grant.

[For other cases, see Private Land Claims, III. f, in Digest Sup. Ct. 1908.]

[No. 203.]

Argued and submitted January 27, 1914. Decided February 24, 1914.

IN ERROR to the Supreme Court of the Territory of New Mexico to review a judgment which reversed a judgment of the District Court for San Miguel County, in that territory, in favor of plaintiff in a suit to determine the title of persons claiming interests under a Mexican land grant. Reversed and remanded for further proceedings.

See same case below, 16 N. M. 754, 120 Pac. 898.

The facts are stated in the opinion.

Mr. Andrieus A. Jones argued the cause and filed a brief for appellant:

The court will look behind the confirmations, and determine as to which claimant had the better title under the former government.

Doe ex dem. Barbarie v. Eslava, 9 How. 446, 13 L. ed. 210; Berthold v. McDonald, 22 How. 340, 16 L. ed. 321; Henshaw v. Bissell, 18 Wall. 266, 21 L. ed. 839; Rodrigues v. United States, 1 Wall. 582, 17 L. ed. 689; Trenier v. Stewart, 101 U. S. 810, 25 L. ed. 1024.

If the original concessions furnish no guide to a just conclusion, we must seek a solution in the proceedings had before our tribunals and officers by which the claims of the parties were determined.

Miller v. Dale, 92 U. S. 474, 23 L. ed. 736.

Messrs. Charles A. Spiess and S. B. Davis, Jr., submitted the cause for appellee:

The supreme court of New Mexico, having concluded that neither the Perea nor the Preston Beck was a valid grant under Mexican law, decided that the land here in question should be divided between them. In so doing the court followed the rule laid down in —

Southern P. R. Co. v. United States, 183 U. S. 519, 46 L. ed. 307, 22 Sup. Ct. Rep. 154; St. Paul & S. C. R. Co. v. Winona & St. P. R. Co. 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334; Chicago, M. & St. P. R. Co. v. United States, 159 U. S. 372, 40 L. ed. 185, 16 Sup. Ct. Rep. 26; Sioux City & St. P. R. Co. v. United States, 159 U. S. 349, 40 L. ed. 177, 16 Sup. Ct. Rep. 17.

The doctrine of relation cannot be adopted so as to refer the title of the Beck grant to the date of the Mexican proceedings had thereon.

Dent v. Emmeger, 14 Wall. 308, 312, 313, 20 L. ed. 838–840; Menard v. Massey, 8 How. 307, 12 L. ed. 1091; Choteau v. Eckhart, 2 How. 345, 11 L. ed. 293; Les Bois v. Bramell, 4 How. 449, 11 L. ed. 1051; Rodriguez v. United States, 1 Wall. 582–588, 17 L. ed. 689–691; Hale v. Ackers, 69 Cal. 160, 10 Pac. 385; Jackson ex dem. Griswold v. Baird, 4 Johns. 230, 4 Am. Dec. 267; 3 Washb. Real Prop. 328, 329; Butler's Case, 3 Coke, 29; Gibson v. Choteau, 13 Wall. 101, 20 L. ed. 537; Lynch v. Bernal, 9 Wall. 315–325, 19 L. ed. 714–716; Evans v. Durango Land & Coal Co. 25 C. C. A. 531, 49 U. S. App. 320, 80 Fed. 439; Henshaw v. Bissell, 18 Wall. 255, 21 L. ed. 835; Berthold v. McDonald, 24 Mo. 126, 22 How. 334, 341, 16 L. ed. 318, 321; Doe ex dem. Barbarie v. Eslava, 9 How. 421, 446, 13 L. ed. 200, 210; Barry v. Gamble, 3 How. 32, 11 L. ed. 479; Lanfear v. Hunley, 4 Wall. 204, 18 L. ed. 325; McCabe v. Worthington, 16 How. 86, 14 L. ed. 856; Trenier v. Stewart, 101 U. S. 797, 808, 25 L. ed. 1021, 1023.

Mr. Justice McKenna delivered the opinion of the court:

In the year 1876 this suit was instituted by William P. Beck et al. for the purpose of determining the title of the parties to what is known as the Preston Beck grant, and for a partition of the same. This grant conflicts with a certain other grant, known as the Perea grant, to the extent of about 5,000 acres. In the year 1903, Andrieus A. Jones, appellant, was appointed receiver of the Beck grant, and entered into possession of it, including the land in conflict. The St. Louis Land & Cattle Company appellee, filed an intervening petition in the cause, and set up a claim to the land in conflict and prayed as relief that the receiver be ordered to surrender to it the land claimed. Answer was filed to the petition, which, among other things, denied that the Land & Cattle Company had any right, title, or interest in the land.

[359] After hearing, the district court decided in favor of the receiver, and dismissed the petition in intervention. The decree was reversed by the supreme court of

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the territory, and this appeal was then taken.

The question in the case is, Of which grant is the conflict land a part?

Both grants were reported favorably by the surveyor general of the territory to Congress for confirmation, the Beck grant September 30, 1856, the Perea grant September 15, 1857. Both were confirmed by Congress in the act of June 21, 1860 (12 Stat. at L. 71, chap. 167). The act recited the fact of the recommendation for confirmation by the surveyor general of the territory of certain private land claims in the territory, and confirmed them under the numbers by which he had designated them, the Beck grant being No. 1 and the Perea grant being No. 16.

Section 4 of the act provided "that the foregoing confirmation shall only be construed as quitclaims or relinquishments, on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever."

The arguments of counsel have taken a wide range, but we think the decision of the case can be put on a short ground. Both grants have the same Mexican source; that is, they are grants by the political chief (governor) and the territorial deputation. The Beck grant was the prior one, its date being December, 1823; that of the Perea grant, March, 1825. Juridical possession was given of the Beck grant; it was not of the Perea grant. The Beck grant was presented for confirmation to the surveyor general of New Mexico in May, 1855, and declared valid by that officer, and a report made thereof September 30, 1856, to the Secretary of the Interior for confirmation by Congress. The Perea grant was presented for confirmation in 1857, decided to be valid, and reported to the Secretary of the Interior. Both grants, we have seen, were confirmed [360] by Congress by the same act. In 1860 the Beck grant was duly surveyed and the survey approved, and on the 13th of June, 1883, a patent was duly issued for the grant as surveyed. The survey of the Perea grant was not made until 1871. It will be observed, therefore, that the Beck grant, in all of its steps, preceded the Perea grant.

The supreme court of New Mexico, however, was of opinion that those steps could not be considered and that both grants were invalid under the Mexican law, and took their efficacy solely from the act of Congress, and that, therefore, the parties "holding by the same act of Congress, in so far as their grants conflict or overlap, have each an 'equal undivided moiety of the lands within the conflict,'" applying the principle of Southern P. R. Co. v. United States, 183 U. S. 519, 46 L. ed. 307, 22 Sup. Ct. Rep. 154. In this, we think the court erred. The act of Congress was not a gratuity, it was intended to be a discharge of the obligations of the treaty between the United States and Mexico. It was a confirmation of rights which existed, and as they existed.

The reports of the surveyor general were made under the authority of the act of Congress of 1854, which made it the duty of that officer "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico." He was required to make report thereof, "denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States, . . . which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirming bona fide grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico," [9 Stat. at L. 922]. 10 Stat. at L. 308, chap. 103.

The proceedings, therefore, for the confirmation of titles [361] derived from Mexico, commenced with the surveyor general, and were consummated by the confirming act, the surveyor general deciding in the first instance. The petition to him "is the commencement of proceedings, which necessarily involve the validity of the grant from the Mexican government." Congress, however, constituted itself the tribunal of ultimate decision of the validity or invalidity of the claim, as, of course, it might do in the discharge of the treaty obligations, or delegate that duty to the judicial department. Tameling v. United States Freehold & Emigration Co. 93 U. S. 644, 23 L. ed. 998; Astiazaran v. Santa Rita Land & Min. Co. 148 U. S. 80, 82, 84, 37 L. ed. 376–378, 13 Sup. Ct. Rep. 457; Stoneroad v. Stoneroad, 158 U. S. 240, 248, 39 L. ed. 966, 968, 15 Sup. Ct. Rep. 822.

The confirmation, therefore, cannot be dissociated from what preceded it, and it may be said of such direct confirmation by act of Congress, as has been said of confirmation through special tribunals created by Congress, that it constitutes a declaration of the validity of the claim under the Mexican laws, and that the claim is entitled to recognition and protection by the stipulations of the treaty. Beard v. Federy, 3 Wall. 478, 492, 18 L. ed. 88, 92. And if there be claims under two patents each of which reserves the rights of the other parties, the inquiry must extend to the character of the original concession. The con-

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troversy can only be settled by determining which of these two gives the better right to the demanded premises. Henshaw v. Bissell, 18 Wall. 255, 266, 21 L. ed. 835, 839.

In Miller v. Dale, 92 U. S. 473, 23 L. ed. 735, there was a conflict between a concession of the Mexican government, confirmed by the tribunals of the United States and a survey thereon, and a patent of the United States issued upon a similar confirmed concession, and the question in the case was which gave the better right to the premises. This court said: "To answer this question, we must look into the character of the original concessions; and if they furnish no guide to the just conclusion, we must seek a [362] solution in the proceedings had before our tribunals and officers by which the claims of the parties were determined." This rule is the only just and practical one, and, besides, the act of Congress confirming the Beck and Perea grants saved to each rights against the other by § 4 of the act.

It is urged, however, that this doctrine is opposed by Dent v. Emmeger, 14 Wall. 308, 20 L. ed. 838, Les Bois v. Bramell, 4 How. 449, 11 L. ed. 1051, and the cases cited by them. In Dent v. Emmeger, it was said of grants which were described as of "imperfect obligation, and affected only the conscience of the new sovereign," and received from it "a vitality and efficacy which they did not before possess," that "when confirmed by Congress they became American titles and took their legal validity wholly from the act of confirmation, and not from any French or Spanish element which entered into their previous existence. The doctrine of senior and junior equities and of relation back has no application in the jurisprudence of such cases."

Of the same character were the rights in the other cases. In some of them there were mere orders for surveys and promises of title which the new sovereign was under no obligation to yield to. In the case at bar we are dealing with rights which were recognized by the new sovereign because they were supposed to have legal validity under the old sovereign.

It is true in the case at bar, such validity is contested, and the contest is certainly justified as to the Perea grant. It was decided in Hayes v. United States, 170 U. S. 637, 644, 42 L. ed. 1174, 1177, 18 Sup. Ct. Rep. 735, that after it was decreed by the general constituent Congress July 6, 1824, that "the province of New Mexico remains a territory of the federation," the adoption by the same Congress of a general colonization law, August 18, 1824, and a permanent Constitution October 24th of the same year, the officials of the territory had no "power to dispose of the public lands, even though it be [363] *arguendo* conceded that such power had theretofore been possessed by the officials who exercised authority within the area which was made a territory by the Constitution." But this only in passing. We are not called upon to consider the power of the territorial officers. The validity of the grants has been pronounced by Congress, and we are only required to consider their relation to each other and the public domain. We have seen that the Beck grant in all of its steps was prior to the Perea grant. Juridical possession was given of it before the Perea grant was applied for and the conveyance of the land embraced within its boundaries made complete. It was confirmed first by the surveyor general of the territory and surveyed first by the Interior Department, and a survey "was necessary to its accurate segregation and delimitation." Stoneroad v. Stoneroad, 158 U. S. 250, 39 L. ed. 969, 15 Sup. Ct. Rep. 822.

It follows from these views that the land in conflict is part of the Beck grant, and the judgment of the Supreme Court of the Territory is reversed, and the cause remanded to the Supreme Court of the state for further proceedings not inconsistent with this opinion.

Reversed.

SUSAN J. TAYLOR, as Administratrix of the Goods, Chattels, and Credits which were of Howard E. Taylor, Deceased, Plff. in Err.,

v.

SEXTUS E. TAYLOR.

(See S. C. Reporter's ed. 363-371.)

Commerce — exclusiveness of Federal power — employers' liability — distribution of damages.

Nothing in the state statute for the distribution of personal property can defeat the right of the childless widow of an interstate railway employee who was fatally injured while employed by the carrier in interstate commerce, to the entire net proceeds of a judgment for the resulting damages recovered by her as administratrix in an action against the carrier, whether her action was based upon the provisions of § 1 of the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), making every such carrier liable in damages for the negligent death of such employee "to his or her personal representative for the benefit of the surviving widow or husband

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Note.—On the constitutionality, application, and effect of the Federal employers' liability act—see note to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38.

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and children of such employee; and if none, than of such employee's parents; and if none, then of the next of kin dependent upon such employee," or upon the provision of § 9, added by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1324), that "any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then to such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury," since such provisions govern the distribution of the damages to the exclusion of any applicable state legislation.

[For other cases, see Commerce, I. c, in Digest Sup. Ct. 1913 Supp.]

[No. 224.]

Argued January 30, 1914. Decided February 24, 1914.

IN ERROR to the Supreme Court of the State of New York in and for Orange County in that state to review a judgment directing the distribution according to the state law of the proceeds of a judgment recovered under the Federal employers' liability act, entered pursuant to the mandate of the Court of Appeals of the state, which affirmed a judgment of the Appellate Division of the Supreme Court, Second Department, which had reversed an order of the Supreme Court at Special Term. Reversed and remanded for further proceedings.

See same case below in Appellate Division, 144 App. Div. 634, 128 N. Y. Supp. 378; in Court of Appeals, 204 N. Y. 135, 97 N. E. 502, Ann. Cas. 1913D, 276.

The facts are stated in the opinion.

Mr. Frederic D. McKenney argued the cause, and, with Messrs. George F. Brownell, John Spalding Flannery, and William Hitz, filed a brief for plaintiff in error:

Upon authority of the opinions and judgments of this court in Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 576, 57 L. ed. 355, 362, 33 Sup. Ct. Rep. 135; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 67, 57 L. ed. 417, 420, 33 Sup. Ct. Rep. 192; American R. Co. v. Didricksen, 227 U. S. 145, 149, 57 L. ed. 456, 457, 33 Sup. Ct. Rep. 224; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 175, 57 L. ed. 785, 786, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806; St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 158, 162, 57 L. ed. 1129, 1133, 1135, 33 Sup. Ct. Rep. 651,—the judgment of the state court herein complained of was wrong, and should be reversed, with instructions to reinstate the judgment of the special term of the supreme court of New York.

The right of action given by the Federal employers' liability acts is wholly dependent upon the disposition of the Congress in such regard. It does not inhere in the common law, and may be extended or withheld in the nature of a gratuity, as the Congress may see fit. If capable of being extended or withheld *in toto*, it may be extended upon conditions, and in favor of those only whom the Congress may select, in the order and to the extent which the Congress may specify.

Marvin v. Maysville Street R. & Transfer Co. 49 Fed. 436; McCarty v. New York, L. E. & W. R. Co. 62 Fed. 437; Wilson v. Footle, 55 Fed. 211; Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; Florida C. & P. R. Co. v. Sullivan, 61 L.R.A. 410, 57 C. C. A. 167; 120 Fed. 799.

It being conceded that the Federal government, when operating within its own proper sphere, is supreme, it is of the very essence of that supremacy that it should also possess the incidental power to remove all obstacles to its operation, and to that end so to modify every power vested in subordinate governments as to exempt its own operations from their influence.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579.

No brief was filed for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

The plaintiff in error and defendant in error are respectively the widow and father of one Howard Taylor, a resident of Orange county, state of New York, who, through the negligence of the Erie Railroad Company, met with an accident which caused his death.

Plaintiff in error was appointed the administratrix of his estate, with right to prosecute any right of action granted by special provision of law as such administratrix. She brought suit, as such administratrix, against the railroad company for damages, alleging the employment of her husband in interstate commerce upon a train running from Port Jervis, New York, to Jersey City, New Jersey, the negligence of the railroad company as the cause of his death, and that the action was brought under the act of Congress of April 22,

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1908 [35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322], entitled, "An Act Relating to Liability of Common Carriers by Railroads to their Employees in Certain Cases," known as the employers' liability law.

By permission of the surrogate of Orange county, she compromised with the railroad, accepting a judgment for $5,000.

Defendant in error filed a petition in the supreme court of Orange county for an order directing plaintiff in error to pay over to him one half of the net proceeds of the judgment in accordance with the statute of distribution of the state. The motion was denied and an order was entered determining that plaintiff in error, as widow of the deceased, was entitled to receive and retain for her own use all of the net proceeds of the judgment. The order was reversed by the appellate division of the supreme court, and the judgment of reversal, on appeal to the court of appeals, was affirmed and the record remitted [366] to the supreme court. This writ of error was then prosecuted.

The appellate division was of opinion that the law of the state gave the right of action and determined the distribution of the proceeds of the judgment. Considering the act of Congress and its provisions, the court was of the view that the act of Congress "should be construed as one granting a new remedy under certain circumstances, where none, or a less adequate one, existed under the state laws, and as not intended to supplant or abrogate a right of action of practically equal extent existing under the laws of this state." [144 App. Div. 641, 129 N. Y. Supp. 378.] The court further said: "It is only on the theory that this act of Congress constitutes the exclusive rule applicable to the facts of the case before us that the order of the special term [the order under review] can be upheld. If the remedy afforded by our laws be concurrent with that provided by Congress, then we think that our public policy will not permit an administratrix appointed by our courts under our laws, to use the Federal statute simply for the purpose of defeating our statute of distribution of personal property." The court of appeals expressed the opinion that the case presented a case of conflict between the Federal and state statutes, and determined that the state statutes must prevail. It was said that the power of Congress "to regulate interstate commerce must end somewhere, and so far as employees of common carriers engaged in interstate commerce are concerned, it appears to us that it must end with the death of the employee." [204 N. Y. 140, 97 N. E. 502, Ann. Cas. 1913 D, 276.] And considering that the consequences of a contrary doctrine would give Congress power over the distribution of real estate which might happen to be purchased by the earnings of an employee in interstate commerce, the court declared that the act of Congress, in so far as it attempted to distribute the funds in controversy, was "invalid and unauthorized." There were dissenting opinions expressed. The judgment of the [367] appellate division of the supreme court was affirmed, and the record was remitted to the supreme court, to be proceeded upon according to law, and the judgment of the latter court was entered conformably thereto.

We have had many occasions to declare the comprehensive and exclusive power which Congress possesses over interstate commerce. And starting with that power as a factor, we have only to consider the breadth and meaning of the act of Congress.

Section 1 provides that every common carrier by railroad, while engaged in interstate commerce, "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin, dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier," or by reason of any defect in its instrumentalities.

Section 6, as amended April 5, 1910, provides that the jurisdiction of the courts of the United States shall be concurrent with that of the courts of the several states, and if the action be brought in a state court it shall not be removed to a court of the United States.

Section 9, as amended, is as follows:

"That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee; but in such cases there shall be only one recovery for the same injury." [36 Stat. at L. 291, chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1324.]

[368] The act has come up for consideration in a number of cases. In Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep.

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169, 1 N. C. C. A. 875, it and its amendments were declared to be constitutional; that having been enacted in pursuance of a power reserved to Congress, state laws must give away to them. They established the policy for all, it was decided, and the courts of a state cannot refuse to enforce them on the ground that they are not in harmony with the policy of the state. Congress having acted, it was said, "the laws of the states, in so far as they cover the same field, are superseded; for necessarily that which is not supreme must yield to that which is."

In Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, the Mondou Case was applied. The action was brought by the mother of a deceased employee in interstate commerce, under the state statute. The petition was subsequently amended to embrace a right of action by her under the Federal law as the personal representative of the decedent. The amendment was held not to be the commencement of a new action. It was said that notwithstanding the original petition asserted a cause of action under the state statute without making reference to the act of Congress, the court was presumed to be cognizant of the Federal enactment, and "to know that, with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject."

In Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, it is again said that the act of Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce, and that state legislation was superseded by it. "The obvious purpose of Congress," it was said, "was to save a right of action to certain relatives dependent upon an employee wrongfully injured, for the loss and [369] damage resulting to them financially by reason of the wrongful death." And again, "It is one beyond that which the decedent had,—one proceeding upon altogether different principles."

The same view was expressed in American R. Co. v. Didricksen, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224. The action was by surviving parents, they being the sole beneficiaries under the statute. A distinction was expressed between a cause of action to an injured employee, and in case of his death, a cause of action to dependent relatives; and of the first it was said that it does not survive his death, but that in such case the act "creates a new and distinct right of action for the benefit of the dependent relatives named in the statute" for the damages which result to them because they have been deprived of a reasonable expectation of pecuniary benefits on account of his wrongful death.

In Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806, the statute was again considered as giving a cause of action to the personal representative of the deceased employee for the benefit of the persons designated because of the pecuniary loss resulting to them.

In St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703, the same principles were applied. In St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, the action was by the widow and parent of an interstate commerce employee. The petition stated a case under the state statute. The railroad company contended that the Federal statute was the applicable one. There was a conflict between the statutes. The state statute gave the right of action to the surviving husband, wife, children, and parents; the Federal statute vested the right of action in the personal representative of the deceased for certain named beneficiaries, the parents of the deceased having no rights if there be a widow, husband, or children. The railroad company, therefore, interposed the objection [370] grounded on the Federal statute that the plaintiffs were not entitled to recover on the case proved. The state court overruled the objection and we declared the ruling to be error. We said: "Two of the plaintiffs, the father and mother, in whose favor there was a separate recovery, are not even beneficiaries under the Federal statute, there being a surviving widow; and she was not entitled to recover in her own name, but only through the deceased's personal representative, as is shown by the terms of the statute and the decisions before cited."

These cases were all brought under the statute as originally enacted and before the amendments of 1910. Section 1, however, was not amended, and in St. Louis, I. M. & S. R. Co. v. Hesterly, supra, it was said that the amendment of April 5, 1910, which added § 9, quoted above, "in like manner allows but one recovery, although it provides for survival of the right of the injured person."

It is clear from these decisions that the source of the right of plaintiff in error was the Federal statute; and this whether the cause of action is based on the 1st section of the act or on § 9, added in 1910. From plaintiff in error's complaint against the

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railroad company it is not clear whether she counted on § 1 alone or on that and § 9. If under § 1, the cause of action was not derived from the deceased in the sense of a succession from him. As said in one of the cited cases, her cause of action was "one beyond that which the decedent had,—one proceeding upon altogether different principles." It came to her, it is true, on account of his death, but because of her pecuniary interest in his life and the damage she suffered by his death. It was her loss, not that which his father may have suffered. The judgment she recovered was for herself alone. He had no interest in it. Any loss he may have suffered was not and could not have been any part of it, as we have seen.

[371] If the action included a right under § 9, the recovery was for her benefit exclusively as the widow of the decedent. The language of the section is that the right of action given to the employee survives to his personal representatives for the benefit of his parents only when there is no widow.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

ROSA MARIA CALAF Y FUGURUL et al., Appts.,
v.
FEDERICO CALAF Y RIVERA.

(See S. C. Reporter's ed. 371–374.)

Evidence — filiation — judgment or solemn act.

1. The recognition of a natural son, ignored in his father's will, can be proved in the Porto Rico courts in a suit to nullify the institution of a universal heir by such will only by a judgment, or by an act in solemn and authentic form.

[For other cases, see Evidence, XII. f, in Digest Sup. Ct. 1908.]

Appeal — from Porto Rico courts — following decision below — res judicata.

2. A ruling of the Porto Rico supreme court that the dismissal of a suit to establish filiation by judgment is a bar to a subsequent suit between the same parties to nullify a will which ignored the child whose filiation was sought to be established in the earlier suit will not be disturbed by the Federal Supreme Court on appeal, unless shown by the clearest authority to be erroneous.

[For other cases, see Appeal and Error, VIII. m, 1; Courts, VII. d, in Digest Sup. Ct. 1908.]

Appeal — from Porto Rico courts — following decision below — res judicata.

3. The Federal Supreme Court will ordinarily not disturb on appeal the ruling of the Porto Rico supreme court upon the question whether there was a final judgment in a suit which could be set up as a bar to a later suit.

[For other cases, see Appeal and Error, VIII. m, 1; Courts, VII. d, in Digest Sup. Ct. 1908.]

[No. 199.]

Argued January 26, 1914. Decided February 24, 1914.

APPEAL from the Supreme Court of Porto Rico to review a decree, which, reversing a decree of the District Court of Arecibo, dismissed the complaint in a suit to nullify a will instituting a universal heir. Affirmed.

See same case below, 17 P. R. R. 185.

The facts are stated in the opinion.

Mr. **Manuel Rodriguez-Serra** argued the cause, and, with Mr. Charles Hartzell, filed a brief for appellants:

Under the law 11 of Toro, it is not required, in order to exercise the rights of a natural recognized son, that the fact of the recognition by the natural father be proved in a manner which is solemn, self-evident, and authentic.

Decisions of Supreme Court of Spain: 1853, October 8; 1864, April 16; 1865, January 26; 1865, February 20; 1865, March 2; 1865, April 4; 1865, June 30; 1865, October 9; 1870, June 11; 1871, January 5; 1872, March 23; 1873, January 10; 1874, January 10; 1875, October 14; 1876, December 27; 1877, May 21; 1881, May 6; 1882, October 18; 1886, November 16; 1889, March 29; 1890, March 18; 1888, January 19, 20; 1899, November 29; 1909, April 2; Legislative Collection 1861, p. 293; 1865, vol. 2, p. 50; 1869, vol. 2, p. 518; 1871, vol. 1, p. 582; 1873, vol. 1, p. 377; 1881, vol. 3, p. 868; Aviles v. Sucesion Lange, 1 D. P. R. 350; Rivera v. Borrero, 3 P. R. R. 439.

The certified copy of such a decision or opinion, which was introduced at the trial by defendant, is insufficient to base a plea of *res judicata*, because from it it does not appear that the case had been terminated, which condition is essential in order to produce the effects of *res judicata*.

Decisions of Supreme Court of Spain: 1864, June 14; 1868, May 6; 1897, April 8; 1897, September 28; Re Weber, 28 L.R.A. 637, note; Callanan v. Votruba, 104 Iowa, 672, 40 L.R.A. 376, 63 Am. St. Rep. 538, 74 N. W. 13; 23 Cyc. 836, 1124, 1155; Los Angeles v. Mellus, 59 Cal. 444; 1 Freeman,

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over Porto Rican courts—see note to Garrozi v. Pastas, 51 L. ed. U. S. 369.

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Judgm. p. 17, § 15, p. 485; Elwell v. Johnson, 74 N. Y. 80; Cambridge Valley Nat. Bank v. Lynch, 76 N. Y. 514; Rose v. Gibson, 71 Ala. 35; Kirchner v. Wood, 48 Mich. 199, 12 N. W. 44; Gage v. Eich, 56 Ill. 297; Hall v. Hudson, 20 Ala. 284; Garner v. Harmony Mills, 13 Jones & S. 148, 6 Abb. N. C. 212; Ferris v. Aspinwall, 10 Abb. Pr. N. S. 137; Campbell v. New York Cotton Exch. 15 Jones & S. 558; Olsen v. Newton, 3 Wash. 429, 30 Pac. 450; Morago v. Emeric, 4 Cal. 308; Cummings v. Heard, 2 Minn. 34, Gil. 25; Slagle v. Bodmer, 58 Ind. 465; Newell v. Gatling, 7 Ind. 147; Andrews v. Loveland, 1 Colo. 8; 8 Enc. Pl. & Pr. 24; Clay v. His Creditors, 9 Mart. (La.) 519; Fink v. Martin, 5 La. Ann. 103.

If the plaintiff fails on demurrer in the first action from the omission of essential allegations in his declaration, which are fully supplied in the second suit, the judgment in the first suit is no bar to the complaint, although the respective actions were instituted to enforce the same right, for the reason that the merits of the cause as disclosed in the second declaration were not heard and decided in the first action.

24 Am. & Eng. Enc. Law, 800; Gould v. Evansville & C. R. Co. 91 U. S. 526, 23 L. ed. 416; Leonard v. Vicksburg, S. & P. R. Co. 198 U. S. 418, 49 L. ed. 1109, 25 Sup. Ct. Rep. 750; Smith v. McNeal, 109 U. S. 426, 27 L. ed. 986, 3 Sup. Ct. Rep. 319; North Muskegon v. Clark, 10 C. C. A. 591, 22 U. S. App. 522, 62 Fed. 694; Reynolds v. Lincoln, 71 Cal. 183, 12 Pac. 449; Los Angeles v. Mellus, 59 Cal. 444.

The plea of prescription cannot be invoked in the matter of recognition of natural children who were born under the *regime* of law 11 of Toro. Natural children, under the legislation prior to the Civil Code, do not need to exercise the action of filiation, and to obtain, through it, a judicial recognition, previously or simultaneously to bringing their action for the purpose of enforcing the rights which they have as such natural children, provided that they have been recognized in accordance with the law 11 of Toro.

Decisions of Supreme Court of Spain: 1888, April 27; 1896, July 9; 1898, September 23; 1906, April 11; 1906, December 28; Curtis v. Whitney, 13 Wall. 68, 20 L. ed. 513.

The private document by which Salvador Calaf made the recognition of his son, Ramon, meets all the conditions.

Armsterdam v. Puente, 16 P. R. R. 527; Puente v. Puente, 16 P. R. R. 556; Gual v. Bonafoux, 15 P. R. R. 545; Cordova v. Folgueras y Rijos, 227 U. S. 375, 57 L. ed. 556, 33 Sup. Ct. Rep. 350.

The possession of the status of natural son cannot and should not be confounded with the recognition, express or tacit, referred to in law 11 of Toro.

Decision of Supreme Court of Spain: 1896, June 9.

Law 11 of Toro, within the ample scope of an express or tacit recognition, did admit an absolute inquiry of paternity, not permitted by the Civil Code, which restricts it only to the specific cases of § 135, to wit, undoubted written document of the father, or continuous possession of the status of natural son.

1 Scaevelo, Jurisprudence of the Civil Code, p. 350.

The possession of the status of natural son is characterized by the series of acts presenting a person in a direct and uninterrupted relation, as natural son, with respect to another.

Decisons of Supreme Court of Spain: 1895, June 28; 1896, May 21; 1896, November 7.

Mr. Paul Fuller argued the cause, and, with Mr. Frederic R. Coudert, filed a brief for appellee:

The foundation of the doctrine of *res judicata*, or estoppel by judgment, is that both parties have had their day in court.

2 Black, Judgm. §§ 500–504.

A right, question, or fact, distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies.

Southern P. R. Co. v. United States, 168 U. S. 1–48, 42 L. ed. 355–376, 18 Sup. Ct. Rep. 18; Johannessen v. United States, 225 U. S. 238, 56 L. ed. 1070, 32 Sup. Ct. Rep. 613.

Where a judgment between the same parties is pleaded in bar, the plea will be upheld if the object of both suits is the same.

Gonzalez v. Méndez, 15 P. R. R. 682.

Either the allegation of recognition raises an issue to be determined in the action, and requiring proof and judicial sanction to make it operative in creating the status of natural son (and in that event this action is identical in issue and in purpose with the earlier action), or the plaintiff's case rests upon a mere allegation of a fact, the effect of which has not been judicially determined, and is not to be judicially determined in this action (which plaintiff avers and the court holds is not an action of filiation). In that event he is not entitled to the relief which can only be based upon judicial establishment of the status, or its creation by authentic and public instrument.

Gual v. Bonafoux, 15 P. R. R. 545.

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by a suit in law or equity, effectually prosecuted, shall have been set up.

[For other cases, see Adverse Possession, I. k, 2, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — prescription.

4. The heirs of the original grantee in the Alameda land grant are not deprived of their property without due process of law, contrary to the Federal Constitution, by N. M. Comp. Laws 1865, chap. 73, § 1, Comp. Laws 1897, § 2937, under which ten years' possession by a disseisor of a strip of such grant lying between the Rio Grande and the foothills to the west, under a deed purporting to convey the land from the river westward to the ridge of Rio Puerco, gives title to the whole.

[For other cases, see Constitutional Law, 686-688, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — prescription.

5. The equal protection of the laws is not denied by confining to Spanish and Mexican grants the provision of N. M. Comp. Laws 1865, chap. 73, § 1, Comp. Laws 1897, § 2937, under which ten years' possession of land under a deed purporting to convey a fee simple gives title in fee to the quantity of land specified in the deed if, during the ten years, no claim by suit in law or equity, effectually prosecuted, shall have been set up.

[For other cases, see Constitutional Law, IV. a, 7, in Digest Sup. Ct. 1908.]

[No. 204.]

Argued January 27, 1914. Decided February 24, 1914.

APPEAL from the Supreme Court of the Territory of New Mexico to review a decree which affirmed in part and reversed in part a decree of the District Court for Bernalillo County, in that territory, in favor of interveners in a partition suit. Affirmed.

See same case below, 16 N. M. 349, 120 Pac. 676.

The facts are stated in the opinion.

Mr. Alonzo B. McMillen argued the cause and filed a brief for appellant:

The plaintiff and her cotenants having shown a perfect legal title, and possession of the grantee and his heirs down to the present time, certain presumptions prevail:

(1) Possession in accordance with the legal title is presumed.

Gonzales v. Ross, 120 U. S. 605, 629, 30 L. ed. 801, 809, 7 Sup. Ct. Rep. 705; Chesapeake Beach R. Co. v. Washington, P. & C. R. Co. 199 U. S. 247, 249, 50 L. ed. 175, 177, 26 Sup. Ct. Rep. 25.

(2) All presumptions are in favor of the legal holder, and the burden of overcoming them rests with him who assails the legal title.

Evans v. Welch, 29 Colo. 355, 68 Pac. 776; 1 Washb. Real Prop. p. 63.

(3) It is a presumption of law that possession of one cotenant is possession of all.

Union Consol. Silver Min. Co. v. Taylor, 100 U. S. 37, 40, 25 L. ed. 541, 542, 5 Mor. Min. Rep. 323; M'Clung v. Ross, 5 Wheat. 116, 124, 5 L. ed. 46, 49; Barr v. Gratz, 4 Wheat. 213, 222, 4 L. ed. 553, 555; Armijo v. Neher, 11 N. M. 645, 72 Pac. 12; Stevens v. Martin, 168 Mo. 407, 68 S. W. 347; Freeman, Cotenancy & Partition, §§ 166, 167, 222; 1 Washb. Real Prop. p. 689.

(4) If several persons have a mixed possession of land, and one of them has title to it, the seisin belongs to him only.

1 Washb. Real Prop. p. 63.

(5) It is a conclusive presumption of law that where two persons are in possession of land at the same time, under different titles, the law adjudges him to have the seisin of the estate who has the better right. Both cannot be seised, and therefore the seisin follows the title:

Barr v. Gratz, 4 Wheat. 213, 223, 4 L. ed. 553, 555; Brownsville v. Cavazos, 100 U. S. 138, 145, 25 L. ed. 574, 577.

(6) It is also a conclusive presumption of law that where the rightful owner is in the actual occupancy of a part of his tract he is in the constructive and legal possession and seisin of the whole, unless he is disseised by actual occupation and dispossession: and where the possession is mixed, the legal seisin is according to the legal title.

Deputron v. Young, 134 U. S. 241, 254, 33 L. ed. 923, 929, 10 Sup. Ct. Rep. 539; Ward v. Cochran, 150 U. S. 597, 605, 608, 37 L. ed. 1195, 1197, 1198, 14 Sup. Ct. Rep. 230; Hunnicutt v. Peyton, 102 U. S. 333, 367-369, 26 L. ed. 113, 120, 121; Bracken v. Union P. R. Co. 21 C. C. A. 387, 41 U. S. App. 491, 75 Fed. 347.

The decree of partition was a final judgment as to all adverse claimants, and nothing remained to be done except to carry out the provisions of the statute by a division of the land or its proceeds among the cotenants.

1 Freeman, Judgm. 4th ed. §§ 104-A, 304, 307; 30 Cyc. 253, ¶ 8; Keil v. West, 21 Fla. 508; Irvin v. Buckles, 148 Ind. 389, 47 N. E. 822; Janes v. Brown, 48 Iowa, 568; Traverso v. Row, 11 La. 498; Allen v. Hall, 50 Me. 253; Ham v. Ham, 39 Me. 216; Partridge v. Luce, 36 Me. 16; Slingluff v. Stanley, 66 Md. 220, 7 Atl. 261; Pfeltz v. Pfeltz, 1 Md. Ch. 455; Mt. Hope Iron Co. v. Dearden, 140 Mass. 430, 4 N. E. 803; Bughardt v. Van Deusen, 4 Allen, 374; Brown v. Bulkley, 11 Cush. 168; Foster v. Jones, — Miss. —, 17 So. 893; Hinds v. Stev-

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ena, 45 Mo. 209; Rockwell v. Decker, 5 N. Y. Civ. Proc. Rep. 62; Grimes v. Taft, 98 N. C. 193, 3 S. E. 674; Clemans's Appeal, 8 Sadler (Pa.) 321, 11 Atl. 559; Johnson v. Murray, 12 Lea, 109; Petrucio v. Seardon, 76 Tex. 639, 13 S. W. 560.

Where a statute requires payment of taxes as an element of adverse possession, it is necessary for the adverse claimant to show such payment of taxes during the full period necessary to establish adverse possession.

Beaver v. Taylor, 1 Wall. 637, 17 L. ed. 601; Warvelle, Ejectment, § 342; Wettig v. Bowman, 47 Ill. 17; Power v. Kitching, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737; Reynolds v. Willard, 80 Cal. 605, 22 Pac. 262; Irwin v. Miller, 23 Ill. 401; Cofield v. Furry, 19 Ill. 183; Snowden v. Rush, 76 Tex. 197, 13 S. W. 189; Hardin v. Gouveneur, 69 Ill. 140.

In order to constitute adverse possession it must be actual, open, visible, notorious, continuous, exclusive, hostile, and under claim of right.

Johnston v. Albuquerque, 12 N. M. 20, 72 Pac. 9; Gentile v. Kennedy, 8 N. M. 347, 45 Pac. 879; Probst v. Domestic Missions, 3 N. M. 373, 5 Pac. 702; Jenkins v. Maxwell Land Grant Co. 15 N. M. 281, 107 Pac. 730; Armstrong v. Morrill, 14 Wall. 120, 145, 20 L. ed. 765, 772; Hogan v. Kurtz, 94 U. S. 773, 24 L. ed. 317; Ward v. Cochran, 150 U. S. 597, 606, 37 L. ed. 1195, 1197, 14 Sup. Ct. Rep. 230; Clarke v. Courtney, 5 Pet. 319, 8 L. ed. 140; Hunnicutt v. Peyton, 102 U. S. 368, 26 L. ed. 120; Barr v. Gratz, 4 Wheat. 223, 4 L. ed. 555; Brownsville v. Cavazos, 100 U. S. 138, 145, 25 L. ed. 574, 577; Deputron v. Young, 134 U. S. 241, 254, 33 L. ed. 923, 929, 10 Sup. Ct. Rep. 539; Bracken v. Union P. R. Co. 21 C. C. A. 387, 36 U. S. App. 629, 75 Fed. 347.

The line of demarcation between statutes of limitation and statutes which attempt to adjudicate or transfer property is clear. Statutes of limitation do not attempt to transfer the right, but merely limit the remedy to a certain reasonable time; and a statute of limitation which does not give a reasonable time within which to bring an action is unconstitutional and void.

Sohn v. Waterson, 17 Wall. 596, 21 L. ed. 737; McClellan v. Kellogg, 17 Ill. 498; McConnel v. Street, 17 Ill. 253; Woodward v. Blanchard, 16 Ill. 424; Irving v. Brownell, 11 Ill. 402; Gittings v. Stearns, 19 Ill. 380; Groesbeck v. Seeley, 13 Mich. 342; Baker v. Kelley, 11 Minn. 480, Gil. 358; Smith v. Sherry, 54 Wis. 114, 11 N. W. 465; Farrar v. Clark, 85 Ind. 449; Dingey v. Paxton, 60 Miss. 1038; Cooley, Const. Lim. p. 449, note 3.

All limitation laws must proceed upon the theory that the party, by lapse of time and omission on his part, has forfeited his right to assert his title in the law.

Gittings v. Stearns, 19 Ill. 376; Sturges v. Crowninshield, 4 Wheat. 122–207, 4 L. ed. 529–551; Pearce v. Patton, 7 B. Mon. 162, 45 Am. Dec. 61; Griffin v. McKenzie, 7 Ga. 163, 50 Am. Dec. 389; Coleman v. Holmes, 44 Ala. 124, 4 Am. Rep. 121.

Mr. George S. Klock argued the cause, and, with Mr. Neill B. Field, filed a brief for appellees:

The decree of partition was interlocutory, and was not a final decree until after the district court confirmed the report of the commissioners and ordered the sale of the property.

30 Cyc. 252, subdiv. 6; Randles v. Randles, 63 Ind. 93; Aull v. Day, 133 Mo. 337, 34 S. W. 578; Warren v. Williams, 25 Mo. App. 22; Mingay v. Lackey, 142 N. Y. 449, 37 N. E. 471; Schweitzer's Estate, 4 Lanc. L. Rev. 369; Zittle's Estate, 4 Lanc. L. Rev. 163; 15 Enc. Pl. & Pr. 810; Hart v. Steedman, 98 Mo. 457, 11 S. W. 993; Holloway v. Holloway, 103 Mo. 284, 15 S. W. 536; 3 Bl. Com. 296; 1 Black, Judgm. §§ 17, 39; Green v. Fisk, 103 U. S. 518, 26 L. ed. 486; Green v. Fisk, 154 U. S. 668, and 26 L. ed. 486, 14 Sup. Ct. Rep. 1193; Elder v. McClaskey, 17 C. C. A. 251, 37 U. S. App. 1, 199, 70 Fed. 529; Gesell's Appeal, 84 Pa. 238; Beebe v. Griffing, 6 N. Y. 465; Templeman v. Steptoe, 1 Munf. 339; Young v. Skipwith, 2 Wash. (Va.) 300; Putman v. Lewis, 1 Fla. 507; Medford v. Harrell, 10 N. C. (3 Hawks) 41; Clester v. Gibson, 15 Ind. 10; Davis v. Davis, 36 Ind. 160; Kern v. Maginnis, 41 Ind. 398; Pipkin v. Allen, 29 Mo. 229; Durham v. Darby, 34 Mo. 447; Ivory v. Delore, 26 Mo. 505; Gates v. Salmon, 28 Cal. 320; Peck v. Vandenberg, 30 Cal. 11; Mills v. Miller, 2 Neb. 299; Murray v. Yates, 73 Mo. 13; Green v. Fiske, 103 U. S. 518, 26 L. ed. 486; 10 Rose's Notes (U. S.) 83; Williams v. Field, 60 Am. Dec. 434, note; Knapp, Partition, pp. 202, 203; Emeric v Alvarado, 64 Cal. 529, 2 Pac. 418; Booth Real Actions, 244; Dan. Ch. Pl. & Pr. 2254; Ham v. Ham, 39 Me. 218; Robinson v. Glancy, 69 Pa. 89; Clarke v. Baird, 98 Cal. 642, 33 Pac. 756; Tompkins v. Hyatt, 19 N. Y. 534; McKeown v. Officer, 127 N. Y. 687, 28 N. E. 401; 30 Cyc. 301, 302.

The interveners established title to the strips of land claimed by them, and the findings of fact warranted the decree in favor of such interveners.

Tyler, Ejectment & Adverse Enjoyment, pp. 88, 872, 873; Wright v. Mattison, 18 How. 50, 15 L. ed. 280; 5 Rose's Notes (U. S.) 526–528; Lea v. Polk County Cop-

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per Co. 21 How. 493, 16 L. ed. 203; Walls v. Smith, 19 Ga. 8; Dickenson v. Breeden, 30 Ill. 279; Hanna v. Renfro, 32 Miss. 125; Jackson ex dem. Bradstreet v. Huntington, 5 Pet. 402, 8 L. ed. 170; Ewing v. Burnett, 11 Pet. 51, 52, 9 L. ed. 628, 629; 3 Rose's Notes (U. S.) 637–643; Strother v. Lucas, 12 Pet. 437, 9 L. ed. 1147.

Where one is in actual possession of a portion of the tract under color of title, his possession will be presumed to extend, by construction, to the limits of the land described in his deed.

Ellicott v. Pearl, 10 Pet. 413, 9 L. ed. 476; 3 Rose's Notes (U. S.) 592–594.

The presumption of amicable relation between tenants in common is merely a rule of evidence, liable to be overcome by the circumstances of any particular case involving the question whether in fact the possession was adverse; and it is not a rule of law denying the application of the statute of limitations to persons sustaining the relation of tenants in common.

1 Enc. Ev. pp. 685, 686.

In the acquisition of title by adverse possession, the distinction between strangers and tenants in common relates to the character of the evidence necessary to prove that the possession was adverse.

Foulke v. Bond, 41 N. J. L. 527.

The acts of an occupant may create such notorious evidence of his adverse claim as to render it unnecessary to show either positive notice to a cotenant, or facts showing actual knowledge on his part.

Elder v. McClaskey, 17 C. C. A. 251, 37 U. S. App. 1, 199, 70 Fed. 529; Packard v. Johnson, 57 Cal. 180; Dugan v. Follett, 100 Ill. 581; Sullivan v. Holmes, 8 Cush. 252.

The exclusive possession and in severalty by coparceners, of the various parts of the common land, acquiesced in for a great number of years, will authorize an inference of parol partition, unless other circumstances rebut such presumption.

1 Enc. Ev. 690; Berry v. Seawall, 13 C. C. A. 101, 31 U. S. App. 30, 65 Fed. 742; Allen v. Seawell, 17 C. C. A. 217, 37 U. S. App. 436, 70 Fed. 561.

The area of interveners' possession was coextensive with the land as described in their several deeds and assurances.

Campbell v. Bates, 143 Ala. 338, 39 So. 144; Connerly v. Dickinson, 81 Ark. 258, 99 S. W. 82; Rucker v. Dixon, 78 Ark. 99, 93 S. W. 750; George v. Cole, 109 La. 816, 33 So. 784; Santee River Cypress Lumber Co. v. James, 50 Fed. 360; Peden v. Crenshaw, — Tex. Civ. App. —, 81 S. W. 369; Roberson v. Downing Co. 120 Ga. 833, 102 Am. St. Rep. 128, 48 S. E. 429, 1 Ann. Cas. 757; O'Brien v. Fletcher, 123 Ga. 427, 51 S. E. 405; Van Gunden v. Virginia Coal & I. Co. 3 C. C. A. 294, 8 U. S. App. 229, 52 Fed. 838; Brackett v. Persons Unknown, 53 Me. 228, 87 Am. Dec. 548; Green v. Irving, 54 Miss. 450, 28 Am. Rep. 360; Little v. Downing, 37 N. H. 355; Black v. Tennessee Coal, Iron & R. Co. 93 Ala. 109, 9 So. 537; Watters v. Connelly, 59 Iowa, 217, 13 N. W. 82; Taliaferro v. Butler, 77 Tex. 578, 14 S. W. 191; Hodges v. Ross, 6 Tex. Civ. App. 437, 25 S. W. 975; Brown v. O'Brien, 11 Tex. Civ. App. 459, 33 S. W. 267; Swift v. Gage, 26 Vt. 224.

An unregistered deed is sufficient to constitute the bar of the statute of limitations.

Lea v. Polk County Copper Co. 21 How. 493, 16 L. ed. 203; Packard v. Moss, 68 Cal. 128, 8 Pac. 818; Den ex dem. Chastien v. Philips, 33 N. C. (11 Ired. L.) 255; Doe ex dem. Hardin v. Barrett, 51 N. C. (6 Jones, L.) 159; Doe ex dem. Kron v. Hinson, 53 N. C. (8 Jones, L.) 347; Rawson v. Fox, 65 Ill. 200; Bellows v. Jewell, 60 N. H. 420; Minot v. Brooks, 16 N. H. 374; Dickenson v. Breeden, 30 Ill. 279.

Registration or record of a deed is not essential to give color of title in cases where constructive possession of the whole of a tract of land is claimed by reason of actual possession of part thereof.

Dorlan v. Westervitch, 140 Ala. 283, 103 Am. St. Rep. 35, 37 So. 382; Packard v. Moss, 68 Cal. 123, 8 Pac. 818; Dickenson v. Breeden, 30 Ill. 279; Rawson v. Fox, 65 Ill. 200; Hanna v. Renfro, 32 Miss. 125; Plaster v. Grabeel, 160 Mo. 669, 61 S. W. 589; Minot v. Brooks, 16 N. H. 374; Lea v. Polk County Copper Co. 21 How. 493, 16 L. ed. 203; Jaques v. Lester, 118 Ill. 246, 8 N. E. 795.

A state may classify the objects of legislation, so long as its attempt at classification is not merely arbitrary and unreasonable.

Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; Cooley, Const. Lim. 7th ed. pp. 14–18; San Mateo County v. Southern P. R. Co. 8 Sawy. 238, 13 Fed. 722; Wood, Limitations, 3d ed. § 254, p. 567.

A statute of limitations cannot be said to impair the obligation of the contract, or to deprive one of property without due process of law, unless in its application to an existing line of action it unreasonably limits the opportunity to enforce that right by suit.

Wheeler v. Jackson, 137 U. S. 245, 34 L. ed. 659, 11 Sup. Ct. Rep. 76; Probst v. Domestic Missions, 129 U. S. 182, 32 L. ed. 655, 9 Sup. Ct. Rep. 263; 2 Tucker, Const. § 390; Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. Rep. 209; Leffingwell v. Warren, 2 Black, 599, 17 L. ed. 261;

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Croxall v. Shererd, 5 Wall. 268, 18 L. ed. 572; Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618; Bicknell v. Comstock, 113 U. S. 149, 28 L. ed. 962, 5 Sup. Ct. Rep. 399.

No rule as to the length of time which will be deemed reasonable can be laid down for the government of all cases alike. Different circumstances will often require a different rule. What would be reasonable in one class of cases would be entirely unreasonable in another.

McGahey v. Virginia, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972.

Title to land acquired by adverse possession has always been held of such validity that the repeal of the statute has been conceded and decided to amount to the taking of property from the person who acquired title to his land, in contravention of article 5 of the Amendments to the Constitution of the United States.

Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. Rep. 209; Baker v. Oakwood, 123 N. Y. 16, 10 L.R.A. 387, 25 N. E. 312; Orman v. Van Arsdell, 12 N. M. 349, 67 L.R.A. 438, 78 Pac. 48.

A person who enters into possession of lands under a conveyance, although the person so conveying has not title thereto, is presumed to enter according to the description of the deed; and his occupancy of a part, claiming the whole, is construed as a possession of the entire tract.

Coleman v. Billings, 89 Ill. 183; Fisher v. Bennehoff, 121 Ill. 426, 13 N. E. 150; Kruse v. Wilson, 79 Ill. 233; Hamilton v. Boggess, 63 Mo. 233; Mason v. Ayers, 73 Ill. 121.

Legislative power can be exerted rightfully in creating a right by limitation. It is not confined exclusively to barring the remedy.

United States v. Chandler-Dunbar Water Power Co. 209 U. S. 452, 52 L. ed. 887, 28 Sup. Ct. Rep. 579; Leffingwell v. Warren, 2 Black, 599, 605, 17 L. ed. 261, 263; Sharon v. Tucker, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 720; Davis v. Mills, 194 U. S. 451, 457, 48 L. ed. 1067, 1072, 24 Sup. Ct. Rep. 692.

[376] Mr. Justice Holmes delivered the opinion of the court:

This action was begun on June 12, 1906, for the partition, among the remote heirs of Juan Gonzales, of the Alameda land grant, a Spanish grant of land in New Mexico, confirmed as perfect by the court of private land claims of the United States. On June 17, 1907, a judgment of partition was entered, declaring the persons named to be entitled to stated fractional undivided interests, and appointing commissioners to divide the land, or to report to the court if it could not be divided without prejudice to the owners. On July 3, 1907, the commissioners reported that partition could not be made, and before further action of the court, on July 20, 1907, the appellees asked leave to intervene in order to assert adverse interests. The application was allowed on November 20, 1907, and the questions now before this court arise between these interveners and heirs of Gonzales. By way of parenthesis we will dispose of a preliminary objection at this point. It was argued that the decree of partition was a final decree and that the intervention came too late; but apart from the often-stated disposition of this court to leave decisions upon matters of local procedure undisturbed (Tiaco v. Forbes, 228 U. S. 549, 558, 57 L. ed. 960, 965, 33 Sup. Ct. Rep. 585), the right to intervene was given by statute "during the pendency of such suit," and the decision that the suit still was pending was right. N. M. Comp. Laws, 1897, § 3182, Acts of 1907, chap. 107, subsec. 269. See further Clark v. Roller, 199 U. S. 541, 546, 50 L. ed. 300, 302, 26 Sup. Ct. Rep. 141.

The main questions concern the merits of the case. The greater part of the Alameda grant, it is found, has been occupied in strips, from beyond the memory of men now living. The interveners claim such strips, most of them but a few yards wide, but extending, as they say, from the Rio Grande westward to the Ceja or ridge of Rio Puerco,—a distance of some 16 miles. They have [377] no documentary evidence of a title derived from Juan Gonzales, but they and their predecessors in title have occupied the bottom lands between the Rio Grande and the foothills to the west for more than ten years under deeds purporting to convey a fee simple in the respective strips to the ridge of Rio Puerco. The eastern part has been fenced, cultivated, and built upon; but from the foothills to the Ceja of Rio Puerco the land is unfenced, and by a general custom has been used mainly for the grazing of cattle by the interveners and others claiming ownership in the grant. The title to this last-mentioned land alone is in question now, and it will be seen that if the interveners have the title they claim, it must have been gained by the lapse of time during which they have held what they have held under the above-mentioned deeds. The judgment was in their favor in the courts below. 16 N. M. 349, 120 Pac. 676.

The title of the interveners does not depend upon the ordinary statute of limitations, and some considerations that might be relevant under that statute are not relevant here. The title rests upon a peculiar statute that has been in force un-

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changed in any particular affecting this case, it is said, since 1858. Comp. Laws. 1865, chap. 73, § 1, Comp. Laws 1897, § 2937. By this act, possession for ten years, under a deed purporting to convey a fee simple, of any lands which have been granted by Spain, Mexico, or the United States, gives a title in fee to the quantity of land specified in the deed, if, during the ten years, no claim by suit in law or equity, effectually prosecuted, shall have been set up. We stat the statute according to its construction by the court below, with which, again, we should be slow to interfere (Gray v. Taylor, 227 U. S. 51, 57, 57 L. ed. 413, 416, 33 Sup. Ct. Rep. 199), and which also seems plainly right. The interveners, therefore, brought precisely within the words of the act, and we think it unnecessary to spend time on the suggestion that the appellants equally are within it, and [378] therefore, on the principle of cases such as Hunnicutt v. Peyton, 102 U. S. 333, 26 L. ed. 113, are entitled to prevail on the strength of their older title so far as they were not actually excluded from the land. The purpose of the act is to ripen disseisin into title according to the deed under which the disseisor holds, and it is especially directed against ancient claims such as the appellants set up.

It only remains to consider whether there is anything in the Constitution of the United States to prevent the statute from doing its work. We limit our inquiry to its operation in the present case, and do not speculate as to whether other cases could be put in which the letter of some parts of the law could not be sustained. As applied to the interveners, the statute simply enacts that possession for ten years of the front and cultivable portion of a strip under a deed carrying the whole of it back to the ridge of the Puerco shall give title to the whole. We can see no taking of property without due process of law in this. A statute of limitation may give title. Toltec Ranch Co. v. Cook, 191 U. S. 532, 48 L. ed. 291, 24 Sup. Ct. Rep. 166; Davis v. Mills, 194 U. S. 451, 456, 457, 48 L. ed. 1067, 1071, 1072, 24 Sup. Ct. Rep. 692; United States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 579. The disseisee has notice of the law and of the fact that he is dispossessed, and that a deed to the disseisor may purport to convey more than is fenced in. If he chooses to wait ten years without bringing suit, he is not in a position to complain of the consequences,—at least, not when, as in the present case, the deeds do not purport to convey more than a reasonable man probably would have anticipated. See Soper v. Lawrence Bros. Co. 201 U. S. 359, 367, 368, 50 L. ed. 788, 790, 791, 26 Sup. Ct. Rep. 473. For we should conjecture, if it were material, that in this case the deeds under which the interveners held were in a form that was usual and expected in that place.

The statute does not deny the equal protection of the laws, even if it should be confined to Spanish and Mexican grants. For there very well may have been grounds for [379] the discrimination in the history of those grants and the greater probability of an attempt to revive stale claims, as is explained by the supreme court of New Mexico. There is no other matter that we think proper for reconsideration here.

Judgment affirmed.

MITCHELL STORE BUILDING COMPANY, Appt.,

v.

R. DE V. CARROLL, Trustee in Bankruptcy of the Herman Keck Manufacturing Company, Bankrupt.

(See S. C. Reporter's ed. 379–382.)

Appeal — from circuit court of appeals — final decree — bankruptcy case.

1. A decree of a Federal circuit court of appeals, which affirmed an order of a court of bankruptcy, granting a temporary injunction against the prosecution in a state court of a suit affecting the bankrupt estate, is interlocutory, and is therefore not reviewable under the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 24a, providing for appeals in controversies arising in bankruptcy proceedings as in other cases, although the case is not one of the class which the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), § 6, makes final in the circuit courts of appeals.

[For other cases, see Appeal and Error, I. d, 19, in Digest Sup. Ct. 1908.]

Appeal — from circuit court of appeals — bankruptcy case.

2. An appeal will not lie to the Federal Supreme Court from a decision of a circuit court of appeals, made in the exercise of its jurisdiction under the bankrupt act of July 1, 1898, § 24b, upon a petition to revise the proceedings of the bankruptcy courts.

[For other cases, see Appeal and Error, III. d, 2, e, in Digest Sup. Ct. 1908.]

[No. 212.]

Note.—On appellate jurisdiction of the Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

On the appellate jurisdiction of the Federal Supreme Court in bankruptcy cases—see note to James v. Stone & Co. 57 L. ed. U. S. 573.

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Argued January 28, 1914. Decided February 24, 1914.

APPEAL from the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which affirmed a decree of the District Court for the Southern District of Ohio, enjoining the prosecution in a state court of a suit affecting a bankrupt estate. Dismissed for want of jurisdiction. Also a

PETITION for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review the same decree. Denied.

See same case below, 113 C. C. A. 484, 193 Fed. 616.

The facts are stated in the opinion.

Messrs. P. Lincoln Mitchell and Walter A. DeCamp argued the cause and filed a brief for appellant.

Mr. Joseph S. Graydon argued the cause, and, with Messrs. Joseph L. Lackner and Lawrence Maxwell, filed a brief for appellee.

Mr. Justice Day delivered the memorandum opinion of the court:

An involuntary petition in bankruptcy was filed against the Keck Manufacturing Company on February 8, 1909, in the district court of the United States for the southern district of Ohio, and it was later adjudicated a bankrupt. Upon application a receiver was appointed for the Duhme Jewelry Company, an adjunct of the Keck Manufacturing Company, all of the stock of the former being owned by the latter company, and subsequently the receiver, in pursuance of an order of the court, transferred all the property and assets of the Duhme Jewelry Company to the trustee of the bankrupt, by him to be kept under separate account.

The Mitchell Store Building Company had leased certain premises to the Duhme Jewelry Company, which on June 30, 1910, the rent being paid to that time, the latter company vacated, although the lease had not yet expired. The Mitchell Store Building Company brought suit against the Duhme Jewelry Company in the common pleas court of Hamilton county, Ohio, to recover under the lease, also applying to the district court for an order on the trustee to withhold sufficient in amount of the assets of the Duhme Jewelry Company to satisfy its claim, which was eventually refused by the referee, and is now before the district judge upon petition for review.

Upon the petition of the trustee, the Mitchell Store Building Company was made a party to the bankruptcy proceeding, in the district court, and later the trustee [381] sought to restrain that company from prosecuting its suit in the state court. The district judge granted a temporary injunction, and upon appeal the circuit court of appeals affirmed the order of the district court. There was also a petition to review the order of the district court, granting the temporary injunction, but that was not passed upon by the circuit court of appeals. The case was then brought to this court by appeal, the petition for appeal stating that "this cause is one in which the United States circuit court of appeals for the sixth circuit has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal."

The jurisdiction of the appellate courts of the United States, including this court, under the bankruptcy act, is regulated by §§ 24 and 25 of that act. Under the latter section appeals may be taken in certain cases from the district court to the circuit court of appeals, and, under certain limitations, appeals may be allowed from the latter court to this court, from final decisions of the circuit court of appeals allowing or rejecting claims. This case does not come within § 25. Section 24a provides for appeals in controversies arising in bankruptcy proceedings, and controls the present case. In such cases the appeal takes the course prescribed in the circuit court of appeals act (26 Stat. at L. 826, 828, chap. 517, U. S. Comp. Stat. 1901, pp. 488, 549). See Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008.

It is undertaken to sue out the appeal in this case from the circuit court of appeals under § 6 of the circuit court of appeals act, as the petition for allowance of appeal shows; while the appeal to the circuit court of appeals was under § 7 of that act, as amended (31 Stat. at. L. 660, chap. 803, U. S. Comp. Stat. 1901, p. 551), providing for an appeal from an interlocutory order of a district or circuit court, granting an injunction, to the circuit court of appeals [382] in a cause in which an appeal from a final decree might have been taken under the act. No provision is made in this section, or in any other, for a further appeal concerning such interlocutory orders, to this court.

Section 6 regulates appeals from the circuit court of appeals to this court, providing that cases not made final by that section shall be entitled to review in this court. While this case, taken to the circuit court of appeals under § 7, is not one of the class made final in that court by § 6,

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it is well settled that this court's jurisdiction under § 6 relates solely to final orders of the district court reviewed by the circuit court of appeals. The decree in the district court being an interlocutory order granting a temporary injunction, and the circuit court of appeals simply affirming that order, it is not a proper case for appeal to this court. Kirwan v. Murphy, 170 U. S. 205, 42 L. ed. 1009, 18 Sup. Ct. Rep. 592.

If this case were treated as an appeal from the judgment of the circuit court of appeals upon a petition to revise under § 24b of the bankruptcy act, this court would not entertain the appeal. Holden v. Stratton, 191 U. S. 115, 48 L. ed. 116, 24 Sup. Ct. Rep. 45.

It follows that the appeal must be dismissed. The petition for a writ of certiorari, filed in this cause, is denied.

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[383] FREMONT WEEKS, Plff. in Err., v. UNITED STATES.

(See S. C. Reporter's ed. 383–399.)

Searches and seizures — use of evidence wrongfully obtained.

1. The immunity from unreasonable searches and seizures afforded by U. S. Const., 4th Amend., has been denied the accused in a criminal prosecution in a Federal district court where that court has refused the accused's seasonable application for the return of his letters and private documents seized in his house in his absence, by a United States marshal holding no warrant for his arrest and none for the search of his premises, and has permitted their use in evidence at the trial.

[For other cases, see Searches and Seizures; Evidence VIII., in Digest Sup. Ct. 1908.]

Searches and seizures — protection against misconduct of police officers.

2. Protection against individual misconduct of municipal police officers not acting under any claim of Federal authority is not afforded by the guaranty of U. S. Const., 4th Amend., of immunity from unreasonable searches and seizures, but the limitations of such Amendment reach only the Federal Government and its agents.

[For other cases, see Searches and Seizures; Constitutional Law, II. b, in Digest Sup. Ct. 1908.]

[No. 461.]

Argued and submitted December 2 and 3, 1913. Decided February 24, 1914.

Note.—As to unreasonable searches and seizures—see note to Levy v. Superior Ct. 29 L.R.A. 818.

As to admissibility in evidence against accused of documents or other things taken from him—see note to State v. Edwards, 59 L.R.A. 465.

IN ERROR to the District Court of the United States for the Western District of Missouri to review a conviction for the unlawful use of the mails. Reversed and remanded for a new trial.

The facts are stated in the opinion.

Mr. Martin J. O'Donnell argued the cause and filed a brief for plaintiff in error:

The constitutional questions herein involved have never been decided by this court adversely to defendant's contention.

Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; American Tobacco Co. v. Werckmeister, 207 U. S. 284, 302, 52 L. ed. 208, 219, 28 Sup. Ct. Rep. 72, 12 Ann. Cas. 595; Ensign v. Pennsylvania, 227 U. S. 592, 57 L. ed. 658, 33 Sup. Ct. Rep. 321; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370.

The decision of the district court denying defendant's petition to return his property and private papers after it had taken jurisdiction of the subject-matter set forth in the petition, and found that such private papers had come into the possession of the government as a result of its own unlawful acts, in violation of its own Constitution, is reversible error.

Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; United States v. Mounday, 208 Fed. 186; United States v. McHie, 196 Fed. 586, 194 Fed. 894; United States v. Wilson, 163 Fed. 338; United States v. Mills, 185 Fed. 318; Wise v. Mills, 220 U. S. 549, 55 L. ed. 579, 31 Sup. Ct. Rep. 597; Wise v. Henkel, 220 U. S. 556, 55 L. ed. 581, 31 Sup. Ct. Rep. 599.

The reception in evidence of the property and papers seized by officers of the government, after the court had inquired into and found that they had been so seized, was reversible error.

3 Bl. Com. p. 256; 4 Bl. Com. pp. 180, 223; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Broom, Legal Maxims, 7th ed. 227; Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Ex parte Jackson, 96 U. S. 727, 24 L. ed. 877; Gindrat v. People, 138 Ill. 103, 27 N. E. 1085; 1 Greenl. Ev. § 245a; Marshall v. Riley, 7 Ga. 367; 3 Bl. Com. p. 256, note 1; Rusher v. State, 94 Ga. 366, 47 Am. St. Rep. 175, 21 S. E. 594; Shields v. State, 104 Ala. 35, 53 Am. St. Rep. 17, 16 So. 85, 9 Am. Crim. Rep. 149; State v. Flynn, 36 N. H. 64; Thornton v. State, 117 Wis. 338, 98 Am. St. Rep. 924, 93 N. W. 1107; Underwood v. State, 13 Ga. App. 206, 78 S. E. 1103; United States v. Wong Quong Wong,

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94 Fed. 832; 4 Wigmore, Ev. §§ 2251, 2270; 2 Wharton, Crim. Ev. 10th ed. § 516f, p. 1076.

The common-law rules of evidence embodied in the Constitution have, by being so embodied, been clothed with the dignity of a fundamental law; and the application of the same under the Constitution is not limited by the rules of the common law.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Black, Const. & Interpretation of Laws, p. 22; Bram v. United States, 168 U. S. 532, 542, 42 L. ed. 568, 573, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547; Brown v. Walker, 161 U. S. 596, 597, 40 L. ed. 820, 821, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Emery's Case, 107 Mass. 172, 9 Am. Rep. 22; Entick v. Carrington, 19 How. St. Tr. 1029; People ex rel. Hackley v. Kelly, 24 N. Y. 74; Sohm, Institutes of Roman Law, 2d ed. p. 30; Thayer, Ev. 263, 276.

Solicitor General Davis and Assistant Attorney General Denison submitted the cause for defendant in error:

The question is no longer open.

Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; American Tobacco Co. v. Werckmeister, 207 U. S. 284, 302, 52 L. ed. 208, 218, 28 Sup. Ct. Rep. 72, 12 Ann. Cas. 595; Holt v. United States, 218 U. S. 245, 252, 54 L. ed. 1021, 1030, 31 Sup. Ct. Rep. 20, 20 Ann. Cas. 1138; United States v. Wilson, 163 Fed. 338; Hardesty v. United States, 91 C. C. A. 1, 164 Fed. 420.

Mr. Justice Day delivered the opinion of the court:

An indictment was returned against the plaintiff in error, defendant below, and herein so designated, in the district court of the United States for the western district of Missouri, containing nine counts. The seventh count, upon which a conviction was had, charged the use of the mails for the purpose of transporting certain coupons or tickets representing chances or shares in a lottery or gift enterprise, in violation of § 213 of the Criminal Code [35 Stat. at L. 1129, chap. 321, U. S. Comp. Stat. Supp. 1911, p. 1652]. Sentence of fine and imprisonment was imposed. This writ of error is to review that judgment.

The defendant was arrested by a police officer, so far as the record shows, without warrant, at the Union Station in Kansas City, Missouri, where he was employed by an express company. Other police officers had gone to the house of the defendant, and being told by a neighbor where the key was kept, found it and entered the house. They searched the defendant's room and took possession of various papers and articles found there, which were afterwards turned over to the United States marshal. Later in the same day police officers returned with the marshal, who thought he might find additional evidence, and, being admitted by someone in the house, probably a boarder, in response to a rap, the marshal searched the defendant's room and carried away certain letters and envelops found in the drawer of a chiffonier. Neither the marshal nor the police officers had a search warrant.

[387] The defendant filed in the cause before the time for trial the following petition:

Petition to Return Private Papers, Books, and Other Property.

Now comes defendant and states that he is a citizen and resident of Kansas City, Missouri, and that he resides, owns, and occupies a home at 1834 Penn street in said city;

That on the 21st day of December, 1911, while plaintiff was absent at his daily vocation, certain officers of the government whose names are to plaintiff unknown, unlawfully and without warrant or authority so to do, broke open the door to plaintiff's said home and seized all of his books, letters, money, papers, notes, evidences of indebtedness, stock, certificates, insurance policies, deeds, abstracts, and other muniments of title, bonds, candies, clothes, and other property in said home, and this in violation of §§ 11 and 23 of the Constitution of Missouri, and of the 4th and 5th Amendments to the Constitution of the United States;

That the district attorney, marshal, and clerk of the United States court for the western district of Missouri took the above-described property so seized into their possession, and have failed and refused to return to defendant portion of same, to wit:

One (1) leather grip, value about $7; one (1) tin box valued at $3; one (1) Pettis county, Missouri, bond, value $500; three (3) mining stock certificates which defendant is unable to more particularly describe, valued at $12,000; and certain stock certificates in addition thereto, issued by the San Domingo Mining, Loan, & Investment Company; about $75 in currency; one (1) newspaper published about 1790, an heirloom; and certain other property which plaintiff is now unable to describe.

That said property is being unlawfully and improperly [388] held by said district

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attorney, marshal, and clerk, in violation of defendant's rights under the Constitution of the United States and the state of Missouri.

That said district attorney purposes to use said books, letters, papers, certificates of stock, etc., at the trial of the above-entitled cause, and that by reason thereof and of the facts above set forth defendant's rights under the amendments aforesaid to the Constitution of Missouri and the United States have been and will be violated unless the court order the return prayed for;

Wherefore, defendant prays that said district attorney, marshal, and clerk be notified, and that the court direct and order said district attorney, marshal, and clerk, to return said property to said defendant.

Upon consideration of the petition the court entered in the cause an order directing the return of such property as was not pertinent to the charge against the defendant, but denied the petition as to pertinent matter, reserving the right to pass upon the pertinency at a later time. In obedience to the order the district attorney returned part of the property taken, and retained the remainder, concluding a list of the latter with the statement that, "all of which last above described property is to be used in evidence in the trial of the above-entitled cause, and pertains to the alleged sale of lottery tickets of the company above named."

After the jury had been sworn and before any evidence had been given, the defendant again urged his petition for the return of his property, which was denied by the court. Upon the introduction of such papers during the trial, the defendant objected on the ground that the papers had been obtained without a search warrant, and by breaking open his home, in violation of the 4th and 5th Amendments to the Constitution of the United States, which objection was overruled by the court. Among the papers retained and put in evidence were a number of [389] lottery tickets and statements with reference to the lottery, taken at the first visit of the police to the defendant's room, and a number of letters written to the defendant in respect to the lottery, taken by the marshal upon his search of defendant's room.

The defendant assigns error, among other things, in the court's refusal to grant his petition for the return of his property, and in permitting the papers to be used at the trial.

It is thus apparent that the question presented involves the determination of the duty of the court with reference to the motion made by the defendant for the return of certain letters, as well as other papers, taken from his room by the United States marshal, who, without authority of process, if any such could have been legally issued, visited the room of the defendant for the declared purpose of obtaining additional testimony to support the charge against the accused, and, having gained admission to the house, took from the drawer of a chiffonier there found certain letters written to the defendant, tending to show his guilt. These letters were placed in the control of the district attorney, and were subsequently produced by him and offered in evidence against the accused at the trial. The defendant contends that such appropriation of his private correspondence was in violation of rights secured to him by the 4th and 5th Amendments to the Constitution of the United States. We shall deal with the 4th Amendment, which provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The history of this Amendment is given with particularity in the opinion of Mr. Justice Bradley, speaking for [390] the court in Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524. As was there shown, it took its origin in the determination of the framers of the Amendments to the Federal Constitution to provide for that instrument a Bill of Rights, securing to the American people, among other things, those safeguards which had grown up in England to protect the people from unreasonable searches and seizures, such as were permitted under the general warrants issued under authority of the government, by which there had been invasions of the home and privacy of the citizens, and the seizure of their private papers in support of charges, real or imaginary, made against them. Such practices had also received sanction under warrants and seizures under the so-called writs of assistance, issued in the American colonies. See 2 Watson, Const. 1414 *et seq.* Resistance to these practices had established the principle which was enacted into the fundamental law in the 4th Amendment, that a man's house was his castle, and not to be invaded by any general authority to search and seize his goods and papers. Judge Cooley, in his Constitutional Limitations, pp. 425, 426, in treating of this feature of our Constitution said: "The maxim that 'every man's house is his castle' is made a part

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of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen." "Accordingly," says Lieber in his work on Civil Liberty and Self-Government, 62, in speaking of the English law in this respect, "no man's house can be forcibly opened, or he or his goods be carried away after it has thus been forced, except in cases of felony; and then the sheriff must be furnished with a warrant, and take great care lest he commit a trespass. This principle is jealously insisted upon." In Ex parte Jackson, 96 U. S. 727, 733, 24 L. ed. 877, 879, this court recognized the principle of protection as applicable to letters and sealed packages in the mail, and held that, consistently [391] with this guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures, such matter could only be opened and examined upon warrants issued on oath or affirmation, particularly describing the thing to be seized, "as is required when papers are subjected to search in one's own household."

In the Boyd Case, supra, after citing Lord Camden's judgment in Entick v. Carrington, 19 How. St. Tr. 1029, Mr. Justice Bradley said (630):

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."

In Bram v. United States, 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547, this court, in speaking by the present Chief Justice of Boyd's Case, dealing with the 4th and 5th Amendments, said (544):

"It was in that case demonstrated that both of these Amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change."

The effect of the 4th Amendment is to put the courts [392] of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

What, then, is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the government, always recognized under English and American law, to search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. 1 Bishop. Crim. Proc. § 211; Wharton, Crim. Pl. & Pr. 8th ed. § 60; Dillon v. O'Brien, 16 Cox, C. C. 245, Ir. L. R. 20 C. L. 300, 7 Am. Crim. Rep. 66. Nor is it the case of testimony offered at a trial where the court is asked to stop and consider the illegal means by which proofs, otherwise competent, were obtained,—of which we shall have occasion to treat later in this opinion. Nor is it the case of burglar's tools or other proofs of guilt found upon his arrest within the control of the accused.

[393] The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises. The accused, without awaiting his trial, made timely application to the court for an order for the return of these letters, as well or other property. This application was denied, the

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letters retained and put in evidence, after a further application at the beginning of the trial, both applications asserting the rights of the accused under the 4th and 5th Amendments to the Constitution. If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information, and describing with reasonable particularity the thing for which the search was to be made. Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. Under such circumstances, without sworn information and particular description, not even an order of court would [394] have justified such procedure; much less was it within the authority of the United States marshal to thus invade the house and privacy of the accused. In Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372, this court said that the 4th Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law, acting under legislative or judicial sanction. This protection is equally extended to the action of the government and officers of the law acting under it. Boyd Case, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524. To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

The court before which the application was made in this case recognized the illegal character of the seizure, and ordered the return of property not in its judgment competent to be offered at the trial, but refused the application of the accused to turn over the letters, which were afterwards put in evidence on behalf of the government. While there is no opinion in the case, the court in this proceeding doubtless relied upon what is now contended by the government to be the correct rule of law under such circumstances, that the letters having come into the control of the court, it would not inquire into the manner in which they were obtained, but, if competent, would keep them and permit their use in evidence. Such proposition, the government asserts, is conclusively established by certain decisions of this court, the first of which is Adams v. New York, supra. In that case the plaintiff in error had been convicted in the supreme court of the state of New York for having in his possession certain gambling paraphernalia used in the game known as policy, in violation of the Penal Code of New York. At the trial certain papers, which had been seized by police officers executing a search warrant for the discovery and [395] seizure of policy slips, and which had been found in addition to the policy slips, were offered in evidence over his objection. The conviction was affirmed by the court of appeals of New York (176 N. Y. 351, 63 L.R.A. 406, 98 Am. St. Rep. 675, 68 N. E. 636), and the case was brought here for alleged violation of the 4th and 5th Amendments to the Constitution of the United States. Pretermitting the question whether these Amendments applied to the action of the states, this court proceeded to examine the alleged violations of the 4th and 5th Amendments, and put its decision upon the ground that the papers found in the execution of the search warrant, which warrant had a legal purpose in the attempt to find gambling paraphernalia, were competent evidence against the accused, and their offer in testimony did not violate his constitutional privilege against unlawful search or seizure, for is was held that such incriminatory documents thus discovered were not the subject of an unreasonable search and seizure, and in effect that the same were incidentally seized in the lawful execution of a warrant, and not in the wrongful invasion of the home of a citizen, and the unwarranted seizure of his papers and property. It was further held, approving in that respect the doctrine laid down in 1 Greenleaf, Ev. § 254a, that it was no valid objection to the use of the papers that they had been thus seized, and that the courts in the course of a trial would not make an issue to determine that question, and many state cases were cited supporting that doctrine.

The same point had been ruled in People v. Adams, 176 N. Y. 351, 63 L.R.A. 406, 98 Am. St. Rep. 675, 68 N. E. 636, from which decision the case was brought to this

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court, where it was held that if the papers seized in addition to the policy slips were competent evidence in the case, as the court held they were, they were admissible in evidence at the trial, the court saying (p. 358): "The underlying principle obviously is that the court, when engaged in trying a criminal cause, will not take notice of [396] the manner in which witnesses have possessed themselves of papers, or other articles of personal property, which are material and properly offered in evidence." This doctrine thus laid down by the New York court of appeals and approved by this court, that a court will not, in trying a criminal cause, permit a collateral issue to be raised as to the source of competent testimony, has the sanction of so many state cases that it would be impracticable to cite or refer to them in detail. Many of them are collected in the note to State v. Turner, 136 Am. St. Rep. 129, 135 et seq. After citing numerous cases the editor says: "The underlying principle of all these decisions obviously is, that the court, when engaged in the trial of a criminal action, will not take notice of the manner in which a witness has possessed himself of papers or other chattels, subjects of evidence, which are material and properly offered in evidence. People v. Adams, supra. Such an investigation is not involved necessarily in the litigation in chief, and to pursue it would be to halt in the orderly progress of a cause, and consider incidentally a question which has happened to cross the path of such litigation, and which is wholly independent thereof."

It is therefore evident that the Adams Case affords no authority for the action of the court in this case, when applied to in due season for the return of papers seized in violation of the Constitutional Amendment. The decision in that case rests upon incidental seizure made in the execution of a legal warrant, and in the application of the doctrine that a collateral issue will not be raised to ascertain the source from which testimony, competent in a criminal case, comes.

The government also relies upon Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370, in which the previous cases of Boyd v. United States, and Adams v. New York, supra; Interstate Commerce [397] Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125, and Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563, are reviewed, and wherein it was held that a subpœna duces tecum requiring a corporation to produce all its contracts and correspondence with no less than six other companies, as well as all letters received by the corporation from thirteen other companies, located in different parts of the United States, was an unreasonable search and seizure within the 4th Amendment, and it was there stated that (p. 76) "an order for the production of books and papers may constitute an unreasonable search and seizure within the 4th Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the Boyd Case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpœna duces tecum, against which the person, be he individual or corporation, is entitled to protection." If such a seizure under the authority of a warrant supposed to be legal, constitutes a violation of the constitutional protection, *a fortiori* does the attempt of an officer of the United States, the United States marshal, acting under color of his office, without even the sanction of a warrant, constitute an invasion of the rights within the protection afforded by the 4th Amendment.

Another case relied upon is American Tobacco Co. v. Werckmeister, 207 U. S. 284, 52 L. ed. 208, 28 Sup. Ct. Rep. 72, 12 Ann. Cas. 595, in which it was held that the seizure by the United States marshal in a copyright case of certain pictures under a writ of replevin did not constitute an unreasonable search and seizure. The other case from this court relied upon is Holt v. United States, 218 U. S. 245, 54 L. ed. 1021, 31 Sup. Ct. Rep. 20, 20 Ann. Cas. 1138, in which it was held that testimony tending to show that a certain blouse which was in evidence as incriminating him, had been put upon the prisoner, and fitted him, did not violate his constitutional right. We [398] are at a loss to see the application of these cases to the one in hand.

The right of the court to deal with papers and documents in the possession of the district attorney and other officers of the court, and subject to its authority, was recognized in Wise v. Henkel, 220 U. S. 556, 55 L. ed. 581, 31 Sup. Ct. Rep. 599. That papers wrongfully seized should be turned over to the accused has been frequently recognized in the early as well as later decisions of the courts. 1 Bishop, Crim. Proc. § 210; Rex v. Barnett, 3 Car. & P. 600; Rex v. Kinsey, 7 Car. & P. 447; United States v. Mills, 185 Fed. 318; United States v. McHie, 194 Fed. 894, 898.

We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitu-

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tional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed. As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the Federal court; under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the 4th Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal government and its agencies. Boyd Case, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, and see Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14.

[399] It results that the judgment of the court below must be reversed, and the case remanded for further proceedings in accordance with this opinion.

Reversed.

UNITED STATES OF AMERICA, Petitioner,
v.
LEXINGTON MILL & ELEVATOR COMPANY.

(See S. C. Reporter's ed. 399–413.)

Food and drugs — adulteration — poisonous ingredients.

1. The addition of poisonous substances to an article of food in such minute quantities that the health of consumers cannot possibly be injured is not condemned by the provisions of the food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915, U. S. Comp. Stat. Supp. 1911, p. 1356), § 7, subd. 5, that for the purposes of the act an article shall be deemed to be adulterated "if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health."

[Pure food laws, see Food and Drugs, in Digest Sup. Ct. 1913 Supp.]

Evidence — burden of proof — adulteration.

2. The government, when proceeding to condemn, under the pure food and drugs act of June 30, 1906, § 10, an article of food which it claims is adulterated under § 7, subd. 5, of that act, because it contains "any added poisonous or other added deleterious ingredient which may render such article injurious to health," is charged with the burden of proving that the added poisonous or deleterious substance is such as may render such article dangerous to health.

[For other cases, see Evidence, II. m, in Digest Sup. Ct. 1908.]

[No. 548.]

Argued January 5, 1914. Decided February 24, 1914.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which reversed a decree of the District Court for the Western District of Missouri, condemning certain flour as adulterated. Affirmed and cause remanded to District Court for a new trial.

See same case below, 121 C. C. A. 23, 202 Fed. 615.

The facts are stated in the opinion.

Attorney General McReynolds argued the cause, and, with Mr. Francis G. Caffey, filed a brief for petitioner:

The seized flour was adulterated within subd. 5, § 7, of the food and drugs act, relating to food.

United States v. 1950 Boxes of Macaroni, 181 Fed. 427; United States v. Koca Nola Co. (N. D. Ga.) Notice of Judgment, 202; United States v. Mayfield, 177 Fed. 765; United States v. Rosebrock & Co. (S. D. N. Y.) Notice of Judgment, 825; Friend v. Matt, 68 J. P. 589; French Silver Dragee Co. v. United States, 103 C. C. A. 316, 179 Fed. 824.

Being remedial, the statute should be liberally construed.

United States v. Corbett, 215 U. S. 233, 54 L. ed. 173, 30 Sup. Ct. Rep. 81; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412.

Messrs. Edward P. Smith and Bruce S. Elliott argued the cause, and, with Messrs. Edward L. Scarritt, C. J. Smyth, and W. C. Scarritt, filed a brief for respondent:

The language used in the act in question is not susceptible of the interpretation placed thereon by the trial court.

Post Master General v. Early, 12 Wheat. 136, 6 L. ed. 577; Montclair Twp. v. Ramsdell, 107 U. S. 147, 27 L. ed. 431, 2 Sup. Ct. Rep. 391; French Silver Dragee Co. v. United States, 103 C. C. A. 316, 179 Fed. 824; Friend v. Mapp, 68 J. P. 589; Hull v. Horsnell, 68 J. P. 591.

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The act as construed by the trial court is arbitrary, and an unreasonable interference with the rights of property.

Jew Ho v. Williamson, 103 Fed. 10; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; State v. Layton, 160 Mo. 474, 62 L.R.A. 163, 83 Am. St. Rep. 487, 61 S. W. 171; State v. Addington, 12 Mo. App. 219; State v. Fisher, 52 Mo. 174; Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; River Rendering Co. v. Behr, 77 Mo. 91, 46 Am. Rep. 6; McConnell v. McKillip, 71 Neb. 712, 65 L.R.A. 610, 115 Am. St. Rep. 614, 99 N. W. 505, 8 Ann. Cas. 898.

The interpretation placed upon the act of June 30, 1906, by the circuit court of appeals, is reasonable, gives effect to all the language contained in the act, and is the only interpretation under which its constitutionality can be sustained.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; Interstate Drainage & Invest. Co. v. Freeborn County, 85 C. C. A. 532, 158 Fed. 270; Martin v. United States, 168 Fed. 201, 93 C. C. A. 484; Maillard v. Lawrence, 16 How. 251, 14 L. ed. 925; Levy v. M'Cartee, 6 Pet. 110, 8 L. ed. 337; Parsons v. Hunter, 2 Sumn. 422, Fed. Cas. No. 10,778; Bernier v. Bernier, 147 U. S. 246, 37 L. ed. 154, 13 Sup. Ct. Rep. 244; Washington Market Co. v. Hoffman, 101 U. S. 115, 25 L. ed. 783; Lake County v. Rollins, 130 U. S. 670, 32 L. ed. 1063, 9 Sup. Ct. Rep. 651; Hamilton v. Rathbone, 175 U. S. 421, 44 L. ed. 222, 20 Sup. Ct. Rep. 155; Swarts v. Siegel, 54 C. C. A. 399, 117 Fed. 18; Glover v. United States, 164 U. S. 298, 41 L. ed. 441, 17 Sup. Ct. Rep. 95; Harless v. United States, 31 C. C. A. 397, 59 U. S. App. 745, 88 Fed. 102; United States v. Fisher, 109 U. S. 145, 27 L. ed. 886, 3 Sup. Ct. Rep. 154; Lake Superior Ship Canal, R. & Iron Co. v. Cunningham, 155 U. S. 380, 39 L. ed. 192, 15 Sup. Ct. Rep. 103; Rhodes v. Iowa, 170 U. S. 423, 42 L. ed. 1095, 18 Sup. Ct. Rep. 664.

Mr. Ralph S. Rounds filed a brief as *amicus curiæ:*

The phrase must be construed strictly, as the food law is a penal statute.

United States v. 84 Boxes of Sugar, 7 Pet. 453, 463, 8 L. ed. 745, 749; United States v. A Lot of Silk Umbrellas, 12 Fed. 412; United States v. 1150½ Pounds of Celluloid, 27 C. C. A. 231, 54 U. S. App. 273, 82 Fed. 627; United States v. Johnson, 177 Fed. 313, affirmed in 221 U. S. 488, 55 L. ed. 823, 31 Sup. Ct. Rep. 627.

The purpose of the food law is to prevent the sale of fraudulent and unhealthful products.

United States v. Morgan, 222 U. S. 274, 281, 56 L. ed. 198, 200, 32 Sup. Ct. Rep. 81; United States v. Johnson, 177 Fed. 315, affirmed in 221 U. S. 488, 55 L. ed. 823, 31 Sup. Ct. Rep. 627; United States v. One Car Load of Corno Horse & Mule Feed, 188 Fed. 463; United States v. Five Boxes of Asafoetida, 181 Fed. 565; United States v. 1950 Boxes of Macaroni, 181 Fed. 427; United States v. Buffalo Cold Storage Co. 179 Fed. 866; French Silver Dragee Co. v. United States, 103 C. C. A. 316, 179 Fed. 824; Ex parte Kohler, 74 Cal. 42, 15 Pac. 436.

Where the purpose of a statute is in general the same as that of the common law, it will be presumed that the legislature intended to re-enact, in statute form, the common rules.

Standard Oil Co. v. United States, 221 U. S. 1, 59, 60, 55 L. ed. 619, 644, 645, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. Carll, 105 U. S. 611, 26 L. ed. 1135, 4 Am. Crim. Rep. 246; Kepner v. United States, 195 U. S. 100, 125, 132, 49 L. ed. 114, 122, 125, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655; United States v. Sanges, 144 U. S. 310, 311, 36 L. ed. 445, 446, 12 Sup. Ct. Rep. 609; United States v. Wong Kim Ark, 169 U. S. 649, 653, 42 L. ed. 890, 892, 18 Sup. Ct. Rep. 456; Moore v. United States, 91 U. S. 270, 274, 23 L. ed. 346, 347; 8 Cyc. 386.

At the common law, both in England and in the several states, it was a criminal offense to offer for sale unwholesome food, or food or drink to which poisonous or deleterious substances had been added to such an extent as to make the article injurious to health; so that the health provisions of the food law cover the same general ground as those of the common law. Unwholesomeness was a necessary element of the offense at common law, and it must be held to be a necessary element, under the section in question, of the definition of the words used in the present statute.

Bishop, Crim. Law, 8th ed. ¶ 491; 19 Cyc. 1086, note 3; State v. Norton, 24 N. C. (2 Ired. L.) 40; Goodrich v. People, 19 N. Y. 578; State v. Buckman, 8 N. H. 203, 29 Am. Dec. 646; State v. Smith, 10 N. C. (3 Hawks) 378, 14 Am. Dec. 594; Craft v.

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Parker, W. & Co. 96 Mich. 245, 21 L.R.A. 140, 55 N. W. 812.

This court has in many notable instances limited general words of statutes by construction.

Standard Oil Co. v. United States, 221 U. S. 1, 59, 60, 68, 55 L. ed. 619, 644, 645, 648, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; American Security & T. Co. v. District of Columbia, 224 U. S. 491, 494, 495, 56 L. ed. 856, 857, 32 Sup. Ct. Rep. 553; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Lau Ow Bew v. United States, 144 U. S. 47, 61, 36 L. ed. 340, 345, 12 Sup. Ct. Rep. 517; United States v. Kirby, 7 Wall. 482, 19 L. ed. 278; Price v. Forrest, 173 U. S. 410, 43 L. ed. 749, 19 Sup. Ct. Rep. 434; Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. Rep. 881; United States v. Laws, 163 U. S. 258, 41 L. ed. 151, 16 Sup. Ct. Rep. 998; Oates v. First Nat. Bank, 100 U. S. 239, 244, 25 L. ed. 580, 582; United States v. Goldenberg, 168 U. S. 95, 102, 42 L. ed. 394, 398, 18 Sup. Ct. Rep. 3; McKee v. United States, 164 U. S. 287, 293, 41 L. ed. 437, 439, 17 Sup. Ct. Rep. 92; Hawaii v. Mankichi, 190 U. S. 197, 47 L. ed. 1017, 23 Sup. Ct. Rep. 787, 12 Am. Crim. Rep. 465.

Mr. Justice Day delivered the opinion of the court:

The petitioner, the United States of America, proceeding under § 10 of the food and drugs act (34 Stat. at L. 768, chap. 3915, U. S. Comp. Stat. Supp. 1911, p. 1354), by libel filed in the district court of the United States for the western district of Missouri, sought to seize and condemn 625 sacks of flour in the possession of one Terry, which had been shipped from Lexington, Nebraska, to Castle, Missouri, and which remained in original, unbroken packages. The judgment of the district court, upon verdict in favor of the government, was reversed by the circuit court of appeals for the eighth circuit (121 C. C. A. 23, 202 Fed. 615), and this writ of certiorari is to review the judgment of that court.

[405] The amended libel charged that the flour had been treated by the "Alsop Process," so called, by which nitrogen proxide gas, generated by electricity, was mixed with atmospheric air, and the mixture then brought in contact with the flour, and that it was thereby adulterated under the fourth and fifth subdivisions of § 7 of the act; namely, (1) in that the flour had been mixed, colored, and stained in a manner whereby damage and inferiority were concealed and the flour given the appearance of a better grade of flour than it really was, and (2) in that the flour had been caused to contain added poisonous or other added deleterious ingredients, to-wit, nitrites or nitrite reacting material, nitrogen peroxide, nitrous acid, nitric acid, and other poisonous and deleterious substances which might render the flour injurious to health. The libel also charged that the flour was adulterated under the first subdivision of § 7, and was misbranded; but the government does not urge these features of the case here. The verdict was broad enough to cover the charge under the first subdivision of § 7, but in the view we take of the case as to the instruction of the court under subdivision 5, it need not be noticed.

The Lexington Mill & Elevator Company, the respondent herein, appeared, claiming the flour, and answered the libel, admitting that the flour had been treated by the Alsop Process, but denying that it had been adulterated, and attacking the constitutionality of the act.

A special verdict to the effect that the flour was adulterated was returned and judgment of condemnation entered. The case was taken to the circuit court of appeals upon writ of error. The respondent contended that, among other errors, the instructions of the trial court as to adulteration were erroneous and that the act was unconstitutional. The circuit court of appeals held that the testimony was insufficient to show that by the [406] bleaching process the flour was so colored as to conceal inferiority, and was thereby adulterated, within the provisions of subdivision 4. That court also held—and this holding gives rise to the principal controversy here—that the trial court erred in instructing the jury that the addition of a poisonous substance, in any quantity, would adulterate the article, for the reason that "the possibility of injury to health due to the added ingredient, and in the quantity in which it is added, is plainly made an essential element of the prohibition." It did not pass upon the constitutionality of the act, in view of its rulings on the act's construction.

The case requires a construction of the food and drugs act. Parts of the statute pertinent to this case are:

"Sec. 7. That for the purposes of this act an article shall be deemed to be adulterated: . . .

"In the case of food:

"First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength. . . .

"Fourth. If it be mixed, colored, pow-

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dered, coated, or stained in a manner whereby damage or inferiority is concealed.

"Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health.

. . .

"Sec. 10. That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one state, territory, district, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, . . . shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for [407] condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this act, the same shall be disposed of by destruction or sale, as the said court may direct."

Without reciting the testimony in detail it is enough to say that for the government it tended to show that the added poisonous substances introduced into the flour by the Alsop Process, in the proportion of 1.8 parts per million, calculated as nitrogen, may be injurious to the health of those who use the flour in bread and other forms of food. On the other hand, the testimony for the respondent tended to show that the process does not add to the flour any poisonous or deleterious ingredients which can in any manner render it injurious to the health of a consumer. On these conflicting proofs the trial court was required to submit the case to the jury. That court—after stating the claims of the parties, the government insisting that the flour was adulerated and should be condemned if it contained any added poisonous or other added deleterious ingredient of a kind or character which was capable of rendering such article injurious to health; the respondent contending that the flour should not be condemned unless the added substances were present in such quantity that the flour would be thereby rendered injurious to health—gave certain instructions to the jury. Part of the charge, excepted to by the respondent reads:

"The fact that poisonous substances are to be found in the bodies of human beings in the air, in potable water, and in articles of food, such as ham, bacon, fruits, certain vegetables, and other articles, does not justify the adding of the same or other poisonous substances to articles of food, such as flour, because the statute condemns the adding of poisonous substances. Therefore the court charges you that the government need not prove that this flour,, or foodstuffs made by the use of it, would injure [408] the health of any consumer. It is the character—not the quantity—of the added substance, if any, which is to determine this case."

On the other hand, the respondent insisted that the law is, and requested the court to charge the jury:

"That the burden is upon the prosecution to prove the truth of the charge in the libel, that by the treatment of the flour in question by the said Alsop Process it has been caused to contain added poisonous or other added deleterious ingredients, to wit, nitrites or nitrite reacting material, which may render said flour injurious to health.

"And in this connection you are further instructed that it is incumbent upon the government to prove that any such added poisonous or other added deleterious ingredients, if any, contained in said flour, are of such a character and contained in the flour seized in such quantities, conditions, and amounts as may render said flour injurious to health; and unless you find that all of such facts are so proven you cannot find against the claimant, or condemn the flour in question under that charge in the libel; and if you fail to so find, your verdict upon that count or charge in the libel must be in favor of the claimant or defendant.

. . . . . .

"The law does not prohibit the adding of nitrites or nitrite reacting material to flour, and a jury cannot find for the government or against the claimant, even if it be shown that nitrites or nitrite reacting material was added to the flour in question, unless they believe from a preponderance of the evidence that such addition, if any, rendered said flour injurious to the health of those who might consume the bread or other foods made from said flour."

It is evident from the charge given and requests refused that the trial court regarded the addition to the flour of any poisonous ingredient as an offense within this statute, no [409] matter how small the quantity, and whether the flour might or might not injure the health of the consumer. At least, such is the purport of the part of the charge above given, and if not correct, it was clearly misleading, notwithstanding other parts of the charge seem to recognize that, in order to prove adulteration, it is necessary to show that the flour may be injurious to health. The testimony shows that the effect of the Alsop Process is to bleach or whiten the flour, and thus make it more marketable. If the testimony introduced on the part of the respondent was believed by the jury, they must necessarily

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have found that the added ingredient, nitrites of a poisonous character, did not have the effect to make the consumption of the flour by any possibility injurious to the health of the consumer.

The statute upon its face shows that the primary purpose of Congress was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated foods. The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was, and not upon misrepresentations as to character and quality. As against adulteration, the statute was intended to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances which might render such articles injurious to the health of consumers. If this purpose has been effected by plain and unambiguous language, and the act is within the power of Congress, the only duty of the courts is to give it effect according to its terms. This principle has been frequently recognized in this court. Lake County v. Rollins, 130 U. S. 662, 670, 32 L. ed. 1060, 1063, 9 Sup. Ct. Rep. 651.

"Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have [410] plainly expressed, and consequently no room is left for construction."

Hamilton v. Rathbone, 175 U. S. 414, 421, 44 L. ed. 219, 222, 20 Sup. Ct. Rep. 155.

"The cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary."

Furthermore, all the words used in the statute should be given their proper signification and effect. Washington Market Co. v. Hoffman, 101 U. S. 112, 115, 25 L. ed. 782, 783.

"We are not at liberty," said Mr. Justice Strong, "to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, § 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word, shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times."

Applying these well-known principles in considering this statute, we find that the fifth subdivision of § 7 provides that food shall be deemed to be adulterated "if it contain any added poisonous or other added deleterious ingredient *which may render such article injurious to health*." The instruction of the trial court permitted his statute to be read without the final and qualifying words, concerning the effect of the article upon health. If Congress had so intended, the provision would have stopped with the condemnation of food which contained any added poisonous or other added deleterious ingredient. In other words, the first and familiar consideration is that, if Congress had intended to enact the statute in that form, it would have done so by choice of apt words to express that intent. It did not do so, but only condemned food containing an added poisonous or other added deleterious ingredient when such addition might render the article of food injurious [411] to the health. Congress has here, in this statute, with its penalties and forfeitures, definitely outlined its inhibition against a particular class of adulteration.

It is not required that the article of food containing added poisonous or other added deleterious ingredients must affect the public health, and it is not incumbent upon the government in order to make out a case to establish that fact. The act has placed upon the government the burden of establishing, in order to secure a verdict of condemnation under this statute, that the added poisonous or deleterious substances must be such as may render such article injurious to health. The word "may" is here used in its ordinary and usual signification, there being nothing to show the intention of Congress to affix to it any other meaning. It is, says Webster, "an auxiliary verb, qualifying the meaning of another verb, by expressing ability, . . . contingency or liability, or possibility or probability." In thus describing the offense, Congress doubtless took into consideration that flour may be used in many ways, in bread, cake, gravy, broth, etc. It may be consumed, when prepared as a food, by the strong and the weak, the old and the young, the well and the sick; and it is intended that if any flour, because of any added poisonous or other deleterious ingredient, may possibly injure the health of any of these, it shall come within the ban of the statute. If it cannot by any possibility, when the facts are reasonably considered, injure the health of any consumer, such flour, though having a small addition of poisonous or deleterious ingredients, may not be condemned under the act. This is the plain meaning of the words, and in our view needs no additional support by reference to reports and debates, although it may be said

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in passing that the meaning which we have given to the statute was well expressed by Mr. Heyburn, chairman of the committee having it in charge upon the floor of the Senate (Congressional Record, vol. 40, pt. 2, p. 1131):

412] "As to the use of the term 'poisonous,' let me state that everything which contains poison is not poison. It depends on the quantity and the combination. A very large majority of the things consumed by the human family contain, under analysis, some kind of poison, but it depends upon the combination, the chemical relation which it bears to the body in which it exists, as to whether or not it is dangerous to take into the human system."

And such is the view of the English courts construing a similar statute. The English statute provides (§ 3, of the sale of food and drugs act 1875):

"No person shall mix, color, . . . or order or permit any other person to mix, color, . . . any article of food with any ingredient or material so as to render the article injurious to health."

That section was construed in Hull v. Horsnell, 68 J. P. 591, which involved preserved peas, the color of which had been retained by the addition of sulphate of copper, charged to be a poisonous substance and injurious to health. There was a conviction in the lower court. Lord Alverstone, L. C. J., in reversing and remitting the case on appeal, said:

"In my opinion, if the justices convicted the appellant of an offense under § 3 of the sale of food and drugs act 1875, on the ground that the ingredient mixed with the article of food was injurious to health,—that the sulphate of copper was injurious to health, and not on the ground that the peas, by reason of the addition of sulphate of copper, were rendered injurious to health, the conviction is clearly wrong. To constitute an offense under the latter part of § 3 the article of food sold must, by the addition of an ingredient, be rendered injurious to health. All the circumstances must be examined to see whether the article of food has been rendered injurious to health."

We reach the conclusion that the circuit court of appeals did not err in reversing the judgment of the district [413] court for error in its charge with reference to subdivision 5 of § 7.

The circuit court of appeals reached the conclusion that there was no substantial proof to warrant the conviction under the fourth subdivision of § 7, that the flour was mixed, colored, and stained in a manner whereby damage and inferiority were concealed. As the case is to be retried to a jury, we say nothing upon this point.

As to the objection on constitutional grounds, it is not contended that the statute, as construed by the circuit court of appeals and this court, is unconstitutional.

It follows that the judgment of the Circuit Court of Appeals, reversing the judgment of the District Court, must be affirmed, and the case remanded to the District Court for a new trial.

Affirmed.

RUBBER TIRE WHEEL COMPANY, and Consolidated Rubber Tire Company, Petitioners,

v.

GOODYEAR TIRE & RUBBER COMPANY.

(See S. C. Reporter's ed. 413–420.)

Judgment — conclusiveness — in patent case.

1. A decree of a Federal circuit court of appeals denying patentability to the Grant patent, No. 554,675, for an improvement in rubber-tired wheels consisting of a solid rubber tire held in place in a flaring channel by the tension of two tightly drawn wires imbedded in the rubber within the periphery of the flanges does not work an estoppel in favor of one not a party to the suit, so as to afford him a defense against a charge of infringement (the patent having been upheld by the Supreme Court in a later suit) in making the patented structure by assembling the various elements for that purpose and effecting the combination, merely because he bought one element of the tire, *viz.*, the rubber, from the defendant in the first suit.

[For other cases, see Judgment, 581–587, in Digest Sup. Ct. 1908.]

Judgment — conclusiveness — in patent suit.

2. Defendant's rights under the final decree in a patent infringement suit denying patentability to the Grant patent, No. 554,675 for an improvement in rubber-tired wheels consisting of a solid rubber tire held in place in a flaring channel by the tension of two tightly drawn wires imbedded in the rubber within the periphery of the flanges are not violated by the action of complainants in bringing suit (after the patent has been upheld by the Federal Su-

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NOTE. — On conclusiveness of judgments, generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson County v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

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preme Court in another suit) against defendant's customers who bought its rubber tire, purchasing from others the wire and flaring channel, and themselves made the patented combination by assembling its various elements.

[For other cases, see Judgment, 581–587, in Digest Sup. Ct. 1908.]

[No. 37.]

Argued May 7, 1913. Decided February 24, 1914.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which affirmed in part a decree of the Circuit Court for the Southern District of New York, enjoining the prosecution of patent infringement suits against the customers of the defendant in another suit in which the patent was held invalid. Reversed and remanded to the District Court, with instructions to deny the injunction.

See same case below, 106 C. C. A. 318, 183 Fed. 978.

The facts are stated in the opinion.

Mr. Frederick P. Fish argued the cause, and, with Mr. J. L. Stackpole, filed a brief for petitioners:

Doherty infringes the Grant patent when he made a rubber-tired wheel. The Goodyear Company did not make a Grant wheel when it made and sold Doherty the rubber which he used. If Doherty had used the rubber for another purpose, or had sent it to Canada to be made into a rubber-tired wheel, the Goodyear Company would not even have been a contributory infringer, because it would not have acted with Doherty to infringe the patent.

Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co. 63 C. C. A. 607, 129 Fed. 105.

If the Goodyear Company had sold the rubber to Doherty, knowing and intending that he was to use it in making up a Grant rubber-tired wheel, and he did so use it, then the Goodyear Company would have been a contributory infringer, and liable as such, except for the decree which protects it from suit.

Thomson-Houston Electric Co. v. Ohio Brass Co. 26 C. C. A. 170, 54 U. S. App. 1, 80 Fed. 712.

Doherty in the specific case at bar is not protected by the decree in favor of the Goodyear Company, because he is not in privity with the Goodyear Company, who alone is a party to the decree relied on. It is only in favor of the Goodyear Company, not of Doherty, that the estoppel raised by the decree runs.

Reed v. Locks & Canals, 8 How. 274, 12 L. ed. 1077; Aspden v. Nixon, 4 How. 467, 11 L. ed. 1059; Birdsell v. Shaliol, 112 U. S. 485, 28 L. ed. 768, 5 Sup. Ct. Rep. 244; Russell v. Place, 94 U. S. 606, 24 L. ed. 214.

It has been said that the Goodyear Company is in the position of a licensee under the Grant patent, having the right to make, use, and sell the rubber-tired wheel of the Grant patent. If such is the legal status of the Goodyear Company, it follows that Doherty is not protected by the license. The Goodyear Company could not assign its license to Doherty, and there is no pretense that Doherty was acting as the agent of the Goodyear Company. He was an independent individual manufacturing the rubber-tired wheel on his own responsibility, for his own profit, and on his own machinery, at his own expense. The Goodyear Company could not assign its license to him.

Hapgood v. Hewitt, 119 U. S. 226, 234, 30 L. ed. 369, 372, 7 Sup. Ct. Rep. 193; Troy Iron & Nail Factory v. Corning, 14 How. 205, 14 L. ed. 388; Oliver v. Rumford Chemical Works, 109 U. S. 75, 83, 27 L. ed. 862, 864, 3 Sup. Ct. Rep. 61; Bowers v. Lake Superior Contracting & Dredging Co. 79 C. C. A. 493, 149 Fed. 983.

The situation arising in this case bears a close analogy to infringement by the reconstruction of a patented article, a part of which has worn out by its intended use. The purchaser of a patented article, such for example as a Grant rubber-tired wheel, has the right to use it until it is worn out, but has no right to reconstruct it; that is, if he used a Grant tire until the rubber was entirely worn out, he would have no right to make a new tire by taking off the worn-out rubber and replacing it with a new rubber. Such a reconstruction would be plainly the making of a new tire, and an infringement of the Grant patent.

National Cash Register Co. v. Grobet. 82 C. C. A. 651, 153 Fed. 905; American Cotton-Tie Co. v. Simmons, 106 U. S. 89, 27 L. ed. 79, 1 Sup. Ct. Rep. 52; Davis Electrical Works v. Edison Electric Light Co. 8 C. C. A. 615, 21 U. S. App. 74, 60 Fed. 276; Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co. 22 C. C. A. 1, 45 U. S. App. 95, 75 Fed. 1005; Goodyear Shoe Machinery Co. v. Jackson, 55 L.R.A. 692, 50 C. C. A. 159, 112 Fed. 146; Shickle, H. & H. Iron Co. v. St. Louis Car-Coupler Co. 23 C. C. A. 433, 40 U. S. App. 728, 77 Fed. 739.

Mr. H. A. Toulmin argued the cause and filed a brief for respondent:

Petitioners must show better and graver reasons than the facts of this litigation present, before this court will be justified

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in abdicating or modifying Kessler v. Eldred, 206 U. S. 285, 51 L. ed. 1065, 27 Sup. Ct. Rep. 611, or in abdicating or modifying Waterman v. Mackenzie, 138 U. S. 252, 34 L. ed. 923, 11 Sup. Ct. Rep. 334.

The right under the statute to sue the maker, user, and seller, although it means a concurrent right to sue all three at once, or a successive right to sue one such party after another, is subject to the qualification that in either such case the right to sue the other two falls when a judgment giving satisfaction has been rendered against one such defendant.

Birdsell v. Shaliol, 112 U. S. 485, 488, 28 L. ed. 768, 769, 5 Sup. Ct. Rep. 244.

Where one party buys and sells or deals in the goods of a manufacturer, he holds the relation of privy, and, as such, is entitled to the benefits of a final judgment rendered in a case between his principal and a complainant who afterwards sues him.

Warren Featherbone Co. v. DeCamp, 154 Fed. 198; Lea v. Deakin, 11 Biss. 23, Fed. Cas. No. 8,154; Norton v. San Jose Fruit-Packing Co. 25 C. C. A. 194, 48 U. S. App. 295, 79 Fed. 793, 27 C. C. A. 576, 48 U. S. App. 590, 83 Fed. 512; Hilton v. Guyot, 159 U. S. 113, 170, 40 L. ed. 95, 110, 16 Sup. Ct. Rep. 139.

As the action of petitioners in suing respondent's customers reacts against respondent's business to its injury, respondent is entitled, by reason of its relation of privity with its customers, to restrain the prosecution of such suits to prevent irreparable loss due to such reaction.

Johnson Steel Street Rail Co. v. Wharton, 152 U. S. 252, 38 L. ed. 429, 14 Sup. Ct. Rep. 608; Hubbell v. United States, 171 U. S. 203, 43 L. ed. 136, 18 Sup. Ct. Rep. 828.

Mr. Justice **Hughes** delivered the opinion of the court:

The petitioners are the owners of the Grant patent (No. 554,675) issued February 18, 1896, for an improvement in rubber-tired wheels. In a suit for infringement brought by the petitioners against the Goodyear Tire & Rubber Company (the respondent) it was held by the circuit court of appeals for the sixth circuit that the patent was void for want of novelty. Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co. 53 C. C. A. 583, 116 Fed. 363. Upon the basis of the decree entered upon that decision, the respondent instituted the present suit in the southern district of Ohio, to restrain the petitioners from prosecuting suits for infringement against the respondent's customers. The circuit court granted a preliminary injunction. Upon appeal, the circuit court of appeals for the sixth circuit sustained the injunction so far as it applied to the prosecution of a suit which the petitioners had brought against John Doherty in the circuit court for the southern district of New York. 106 C. C. A. 318, 183 Fed. 978. This writ of certiorari was then granted.

[415] The Grant tire is composed of three elements: (1) a channel or groove with tapered or inclined sides, (2) a rubber tire with a described shape, adapted to fit into the channel, and (3) a fastening device consisting of independent retaining wires, which pass through the rubber tire and are placed in a particular position. It was held in the sixth circuit that both the elements and the results were old, and hence patentability was denied. Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co. supra; Rubber-Tire Wheel Co. v. Victor Rubber-Tire Co. 59 C. C. A. 215, 123 Fed. 85. In the second circuit, and in the circuit court for the northern district of Georgia, the patent was sustained. Rubber Tire Wheel Co. v. Columbia Pneumatic Wagon Wheel Co. 91 Fed. 978; Consolidated Rubber Tire Co. v. Finley Rubber Tire Co. 116 Fed. 629; Consolidated Rubber Tire Co. v. Firestone Tire & Rubber Co. 147 Fed. 739, 80 C. C. A. 589, 151 Fed. 237; Consolidated Rubber Tire Co. v. Diamond Rubber Co. 85 C. C. A. 349, 157 Fed. 677, 89 C. C. A. 582, 162 Fed. 892. The controversy came to this court upon certiorari to review the decision of the circuit court of appeals for the second circuit in the case last mentioned, and it was finally determined that the patent was valid. Diamond Rubber Co. v. Consolidated Rubber Tire Co. 220 U. S. 428, 55 L. ed. 527, 31 Sup. Ct. Rep. 444. The patented structure was held to be not a mere aggregation of elements, but a new combination of parts, co-acting so as to produce a new and useful result. It was found that the Grant tire possessed a distinctive characteristic; that is, a "tipping and reseating power." This, said this court, "is the result of something more than each element acting separately. It is not the result alone of the iron channel, with diverging sides, nor alone of the retaining bands or the rubber. They each have uses and perform them to an end different from the effect of either, and they must have been designed to such end,—contrived to exactly produce it. There can be no other deduction from their careful relation. The adaptation of the rubber to [416] the flaring channel, the shape of that permitting lateral movement and compression, the retaining band, holding and yielding, placed in such precise adjustment and correlation with the other parts, producing a tire that 'when compressed and bent sidewise shall not escape from the channel, and shall not

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be cut on the flange of the channel,' and yet shall 'be mobile in the channel.'" 220 U. S. p. 443. There was thus a patentable combination, the patentability of which did not depend on the novelty of any of the elements entering into it, whether rubber, iron, or wires.

Doherty, against whom suit was enjoined, had a shop in New York city, where he was engaged in the business of applying rubber tires to vehicle wheels. It appeared that having purchased the rubber from the respondent, and the wire and channel from other parties, he combined these elements and fitted them to a carriage wheel, thus constructing a complete tire. This we may assume to be a typical case.

It is at once apparent that the decree in favor of the Goodyear Company in the former suit does not work an estoppel in favor of Doherty, so as to afford him a defense against the charge of infringement in making the patented structure. He was not a party to the suit in which that decree was rendered; nor, at least with respect to tires made by him, can he be regarded as a privy to that decree. We may lay on one side the question as to the rights of one purchasing from the respondent the completed article. Doherty did not purchase it; he made it himself, assembling its various elements for that purpose and effecting the combination. On no possible theory can it be said that, if the tire thus constructed was covered by the patent, Doherty was entitled to immunity simply because he bought one element of the time from the Goodyear Company.

The respondent, however, is asserting its own right, and not that of Doherty. It insists that, by virtue of the [417] decree in its favor in the infringement suit, it should have the injunction in order to protect its trade. It contends that it has an equitable right to this protection by restraining suits not only against those who buy from it the structure which is the subject of the patent, but also against those who buy its rubber and themselves make the patented tire. In urging this contention the respondent relies upon the doctrine of Kessler v. Eldred, 206 U. S. 285, 51 L. ed. 1065, 27 Sup. Ct. Rep. 611. There, Kessler and Eldred were rival manufacturers of electric cigar lighters. Eldred, being the owner of the Chambers patent, sued Kessler in the northern district of Indiana for infringement. The circuit court, finding noninfringement, dismissed the bill; and this decree was affirmed by the circuit court of appeals for the seventh circuit. 45 C. C. A. 454, 106 Fed. 509. Subsequently, Eldred brought suit on the same patent in the northern district of New York against Kirkland, who was selling a similar cigar lighter, but not of Kessler's make. The circuit court of appeals for the second circuit held the Kirkland lighter to be an infringement. 64 C. C. A. 588, 130 Fed. 342. Eldred then began a suit for infringement in the western district of New York against Breitwieser, a user of Kessler's lighters. Thereupon Kessler filed his bill in the circuit court for the northern district of Illinois to enjoin Eldred from prosecuting suit against anyone for alleged infringement of the Chambers patent by purchase, use, or sale of any electric cigar lighter manufactured by Kessler, and identical with the lighter before the court in the suit of Eldred v. Kessler. Kessler, being defeated in the circuit court, appealed to the circuit court of appeals for the seventh circuit. Answering questions certified by that court, this court held that the decree in the suit of Eldred v. Kessler had the effect of entitling Kessler to continue the business of manufacturing and selling throughout the United States the same lighter he had theretofore been manufacturing and selling, without molestation by Eldred [418] through the patent which he held; and that the decree also had the effect of making a suit by Eldred against any customer of Kessler for the alleged infringement of the patent by use or sale of Kessler's lighters a wrongful interference with Kessler's business, with respect to which he was without adequate remedy at law. 206 U. S. pp. 287, 290.

It will be observed that the equity thus sustained sprang from the decree in the former suit between the parties, and that the decision went no further than to hold it to be a wrongful interference with Kessler's business to sue his customers for using and selling the lighter which Kessler had made and sold to them, and which was the same as that passed upon by the court in the previous suit. His right to make and sell the particular article, the making of which Eldred had unsuccessfully challenged as an infringement, was deemed to include the right to have others secure in buying that article, and in its use and resale. But the present question was in no way involved. It was not held that Kessler would have been entitled to restrain Eldred from suing other manufacturers of lighters who might buy from Kessler some of the materials used in such manufacture.

The distinction is controlling. Under the doctrine of Kessler v. Eldred, the respondent—by reason of the final adjudication in its favor—was entitled to make and sell the Grant structure, and to have those who bought that structure from it unmolested in taking title and in enjoying the rights of ownership. It may also be assumed

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that the respondent had the right to make and sell its rubber without hindrance by the petitioners claiming under the patent. The trade right of the respondent, however, whether with respect to the complete structure or its separate parts, is merely the right to have that which it lawfully produces freely bought and sold without restraint or interference. It is a right which attaches to its product—to a particular thing—as an article of lawful commerce, [419] and it continues only so long as the commodity to which the right applies retains its separate identity. If that commodity is combined with other things in the process of the manufacture of a new commodity, the trade right in the original part as an article of commerce is necessarily gone. So that when other persons become manufacturers on their own behalf, assembling the various elements and uniting them so as to produce the patented device,—a new article,—it is manifest that the respondent cannot insist upon their being protected from suit for infringement by reason merely of its right to make and sell, and the fact of its having made and sold, some component part of that article. It must be able to go beyond a mere trade right in that element, and to show itself to be entitled to have its customers manufacture the patented structure. Thus the fallacy in the respondent's contention becomes apparent. The decree gave the respondent no right to have others make Grant tires. It could make and sell them, and it could make and sell rubber; it could demand protection for its trade rights in the commodities it produced. But it had no transferable immunity in manufacture. The decree gave it no privilege to demand that others should be allowed to make and sell the patented structure in order that it might have a market for its rubber.

The suit against Doherty was based upon his conduct in constructing Grant tires. The fact that the respondent could not be charged with liability as a participant in the infringement thus alleged did not excuse him; and the petitioners, in bringing the suit, did not violate any right of the respondent.

It is not necessary to consider the evidence bearing upon the question whether Doherty had authority from the petitioners, as that is a matter between him and them; and if the facts afford him a defense, he is free to urge it.

The decree of the Circuit Court of Appeals, in so far [420] as it affirmed the order of injunction granted by the Circuit Court, is reversed, and the cause is remanded to the District Court, with instructions to enter an order denying the application for injunction.

It is so ordered.

Mr. Justice Day states that in his view the suit against Doherty was properly enjoined upon the principles established in this court in Kessler v. Eldred, 206 U. S. 285, 51 L. ed. 1065, 27 Sup. Ct. Rep. 611; and, without repeating, agrees with the reasoning by which that conclusion was reached in the opinion of Judge Warrington, speaking for the circuit court of appeals in this case.

WILLIAM SEIM and Gustav Reissig
v.
JAMES D. HURD, Consolidated Rubber Tire Company, and Rubber Tire Wheel Company.

(See S. C. Reporter's ed. 420-427.)

Cases certified — questions not presented by facts.

Questions certified by a Federal circuit court of appeals to the Supreme Court must go unanswered where they are not apposite to the facts as stated in the certificate.

[For other cases, see Cases Certified, III., in Digest Sup. Ct. 1908.]

[No. 141.]

Argued December 17, 1913. Decided February 24, 1914.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit, presenting four questions as to the immunity of the successful defendant in a patent infringement suit, and its customers, from subsequent prosecutions for infringement. Dismissed.

Statement by Mr. Justice Hughes:

The certificate in this case is as follows:

"There arises in this case a question of law upon which this court desires the instruction of the Supreme Court for its proper decision.

[421] "It is therefore ordered that the statement and questions here following be certified to the Supreme Court as provided by the 6th section of the act of March 3d, 1891 [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549].

"United States patent No. 554,675 was issued February 18, 1896, to Arthur W. Grant for rubber tired wheel. The patentee immediately assigned the entire interest in

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NOTE.—On definiteness of question to be certified—see note to Waco Water & Light Co. v. Waco, 31 L.R.A. 392.

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said patent to the Rubber Tire Wheel Company. October 11, 1897, the Rubber Tire Wheel Company, being the sole owner, sold and assigned to the complainant, James D. Hurd, an exclusive license and shop-right to put on rubber tires according to said patent in Berkshire county, Massachusetts, in the western part of Vermont, and in seventeen counties in New York state, 'with the exclusive right to ship and sell the same throughout said territory, and not elsewhere;' subject, however, to the rights of the Hartford Rubber Works Company, under a certain contract. Mr. Hurd immediately commenced and has ever since continued to operate under said patent in said territory.

"July 18, 1899, the owner of said patent conveyed the exclusive license to make and vend such tires throughout the United States to the Consolidated Rubber Tire Company, subject, however, to Hurd's rights and the Hartford Rubber Works Company contract.

"Much litigation has been had in reference to said patent. The following are the only cases important here, all of which were commenced after the exclusive license was granted to the complainant Hurd, and in none of which was he a party to the action or in control of the action.

"The circuit court of appeals in the sixth circuit, in the case of Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co. 53 C. C. A. 583, 116 Fed. 363, held that the patent was invalid.

"The court in the second circuit, in the case of the Consolidated Rubber Tire Co. v. Finley Rubber Tire Co. 116 Fed. 629, held that the patent was valid.

"The court in the sixth circuit, in the case of Rubber-Tire Wheel Co. v. Victor Rubber-Tire Co. 59 C. C. A. 215, 123 Fed. 85, held that the patent was void.

"The court in the second circuit, in the case of the [422] Consolidated Rubber Tire Co. v. Firestone Tire & Rubber Co. 147 Fed. 739, affirmed on appeal in 80 C. C. A. 589, 151 Fed. 237, held that the patent was valid and infringed.

"The circuit court of the district of Indiana, in the case of the Consolidated Rubber Tire Co. and Rubber Tire Wheel Co., D. B. Sullivan and Kenney & Sullivan v. Kokomo Co., D. C. Sparker, A. Lehman, and G. W. Landan, not reported, dismissed the complaint upon the pleadings, testimony, and exhibits for want of equity, no opinion being written, and the ground for the decision not being set forth in the order, except that the complaint was dismissed 'for want of equity,' the case then being appealed by the complainants to the U. S. circuit court of appeals of the seventh circuit, and thereupon dismissed thereafter.

"The circuit court of appeals in the second circuit, in the case of the Consolidated Rubber Tire Co. v. Diamond Rubber Co. 85 C. C. A. 349, 157 Fed. 678, and on rehearing (89 C. C. A. 582, 162 Fed. 892), held that the patent was valid and infringed by the defendant.

"The Supreme Court of the United States affirmed this decision in 220 U. S. 428, 55 L. ed. 527, 31 Sup. Ct. Rep. 444, and held that the patent was valid and infringed by the defendant.

"None of these cases were for infringement in Hurd's exclusive territory.

"In view of the ruling of the Supreme Court in Kessler v. Eldred, 206 U. S. 285, 51 L. ed. 1065, 27 Sup. Ct. Rep. 611, the court of appeals in the second circuit inserted the following clause in the final decree in the case of the Consolidated Rubber Tire Co. v. Diamond Rubber Co. 89 C. C. A. 582, 162 Fed. 895.

[423] " 'Nothing in this injunction shall prevent or is intended to prevent or enjoin this defendant from handling, using, and selling rubber tires and rims covered by the Grant patent, manufactured by the Goodyear Tire & Rubber Company, having a right to manufacture, use, and sell such tires under a judicial decree in the Federal courts of the sixth circuit; or manufactured by the Kokomo Rubber Company, having a right to manufacture, use, and sell such tires under a judicial decree in the district of Indiana, seventh circuit; or manufactured by the Victor Rubber Tire Company, under a judicial decree in a litigation in the Federal courts in the sixth circuit, wherein in such litigations it has been judicially determined that the said Grant patent is invalid and void.'

"After the decision of the Supreme Court sustaining the Grant patent, Hurd commenced this suit, joining with him the legal owner and licensee of the patent, against defendants residing and doing business within Hurd's exclusive territory. Defendants purchased the infringing tires from the Diamond Rubber Company of New York, which was the defendant in the former litigation, and at the city of New York, and such tires were delivered to defendants at the city of New York, and then taken to Albany, complainant Hurd's territory, and the rubber, metal channel, and retaining wires were there assembled and attached to the wheel rim by defendants, and not by the Kokomo Company or the Diamond Rubber Company of New York.

"Defendants now claim that the infringing tires used by them in their business were made by the Kokomo Rubber Company and sold to them by the Diamond Rubber Company of and at New York city, said Ko-

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komo Company being the defendant in the action in the district of Indiana, where the complaint wa. dismissed for want of equity.

"Defendants claim that under the ruling of the Supreme [424] Court in the case of Kessler v. Eldred, supra, the Kokomo Company have the right to manufacture the infringing tires, and that the tires so made are free from the monopoly of the patent, and the users of the tires made by the Kokomo Company are immune from prosecution, and such tires may be used and sold by anyone.

"On the other hand, it is claimed by complainants that the doctrine of the case of Kessler v. Eldred does not apply here for the reason that the patent has since been held valid by the Supreme Court, and that the complainant Hurd had possession of his limited territory under his exclusive license before any of the suits in question were commenced, and was not a party to those actions, and had no control over any of those actions, and is not privy to the parties in those actions, and is therefore not bound by the decisions in those actions; also that the decision in Kessler v. Eldred was upon the ground that a decree that an article in question is, or is not, an infringement of the patent, is *res judicata* as to similar articles only, and does not apply to a case where the patent was held void by the lower court, and afterward held valid by the Supreme Court, and also that no specific ground for the decision in the case against the Kokomo Company having be stated by the court, the reasons for that decision cannot now be inferred, and such decision cannot be binding upon any person not a party to that action.

Questions Certified.

"The court entertaining a doubt as to which is the correct interpretation to be put upon the opinion in Kessler v. Eldred, upon the facts set forth above, desires the instruction of the Supreme Court for the proper decision of this appeal, and to that end it certifies to the Supreme Court under § 6 of the court of appeals act, for its instruction, the following questions:

"1st. Has the Kokomo Company the right to manufacture [425] the infringing tires free from the monopoly of the patent?

"2d. Are purchasers and users of infringing tires made by the Kokomo Company immune from prosecution by the owners of the patent?

"3d. Are the defendants immune from prosecution by the complainant Hurd for using and selling the infringing tires made by the Kokomo Company, and sold and delivered to them by the Diamond Rubber Company of New York, at the city of New York, in the exclusive territory conveyed to Hurd prior to the commencement of the action against the Kokomo Company?

"4th. If the Kokomo Company is immune in making the infringing rubber, which is only one element of the combination of the patent, are its customers who purchase the rubber of the Kokomo Company and the metal rims and retaining wires of other parties, and sell them to be assembled upon wheel rims, making the completed structure of the patent, also immune from prosecution?"

Mr. **Charles K. Offield** argued the cause and filed a brief for William Seim et al.

Mr. **Walter E. Ward** argued the cause and filed a brief for James D. Hurd et al.

Mr. Justice **Hughes**, after making the above statement, delivered the opinion of the court:

Hurd, a licensee for a limited territory under the Grant patent for rubber tires, joining with him the legal owner of the patent and the holder of an exclusive license subject to the rights of Hurd and another, brought suit against Seim and Reissig, for infringement. It is stated that the defendants purchased the infringing tires from the Diamond Rubber Company of New York, and, also, that it is the contention of the defendants that these tires were bought by the Diamond Rubber Company from the [426] Kokomo Company. The patent had been sustained in a suit against the Diamond Rubber Company (89 C. C. A. 582, 162 Fed. 895, 220 U. S. 428, 55 L. ed. 527, 31 Sup. Ct. Rep. 444), but by a provision in the final decree there was excepted from the operation of the injunction tires manufactured by parties to other suits in which the patent had been declared invalid, naming, among others, the Kokomo Company.

The further statement of the certificate, however, makes it plain that the defendants did not purchase the patented structure, but made it themselves. The statement is that "such tires" (referring to those purchased by the defendants) "were delivered to defendants at the city of New York, and then taken to Albany, complainant Hurd's territory, and the rubber, metal channel, and retaining wires were there assembled and attached to the wheel rim by defendants, and not by the Kokomo Company or the Diamond Rubber Company of New York."

The elements in the Grant structure were old. There had been previous combinations of rubber, metal channels, and retaining wires in the effort to produce a successful

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rubber tire (220 U. S. pp. 438, 439). The claims of the Grant patent were narrow and were limited closely to a specified combination which, through the co-operation of the various parts, when these were correlated in the precise adjustment described, produced a new and useful result.

It is thus apparent that the defendants themselves constructed the device, effecting that union of the separate elements which alone could bring the structure within the patent claims. In this aspect, it is immaterial from whom they bought the rubber or the wires or the channel. It is not the case of the purchase of the article in question from one who had a right to sell. There was no actual infringement until they made the tire, and for their act in making it they could not escape liability by the purchase of parts from others. See Rubber Tire Wheel Co. v. [427] Goodyear Tire & Rubber Co. decided this day [232 U. S. 413, ante, 663, 34 Sup. Ct. Rep. 403].

None of the questions certified is apposite to the facts as we understand the certificate to state them. It may have been the intention by the use of the words "infringing tires" in the first, second, and third questions to refer to the rubber stock only. It seems to be conceded in the arguments of both parties that the rubber alone is made by the Kokomo Company. But the questions, as put, are not raised by the case made, and for that reason they must go unanswered. Neither the right of the Kokomo Company to make the Grant structure, nor the right of a purchaser or user of that structure, if made and sold by the Kokomo Company, is involved.

The fourth question is as follows:

"If the Kokomo Company is immune in making the infringing rubber, which is only one element of the combination of the patent, are its customers, who purchase the rubber of the Kokomo Company and the metal rims and retaining wires of other parties, and sell them, to be assembled upon wheel rims, making the completed structure of the patent, also immune from prosecution?"

A similar question is answered in the case of Woodward Co. v. Hurd, decided this day [232 U. S. 428, infra, 670, 34 Sup. Ct. Rep. 409], but it is not presented by the facts of the present case. There is no suggestion that the defendants here purchased the various parts and sold them to be assembled by their customers, but, on the contrary, as we have said, the defendants made the structure themselves.

In view of the form of the questions, the certificate must be dismissed.

Dismissed.

[428] WOODWARD COMPANY v. JAMES D. HURD, Consolidated Rubber Tire Company, and Rubber Tire Wheel Company.

(See S. C. Reporter's ed. 428–430.)

Judgment — conclusiveness — in patent case.

A decree dismissing for want of equity a suit for the infringement of the Grant patent No. 554,675 for an improvement in rubber-tired wheels consisting of a solid rubber tire held in place in a flaring channel by the tension of two tightly drawn wires imbedded in the rubber within the periphery of the flanges affords no defense to defendant's customers against a charge of contributory infringement (the patent having afterwards been upheld by the Federal Supreme Court in another suit) based upon their purchase of the rubber from defendant, and the metal channel and retaining wires from other parties, and the resale of these various elements with the intent that they shall be assembled and combined by the purchasers into the patented structure.

[For other cases, see Judgment, 581–587, in Digest Sup. Ct. 1908.]

[No. 142.]

Argued December 17, 1913. Decided February 24, 1914.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit, presenting four questions as to the immunity of the successful defendant in a patent infringement suit, and its customers, from subsequent prosecutions for infringement. Fourth question answered in the negative; other questions unanswered.

The facts are stated in the opinion.

Mr. Charles K. Offield argued the cause and filed a brief for the Woodward Company.

Mr. Walter E. Ward argued the cause and filed a brief for James D. Hurd et al.

Mr. Justice Hughes delivered the opinion of the court:

The recitals of the certificate with respect to the Grant patent, and the decrees which have been rendered in suits brought for its

NOTE.—On conclusiveness of judgments, generally, see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson County v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

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infringement, are identical with those contained in the certificate in Seim v. Hurd, decided this day [232 U. S. 420, ante, 667, 34 Sup. Ct. Rep. 406]. The questions certified are, in substance, the same. The facts of the present case are thus stated in the certificate:

"After the decision of the Supreme Court sustaining the Grant patent, Hurd commenced this suit, joining with him the legal owner and licensee of the patent, against defendants, residing and doing business within Hurd's exclusive territory. Defendant purchased the infringing tires—the rubber portions only, not the metal channel or retaining wires—from the Diamond Rubber Company of [429] New York, which was the defendant in the former litigation, and the rubber, metal channels, and retaining wires were sold by the defendant, the Woodward Company, to be assembled and attached to the wheel rim of its purchasers, and not by the Kokomo Company.

"Defendants now claim that the infringing tires—the rubber stock only—used by them in their business was made by the Kokomo Rubber Company, which was the defendant in the action in the district of Indiana, where the complaint was dismissed for want of equity, and sold to them by the Diamond Rubber Company of New York, at the city of New York, and there delivered."

It thus appears that the Kokomo Company did not make the patented device, but only one of its elements,—the rubber stock. Nor did the defendant itself make the patented article. The defendant, buying from the Diamond Company the rubber that had been made by the Kokomo Company, and otherwise obtaining the necessary channel of metal and the retaining wires, sold all the parts to be united into the patented structure by its customers. Neither the right of the Kokomo Company, by virtue of the decree in its favor, to make and sell the patented thing, or to make and sell its rubber, nor its right to have the commodity which it lawfully produces freely move as an article of commerce through the channels of trade without hindrance by the owners of the patent, is here involved. See Rubber Tire Wheel Co. v. Goodyear Tire & Rubber Co. decided this day [232 U. S. 413, ante, 663, 34 Sup. Ct. Rep. 403]. The case as stated concerns the liability of the defendant as a contributory infringer upon the assumption that, in the manner described, it assembles the various elements essential to the making of the Grant tire, and sells them with the intent and purpose that they shall be so combined.

Can the defendant demand immunity upon the ground that one of the elements in which it dealt was made and sold by the Kokomo Company? We think not. It is not [430] simply a purchaser of, or dealer in, that which the Kokomo Company produces. The defendant goes beyond that; it buys from others the parts that are as much needed in effecting the patented combination as the rubber itself, and sells them in order that the infringing device may be constructed by its customers.

The fourth question which is certified by the court below is:

"If the Kokomo Company is immune in making the infringing rubber, which is only one element of the combination of the patent, are its customers who purchase the rubber of the Kokomo Company and the metal rims and retaining wires of other parties, and sell them to be assembled upon wheel rims, making the completed structure of the patent, also immune from prosecution?"

We answer this question in the negative. The other questions are not raised by the case made, and hence are left unanswered. It is so ordered.

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, Plff. in Err.,
v.
CITY OF MINNEAPOLIS.

(See S. C. Reporter's ed. 430–442.)

Constitutional law — due process of law — imposing special burden on railway company.

The expense of constructing and maintaining the necessary bridge over the gap in a railway right of way made by the mu-

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NOTE.—On the power to compel a railroad to establish or maintain at its own expense overhead or underground crossing, as affected by the fact that the street or highway is opened subsequently to the construction of the railroad—see note to State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 28 L.R.A.(N.S.) 298.

As to the power to lay out streets or highways across railway property or right of way—see note to Louisville & N. R. Co. v. Louisville, 24 L.R.A.(N.S.) 1213.

As to the necessity of making compensation upon laying out streets across railway property, and the measure thereof, including damages for constructing the crossing and necessary safety appliances—see note to New York, C. & St. L. R. Co. v. Rhodes, 24 L.R.A.(N.S.) 1225.

On the duty of a railroad company to construct bridges at its own expense over public drainage ditches—see note to Chicago, B. & Q. R. Co. v. Appanoose County, 31 L.R.A.(N.S.) 1118.

On canal as navigable water—see note to State ex rel. Lyon v. Columbia Water Power Co. 22 L.R.A.(N.S.) 435.

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nicipal construction across it of a canal or water way with footpaths on each side connecting two lakes used for public recreation may be cast upon the railway company without denying it the due process of law guaranteed by the Federal Constitution.

[For other cases, see Constitutional Law, 458–466, in Digest Sup. Ct. 1908.]

[No. 150.]

Argued December 19, 1913. Decided February 24, 1914.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the District Court for Hennepin County, in that state, in a controversy submitted upon an agreed statement of facts presenting the question as to the right of a railway company to compensation for bridging the gap in its right of way made by the municipal construction of a canal. Affirmed.

See same case below, 115 Minn. 460, — L.R.A.(N.S.) —, 133 N. W. 169, Ann. Cas. 1912D, 1029.

The facts are stated in the opinion.

Mr. F. W. Root argued the cause, and, with Mr. Burton Hanson, filed a brief for plaintiff in error:

Counsel for the city will be unable to cite the court to any respectable case which applies the doctrine of police power to the acquisition of private property, to the compulsory outlay of private funds, not to the avoidance or correction of something injurious to the community, but to the provision of some mere pleasure to either the few or the many.

Contrast the holding of the state supreme court in our case with the sedulous care exhibited by that court for the property of the individual citizen since the amendment to the state Constitution, which forbids damage to private property without compensation.

Sallden v. Little Falls, 102 Minn. 358, 13 L.R.A.(N.S.) 790, 120 Am. St. Rep. 635, 113 N. W. 884.

Mr. Chelsea J. Rockwood argued the cause and filed a brief for defendant in error:

Railways are charged with the duty of separating grades, or adopting other safety devices, at their own expense.

State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3; State ex rel. Minneapolis v. Minneapolis & St. L. R. Co. 39 Minn. 219, 39 N. W. 153; State ex rel. St. Paul, M. & M. R. Co. v. District Ct. 42 Minn. 247, 7 L.R.A. 121, 44 N. W. 7; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047, affirmed in 214 U. S. 497, 53 L. ed. 1060, 29 Sup. Ct. Rep. 698; State ex rel. Duluth v. Northern P. R. Co. 98 Minn. 429, 108 N. W. 269, affirmed in 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341; State ex rel. Faribault v. Wisconsin, M. & P. R. Co. 98 Minn. 536, 108 N. W. 822; Minneapolis v. Minneapolis Street R. Co. 115 Minn. 514, 133 N. W. 80; Twin City Separator Co. v. Chicago, M. & St. P. R. Co. 118 Minn. 491, 137 N. W. 193; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Detroit, Ft. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. Rep. 540; St. Louis & S. F. R. Co. v. Fayetteville, 75 Ark. 534, 87 S. W. 1174; Woodruff v. Catlin, 54 Conn. 277, 6 Atl. 849; Cleveland v. Augusta, 102 Ga. 233, 43 L.R.A. 638, 29 S. E. 584; Chicago & N. W. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109; Chicago, B & Q. R. Co. v. Chicago, 149 Ill. 457, 37 N. E. 78, affirmed in 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Lake Erie & W. R. Co. v. Shelley, 163 Ind. 36, 71 N. E. 151; Cincinnati, I. & W. R. Co. v. Connersville, 170 Ind. 316, 83 N. E. 503; New York, C. & St. L. R. Co. v. Rhodes, 171 Ind. 521, 24 L.R.A. (N.S.) 1225, 86 N. E. 840; Boston & M. R. Co. v. York County, 79 Me. 386, 10 Atl. 113; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 624; Lake Shore & M. S. R. Co. v. Sharpe, 38 Ohio St. 150; Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625; Chicago, M. & St. P. R. Co. v. Milwaukee, 97 Wis. 418, 72 N. W. 1118.

As a necessary corollary, the measure of damages, in the absence of a statute on the subject, in taking an easement for the crossing of a railway for highway purposes, does not include the cost of bridges and other safety devices.

State ex rel. St. Paul, M. & M. R. Co. v. District Ct. 42 Minn. 247, 7 L.R.A. 121, 44 N. W. 7; Chicago, B. & Q. R. Co. v. Chicago, 149 Ill. 457, 37 N. E. 78, affirmed in 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Cincinnati, I. & W. R. Co. v. Connersville, 170 Ind. 316, 83 N. E. 503, affirmed in 218 U. S. 336, 54 L. ed. 1060, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206; St. Louis & S. F. R. Co. v. Fayetteville, 75 Ark. 534, 87 S. W. 1174; Chicago & N. W. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109; Lake Erie & W. R. Co. v. Shelley, 163 Ind. 36, 71 N. E. 151; New York, C. & St. L. R. Co. v. Rhodes, 171 Ind. 521, 24 L.R.A.(N.S.) 1225, 86 N. E. 840; Mason City & Ft. D. R. Co. v. Board of Supervisors, 144 Iowa, 10, 121

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N. W. 690; Louisville & N. R. Co. v. Louisville, 131 Ky. 108, 24 L.R.A.(N.S.) 1213, 114 S. W. 743; Albany Northern R. Co. v. Brownell, 24 N. Y. 345; People ex rel. Buffalo v. New York C. & H. R. R. Co. 156 N. Y. 570, 51 N. E. 312; Lehigh Valley R. Co. v. Canal Bd. 204 N. Y. 476, 97 N. E. 964, Ann. Cas. 1913C, 1228; Southern Kansas R. Co. v. Oklahoma, 12 Okla. 82, 69 Pac. 1050.

The right of the public to convenient crossings, and the duty of protection to the public, exist at common law.

State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 400, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047; Chicago & Erie R. Co. v. Luddington, 175 Ind. 35, 91 N. E. 939, 93 N. E. 273; Pittsburgh, C. C. & St. L. R. Co. v. Gregg, — Ind. —, 102 N. E. 961.

The same rule applies to waterways, natural and artificial.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518, affirming 214 Ill. 9, 73 N. E. 393; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Chicago, B. & Q. R. Co. v. Appanoose County, 31 L.R.A.(N.S.) 1117, 104 C. C. A. 573, 182 Fed. 291; Chicago & E. R. Co. v. Luddington, 175 Ind. 35, 91 N. E. 939, 93 N. E. 273; Mason City & Ft. D. R. Co. v. Board of Supervisors, 144 Iowa, 10, 121 N. W. 690; Lehigh Valley R. Co. v. Canal Bd. 204 N. Y. 476, 97 N. E. 964, Ann. Cas. 1913C, 1228.

Lands and waters reserved for the recreation of the people are devoted to a public use, a use as fully entitled as any other to the protection of the law.

Lamprey v. State, 52 Minn. 181, 18 L.R.A. 670, 38 Am. St. Rep. 541, 53 N. W. 1139; State Park Comrs. v. Henry, 38 Minn. 266, 36 N. W. 874; Shoemaker v. United States, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361; Smart v. Aroostook Lumber Co. 103 Me. 37, 14 L.R.A.(N.S.) 1083, 68 Atl. 527; Atty. Gen. v. Woods, 108 Mass. 436, 11 Am. Rep. 380; Atty. Gen. v. Williams (Knowlton v. Williams), 174 Mass. 476, 47 L.R.A. 314, 55 N. E. 77; Grand Rapids v. Powers, 89 Mich. 94, 14 L.R.A. 498, 28 Am. St. Rep. 276, 50 N. W. 661; People v. Adirondack R. Co. 160 N. Y. 248, 54 N. E. 689, affirmed in 176 U. S. 335, 44 L. ed. 492, 20 Sup. Ct. Rep. 460; Re New York, 167 N. Y. 624, 60 N. E. 1108, affirming 57 App. Div. 166, 68 N. Y. Supp. 196; State ex rel. Lyon v. Columbia Water Power Co. 82 S. C. 181, 22 L.R.A.(N.S.) 435, 129 Am. St. Rep. 876, 63 S. E. 884, 17 Ann. Cas. 343; Madson v. Spokane Valley Land & Water Co. 40 Wash. 414, 6 L.R.A.(N.S.) 257, 82 Pac. 718.

[436] Mr. Justice **Hughes** delivered the opinion of the court:

This is a writ of error to review a judgment of the supreme court of the state of Minnesota, which affirmed a judgment entered in a controversy submitted upon an agreed statement of facts. The statement, in substance, shows:

Within the limits of the city of Minneapolis are Lake Calhoun, Lake of the Isles, and Cedar lake, lying in close proximity to each other, and used by the public for pleasure boating and other recreations. The city, having acquired for park and parkway purposes the shores of Lake Calhoun and Lake of the Isles, and a portion of the shores of Cedar lake, together with large tracts of land in the vicinity, is engaged in constructing two canals which will connect the lakes and will greatly enhance their usefulness to the public. Between Lake Calhoun and Lake of the Isles is a strip of land, 600 feet wide in its narrowest part, through which one of these canals is to be opened. Along this strip and near its center lies the right of way—100 feet in width—of the appellant, the Chicago, Milwaukee, & St. Paul Railway Company, which is used by it in the operation of its road. The city, in order to provide for the canal and walks on either side, seeks to condemn an easement in a piece of land 100 feet wide across the right of way. The two lakes are now connected by a small water course which crosses the right of way about 59 feet from the center of the proposed canal, and is carried under the railway tracks by a pipe about 3 feet in diameter. The construction of the canal will render the water course and pipe useless and permit the closing of this channel. At the point where the land is to be taken by the city, the railway tracks are upon an artificial embankment about 18 feet above the established level of the [437] water in the lakes. The city's improvement will require the construction of a bridge to carry the tracks across the canal and walks. The agreed value of the mere land proposed to be taken, irrespective of the cost of the bridge, is the sum of $10; and the estimated cost of building a bridge in accordance with plans prepared by the city and accepted by the railway company is the sum of $18,513. It is agreed that an adequate bridge for railway purposes, built according to the plans usually adopted by the railway company, would cost only $15,969. The difference in cost, or $2,544, is due to ornamental features, and this amount it is agreed that, in any event, the

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city shall pay. For the purposes of this proceeding, the railway company conceded the authority of the city to take the described land under the power of eminent domain; and it was agreed accordingly that the city should take the land and construct the canal and walks, and that the railway company should build the bridge after the city's plans; but no claim for damages or compensation to which the railway company was entitled under the law by reason of the taking was waived.

The controversy submitted was as to the amount which the company should receive. It was contended by the company that it should be paid (1) the sum of $10 as the agreed value of the land taken, (2) the entire cost of the bridge, and (3) such further sum as would be sufficient to maintain the bridge. It was also insisted that to divest it of its property without such payment would be a violation both of the state Constitution and of § 1 of the 14th Amendment to the Federal Constitution. In the court of first instance it was held that the company was entitled to recover only the sum of $2,554, being the value of the land and the cost of the ornamental features of the bridge; and this judgment was affirmed by the supreme court of the state. 115 Minn. 460, 51 L.R.A.(N.S.) 236, 133 N. W. 169, Ann. Cas. 1912D, 1029.

The question thus presented is whether the refusal [438] to allow compensation for the cost of constructing and maintaining the necessary railroad bridge across the gap in the right of way, made by the building of the canal, amounts to a deprivation of property without due process of law.

It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways. New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 252, 255, 41 L. ed. 979, 990, 991, 17 Sup. Ct. Rep. 581; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 597, 52 L. ed. 630, 636, 28 Sup. Ct. Rep. 341; St. Paul, M. & M. R. Co. v. Minnesota, 214 U. S. 497, 53 L. ed. 1060, 29 Sup. Ct. Rep. 698; Cincinnati, I. & W. R. Co. v. Connersville, 218 U. S. 336, 343, 344, 54 L. ed. 1060, 1064, 1065, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206. See also Detroit, Ft. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. Rep. 540; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 462, 49 L. ed. 831, 835, 25 Sup. Ct. Rep. 471; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 593, 50 L. ed. 596, 609, 610, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Atlantic Coast Line R. Co. v. Goldsboro, decided this day [232 U. S. 548, ante, 721, 34 Sup. Ct. Rep. 364]. The rule, as established in the state of Minnesota, was thus declared in the case of State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047 (see 115 Minn. p. 466): "A railroad company receives its charter and franchise subject to the implied right of the state to establish and open such streets and highways over and across its right of way as public convenience and necessity may, from time to time, require. That right on the part of the state attaches by implication of law to the franchise of the railroad company, and imposes upon it an obligation to construct and maintain at its own expense suitable crossings at new streets and highways to the same extent as required by the rules of the common law at streets and highways in existence when the railroad was constructed." In that case, it appeared that long after the construction of the railroad, the city of Minneapolis had laid [439] out a street across the railroad right of way, building at its own cost a bridge over the railroad tracks. After the bridge had been maintained for several years by the city it was destroyed by fire, and the city then demanded that the railroad company should build a new one. This demand the state court sustained; and, mandamus having thereupon been awarded (101 Minn. 545, 112 N. W. 1142), the case was brought to this court, one of the grounds being that the action of the state deprived the company of its property without due process of law. The judgment was affirmed (St. Paul, M. & M. R. Co. v. Minnesota, 214 U. S. 497, 53 L. ed. 1060, 29 Sup. Ct. Rep. 698), this conclusion being reached upon the authority of Northern P. R. Co. v. Duluth, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341. Although the Duluth Case was earlier in this court, the decision therein by the supreme court of the state immediately followed that of the same court in the Minneapolis Case, and applied the principle which had been there announced. State ex rel. Duluth v. Northern P. R. Co. 98 Minn. 429, 108 N. W. 269. The facts were that after the railroad had been built, a street had been opened across the right of way, and subsequently a viaduct for the crossing had been constructed at the joint expense of the city and the railroad company, the

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former agreeing to maintain it. Later, the city, repudiating the agreement, insisted that the company should repair the viaduct at its own expense. The state court entered judgment for the city, holding that the obligation to construct and maintain the viaduct rested upon the railroad company, and that hence the contract was invalid. This court affirmed the judgment, saying: "As the supreme court of Minnesota points out in the opinion in 98 Minn. 380, . . . the state courts are not altogether agreed as to the right to compel railroads, without compensation, to construct and maintain suitable crossings at streets extended over its right of way, after the construction of the railroad. The great weight of state authority [440] is in favor of such right. See cases cited in 98 Minn. 380. There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against the impairment of the obligation of contracts. . . . In this case the supreme court of Minnesota has held that the charter of the company, as well as the common law, required the railroad, as to existing and future streets, to maintain them in safety, and to hold its charter rights subject to the exercise of the legislative power in this behalf, and that any contract which undertook to limit the exercise of this right was without consideration, against public policy, and void. This doctrine is entirely consistent with the principles decided in the cases referred to in this court."

In Cincinnati, I. & W. R. Co. v. Connersville, 218 U. S. 336, 343, 344, 54 L. ed. 1060, 1064, 1065, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206, a street was opened through an embankment upon which the railroad tracks were laid. At the time of the construction of the railroad that part of the embankment was outside the city limits. But the city was extended, and the intersecting street was laid out in order to provide a suitable means of communication between the parts of the city on either side of the embankment. On reviewing the judgment entered in the condemnation proceeding, it was held that there was no violation of the 14th Amendment in refusing to allow to the company the cost of building a bridge for its tracks over the opening made by the street. "The question," said the court, "as to the right of the railway company to be reimbursed for any moneys necessarily expended in constructing the bridge in question is, we think, concluded [441] by former decisions of this court. . . . The railway company accepted its franchise from the state, subject necessarily to the condition that it would conform at its own expense to any regulations, not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might, from time to time, be established by the municipality, when proceeding under legislative authority, within whose limits the company's business was conducted. . . . Without further discussion, . . . we adjudge, upon the authority of former cases, that there was no error in holding that the city could not be compelled to reimburse the railway company for the cost of the bridge in question."

Under the doctrine of these decisions, it necessarily follows that if the city of Minneapolis had opened a public road through the embankment of the plaintiff in error, the latter would have had no ground to complain that its constitutional rights had been violated because it was compelled to bridge the gap at its own cost. No different rule could be applied because the highway was laid out in order to increase the advantages of a public park. In this aspect, it would be equally a crossing devoted to the public use (Shoemaker v. United States, 147 U. S. 282, 297, 37 L. ed. 170, 184, 13 Sup. Ct. Rep. 361); and we see no basis for a distinction in principle in the case of an intersecting public road opened under competent authority because such a highway might lead to public recreation grounds instead of to places of business, or might connect lakes instead of avenues.

If there is a distinction in the present case, it must lie in the fact that the crossing is an artificial waterway instead of a road. But it is none the less a public highway, established to afford an appropriate place of public passage. Walks are provided for those who go afoot, and it does not concern the plaintiff in error that others go in [442] boats instead of vehicles. "The way sought to be established," said the supreme court of Minnesota, "a canal or waterway, with walks along each side," was "clearly a public way, subject to the rules governing public ways." It cannot make a difference in the constitutional rights of the railway company that this way was not constructed entirely, or chiefly, of solid earth; it is the fact, and not the mode, of public passage, that is

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controlling. The case must be regarded as being one of a public crossing provided by law; and the authorities we have cited lead to the conclusion that the state, without infringing the guaranties of the Federal Constitution, could require the railway company to make suitable provision for carrying its tracks over the crossing without compensation.

The judgment is affirmed.

Affirmed.

UNITED STATES, Plff. in Err.,
v.
SAM PELICAN and Tony Ponterre, alias Alex Licomte.

(See S. C. Reporter's ed. 442–452.)

Indians — opening reservation to settlement — excepted lands — individual allotments.

1. Lands allotted in severalty to individual Indians under the act of July 1, 1892 (27 Stat. at L. 62, chap. 140), were excepted from that part of the Colville Indian Reservation which was restored to the public domain by that act "subject to the reservations and allotment of lands in severalty to the individual members of the Indians of the Colville Reservation," for which such act provided, and which was thrown open to settlement by the President's proclamation of April 10, 1900 (31 Stat. at L. 1963), which saved and excepted such tracts as had been or might be "allotted to, or reserved or selected for, the Indians, or other purposes," under the governing statutes.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indians — Federal control — crimes in Indian country.

2. Land allotted to an Indian under the act of July 1, 1892 (27 Stat. at L. 62, chap. 140), and therefore excepted from that part of the Colville Indian Reservation which was restored to the public domain by that act, is, during the trust period, "Indian country," within the meaning of U. S. Rev. Stat. § 2145, extending to the Indian country certain general laws of the United States as to the punishment of crime.

[For other cases, see Indians, 23–28, 45–50, in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — crimes in Indian country.

3. The killing of an Indian allottee during the trust period by persons not of Indian blood, when committed upon land allotted to him by the act of July 1, 1892, within that part of the Colville Indian Reservation which was restored to the public domain by that act, is cognizable in the Federal courts under U. S. Rev. Stat. § 2145, which extends to the Indian country certain general laws of the United States as to the punishment of crime.

[For other cases, see Courts, 1454–1458, in Digest Sup. Ct. 1908.]

NOTE.—On jurisdiction to punish crimes committed by or against Indians—see note to State v. Campbell, 21 L.R.A. 169.

On Federal control of Indians—see note to Worcester v. Georgia, 8 L. ed. U. S. 484.

[No. 787.]

Argued January 13, 1914. Decided February 24, 1914.

IN ERROR to the District Court of the United States for the Eastern District of Washington to review a judgment sustaining a demurrer to an indictment for the murder of an Indian allottee. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Assistant Attorney General Wallace argued the cause and filed a brief for plaintiff in error:

Every question in this case is foreclosed in favor of the government's contention, save the effect of the act of July 1, 1892, and the proceedings had thereunder.

Donnelly v. United States, 228 U. S. 271, 57 L. ed. 832, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913E, 710.

The allotment under the act of July 1, 1892 (providing for proceedings after selection, pursuant to the act of 1887, as amended), did not deprive Louie of his character as an Indian.

Eells v. Ross, 12 C. C. A. 207, 29 U. S. App. 59, 64 Fed. 417; United States v. Celestine, 215 U. S. 287, 54 L. ed. 198, 30 Sup. Ct. Rep. 93.

The disparaging reference, in §§ 1 and 8 of the act, to the previous Executive order creating the reservation, cannot lessen the force of the latter, nor the title or rights of the Indians in the lands; neither can they be affected by the declaration, in the closing section of the act, that it is not to be construed as recognizing any title in the Indians; for, whatever Congress then said, these Indians had, as a matter of law and by force of the Executive order and earlier acts of Congress, referring to and recognizing the reservation, the very same right in the land as if it had been carved out of their own previous occupancy.

Re Wilson, 140 U. S. 577, 35 L. ed. 514, 11 Sup. Ct. Rep. 870; McFadden v. Mountain View Min. & Mill. Co. 38 C. C. A. 354, 97 Fed. 670.

Because this allotment was a part of the Colville Reservation, and therefore "Indian country" (at least before the passage of the act of July 1, 1892), jurisdiction in the district court would have attached under § 2145 of the Revised Statutes, and would continue to attach after the passage of that

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act, unless, as a result of the act or its operation, the land in the "Agnes" allotment had ceased to be Indian country. Allotments while held in trust, if selected from reservation lands, would not cease to be "Indian country."

Bates v. Clark, 95 U. S. 209, 24 L. ed. 473; United States v. Celestine, 215 U. S. 284, 285, 54 L. ed. 197, 30 Sup. Ct. Rep. 93; United States v. Sutton, 215 U. S. 295, 54 L. ed. 202, 30 Sup. Ct. Rep. 116; Monson v. Simonson, 231 U. S. 341, ante, 260, 34 Sup. Ct. Rep. 71; United States v. Gardner, 189 Fed. 690.

The allotment was excepted from the operation of the act of July 1, 1892, and hence remained a part of the Indian country.

McFadden v. Mountain View Min. & Mill. Co. 38 C. C. A. 354, 97 Fed. 677.

The argument of inconvenience, dwelt on by the court below, and suggested in Ex parte Moore, 28 S. D. 339, 133 N. W. 817, cited in the court's opinion, which seems formidable at first, becomes less so upon analysis.

Donnelly v. United States, 228 U. S. 271, 57 L. ed. 832, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913E, 710; Dick v. United States, 208 U. S. 351, 52 L. ed. 524, 28 Sup. Ct. Rep. 399; United States v. 43 Gallons of Whiskey (United States v. Lariviere) 93 U. S. 193, 195, 197, 23 L. ed. 846–848; United States v. Sutton, 215 U. S. 295, 54 L. ed. 202, 30 Sup. Ct. Rep. 116; Starr v. Long Jim, 227 U. S. 621, 57 L. ed. 674, 33 Sup. Ct. Rep. 358; United States v. Celestine, 215 U. S. 285, 54 L. ed. 197, 30 Sup. Ct. Rep. 93; United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478; Marchie, Tiger v. Western Invest. Co. 221 U. S. 286, 312, 55 L. ed. 738, 748, 31 Sup. Ct. Rep. 578.

No appearance for defendant in error.

[444] Mr Justice **Hughes** delivered the opinion of the court:

The defendants were indicted for the murder, on August 30, 1913, of Ed Louie, a full-blood Indian and a member of the Colville tribe. It was charged that the crime was committed "at a point about 9 miles northwest of the town of Curlew, in the county of Ferry, state of Washington, in the Indian country, to wit, upon the allotment of one Agnes, an Indian, being lot 3 of section 26, and lot 9 of section 35, in township 40 north, or range 32 E. W. M., in the northern division of the eastern district of Washington, said land being then held in trust by the United States for the said Agnes for the period of twenty-five years from the date of the trust patent; to wit, from the 6th day of December, A. D., 1909."

The indictment was based upon § 2145 of the Revised Statutes, which provides that, save as stated, "the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country" (see Rev. Stat. § 5339, U. S. Comp. Stat. 1901, p. 3627; Criminal Code, 35 Stat. at L. 1088, chap. 321, U. S. Comp. Stat. Supp. 1911, p. 1588, §§ 272, 273, 341).

A demurrer was filed upon the ground that it did not appear that the crime had been committed within "the Indian country," and hence that the court was without jurisdiction. In connection with the hearing upon the demurrer the parties stipulated that the land described in the indictment as the place of the crime had been allotted to the Indian Agnes under the act approved February 8, 1887 [24 Stat. at L. 388, chap. 119], and the act in amendment and extension thereof approved February 28, 1891 [26 Stat. at L. 794, chap. 383], and that this land was situated on that part of the Colville Indian Reservation which had been opened to settlement and entry by [445] the act of Congress. See act of July 1, 1892, 27 Stat. at L. 62, chap. 140. The district court, holding that the Agnes allotment was not a part of the Indian country within the meaning of the statute, sustained the demurrer; and the government brings this writ of error under the criminal appeals act, March 2, 1907 (34 Stat. at L. 1246, chap. 2564).

There can be no doubt that the Colville Reservation, set apart by Executive order on July 2, 1872 (Exec. Ord. Ind. Reserv. [1912 ed.], 194, 195; 1 Kappler, 915, 916), and repeatedly recognized by acts of Congress,† was a legally constituted reservation. Re Wilson, 140 U. S. 575, 577, 35 L. ed. 513, 514, 11 Sup. Ct. Rep. 870. As such it was included in the "Indian country" to which § 2145 of the Revised Statutes refers, and it was none the less embraced within that description because it had been segregated from the public domain. Donnelly v. United States, 228 U. S. 243, 269, 57 L. ed. 820, 831, 33 Sup. Ct. Rep.

†July 4, 1884, chap. 180, 23 Stat. at L. 76, 79; February 8, 1887, chap. 119, 24 Stat. at L. 388; February 28, 1891, chap. 383, 26 Stat. at L. 794; July 1, 1892, chap. 140, 27 Stat. at L. 62; February 20, 1896, chap. 24, 29 Stat. at L. 9; March 6, 1896, chap. 42, 29 Stat. at L. 44; June 18, 1898, chap. 465, 30 Stat. at L. 475; July 1, 1898, chap. 545, 30 Stat. at L. 571, 593; March 22, 1906, chap. 1126, 34 Stat. at L. 80.

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449, Ann. Cas. 1913E, 710. The inquiry then, is whether, with respect to the part of the original reservation that is comprised in the described allotment, the United States has lost the jurisdiction which it formerly had. The authority of Congress to deal with crimes committed by or against Indians upon the lands within the reservation was not affected by the admission of the state of Washington into the Union (act of February 22, 1889, chap. 180, 25 Stat. at L. 676, 677; Draper v. United States, 164 U. S. 240, 242, 247, 41 L. ed. 419, 420, 421, 17 Sup. Ct. Rep. 107; Donnelly v. United States, 228 U. S. 243, 271, 272, 57 L. ed. 820, 832, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913E, 710); and we pass to the consideration of the effect of the Federal legislation by which the reservation was diminished.

By the act of July 1, 1892, chap. 140, 27 Stat. at L. 62, a specified tract or portion of the reservation—with certain exceptions—was "vacated and restored to the public domain," [446] and it was provided that this tract should be open to settlement and entry by the proclamation of the President, and should be disposed of under the general laws applicable to the disposition of public lands in the state of Washington. The exceptions were made by Congress in order to care for the Indians residing on that portion of the reservation. Every such Indian was entitled to select therefrom 80 acres which were to be allotted to the Indian in severalty (§ 4). The titles to the lands selected were to "be held in trust for the benefit of the allottees, respectively, and afterwards conveyed in fee simple to the allottees or their heirs," as provided in the acts of February 8, 1887 (24 Stat. at L. 388, chap. 119), and February 28, 1891 (26 Stat. at L. 794, chap. 383). Further, certain school and mill lands within the described tract were reserved from the operation of the statute, unless other lands were selected in their stead (§ 6).

The evident purpose of Congress was to carve out of the portion of the reservation restored to the public domain the lands to be allotted and reserved, as stated, and to make the restoration effective only as to the residue. The vacation and restoration which the statute accomplished (§ 1) was thus expressly made "subject to the reservations and allotment of lands in severalty to the individual members of the Indians of the Colville Reservation" for which the act provided. In 1898, in furtherance of the same object, Congress required the completion of the allotments as soon as practicable, and not later than six months after the President's proclamation (act of July 1, 1898, chap. 545, 30 Stat. at L. 571, 593). Accordingly the President issued his proclamation on April 10, 1900, declaring that the restored portion of the reservation would be open to settlement and entry on October 10, 1900, and an appropriate clause was inserted which saved and excepted such tracts as had been or might be "allotted to or reserved or selected for the Indians, or other purposes," [447] under the governing statutes. 31 Stat. at L. 1963, 1965. The government presents extracts from the records of the Department of the Interior which purport to show that the actual allotment to the Indian Agnes, of the land described in the indictment, had been made prior to the date of this proclamation, and we are asked to take notice of that fact. We find it to be unnecessary to pass upon this, but we shall assume, in view of the grounds of the decision below, that the allotment was duly made under the statutory provisions to which we have referred, and it follows that these allotted lands must be demed to be among those excepted from the portion of the reservation which was thrown open to settlement.

Although the lands were allotted in severalty, they were to be held in trust by the United States for twenty-five years for the sole use and benefit of the allottee, or his heirs, and during this period were to be inalienable. That the lands, being so held, continued to be under the jurisdiction and control of Congress for all governmental purposes relating to the guardianship and protection of the Indians, is not open to controversy. United States v. Rickert, 188 U. S. 432, 437, 47 L. ed. 532, 536, 23 Sup. Ct. Rep. 478; McKay v. Kalyton, 204 U. S. 458, 466, 468, 51 L. ed. 566, 570, 571, 27 Sup. Ct. Rep. 346; Couture v. United States, 207 U. S. 581, 52 L. ed. 350, 28 Sup. Ct. Rep. 259; United States v. Celestine, 215 U. S. 278, 290, 291, 54 L. ed. 195, 199, 200, 30 Sup. Ct. Rep. 93; United States v. Sutton, 215 U. S. 291, 54 L. ed. 200, 30 Sup. Ct. Rep. 116; Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 315, 316, 55 L. ed. 738, 749, 31 Sup. Ct. Rep. 578; Hallowell v. United States, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587; United States v. Wright, 229 U. S. 226, 237, 57 L. ed. 1160, 1166, 33 Sup. Ct. Rep. 630. Thus, in the act of January 30, 1897, chap. 109, 29 Stat. at L. 506, relating to the introduction of intoxicating liquor "into the Indian country," it is expressly provided that this term "shall include any Indian allotment while the title to the same shall be held in trust by the government. or while the same shall remain inalienable by the allottee without the consent of the United States." This statute was upheld in United States v. Sutton, 215 U. S. 291, 54 L. ed. 200,

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30 Sup. Ct. Rep. 116, as a valid exercise of Federal power with respect to allotments made under the [448] act of February 8, 1887, within the Yakima Reservation in the state of Washington. Again, in Hallowell v. United States, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587, the Federal jurisdiction under the same statute was sustained with respect to an allotment to an Omaha Indian in Nebraska, the title being held in trust by the government under the act of August 7, 1882 (22 Stat. at L. 341, chap. 434). There it appeared that practically all the lands in the Omaha Reservation had been allotted, and that many of the allotments of deceased Indians had passed into the hands of the whites, without restrictions, under the provisions of the act of May 27, 1902 (32 Stat. at L. 275, chap. 888). Further, the Omaha Indians were exercising the rights of citizenship within the state, and the defendant himself, who was charged with taking liquor to his own allotment, was a citizen and had served as a public officer. The question certified to this court was, in effect, whether the fact that the allotment was held by the government in trust authorized Congress to regulate or prohibit the introduction of liquor. This question was answered in the affirmative, the court saying (p. 324): "In the case at bar, the United States had not parted with the title to the lands, but still held them in trust for the Indians. In that situation its power to make rules and regulations respecting such territory was ample. . . . While for many purposes the jurisdiction of the state of Nebraska had attached, and the Indian as a citizen was entitled to the rights, privileges, and immunities of citizenship, still the United States, within its own territory and in the interest of the Indians, had jurisdiction to pass laws protecting such Indians from the evil results of intoxicating liquors as was done in the act of January 30, 1897, which made it an offense to introduce intoxicating liquors into such Indian country, including an Indian allotment." It cannot be doubted that the power of Congress was quite as complete to punish crimes committed by or against Indians upon [449] allotted lands of this character as to prohibit the introduction of liquor. The present question, then, is not one of power, but whether it can be said that the descriptive term "Indian country," as it is used in § 2145 of the Revised Statutes, is inadequate to embrace these allotments, or, if it is adequate for that purpose, whether Congress, in providing for the allotments, has excluded them from the purview of that statute.

We find no inadequacy in the statutory description. The lands, which, prior to the allotment, undoubtedly formed part of the Indian country, still retain during the trust period a distinctively Indian character, being devoted to Indian occupancy under the limitations imposed by Federal legislation. The explicit provision in the act of 1897, as to allotments, we do not regard as pointing a distinction, but rather as emphasizing the intent of Congress in carrying out its policy with respect to allotments in severalty where these have been accompanied with restrictions upon alienation or provision for trusteeship on the part of the government. In the present case, the original reservation was Indian country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the government. Donnelly v. United States, 228 U. S. 243, 271, 272, 57 L. ed. 820, 832, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913E, 710. The same considerations, in substance, apply to the allotted lands which, when the reservation was diminished, were excepted from the portion restored to the public domain. The allottees were permitted to enjoy a more secure tenure, and provision was made for their ultimate ownership without restrictions. But, meanwhile, the lands remained Indian lands, set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings, the government retaining control.

It is said that it is not to be supposed that Congress has intended to maintain the Federal jurisdiction over hundreds [450] of allotments scattered through territory other portions of which were open to white settlement. But Congress expressly so provided with respect to offenses committed in violation of the act of 1897. Nor does the territorial jurisdiction of the United States depend upon the size of the particular areas which are held for Federal purposes (Criminal Code, § 272 [35 Stat. at L. 1142, chap. 321, U. S. Comp. Stat. Supp. 1911, p. 1671]). It must be remembered that the fundamental consideration is the protection of a dependent people. As the court said in United States v. Rickert, 188 U. S. 432, 437, 47 L. ed. 532, 536, 23 Sup. Ct. Rep. 478, where allotments had been made under the conditions provided by the act of February 8, 1887 (and it was found that the agreement with the Indians, 26 Stat. at L. 1035–1038, chap. 543, did not indicate any different relation of the United States to the allotted lands from that created or recognized by that act): "These Indians are yet wards of the nation, and a condition of pupilage or dependency, and

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have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889, ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship." It is true that by § 6 of the act of 1887 it was provided that upon the completion of the allotments and the patenting of the lands to the allottees under that act, every allottee should "have the benefit of and be subject to the laws, both civil and criminal, of the state or territory" in which he resided. See Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506. But, by the act of May 8, 1906, chap. 2348 (34 Stat. at L. 182), Congress amended this section so as distinctly to postpone to the expiration of the trust period the subjection of allottees under that act to state laws. The first part of the section, as amended, is: "That at the expiration of the trust period, and when the [451] lands have been conveyed to the Indians by patent in fee, as provided in § 5 of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside." And, at the same time, there was added to the section the explicit proviso: "That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States." We deem is to be clear that Congress had the power thus to continue the guardianship of the government (United States v. Kagama, 118 U. S. 375, 383, 384, 30 L. ed. 228, 231, 6 Sup. Ct. Rep. 1109; United States v. Celestine, 215 U. S. 278, 290, 291, 54 L. ed. 195, 199, 200, 30 Sup. Ct. Rep. 93; Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 315, 316, 55 L. ed. 738, 749, 750, 31 Sup. Ct. Rep. 578; Hallowell v. United States, supra; Heckman v. United States, 224 U. S. 413, 437, 56 L. ed. 820, 829, 32 Sup. Ct. Rep. 424; Ex parte Webb, 225 U. S. 663, 683, 56 L. ed. 1248, 1256, 32 Sup. Ct. Rep. 769; United States v. Wright, 229 U. S. 226, 237, 57 L. ed. 1160, 1166, 33 Sup. Ct. Rep. 630; United States v. Sandoval, 231 U. S. 28, 46, ante, 107, 114, 34 Sup. Ct. Rep. 1; Perrin v. United States, decided this day [232 U. S. 478, post, 691, 34 Sup. Ct. Rep. 387]); and these provisions leave no room for doubt as to the intent of Congress with respect to the maintenance of the Federal jurisdiction over the allotted lands described in the indictment.

A cognate question is presented as to the status of the person with whose murder the defendants are charged. It is not alleged in the indictment that the defendants were Indians, and we assume that they were not. But the court below had jurisdiction if the deceased was an Indian ward. Donnelly v. United States, 228 U. S. 269–272, 57 L. ed. 831, 832, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913E, 710. It is alleged, as already stated, that the deceased was "a full-blood Indian, a member of the Colville tribe," and, further, that he had received an allotment of land under the act of 1887, as amended in 1891, and under the act of July 1, 1892, the land being held in trust by the United States for twenty-five years from the date of the patent, July, 31, 1900. Upon this statement, the deceased must be regarded as one who was still under the government's care. Congress had not terminated that relation, and the commission [452] of a crime against his person upon Indian lands, such as we have found the allotted lands in question to be, was punishable under the laws of the United States.

The order sustaining the demurrer is reversed and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

It is so ordered.

EDWIN L. GAUTHIER, Plff. in Err.,
v.
PETER MORRISON et al.

(See S. C. Reporter's ed. 452–462.)

Error to state court — Federal question — rights under homestead law.

1. A decree of the highest state court adverse to the asserted rights under the Federal homestead law to settle upon unsurveyed public land, notwithstanding the wrongful act or error of the surveyor in designating and meandering such land as a lake, and to remain in possession to the end that the acts essential to the acquisition of title may be performed, is re-

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NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On error to state courts in cases involving land titles—see note to O'Conor v. Texas, 50 L. ed. U. S. 1120.

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viewable under the Federal Judicial Code, § 237, by the Federal Supreme Court.

[For other cases, see Appeal and Error, 1825-1871, in Digest Sup. Ct. 1908.]

Public lands — unsurveyed lands — wrongful act or error of surveyor.

2. A tract of agricultural land susceptible of cultivation, but which by wrongful act or error of the surveyor was omitted from the survey, and was designated and meandered as a lake, was as much public land after the survey, and as much within the operation of the Federal settlement laws, as if its true character had been reported by the surveyor. It merely was left unsurveyed.

[For other cases, see Public Lands, I. e, 4, in Digest Sup. Ct. 1908.]

Courts — relation to Land Department — restoring possession under inceptive homestead claim.

3. Jurisdiction of a suit by a homestead settler to re-establish the possession which trespassers have invaded and interrupted, to the end that he may continue his efforts to earn the title, may not be declined by a state court on the theory that to entertain jurisdiction will amount to an interference with the Land Department or a usurpation of its functions because the land in question forms part of a tract of agricultural land which the surveyor unlawfully or erroneously omitted from the survey, designating and meandering it as a lake.

[For other cases, see Courts, I. e, 6, in Digest Sup. Ct. 1908.]

[No. 157.]

Argued December 19, 1913. Decided February 24, 1914.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court of Spokane County, in that state, in favor of defendants in an action of ejectment. Reversed.

See same case below, 62 Wash. 572, 114 Pac. 501.

The facts are stated in the opinion.

Mr. **Fred B. Morrill** argued the cause, and, with Messrs. W. C. Jones, L. F. Chester, and John J. Skuse, filed a brief for plaintiff in error:

No appropriation of public land can be made for any purpose but by the authority of an act of Congress.

United States v. Fitzgerald, 15 Pet. 407, 10 L. ed. 785; United States v. Gratiot, 14 Pet. 526, 10 L. ed. 573; Bagnell v. Broderick, 13 Pet. 436, 10 L. ed. 235; United States v. Tichenor, 8 Sawy. 142, 12 Fed. 415; Frazee v. Spokane County, 29 Wash. 278, 69 Pac. 779.

Hence no officer of the government has the power or authority to dispose of public lands without authority of Congress, and he cannot waive the conditions and limitations provided by Congress.

Deffeback v. Hawke, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; Davis v. Wiebbold, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628; Taylor v. Brown, 5 Dak. 335, 40 N. W. 525, 147 U. S. 640, 37 L. ed. 313, 13 Sup. Ct. Rep. 549; Eells v. Ross, 12 C. C. A. 205, 29 U. S. App. 59, 64 Fed. 417.

Nothing passes title to public lands but a patent, the sole exception being a grant by an act of Congress.

United States v. Fitzgerald, 15 Pet. 407, 10 L. ed. 785; Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264.

While the surveyor meandered the lands and designated the same as a lake, such meandered lines are not conclusive as to the existence of a lake within such meandered lines, and if there never was a permanent body of water within such lines, as alleged in the complaint herein, or if one did not exist at the time of the survey, such meandered lines are not conclusive as to the government of the United States, or anyone else.

Niles v. Cedar Point Club, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124; French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563, 35 Or. 312; Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988; Security Land & Exploration Co. v. Burns, 193 U. S. 168, 48 L. ed. 662, 24 Sup. Ct. Rep. 425; Kean v. Calumet Canal & Improv. Co. 190 U. S. 458, 47 L. ed. 1136, 23 Sup. Ct. Rep. 651; Carr v. Moore, 119 Iowa, 152, 97 Am. St. Rep. 292, 93 N. W. 52; Schlosser v. Hemphill, 118 Iowa, 452, 90 N. W. 842; Lammers v. Nissen, 4 Neb. 245; Bissell v. Fletcher, 19 Neb. 725, 28 N. W. 303; Grant v. Hemphill, 92 Iowa, 218, 59 N. W. 263, 60 N. W. 618; Chapman & D. Land Co. v. Bigelow, 206 U. S. 41, 51 L. ed. 953, 27 Sup. Ct. Rep. 679.

The rule of construction in the case of a grant from the Sovereign is quite different from that which governs private grants.

Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773; Martin v. Waddell, 16 Pet. 367, 10 L. ed. 997; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; The Rebeckah, 1 C. Rob. 227.

Lands within meandered lines, where such surveys were not correct, or where waters originally within those lines have disappeared, should be surveyed, and the lands brought under the operation of the laws governing the disposal of public lands.

Arkansas Sunk Lands, 37 Land Dec. 345, 462.

Land covered by water within the public

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domain of the United States is as much a part thereof as the dry land.

Illinois C. R. Co. v. Chicago, 176 U. S. 646, 44 L. ed. 622, 20 Sup. Ct. Rep. 509.

It has been the settled policy of the United States, from the beginning of our present form of government, to concede all navigable waters, as well as the land under them, as belonging to the states, to be held in trust for the people, subject only to the power of Congress to regulate commerce thereon.

Kean v. Calument Canal & Improv. Co. 190 U. S. 485, 47 L. ed. 1147, 23 Sup. Ct. Rep. 651.

As a necessary consequence of the ownership, in trust, by the states, of all navigable water therein, as well as the land under them, it came to be decided that rights in such navigable water, and the lands under them, were to be determined by the Federal courts solely with reference to the law of the state in which such waters were situate.

St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224.

When the lands sought to be entered are unsurveyed, the homestead settler initiates his claim and right to the land by making a settlement thereon, and by such settlement the claimant acquires a valuable and valid vested right under the laws of the United States, which were enacted for the benefit of the actual settler.

Moss v. Dowman, 176 U. S. 413, 44 L. ed. 526, 20 Sup. Ct. Rep. 429; Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424; Anderson v. Carkins, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905; Bohall v. Dilla, 114 U. S. 47, 29 L. ed. 61, 5 Sup. Ct. Rep. 782.

It cannot be that the courts are powerless under such conditions, and that a settler cannot seek and receive protection in his rights through courts of justice.

Hebeisen v. Hatchell, 12 Okla. 29, 69 Pac. 888; La Chapelle v. Bubb, 62 Fed. 545, 69 Fed. 481; Colwell v. Smith, 1 Wash. Terr. 92; Ward v. Moorey, 1 Wash. Terr. 104; Zimmerman v. McCurdy, 15 N. D. 79, 106 N. W. 125, 12 Ann. Cas. 29; Wood v. Murray, 85 Iowa, 505, 52 N. W. 356; Hadley v. Ulrich, 1 Okla. 380, 33 Pac. 705; Peckham v. Faught, 2 Okla. 173, 37 Pac. 1085; Commager v. Dicks, 1 Okla. 82, 28 Pac. 864, 867; Fulmele v. Camp, 20 Colo. 495, 39 Pac. 407; Matthews v. O'Brien, 84 Minn. 505, 88 N. W. 12; Woodsides v. Rickey, 1 Or. 108.

The lands settled upon by plaintiff in error being public lands, then the real status of the respondents is that of trespassers, and they cannot prevent the plaintiff in error, as a qualified settler, from residing thereon, and occupying and improving the same, and taking all necessary steps to fully comply with the homestead law and acquire title thereunder.

Kitts v. Austin, 83 Cal. 167, 23 Pac. 290; Haven v. Haws, 63 Cal. 514; Whittaker v. Pendola, 78 Cal. 296, 20 Pac. 680; Thallmann v. Thomas, 49 C. C. A. 317, 111 Fed. 277, 21 Mor. Min. Rep. 573; United States v. Waddell, 112 U. S. 76, 28 L. ed. 673, 5 Sup. Ct. Rep. 35.

Mr. Reese H. Voorhees argued the cause and filed a brief for defendants in error:

It will be observed that the court below refused to decide any question, either of fact or law, with regard to the merits of the case, by expressly refusing to take jurisdiction of it. The rule of this court is that, in order to give it jurisdiction of a writ of error from a state court, the Federal question relied upon must not only be clearly raised in the case, and clearly relied upon in the court below, but must have been expressly decided by the court below, or necessarily decided in reaching its judgment; and it is further the rule of this court that, where the opinion of the court below is brought to this court, and shows that the court below refused to entertain jurisdiction, the writ of error will be dismissed for lack of a Federal question; and this is true even though there might have arisen a Federal question, and it might have been decided had the court entertained jurisdiction.

Semple v. Hagar, 4 Wall. 431, 18 L. ed. 402; Smith v. Adsit, 16 Wall. 185, 21 L. ed. 310; Jacks v. Helena, 115 U. S. 288, 29 L. ed. 392, 6 Sup. Ct. Rep. 39; California v. Holladay, 159 U. S. 415, 40 L. ed. 202, 16 Sup. Ct. Rep. 53; Cox v. Texas, 202 U. S. 446, 50 L. ed. 1099, 26 Sup. Ct. Rep. 671; De Lamar's Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715; Endowment Benev. Asso. v. Kansas, 120 U. S. 103, 30 L. ed. 593, 7 Sup. Ct. Rep. 499; Blackburn v. Portland Gold Min. Co. 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, 20 Mor. Min. Rep. 358.

The question as to who had acquired this priority of possession was not a Federal question, but a pure question of fact, upon which the decision of the state court was conclusive. No construction was put upon the statute; no question arose under it; but a preliminary question was to be decided before the statute became material, and that was whether defendants were first in possession of the land. Even if priority of possession had been shown, it would still have been necessary to prove that defend-

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ants' right to the use of the water was recognized and acknowledged by ocal customs, laws, and decisions,—all of which were questions of state law. The jurisdiction of this court in this class of cases does not extend to questions of fact or of local law, which are merely preliminary to, or the possible basis of, a Federal question.

Telluride Power Transmission Co. v. Rio Grande Western R. Co. 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245; Telluride Power Transmission Co. v. Rio Grande Western R. Co. 187 U. S. 569, 47 L. ed. 307, 23 Sup. Ct. Rep. 178; Myrtle v. Nevada, C. & O. R. Co. 137 Fed. 193.

This court has repeatedly ruled that there is no jurisdiction in the courts,—this court and other Federal courts as well as state courts,—of the questions affecting public land raised upon plaintiff in error's complaint; that the courts have no jurisdiction, either to control the public land or the action of the government in connection therewith, before patent shall have issued and until the land shall have ceased to be public land.

Cragin v. Powell, 128 U. S. 691, 32 L. ed. 566, 9 Sup. Ct. Rep. 203; United States v. Schurz, 102 U. S. 378, 26 L. ed. 167; Stoneroad v. Stoneroad, 158 U. S. 240, 39 L. ed. 966, 15 Sup. Ct. Rep. 822; Russell v. Maxwell Land Grant Co. 158 U. S. 253, 39 L. ed. 971, 15 Sup. Ct. Rep. 827; Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; Kirwan v. Murphy, 189 U. S. 35, 47 L. ed. 698, 23 Sup. Ct. Rep. 599; Humbird v. Avery, 195 U. S. 480, 49 L. ed. 286, 25 Sup. Ct. Rep. 123; Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 42 L. ed. 591, 18 Sup. Ct. Rep. 208; Brown v. Hitchcock, 173 U. S. 473, 43 L. ed. 772, 19 Sup. Ct. Rep. 485; Oregon v. Hitchcock, 202 U. S. 60, 50 L. ed. 935, 26 Sup. Ct. Rep. 568; Columbia Canal Co. v. Benham, 47 Wash. 249, 125 Am. St. Rep. 901, 91 Pac. 961.

In this kind of an action the plaintiff, if he prevails at all, must prevail upon the strength of his own title, and not upon the weakness of that of the adversary. The basis of this claim is a possessory right.

George v. Columbia & P. S. R. Co. 38 Wash. 483, 80 Pac. 767; Helm v. Johnson, 40 Wash. 422, 82 Pac. 402; Humphries v. Sorenson, 33 Wash. 570, 74 Pac. 690; Seymour v. Dufur, 53 Wash. 650, 102 Pac. 756.

The classification of the public lands for the purposes of disposition under the various acts of Congress is a part of the duty imposed by law upon the Secretary of the Interior; and even after patent has issued, his determination cannot be reversed by a mere intruder without title.

Ehrhardt v. Hogaboom, 115 U. S. 67, 29 L. ed. 346, 5 Sup. Ct. Rep. 1157.

Mr. Justice Van Devanter delivered the opinion of the court:

This case originated in the superior court of Spokane county, Washington, and involves the present right of possession of a tract of unsurveyed public land, containing about 75 acres, in that county.

Considerably abridged, the facts stated in the complaint are these: In 1877, when the public lands in that vicinity were surveyed, an area embracing approximately 1,200 acres was, by the wrongful act or error of the surveyor, omitted from the survey and meandered as a lake, when in truth it was not such, but was agricultural land susceptible of cultivation. That area still remains unsurveyed and includes the tract in question. On October 30, 1909, this tract was unappropriated public land, open to settlement under the homestead law of the United States. On that day the plaintiff, being in every way qualified so to do, made actual settlement upon the tract with the purpose of acquiring the title under that law by a full and bona fide compliance with its requirements, and, in furtherance of that purpose, erected upon the tract a habitable frame dwelling, furnished the same with all necessary household goods, entered into possession of the tract, and established [457] his actual residence thereon. Shortly thereafter, during the continuance of his possession and residence, the defendants, with the wrongful purpose of preventing him from complying with the requirements of the homestead law, and of subjecting the tract to their own use, unlawfully compelled him to withdraw therefrom and remain away; and when the action was commenced, a few months later, they were wrongfully withholding the tract from him, and were themselves mere trespassers thereon. It also was alleged: "That in order to comply with the requirements of the homestead law of the United States, and to acquire title to the land so settled upon by this plaintiff, as aforesaid, under said law, it becomes and is necessary for this plaintiff to reside upon and cultivate such land, and to have possession thereof for a period of five years; and unless this plaintiff can reside upon, cultivate, and have possession of said land for and during such period of time from and after his said settlement, this plaintiff cannot comply with the requirements of the homestead law of the United States, and sustain and maintain his rights to said land, and acquire title thereto from the government of the United States under the homestead law of the United States." The prayer was for a judgment establishing the plain-

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tiff's right to the possession, declaring the defendants were without any right thereto, and awarding costs.

The defendants demurred upon the grounds that the complaint did not state facts sufficient to constitute a cause of action, and that the court was without jurisdiction of the subject-matter. The demurrer was sustained, and, the plaintiff electing to stand upon his complaint, a judgment of dismissal was entered. An appeal resulted in an affirmance by the supreme court of the state, which held, first, that the land was not subject to settlement under the homestead law, because the surveyor had designated and meandered it as a lake; and, second, that [458] only the Land Department could undo and correct the wrong or error of the surveyor in that regard. 62 Wash. 572, 114 Pac. 501. To secure a reversal of the judgment the plaintiff prosecutes this writ of error.

Although challenged by the defendants, our jurisdiction does not admit of any doubt. The plaintiff asserted a right to settle upon the land notwithstanding the wrongful act or error of the surveyor in designating and meandering it as a lake, and also a right to remain in possession to the end that he might perform the acts essential to the acquisition of the title; and he expressly predicated these rights upon the homestead law of the United States. The decision was against the rights so claimed, and this brings the case within § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575) now § 237 of the Judicial Code [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227].

The state courts seem to have proceeded upon the theory (a) that the surveyor's action in designating and meandering the 1,200-acre area as a lake operated as an authoritative determination that it was not agricultural land, but a permanent body of water; and (b) that this determination, while remaining undisturbed by the Land Department, took the land without the operation of the settlement laws, including the homestead law. But in this there was a misconception of the authority of the surveyor. He was not invested with power to determine the character of the land which he surveyed or left unsurveyed, or to classify it as within or without the operation of particular laws. All that he was to do in that regard was to note and report its character, as it appeared to him, as a means of enlarging the sources of information upon that subject otherwise available. In Barden v. Northern P. R. Co. 154 U. S. 288, 292, 320, 38 L. ed. 992, 993, 999, 14 Sup. Ct. Rep. 1030, in disposing of a contention that the lands there in question had been determined and reported by the surveyor as agricultural, and not mineral, and that the determination and report remained in force, this court said: "But [459] the conclusive answer to such alleged determination and report is that the matters to which they relate were not left to the Surveyor General. Neither he nor any of his subordinates was authorized to determine finally the character of any lands granted, or make any binding report thereon. Information of the character of all lands surveyed is required of surveying officers, so far as knowledge respecting them is obtained in the course of their duties, but they are not clothed with authority to especially examine as to these matters outside of their other duties, or determine them, nor does their report have any binding force. It is simply an addition made to the general information obtained from different sources on the subject." So, if the area designated and meandered as a lake was in truth agricultural land susceptible of cultivation, as alleged in the complaint and admitted by the demurrer, it was as much public land after the survey, and as much within the operation of the settlement laws, as if its true character had been reported by the surveyor. It merely was left unsurveyed. See Niles v. Cedar Point Club, 175 U. S. 300, 308, 44 L. ed. 171, 174, 20 Sup. Ct. Rep. 124; French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563; Security Land & Exploration Co. v. Burns, 193 U. S. 167, 187, 48 L. ed. 662, 674, 24 Sup. Ct. Rep. 425; Scott v. Lattig, 227 U. S. 229, 241, 57 L. ed. 490, 495, 44 L.R.A.(N.S.) 107, 33 Sup. Ct. Rep. 242.

It will be perceived that we are not speaking of land which was covered by a permanent body of water at the time of the survey, and thereafter was laid bare by a subsidence of the water, nor yet of comparatively small areas which sometimes lie within meander lines reasonably approximating the shores of permanent bodies of water. See Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988; Kean v. Calumet Canal & Improv. Co. 190 U. S. 452, 47 L. ed. 1134, 23 Sup. Ct. Rep. 651; Hardin v. Shedd, 190 U. S. 508, 47 L. ed. 1156, 23 Sup. Ct. Rep. 685. Neither are we concerned with a collateral attack upon a public survey, as was the case in Cragin v. Powell, 128 U. S. 691, 33 L. ed. 566, 9 Sup. Ct. Rep. 203, and Stoneroad v. Stoneroad, 158 U. S. 240, 39 L. ed. 966, 15 Sup. Ct. Rep. 822, for the plaintiff is not asking that any of the lines of the survey be rejected or altered, but only that a possessory right acquired [460] by settlement upon public land confessedly left unsurveyed be protected.

The homestead law in terms subjects un-

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surveyed public lands, if agricultural and unappropriated, to settlement by persons having the requisite qualifications and intending to comply with its requirements as a means of acquiring the title, and also plainly confers upon the settler the right of possession, without which compliance with those requirements would be impossible. Rev. Stat. §§ 2289 et seq.; U. S. Comp. Stat. 1901, p. 1388; act May 14, 1880, 21 Stat. at L. 140, chap. 89, § 3; U. S. Comp. Stat. 1901, p. 1392; Rev. Stat. § 2266; act March 3, 1891, 26 Stat. at L. 1095, chap. 561, § 5, U. S. Comp. Stat. 1901, p. 1535; United States v. Waddell, 112 U. S. 76, 80, 26 L. ed. 673, 674, 5 Sup. Ct. Rep. 35; Sturr v. Beck, 133 U. S. 541, 547, 33 L. ed. 761, 764, 10 Sup. Ct. Rep. 350; Nelson v. Northern P. R. Co. 188 U. S. 108, 125, 47 L. ed. 406, 413, 23 Sup. Ct. Rep. 302; Scott v. Lattig, 227 U. S. 229, 240, 57 L. ed. 490, 495, 44 L.R.A.(N.S.) 107, 33 Sup. Ct. Rep. 242; Wadkins v. Producers' Oil Co. 227 U. S. 368, 373, 57 L. ed. 551, 555, 33 Sup. Ct. Rep. 380. So, it clearly appears from the allegations of the complaint, as admitted by the demurrer, that the land in question was open to homestead settlement when the plaintiff settled thereon; that by his settlement and subsequent acts he acquired an inceptive homestead right which entitled him to the possession; and that the defendants, in forcing him to withdraw from the land, and in then withholding the same from him, wrongfully invaded this possessory right.

The question of the jurisdiction of the court of first instance, although not difficult of solution, remains to be noticed. It was not held by the appellate court that the jurisdiction of the former under the local laws was not broad enough to enable it to entertain the action and award appropriate relief, but only that this jurisdiction could not be exerted consistently with the laws of Congress; and this upon the theory that the latter invested the Land Department with exclusive authority to deal with the subject.

It is true that the authority to make surveys of the public lands is confided to the Land Department, and that [461] the courts possess no power to revise or disturb its action in that regard; but here the court was not asked to make a survey or to revise or disturb one already made. As has been indicated, the land in question was not surveyed, but left unsurveyed; and the plaintiff, whose possession under a lawful homestead settlement had been invaded and interrupted by mere trespasses, was seeking a return of the possession to the end that he might continue his rightful efforts to earn the title. In short, it was not a survey, but the right of possession under an inceptive homestead claim, that was in question.

Generally speaking, it also is true that it is not a province of the courts to interfere with the Land Department in the administration of the public-land laws, and that they are to be deemed in process of administration until the proceedings for the acquisition of the title terminate in the issuing of a patent. But no interference with that Department or usurpation of its functions was here sought or involved. It has not been invested with authority to redress or restrain trespasses upon possessory rights, or to restore the possession to lawful claimants when wrongfully dispossessed. Congress has not prescribed the forum and mode in which such wrongs may be restrained and redressed, as doubtless it could, but has pursued the policy of permitting them to be dealt with in the local tribunals according to local modes of procedure. And the exercise of this jurisdiction has been not only sanctioned by the appellate courts in many of the public-land states, but also recognized and approved by this court. Woodsides v. Rickey, 1 Or. 108; Colwell v. Smith, 1 Wash. Terr. 92; Ward v. Moorey, 1 Wash. Terr. 104, 107; Arment v. Hensel, 5 Wash. 152, 31 Pac. 464; Fulmele v. Camp, 20 Colo. 495, 39 Pac. 407; Wood v. Murray, 85 Iowa, 505, 52 N. W. 356; Matthews v. O'Brien, 84 Minn. 505, 88 N. W. 12; Zimmerman v. McCurdy, 15 N. D. 79, 106 N. W. 125, 12 Ann. Cas. 29; Whittaker v. Pendola, 78 Cal. 296, 20 Pac. 680; Sproat v. Durland, 2 Okla. 24, 45, 35 Pac. 682, 886; Peckham v. Faught, 2 Okla. 173, 37 Pac. 1085; [462] Lytle v. Arkansas, 22 How. 193, 205, 16 L. ed. 306, 310; Marquez v. Frisbie, 101 U. S. 473, 475, 25 L. ed. 800, 801; Black v. Jackson, 177 U. S. 349, 44 L. ed. 801, 20 Sup. Ct. Rep. 648; United States v. Buchanan, 232 U. S. 72, ante, 511, 34 Sup. Ct. Rep. 237. See also Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 308, 315, 47 L. ed. 1064, 1070, 1073, 23 Sup. Ct. Rep. 692; Humbird v. Avery, 195 U. S. 480, 504, 49 L. ed. 286, 297, 25 Sup. Ct. Rep. 123; Bunker Hill & S. M. & Concentrating Co. v. United States, 226 U. S. 548, 550, 57 L. ed. 345, 346, 33 Sup. Ct. Rep. 138. It was well said by the supreme court of Oklahoma in Sproat v. Durland, 2 Okla. 24, 45, 35 Pac. 682: "To say that no relief can be granted, or that our courts are powerless to do justice between litigants in this class of cases, pending the settlement of title in the Land Department, would be the announcement of a doctrine abhorrent to a sense of common justice. It would encourage the strong to override the weak; would place a premium upon greed and the use of force, and in many instances lead to

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bloodshed and crime. Such a state of affairs is to be avoided; and the courts should not hesitate to invoke the powers inherent in them and lend their aid, in every way possible, in aid of justice by preventing encroachments upon the possessory rights of settlers, or by equitably adjusting their differences."

We are accordingly of opinion that the laws of Congress interposed no obstacle to the jurisdiction of the court of first instance, and that, instead of dismissing the case, it should have proceeded to an appropriate disposition of the asserted right of possession. See Rem. & Bal. Code, Wash. § 942; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 55–59, 56 L. ed. 327, 348–350, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

Judgment reversed.

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[463] UNITED STATES, Plff. in Err.,
v.
PAUL BEATTY et al.

(See S. C. Reporter's ed. 463–468.)

Error to circuit court of appeals — final judgment.

1. A judgment of a Federal circuit court of appeals which reverses the judgment of a district court in condemnation proceedings, vacates the commissioners' award to the owners of the property taken, and requires that compensation be ascertained anew through a trial by jury, is essentially interlocutory, and cannot be the subject of a writ of error from the Federal Supreme Court.

[For other cases, see Appeal and Error, I. d., in Digest Sup. Ct. 1908.]

Certiorari — to circuit court of appeals — when allowed.

2. The power conferred upon the Federal Supreme Court by the Judicial Code, § 240, to require by writ of certiorari that cases in the circuit courts of appeals be certified for review and determination in the former court, is plainly confined to that class of cases in which, according to the provisions of §§ 128 and 241 of such Code, the final judgments and decrees of those courts are not reviewable upon appeal or writ of error.

[For other cases, see Certiorari, II. a, in Digest Sup. Ct. 1908.]

Certiorari — to circuit court of appeals — substitute for writ of error or appeal.

3. The employment of a writ of certiorari directed to a Federal circuit court of appeals to correct mere errors committed by that court in the exercise of its lawful jurisdiction in rendering an interlocutory judgment which may be corrected upon writ of error from the final judgment is not contemplated by the provision of the Judicial Code, § 262, which empowers the Supreme Court of the United States to issue all writs not specifically provided for by statute which may be necessary for the exercise of its jurisdiction, and agreeable to the usage and principles of law.

[For other cases, see Certiorari, I. b, 2, in Digest Sup. Ct. 1908.]

NOTE.—As to what judgments or decrees are final for purposes of review—see notes to Gibbons v. Ogden, 5 L. ed. U. S. 302, and Schlosser v. Hemphill, 49 L. ed. U. S. 1001.

On the appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

On certiorari from Federal Supreme Court to circuit courts of appeals—see note to United States v. Dickinson, 53 L. ed. U. S. 711.

[No. 555.]

Argued January 12 and 13, 1914. Decided February 24, 1914.

IN ERROR to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment which, reversing a judgment of the District Court for the Western District of Virginia in condemnation proceedings, directed that the compensation be ascertained anew through a trial by jury. Dismissed for want of jurisdiction. Also a

PETITION for a Writ of Certiorari to review the same judgment. Denied.

See same case below, 122 C. C. A. 16, 203 Fed. 620.

The facts are stated in the opinion.

Solicitor General Davis argued the cause, and, with Mr. W. C. Herron, filed a brief for plaintiff in error.

Messrs. E. Hilton Jackson and D. C. O'Flaherty argued the cause, and, with Mr. E. H. Jackson, filed a brief for defendants in error.

Mr. Justice Van Devanter delivered the opinion of the court:

This was a statutory proceeding by the United States to acquire for public use, by condemnation under judicial process, certain land in Warren county, in the western district of Virginia. It was based upon two congressional enactments: One, a provision in the army appropriation act of March 3, 1911 (36 Stat. at L. 1037, 1049, chap. 209), appropriating "not to exceed two hundred thousand dollars for the purchase of land accessible to the horse-raising section of the state of Virginia, for the assembling, grazing, and training of horses purchased for the mounted service;" and the other, the act of August 1, 1888 (25 Stat. at L. 357,

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chap. 728, U. S. Comp. Stat. 1901, p. 2516) which reads as follows:

"That in every case in which the Secretary of the Treasury, or any other officer of the government, has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever, in his opinion, it is necessary or advantageous to the government to do so; and the United States circuit or district courts of the district wherein such real estate is located shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced [465] for condemnation, within thirty days from the receipt of the application at the Department of Justice.

"Sec. 2. The practice, pleadings, forms, and modes of proceeding in causes arising under the provisions of this act, shall conform, as near as may be, to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding."

The proceeding was initiated, under the Attorney General's direction, by a petition filed in the district court of the United States for the district wherein the land is situate, praying for the appointment of commissioners, according to the law of the state, to ascertain the just compensation to be paid. Due notice having been given, the owners appeared and interposed objections to the proceeding; all of which having been considered and overruled, an order was entered appointing commissioners agreeably to the prayer in the petition and to the state statute. The commissioners viewed the land, heard the evidence, fixed the compensation at upwards of $30,000, and returned into the district court a report of their proceedings and ascertainment. Exceptions to the report were filed by the owners, and, after a hearing, were overruled; whereupon a judgment was entered, confirming the report. 198 Fed. 284. The owners carried the cause to the circuit court of appeals, and that court, being of opinion that the 7th Amendment to the Constitution, preserving the right of trial by jury, embraces such a proceeding, reversed the judgment, with a direction that the compensation be determined upon a trial before a common-law jury. 122 C. C. A. 16, 203 Fed. 620. The United States then sued out the present writ of error, and subsequently presented a petition praying that the judgment of the circuit court of appeals be reviewed upon writ of certiorari, if the writ of error should be regarded as premature. [466] Consideration of this petition was postponed to the hearing upon the writ of error.

As the proceeding was begun by the United States, and the amount in controversy greatly exceeds $1,000, besides costs, there can be no doubt that the case is one in which a final judgment in the circuit court of appeals may be reviewed by this court upon a writ of error. Judicial Code, §§ 128, 241 [36 Stat. at L. 1133, 1157, chap. 231, U. S. Comp. Stat. Supp. 1911, pp. 193, 229]. But the judgment rendered in that court is not final either in form or substance. It reverses the judgment in the district court, vacates the commissioners' award, and requires that the compensation be ascertained anew through a trial by jury. Thus, it puts at large the principal matter in controversy, and refers it to the district court for solution in the mode indicated. It is therefore essentially interlocutory, and cannot be the subject of a writ of error from this court. Tracy v. Holcombe, 24 How. 426, 16 L. ed. 742; Macfarland v. Brown, 187 U. S. 239, 47 L. ed. 159, 23 Sup. Ct. Rep. 105; United States v. Krall, 174 U. S. 385, 43 L. ed. 1017, 19 Sup. Ct. Rep. 712; German Nat. Bank v. Speckert, 181 U. S. 405, 409, 45 L. ed. 926, 927, 21 Sup. Ct. Rep. 688. If it be erroneous, and ultimately operates prejudicially to the United States, the latter may, of course, secure its correction by a writ of error from this court; but not until the case proceeds to a final judgment in the circuit court of appeals. United States v. Denver & R. G. R. Co. 191 U. S. 84, 93, 48 L. ed. 106, 109, 24 Sup. Ct. Rep. 33; Messenger v. Anderson, 225 U. S. 436, 444, 56 L. ed. 1152, 1156, 32 Sup. Ct. Rep. 739; Zeckendorf v. Steinfeld, 225 U. S. 445, 454, 56 L. ed. 1156, 1162, 32 Sup. Ct. Rep. 728; Union Trust Co. v. Westhus, 228 U. S. 519, 57 L. ed. 947, 33 Sup. Ct. Rep. 593, and cases cited. Being premature, the writ of error must be dismissed.

The power conferred upon this court by § 240 of the Judicial Code to require, by writ of certiorari, that cases in the circuit courts of appeals be certified here for review and determination, is plainly confined to that class of cases in which, according to the provisions of §§ 128 and 241, the final decrees and judgments of those courts are not reviewable upon appeal or writ of error; that is to say, if a case be one which may come here under § 241 by [467] appeal or writ of error after a final decree or judgment in the circuit court of appeals, it is

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not a case which may be brought here by certiorari under § 240. It is not intended that these two modes of exercising appellate authority over the circuit courts of appeals, one upon appeal or writ of error and the other upon certiorari, shall be coexistent as respects any case or class of cases, but rather that the former, where it exists at all, shall be exclusive. This is fully recognized in Lau Ow Bew v. United States, 144 U. S. 47, 58, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 372, 385, 37 L. ed. 486, 491, 13 Sup. Ct. Rep. 758, and Forsyth v. Hammond, 166 U. S. 506, 513, 514, 41 L. ed. 1095, 1099, 17 Sup. Ct. Rep. 665.

This case is not within any of the classes enumerated in the latter part of § 128, and the amount in controversy is greatly in excess of $1,000, besides costs; so it is a case, as before indicated, in which a final judgment by the circuit court of appeals may be reviewed by this court upon writ of error under § 241. And from this it follows that it is not a case which may be brought here by certiorari under § 240.

We do not overlook § 262 of the Judicial Code [36 Stat. at L. 1162, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 235], formerly § 716 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 580), which empowers this court to issue all writs, not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction, and agreeable to the usages and principles of law. No doubt, this provision contemplates the employment of the writ of certiorari in instances not covered by § 240, and affords ample authority for using the writ as an auxiliary process, and, whenever there is imperative necessity therefor, as a means of correcting excesses of jurisdiction, of giving full force and effect to existing appellate authority, and of furthering justice in other kindred ways. American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 372, 380, 37 L. ed. 486, 489, 13 Sup. Ct. Rep. 758; Re Chetwood, 165 U. S. 443, 462, 41 L. ed. 782, 788, 17 Sup. Ct. Rep. 385; Whitney v. Dick, 202 U. S. 132, 50 L. ed. 963, 26 Sup. Ct. Rep. 584; McClellan v. Carland, 217 U. S. 268, 54 L. ed. 762, 30 Sup. Ct. Rep. 501. But it may not be used under this provision as a substitute [468] for an appeal or writ of error to correct mere errors committed in the exercise of a lawful jurisdiction. American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 372, 385, 37 L. ed. 486, 491, 13 Sup. Ct. Rep. 758; Re Tampa Suburban R. Co. 168 U. S. 583, 42 L. ed. 589, 18 Sup. Ct. Rep. 177; United States v. Dickinson, 213 U. S. 92, 102, 53 L. ed. 711, 719, 29 Sup. Ct. Rep. 485.

Here the use sought to be made of the writ is not an admissible one. Whether the 7th Amendment, preserving the right of trial by jury, embraces a proceeding to condemn land for public use, was one of the questions arising for decision in the circuit court of appeals. In deciding it, the court but exercised an undoubted jurisdiction, and this whether the decision was right or wrong. If wrong, it was a mere error, and the landowners, having invited it, will not be heard to complain. The jury may award a less compensation than did the commissioners, and, if so, the United States will hardly be in a position to complain. Interlocutory rulings not infrequently become of no importance by reason of the final result or of intervening matters, and that may be true here. But if the decision ultimately operates prejudicially to the United States, it can be reviewed, and, if need be, corrected upon a writ of error from the final judgment, as before indicated. In this situation we perceive no adequate reason for resorting to the writ of certiorari under § 262.

Writ of error dismissed.

Petition for certiorari denied.

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[469] MALINDA THURSTON, Administratrix, Appt.,
v.
UNITED STATES and Ute Indians.

(See S. C. Reporter's ed. 469–478.)

Claims — jurisdiction of court of claims — Indian depredations.

A claim was not pending before Congress prior to the passage of the Indian depredation act of March 3, 1891 (26 Stat. at L. 851, chap. 538, U. S. Comp. Stat. 1901, p. 758), so as to prevent the application of the restrictive clause in § 2 of that act, excluding from the jurisdiction of the court of claims all claims accruing prior to July 1, 1865, "unless the claim shall be allowed, or has been, or is, pending prior to the passage of this act," where the only claim for the depredation in question which had been presented to Congress was one for reimbursement for a depredation committed by Mormons, not by Indians.

[For other cases, see Claims, 145–163, in Digest Sup. Ct. 1908.]

[No. 605.]

Submitted December 22, 1913. Decided February 24, 1914.

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APPEAL from the Court of Claims to review the dismissal of a suit under the Indian depredation act. Affirmed.

The facts are stated in the opinion.

Messrs. Harry Peyton, F. Sprigg Perry, and J. Wharton Clark submitted the cause for appellant:

A court must determine the meaning of the law from the words of that law. There can be no construction where there is no ambiguity.

United States v. Temple, 105 U. S. 97, 99, 26 L. ed. 967, 968; Maxwell v. Moore, 22 How. 185, 191, 16 L. ed. 251, 253; Thornley v. United States, 113 U. S. 310, 313, 28 L. ed. 999, 1000, 5 Sup. Ct. Rep. 491; United States v. Fisher, 2 Cranch, 358, 2 L. ed. 304; White v. United States, 191 U. S. 545, 550, 48 L. ed. 295, 297, 24 Sup. Ct. Rep. 171; Sturges v. Crowninshield, 4 Wheat. 122, 202, 4 L. ed. 529, 550; Potter's Dwarr. Stat. Constr. p. 199; 2 Lewis's Sutherland, Stat. Constr. 2d ed. § 367; Lewis v. United States. 92 U. S. 618, 23 L. ed. 513; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508; Brewer v. Blougher, 14 Pet. 178, 10 L. ed. 408; Washington Market Co. v. Hoffman, 101 U. S. 116, 25 L. ed. 783; Petri v. Commercial Nat. Bank, 142 U. S. 650, 35 L. ed. 1146, 12 Sup. Ct. Rep. 325; McKee v. United States, 164 U. S. 293, 41 L. ed. 439, 17 Sup. Ct. Rep. 92; United States v. Goldenberg, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3; Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; Dewey v. United States, 178 U. S. 510, 44 L. ed. 1170, 20 Sup. Ct. Rep. 981; Marks v. United States, 161 U. S. 297, 40 L. ed. 706, 16 Sup. Ct. Rep. 476; Yerke v. United States, 173 U. S. 439, 43 L. ed. 760, 19 Sup. Ct. Rep. 441; Johnson v. United States, 160 U. S. 546, 549, 40 L. ed. 529, 531, 16 Sup. Ct. Rep. 377.

The term "claim pending" is simply a designation of a particular class of cases. It was not intended by this Indian depredation act to change the nature of an Indian depredation claim. This term is simply a definition of the nature and character of the claims embraced, and was not intended to be considered as a strict and technical rule of pleading.

Johnson v. United States, 160 U. S. 546, 40 L. ed. 529, 16 Sup. Ct. Rep. 377.

Congress intended to allow great liberality in dealing with technical questions. All questions of the manner of filing claims were waived. It was not necessary to name the proper tribe of Indians. It was intended that the court of claims should render judgment against the United States alone, if the tribe of Indians could not be identified. Such has been the practice in the court of claims under this act, and judgments have been frequently rendered against the United States and unknown Indians where it has been impossible, from the evidence, to determine the tribe of Indians committing the wrong.

United States v. Gorham, 165 U. S. 316, 41 L. ed. 729, 17 Sup. Ct. Rep. 382.

The proviso does not relate to that part of the enacting clause which waives all questions of the manner of presenting claims. This is an entirely separate and distinct part of the enacting clause, and the dependent proviso is in no way connected with it.

Sedgw. Interpretation of Statutes, § 186, p. 257; Minis v. United States, 15 Pet. 423, 445, 10 L. ed. 791, 799; American Exp. Co. v. United States, 212 U. S. 522, 534, 53 L. ed. 635, 640, 29 Sup. Ct. Rep. 315; Burlingham v. Crouse, 228 U. S. 459, 471, 57 L. ed. 920, 926, 46 L.R.A.(N.S.) 148, 33 Sup. Ct. Rep. 564; White v. United States, 191 U. S. 545, 48 L. ed. 295, 24 Sup. Ct. Rep. 171; Interstate Commerce Commission v. Baird, 194 U. S. 25, 36, 48 L. ed. 860, 865, 24 Sup. Ct. Rep. 563.

The claim of Malinda Thurston is a claim for a depredation committed by Indians. The manner of filing that claim in Congress against the Indians was defective. This defect in the manner of filing the claim was expressly waived by the Indian depredation act.

Nesbitt v. United States, 186 U. S. 153, 46 L. ed. 1100, 22 Sup. Ct. Rep. 805; Leahy v. United States, 41 Ct. Cl. 266; United States v. Martinez, 195 U. S. 469, 49 L. ed. 282, 25 Sup. Ct. Rep. 80; Brown v. United States, 32 Ct. Cl. 432.

The saving clause is not to be considered as an exception from the action of the provisional clause. The saving clause is to be considered as a part of the general enacting clause, and in furtherance of the desire of Congress to be liberal towards pending claims.

United States v. Martinez, 195 U. S. 476, 49 L. ed. 285, 25 Sup. Ct. Rep. 80; Ryan v. Carter, 93 U. S. 78, 23 L. ed. 807.

Unless this case falls clearly within the terms of the proviso, it is to be considered as falling within the terms of the general enacting and saving clauses.

Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 10, 51 L. ed. 681, 685, 27 Sup. Ct. Rep. 407; United States v. Dickson, 15 Pet. 141, 10 L. ed. 689; Javierre v. Central Altagracia, 217 U. S. 502, 507, 54 L. ed. 859, 860, 30 Sup. Ct. Rep. 598.

In the determination of claims for Indian depredations filed in the Interior Department, it was not necessary that notice be given to the Indians.

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Jaeger v. United States, 27 Ct. Cl. 278.

It is sufficient for a claim to be pending before Congress, if such claim is filed and considered by that body. Hence it was not necessary in Congress to name Indians as defendants.

Leahy v. United States, 41 Ct. Cl. 266; Cahalan v. United States, 42 Ct. Cl. 281; Cofer v. United States, 30 Ct. Cl. 131.

The purpose of § 2 of the Indian depredation act was to protect diligent claimants and to prevent the filing of stale claims.

Weston v. United States, 29 Ct. Cl. 420; Stevens v. United States, 34 Ct. Cl. 244; Martin v. United States, 46 Ct. Cl. 200.

Not only did Congress have special notice of the facts of this massacre, but the matter was of such prominence that it has become a part of the history of our country. The courts, and Congress as well, will take judicial notice of a matter of history.

Bank of Augusta v. Earle, 13 Pet. 519, 590, 10 L. ed. 274, 308; United States v. Union P. R. Co. 91 U. S. 72, 79, 23 L. ed. 224, 228; 1 Greenl. Ev. 15th ed. § 5; Swinnerton v. Columbian Ins. Co. 37 N. Y. 174, 93 Am. Dec. 560.

Assistant Attorney General Thompson submitted the cause for appellees:

The statute of March 3, 1891, being in derogation of common law, and giving "a right of action for an injury not previously actionable," must be strictly construed against the petitioner.

Price v. United States, 174 U. S. 373, 43 L. ed. 1011, 19 Sup. Ct. Rep. 765; Wilson v. United States, 38 Ct. Cl. 6; Johnson v. United States, 160 U. S. 546, 40 L. ed. 529, 16 Sup. Ct. Rep. 377; Wisconsin C. R. Co. v. United States, 164 U. S. 190, 202, 41 L. ed. 399, 403, 17 Sup. Ct. Rep. 45.

The Indian depredation act required that a claim which accrued previous to July 1, 1865, must, as presented to Congress, have charged Indians with having committed the depredation.

Marks v. United States, 161 U. S. 297, 306, 40 L. ed. 706, 709, 16 Sup. Ct. Rep. 476.

The proviso of said act is one of limitation, and in order that the court of claims might have jurisdiction, a claim which accrued prior to July 1, 1865, must have been filed in Congress prior to March 3, 1891.

Appellant's petition before Congress, having prayed for a gratuity, did not allege a claim.

Prigg v. Pennsylvania, 16 Pet. 539–615, 10 L. ed. 1060–1089.

Mr. Justice Van Devanter delivered the opinion of the court:

This suit was begun in the court of claims in 1892, under the Indian depredation act of March 3, 1891 (26 Stat. at L. 851, chap. 538, U. S. Comp. Stat. 1901, p. 758), to recover from the United States and the Ute Indians the value of certain personal property alleged to have belonged to appellant's intestate, and to have been taken and destroyed by members of the Ute tribe in 1857. It was also alleged that the claim had been presented to, and was pending before, the House of Representatives in 1877 and 1878. The allegations of the petition were traversed, and a trial resulted in a judgment of dismissal for want of jurisdiction, upon the ground that the claim accrued before July 1, 1865, and had not been presented to Congress, or any officer authorized to inquire into such claims, prior to the act of 1891, and so was not cognizable under that act.

The facts disclosed in the findings, and material to be noticed, are these: The depredation occurred at Mountain Meadows, Utah, September 11, 1857, while the appellant's intestate was *en route*, with an emigrant train, from Arkansas to California, his life being taken at the time. In 1877 and again in 1878 one of his daughters, on behalf of his heirs, presented to Congress a petition praying that they be reimbursed for the property from the public treasury. The petitions, as also the accompanying affidavits, represented that the depredation was committed by Mormons acting under the direction of Brigham Young, and contained no suggestion that it was in anywise chargeable to the Ute Indians or to any Indians. In response to each of the petitions a bill was introduced in the House of Representatives, reciting that the depredation was committed [476] by Mormons at the instance of Brigham Young, and making an appropriation to reimburse the heirs as prayed in the petition, but neither bill was passed, and the claim was not otherwise recognized by Congress. In no other way or form was the claim presented to or pending before any department of the government, or any of its officers or agents, prior to the passage of the act of 1891.

Preliminarily, it is well to observe that the court of claims has no general jurisdiction over claims against the United States, and can take cognizance only of those which, by the terms of some act of Congress, are committed to it. Johnson v. United States, 160 U. S. 546, 549, 40 L. ed. 529, 531, 16 Sup. Ct. Rep. 377.

Turning to the act of 1891 we find that it is not couched in general terms, but, on the contrary, carefully specifies what claims may be considered, and as carefully points out some which it is intended shall not be considered. It is entitled, "An act to Pro-

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vide for the Adjudication and Payment of Claims Arising from Indian Depredations." Its 1st section empowers the court to inquire into and adjudicate, among others not material here, "all claims for property of citizens of the United States, taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for." And the 2d section declares:

"That all questions of limitations as to time and manner of presenting claims are hereby waived, and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or other officer or department of the government: Provided, That no claim accruing prior to July first, eighteen hundred and sixty-five, shall be considered by the court unless the claim shall be allowed or has been or is pending, prior to the passage of this act, before the Secretary of the Interior or the Congress of the United [477] States, or before any superintendent, agent, subagent, or commissioner authorized under any act of Congress to inquire into such claims; but no case shall be considered pending unless evidence has been presented therein: . . . "

Assuming, without so deciding, that the clause quoted from the first section, if not otherwise restrained, is broad enough to embrace the present claim, notwithstanding some of its particulars not here noticed, we come to consider whether it is within the restrictive clause in the 2d section, declaring that no claim accruing prior to July 1, 1865, shall be considered unless it was allowed or was pending prior to the passage of the act. To a better understanding of this clause and the preceding one in the same section it is well to recall that there was an existing limitation of time upon the prosecution of claims against the government (Rev. Stat. § 1069, U. S. Comp. Stat. 1901, p. 740), and that there had been and were then various statutory and treaty provisions regulating the manner of presenting claims for Indian depredations, by whom they were to be examined, and the evidence required to sustain them. 4 Stat. at L. 731, chap. 161, § 17; 11 Stat. at L. 401, chap. 66, § 8; 12 Stat. at L. 120, Res. No. 26; 16 Stat. at L. 360, chap. 296, § 4; 17 Stat. at L. 190, chap. 233, § 7, U. S. Comp. Stat. 1901, p. 254; Rev. Stat. §§ 466, 2098, 2156, 2157, U. S. Comp. Stat. 1901, p. 264; 23 Stat. at L. 376, chap. 341; 13 Stat. at L. 674, art. 6; 15 Stat. at L. 620, arts. 5 and 6. Both clauses must be read in the light of those limitations and provisions, and when this is done, it is apparent that Congress, while disposed to be very liberal in waiving prior restrictions upon the time and mode of presenting such claims, deemed it unwise to open the door so wide in respect of claims accruing prior to July 1, 1865, and therefore declared that the court should not consider them, save where they had been allowed or had been pending prior to the passage of the act.

The present claim accrued in 1857, was never allowed, and was not a pending claim before the date of the act; [478] unless it can be said that it was pending before Congress in 1877 and 1878. We think this cannot properly be said. The claim to which the attention of Congress was invited in those years was not for an act of depredation by Indians, but, as was stated in the petitions and accompanying affidavits and in the bills introduced in response thereto, was for a depredation by Mormons. No one could understand from the petitions and affidavits or from the bills that there was any purpose to claim indemnity from the government on the ground that the depredation was committed by its Indian wards, or to obtain reparation from the latter through the exertion of the government's control over them. Rightly speaking, it was merely an appeal to the bounty or generosity of Congress, and probably was so regarded by the latter. At all events it was not an assertion or presentation of the claim which is the subject of this suit, for the latter is for an act of depredation by Indians, not by Mormons. We are accordingly of opinion that the claim is one jurisdiction of which is expressly withheld from the Court of Claims by the act of 1891.

Judgment affirmed.

SAM B. PERRIN, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 478–487.)

Indians — power of Congress over ceded lands — commerce in intoxicating liquor.

1. The power to protect the government's Indian wards against the evils of intemperance is sufficiently comprehensive to enable Congress, when securing the cession of part of an Indian reservation within a state, to prohibit the sale of intoxicants upon the ceded lands if, in its judgment, that is reasonably essential to the protection of the Indians residing on the unceded lands.

[For other cases, see Indians, II., in Digest Sup. Ct. 1908.]

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Indians — power of Congress over ceded lands — commerce in intoxicating liquor.

2. The prohibition against the sale of intoxicating liquors upon any of the ceded lands embraced in an agreement ratified and confirmed by Congress by the act of August 15, 1894 (28 Stat. at L. 286, chap. 290), by which the Yankton tribe of Sioux Indians ceded and relinquished to the United States all the unallotted lands in a reservation in South Dakota, does not transcend the power of Congress as covering an unnecessarily extensive territory, where the reservation originally embraced 400,000 acres, and the lands which had been allotted to the Indians in severalty are in small tracts scattered throughout the ceded district, and aggregate nearly 100,000 acres, occupied by more than 1,500 Indians.

[For other cases, see Indians, II., in Digest Sup. Ct. 1908.]

Indians — power of Congress over ceded lands — commerce in intoxicating liquors.

3. The failure expressly to limit the duration of the prohibition against the sale of intoxicating liquors upon the ceded lands embraced in an agreement ratified and confirmed by Congress by the act of August 15, 1894, by which the Yankton tribe of Sioux Indians ceded all their unallotted lands in a reservation in South Dakota, will not invalidate such prohibition so long as the period during which the United States, under the act of February 8, 1887 (24 Stat. at L. 388, chap. 119), § 5, holds the allotted lands in trust, has not expired, and the tribal relation has not been dissolved, and the wardship of the Indians has not been terminated.

[For other cases, see Indians, II., in Digest Sup. Ct. 1908.]

[No. 707.]

Submitted January 13, 1914. Decided February 24, 1914.

IN ERROR to the District Court of the United States for the District of South Dakota to review a conviction for unlawfully selling intoxicating liquors upon lands ceded by Indians. Affirmed.

The facts are stated in the opinion.

Messrs. Charles H. Bartelt and Edwin R. Winans submitted the cause for plaintiff in error:

The plaintiff in error is a white male citizen and resident of the state of South Dakota, and amenable to all the laws of the state, both civil and criminal, and owes allegiance to the state, which is bound to protect him in his rights as such citizen; and in doing so the state should have the right to legislate concerning the sale and introduction of intoxicating liquor by him.

People v. Bray, 105 Cal. 344, 27 L.R.A. 158, 38 Pac. 731.

When the unallotted lands of Yankton Indian Reservation were ceded to the United States by the Yankton tribe of Sioux Indians by treaty of December 31, 1892, and when such unallotted lands were opened to settlement by virtue of the act of Congress approved August 15th, 1894, and by the proclamation of the President of the United States in pursuance thereof dated May 16, 1895, the United States relinquished its jurisdiction thereover and it then became subject to the general jurisdiction of the state of South Dakota, for the purpose of punishing criminal offenses committed on said land.

Ex parte Moore, 28 S. D. 339, 133 N. W. 817; State v. Nimrod, 30 S. D. 239, 138 N. W. 377.

If the state has the right to legislate concerning the sale of intoxicating liquor, it cannot belong to the Federal government.

United States v. Ward, McCahon (Kan.) 199.

A citizen is one who owes the government, allegiance, service, and money by way of taxation, and to whom the government in turn grants and guarantees liberty of person, conscience, the right of acquiring and possessing property, of marriage and the social relations, of suit and defense, and security in person, estate, and reputation.

United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588.

Congress cannot make police regulations affecting citizens of states.

United States v. Dewitt, 9 Wall. 41, 19 L. ed. 593; State v. Wise, 70 Minn. 99, 72 N. W. 843.

Assistant Attorney General Wallace submitted the cause for defendant in error:

The cession grant did not disturb the status of the land as Indian country.

Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399.

A like unlimited restriction is found in Marchie Tiger v. Western Invest. Co. 221 U. S. 316, 55 L. ed. 749, 31 Sup. Ct. Rep. 578, where the "condition" as applied to allotted lands, with the ordinary twenty-five-year nonalienation provision, forever requires the approval of the Secretary of the Interior before a valid conveyance can be made by the Indian.

So long as a tribal organization obtains capable of making agreements from time to time with the United States, so long as there is a tribal property, so long must Congress possess this power to protect the members of the tribe against the evil consequences of indulging in liquor. And the period during which that protection may be

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demanded is a legislative, and not a judicial, question.

United States v. Sandoval, 231 U. S. 28, ante, 107, 34 Sup. Ct. Rep. 1; Marchie Tiger v. Western Invest. Co. 221 U. S. 311–315, 55 L. ed. 747–749, 31 Sup. Ct. Rep. 578; United States v. Sutton, 215 U. S. 296, 54 L. ed. 202, 30 Sup. Ct. Rep. 116; United States v. Richert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478; United States v. 43 Gallons of Whiskey (United States v. Lariviere) 93 U. S. 195, 196, 23 L. ed. 847, 848.

This court has also decided that the unlimited restriction against the sale of liquor is perfectly valid in the case of a private grant.

Cowell v. Colorado Springs Co. 100 U. S. 55, 25 L. ed. 547.

And so far as the feature of condition subsequent is concerned, the analogy is pointed out in Beck v. Flournoy Live Stock & Real Estate Co. 12 C. C. A. 497, 27 U. S. App. 618, 65 Fed. 35; quoted in Marchie Tiger v. Western Invest. Co. 221 U. S. 313, 55 L. ed. 748, 31 Sup. Ct. Rep. 578.

The fact that some or all of these Indians may have become citizens under the provisions of the allotment act of 1887 does not in any way affect the power of Congress to protect them against their appetites (which are not altered by the investiture of citizenship), or to protect the neighboring white inhabitants, whose safety would be affected by excessive indulgence of the Indian appetite.

Marchie Tiger v. Western Invest. Co. 221 U. S. 314, 315, 55 L. ed. 749, 31 Sup. Ct. Rep. 578.

[480] Mr. Justice **Van Devanter** delivered the opinion of the court:

This direct writ of error brings under review a judgment of conviction for unlawfully selling intoxicating liquors upon ceded lands formerly included in the Yankton Sioux Indian Reservation, in the state of South Dakota. This reservation was created by the treaty of April 19, 1858 (11 Stat. at L. 743), for the use of the Yankton tribe of Sioux Indians, and originally embraced 400,000 acres. A considerable part of it was allotted in severalty to the members of the tribe under the act of February 8, 1887 (24 Stat. at L. 388, chap. 119), and the amendatory act of February 28, 1891 (26 Stat. at L. 794, chap. 383), the allotments being in small tracts scattered throughout the reservation. By an agreement ratified and confirmed by Congress August 15, 1894 (28 Stat. at L. 286, 314, chap. 290), the tribe ceded and relinquished to the United States all the unallotted lands. In the 17th article of the agreement it was stipulated: "No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians, as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement." And in the ratifying act it was provided: "That every person who shall sell or give away any intoxicating liquors or other intoxicants upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the treaty of April nineteenth, eighteen hundred and fifty-eight, shall be punishable by imprisonment for not more than two [481] years and by a fine of not more than three hundred dollars." [p. 319.]

Conformably to § 5 of the act of 1887, each allottee was given a trust certificate declaring that the United States would hold the land embraced in his allotment, for the period of twenty-five years, or such extended period as the President might direct, in trust for him, or, in case of his decease, for his heirs, but without power in him or them to convey or make any contract touching the land during the trust period, and at the expiration of that period would issue to him or them a patent conveying the title in fee, discharged of the trust. Some of the allotted lands were subsequently disposed of pursuant to express authority from Congress, and those remaining approach 100,000 acres, occupied by more than 1,500 Indians. Rep. Com. Ind. Affairs, 1911, p. 72. The trust period has not expired, nor has the tribal relation of the Indians been dissolved. An agent or superintendent remains in charge of their affairs and they are still wards of the government. Hallowell v. United States, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587; United States v. Sandoval, 231 U. S. 28, ante, 107, 34 Sup. Ct. Rep. 1.

The ceded lands, excepting some small tracts retained by the government as sites for an Indian agency, Indian schools, and the like, were opened to disposition under the homestead and town-site laws, May 21, 1895 (29 Stat. at L. 865), and have largely passed into private ownership.

The place at which the intoxicating liquors were sold was within the defendant's own premises in the town of Dante, an organized municipality located upon a

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part of the ceded lands then held in private ownership by the inhabitants, none of whom was an India. . The defendant is a white man, but whether the persons to whom the liquors were sold were white or Indian does not appear, and is immaterial under the statutory provision before quoted, upon which the prosecution was founded.

The objections urged in the district court against the [482] conviction, and now renewed, call in question the validity of that statutory provision, and are, first, that the power to regulate the sale of intoxicating liquors upon all ceded lands rests exclusively in the state; and, second, that if Congress possesses any such power, it necessarily is limited to what is reasonably essential to the protection of the Indians occupying the unceded lands, and that this limitation is transcended by the provision in question because it embraces territory greatly in excess of what the situation reasonably requires, and because its operation is not confined to a designated period, reasonable in duration, but apparently is intended to be perpetual.

The power of Congress to prohibit the introduction of intoxicating liquors into an Indian reservation, wheresoever situate, and to prohibit traffic in such liquors with tribal Indians, whether upon or off a reservation and whether within or without the limits of a state, does not admit of any doubt. It arises in part from the clause in the Constitution investing Congress with authority "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," and in part from the recognized relation of tribal Indians to the Federal government. United States v. Holliday, 3 Wall. 407, 417, 18 L. ed. 182, 185; United States v. Sutton, 215 U. S. 291, 54 L. ed. 200, 30 Sup. Ct. Rep. 116; Hallowell v. United States, supra; Ex parte Webb, 225 U. S. 663, 683, 691, 56 L. ed. 1248, 1256, 1259, 32 Sup. Ct. Rep. 769; United States v. Wright, 229 U. S. 226, 57 L. ed. 1160, 33 Sup. Ct. Rep. 630; United States v. Sandoval, supra. "These Indian tribes are the wards of the Nation. They are communities dependent on the United States. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." United States v. Kagama, 118 U. S. 375, 383, 30 L. ed. 228, 231, 6 Sup. Ct. Rep. 1109.

[483] Whether this power to protect the government's Indian wards against the evils of intemperance, of which they are easy victims, is sufficiently comprehensive to enable Congress, when securing the cession of part of an Indian reservation within a state, to prohibit the sale of intoxicants upon the ceded lands, if, in its judgment, that is reasonably essential to the protection of the Indians residing upon the unceded lands, is the real question presented by the first of the defendant's objections. We say it is the real question, because if Congress possesses power to do this it follows that the state possesses no exclusive control over the subject, and that the congressional prohibition is supreme. United States v. Holliday, 3 Wall. 419, 18 L. ed. 186.

The stipulation before quoted shows that when the Indians and the commissioners representing the United States agreed upon a cession of the unallotted lands, among which the allotted tracts were interspersed, both were of opinion that due regard for the welfare of the Indians required that traffic in intoxicants upon the ceded lands be interdicted, as it was before the cession; and Congress, evidently being of a like opinion, inserted in the ratifying act the provision making it a punishable offense for any person to sell or give away any intoxicating liquors or other intoxicants upon any of the ceded lands. Stipulations and provisions of this character are not new, but have occasionally appeared in Indian treaties and legislation for more than fifty years. The case of United States v. 43 Gallons of Whiskey (United States v. Lariviere), 93 U. S. 188, 23 L. ed. 846, arose out of a treaty with the Chippewas in 1863 (13 Stat. at L. 668), wherein a considerable portion of a reservation in the state of Minnesota was ceded to the United States. The treaty contained a stipulation that the laws of the United States, then in force or thereafter enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, should be operative throughout the ceded lands [484] until Congress or the President should direct otherwise; and the principal question in the case was whether this stipulation encroached upon the power of the state and upon its equal footing with the original states. This court upheld the stipulation, and in the course of the opinion, after observing that the power of Congress to regulate commerce with the Indian tribes is "as broad and as free from restrictions as that to regulate commerce with foreign nations," said (p. 195): "As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, Con-

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gress has the power to say with whom, and on what terms, they shall deal, and what articles shall be contraband. If liquor is injurious to them inside of a reservation, it is equally so outside of it; and why cannot Congress forbid its introduction into a place near by, which they would be likely to frequent? It is easy to see that the love of liquor would tempt them to stray beyond their borders to obtain it; and that bad white men, knowing this, would carry on the traffic in adjoining localities, rather than venture upon forbidden ground." And again (p. 197): "The chiefs doubtless saw, from the curtailment of their reservation, and the consequent restriction of the limits of the 'Indian country,' that the ceded lands would be used to store liquors for sale to the young men of the tribe; and they well knew that, if there was no cession, they were already sufficiently protected by the extent of their reservation. Under such circumstances, it was natural that they should be unwilling to sell until assured that the commercial regulation respecting the introduction of spirituous liquors should remain in force in the ceded country, until otherwise directed by Congress or the President. This stipulation was not only reasonable in itself, but was justly due from a strong government to a weak people it had engaged to protect. . . . Based as it is exclusively on the Federal [485] authority over the *subject-matter*, there is no disturbance of the principle of state equality." The case came here a second time and the views before expressed were reaffirmed. 108 U. S. 491, 27 L. ed. 803, 2 Sup. Ct. Rep. 906.

The case of Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399, is even more in point. There the Nez Percé tribe, by an agreement ratified by Congress, had ceded to the United States a large portion of their reservation in the state of Idaho, and in the agreement was a stipulation subjecting the ceded lands, for a period of twenty-five years, to the Federal laws prohibiting the introduction of intoxicants into the Indian country. The major part of the unceded lands was allotted in severalty to members of the tribe under the acts of 1887 and 1891, supra, and the ceded lands were opened to disposition under the public-land laws. In regular course, some of the ceded lands were patented to white men and came to be the site of a town. Under the stipulation, Dick was prosecuted for introducing intoxicating liquors into the town, and was convicted; whereupon he brought the judgment here for review, his chief contention being that, in view of Idaho's position as a state, Congress was without constitutional power to authorize or ratify the stipulation. Upon full consideration this court affirmed the judgment, and, following United States v. 43 Gallons of Whiskey, supra, and other cases, held that the stipulation was a valid regulation, and not subject to objection on constitutional grounds. See also Bates v. Clark, 95 U. S. 204, 208, 24 L. ed. 471, 472; Clairmont v. United States, 225 U. S. 551, 558, 56 L. ed. 1201, 1204, 32 Sup. Ct. Rep. 787.

We could not sustain the defendant's first objection without departing from the principles announced and applied in those cases, and this we have no disposition to do, for we regard them as embodying a right conception of the power of Congress in dealing with the Indian wards and adopting measures for their protection.

We come, then, to the objection that the prohibition in [486] the act of 1894 covers an unnecessarily extensive territory, and is not limited in duration, and so transcends the power of Congress.

As the power is incident only to the presence of the Indians and their status as wards of the government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis. Thus, a prohibition like that now before us, if covering an entire state when there were only a few Indian wards in a single county, undoubtedly would be condemned as arbitrary. And a prohibition valid in the beginning doubtless would become inoperative when, in regular course, the Indians affected were completely emancipated from Federal guardianship and control. A different view in either case would involve an unjustifiable encroachment upon a power obviously residing in the state. On the other hand, it must also be conceded that, in determining what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the courts.

The claim that the territory covered by this prohibition is so excessive as to make it purely arbitrary is devoid of merit. The original reservation embraced 400,000 acres,—a district practically 25 miles square. The allotments are in small tracts scattered throughout this district, and aggregate nearly 100,000 acres. The number of Indians affected is upwards of 1,500, and they are more or less in a state of transition from an unsettled to a settled life. In this situation, and having some regard to the weakness of Indians in re-

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spect of the use of intoxicants, we are far from believing that Congress exceeded the limits of its discretion in applying the prohibition to all the ceded lands.

[487] Of the claim that the prohibition is not expressly limited in its duration it is enough to observe that this objection cannot be of present avail. The conditions justifying the prohibition remain substantially the same as when it was adopted. The trust period has not expired, the tribal relation has not been dissolved, and the wardship of the Indians has not been terminated. See Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 315, 55 L. ed. 738, 749, 31 Sup. Ct. Rep. 578; act May 8, 1906, 34 Stat. at L. 182, chap. 2348; United States v. Pelican (decided this day [232 U. S. 442, ante, 676, 34 Sup. Ct. Rep. 396]). The fact that the conditions may become so changed in the future as to render the prohibition inoperative affords no reason for condemning it now. Unless sooner repealed, it will continue in force as long as the presence and status of the Indians sustain it as a Federal regulation.

Judgment affirmed.

JOSEPH PRONOVOST, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 487–490.)

Error to district court — jurisdiction below — Federal question.

A direct writ of error will not lie from the Federal Supreme Court under the Judicial Code, § 238, to a district court, to review a conviction for introducing intoxicating liquors into the Indian country, where the grounds upon which the jurisdiction of the district court was challenged are not disclosed by the record, and there is no constitutional or treaty question involved.

[For other cases, see Appeal and Error, III. d, 3, g, in Digest Sup. Ct. 1908.]

[No. 128.]

Submitted January 15, 1914. Decided February 24, 1914.

IN ERROR to the District Court of the United States for the District of Montana to review a conviction for introducing intoxicating liquors into the Indian country. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

No brief was filed for plaintiff in error.

Assistant Attorney General Wallace submitted the cause for defendant in error.

Mr. Justice Van Devanter delivered the opinion of the court:

This was a criminal prosecution for introducing intoxicating liquors into the Indian country. Upon the trial, the jury found the defendant guilty, and a judgment of conviction followed, to reverse which he sued out this direct writ of error. No brief or argument has been submitted in his behalf, and the grounds upon which he seeks a reversal are not made clear.

It appears that the jurisdiction of the district court was challenged upon some ground, not disclosed in the record, and that the objection was overruled. The indictment is in the usual form, gives January 2, 1911, as the date of the offense, describes the liquors as consisting of designated quantities of whisky, wine, and beer, and charges that they were introduced by the defendant into the Flathead Indian Reservation, in the state of Montana, the same "then and there being an Indian country." A brief bill of exceptions recites that the government produced evidence in support of the charge, and that the defendant admitted the introduction of the liquors "as charged in the indictment." Nothing more appears respecting what was shown at the trial.

An act of Congress makes the introduction of liquors, such as whisky, wine, and beer, into the Indian country, an offense against the United States, and prescribes its punishment. 29 Stat. at L. 506, chap. 109. [489] This act embraces Indian country within the limits of a state. Hallowell v. United States, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587; United States v. Wright, 229 U. S. 226, 237, 57 L. ed. 1160, 1166, 33 Sup. Ct. Rep. 630. An Indian reservation is Indian country (Clairmont v. United States, 225 U. S. 551, 56 L. ed. 1201, 32 Sup. Ct. Rep. 787), and we take judicial notice that on the date named there was an Indian reservation in the state of Montana known as the Flathead Indian Reservation. Treaty of July 16, 1855, 12 Stat. at L. 975, art. 2; acts April 23, 1904, 33 Stat. at L. 302, chap. 1495, § 12, and March 3, 1905. 33 Stat. at L. 1048, 1080, chap. 1479, § 9: Rep. Com. Ind. Affairs, 1911, p. 83. Subject to exceptions not here material, the jurisdiction of the district court, as prescribed by law, embraced all offenses against the United States committed within the state of Montana. Rev. Stat. § 563, U. S. Comp.

NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

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Stat. 1901, p. 455; 25 Stat. at L. 676, 682, chap. 180, § 21.

Thus we see not only that the grounds upon which the court's jurisdiction was challenged are not disclosed by the record, but also that, so far as appears, the offense charged in the indictment and shown at the trial was manifestly cognizable in the district court.

The bill of exceptions contains a further recital that the defendant, at the conclusion of the evidence, requested the court to direct a verdict of acquittal upon the ground that the town of Polson was incorporated under the laws of Montana and subject to the state's police power, and that the subject-matter of the case was not within the control of the United States. In this there may have been an indirect assertion that the liquors were introduced into the town of Polson, not into the Flathead Indian Reservation, and that the offense, if any, was not one against the United States. But, even if so, the assertion has no other support in the record. The indictment makes no mention of the town of Polson, and neither does the recital respecting what was shown at the trial. The latter, as we have seen, states that the government produced [490] evidence in support of the charge, and that the defendant admitted the introduction of the liquor "as charged in the indictment." The natural import of this is that the liquors were introduced into the Flathead Indian Reservation. In this situation the reference to the town of Polson cannot be regarded as a factor in the case. But, as bearing upon the possible status of the lands occupied by the town, see Perrin v. United States, 232 U. S. 478, ante, 691, 34 Sup. Ct. Rep. 387; 34 Stat. at L. 354, chap. 3504, § 17; 35 Stat. at L. 795, chap. 263, § 21.

As no real question of the District Court's jurisdiction is involved, nor any constitutional or treaty question, there is no basis for the direct writ of error. The Judicial Code, § 238 [36 Stat. at L. 1157, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 228].

Writ of error dismissed.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.
JELSKE CRAMER.

(See S. C. Reporter's ed. 490–493.)

Commerce — Federal power — superseding state regulation — carrier's liability.

State statutes which, like Iowa Code, § 2074, nullify contracts limiting the liability of a carrier for loss or damage to the agreed or declared value upon which the rate was based, were superseded, so far as interstate shipments are concerned, by the Carmack amendment of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), § 7, to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), § 20, which furnishes the exclusive rule on the subject of the liability of a carrier under contracts for interstate shipments.

[For other cases, see Commerce, I. c, in Digest Sup. Ct. 1908.]

[No. 156.]

Submitted January 16, 1914. Decided February 24, 1914.

IN ERROR to the Supreme Court of the State of Iowa, to review a judgment which affirmed a judgment of the District Court of Wright County, in that state, against a carrier for the full amount of the damage to an interstate shipment, notwithstanding stipulations limiting the carrier's liability to the agreed value. Reversed and remanded for further proceedings.

See same case below, 153 Iowa, 103, 133 N. W. 387.

The facts are stated in the opinion.

Mr. M. L. Bell submitted the cause for plaintiff in error. Mr. F. C. Dillard was on the brief:

The provisions of § 20 of the act of February 4, 1887, as amended by the act of June 29, 1906, constitute an exclusive regulation of contracts for interstate shipments by railroad common carriers, superseding all state regulations upon the same subject.

Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Chicago, St. P. M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155.

The liability imposed by said amended § 20 is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification is reasonable and does not exempt from loss due to negligence.

Missouri, K. & T. R. Co. v. Harriman,

NOTE.—On validity of stipulation limiting carrier's liability to agreed valuation, as affected by the Hepburn act—see note to Bernard v. Adams Exp. Co. 28 L.R.A.(N.S.) 293.

On Carmack amendment as affecting state regulations as to stipulations limiting liability of common carriers for loss or damage to goods—see note to Adams Exp. Co. v. Croninger, 44 L.R.A.(N.S.) 257.

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227 U. S. 672, 57 L. ed. 698, 33 Sup. Ct. Rep. 397; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 652, 57 L. ed. 683, 688, 33 Sup. Ct. Rep. 391.

An agreed valuation regulation determining a rate is, when filed and published according to law, in effect a part of the act of Congress. Its reasonableness is not open to question in this action.

Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Poor v. Chicago, B. & Q. R. Co. 12 Inters. Com. Rep. 418, 469; L. W. Blinn Lumber Co. v. Southern P. Co. 18 Inters. Com. Rep. 430.

No appearance for defendant in error.

Mr. Justice Lamar delivered the opinion of the court:

The plaintiff, Cramer, sued the railroad company to recover $992, the amount of damage to a carload of 60 hogs shipped from Galt, Iowa, to Chicago, Illinois. The company defended on the ground that the plaintiff overloaded the car, and placed therein such an excessive quantity of hay as to overheat the animals, thereby damaging some and causing the death of others. It further contended that no agent of the company had any knowledge as to the value of the hogs, except what was stated by the shipper, who represented that their value did not exceed $10 per head, and thereby secured the benefit of the lower of two rates specified in the tariff on file with the Interstate Commerce Commission and at Galt. One of these rates applied where the value of the hogs did not exceed $10 per head, and the other, a higher rate, applied where the value exceeded $10 per head. The defendant claimed that the tariffs were binding on plaintiff, [493] and that he could not, in any event, recover beyond the valuation on which the freight was charged. This latter defense was stricken out on demurrer, and the trial resulted in a verdict in favor of the plaintiff for more than $600. On writ of error the supreme court affirmed the judgment and sustained the order, striking out the plea on the ground that such defense was prohibited by § 2074 of the Iowa Code, which provides that:

"No contract, receipt, rule, or regulation shall exempt any railway corporation engaged in transporting persons or property, from the liability of a common carrier or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into."

In Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289, decided in January, 1898, it was held that this statute was valid even as applied to interstate shipments. But in 1906 Congress passed the Hepburn bill [34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288], which established in interstate commerce a uniform rule of liability. That rule of liability is to be enforced in the light of the fact that the provisions of the tariff enter into and form a part of the contract of shipment, and if a regularly filed tariff offers two rates, based on value, and the goods are forwarded at the low value in order to secure the low rate, then the carrier may avail itself of that valuation when sued for loss or damage to the property. The question has been so fully considered in cases determined since the decision herein of the supreme court of Iowa, that it is unnecessary to do more than refer to Kansas City Southern R. Co. v. Carl, 227 U. S. 645, 57 L. ed. 685, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397, where the facts were substantially like those here involved, and where it was held that a carrier had the right to make a defense like that filed in the court below. As it was error to strike the plea, the judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

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[494] D. E. FOOTE & COMPANY, Incorporated, et al., Plffs. in Err.,

v.

CHARLES H. STANLEY, Comptroller of the State of Maryland.

(See S. C. Reporter's ed. 494–508.)

Commerce — state regulation of imports — inspection fees.

The charge of 1 cent per bushel upon oysters coming from other states, which is levied by the Maryland oyster law, § 69, to help defray the expenses of the inspection provided for by that section, and the other expenses of the State Fishery Force, violates U. S. Const. art. 1, § 8, as unlawfully interfering with interstate commerce, where such tax regularly yields a revenue largely

Note.—On inspection laws as regulations of commerce—see note to New Mexico ex rel. McLean v. Denver & R. G. R. Co. 51 L. ed. U. S. 78.

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in excess of the amount required to pay the salaries of the inspectors, and the excess is devoted to noninspection purposes.
[For other cases, see Commerce, V.; VI. c, in Digest Sup. Ct. 1908.]

[No. 159.]

Argued January 16, 1914. Decided February 24, 1914.

IN ERROR to the Court of Appeals of the State of Maryland to review a decree which affirmed a decree of the Circuit Court of Baltimore City, in that state, dismissing the bill in a suit to enjoin the collection of a tax upon oysters coming into the state. Reversed and remanded for further proceedings.

See same case below, 117 Md. 335, 82 Atl. 380.

Statement by Mr. Justice Lamar:

The plaintiffs are engaged in packing oysters taken from the waters of Maryland, Virginia, and New Jersey, and shipped to Baltimore, where they are inspected under the provisions of the Maryland oyster law. This comprehensive statute contains 82 sections, one of which (§ 69) provides for the appointment of 20 special inspectors, to be paid $45 per month each, during the season. They are required to inspect all oysters in the district to which they are assigned, and to give a certificate to buyer and seller in substantially the following form:

"I hereby certify that I have this day inspected for Captain ———— of the schooner ————, a cargo of oysters, sold to ————, and found the same to contain —— bushels of merchantable oysters, and —— bushels of unmerchantable oysters. . . ."

The section further provides that "a charge of 1 cent per bushel is hereby levied to help defray the expenses of such inspection and the other expenses of the State Fishery Force, upon all oysters unloaded from vessels at the place where said oysters are to be no further shipped in bulk in vessels."

The fee was to be charged equally to the buyer and seller, and in case it was not paid at the end of the week, the property of the party indebted was to be levied on and sold by the comptroller "as in cases of taxes in default, without further process of law."

[496] The four plaintiffs refused to pay the inspection fees charged against them between October, 1910, and April, 1911. The comptroller threatened to enforce collection by levy and sale, and they filed a bill in the circuit court of Baltimore city, seeking an injunction on the ground that the inspection fees were excessive and constituted a burden on interstate commerce and a violation of the provision of the Constitution that "no state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." [Art. 1, § 10.]

The case was heard on an agreed statement of facts which, in addition to those above recited, showed that the act of April, 1910, was a re-enactment of sections of a prior statute (Code of Maryland, art. 72) which was substantially like the present law, with the same charge of 1 cent a bushel for measuring oysters.

Extracts from various annual reports of the comptroller were stipulated into the record. They show that the salaries of the inspectors amounted to about $14,000 per annum. After the deduction of salaries of these inspectors there was for 1909 and 1910 respectively, an excess of $22,010 and $28,680. This annual excess was carried to the credit of the oyster fund, provided for both in the repealed and re-enacted oyster law. In the report of the comptroller for 1909, he says: "The tax as to 1 cent per bushel on all oysters inspected in this state, as enacted by chapter 488 of the Acts of 1908, has been sufficient not only to pay the cost of such inspections, but also to carry to this [oyster] fund the balance or excess of $22,010.95."

In the report for 1910, he says: "During the fiscal year ending September 30, 1910, the receipts of taxes on oysters amounted to $43,671.94. The disbursements for account of salaries of the measurers and inspectors of oysters were $14,991, leaving a balance or excess [497] of $28,680.94, which was carried to the credit of the Maryland state oyster fund."

"The receipts from dredging and tonging licenses show a heavy shrinkage by reason of fewer boats being engaged in the industry; nevertheless the excess tax of 1 cent per bushel on oysters sold amounted to $28,680.94, making the fund self-sustaining for the year" (1911).

Section 30 of the oyster law referred to provides that the oyster fund shall only be drawn upon for "the purpose of maintaining sufficient and proper police regulations for the protection of fish and oysters in Maryland waters, and in the payment of the officers and men, and keeping in repair and supplying the necessary means of sailing the boats and vessels of the state fishery force."

After a hearing and consideration of the facts submitted, the circuit court held that

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the inspection tax was valid, refused to enjoin its collection, and dismissed the bill. That judgment was affirmed by the court of appeals (117 Md. 335, 82 Atl. 380), and the case was brought here by writ of error.

Messrs. W. Thomas Kemp and George Whitelock argued the cause and filed a brief for plaintiffs in error:

Under art. 1, § 8 of the Federal Constitution, the state of Maryland can impose no tax upon Virginia and New Jersey oysters, except such as may be reasonably necessary for inspection purposes "to secure the due quality and measure of" the oysters shipped from Virginia and New Jersey into Maryland, and inspected in Maryland at the termination of the shipment.

Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

Interstate commerce can only be impeded by such local statutes as seek fairly and honestly to protect the citizens of a state from the fraud of short measures, or injury by introduction of dangerous or unwholesome articles. The act of inspection of goods shipped into a state must be performed at the termination of the shipment, or, as Chief Justice Marshall observes, it must be on land, "while the article is in the bosom of the country." The person to perform the inspection must be one qualified to measure, weigh, or in some manner judge as to the particular commodity to be examined.

Gibbons v. Ogden, 9 Wheat. 1, 203, 6 L. ed. 23, 71; Brown v. Maryland, 12 Wheat. 419, 437, 438, 6 L. ed. 678, 685; Foster v. Master & Wardens, 94 U. S. 246, 24 L. ed. 122; Turner v. Maryland, 107 U. S. 38, 55, 27 L. ed. 370, 376, 2 Sup. Ct. Rep. 44; New York v. Compagnie Générale Transatlantique, 107 U. S. 59, 62, 63, 27 L. ed. 383, 385, 2 Sup. Ct. Rep. 87.

The Federal Constitution contemplates and permits only such state inspection taxes as are reasonable in amount, single in purpose, and assessed under a law designed for the protection of the health or safety of the community, as distinguished from a tax which, in whole or in part, levies tribute upon interstate commerce for the enrichment of the coffers of the taxing state itself.

Brown v. Maryland, 12 Wheat. 419, 460, 6 L. ed. 678, 693; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Leisy v. Hardin, 135 U. S. 100, 108, 34 L. ed. 128, 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Turner v. Maryland, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Re Rebman, 3 Inters. Com. Rep. 126, 41 Fed. 867, affirmed in 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; Minnesota v. Barber, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179, 3 Inters. Com. Rep. 532, 43 Fed. 609; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; Postal Teleg. Cable Co. v. Taylor, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 27, 54 L. ed. 355, 366, 30 Sup. Ct. Rep. 190; Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 381, 394, 56 L. ed. 241, 245, 32 Sup. Ct. Rep. 152; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

This tax is grossly excessive and is imposed for other than inspection purposes.

Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 381, 394, 56 L. ed. 241, 245, 32 Sup. Ct. Rep. 152; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; Standard Stock Food Co. v. Wright, 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784; Re Rebman, 3 Inters. Com. Rep. 126, 41 Fed. 875.

Mr. Edgar Allan Poe, Attorney General of Maryland, argued the cause and filed a brief for defendant in error:

In view of the fact that it appears from the bill of complaint and agreed statement of facts that the plaintiffs in error are not complaining of the imposition of any inspection charge upon oysters imported from foreign countries, § 10 of article 1 of the Constitution of the United States has no bearing upon the controversy now before this court.

New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 49, 51 L. ed. 85, 27 Sup. Ct. Rep. 1.

The vesting in Congress of exclusive power to regulate interstate commerce does not prohibit the states from passing, in the exercise of the police power, inspection laws, even though such laws operate upon articles of interstate commerce.

New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 50, 51 L. ed. 86, 27 Sup. Ct. Rep. 1; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; Neilson v. Garza, 2 Woods, 287, Fed. Cas. No. 10,091; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

The interpretation of article 72 of the

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Maryland Code, as set forth by the court of last resort in Maryland, is conclusive and binding upon this court, and completely and finally disposes of the contention advanced by the plaintiffs in error.

Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 L. ed. 170, 26 Sup. Ct. Rep. 23; Gatewood v. North Carolina, 203 U. S. 531, 51 L. ed. 305, 27 Sup. Ct. Rep. 167; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160.

The statute in question must be considered as an inspection law which it was in the power of the state of Maryland to enact, and its fair import is that the fees exacted under its provisions are for the purpose of meeting the expenses of inspection.

Standard Stock Food Co. v. Wright, 225 U. S. 549, 56 L. ed. 1200, 32 Sup. Ct. Rep. 784.

Mr. Justice Lamar, after making the foregoing statement of facts, delivered the opinion of the court:

The plaintiffs are engaged in the business of packing oysters in the city of Baltimore, and, during the season of 1910-11 purchased 736,000 bushels, of which 494,000 bushels were taken from the waters of the state of Maryland, 228,000 from the waters of the state of Virginia, and 14,118 from the state of New Jersey. These oysters were inspected in Baltimore by officers appointed under the provisions of the Maryland statute, which fixed an inspection fee of 1 cent per bushel to be paid, one half by the seller and one half by the buyer. The plaintiffs having refused to pay the inspection charge assessed against them, litigation followed. The decision was against their claim of immunity under art. I, §§ 8 and 10, of the Constitution. The case was then brought here on the ground that the inspection fee of 1 cent per bushel charge was excessive, that it interfered with interstate [503] commerce, and levied an unlawful impost duty upon goods shipped into Maryland from other states.

1. The Constitution prohibits a state from regulating interstate commerce, but at the same time authorizes the collection of the necessary expenses of its inspection laws, with the result that interstate commerce is to that extent lawfully burdened. Inspection is intended to determine the weight, condition, quantity, and quality of merchandise to be sold within or beyond the state's borders. It is usually "accomplished by looking at or weighing or measuring the thing to be inspected." (New York v. Compagnie Générale Transatlantique, 107 U. S. 62, 27 L. ed. 384, 2 Sup. Ct. Rep. 87), though there may be cases in which some degree of supervision or policing is required in order to secure the proper certification of the property intended for sale or shipment. But while the two duties may sometimes overlap, there is a difference between policing and inspection, and if the state imposes upon one set of officers the performance of the two duties, and pays the whole or a part of the joint expenses out of inspection fees, it must be made to appear that such tax does not materially exceed the cost of inspection,—the burden in such cases being on those seeking to collect the combined charge. For if the cost of inspection is so intermingled with other expenses as to make it impossible to separate the two, interstate commerce might be burdened by fees collected both for inspection and revenue,—for a lawful and for an unlawful purpose. Such is the contention here, the plaintiffs insisting that the fees are collected partly for inspecting oysters and partly for the cost of policing the waters of Chesapeake bay; while the defendant insists that the charge is collected and spent solely for inspection.

2. Inspection necessarily involves expense, and the power to fix the fee, to cover that expense, is left primarily to the legislature, which must exercise discretion in determining the amount to be charged, since it is impossible [504] to tell exactly how much will be realized under the future operations of any law. Beside, receipts and disbursements may so vary from time to time that the surplus of one year may be needed to supply the deficiency of another. If, therefore, the fees exceed cost by a sum not unreasonable, no question can arise as to the validity of the tax so far as the amount of the charge is concerned. And even if it appears that the sum collected is beyond what is needed for inspection expenses, the courts do not interfere, immediately on application, because of the presumption that the legislature will reduce the fees to a proper sum. Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 393, 56 L. ed. 244, 32 Sup. Ct. Rep. 152. But when the facts show that what was known to be an unnecessary amount has been levied, or that what has proved to be an unreasonable charge is continued, then they are obliged to act in the light of those facts, and to give effect to the provision of the Constitution prohibiting the collection by a state of more than is necessary for executing its inspection laws. In such inquiry they treat the fees fixed by the legislature for inspection proper as prima facie reasonable,

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and do not enter into any nice calculation as to the difference between cost and collection; nor will they declare the fees to be excessive unless it is made clearly to appear that they are obviously and largely beyond what is needed to pay for the inspection services rendered. Still, effect must be given to the provision of the Constitution, which, in unusual and emphatic terms, permits the state to collect only what is "absolutely necessary." If, therefore, it is shown, that the fees are disproportionate to the service rendered, or, that they include the cost of something beyond legitimate inspection to determine quality and condition, the tax must be declared void because such costs, by necessary operation, obstruct the freedom of commerce among the states. New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; Brimmer v. Rebman, 138 [505] U. S. 83, 34 L. ed. 864, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; Postal Teleg. Cable Co. v. Taylor, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 354, 43 L. ed. 194, 18 Sup. Ct. Rep. 862; Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 394, 56 L. ed. 245, 32 Sup. Ct. Rep. 152; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

3. The unreasonableness of inspection fees may appear from the language of the act, as in D. E. Foote & Co. v. Clagett, 116 Md. 228, 81 Atl. 511, where a charge of 2 cents a bushel on oysters was collected, under a statute which provided that one half was to be used for inspection and the other half was to be used for replacing shells on the natural beds for the purpose of increasing the oyster crop. That law was declared void by the court of appeals of Maryland, because of the provision that one half of the inspection fee should be applied to other than the inspection purpose. The present statute contains language susceptible of the same construction, for it provides for an inspection fee of 1 cent per bushel to be "levied to help pay the salary of the inspectors and the other expenses of the State Fishery Force."

As the act itself makes a clear distinction between inspection expenses "and other expenses," the question at once arises as to whether the state did not provide for the collection of more than was "absolutely necessary for executing its inspection laws," thereby rendering the statute void because it included the cost of "something beyond legitimate inspection to determine quality and condition." Brimmer v. Rebman, 138 U. S. 83, 34 L. ed. 864, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213.

This objection, apparent on the face of the act, was sought to be answered by the suggestion that § 69, which levied the tax, was but a part of an elaborate system of inspection running through the whole law, "the enforcement of which was an inseparable part of the duty of the State Fishery Force," and that "the expense of such inspection is a component part of all the expenses of that force." 117 Md. 335, 82 Atl. 380. It was urged that, in addition to inspecting oysters as they were unloaded from vessels, [506] the Fishery Force performed other inspection duties such as preventing what were known as "buy-boats" from secretly carrying culls and other unmerchantable oysters beyond the limits of the state for consumption or transplanting. But even if it be conceded that these, or like services, could be classed as inspection within the meaning of the Constitution, they form only a part of the many and various duties imposed upon the Fishery Force. That organization is supplied with men and boats, and required to patrol, day and night, the waters of Chesapeake bay to prevent unlicensed boats from taking oysters from improper tonging or dredging, and to see that shells and culls are returned to the natural beds,—provisions intended for the preservation of the supply rather than determining the merchantable quality of oysters offered for sale. Other noninspection duties might be named, but the foregoing will suffice to show that inspection, policing, and business expenses are to be paid for out of inspection fees.

3. But the commingling of these various duties, paid for out of a fund raised for inspection, does not necessarily show that the fee is excessive. For the presumption of invalidity arising from such intermingling might be met by carrying the burden of showing that, while the statute required payment out of which joint fund, the collections were not sufficient, but only helped, to pay the definitely ascertained expenses of inspection. The question of reasonableness, therefore, may be considered in the light of the practical operation of the law with a view of determining, with reasonable certainty, the permanent relation between the amount collected and the cost of inspecting. The court of appeals of Maryland, following the intimation in Turner v. Maryland, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44, declined to pass on the question, upon the ground that a court could not decide whether "a charge or duty under an inspection law is or is not excessive." That suggestion, [507]

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however, is opposed to the distinct rulings in Brimmer v. Rebman, supra, and other cases above cited, which hold that it is the duty of the courts to pass upon the question, so as to protect the private citizen against the payment of inspection fees larger than those authorized by the Constitution.

4. The Maryland statute provided for that kind of inspection that could be performed by "looking at or measuring the thing to be inspected" (New York v. Compagnie Générale Transatlantique, 107 U. S. 62, 27 L. ed. 384, 2 Sup. Ct. Rep. 87). It fixed the amount of salary to be paid the inspectors for such services, so that the cost was definitely known. The receipts, too, are reasonably certain in view of collections in the past.

The present statute is a re-enactment of an old law levying the same charge of 1 cent per bushel. Under the operations of that law it appeared that about 4,000,000 bushels were inspected each year, producing a revenue of $40,000, one third of which was sufficient to pay the salaries of the inspectors, the other two thirds being appropriated to the "other expenses of the Fishery Force." The comptroller, in his annual reports, called the attention of the legislature to the fact that, as required, this "excess" had been credited to the oyster fund. This fund was to be used—not for inspection purposes, but for "maintaining sufficient and proper police regulations for the protection of fish and oysters in Maryland waters, and the payment of the officers and men, and for keeping in repair and supplying the necessary means of sailing the boats and vessels of the State Fishery Force."

Even during the year following the enactment of the new statute, and the failure of many to pay, pending the decision as to the validity of the tax, the collections were in excess of the cost of inspection. In the light of the operation of the previous act, and the failure to show that the amount collected under the new would not be more than was necessary for the expenses of inspection proper, [508] the present statute must be held to be void. The excess collected may have been valid as a tax on property in Maryland, but was a burden on interstate commerce when levied upon oysters coming from other states. This fact renders the whole tax void, because there is no claim that the intrastate commerce can be separated from the interstate shipments, or that the legislature would have taxed one and left the other untaxed.

Judgment reversed and the case remanded for further proceedings not inconsistent with this opinion.

GREAT NORTHERN RAILWAY COMPANY, Plff. in Err.,
v.
GERTRUDE O'CONNOR.

(See S. C. Reporter's ed. 508–516.)

Principal and agent — authority of forwarder — statement as to value.

1. A carrier receiving from a forwarder engaged in combining shipments of various owners to secure carload rates, a carload shipment billed as household goods of small value, is not required, in the absence of anything to indicate false billing, to make special inquiry as to value, but may rely on the forwarder's statement that the car is loaded with goods of the character and value stated.

[For other cases, see Principal and Agent, III. a, in Digest Sup. Ct. 1908.]

Principal and agent — authority of forwarder — secret instructions.

2. A carrier has the right to assume, nothing to the contrary appearing, that a forwarder engaged in combining shipments of various owners to secure carload rates has the authority to agree upon the terms of shipment, and is therefore not bound by the private instructions of one of the owners.

[For other cases, see Principal and Agent, III. c. in Digest Sup. Ct. 1908.]

Carriers — limiting liability — agreed value — use of printed forms.

3. A case of an agreed valuation within the meaning of the rule that a carrier, when its rates are graduated by value, may limit its liability for the loss of an interstate shipment to the agreed or declared value, is presented where the shipper's agent filled out a printed bill of lading describing the shipment as "emigrant movables . . . Released to $10 per cwt.," which, on presentation, was signed by the carrier's agent, and the goods were shipped under the lower rate applicable to goods of that character and value.

[For other cases, see Carriers, II. b, 7, b, in Digest Sup. Ct. 1908.]

[No. 473.]

NOTE.—As to limitation of carrier's liability for loss to agreed valuation—see notes to Everett v. Norfolk & S. R. Co. 1 L.R.A.(N.S.) 985.

As to carrier's power to limit amount of liability in case of negligence generally—see note to Ballou v. Earle, 14 L.R.A. 433.

As to right to limit liability by contract in the absence of negligence—see note to Little Rock & Ft. S. R. Co. v. Cravens, 18 L.R.A. 527.

On validity of stipulation limiting carrier's liability to agreed valuation as affected by the Hepburn act—see note to Bernard v. Adams Exp. Co. 28 L.R.A.(N.S.) 293.

On Carmack amendment as affecting state regulations as to stipulations limiting liability of common carriers for loss or damage to goods—see note to Adams Exp. Co. v. Croninger, 44 L.R.A.(N.S.) 257.

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Submitted January 6, 1914. Decided February 24, 1914.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which, on a second appeal, affirmed a judgment of the District Court of Ramsey County, in that state, against a carrier for the full value of a lost interstate shipment, notwithstanding stipulations limiting the carrier's liability to the agreed value. Reversed and remanded for further proceedings.

See same case below on first appeal, 118 Minn. 223, 136 N. W. 743, on second appeal, 126 Minn. 359, 139 N. W. 618.

Statement by Mr. Justice Lamar:

The Boyd Transfer Company of Minneapolis in addition to its regular transfer business acted as a forwarder by railroad. By collecting from different shippers small lots of goods sufficient in the aggregate to fill a car, it secured carload rates, and out of the difference between carload and less than carload rates it made a profit and at the same time was enabled to offer better rates to the small shipper. How this difference between the two rates was divided between owner and forwarder does not appear in the record. At the time of the shipment referred to in this case, the railroad company had four rates on household goods (including emigrant movables), which vary, both according to the weight and value of the shipment, as follows:

Less than carload lots (value not stated)	$3.00	per cwt.
Less than carload lots (not to exceed $10 per cwt.)	2.00	" "
Carload lots (value not stated)	1.60	" "
Carload lots (value not to exceed $10)	1.00	" "

While these tariffs were in force, the Boyd Transfer Company was employed by the plaintiff, on terms not stated, to box, transfer, and ship certain property which she desired to have sent to Portland, Oregon. The articles consisted of a typewriter, stationery, books, curtains, wearing apparel, jewelry, and other personal effects. Some of them had been packed in a trunk, and the balance were boxed by the Boyd Company and loaded by it into a car filled with household goods. The weight of the load was 22,000 lbs. The Boyd Company filled out a bill of lading, describing the shipment as "One car of Emigrant Movable." [510] "Released to $10 per cwt.," and naming "Boyd Transfer & Storage Company, shipper." The bill of lading on presentation was signed by the agent of the railroad company. The goods were lost *en route* and the plaintiff brought suit against the railroad company for $598.65, their full value. The company filed a plea setting up that the property had been destroyed without its fault, and further contended that in view of the provisions of the tariff, and the fact that the goods had been shipped on the $1 rate, the carrier could not be held liable beyond $10 per hundredweight.

At the trial the plaintiff testified she did not know that there had been any valuation of her goods, as the agent of the Boyd Company in soliciting the shipment had stated that it had a through car, but said nothing to her about shipping her effects as household goods, and she understood that they were to be shipped as a separate consignment. She testified that she had stated to the transfer company that her goods were new, and as she had no insurance, she was willing to pay the regular rates.

The defendant introduced the tariffs, and offered evidence to show that its agents had no knowledge of the contents of plaintiff's boxes which had been loaded into the car by the transfer company, which also made out the bill of lading and indorsed thereon a statement that the car contained "Emigrant Movables Released at $10 per cwt."

A number of auctioneers and dealers in secondhand furniture were introduced as witnesses for the purpose of establishing the average value of secondhand furniture and household goods. They testified that they were familiar with the value of household goods and secondhand furniture; testified that only a few of such effects are sold by weight, but the value being ascertained, the articles could be weighed and the value per pound then [511] determined. This they illustrated by giving the cost, weight, and value per pound of various articles, and gave their opinion as to the average value of shipments of household goods, including furniture, carpets, wearing apparel, and the like. One witness stated that the average value was about $4 per cwt., another $5 per cwt., another testified that, including a secondhand piano weighing 1,500 lbs., the average value would be about $7 per cwt. There was no testimony in rebuttal, beyond the fact that the articles belonging to plaintiff were shown to be worth much more than $10 per cwt.

The court charged that if the Boyd Company was the agent of the plaintiff to make the shipment, she was bound by its valuation, provided such valuation was not an arbitrary attempt to limit liability, and left to the jury to determine whether there had been such an arbitrary attempt to limit liability. They returned a verdict for the amount claimed in the complaint. The defendant moved for a new trial because of

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errors in the charge and because the verdict was in excess of the sum for which the defendant could be held responsible under the tariffs filed with the Interstate Commerce Commission. The judge held that the carrier was not responsible for $62.50, the value of jewelry and silverware in the trunk, and the plaintiff having written off that amount, judgment was rendered against the defendant for $533.40, a sum much in excess of $10 per cwt. The case was then taken to the supreme court of Minnesota, which affirmed the judgment. It held that the railroad company was charged with knowledge that a considerable portion of the amount received by shipping at reduced rates went to the forwarding company, and not to the various owners of the goods packed in one car; and that the railway company must have known that the Boyd Company was ignorant of the value and contents of the boxes belonging to the different shippers. It ruled that the Boyd Company had no implied [512] authority to make an agreement as to the value of plaintiff's goods. It further held that whether there had been any bona fide attempt to fix value was a question of fact; and as the jury by their verdict had found that there had been no such effort, the plaintiff, under Ostroot v. Northern P. R. 111 Minn. 504, 127 N. W. 177, was entitled to recover the full value of the goods shipped. It further held that the rule announced by it was not opposed to Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Chicago, St. P. M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155. The defendant then sued out a writ of error.

Mr. E. C. Lindley submitted the cause for plaintiff in error. Mr. M. L. Countryman was on the brief:

Under the act to regulate commerce, defendant in error was bound by the released valuation of $10 per cwt. declared by her agent, the Boyd Transfer & Storage Company, upon which valuation she obtained a lower rate of freight in accordance with the carrier's interstate tariff provisions.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Chicago, St. P. M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155; Ford v. Chicago, R. I. & P. R. Co. 123 Minn. 87, 143 N. W. 249.

Mr. C. D. O'Brien submitted the cause for defendant in error. Messrs. James Mattimore and T. P. McNamara were on the brief:

Nachtigall, the manager of the Boyd Transfer Company, had no authority to release the value of the goods of defendant in error.

Benson v. Oregon Short Line R. Co. 35 Utah, 241, 136 Am. St. Rep. 1052, 99 Pac. 1072, 19 Ann. Cas. 803.

Without either a contract or acts constituting an estoppel, a carrier may not limit its liability for its own negligence.

Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Re Released Rates, 13 Inters. Com. Rep. 554.

Mr. Justice Lamar, after making the foregoing statement of facts, delivered the opinion of the court:

The plaintiff owned personal effects weighing 545 lbs. and worth $598. She employed the Boyd Transfer Company, which was also a forwarder, to box and ship the property from Minneapolis to Portland. The regular freight rate on such a shipment would have been $3 per cwt.; but without express authority from her, the company forwarded her boxes with others under the terms of a tariff which named $1 as the rate on carload shipments of household goods valued at less than $10 per cwt. The car and its contents were destroyed, and the state supreme court held that the plaintiff was entitled to recover the full value of her property because (1) the railroad agents must have known that the transfer company was a forwarder, without authority to value plaintiff's property, and because (2) there had been no bona fide effort to agree upon a valuation.

[514] 1. It is conceded that the carrier had no knowledge of the contents of the boxes which were loaded by the transfer company and forwarded under the low rate applicable to household goods worth less than $10 per cwt. In the absence of something to indicate that the transfer company was guilty of false billing, the carrier was not required to make special inquiry, but could rely on the statement that the car was loaded with goods of the character and value stated. For, although the Boyd Company was a forwarder, engaged in collecting a number of small shipments from various persons in order to fill a car and obtain the lower rates applicable to carload

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shipments, yet the railroad company was obliged to treat the forwarder as shipper, even though thereby the carrier lost the benefit of the higher rate which would have been applicable to separate and small shipments. This was the ruling in Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392, where it was held that the carriers were not concerned with the question of title, but must treat the forwarder as shipper, and charge the rates applicable to the quantity of freight tendered regardless of who owned the separate articles. If the forwarder was shipper for the purpose of securing carload rates, it was also shipper for the purpose of classifying and valuing, in order to determine which tariff rate was applicable.

2. The plaintiff contended, however, that she had expected her goods to be transported as a separate consignment. But the transfer company had been intrusted with goods to be shipped by railway, and, nothing to the contrary appearing, the carrier had the right to assume that the transfer company could agree upon the terms of the shipment, some of which were embodied in the tariff. The carrier was not bound by her private instructions or limitation on the authority of the transfer company, whether it be treated as agent or forwarder. If there was any undervaluation, wrongful classification, or [515] violation of her instructions, resulting in damage, the plaintiff has her remedy against that company.

3. The plaintiff, however, claimed that, even if the Boyd Transfer Company is to be treated as her agent to agree upon the terms of shipment, there had been no bona fide effort to agree on a valuation, and that she was therefore entitled to recover the full value of her goods. In order to meet this contention the defendant offered evidence to show that it had no knowledge of the contents of the boxes, and was entitled to rely upon the entry on the bill of lading inasmuch as the fair average value of household goods was less than $10 per cwt. Under the decisions in Kansas City Southern R. Co. v. Carl, 227 U. S. 655, 57 L. ed. 689, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397, it was not necessary to offer evidence to sustain the reasonableness of rates, classification, or other terms in the tariff filed with the Commission. The shipper had the right, by appropriate proceedings, to attack the rate or the classification, and, if either or both were held to be unreasonable, could secure appropriate relief either by reparation order, or by suit in court, after such finding of unreasonableness. But so long as the tariff rate, based on value, remained operative, it was binding upon the shipper and carrier alike, and was to be enforced by the courts in fixing the rights and liabilities of the parties. The tariffs are filed with the Commission and are open to inspection at every station. In view of the multitude of transactions, it is not necessary that there shall be an inquiry as to each article, or a distinct agreement as to the value of each shipment. If no value is stated, the tariff rate applicable to such a state of facts applies. If, on the other hand, there are alternative rates based on value, and the shipper names a value to secure the lower rate, the carrier, in the absence of something to show rebating or false billing, is entitled to collect the rate which applies to goods of that class, and if sued for their loss it is liable only for the loss of [516] what the shipper had declared them to be in class and value.

4. Nor was the result changed because of the use of printed forms. This appears from the ruling in Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151, where it was claimed that the shipper had not been asked to state the value, but had merely signed a printed contract naming a value. The court said: "The valuation named was the 'agreed valuation,' the one on which the minds of the parties met, however it came to be fixed. and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further." The rule of the Hart, Carl, and Harriman Cases was not applied in the court below, and the judgment must be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

FARMERS & MECHANICS SAVINGS BANK OF MINNEAPOLIS, Plff. in Err.,

v.

STATE OF MINNESOTA.

(See S. C. Reporter's ed. 516–531.)

Taxes — Federal agency — bonds of territorial municipalities.

1. A state may not tax bonds issued by municipalities in the Indian territory and in the territory of Oklahoma as property

Note.—On constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

On constitutional equality in respect to corporate taxation—see note to Bacon v. State Tax Comrs. 60 L.R.A. 321.

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in the hands of the holders, since this would be to tax the performance of a governmental function by an instrumentality and agency of the Federal government, although the bonds may not have been guaranteed either by the United States or by the central government of the territory.

[For other cases, see Taxes, I. c, 2, in Digest Sup. Ct. 1908.]

Taxes — Federal agency — bonds of territorial municipality — effect of admission of state.

2. The admission of Oklahoma to the Union under the enabling act of June 16, 1906 (34 Stat. at L. 267, chap. 3335), did not operate to deprive the holders of bonds issued by municipalities in the Indian territory and the territory of Oklahoma of the exemption from state taxation which they enjoyed as holders of obligations of an agency of the Federal government, even conceding that an obligation to pay the bonds was assumed by the new state.

[For other cases, see Taxes, I. c, 2; States, XI., in Digest Sup. Ct. 1908.]

Taxes — savings bank surplus — bonds of territorial municipalities.

3. A state, in taxing as credits the surplus of a savings bank, ascertained by deducting from its assets the amount of its deposits and other accounts payable, must leave out of the computation of its assets bonds issued by territorial municipalities which are exempt from taxation as the obligations of an agency of the Federal government.

[For other cases, see Taxes, I. c, 2, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — taxation of savings banks — classification.

4. Requiring savings banks to include in the computation of their assets for taxation notes secured by mortgages upon Minnesota real estate upon which the registration tax has been paid, as is done by Minn. Laws 1907, chap. 328, which at the same time relieves mortgages upon such real estate when otherwise owned from all taxation except the registration tax, cannot be deemed to contravene the equal protection of the laws clause of U. S. Const., 14th Amend., in view of the privileges respecting taxation enjoyed by savings banks under Minn. Laws 1905, chap. 839, accorded to no other person or corporation subject to taxation.

[For other cases, see Constitutional Law, IV. a, 4, in Digest Sup. Ct. 1908.]

[No. 39.]

Argued May 8, 1913. Decided February 24, 1914.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the District Court for the County of Hennepin, in that state, in favor of the state in proceedings to collect taxes assessed against a savings bank. Reversed and remanded for further proceedings.

See same case below, 114 Minn. 95, 130 N. W. 445, 851.

The facts are stated in the opinion.

Mr. William A. Lancaster argued the cause, and, with Messrs. Claude B. Leonard and Milton D. Purdy, filed a brief for plaintiff in error:

Federal agencies and instrumentalities are not taxable by the states.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; New York ex rel. Bank of Commerce v. Tax Comrs. 2 Black, 620, 15 L. ed. 451; Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897; Banks v. New York, 7 Wall. 16, 18 L. ed. 57; Home Sav. Bank v. Des Moines, 205 U. S. 503, 51 L. ed. 901, 27 Sup. Ct. Rep. 571; Grether v. Wright, 23 C. C. A. 498, 43 U. S. App. 770, 75 Fed. 742; Bank of New York v. New York County (New York ex rel. Bank of New York v. New York County) 7 Wall. 26, 19 L. ed. 60.

The Federal government cannot tax the bonds of the municipalities of a state.

Mercantile Nat. Bank v. New York, 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. Rep. 826; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597.

It is just as incompetent for a state to tax the bonds of the municipalities of a territory as it is for the Federal government to tax the bonds of the municipalities of the state.

So much of § 3 of chapter 328, Minn. Laws of 1907, as attempts to hold banks, savings banks, and trust companies to double taxation on mortgages upon real estate in the state of Minnesota, at the same time relieving all mortgages upon such real estate owned by others than banks, savings banks, and trust companies from all other taxation thereon than the mortgage registration tax provided for by the act, is unconstitutional, as being in violation of § 1, article 14, of the Amendments to the Constitution of the United States.

State v. Canada Cattle Car Co. 85 Minn. 457, 89 N. W. 66; Noonan v. Stillwater, 33 Minn. 198, 53 Am. Rep. 23, 22 N. W. 444; State v. Pioneer Sav. & L. Co. 63 Minn. 80, 65 N. W. 138; Faribault v. Misener, 20 Minn. 396, Gil. 347; State v. Weyerhauser, 68 Minn. 353, 71 N. W. 265; State v. Duluth Water & Light Co. 76 Minn. 96, 57 L.R.A. 63, 78 N. W. 1032.

Mr. Lyndon A. Smith, Attorney General of Minnesota, and Mr. James Robertson, argued the cause and filed a brief for defendant in error:

At the time of the making of the assessment, Indian territory and the territory of

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Oklahoma had ceased to exist for nearly six months, and if the bonds of the municipalities of these territories were ever the obligations of the territorial government, they were, by the Constitution, assumed by the state of Oklahoma.

Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. Rep. 208.

Conceding, for the sake of the argument, that municipalities of territories are agencies of the national government, their exemption from taxation applies only in so far as their property is actually engaged in furthering the interest of and actually serving the national government. When a municipality of a territory issues bonds for local improvements, in what way is it serving the Federal government? And by reason of such service why should it be entitled to have its obligations exempt from taxation?

Atlantic & P. R. Co. v. LeSueur, 2 Ariz. 428, 1 L.R.A. 244, 2 Inters. Com. Rep. 189, 19 Pac. 157; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; Western U. Teleg. Co. v. Pennsylvania R. Co. 120 Fed. 984; State ex rel. Gottlieb v. Western U. Teleg. Co. 165 Mo. 521, 65 S. W. 775; Elmira Sav. Bank v. Davis, 142 N. Y. 595, 25 L.R.A. 546, 37 N. E. 646; Moore v. Beason, 7 Wyo. 292, 51 Pac. 875; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; Dyer v. Melrose, 215 U. S. 594, 54 L. ed. 341, 30 Sup. Ct. Rep. 410; First Nat. Bank v. Kentucky, 9 Wall. 361, 19 L. ed. 703; Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670; Central P. R. Co. v. California, 162 U. S. 119, 40 L. ed. 912, 16 Sup. Ct. Rep. 766; Hibernia Sav. & L. Soc. v. San Francisco, 200 U. S. 314, 50 L. ed. 496, 26 Sup. Ct. Rep. 265, 4 Ann. Cas. 934; Thomson v. Union P. R. Co. 9 Wall. 591, 19 L. ed. 798; Central P. R. Co. v. California, 162 U. S. 121, 40 L. ed. 913, 16 Sup. Ct. Rep. 766; Weston v. Charleston, 2 Pet. 477, 7 L. ed. 491; St. Paul, M. & M. R. Co. v. Todd County, 142 U. S. 282, 35 L. ed. 1014, 12 Sup. Ct. Rep. 281; Phœnix F. & M. Ins. Co. v. Tennessee, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471; State v. Western U. Teleg. Co. 96 Minn. 22, 104 N. W. 567; Delaware Railroad Tax, 18 Wall. 225, 21 L. ed. 804.

Does chapter 328, Laws of Minnesota for 1907, in excepting savings banks from the exemption of all other taxes allowed generally to other holders of real estate mortgages, paying the registry fee, unlawfully discriminate against such savings banks, and does it violate the equality clause of § 1, art. 14, of the Amendments of the Constitution of the United States?

Mutual Ben. L. Ins. Co. v. Martin County, 104 Minn. 179, 116 N. W. 572; State ex rel. Hilderbrandt v. Fitzgerald, 117 Minn. 192, 134 N. W. 728; People ex rel. Eisman v. Ronner, 185 N. Y. 285, 291, 77 N. E. 1061; New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 47, 50 L. ed. 65, 79, 25 Sup. Ct. Rep. 705, 4 Ann. Cas. 381; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; Southwestern Oil Co. v. Texas, 217 U. S. 122, 54 L. ed. 692, 30 Sup. Ct. Rep. 496; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Flint v. Stone Tracy Co. 220 U. S. 108, 160, 55 L. ed. 389, 417, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Mercantile Nat. Bank v. New York, 172 N. Y. 35, 64 N. E. 756; Genet v. Brooklyn, 99 N. Y. 296, 1 N. E. 777; Gray, Limitations of Taxing Power, § 1630; 1 Cooley, Taxn. 3d ed. §§ 389, 397.

The statute of Minnesota providing for the registry tax seems on its face to make its payment cover not only all taxes upon the security, but also on the debt secured. The supreme court of Minnesota has construed that statute to the contrary.

Mutual Ben. L. Ins. Co. v. Martin County, 104 Minn. 179, 116 N. W. 572; State ex rel. Hilderbrandt v. Fitzgerald, 117 Minn. 192, 134 N. W. 728.

Undoubtedly this court will regard the decisions of the supreme court of Minnesota as conclusive as to the proper construction of its own tax laws.

Chicago Theological Seminary v. Illinois, 188 U. S. 662, 674, 47 L. ed. 641, 649, 23 Sup. Ct. Rep. 386; Fairfield v. Gallatin County, 100 U. S. 47, 52, 25 L. ed. 544, 546.

The tax in question is not specific.

State ex rel. Winona Motor Co. v. Minnesota Tax Commission, 117 Minn. 159, 134 N. W. 643; United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211.

The 14th Amendment does not attempt the regulation of the details of taxation.

Brown-Forman Co. v. Kentucky, 217 U. S. 563, 572, 574, 54 L. ed. 883, 886, 887, 30 Sup. Ct. Rep. 578; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 205, 50 L. ed. 150, 154, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493.

The infirmity in appellant's argument is that it assumes that a discrimination exists

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against the bank because it is taxed in a different way from that by which other persons are taxed.

Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 281, 53 L. ed. 176, 186, 29 Sup. Ct. Rep. 50.

It was perhaps material to inquire whether these bonds were issued for private or for governmental purposes. Such question was not introduced into the case by either pleadings or evidence. The presumption, then, is that the bonds were of such a kind as to sustain the taxation of the bank on their account.

South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; Vilas v. Manila, 220 U. S. 345, 55 L. ed. 491, 31 Sup. Ct. Rep. 416; Audit Co. v. Louisville, 107 C. C. A. 467, 185 Fed. 349; Louisville v. Com. 1 Duv. 295, 85 Am. Dec. 624.

There was a marked difference between the District of Columbia and ordinary territories in their relations to the Federal Government.

Kawananakoa v. Polyblank, 205 U. S. 349, 353, 354, 51 L. ed. 834, 836, 27 Sup. Ct. Rep. 526; Adams Exp. Co. v. Denver & R. G. R. Co. 4 McCrary, 77, 16 Fed. 715; Honolulu Rapid Transit & Land Co. v. Wilder, 211 U. S. 137, 53 L. ed. 121, 29 Sup. Ct. Rep. 44; Gromer v. Standard Dredging Co. 224 U. S. 362, 369, 370, 56 L. ed. 801, 804, 805, 33 Sup. Ct. Rep. 499.

Another distinction between a case in which there is an interference with Federal agencies and operations and the case now being considered is drawn with accuracy and clearness in Union P. R. Co. v. Peniston, 18 Wall. 5, 32, 37, 21 L. ed. 787, 792, 793.

A tax which is objectionable because interfering with a Federal agency is shown in sharp contrast with a tax upon property somewhat connected with governmental operations in Williams v. Talladega, 226 U. S. 404, 57 L. ed. 275, 33 Sup. Ct. Rep. 116.

No claim is made, and none could be, that the bonds in question were not taxable, except on the ground that they are practically United States bonds. If they were the municipal bonds of a state or any of its municipalities, they were taxable.

Bonaparte v. Appeal Tax Ct. 104 U. S. 592, 26 L. ed. 845.

Mr. Justice Pitney delivered the opinion of the court:

This writ of error brings under review a judgment of the supreme court of Minnesota (114 Minn. 95, 130 N. W. 445, 851), affirming the judgment of a lower court, in proceedings for the collection of taxes assessed against plaintiff in error for the year 1908. Plaintiff in error is a savings bank, having no capital stock, and was taxable under § 839, Rev. Laws 1905, which provides for ascertaining the surplus remaining after deducting from its assets (other than real estate, which is separately assessed) the amount [521] of the deposits and of all other accounts payable; the surplus to be taxed as "credits." The supreme court of Minnesota held that this section imposes not a franchise but a property tax, and that the surplus of savings banks as thus determined is taxable property. This construction is not questioned here; perhaps is not open to question.

Two Federal questions are raised.

First, the savings bank insisted in the state courts, and here renews the insistence, that certain bonds issued by municipalities in Indian territory and in the territory of Oklahoma, held by the bank, amounting to about $700,000 in value, should have been omitted from the list of its personal assets, for the reason that bonds of this character are not taxable by the state.

This question, although novel, is to be solved by the application of principles long established.

It was laid down by Mr. Chief Justice Marshall, speaking for this court in M'Culloch v. Maryland, 4 Wheat. 316, 436, 4 L. ed. 579, 607, 608, that the state could not constitutionally impose taxation upon the operations of a local branch of the United States Bank, because the bank was an agency of the Federal government, and the states had no power, by taxation or otherwise, to hamper the execution by that government of the powers conferred upon it by the people. The supremacy of the Federal Constitution and the laws made in pursuance thereof, and the entire independence of the general government from any control by the respective states, were the fundamental grounds of the decision. The principle has never since been departed from, and has often been reasserted and applied. Osborn v. Bank of United States, 9 Wheat. 738, 859, 6 L. ed. 204, 233; Home Sav. Bank v. Des Moines, 205 U. S. 503, 513, 51 L. ed. 901, 907, 27 Sup. Ct. Rep. 571; Grether v. Wright, 23 C. C. A. 498, 43 U. S. App. 770, 75 Fed. 742, 753.

State taxation of national bank shares, as permitted by the act of Congress, without regard to the fact that a [522] part or the whole of the capital of the bank is invested in national securities which are exempt from taxation (Van Allen v. Assessors [Churchill v. Utica], 3 Wall. 573, 583, 18 L. ed. 229, 234; Bradley v. Illinois, 4 Wall. 459, 18 L. ed. 433; First Nat. Bank v. Kentucky, 9 Wall. 353, 359, 19

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L. ed. 701, 702), is an apparent, not a real, exception. The same is true of taxes upon the mere property of agencies of the Federal government (Thomson v. Union P. R. Co. 9 Wall. 579, 589, 19 L. ed. 792, 798; Union P. R. Co v. Peniston, 18 Wall. 5, 32, 34, 21 L. ed. 787, 792, 793). Indeed, these exceptions rest upon distinctions that were recognized in the decision of M'Culloch v. Maryland. Chief Justice Marshall said, in closing the discussion: "This opinion . . . does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional." For a fuller discussion of the Van Allen Case, see Home Sav. Bank v. Des Moines, 205 U. S. 503, 517, 51 L. ed. 901, 909, 27 Sup. Ct. Rep. 571.

The government of the respective territories in question was that provided by the act of Congress of May 2, 1890 (26 Stat. at L. 81, 93, chap. 182), of which the first 28 sections created a temporary government for the territory of Oklahoma; while § 29 (p. 93) and subsequent sections established laws for the government of what was thereafter to be known as the Indian territory, but without conferring general powers of local self-government. To the territorial government of Oklahoma legislative power was granted (§ 6), extending to "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." Municipal corporations were in contemplation. Sec. 7 provided that [523] the legislative assembly should not authorize the issuing of any bond or evidence of debt by any county, city, town, or township for the construction of any railroad; thus recognizing that the borrowing power might be employed for other purposes. By § 11, certain provisions of the Compiled Laws of Nebraska, in force November 1, 1889, so far as locally applicable, were extended to and put in force in the territory until after the adjournment of the first session of its legislative assembly; among these being chapter 14, entitled, "Cities of the Second Class and Villages," which contains provisions for the organization of municipal corporations, with power to borrow money for public purposes. The Indian territory was not made an "organized territory," but by § 31 certain general laws of the state of Arkansas, as published in Mansfield's Digest (1884), were put in force there until Congress should otherwise provide; among these, the chapter relating to municipal corporations (§§ 722-959).

It is not disputed that the municipal bonds now in question were lawfully authorized and are in every respect valid obligations of the respective municipalities. Except as such obligations they would hardly be treated as taxable property in the hands of the holder.

The relation of the organized territories to the United States has been frequently adverted to. In First Nat. Bank v. Yankton County, 101 U. S. 129, 133, 25 L. ed. 1046, 1047, which had to do with the organic act of the territory of Dakota (12 Stat. at L. 239, chap. 86), the court, speaking by Mr. Chief Justice Waite, said:

"All territory within the jurisdiction of the United States, not included in any state, must necessarily be governed by or under the authority of Congress. The territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective states, and Congress may [524] legislate for them as a state does for its municipal organizations. . . . Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the states."

The territory of Oklahoma, therefore, was an instrumentality established by Congress for the government of the people within its borders, with authority to subdelegate the governmental power to the several municipal corporations therein. These corporations were established for public and governmental purposes only, and exercised their powers and performed their functions as agents of the central authority. With respect to Indian territory, the situation under the act of 1890 was somewhat different, and the municipal corporations derived their authority directly from the act of Congress.

No doubt, as is usual in such cases, the people of the respective municipalities had a more immediate and direct interest than others in the local government, and in the local improvements that presumably may

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have been constructed with the proceeds of the municipal bonds. But this interest was that of citizens and taxpayers, not that of proprietors. And the policy of Congress, as manifested in its legislation upon the subject, had regard not merely, nor even chiefly, for the particular and immediate interests of the several municipalities. It looked to the promotion of the prosperity and welfare of the whole people of the United States, through the development of organized self-governing communities—afterwards to become states of the Union—throughout the whole of the public domain. With statehood as the ultimate aim and [525] purpose, the organic acts were consciously framed. They were frequently, if not always, entitled: "An Act to Provide a *Temporary* Government for the Territory," etc.; and so reads the title of the act of May 2, 1890.

In our opinion, therefore, the municipalities of the territory of Oklahoma and of Indian territory were instrumentalities and agencies of the Federal government, with whose operations the states were not permitted to interfere by taxation or otherwise; and the issuing of municipal bonds was the performance of a governmental function, within the established doctrine. And we deem it immaterial that these bonds were not guaranteed by the United States, or even (in the case of the Oklahoma bonds) by the central government of the territory.

The supreme court of Minnesota, conceding that the municipalities were Federal agencies in the performance of governmental functions, yet deemed that a material narrowing of the doctrine of M'Culloch v. Maryland was to be inferred from an expression contained in the opinion of this court in First Nat. Bank v. Kentucky, 9 Wall. 353, 362, 19 L. ed. 701, 703, where it was said: "The principle we are discussing has its limitation,—a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal government are only exempted from state legislation so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government." And from a like expression contained in the opinion in Union P. R. Co. v. Peniston, 18 Wall. 5, 36, 21 L. ed. 787, 793: "It is therefore manifest that exemption of Federal agencies from state taxation is dependent not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to [526] serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers."

But we deem it entirely clear that a tax upon the exercise of the function of issuing municipal bonds is a tax upon the operations of the government, and not in any sense a tax upon the property of the municipality. And to tax the bonds as property in the hands of the holders is, in the last analysis, to impose a tax upon the right of the municipality to issue them. In Weston v. Charleston, 2 Pet. 449, 466, 468, 7 L. ed. 481, 487, 488, which involved the right of the city, acting under the authority of the state of South Carolina, to ordain a tax upon United States stock in the hands of the owner, Mr. Chief Justice Marshall, speaking for the court, after reaffirming the principles settled in M'Culloch v. Maryland, said (p. 468): "The American people have conferred the power of borrowing money on their government, and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised. The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent which shall arrest them entirely."

It is on this ground that United States bonds have always been held exempt from taxation under authority of the states. By like reasoning it has come to be recognised [527] that bonds issued by the states are not taxable by the Federal government, and it was upon this ground that this court held, in Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 584, 39 L. ed. 759, 820, 15 Sup. Ct. Rep. 673, that the income tax provisions of the act of August 27, 1894 [28 Stat. at L. 509, chap. 349], were unconstitutional in that they imposed a tax upon the income derived from municipal bonds issued under the authority of the states.

It is contended by defendant in error

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that the situation was changed by the admission of Oklahoma as a state, combining both the territory of Oklahoma and the Indian territory. This was accomplished under the enabling act of June 16, 1906 (34 Stat. at L. 267, chap. 3335), and was evidenced by the proclamation of the President, issued November 16, 1907 [35 Stat. at L. 2160]. By § 4 of art. I. of the Oklahoma Constitution the debts and liabilities of the territory of Oklahoma were assumed by the state.

The argument is that at the time of making the assessment for taxes against plaintiff in error, the Indian territory and the territory of Oklahoma had ceased to exist as such for nearly six months, and that the bonds of the municipalities of those territories, being the obligations of the territorial government, were, by the Constitution, assumed by the state. There seems to be no provision of law that constitutes the bonds of the municipalities obligations of the territorial governments, and so the argument falls to the ground at once.

But we are unwilling to intimate a concession that an assumption by the state of Oklahoma of the obligation to pay these bonds would operate to deprive the bondholders of the exemption from taxation, previously enjoyed. Presumably the municipal credit was enhanced and the terms of the municipal borrowing rendered more favorable, by the understanding that the bonds, being obligations of an agency of the Federal government, would be exempt from taxation by the several states. The value of the bonds in the market was presumably thereby increased. [528] Indeed, the state court in the present case very plainly declares (114 Minn. 109, 130 N. W. 445, 851) that bonds of the municipalities of the territories, if not taxable by the state, command a higher price on the market than bonds of the municipalities of the states. To deprive bonds of the former description of their immunity from state taxation, and this because of the subsequent action of Congress in erecting the territories into a state, with or without an assumption by the new state of the obligations of the former Federal agency, would be in effect to impair the obligation of the contract; and this is so inconsistent with the honor and dignity of the United States that such an intent should not be presumed without the clearest legislative language requiring it.

It is, however, further suggested that the judgment under review does not sustain a tax upon the bonds as property, but only a tax upon the surplus of the savings bank, computed by taking into the account all of its assets, amounting to about $12,000,000, of which the bonds were only about $700,000, and deducting therefrom its liabilities. But as the surplus is treated as property and taxed as such, it is obvious that some portion of the burden of the tax is attributable to the ownership of the municipal bonds. In New York ex rel. Bank of Commerce v. Tax & A. Comrs. 2 Black, 620, 17 L. ed. 451, it was held that the state of New York, in taxing the capital of banks according to its valuation, must leave out of the calculation that portion of the capital invested in the stocks, bonds, or other securities of the United States not liable to taxation by the state. And see Bank Tax Case (New York ex rel. Bank of Commonwealth v. Tax & A. Comrs.), 2 Wall. 200, 17 L. ed. 793; Home Sav. Bank v. Des Moines, 205 U. S. 503, 509, 51 L. ed. 901, 906.

It results that the inclusion of the bonds now in question in the list of the assets of plaintiff in error, in ascertaining its surplus for the purpose of imposing a state property tax thereon, was repugnant to the Constitution of the United States.

[529] The second Federal question arises out of the insistence of the savings bank that it was entitled to have omitted from the computation of its surplus for purposes of taxation certain notes held by it, amounting to about $161,000, and secured by mortgages upon Minnesota real estate, upon which mortgages a registry tax had been paid.

It appears that the Minnesota legislature, by chap. 328, Laws of 1907, provided a registry tax upon debts secured by mortgages covering real property in the state, the amount of the tax being 50 cents upon each $100, payable at or before the filing of the mortgage for record or registration. By § 3 it was enacted that "all mortgages upon which such tax has been paid, with the debts or obligations secured thereby and the papers evidencing the same, shall be exempt from all other taxes; but nothing herein shall exempt such property from the operation of the laws relating to the taxation of gifts and inheritances, or those governing the taxation of banks, savings banks, or trust companies;" with a further proviso not now pertinent.

It was and is insisted that this section, in subjecting banks, savings banks, and trust companies to double taxation upon their mortgages covering real estate in the state of Minnesota, while at the same time relieving mortgages upon such real estate when otherwise owned, from all taxation except the registration tax, is in contravention of the "equal protection" clause of the 14th Amendment.

Although the clause limiting the exemp-

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tion includes banks and trust companies, the supreme court of Minnesota declined to consider whether the classification was proper with respect to those institutions, and so declining dealt with the status of savings banks only. Holding that this class of institutions under other laws enjoyed privileges respecting taxation that were accorded to no other person or corporation subject to taxation, the court [530] held that savings banks might properly be treated as a class by themselves, and required to include such mortgages in the computation of their assets for purposes of taxation.

If there is no unconstitutional discrimination against savings banks, it is for present purposes unnecessary to inquire whether the act discriminates against other banks and trust companies. Tyler v. Registration Ct. Judges, 179 U. S. 405, 409, 45 L. ed. 252, 254, 21 Sup. Ct. Rep. 206; Hooker v. Burr, 194 U. S. 415, 419, 48 L. ed. 1046, 1050, 24 Sup. Ct. Rep. 706; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Southern R. Co. v. King, 217 U. S. 524, 534, 54 L. ed. 868, 871, 30 Sup. Ct. Rep. 594; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550, 56 L. ed. 1197, 1201, 32 Sup. Ct. Rep. 784; Rosenthal v. New York, 226 U. S. 260, 271, 57 L. ed. 212, 217, 33 Sup. Ct. Rep. 27.

The supreme court of Minnesota lucidly summarized the state of the law which furnished, in its judgment, a sufficient reason for the classification, as follows: "Section 839, Rev. Laws 1905, treats of savings banks, for the purposes of taxation, in a special manner. They have no capital stock, yet their property is not taxed in the same way as the property of individuals or of other corporations. By § 838 the value of the stock of corporations having capital stock is ascertained by deducting the value of the real and personal property from the market or actual value of the stock, and the amount of the difference is taxed as stocks and bonds, and the real estate and personal property are taxed in the ordinary way. Section 839 places all banks without capital stock (except savings banks), brokers, and stock jobbers in one class, and savings banks in another class. The former are taxed by ascertaining the difference between the amount of money on hand or in transit, the amount of money in the hands of others, subject to draft, the amount of checks or cash items, etc., the amount of bills receivable and other credits; and from the total of these amounts the deposits and accounts payable are deducted. The balance, if any, is assessed as money under § 835. The bonds and stocks and personal and real property are assessed separately [531] in the ordinary way. But in the case of savings banks no specific property is taxed separately except real property. Its money, checks, bills receivable, bonds, and stocks, and all personal property appertaining to the business are listed for the purpose of ascertaining whether there is a surplus, and the surplus is found by deducting the total of the deposits and accounts payable from the total value of the costs."

For these and other reasons pointed out in the opinion, it seems to us the court was justified in holding that there were reasonable grounds for the discrimination so far as savings banks were concerned, and that plaintiff in error had therefore not been deprived of the equal protection of the laws. In lieu of further discussion we refer to the oft quoted language employed by Mr. Justice Bradley, speaking for this court, in Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533.

But because of the error in subjecting the bonds of the municipalities of the territories to taxation, the judgment must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

PLYMOUTH COAL COMPANY, Plff. in Err.,
v.
COMMONWEALTH OF PENNSYLVANIA, David T. Davis, Inspector of Mines, etc.

(See S. C. Reporter's ed. 531-547.)

Constitutional law — due process of law — regulating coal mines — boundary pillars.

The method of fixing the width of the barrier pillar to be left between adjoining coal properties, which, under Pa. act of June 2, 1891 (P. L. 176), must be sufficient to safeguard the employees of either mine in case the other shall be abandoned and allowed to fill with water, is not so crude, uncertain, or unjust as to constitute a taking of property without due process of law because such width of pillar is to be determined under that statute "by the engineers of the adjoining property owners, together with the inspector of the district in which the mine is situated," nor because the statute does not require that notice be given to the lessor, being satisfied with reasonable notice to the lessee, nor

NOTE.—On statutory regulations for the protection and safety of workmen in mines —see note to Consolidated Coal & Min. Co. v. Floyd, 25 L.R.A. 848.

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prescribe the procedure, nor give a right to appeal.

[For other cases, see Constitutional Law, IV. b, 5; IV. b, 8, in Digest Sup. Ct. 1908.]

[No. 102.]

Argued January 15, 1914. Decided February 24, 1914.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a decree which affirmed a decree of the Court of Common Pleas in Luzerne County, in that state, enjoining the working of a coal mine without leaving a barrier pillar along the line of an adjoining mine. Affirmed.

See same case below, 232 Pa. 141, 81 Atl. 148.

Statement by Mr. Justice Pitney:

This case involves the constitutionality of a section of the anthracite mine laws of the state of Pennsylvania, [533] being § 10 of art. 3 of the act of June 2, 1891 (P. L. pp. 176, 183), which reads as follows:

"It shall be obligatory on the owners of adjoining coal properties to leave, or cause to be left, a pillar of coal in each seam or vein of coal worked by them, along the line of adjoining property, of such width that, taken in connection with the pillar to be left by the adjoining property owner, will be a sufficient barrier for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water; such width of pillar to be determined by the engineers of the adjoining property owners together with the inspector of the district in which the mine is situated, and the surveys of the face of the workings along such pillar shall be made in duplicate and must practically agree. A copy of such duplicate surveys, certified to, must be filed with the owners of the adjoining properties and with the inspector of the district in which the mine or property is situated."

Art. 18, under the head of "Definition of Terms," contains, *inter alia*, the following:

"The term 'owners' and 'operators' means any person or body corporate who is the immediate proprietor or lessee or occupier of any coal mine or colliery or any part thereof. The term 'owner' does not include a person or body corporate who merely receives a royalty, rent, or fine from a coal mine or colliery or part thereof, or is merely the proprietor of the mine, subject to any lease, grant, or license for the working or operating thereof, or is merely the owner of the soil, and not interested in the minerals of the mine or any part thereof. But any 'contractor' for the working of a mine or colliery, or any part or district thereof, shall be subject to this act as an operator or owner, in like manner as if he were the owner."

The record shows that the Lehigh & Wilkes-Barre Coal Company and the Plymouth Coal Company are respectively the lessees or owners of adjoining coal properties [534] situate at Plymouth, in Luzerne county, Pennsylvania; that on August 31, 1909, Mr. Davis, the inspector of mines of the district in which the properties are located, wrote a letter to the president of the Plymouth Coal Company which reads as follows:

Wilkes-Barre, Pa., Aug. 31, '09.

John C. Haddock, Pres. Plymouth Coal Co.

Dear Sir:—

Kindly have your engineer report at my office Thursday morning Sept. 2d at 10 o'clock at which time we can meet the engineer of the Lehigh & Wilkes-Barre Coal Company to decide as to thickness of barrier pillar to be left unmined between the properties of the Lehigh & Wilkes-Barre Coal Company and the Plymouth Coal Company, situated at Plymouth, Luz. Co., Pa., as per article 3, § 10, anthracite mine laws of this commonwealth, which reads as follows [quoting the section verbatim].

[Signed] D. T. Davis,
Inspector of Mines.

To this the following reply was made:

Wilkes-Barre, Pa.,
Sept. 1, 1909.

Mr. D. T. Davis, Inspector, Ninth Anthracite Inspection District,
Wilkes-Barre, Pa.

Dear Sir:—

I am in receipt of yours of the 31st ult.

Allow me to say in reply that while it would give us great pleasure to meet you and the representatives of the Lehigh & Wilkes-Barre Coal Company at the suggested conference, to be held to-morrow, we cannot enter such a conference to even consider, much less conclude, an agreement that may affect our rights and our duty to our lessors at the Dodson Colliery.

I assume it is needless to assure you that we stand [535] ready at all times to comply with any reasonable request that may emanate from you or your office, but if I am advised correctly, this request or demand originated with the Lehigh & Wilkes-Barre Coal Company.

This was their right to make as it is ours to decline.

Yours very truly,
[Signed] John C. Haddock,
President The Plymouth Coal Co.

Thereupon, pursuant to article 15 of the

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above-mentioned statute, the mine inspector, acting in behalf of the commonwealth, filed his bill of complaint against the Plymouth Coal Company in the court of common pleas of Luzerne county, setting forth the above facts and averring that defendant refused to permit its engineer to meet with the mine inspector and the engineer of the adjoining property owner to determine the width of the barrier pillar, or to even consider the matter, and refused to leave or cause to be left a pillar that, taken in connection with the pillar to be left by the adjoining property owner, would be a sufficient barrier for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water; that defendant employed in its mine at least three hundred persons, and the Lehigh & Wilkes-Barre Coal Company employed in its mine at least seven hundred persons, and the refusal of the defendant endangered the lives and safety of the employees of both mines. There was a prayer for a preliminary and perpetual injunction to restrain defendant from working its mine without leaving a barrier pillar of coal of the thickness or width of at least 30 feet in each seam or vein worked by it along the line of the adjoining property. Defendant answered, admitting the truth of the averments of the bill without qualification, except that it denied that any barrier was necessary for the safety of the employees of either mine in case [536] the other mine should be abandoned. At the same time it averred that the act of June 2, 1891, upon which the bill was based, "is confiscatory, unconstitutional, and void." There was a preliminary injunction, restraining defendant from working its mine without leaving a barrier pillar at least 70 feet wide. This was continued until the final hearing, which resulted in a decree continuing the injunction, but without prejudice to defendant's right "to apply to the court for a dissolution or modification thereof, upon showing to the satisfaction of the court that the proper mine inspector and the engineers of the defendant company and the Lehigh & Wilkes-Barre Coal Company have, upon due investigation and consultation, determined that a barrier pillar of less width than that stated in the injunction (that is, less than 70 feet on defendant's property) is sufficient for the protection of the men employed in the mines of either company in case the mine of the other should be abandoned and allowed to fill with water, and have made duplicate surveys and filed copies of the same as required by law, or, upon such investigation and consultation shall have decided that no such barrier pillar is necessary to the safety of the employees of either company in the event aforesaid."

Upon appeal the supreme court of Pennsylvania affirmed the decree (232 Pa. 141, 81 Atl. 148), and the case comes here by virtue of § 237, Judicial Code [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227], for adjudication under the "due process" clause of the 14th Amendment to the Federal Constitution.

Messrs. William C. Price and John G. Johnson argued the cause and filed a brief for plaintiff in error:

While the phrase "due process of law," as applied in this country, is more or less controlled by its application to the facts and conditions of the particular case, yet in its universality it implies the right of the person to be affected by judicial proceedings against him to be placed before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, there is not due process of law.

Rutherford's Case, 72 Pa. 82, 13 Am. Rep. 655; Philadelphia v. Scott, 81 Pa. 80, 22 Am. Rep. 738; Hancock v. Wyoming, 148 Pa. 635, 24 Atl. 88; 3 Words & Phrases, 2250; Kuntz v. Sumption, 117 Ind. 1, 2 L.R.A. 655, 19 N. E. 474.

It may be admitted that a statute which should authorize any debt or damage to be adjudged against a person upon purely *ex parte* proceedings, without a pretense of notice or any provision for defending, would be a violation of the Constitution, and be void.

Re Empire City Bank, 18 N. Y. 215; Cooley, Const. Lim. 7th ed. 582.

Due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard is absolutely essential.

Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Re Jensen, 28 Misc. 378, 59 N. Y. Supp. 653; San Mateo County v. Southern P. R. Co. 8 Sawy. 238, 13 Fed. 722.

Whatever the character of the proceeding by which one is deprived of his property, whether judicial or administrative, and whether it takes the property directly or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of

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notice and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law.

Re Rosser, 41 C. C. A. 497, 101 Fed. 567; Londoner v. Denver, 210 U. S. 373, 52 L. ed. 1103, 28 Sup. Ct. Rep. 708.

Just what is "due process of law" is not very easy to define; but we are aware of no proceeding like the present having even been claimed, much less decided, to be "due process."

Holden v. Hardy, 169 U. S. 389, 42 L. ed. 790, 18 Sup. Ct. Rep. 383; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 276, 15 L. ed. 374.

Mr. John C. Bell, Attorney General of Pennsylvania, argued the cause, and, with Messrs. B. R. Jones, Morris Wolf, and William M. Hargest, filed a brief for defendants in error:

The trade or business of mining is a proper subject of regulation by the states under their police power.

Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; Barrett v. Indiana, 229 U. S. 26, 57 L. ed. 1050, 33 Sup. Ct. Rep. 692; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. Rep. 66; Lindsley v. National Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160.

It is not a violation of the 14th Amendment to regulate the business of mining by restricting the use of property employed in such business in a manner and to an extent determined by an administrative officer or body.

Fischer v. St. Louis, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144; Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 Sup. Ct. Rep. 318; Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; Davis v. Massachusetts, 167 U. S. 43, 42 L. ed. 71, 17 Sup. Ct. Rep. 731; Wilson v. Eureka City, 173 U. S. 32, 43 L. ed. 603, 19 Sup. Ct. Rep. 317; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633.

"Due process of law" does not require that a person whose property is affected should have personal notice of the proceeding. The notice may be actual or constructive.

Mason v. Messenger, 17 Iowa, 270; United States Trust Co. v. United States F. Ins. Co. 18 N. Y. 200.

Neither does "due process of law" require a hearing before a judicial tribunal. It only requires an orderly proceeding adapted to the nature of the case, in which the citizen has the opportunity to be heard and to defend and enforce his rights. This guaranty does not establish or perpetuate any particular form of action or mode of procedure, so long as the substantial rights are preserved.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Garvin v. Daussman, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826; Re Ross, 38 La. Ann. 523; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 571, 38 L. ed. 269, 274, 14 Sup. Ct. Rep. 437; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 628; Com. v. Beatty, 15 Pa. Super. Ct. 5; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Consolidated Coal Co. v. People, 186 Ill. 135, 56 L.R.A. 266, 57 N. E. 880.

In determining the constitutionality of an act of assembly it is to be construed in every possible way to sustain it, and every possible presumption is to be indulged in favor of it. This applies as well whether it be tested by the state or the Federal Constitution.

Sinking Fund Cases, 99 U. S. 700, 718, 25 L. ed. 496, 501; Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 407, 53 L. ed. 836, 848, 29 Sup. Ct. Rep. 527.

It is not important to the determination of any constitutional question whether the judgment must be that of all of the members of the tribunal, or of the majority only.

Omaha v. Omaha Water Co. 218 U. S. 180, 54 L. ed. 991, 48 L.R.A.(N.S.) 1084, 30 Sup. Ct. Rep. 615; Colombia v. Cauca Co. 190 U. S. 524, 47 L. ed. 1159, 23 Sup. Ct. Rep. 704; People ex rel. Washington v. Nichols, 52 N. Y. 478, 11 Am. Rep. 734; Wheeling Gas Co. v. Wheeling, 8 W. Va. 320; Grindley v. Barker, 1 Bos. & P. 229, 4 Revised Rep. 787.

A right of appeal would be implied in case the tribunal corruptly or unreasonably misused the power given to it.

North American Cold Storage Co. v. Chicago, 211 U. S. 306, 53 L. ed. 195, 29 Sup. Ct. Rep. 101, 15 Ann. Cas. 276; Adams v. Milwaukee, 228 U. S. 572, 57 L. ed. 971, 33 Sup. Ct. Rep. 610; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144; Louis-

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ville & N. R. Co. v. Garrett, 231 U. S. 298, ante, 229, 34 Sup. Ct. Rep. 48, 53; Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 Sup. Ct. Rep. 318; Public Clearing House v. Coyne, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789; Degge v. Hitchcock, 229 U. S. 162, 57 L. ed. 1135, 33 Sup. Ct. Rep. 639; Curran v. Delano, 235 Pa. 478, 84 Atl. 452; Brymer v. Butler Water Co. 179 Pa. 231, 36 L.R.A. 260, 36 Atl. 249.

The plaintiff in error not having submitted itself to this tribunal, whether the determination of the question by some tribunal in some other case might harass the operation of some other owner is academic, and plaintiff in error cannot raise this question.

8 Cyc. 787, 788, and notes 90, 92; Smith v. McCarthy, 56 Pa. 362; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736.

The parties having vested rights are not complaining, and the plaintiff in error is in no position to complain for them of lack of provision for notice.

Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 Sup. Ct. Rep. 318; Gundling v. Chicago, 177 U. S. 183, 186, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633; Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 51 L. ed. 636, 27 Sup. Ct. Rep. 326; Straus v. Foxworth, 231 U. S. 162, ante, 168, 34 Sup. Ct. Rep. 42.

Mine barrier pillar laws are constitutional.

Sterrick Creek Coal Company v. Dolph Coal Company, 11 Lack. Jur. 219; Com. ex rel. Williams v. Bonnell, 8 Phila. 534, 15 Mor. Min. Rep. 14; Com. ex rel. Williams v. Wilkes Barre Coal Co. 29 Phila. Leg. Int. 213; Com. ex rel. Williams v. Kingston Coal Co. 6 Kulp, 241; Mapel v. John, 42 W. Va. 30, 32 L.R.A. 800, 57 Am. St. Rep. 839, 24 S. E. 608.

The long acquiescence in this act of assembly is entitled to great weight in determining its constitutionality.

Com. ex rel. Williams v. Kingston Coal Co. 6 Kulp, 241; Mapel v. John, 42 W. Va. 30, 32 L.R.A. 800, 57 Am. St. Rep. 839, 24 S. E. 608; 1 Lewis's Sutherland, Stat. Constr. p. 134; Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007; Continental Improv. Co. v. Phelps, 47 Mich. 299, 11 N. W. 167; Bohmer v. Haffen, 22 Misc. 565, 50 N. Y. Supp. 857; Cameron v. Chicago, M. & St. P. R. Co. 63 Minn. 388, 31 L.R.A. 553, 65 N. W. 652.

Mr. Justice Pitney, after making the foregoing statement, delivered the opinion of the court:

The statute in question is entitled, "An Act to Provide for the Health and Safety of Persons Employed in and about the Anthracite Coal Mines of Pennsylvania, and for the Protection and Preservation of Property Connected Therewith." It applies to every anthracite coal mine in the commonwealth employing more than ten persons; divides the anthracite coal region into eight inspection districts, with a mine inspector for each district, who is appointed by the governor of the commonwealth upon the recommendation of a board of examiners composed of three reputable coal miners and two reputable mining engineers, all to be selected by judges of the county courts, and the inspector thus appointed must be a citizen of Pennsylvania, more than thirty years of age, having a knowledge of the different systems of working coal mines, and at least five years practical experience in anthracite coal mines of Pennsylvania, including experience in mines where noxious and explosive gases are evolved. Each inspector is to reside in the district for which he is appointed, and is to give his whole time and attention to the duties of his office. He is to examine all the collieries in his district as often as may be required, see that every necessary precaution is taken to secure the safety of the workmen, and that the provisions of the act are observed and obeyed, and is to keep the maps and plans of the mines and the records thereof with all the papers relating thereto. The act contains a multitude of provisions looking to the safety of the men employed in and about the [540] mines, and deals apparently with every branch of the work and every source of danger.

That the business of mining coal is attended with dangers that render it the proper subject of regulation by the states in the exercise of the police power is entirely settled. Holden v. Hardy, 169 U. S. 366, 393, 42 L. ed. 780, 791, 18 Sup. Ct. Rep. 383; Consolidated Coal Co. v. Illinois, 185 U. S. 203, 207, 46 L. ed. 872, 875, 22 Sup. Ct. Rep. 616; Barrett v. Indiana, 229 U. S. 26, 29, 57 L. ed. 1050, 1052, 33 Sup. Ct. Rep. 694.

Legislation requiring the owners of adjoining coal properties to cause boundary pillars of coal to be left of sufficient width to safeguard the employees of either mine in case the other should be abandoned and allowed to fill with water cannot be deemed an unreasonable exercise of the power. In effect it requires a comparatively small portion of the valuable contents of the vein to be left in place, so long as may be required for the safety of the men employed in mining upon either property.

All of this is very frankly admitted by

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plaintiff in error, and the criticism upon § 10 of the act is confined to the single ground that the method of fixing the width of the barrier pillar is so crude, uncertain, and unjust as to constitute a taking of property without due process of law.

So far as the record discloses, this particular objection was not brought to the attention of the state courts as a ground for holding the section in question to be unconstitutional. The very general objection raised by plaintiff in error in its answer has been stated. The court of common pleas in its opinion, not treating the mode of defining the pillar as having any bearing upon the constitutional question, but dealing with it as a matter of interpretation, said:

"If the constitutionality of this provision be conceded for the purpose of discussion, and if the question of the necessity for any barrier pillar at all between these properties may be regarded as an open one, the decision of that question would seem to be committed by the statute [541] to the tribunal of experts thereby constituted; *viz.*, the mine inspector and the engineers of the owners of the adjoining coal properties. The purpose of the enactment is to secure the safety of the workmen in the mines. The law declares that 'it shall be obligatory' on the mine owners to leave such a barrier pillar as the tribunal of mine experts referred to shall determine to be sufficient for that purpose. It is for them to fix its width. Until they say that none at all is needed for the safety of the men, the obligation imposed by the statute remains. . . . If, therefore, we may apply the maxim that the law does not require a vain thing, there is room for the construction that, in vesting in the inspector and engineers the power to determine how wide the barrier pillar should be to secure safety, the intent of the law-making power was to also empower them to say, if such be the fact, that the safety of the men does not require a barrier pillar of any width at all. But, be that as it may, it is evident that the act does not warrant a mine owner in refusing to permit his engineer to participate in determining the question of the width of, or the need for, a barrier pillar simply because he, the mine owner, does not consider one necessary. In our opinion, the law requires such a pillar to be left, unless the inspector and engineers, after due examination of the premises and consideration of the subject, determine that none is needed to secure the safety of the men employed in either mine in case the other should be abandoned and allowed to fill with water."

The same view was repeated in the "Conclusions of Law" at the close of the opinion, and evidently afforded the reason for inserting in the final decree a clause reserving to defendant the right to apply for a dissolution or modification of the injunction after action by the statutory tribunal. The supreme court affirmed the decree on the opinion of the court of common pleas.

[542] In a later case, Curran v. Delano, 235 Pa. 478, 485, 84 Atl. 452, it was held, in effect, that the tribunal created by the statute was to be composed of "two mining engineers and a mine inspector;" or, as was said, "three mine experts;" that its jurisdiction was exclusive; and that even the act of one property owner in removing the coal from its mine up to the boundary line could not deprive the statutory tribunal of its authority, or confer jurisdiction upon a court of equity to determine the width of the boundary barrier. And see Sterrick Creek Coal Co. v. Dolph Coal Co. 11 Lack. Jur. 219.

Although the act has been upon the statute book for over twenty years, the cases just cited are, it seems, the only ones wherein the state courts have placed an authoritative construction upon the pertinent section.

The objections of plaintiff in error to the method of fixing the width of the barrier pillar are based upon the supposed uncertainty and want of uniformity in the membership of the statutory tribunal, and upon the fact that the statute does not expressly provide for notice to the parties interested, that the procedure is not prescribed, and that there is no right of appeal.

The legislature has not defined with precision the width of the pillar, and it is very properly admitted that, in the nature of things, this would have been impossible, because the width necessary in each case must be determined with reference to the situation of the particular property. From this it necessarily results that it was competent for the legislature to lay down a general rule, and then establish an administrative tribunal with authority to fix the precise width or thickness of pillar that will suit the necessities of the particular situation, and constitute a compliance with the general rule. United States v. Grimaud, 220 U. S. 506, 517-522, 55 L. ed. 563, 567-569, 31 Sup. Ct. Rep. 480. Administrative bodies with authority not essentially different are a recognized governmental institution. Commissions for [543] the regulation of public service corporations are a familiar instance. Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 495, 42

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L. ed. 243, 251, 17 Sup. Ct. Rep. 896. And it has become entirely settled that powers and discretion of this character may be delegated to administrative bodies, or even to a single individual. Re Kollock, 165 U. S. 526, 536, 41 L. ed. 813, 816, 17 Sup. Ct. Rep. 444; Wilson v. Eureka City, 173 U. S. 32, 43 L. ed. 603, 19 Sup. Ct. Rep. 317; Gundling v. Chicago, 177 U. S. 183, 186, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633; Fischer v. St. Louis, 194 U. S. 361, 371, 372, 48 L. ed. 1018, 1023, 1024, 24 Sup. Ct. Rep. 673; Jacobson v. Massachusetts, 197 U. S. 11, 25, 49 L. ed. 643, 649, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 560, 562, 50 L. ed. 305, 310, 311, 26 Sup. Ct. Rep. 144.

But it is insisted that under the language of the act before us the tribunal lacks uniformity and there is uncertainty respecting the manner of its constitution. It is said that on one side of the property line there might be but a single owner, while on the other side there might be several owners, and the engineers representing the latter might outnumber and combine against the representative of the single owner, and compel him to leave a barrier pillar of an unreasonable width. This objection is for present purposes sufficiently disposed of by the decisions of the supreme court of Pennsylvania, which establish that the tribunal is composed of three; namely, the inspector and two engineers. We see no difficulty in working this out in practice. The owner on each side has a single engineer in the make-up of the body; and if there be a subdivision of the property on one side of the line, there would no doubt be separate findings with respect to the frontage of each subdivision.

It is objected that the act presupposes a condition which does not always exist; *viz.*, that the owners of coal properties have engineers in their employ; whereas it is insisted that there are many coal owners who employ no engineer; especially among the lessors of coal property. But it cannot be seriously doubted, the business under regulation being so dangerous, that it is within the power of the state to declare that coal mining shall not be conducted [544] without the employment of an engineer; and we deem it to be within the competency of the law-making power to require, also, that notice of such a proceeding be given to the lessee actually in charge of the mining operations, leaving the lessor's interest to be represented by him. It is the lessee whose conduct is to be controlled. The lessor's interest is not so directly involved, and for the purpose in hand is not opposed to that of the lessee. It is not a judicial but a *quasi* legislative proceeding. And if the lessor desires to participate, it is not to be supposed that he would have difficulty in obtaining a hearing.

A requirement of reasonable notice to the lessee seems to be implied in the language of the section. There is to be a "determination" by a tribunal of which the lessee's representative is a member. Assuming, as we do, that for constitutional reasons there must be a fair though summary hearing, it requires no very clear expression to justify such a construction of the section as will render notice obligatory. Certainly this court ought not to adopt a contrary construction in the absence of something in the state decisions to require it.

Respecting this and some of the other objections, it should be said that the difficulties suggested are hypothetical rather than practical. Plaintiff in error had actual notice in fact, and made no objection on the score of lack of sufficient notice. Its lessor is not objecting. Plaintiff in error presumably has an engineer competent to represent it, or could readily employ one. It refused to enter the conference for other reasons, and the refusal can be justified in law only upon the theory that the section is wholly void.

We may once more repeat what has been so often said, that one who would strike down a state statute as violative of the Federal Constitution must show he is within the class with respect to whom the act is unconstitutional, and must show that the alleged unconstitutional feature [545] injures him, and so operates as to deprive him of rights protected by the Federal Constitution. Southern R. Co. v. King, 217 U. S. 524, 534, 54 L. ed. 868, 871, 30 Sup. Ct. Rep. 594; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550, 56 L. ed. 1197, 1201, 32 Sup. Ct. Rep. 784; Rosenthal v. New York, 226 U. S. 260, 271, 57 L. ed. 212, 217, 33 Sup. Ct. Rep. 27.

It is to be presumed, until the contrary appears, that the administrative body would have acted with reasonable regard to the property rights of plaintiff in error; and certainly if there had been any arbitrary exercise of its powers its determination would have been subject to judicial review. New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 562, 50 L. ed. 305, 310, 26 Sup. Ct. Rep. 144; Bradley v. Richmond, 227 U. S. 477, 483, 57 L. ed. 603, 605, 33 Sup. Ct. Rep. 318.

Indeed, the statute seems to contemplate some judicial control, for it prescribes no penalty for a violation of the findings of

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the engineers and inspector, nor any mode of enforcing their determination except by a suit for injunction under art. 15 of the act. In such a suit a party deeming himself aggrieved because of arbitrary action by the statutory tribunal may presumably have his opportunity to be heard with respect to this as well as other fundamental defenses.

It is objected that the act does not state whether the tribunal must be unanimous in order to reach a determination, or what shall be done in case of disagreement; and it is argued that in case of such disagreement the solution of the question to be determined might be delayed for such a length of time as to embarrass the mining operations and throw the workmen out of employment. Here, again, plaintiff in error seems to be unnecessarily borrowing trouble, but we will deal with the point on its merits. This particular objection does not seem to be met by the decision of the state court, either in the present case, or in that of Curran v. Delano, 235 Pa. 478, 84 Atl. 452. They seem to hold simply that the tribunal is made up of three, without deciding what function is to be performed by the respective members, nor how a conclusion is to be reached. That [546] being so, it is not incumbent upon us to construe the statute in this regard; but rather, to say merely whether the section admits of any reasonable construction that will sustain its constitutionality.

For in cases other than such as arise under the contract clause of the Constitution, it is the appropriate function of the court of last resort of a state to determine the meaning of the local statutes. And in exercising the jurisdiction conferred by § 237, Judicial Code [36 Stat. at L. 1136, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227], it is proper for this court rather to wait until the state court has adopted a construction of the statute under attack than to assume in advance that a construction will be adopted such as to render the law obnoxious to the Federal Constitution. Bachtel v. Wilson, 204 U. S. 36, 40, 51 L. ed. 357, 359, 27 Sup. Ct. Rep. 243; Adams v. Russell, 229 U. S. 353, 360, 57 L. ed. 1224, 1227, 33 Sup. Ct. Rep. 846.

And, even aside from the consideration just adverted to, it is a general and fundamental rule that if a statute be reasonably susceptible of two interpretations, one of which would render it unconstitutional and the other valid, it is the duty of the courts to adopt that construction which will uphold its validity; there being a strong presumption that the law-making body has intended to act within, and not in excess of, its constitutional authority. Sinking Fund Cases, 99 U. S. 700, 718, 25 L. ed. 496, 501; Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Knights Templars' & M. Life Indemnity Co. v. Jarman, 187 U. S. 197, 205, 47 L. ed. 139, 145, 23 Sup. Ct. Rep. 108; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 407, 53 L. ed. 836, 848, 29 Sup. Ct. Rep. 527.

Approaching the subject from this point of view, we observe first the language of the section—"such width of pillar to be determined by the engineers of the adjoining property owners, together with the inspector of the district in which the mine is situated." Attention has already been called to the qualifications of the inspector, and the safeguards surrounding the mode of his appointment. The statute confers upon him most important powers, and gives him access to complete information [547] respecting the problems that come before him. There is provision, also, for his removal if neglectful or incompetent, or if guilty of malfeasance in office.

In the clause in question, we think it is quite reasonable to interpret the words "together with the inspector of the district" as meaning that the inspector shall be of the quorum,—shall participate in any determination that is made. But the matter is "to be determined by the engineers . . . together with the inspector." The phrase, of course, admits of the interpretation that if the engineers agree, the added approval of the inspector shall end the matter. We think it not an unreasonable construction that if the engineers disagree they shall submit their differences to the inspector, and that a determination agreed to by one of them in conjunction with the inspector shall fulfil the requirements of the act. It must be remembered that this tribunal is to settle, not a private property right, but a matter affecting the public safety; hence, in the absence of clear language to the contrary, the section is open to the construction that, as in other public matters, a majority of the referees or arbitrators may act. Omaha v. Omaha Water Co. 218 U. S. 180, 192, 54 L. ed. 991, 996, 48 L.R.A.(N.S.) 1084, 30 Sup. Ct. Rep. 615.

It is further objected that the statute provides for no appeal from the determination of the tribunal. But in such cases the right of appeal on other than constitutional grounds may be conferred or withheld, at the discretion of the legislature. As already pointed out, an appeal on fundamental grounds in this instance seems to inhere in the very practice prescribed by the statute for the enforcement of the de-

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termination of the statutory tribunal. Were this not expressed in the act, it would none the less be implied, at least so far as pertains to any violation of rights guaranteed by the 14th Amendment. Yick Wo v. Hopkins, 118 U. S. 356, 370, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 562, 50 L. ed. 305, 310, 26 Sup Ct. Rep. 144.

Judgment affirmed.

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[548] ATLANTIC COAST LINE RAILROAD COMPANY, Plff. in Err.,
v.
CITY OF GOLDSBORO, North Carolina.

(See S. C. Reporter's ed. 548–562.)

Error to state court — scope of review — question of local law.

1. Whether certain municipal ordinances challenged as violating the Federal Constitution are within the power conferred by the legislature upon the municipal corporation is a question of state law, the decision of which by the highest state court is conclusive upon the Federal Supreme Court on writ of error to the state court.

[For other cases, see Appeal and Error, 2124–2151, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — validity of state law.

2. Any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state, within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, governing writs of error from the Federal Supreme Court to state courts.

[For other cases, see Appeal and Error, 1645–1663, in Digest Sup. Ct. 1908.]

Constitutional law — police power — municipal regulation of railway — impairing contract obligations — due process of law.

3. Neither the contract nor due process of law clause of the Federal Constitution prevents a municipal corporation from promoting the public health, safety, or general welfare by forbidding a railway company, through whose acquiescence a part of its right of way through the city not occupied by its tracks has by long user become the city's principal business street, to shift cars on the four blocks of such tracks which lie in the heart of the city except during certain specified hours, or to permit cars to stand within those blocks for a longer period than five minutes, and by requiring the tracks to conform to the street grade, and the spaces between the rails to be filled in except at street intersections,—even assuming that the railway company has still a complete and unqualified ownership of the strip of land that was originally acquired in fee simple, and, as proprietor, may lawfully exclude the public from it.

[For other cases, see Constitutional Law, IV. c, 2; IV. d, 5; IV. g, 2, b, in Digest Sup. Ct. 1908.]

[No. 112.]

Argued December 10, 1013. Decided February 24, 1914.

IN ERROR to the Supreme Court of the State of North Carolina to review a decree which affirmed a decree of the Superior Court of Wayne County, in that state, refusing to restrain the enforcement of certain municipal ordinances affecting the operation of a railway. Affirmed.

See same case below, 155 N. C. 356, 71 S. E. 514.

The facts are stated in the opinion.

Mr. Frederic D. McKenney argued the cause, and, with Messrs. George B. Elliott and George M. Rose, filed a brief for plaintiff in error:

The right of way of plaintiff in error is not a street.

Donahue v. State, 112 N. Y. 142, 2 L.R.A. 576, 19 N. E. 419; East Alabama R. Co. v. Doe, 114 U. S. 340, 29 L. ed. 136, 5 Sup. Ct. Rep. 869; Georgia R. & Bkg. Co. v. Union Point, 119 Ga. 809, 47 S. E. 183; Muse v. Seaboard Air Line R. Co. 149 N. C. 443, 19 L.R.A.(N.S.) 453, 63 S. E. 102; Northern P. R. Co. v. Townsend, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671; Seaboard

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NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

As to what constitutes due process of law generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

Generally as to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Henderson v. State Soldiers' & S. Monument Comrs. 13 L.R.A. 169; and Fletcher v. Peck, 3 L. ed. U. S. 162.

For a discussion of police power generally—see notes to State v. Marshall, 1 L.R.A. 51; Re Gannon, 5 L.R.A. 359; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; State v. Schlemmer, 10 L.R.A. 135; Ulman v. Baltimore, 11 L.R.A. 224; and Barbier v. Connolly, 28 L. ed. U. S. 923.

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Air Line R. Co. v. Olive, 142 N. C. 257, 55 S. E. 263; Southern Kansas R. Co. v. Oklahoma City, 12 Okla. 82, 69 Pac. 1050; McLucas v. St. Joseph & G. I. R. Co. 67 Neb. 603, 93 N. W. 928, 97 N. W. 312, 2 Ann. Cas. 715; Poulan v. Atlantic Coast Line R. Co. 123 Ga. 605, 51 S. E. 657.

Has the city of Goldsboro power to prevent the use of the franchise and property of the plaintiff in error, by ordinance?

Atchison, T. & S. F. R. Co. v. Armstrong, 77 Kan. 366, 1 L.R.A.(N.S.) 113, 114 Am. St. Rep. 474, 80 Pac. 978; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; Chicago, R. I. & P. R. Co. v. Joliet, 79 Ill. 25; Drake v. Hudson River R. Co. 7 Barb. 508; Morgan v. Norfolk Southern R. Co. 98 N. C. 247, 3 S. E. 506; Moses v. Pittsburgh, Ft. W. & C. R. Co. 21 Ill. 516; New Orleans v. Lenfant, 126 La. 455, 29 L.R.A.(N.S.) 642, 52 So. 575; Lexington & O. R. Co. v. Applegate, 8 Dana, 289, 33 Am. Dec. 497; Hammersmith & C. R. Co. v. Brand, L. R. 4 H. L. 196, 38 L. J. Q. B. N. S. 205, 21 L. T. N. S. 238, 18 Week. Rep. 12, 1 Eng. Rul. Cas. 623; Taylor v. Seaboard Air Line R. Co. 145 N. C. 400, 122 Am. St. Rep. 455, 59 S. E. 129; Thomason v. Seaboard Air Line R. Co. 142 N. C. 318, 55 S. E. 205; Yates v. Milwaukee, 10 Wall. 498, 19 L. ed. 984.

Does this ordinance effect a taking of plaintiff's property and franchise without due process of law, and impair the obligation of its contract with the state? Is plaintiff in error entitled to equitable relief?

Atlanta v. Gate City Gaslight Co. 71 Ga. 106; Broadway & E. S. Stage Co. v. American Soc. 15 Abb. Pr. N. S. 51; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Georgia R. & Bkg. Co. v. Atlanta, 118 Ga. 486, 45 S. E. 256; Mobile v. Louisville & N. R. Co. 84 Ala. 115, 5 Am. St. Rep. 342, 4 So. 106; Paulk v. Sycamore, 104 Ga. 24, 41 L.R.A. 772, 69 Am. St. Rep. 128, 30 S. E. 417; Prentis v. Atlantic Coast Line R. Co. 211 U. S. 226, 53 L. ed. 158, 29 Sup. Ct. Rep. 67; Asheville Street R. Co. v. Asheville, 109 N. C. 688, 14 S. E. 316; Chicago & W. I. R. Co. v. Dunbar, 100 Ill. 110; Rushville v. Rushville Natural Gas Co. 132 Ind. 575, 15 L.R.A. 321, 28 N. E. 853; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Southern Exp. Co. v. Ensley, 116 Fed. 756; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585.

Mr. Robert W. Winston argued the cause, and, with Messrs. J. Crawford Biggs, D. C. Humphrey, J. D. Langston, and M. H. Allen, filed a brief for defendant in error:

The construction given to the statute of the state by the highest judicial tribunal of the state is regarded as a part of the statute, and is as binding as is the text upon the courts of the United States.

Lippincott v. Mitchell, 94 U. S. 767, 24 L. ed. 315; 2 U. S. Dig. Sup. Ct. Rep. 1908, p. 2346.

That the highest court of the state of North Carolina was divided in its opinion in no way affects the force of this rule.

Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617.

Section 388 of the Revisal of North Carolina of 1905 does not apply to any right of way not actually condemned or purchased or taken possession of.

Raleigh & A. Air Line R. Co. v. Sturgeon, 120 N. C. 225, 26 S. E. 779; Beattie v. Carolina C. R. Co. 108 N. C. 432, 12 S. E. 913; Blue v. Aberdeen & W. E. R. Co. 117 N. C. 644, 23 S. E. 275.

The railway company has long since been equitably estopped to deny the right of the city of Goldsboro to the use of East and West Center streets, and the streets crossing the same.

Bank of United States v. Lee, 13 Pet. 107, 10 L. ed. 81; Morgan v. Chicago & A. R. Co. 96 U. S. 716, 24 L. ed. 743; Mason v. Williams, 66 N. C. 564.

Not only is the railroad estopped from denying the right of the city to these streets, but by its conduct it has dedicated them to the use of the public.

Morgan v. Chicago & A. R. Co. 96 U. S. 723, 24 L. ed. 746; Elliott, Roads & Streets, 2d ed. §§ 121–124; Tise v. Whitaker-Harvey Co. 146 N. C. 374, 59 S. E. 1012.

That the railroad was constructed before the city was built does not affect the principle herein, of the police power.

State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 28 L.R.A.(N.S.) 307, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047; Cleveland v. Augusta, 102 Ga. 233, 43 L.R.A. 638, 29 S. E. 584; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341.

The railroad can be required by the state to lower its tracks or to raise them, and this without compensation, because the requirement is in the exercise of the police power, and is not the taking of private property for public uses.

22 Am. & Eng. Enc. Law, 2d ed. 720, 732; Elliott, Roads & Streets, §§ 76, 461, 463; Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 42 L.R.A.(N.S.) 1123, 33 Sup. Ct. Rep. 76; District of Columbia v. Brooke,

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214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. Rep. 560; Chicago & N. W. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109.

The city has ample authority under its charter and the general statutes to promulgate the ordinances.

Lake View v. Rose Hill Cemetery Co. 70 Ill. 191, 22 Am. Rep. 71.

The governmental power of self-protection cannot be contracted away, nor the exercise of rights granted nor the use of property be withdrawn from the implied liability of governmental regulations peculiar and essential to the preservation of the community from injury.

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341; Chicago, M. & St. P. R. Co. v. Milwaukee, 97 Wis. 418, 72 N. W. 1118.

A state's police power should be diligently guarded against any needless intrusion. It is almost as great as the power of Congress.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527.

Whenever a municipality has authority to restrict at all upon a given subject, the wisdom or unwisdom of its action is not the subject of judicial review. If the action is not plainly oppressive, the courts can give no relief.

Tate v. Greensboro, 114 N. C. 392, 24 L.R.A. 671, 19 S. E. 767; Rosenthal v. Goldsboro, 149 N. C. 132, 20 L.R.A.(N.S.) 809, 62 S. E. 905, 16 Ann. Cas. 639; Smith, Mun. Corp. § 1318; Louisville, N. A. & C. R. Co. v. Smith, 191 Ind. 119; Small v. Edenton, 146 N. C. 528, 20 L.R.A.(N.S.) 145, 60 S. E. 413; Barnes v. District of Columbia, 91 U. S. 540, 23 L. ed. 440.

These ordinances in effect declare the forbidden things to be nuisances, and it is within the competency of the city to declare what are and what are not nuisances.

Privett v. Whitaker, 73 N. C. 554.

Whenever the public takes private property, it must pay for it; but whenever private property is so used as to injure the public, the public may prevent such use of it without compensating the owner.

Freund, Pol. Power, §§ 511, 512.

It is the duty of a railroad at its own expense to remove a bridge maintained by it and also to erect a new bridge in conformity with regulations of drainage commissioners under the authority of the state.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 562, 50 L. ed. 601, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

There is a difference between the exertion of the power to establish rates in such manner as to confiscate the property of a public-service corporation by fixing them below a remunerative standard, and one compelling a corporation to render a service which it is essentially its duty to do.

Great Northern R. Co. v. Minnesota, 216 U. S. 216, 54 L. ed. 453, 30 Sup. Ct. Rep. 344.

A court of equity has no jurisdiction to restrain a state from prosecuting the violation of statutes and ordinances.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Paul v. Washington, 134 N. C. 363, 65 L.R.A. 902, 47 S. E. 793; Hottinger v. New Orleans, 42 La. Ann. 629, 8 So. 575; Scott v. Smith, 121 N. C. 94, 28 S. E. 64; Cohan v. Goldsboro, 77 N. C. 2; Field v. Western Springs, 181 Ill. 186, 54 N. E. 929; Kelly v. Conner, 122 Tenn. 339, 25 L.R.A.(N.S.) 201, 123 S. W. 622; 16 Am. & Eng. Enc. Law, 370.

Mr. Justice **Pitney** delivered the opinion of the court:

The Atlantic Coast Line Railroad Company, plaintiff in error, has succeeded to the ownership of the property, franchises, and rights of the Wilmington & Raleigh Railroad Company, which was chartered by the general assembly of North Carolina in the year 1833, and whose name was [551] afterwards changed to Wilmington & Weldon Railroad Company. Under its charter powers the original company constructed its railroad from Wilmington to and into Wayne county, North Carolina, passing through the place which later, and in the year 1847, became incorporated as the town of Goldsboro, now the city of Goldsboro, defendant in error.

For the purposes of its railroad, the Wilmington & Raleigh Company acquired a strip of land 130 feet wide, extending through Goldsboro from north to south, and constructed its road upon it before the incorporation of the town. The land was acquired in part under deeds conveying title in fee simple, in part by condemnation proceedings which conferred upon the company, as is claimed, the equivalent of a fee simple. Afterwards, two other companies, designated respectively as the North Carolina Railroad Company and the Atlantic & North Carolina Railroad Company, with the consent and permission of the Wilmington & Raleigh, or Wilmington & Weldon, and under agreements with that company, constructed their railroad tracks upon the same "right of way."

The town naturally grew along the railroad, and the right of way, so far as not occupied by the tracks, was and still is used for the ordinary purposes of a street,

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without objection by plaintiff in error or its predecessors in title. In laying out the town, this right of way was designated as a street 130 feet wide; the portion lying east of the tracks being designated as East Center street, the portion on the west of the tracks as West Center street. Cross streets were laid out, designated successively (commencing at the north) as Holly, Beech, Vine, Oak, Ash, Mulberry, Walnut, Chestnut, Spruce, Pine, and Elm streets. East and West Center streets have become the principal business streets of the town and the portion between Ash and Spruce—four blocks—is the heart of the city.

[552] During the years since the incorporation of Goldsboro numerous industries have been and are now located on East and West Center streets, and the track of plaintiff in error, in addition to its use as a part of the main line, has been and is used by the company in shifting cars into and out of these industries, and also for reaching the freight terminals of the other two railroads, which are in the northerly part of the town; the terminal of plaintiff in error being in the southerly part. A belt line has been built around the city, over which through passenger trains and some freight trains are moved, but the use of the old main line for connecting with the other terminals, for shifting cars into industries, and loading tracks along the right of way, and for the passage of certain of its trains, is claimed by plaintiff in error to be still essential to its business.

The municipal corporation has for many years worked and maintained its streets and cross streets, including so much of the surface of East and West Center streets as lies outside of the space actually occupied by the railroad tracks. More recently it has instituted a system of street grades and of drainage extending throughout the city, and has paved a considerable part of East and West Center streets in conformity to the grade so established. From Chestnut street north the railroad tracks are (or, at least, prior to the municipal action complained of they were) from 6 to 18 inches above the established street grade; the tracks south of Chestnut street being in a cut from 1 to 8 feet deep.

In November, 1909, the board of aldermen passed an ordinance or ordinances containing the following provisions: Section 1 rendered it unlawful for any railroad company to run any freight or passenger train on East or West Center streets at a rate of speed exceeding 4 miles per hour, and required the companies to have flagmen proceed 50 feet in front of every train to warn persons of its approach. Section 2 provided that the shifting [553] limits on East and West Center streets should be from Spruce street to the city limits on the south, and from Ash street to the city limits on the north; thus excluding the four blocks between Spruce and Ash streets. Section 3 declared it to be unlawful for any railroad company to do any shifting within those four blocks at any other time than between the hours of 6:30 and 8:30 A. M., and between 4:30 and 6:30 P. M. Section 4 rendered it unlawful for any railroad company to place any car and allow it to stand for a longer period than five minutes at any point on East and West Center streets within the same four blocks. Section 5 required all railroad companies owning tracks on East and West Center streets between Walnut and Vine (four blocks) to lower the tracks so as to make them conform to the grade line of the streets, and to fill in the tracks between the rails; the required lowering being specified as 6 inches from Walnut to Mulberry, 10 inches between Mulberry and Ash, and 18 inches between Ash and Vine streets. Substantial penalties were prescribed for violations of these prohibitions.

Plaintiff in error began this action against the city of Goldsboro in the superior court of Wayne county, seeking to restrain the enforcement of the ordinances. A temporary restraining order was granted. At the hearing, the objection to the enforcement of § 1 was abandoned by plaintiff; as to the other sections the court vacated the restraining order. Upon appeal, the supreme court of North Carolina affirmed the judgment. 155 N. C. 356, 71 S. E. 514. The present writ of error under § 709, Rev. Stat., U. S. Comp. Stat. 1901, p. 575 (Judicial Code, § 237 [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227]), is based upon the insistence, made in the state courts and there overruled, that the ordinances impair the obligation of the contract contained in the charter of the company, in contravention of § 10 of art. 1, of the Federal Constitution, and deprive the company of its property without due process of law, in contravention of the 14th Amendment.

[554] The supreme court of the state construed the section forbidding shifting as having reference to the "cutting out and putting in" of cars in the making up of a train before it is despatched upon its journey, and not as referring to the "transfer" of a train of cars, already made up by plaintiff in error, to another railroad company for transportation. In view of the fact that plaintiff in error has shifting yards farther from the center of the city, where its trains can

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be made up and at least the chief part of the necessary shifting done, the court held it to be a reasonable exercise of the police power to forbid car shifting, except within the limited hours specified, on the four blocks of the plaintiff's track that lie in the heart of the city; declaring this regulation to be necessary for the convenience and safety of the public at the crossings.

With reference to the section requiring the lowering of the tracks between Walnut and Vine streets so as to make them conform to the grade lines of the streets, the court held that the Company took its charter subject to the right of the state to lay out new roads and streets, and to require the company to make such alterations as would prevent the public passage over its tracks from being impeded; and that there was no contract exempting the railroad from changing its grade at crossings when required.

In this court, plaintiff in error abandons its attack upon the right of the city to require a change of grade at the street crossings. The controversy, therefore, is now limited to (a) the restrictions imposed by §§ 2 and 3 upon shifting operations on East and West Center streets between Spruce and Ash streets; (b) the prohibition of § 4 against the standing of cars for a longer period than five minutes within the same four blocks; and (c) the requirement under § 5 that the tracks from Walnut to Vine street shall conform to the grade of East and West Center streets, and shall be filled in between the rails, elsewhere [555] than at the crossing streets. Upon the argument, it was stated by counsel representing the city that plaintiff in error had complied with the decision of the state court as to § 5, at least, to the extent of lowering its tracks. But there was no clear admission of the fact in behalf of plaintiff in error, and we shall therefore disregard the supposed compliance.

It is, among other things, contended by plaintiff in error that the ordinances are not within the powers conferred by the legislature of North Carolina upon the municipal corporation. This is a question of state law, which, for present purposes, is conclusively settled by the decision of the supreme court of North Carolina in this case. Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 462, 42 L. ed. 236, 237, 17 Sup. Ct. Rep. 829, and cases cited; Lombard v. West Chicago Park Comrs. 181 U. S. 33, 43, 45 L. ed. 731, 737, 21 Sup. Ct. Rep. 507.

A municipal by-law or ordinance, enacted by virtue of power for that purpose delegated by the legislature of the state, is a state law within the meaning of the Federal Constitution. New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31, 31 L. ed. 607, 612, 8 Sup. Ct. Rep. 741; Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 266, 36 L. ed. 963, 967, 13 Sup. Ct. Rep. 90; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 148, 45 L. ed. 788, 791, 21 Sup. Ct. Rep. 575; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 590, 52 L. ed. 630, 633, 28 Sup. Ct. Rep. 341; Grand Trunk Western R. Co. v. Railroad Commission, 221 U. S. 400, 403, 55 L. ed. 786, 787, 31 Sup. Ct. Rep. 537; Ross v. Oregon, 227 U. S. 150, 162, 57 L. ed. 458, 463, 33 Sup. Ct. Rep. 220.

And any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state, within the meaning of the pertinent clause of § 709, Rev. Stat., Judicial Code, § 237; which confers jurisdiction on this court. Williams v. Bruffy, 96 U. S. 176, 183, 24 L. ed. 716, 717.

We must therefore treat the ordinances as legislation enacted by virtue of the lawmaking power of the state. They are manifestly an exertion of the police power, and the question is whether, viewed in that light, they run counter to the "contract" or "due process" clauses.

[556] That a railroad charter may embody a contract, within the meaning of the Constitution, hardly needs to be stated. Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629. In the present case the supreme court of North Carolina held that by the Constitution of the state, the charter was subject to alteration or repeal at the legislative will. If the right of repeal was indeed thus reserved, the result is obvious. Greenwood v. Union Freight R. Co. 105 U. S. 13, 21, 26 L. ed. 961, 965; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 437, 47 L. ed. 887, 891, 23 Sup. Ct. Rep. 531. But when this court has under review the judgment of a state court by virtue of § 709, Rev. Stat., U. S. Comp. Stat. 1901, p. 575, and the validity of a state law is challenged on the ground that it impairs the obligation of a contract, this court must determine for itself the existence or nonexistence of the asserted contract, and whether its obligation has been impaired. Douglas v. Kentucky, 168 U. S. 488, 502, 42 L. ed. 553, 557, 18 Sup. Ct. Rep. 199; Stearns v. Minnesota, 179 U. S. 223, 233, 45 L. ed. 162, 170, 21 Sup. Ct. Rep. 73. We are not referred to and are unable to find, in the state Constitution as it existed when the charter now in question was granted, any reservation of the right of repeal, and will assume for present purposes that the contract was not thus qualified, and deal only

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with the question whether it has been impaired.

Plaintiff in error lays more particular stress upon the insistence that its property rights in the street will be infringed by the enforcement of the ordinances. Because its predecessors acquired the strip of land in fee simple, and because the municipal corporation has never condemned it or made compensation for its use as a street, the contention is that the title of the railroad company remains until now, absolute and unqualified. Reference is made to Rev. Code (N. C.) chap. 65, § 23. This section, it seems, became law in North Carolina in the year 1854, and has remained upon the statute books continuously until the present time, appearing now as § 388 of the Revisal of 1908; see also Code 1883, § 150. It provides that "no railroad, plank road, turnpike, or canal company [557] shall be barred of, or presumed to have conveyed, any real estate, right of way, easement, leasehold, or other interest in the soil which may have been condemned, or otherwise obtained for its use, as a right of way, depot, station house or place of landing, by any statute of limitation, or by occupation of the same by any person whatever." Two cases. Seaboard Air Line R. Co. v. Olive, 142 N. C. 257, 271, 55 S. E. 263, and Muse v. Seaboard Air Line R. Co. 149 N. C. 443, 446, 19 L.R.A.(N.S.) 453, 63 S. E. 102, are cited as supporting the proposition that under this statute a permissive user of any portion of the railroad right of way by others, or even by the public as a street, cannot impair the title of the company unless at least there be adverse user or possession for a sufficient period to satisfy the statutes on that subject; and it is insisted there has been none. But in both cases the question was as to the effect of the permissive user or possession upon merely private rights, and in the Muse Case it was expressly conceded (149 N. C. 446) that the rights of the railroad company in that portion of its right of way that had been used as a street were subject to the police power of the town. In the present case, likewise, the state court (155 N. C. 363) treated the question of the ownership of the soil as not involved in the decision.

And we are not at present particularly concerned with either contract or property rights, except as they may serve to show the conditions under which the ordinances were adopted, and may bear upon the question of the reasonableness of those regulations. These have to do with the use and control of the property, rather than with its ownership; with the mode in which the franchise shall be enjoyed, rather than with its scope. Conceding, for argument's sake only, the utmost that may be claimed as to the charter and property rights of plaintiff in error, we still have yielded nothing that may defeat the exercise of the police power by the state, or by its authorized agency. Adopting the extreme assumption that the railroad [558] company has still a complete and unqualified ownership of every portion of the strip of land that was originally acquired in fee simple, and as proprietor might lawfully exercise its dominion by excluding the public from it: yet it does not do this, but permits, and long has permitted, the public to use material portions of the strip for ordinary street purposes; it apparently excludes the public from no portion except as the existence of the tracks and the passage of trains may have such a tendency or effect. And thus the company, at least for the time, devotes its property in part to public uses that are more or less inconsistent with the railroad uses, and under conditions such as to render the railroad operations necessarily a source of danger to the public while enjoying the permitted use. Under such circumstances the state, in the exercise of the police power, may legitimately extend the application of the principle that underlies the maxim, *Sic utere tuo ut alienum non lædas*, so far as may be requisite for the protection of the public.

For it is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. Slaughter House Cases, 16 Wall. 36, 62, 21 L. ed. 394, 404; Munn v. Illinois, 94 U. S. 113, 125, 24 L. ed. 77, 84; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 33, 24 L. ed. 989, 992; Mugler v. Kansas, 123 U. S. 623, 665, 31 L. ed. 205, 211, 8 Sup. Ct. Rep. 273; Crowley v. Christensen, 137 U. S. 86, 89, 34 L. ed. 620, 621, 11 Sup. Ct. Rep. 13; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437; Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 414, 415, 55 L. ed. 789, 795, 796, 31 Sup. Ct. Rep. 534. And the enforcement of uncompensated obedience to a regulation established under this power for the public health or safety is not an unconstitutional taking of property without compensation or without [559] due process of law. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 255, 41 L.

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ed. 979, 991, 17 Sup. Ct. Rep. 581; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 462, 49 L. ed. 831, 835, 25 Sup. Ct. Rep. 471; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 591, 592, 50 L. ed. 596, 608, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

Of course, if it appear that the regulation under criticism is not in any way designed to promote the health, comfort, safety, or welfare of the community, or that the means employed have no real and substantial relation to the avowed or ostensible purpose, or that there is wanton or arbitrary interference with private rights, the question arises whether the law-making body has exceeded the legitimate bounds of the police power.

The ordinances now in question must be considered in view not only of the charter and property rights of plaintiff in error, but of the actual situation that has developed and now exists in Goldsboro, with the consent and long acquiescence of plaintiff in error and its predecessors in interest. A town of considerable size and importance has grown up along the line of the railroad. The strip of land 130 feet in width, so far as it is not occupied by the railroad tracks, for many years has been and still is used for the ordinary purposes of a street. The supreme court of North Carolina found, upon adequate evidence, that it is the main business street of the town, frequently crowded with pedestrians and vehicles; and that the operation of trains along it, notwithstanding the utmost care of the railroad company, tends to obstruct the crossings and is fraught with danger to life and property. There are, within the blocks covered by the ordinances, two main lines of railway besides that of plaintiff in error. These, of course, complicate the situation by narrowing the spaces available for ordinary travel north and south on East and West Center streets, and must also enhance the dangers at the crossings.

It is very properly conceded that the company may be required to limit the speed of its trains, and to have flagmen [560] precede them to warn persons of their approach; and that the company may be required to change its grade at the street crossings. In New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437, this court sustained a Connecticut statute directed to the extinction of grade crossings as a menace to public safety, and compelling this to be done at the expense of the companies, although the grade crossings had been long before established under legislative authority. In Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 251, 41 L. ed. 979, 989, 17 Sup. Ct. Rep. 581, it was held that when the city opened a new street across the railroad it was not bound to take and pay for the fee in the land, but only to make compensation to the extent that the value of the company's right to use the land for railroad purposes was diminished by opening the street across it; and that the company was not entitled to have its compensation increased because of the fact that in order to safeguard the crossing it would thereafter be obliged to construct gates, and a tower for operating them, plank the crossing, fill in between the rails, and incur certain annual expenses for depreciation, maintenance, employment of gatemen, etc. To the same effect are Wabash R. Co. v. Defiance, 167 U. S. 88, 97, 42 L. ed. 87, 91, 17 Sup. Ct. Rep. 748; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 75, 42 L. ed. 948, 954, 18 Sup. Ct. Rep. 513; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 597, 52 L. ed. 630, 636, 28 Sup. Ct. Rep. 341; Cincinnati, I. & W. R. Co. v. Connersville, 218 U. S. 336, 343, 54 L. ed. 1060, 1064, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206; Chicago, M. & St. P. R. Co. v. Minneapolis, decided this day [232 U. S. 430, ante, 671, 34 Sup. Ct. Rep. 400.] And see Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 554, 57 L. ed. 633, 639, 44 L.R.A.(N.S.) 405, 33 Sup. Ct. Rep. 303.

But manifestly the tracks cannot be brought to the street grade at the crossings without being lowered between the crossings as well. And if this is to be done, it follows that not merely the tracks, but the surface adjacent to the tracks, must be made to conform to the established grade of East and West Center streets between the crossing streets; or else the street will be rendered materially less convenient for purposes of north-and-south travel, [561] and the drainage will be materially interfered with; or at least the municipal authorities might reasonably so determine. The establishment of a proper system of drainage for the city in the interest of the public health and general welfare is an object that legitimately invokes the exercise of the police power. New Orleans Gas Light Co. v. Drainage Commission, 197 U. S. 453, 460, 49 L. ed. 831, 834, 25 Sup. Ct. Rep. 471.

As to filling in between the rails, elsewhere than at the crossing streets, we have to do not merely with the necessities of drainage, but with the safety of persons crossing the railroad tracks midway of the respective street blocks. The power of the state to prescribe precautions with respect to the running of railroad trains so as to guard against injuries to the persons or property of others is not confined to the establishment of such precautions at high-

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way crossings. State enactments requiring railroad corporations to maintain fences and cattle guards alongside the railroad have been repeatedly sustained. Missouri P. R. Co. v. Humes, 115 U. S. 512, 522, 29 L. ed. 463, 466, 6 Sup. Ct. Rep. 110; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 34, 32 L. ed. 585, 588, 9 Sup. Ct. Rep. 207; Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364, 366, 37 L. ed. 769, 771, 13 Sup. Ct. Rep. 870. For the purposes of the argument it may be conceded that no person has the right, as against the railroad company, to pass over its tracks except at one of the street intersections; although this may not be entirely clear. But unless excluding fences be established adjacent to the railroad tracks (and this is not proposed nor even suggested as feasible), it is inevitable that many people, with or without right (children of tender years, among others), will cross at places other than the street intersections; and a police regulation intended to prevent injuries to persons thus crossing cannot be judicially denounced as arbitrary. Other grounds for sustaining § 5 might be mentioned; but we need not further particularize.

There remain only the limitation of car shifting and the prohibition of the standing of cars upon East and West [562] Center streets in the four blocks that lie between Spruce and Ash streets, in the heart of the city. As already pointed out, the state court construed "shifting" as applying only to the "cutting out and putting in" of cars in the making up of trains. This operation is not to be performed within the four blocks specified except during two hours in the morning and two hours in the afternoon of each day. The time limits were evidently adopted with regard to the necessities of the industries that are located along the railroad, and at the same time with a view to the necessities of general travel upon the streets. It was complained that the time allowed for shifting is inadequate; but there is nothing in the proof on this subject to overthrow the finding of the court that the ordinance is a reasonable exercise of the police power.

The prohibition against the standing of cars for a longer period than five minutes within the same four blocks is intended to prevent the loading and unloading of cars in the street, with the attendant use of wagons and drays for the purpose. In view of the obstruction to street travel that is naturally incident to such operations, the prohibition cannot be deemed wholly unreasonable. In effect it prevents ordinary travel upon the street from being thus obstructed, and requires that the loading and unloading of cars shall be done at the regular freight terminals.

The regulations in question are thus found to be fairly designed to promote the public health, safety, and welfare; the measures adopted appear to be reasonably suited to the purposes they are intended to accomplish; and we are unable to say that there is any unnecessary interference with the operations of the railroad, or with the property rights of plaintiff in error. Therefore, no violation of the "contract" or "due process" clauses is shown.

Judgment affirmed.

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[563] CHARLES WILSON, alias Charles Willard, Plff. in Err.,
v.
UNITED STATES. (No. 168.)

CATHARINE WILSON, alias Zoe Willard, Plff. in Err.,
v.
UNITED STATES. (No. 169.)

(See S. C. Reporter's ed. 563-571.)

Error to district court — jurisdiction — Federal question.

1. The jurisdiction of the Federal Supreme Court to review a judgment of a district court in a case in which the constitutionality of an act of Congress is drawn in question is not lost because the question has since been settled adversely to the plaintiff in error, but the court will retain jurisdiction for the purpose of passing upon the other questions in the record.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

Note.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

On cross-examination of the defendant in criminal cases—see note to People v. Tice, 15 L.R.A. 669.

Generally as to scope and limits of cross-examination—see note to Rea v. Missouri, 21 L. ed. U. S. 707.

As to what constitutes a reasonable doubt in criminal cases—see note to Lovett v. State, 17 L.R.A. 705.

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White slave trade — means of transportation.

2. Transportation by a common carrier is not essential to constitute the offense denounced by the white slave act of June 25, 1910 (36 Stat. at L. 825, chap. 395, U. S. Comp. Stat. Supp. 1911, p. 1343), as the transportation, or causing to be transported, or the obtaining, aiding, or assisting in, the transportation in interstate commerce of women or girls for the purpose of prostitution, debauchery, or other immoral purposes.

Commerce — power of Congress — white slave act.

3. A limitation of the means of prohibited transportation to common carriers need not be implied in order to sustain the validity of the white slave act of June 25, 1910, forbidding the transportation in interstate commerce of women or girls for the purpose of prostitution, debauchery, or other immoral purpose.

White slave trade — transportation for prostitution — direction as to choice of conveyance.

4. Defendants charged with causing and procuring the interstate transportation of girls for the purpose of prostitution, contrary to the white slave act of June 25, 1910, cannot escape conviction because they did not control or instruct in the choice of means of conveyance the agent employed by them to effect the transportation, and furnished by them with the money to cover the transportation expense.

Witnesses — cross-examination of accused — credibility.

5. The accused having admitted on cross-examination that she is addicted to the use of morphine, and stated that she last used it before coming into the court room, may be further asked how often she uses it, and whether she has with her the implements to take the dose, although she has not put her character in issue, since such evidence has a material bearing upon her reliability as a witness.

[For other cases, see Witnesses, V. b, in Digest Sup. Ct. 1908.]

Witnesses — cross-examination of accused — relevancy to direct examination.

6. Cross-examination of the accused tending to show that she and her codefendant lived unhappily as husband and wife and were occasionally separated is entirely relevant to her testimony in chief, in which, after flatly denying the testimony of an alleged accomplice that he had met and talked with her at a certain point, conformably to her request to aid in a search for her husband, she added that she always knew where her husband was.

[For other cases, see Witnesses, V. b, in Digest Sup. Ct. 1908.]

Evidence — rebuttal — prosecution under white slave act.

7. Evidence respecting entries made by husband and wife in their books of account, showing payments of money to certain police officers, and indicating friendly relations, if not co-operation, between them as keepers of a house of prostitution and members of the police force, is admissible on their trial for procuring the interstate transportation of girls for the purpose of prostitution, contrary to the white slave act of June 25, 1910, as tending to show the character of the house, and as tending to rebut evidence previously introduced by the defense to the effect that the wife had refused to harbor the girls for fear of police interference.

[For other cases, see Evidence, XI. l, in Digest Sup. Ct. 1908.]

Trial — instructions — reasonable doubt.

8. An instruction defining reasonable doubt as "that frame of mind which forbids you to say, all the evidence considered and weighed, 'I have an abiding conviction of the defendant's guilt,' or, as it has been expressed, 'I am convinced of the defendant's guilt to a moral certainty,'" and adding, "If you can say that you have such a conviction, then you have no reasonable doubt, and your verdict should be 'guilty.' On the contrary, if that is your frame of mind, if you are in the frame of mind where, if it was a matter of importance to you in your own affairs, away from here, you would pause and hesitate before acting, then you have a reasonable doubt," is sufficiently favorable to the accused.

[For other cases, see Trial, VII. c, in Digest Sup. Ct. 1908.]

White slave trade — when offense complete — abandonment of purpose.

9. The offense denounced by the white slave act of June 25, 1910, as the procuring of interstate transportation of women or girls for the purpose of prostitution, is complete when any such woman or girl shall have been transported in such commerce as a result of any of the criminal acts previously described. The statute does not contemplate a *locus penitentiæ* for one accused of violating its provisions after the woman or girl has reached the intended destination within the walls of a house of prostitution.

[Nos. 168 and 169.]

Submitted October 23, 1913. Decided February 24, 1914.

TWO WRITS OF ERROR to the District Court of the United States for the Northern District of Illinois to review convictions of violations of the white slave act. Affirmed.

The facts are stated in the opinion.

Mr. Elijah N. Zoline submitted the cause for plaintiffs in error:

Even though the constitutional question since the suing out of the writ of error has become a mere abstraction, this court will review the whole case.

Williamson v. United States, 207 U. S.

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425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; Burton v. United States, 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243; Horner v. United States, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522.

Under the decision of this court in Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 57 L. ed. 1501, 46 L.R.A.(N.S.) 385, 33 Sup. Ct. Rep. 890, a street railway is not such an agency of commerce as falls within the prohibition of the use of interstate commerce, though it may carry passengers across a state line; and if that be so, no offense was committed.

The court erred in permitting the cross-examination of plaintiff in error Catharine Wilson, as to whether or not she was addicted to the use of morphine or other drugs, and whether she then and there had with her instruments necessary for the administration of such drugs; also in permitting the district attorney to make the statement that said Catharine Wilson was using said instrument every few minutes to stimulate herself with opium or morphine.

3 Am. & Eng. Enc. Law, 110; 11 Am. & Eng. Enc. Law, 2d ed. 519; Kolb v. Union R. Co. 23 R. I. 72, 54 L.R.A. 646, 91 Am. St. Rep. 614, 49 Atl. 392; State v. King, 88 Minn. 175, 92 N. W. 965; 1 Greenl. Ev. § 461a; 29 Am. & Eng. Enc. Law, 804, 806; Wharton, Ev. 3d ed. § 541; Rapalje, Witnesses, § 197; Thomp. Trials, §§ 524, 525; Com. v. Churchill, 11 Met. 538, 45 Am. Dec. 229; State v. Smith, 7 Vt. 141; Spears v. Forrest, 15 Vt. 437; Gilchrist v. M'Kee, 4 Watts. 380, 28 Am. Dec. 721; State v. Carson, 66 Me. 116, 2 Am. Crim. Rep. 58; Rudsdill v. Slingerland, 18 Minn. 380, Gil. 342; Atwood v. Impson, 20 N. J. Eq. 157; Bucklin v. State, 20 Ohio, 18; Muetze v. Tuteur, 77 Wis. 243, 9 L.R.A. 86, 20 Am. St. Rep. 115, 46 N. W. 123; Dimick v. Downs, 82 Ill. 570; Moore v. Moore, 73 Tex. 382, 11 S. W. 396.

The court unduly limited the doctrine of "presumption of innocence" and "reasonable doubt."

Coffin v. United States, 156 U. S. 432, 39 L. ed. 481, 15 Sup. Ct. Rep. 394; Com. v. Webster, 5 Cush. 295, 52 Am. Dec. 711; Miles v. United States, 103 U. S. 304, 316, 26 L. ed. 481, 485; Burt v. State, 72 Miss. 408, 48 Am. St. Rep. 563, 16 So. 342; Frazier v. State, 117 Tenn. 458, 100 S. W. 94; Brown v. State, 72 Miss. 95, 16 So. 202; Johnson v. State, — Miss. —, 16 So. 494.

The court erred in excluding from his charge the principle of *locus penitentiæ*.

Whart. Crim. Law, 9th ed. § 187; Stephens v. State, 107 Ind. 185, 8 N. E. 94; Pinkard v. State, 30 Ga. 757; State v. Baller, 26 W. Va. 90, 53 Am. Rep. 66; Cox v. People, 82 Ill. 191, 2 Am. Crim. Rep. 329; Thompson v. People, 96 Ill. 158; United States v. Stephens, 8 Sawy. 116, 12 Fed. 52; Stabler v. Com. 95 Pa. 318, 40 Am. Rep. 653; State v. Hurley, 79 Vt. 28, 6 L.R.A. (N.S.) 804, 118 Am. St. Rep. 934, 64 Atl. 78; Keck v. United States, 172 U. S. 445, 43 L. ed. 510, 19 Sup. Ct. Rep. 254; People v. Murray, 14 Cal. 159.

Assistant Attorney General Denison submitted the cause for the United States:

Even in the cases that hold it error to show a witness to be generally a drug fiend, it has always been recognized as permissible to show that she was under the influence while on the witness stand.

People v. Webster, 139 N. Y. 86, 34 N. E. 730; State v. Gleim, 17 Mont. 31, 31 L.R.A. 294, 52 Am. St. Rep. 655, 41 Pac. 998, 10 Am. Crim. Rep. 46; State v. White, 10 Wash. 613, 39 Pac. 160, 41 Pac. 442; Williams v. United States, 6 Ind. Terr. 14, 88 S. W. 334; Eldridge v. State, 27 Fla. 185, 9 So. 448; McDowell v. Preston, 26 Ga. 535; Anderson v. State, — Tex. Crim. Rep. —, 144 S. W. 281; 30 Am. & Eng. Enc. Law, 2d ed. 1096; 2 Wigmore, Ev. §§ 934, 1005e; 1 Whart. Crim. Ev. 10th ed. § 384a; 1 Rice, Ev. 625.

The fact that the house had nothing to fear from the police was a relevant circumstance and proper cross-examination. Great latitude is allowed in admitting such circumstantial evidence.

Moore v. United States, 150 U. S. 57, 37 L. ed. 996, 14 Sup. Ct. Rep. 26; Thiede v. Utah, 159 U. S. 510, 517, 40 L. ed. 237, 241, 16 Sup. Ct. Rep. 62; Castle v. Bullard, 23 How. 172, 16 L. ed. 424.

And a trial judge has a reasonable discretion as to cross-examination.

Blitz v. United States, 153 U. S. 308, 312, 38 L. ed. 725, 726, 14 Sup. Ct. Rep. 924.

The government's case was "as well without it."

Cooper v. Coates, 21 Wall. 105, 111, 22 L. ed. 481, 482.

Mr. Justice Pitney delivered the opinion of the court:

This case comes here upon two separate writs of error allowed upon the same record, to review judgments of the district court imposing fine and imprisonment upon each of the plaintiffs in error, upon their conviction on an indictment founded upon the act of Congress of June 25, 1910, commonly known as the white slave act (36 Stat. at L. 825, chap. 395, U. S. Comp. Stat. Supp. 1911, p. 1343).

The case was brought directly to this court, because the constitutionality of the statute was drawn in question. This ques-

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tion has since been settled adversely to plaintiffs in error. Hoke v. United States, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A. (N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905. Nevertheless, we must retain jurisdiction for the purpose of passing upon the other questions in the record. Horner v. [566] United States, 143 U. S. 570, 576, 36 L. ed. 266, 268, 12 Sup. Ct. Rep. 522; Burton v. United States, 196 U. S. 283, 295, 49 L. ed. 482, 485, 25 Sup. Ct. Rep. 243; Williamson v. United States, 207 U. S. 425, 432, 52 L. ed. 278, 284, 28 Sup. Ct. Rep. 163.

There were numerous counts in the indictment, and a general verdict of guilty. The substance of the charge was that defendants caused and procured two girls to be transported in interstate commerce from Milwaukee, Wisconsin, to Chicago, Illinois, for the purpose of prostitution. There was also a count charging a conspiracy to commit the same offense. The theory of the government, sufficiently stated in the indictment and supported by evidence at the trial, was that, in pursuance of an understanding between defendants and a man named Corder, they gave him $11 in money, with instructions to proceed from Chicago to Milwaukee, induce one or both of the girls to return with him to Chicago, paying their transportation and other expenses out of the $11, and bring them to a house of prostitution in the latter city, kept by the defendants; and that Corder carried out these instructions to the letter, bringing both girls over an interstate electric railway line and escorting them to the defendants' house for the purpose of prostitution.

Of the questions of law that are raised, only the following seem to require mention:

1. It is insisted that the offense was not fully proved because there was nothing to show that defendants either directed or knew how the girls were to come from Milwaukee to Chicago, whether in a private vehicle or through the instrumentality of a common carrier. But, in our opinion, in order to constitute an offense under the act it is not essential that the transportation be by common carrier. The statute reads: "That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, . . . any woman or girl for the purpose of prostitution or debauchery, or [567] for any other immoral purpose, . . . or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, . . . in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, . . . whereby any such woman or girl shall be transported in interstate or foreign commerce, . . . shall be deemed guilty of a felony," etc.

The prohibition is not in terms confined to transportation by common carrier, nor need such a limitation be implied in order to sustain the constitutionality of the enactment. As has already been decided, it has the quality of a police regulation, although enacted in the exercise of the power to regulate interstate commerce (Hoke v. United States, 227 U. S. 308, 323, 57 L. ed. 523, 527, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913 E, 905; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 215, 29 L. ed. 158, 166, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826); and since this power is complete in itself, it was discretionary with Congress whether the prohibition should be extended to transportation by others than common carriers.

The contention that defendants were not within the prohibition of the act because they did not control or instruct Corder in the choice of means of conveyance is not worthy of serious consideration. According to the government's evidence, Corder was employed by defendants as their agent, and furnished by them with money sufficient for the expenses of the transportation, but without definite instructions as to what mode should be employed. A natural inference was that he should decide upon the mode and select the route; and that such selection was within the scope of his agency.

2. The female defendant offered herself as a witness, and in the course of her cross-examination was asked whether she was addicted to the use of morphine. Having [568] admitted this, and stated that she had last used it before coming into the court room that morning at 10 o'clock, she was asked how often she used it, and whether she had with her the "implements" with which to "take the dose." She replied in the affirmative. This line of examination was excepted to, and is assigned for error on the ground that she had not put her character at issue. But as we read the record, the evidence was not offered or admitted for its bearing upon her character, but rather to show that she was so much addicted to the use of the drug that the question whether, at the moment of testifying, she was under its influence, or had recovered from the effects of its last administration, had a material bearing upon her reliability as a witness. It seems to us that in this

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aspect the evidence was admissible. People v. Webster, 139 N. Y. 73, 87, 34 N. E. 730; State v. White, 10 Wash. 611, 613, 39 Pac. 160, 41 Pac. 442.

3. Error is assigned upon certain rulings of the trial court permitting cross-examination of the same witness, tending to show that she and the other defendant lived unhappily as husband and wife, were occasionally separated, and (as is said) that they at times indulged in the use of pistols. No evidence was in fact offered or admitted tending to show that weapons had been used, if we except an obscure allusion to "pistols" in a letter that had been written by a person in New York city to the female defendant in Chicago. The use made of this letter was permissible for other reasons. The evidence as to the quarrels and separation was plainly admissible. The government's case depended mainly upon the testimony of Corder. He appeared to have been an accomplice, hence circumstantial corroboration of his story was especially material. He had testified that Mrs. Wilson asked him to go to Milwaukee for the purpose of getting the two girls, and had mentioned as a circumstance that this conversation took place at the Union Depot in Chicago, where he had met Mrs. Wilson at her request [569] to aid her in a search for her husband. On her direct examination she flatly denied this, saying: "I did not take him and he never accompanied me on any trip to hunt for Mr. Wilson; I always knew where Mr. Wilson was." The cross-examination under consideration was entirely relevant to this part of the testimony in chief.

4. It is assigned for error that the court permitted the government to cross-examine the defendant, Charles Wilson, respecting entries made by him and his wife in their books of account, showing payments of money to certain police officers, and indicating friendly relations, if not co-operation, between defendants, as keepers of a house of prostitution, and members of the police force. This was not objected to as exceeding the limits of proper cross-examination, but only as being "incompetent, irrelevant, and immaterial." We think it was admissible as tending to show the character of the house, and as tending to rebut evidence previously introduced by the defense to the effect that Mrs. Wilson had refused to harbor the girls for fear of police interference.

5. Error is assigned upon the instructions of the trial court to the jury respecting the presumption of innocence, and the definition of reasonable doubt. Counsel for defendants preferred no request upon either subject previous to the delivery of the charge. The court instructed the jury in substance that the arrest of defendants, their indictment by the grand jury, and their arraignment, were no evidence whatever of their guilt; that the presumption of innocence meant that at the beginning of the trial they were as innocent of the charges as any man in the jury box; that this presumption continued to abide with the defendants as a complete protection, unless and until it gave way because inconsistent with the existence of a situation proved by the evidence in the case beyond all reasonable doubt; that by that [reasonable doubt] was meant, not the frame of mind of a man endeavoring to [570] find a way out for somebody accused of crime, not a mere capricious doubt, not a frame of mind suggested by something occurring in the trial of the case or in the argument of counsel not based on evidence in the case; but that "reasonable doubt is that frame of mind which forbids you to say, all the evidence considered and weighed, 'I have an abiding conviction of the defendants' guilt;' or, as it has been expressed, 'I am convinced of the defendants' guilt to a moral certainty.' If you can say that you have such a conviction, then you have no reasonable doubt, and your verdict should be 'guilty.' On the contrary, if that is your frame of mind, if you are in the frame of mind where, if it was a matter of importance to you in your own affairs, away from here, you would pause and hesitate before acting, then you have a reasonable doubt." At the conclusion of the charge counsel for defendants said: "I should like that the court say a little more on the reasonable doubt, as I believe it was limited only to a moral certainty. That is the only sentence I heard about that." The argument here is that the instruction as given is faulty, because the court did not tell the jury that the government must prove its case against defendants beyond a reasonable doubt. As we read the charge, it meant nothing less than that, and was sufficiently favorable to defendants. Miles v. United States, 103 U. S. 304, 309, 312, 26 L. ed. 481, 483, 484; Hopt v. Utah, 120 U. S. 430, 439, 440, 30 L. ed. 708, 711, 712, 7 Sup. Ct. Rep. 614; Dunbar v. United States, 156 U. S. 185, 199, 39 L. ed. 390, 395, 15 Sup. Ct. Rep. 325; Coffin v. United States, 156 U. S. 432, 460, 39 L. ed. 481, 493, 15 Sup. Ct. Rep. 394; Cochran v. United States, 157 U. S. 286, 299, 39 L. ed. 704, 708, 15 Sup. Ct. Rep. 628; Davis v. United States, 160 U. S. 469, 487, 40 L. ed. 499, 505, 16 Sup. Ct. Rep. 353; Allen v. United States, 164 U. S. 492, 500, 41 L. ed. 528, 530, 17 Sup. Ct. Rep. 154; Dunlop v. United States, 165 U. S. 486, 502, 41 L. ed. 799, 804, 17 Sup. Ct. Rep. 375.

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6. Error is assigned because the court refused to charge the jury, as requested, to the effect that if they should believe from the evidence that defendants, after the girls came to Chicago from Milwaukee, refused to accept them, and voluntarily abandoned their evil intention and refused [571] to carry out the illegal purpose, no offense against the laws of the United States was committed. It is argued that the end and object of the act is to prevent immorality and trafficking in girls, and not the mere act of transportation. But we think that by the plain language of the statute, the offense is complete when "any such woman or girl shall be transported in interstate or foreign commerce, or in any territory or the District of Columbia" as a result of any of the criminal acts previously described. The suggestion that the law contemplates a *locus penitentiæ* for defendant, after the journey is ended and the woman or girl has been brought to the intended destination within the walls of a house of prostitution, is obviously untenable.

We find no error in the record.

Judgments affirmed.

JACOB WEINMAN and Joseph Barnett, and Ivan Grunsfeld and M. W. Flournoy, Their Sureties, Plffs. in Err.,

v.

RICHARD DE PALMA and Bernard Ruppe.

(See S. C. Reporter's ed. 571–576.)

Joint tort feasors — adjoining owners —construction of party wall — damage to tenant.

1. A contract between the owner of demised premises and an adjoining owner for the construction of a party wall, which cannot be carried out according to its terms without entry upon the demised premises and an undermining of the tenant's wall, is evidential of the landlord's command or approval of the trespass upon the tenant's possession, committed by the adjoining owner or his servants in the performance of the contract, so as to render the landlord liable severally or jointly with the adjoining owner in an action by the tenant for the resulting damage.

[For other cases, see Joint Creditors and Debtors, in Digest Sup. Ct. 1908.]

Damages — trespass — future profits.

2. Loss of future profits (these being reasonably certain and proved with reasonable exactitude) forms a proper element for consideration in awarding compensatory damages for a trespass resulting in the destruction of a building, with consequent interruption of a going business.

[For other cases, see Damages, VI. t, in Digest Sup. Ct. 1908.]

Master and servant — liability of master to third person — independent contractor.

3. A general contractor engaged in building a party wall under the direction of an agent of one of the adjoining owners is not an independent contractor, for whose negligence the owners would not be responsible.

[For other cases, see Master and Servant, III. b, in Digest Sup. Ct. 1908.]

Master and servant — liability of master to third person — independent contractor.

4. The doctrine which relieves the owner from liability for negligence of an independent contractor does not apply where the work that the contractor is to do of itself amounts to a nuisance, or necessarily operates to injure or destroy the property of a third person.

[For other cases, see Master and Servant, III. b, in Digest Sup. Ct. 1908.]

[No. 173.]

Argued January 20, 1914. Decided February 24, 1914.

IN ERROR to the Supreme Court of the Territory of New Mexico to review a judgment which, on a third appeal, affirmed, with a slight modification, a judgment of the District Court of Bernalillo County, in that territory, in favor of plaintiffs in a negligence suit. Affirmed.

See same case below, first appeal, 13 N. M. 226, 82 Pac. 360; second appeal, 15 N. M. 68, 24 L.R.A.(N.S.) 423, 103 Pac. 782; third appeal, 16 N. M. 302, 121 Pac. 38.

The facts are stated in the opinion.

Mr. Neill B. Field argued the cause and filed a brief for plaintiffs in error:

The bill of particulars used to refresh the memory of a witness failed to meet the requirements established by the decisions of this and other courts and by elementary writers on the law of evidence.

1 Greenl. Ev. § 436; 1 Phillipps, Ev. 289;

NOTE.—On the liability of landlord where tenant's property is damaged through interference with party wall by adjoining owner under agreement with landlord—see note to the above case in the New Mexico supreme court as reported in 24 L.R.A. (N.S.) 424.

On damages for tort as affected by loss of profits—see note to Wallace v. Pennsylvania R. Co. 52 L.R.A. 33.

As to who is an independent contractor—see notes to Richmond v. Sitterding, 65 L.R.A. 445, Knicely v. West Virginia Midland R. Co. 17 L.R.A.(N.S.) 371.

As to liability of employer for acts of independent contractor where injury is direct result of work contracted for—see note to Thomas v. Harrington, 65 L.R.A. 750.

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1 Wigmore, Ev. §§ 744, 763; Insurance Cos. v. Weides, 14 Wall. 375, 20 L. ed. 894; Bates v. Preble, 151 U. S. 149, 38 L. ed. 106, 14 Sup. Ct. Rep. 277; Norwalk ex rel. Fawcett v. Ireland, 68 Conn. 1, 35 Atl. 804; Curtis v. Bradley, 65 Conn. 99, 28 L. R. A. 143, 48 Am. St. Rep. 177, 31 Atl. 591; Peterson Bros. v. Mineral King Fruit Co. 140 Cal. 624, 74 Pac. 162.

There is a reasonable probability that the evidence of damage to goods not entirely destroyed tainted the entire verdict.

Hopt v. Utah, 120 U. S. 431, 438, 30 L. ed. 709, 711, 7 Sup. Ct. Rep. 614; Waldron v. Waldron, 156 U. S. 361, 384, 39 L. ed. 453, 459, 15 Sup. Ct. Rep. 383; Throckmorton v. Holt, 180 U. S. 552, 568, 45 L. ed. 663, 671, 21 Sup. Ct. Rep. 474.

It is not without significance that the cash book is offered as original evidence to corroborate the testimony of the witness Ruppe that during six and one-half months of his occupation of the Weinman building his total cash receipts were $14,186.31, and that his gross profit on those sales was $5,674.52, and that from a stock of merchandise returned for taxation under oath by Father Di Palma which gave the average value of merchandise during the year at $1,200.

Giaccomini v. Bulkeley, 51 Cal. 260; Paola Gas Co. v. Paola Glass Co. 56 Kan. 614, 54 Am. St. Rep. 598, 44 Pac. 621; Boston & A. R. Co. v. O'Reilly, 158 U. S. 334, 39 L. ed. 1006, 15 Sup. Ct. Rep. 830; Miller v. Wilkes-Barre Gas Co. 206 Pa. 254, 55 Atl. 974.

A partnership may not ignore the requirements of the statute in keeping a record of its transactions, and then be permitted to use as evidence a record which falls short of such requirements.

Deserant v. Cerillos Coal R. Co. 178 U. S. 409, 44 L. ed. 1127, 20 Sup. Ct. Rep. 967, 20 Mor. Min. Rep. 573.

Damages must be proved, and not left to conjecture by the jury.

Central Coal & Coke Co. v. Hartman, 49 C. C. A. 244, 111 Fed. 102; Bristol Belt Line R. Co. v. Bullock Electric Mfg. Co. 101 Va. 652, 44 S. E. 893; McSherry Mfg. Co. v. Dowagiac Mfg. Co. 89 C. C. A. 26, 160 Fed. 952; Philp v. Nock, 17 Wall. 462, 21 L. ed. 679; Seymour v. McCormick, 16 How. 480, 489, 490, 14 L. ed. 1024, 1028.

Assuming Mr. Ruppe to be the most upright and conscientious of men, is it safe to establish a rule of evidence which would open the way for the perpetration of frauds such as would be possible of accomplishment by a dishonest man in his situation?

2 Wigmore, Ev. §§ 1198 et seq.; Broadwell v. Stiles, 8 N. J. L. 58; The Count Joannes v. Bennett, 5 Allen, 169, 81 Am. Dec. 738; Parker v. Kane, 4 Wis. 1, 65 Am. Dec. 283; Wallace v. Harmstad, 44 Pa. 492; Riggs v. Tayloe, 9 Wheat. 483, 6 L. ed. 140; Price v. Tallman, 1 N. J. L. 447; Wyckoff v. Wyckoff, 16 N. J. Eq. 401; Wilke v. Wilke, 28 Wis. 298; Bagley v. McMickle, 9 Cal. 430; Gugins v. Van Gorder, 10 Mich. 523, 82 Am. Dec. 55.

There was no suggestion of any right to punitive damages in the case, and therefore the effort to create this impression was unjustifiable and prejudicial.

4 Sutherland, Damages, 1030, 1033; 3 Wigmore, Ev. § 1725.

The evidence of Mr. Ruppe's efforts to find another location was intended to fortify the claim for loss of profit, but the effect of it was to permit Mr. Ruppe to express his opinion upon various matters as to which opinion evidence was not admissible, and to put before the jury Mr. Ruppe's views with reference to collateral matters which the jury could not properly consider, and which were of no probative value. If the loss of profits depended upon proof of these matters, upon which Mr. Ruppe was permitted to express an opinion, then such lost profits were not recoverable because they are too speculative, uncertain, and too remote, and depend upon proof of things which are not susceptible of proof.

Karbach v. Fogel, 63 Neb. 601, 88 N. W. 660.

The admissibility of these opinions must be determined upon the principles applicable to the admissibility of the opinions of nonprofessional witnesses, rather than upon those which govern the admissibility of testimony of experts, but it is perfectly clear that they were not admissible under either, and that the trial court was not at liberty to say, as a matter of law, that Mr. Ruppe, or any other witness, could give his opinion about such matters.

3 Wigmore, Ev. §§ 1917 et seq.; Rogers, Expert Testimony, §§ 1 et seq.; Ferguson v. Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; Pearson v. Alaska Pacific S. S. Co. 51 Wash. 560, 130 Am. St. Rep. 1117, 99 Pac. 753; Schmieder v. Barney, 113 U. S. 645, 28 L. ed. 1130, 5 Sup. Ct. Rep. 624; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; Franklin F. Ins. Co. v. Gruver, 100 Pa. 266.

Counsel was also permitted, over the objection of plaintiffs in error, presistently to propound question to the witness Ruppe which suggested the answers desired, and which violated settled principles to such a degree as amounted to an abuse of discretion by the trial judge.

1 Wigmore, Ev. §§ 768 et seq.; Southwestern Brewery & Ice Co. v. Schmidt, 226 U. S. 162, 57 L. ed. 170, 33 Sup. Ct. Rep. 68.

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The construction of the party wall did not necessarily involve a trespass.

Ridge v. Railroad Transfer Co. 56 Mo. App. 138; Northern Trust Co. v. Palmer, 171 Ill. 383, 49 N. E. 555; 1 Taylor, Land. & T. § 174; Proud v. Hollis, 1 Barn. & C. 8; Penley v. Watts, 7 Mees. & W. 601, 10 L. J. Exch. N. S. 229; Shaw v. Cummiskey, 7 Pick. 76; Peterson v. Edmonson, 5 Harr. (Del.) 378.

There is such a conflict in the various parts of the charge as renders it practically certain that the jury did not understand and could not extract from the charge any definite rule with reference to the measure of damages.

Karbach v. Fogel, 63 Neb. 601, 88 N. W. 660; Hayden v. Florence Sewing Mach. Co. 54 N. Y. 225; Howard v. Stillwell & B. Mfg. Co. 139 U. S. 206, 35 L. ed. 150, 11 Sup. Ct. Rep. 500; 3 Sutherland, Damages, 3d ed. § 864; Shafer v. Wilson, 44 Md. 268; Casper v. Klippen, 61 Minn. 353, 52 Am. St. Rep. 604, 63 N. W. 737; Des Allemands Lumber Co. v. Morgan City Timber Co. 117 La. 1, 41 So. 332; Silurian Mineral Springs Co. v. Kuhn, 65 Neb. 646, 91 N. W. 508; Douglass v. Ohio River R. Co. 51 W. Va. 523, 41 S. E. 911; Paquin v. St. Louis & S. R. Co. 90 Mo. App. 118; Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; Butler v. Collins, 12 Cal. 457; Ft. Pitt Gas Co. v. Evansville Contract Co. 59 C. C. A. 281, 123 Fed. 63; Wehle v. Haviland, 69 N. Y. 448; 1 Sedgw. Damages, 7th ed. 128; Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co. 152 U. S. 200, 38 L. ed. 411, 14 Sup. Ct. Rep. 523; Central Trust Co. v. Clark, 34 C. C. A. 354, 92 Fed. 293; Dietrich v. Rumsey, 45 Ill. 209.

As between defendants in error and plaintiff in error Weinman, defendants in error had a right to sue in contract for a breach of the covenant for quiet enjoyment which is implied by the law from the relation of landlord and tenant, or to sue in tort as they did, but in either case the measure of damage was the same, and as it will hardly be contended that Barnett could be properly joined as a defendant in a suit on the covenants of a lease to which he was not a party, it must follow that the bringing of this suit was an election by the defendants in error to waive the breach of their contract rights. The great weight of authority supports the contention that, by the eviction relied on, the relation of landlord and tenant ceased to exist and the rights of the parties became immediately fixed.

Skally v. Shute, 132 Mass. 370; International Trust Co. v. Schumann, 158 Mass. 291, 33 N. E. 509; 3 Sutherland Damages, 3d ed. § 864.

The giving of two or more instructions which are inconsistent with each other is calculated to mislead the jury and leave them in doubt as to the law.

Brown v. McAllister, 39 Cal. 577; Hoben v. Burlington & M. River R. Co. 20 Iowa, 567; Haight v. Vallet, 89 Cal. 245, 23 Am. St. Rep. 465, 26 Pac. 897; Bank of Metropolis v. New England Bank, 6 How. 212, 12 L. ed. 409.

The court should have given the cautionary instruction requested with reference to the testimony of Mr. Ruppe.

Ward v. Brown, 53 W. Va. 227, 44 S. E. 488; Whiteford v. Burckmyer, 1 Gill, 127, 39 Am. Dec. 640; Harrison v. Rowan, 3 Wash. C. C. 580, Fed. Cas. No. 6,141; Beurmann v. Van Buren, 44 Mich. 496, 7 N. W. 62.

Plaintiffs in error are not liable for the defective execution of the party-wall agreement. Grande was an independent contractor.

Casement v. Brown, 148 U. S. 615, 37 L. ed. 582, 13 Sup. Ct. Rep. 672; Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Sulzbacher v. Dickie, 51 How. Pr. 500; Norwalk Gaslight Co. v. Norwalk, 63 Conn. 495, 28 Atl. 32; Conners v. Hennessey, 112 Mass. 96; Engel v. Eureka Club, 137 N. Y. 100, 33 Am. St. Rep. 693, 32 N. E. 1052; Dillon v. Hunt, 105 Mo. 154, 24 Am. St. Rep. 374, 16 S. W. 516; Charless v. Rankin, 66 Am. Dec. 642, note; Gilmore v. Driscoll, 122 Mass. 199, 23 Am. Rep. 312, 14 Mor. Min. Rep. 37.

Mr. F. E. Wood argued the cause, and, with Messrs. Owen N. Marron and A. B. McMillen, filed a brief for defendants in error:

The owner of leased premises, contracting with a stranger to undermine the tenant's wall, becomes liable equally with the stranger to the tenant for resulting damages.

Wertheimer v. Saunders, 95 Wis. 573, 37 L.R.A. 149, 70 N. W. 824, 2 Am. Neg. Rep. 480; Ellis v. Sheffield Gas Consumers' Co. 2 El. & Bl. 767, 2 C. L. R. 249, 23 L. J. Q. B. N. S. 42, 18 Jur. 146, 2 Week. Rep. 19, 19 Eng. Rul. Cas. 180; Robbins v. Chicago, 4 Wall. 679, 18 L. ed. 432; St. Paul Water Co. v. Ware, 16 Wall. 576, 21 L. ed. 488; Dalton v. Angus, L. R. 6 App. Cas. 829, 50 L. J. Q. B. N. S. 689, 44 L. T. N. S. 844, 30 Week. Rep. 191, 14 Eng. Rul. Cas. 769.

Where a trespass results in the destruction of a building and consequent interruption of a going business, future profits thus lost may be recovered as an element of damages.

Wicker v. Hoppock, 6 Wall. 99, 18 L. ed. 753; Allison v. Chandler, 11 Mich. 542; Snow v. Pulitzer, 142 N. Y. 270,

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36 N. E. 1059; 3 Sutherland, Damages, 154; 1 Sedgw. Damages, 8th ed. § 182; Chapman v. Kirby, 49 Ill. 219; Wood, Land. & T. 782; Shaw v. Hoffman, 25 Mich. 162; Hawthorne v. Siegel, 88 Cal. 159, 22 Am. St. Rep. 291; Anvil Min. Co. v. Humble, 153 U. S. 549, 38 L. ed. 817, 14 Sup. Ct. Rep. 876, 18 Mor. Min. Rep. 98; Shafer v. Wilson, 44 Md. 268; Scyfert v. Bean, 83 Pa. 450; Glass v. Garber, 55 Ind. 336; Gibson v. Fischer, 68 Iowa, 29, 25 N. W. 914; Goebel v. Hough, 26 Minn. 252, 2 N. W. 847.

No question relating to the sufficiency of the books of account as evidence is before this court for review.

Southwestern Brewery & Ice Co. v. Schmidt, 226 U. S. 162, 57 L. ed. 170, 33 Sup. Ct. Rep. 68; Santa Fe County v. New Mexico, 215 U. S. 296, 54 L. ed. 202, 30 Sup. Ct. Rep. 111.

Mr. Justice Pitney delivered the opinion of the court:

In November, 1901, Weinman, one of the plaintiffs in error, being the owner of a building and lot of land in Albuquerque, New Mexico, leased them to defendants in error for a term of two years, to commence in December, following. They entered into possession, and occupied and used the building in their business of prescription and retail druggists. Plaintiff in error Barnett was the owner of an adjoining lot and building. Some time in May or June, 1902, while the Weinman building was occupied by defendants in error, Barnett took down and removed his building, including the wall adjacent to the Weinman building. The east wall of the latter was an old adobe wall that stood close to, but perhaps a few inches away from, the easterly boundary line of the lot. In May, 1902, Weinman and Barnett entered into an agreement in writing, whereby Barnett was to construct a party wall, [573] to stand one half of its full thickness upon each lot; the footing course to be 40 inches wide; the foundation wall to be 18 inches thick from the top of the footing to its full height, where it was to receive the first floor joints; the wall above that to be of less thickness. It was stipulated that Barnett should be permitted to take down any part of the east wall of the Weinman building as might be necessary in order to locate the new wall centrally over the property line, and if, through his fault, damage should be done to the Weinman building, he was to make it good. In the execution of this agreement, it was necessary to undermine the east wall of the Weinman building. Barnett made an agreement with one Grande, a general contractor, by which the latter was to do the excavation and stone work according to plans and specifications, and as directed by La Driere, a superintendent who was in Barnett's employ. Grande proceeded under La Driere's direction to do the work. It would seem that the purpose was to excavate for the party wall in sections, so that support for the Weinman building should not at any time be entirely lacking. On or about June 30th, the contractor having excavated for a space about 5 feet in length along the line between the two lots at the northeast corner of the Weinman building, and extending under the east wall of that building for approximately 12 inches, the wall fell, damaging the stock-in-trade and fixtures of defendants in error, and rendering the building untenantable. They removed what remained of their stock and fixtures to another and less desirable location, and carried on their business there, up to the time their lease of the Weinman lot and building would have expired by its terms. After the wall fell, Weinman made demand for the rent payable by the lease for the month of July, 1902, and, defendants in error having refused to pay it, Weinman took possession.

Defendants in error brought suit against both Weinman [574] and Barnett in the district court of one of the counties of the then territory of New Mexico. The action was in the nature of an action of trespass, and damages were claimed for the destruction of parts and injury to other parts of the stock-in-trade and fixtures, for the being compelled to remove to a less favorable location at considerable expense, and for the loss of profits in the business. (There was also a claim of damages for eviction and the loss of the leasehold, but this was afterwards abandoned.)

Answers were filed, and there were subsequent amendments to the pleadings, but it is not necessary to recite them.

The action has been at least three times tried by jury, and three times reviewed by the supreme court of New Mexico. Upon the first trial a verdict was directed in favor of defendants, and the supreme court reversed the judgment and remanded the cause for a new trial. 13 N. M. 226, 82 Pac. 360. The second trial resulted in a verdict and judgment for plaintiffs, which was reversed because compensation for loss of profits and for goods injured was included without sufficient evidence to sustain this part of the recovery. 15 N. M. 68, 24 L.R.A.(N.S.) 423, 103 Pac. 782. At the last trial, the proof was to some extent supplemented, and there was a judgment in favor of plaintiffs for $7,738, based upon the verdict of a jury for that amount. On appeal, the supreme court found error only with respect to the proof as to dam-

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aged goods, and required plaintiffs to elect whether they would file a remittitur of $770 on this account, or submit to a new trial. 16 N. M. 302, 121 Pac. 38. They chose the former alternative, and the judgment was affirmed for the reduced amount. The present writ of error was then sued out.

The record is voluminous. In the territorial supreme court, 105 assignments of error were filed in behalf of Barnett and 68 in behalf of Weinman. In this court the assignments of error are 110 in number. We shall make no [575] effort to deal with them in detail. The points that seem to require mention are the following:

We agree with the supreme court of New Mexico that where the owner of demised premises makes a contract with an adjoining owner for the construction of a party wall, which contract cannot be carried out according to its terms without entry upon the demised premises and an undermining of the tenant's wall, and the adjoining owner or his servants, in the performance of the contract, do commit such a trespass upon the tenant's possession and undermine the wall, the contract is evidential of a command or approval of the trespass by the landlord, such as to render him liable severally, or jointly with the adjoining owner, in an action by the tenant for the resulting damages. Lovejoy v. Murray, 3 Wall, 1, 9, 18 L. ed. 129, 131; Northern Trust Co. v. Palmer, 171 Ill. 383, 388, 49 N. E. 553; Collins v. Lewis, 53 Minn. 78, 83, 19 L.R.A. 822, 54 N. W. 1056; Snow v. Pulitzer, 142 N. Y. 263, 268, 36 N. E. 1059.

In our opinion, the court correctly held that where a trespass results in the destruction of a building, with consequent interruption of a going business, the loss of future profits (these being reasonably certain and proved with reasonable exactitude) forms a proper element for consideration in awarding compensatory damages. Allison v. Chandler, 11 Mich. 543, 550; Schile v. Brokhahus, 80 N. Y. 614, 620; Snow v. Pulitzer, 142 N. Y. 263, 270, 36 N. E. 1059; Chapman v. Kirby, 49 Ill. 211, 219; Terre Haute v. Hudnut, 112 Ind. 542, 552, 13 N. E. 686; National Fibre Board Co. v. Lewiston & A. Electric Light Co. 95 Me. 318, 327, 49 Atl. 1075. And see Anvil Min. Co. v. Humble, 153 U. S. 540, 549, 38 L. ed. 814, 817, 14 Sup. Ct. Rep. 876; 18 Mor. Min. Rep. 98; Brown v. Honiss, 74 N. J. L. 501, 514, 68 Atl. 150.

We agree also with the court below that upon the last trial there was legitimate evidence upon which to base an allowance of damages for loss of profits, and no substantial error in the rulings on evidence or in the instructions to the jury upon the subject.

It is contended that plaintiffs in error are not responsible [576] for what was done by Grande in building the party wall because he was an independent contractor.

But the evidence showed that he was required to follow the instructions of La Driere, who was Barnett's agent, and that La Driere was in fact in charge of the work. For this reason it was properly held that Grande was not an independent contractor. New Orleans, M. & C. R. Co. v. Hanning, 15 Wall. 649, 657, 21 L. ed. 220, 223, 7 Am. Neg. Cas. 309; Singer Mfg. Co. v. Rahn, 132 U. S. 518, 523, 33 L. ed. 440, 442, 10 Sup. Ct. Rep. 175.

Nor does the "independent contractor" doctrine apply where the work that the contractor is to do of itself amounts to a nuisance or necessarily operates to injure or destroy the property of plaintiff. Chicago v. Robbins, 2 Black, 418, 426, 17 L. ed. 298, 303; Robbins v. Chicago, 4 Wall. 657, 678, 18 L. ed. 427, 432.

The other points that are raised have been examined, and we find no material error. They have been sufficiently discussed in the court below, and require no particular mention here.

Judgment affirmed.

OHIO TAX CASES.

OHIO RIVER & WESTERN RAILWAY COMPANY, Appt.,

v.

ROBERT M. DITTEY, Frank E. Munn, and Christian Pabst, as the Tax Commission of Ohio, and the Tax Commission of Ohio. (No. 642).

MARIETTA, COLUMBUS, & CLEVELAND RAILROAD COMPANY, Appt.,

v.

DAVID S. CREAMER, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as the Tax Commission of Ohio, and the Tax Commission of Ohio. (No. 643).

(See S. C. Reporter's ed. 576-594.)

Constitutional law — confiscation — privilege tax.

1. A law imposing a tax upon privileges and franchises is not repugnant to the

NOTE.—On taxation of corporate franchises—see note to Louisville Tobacco Warehouse Co. v. Com. 57 L.R.A. 33.

On constitutional equality in relation to

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Ohio Constitution as being confiscatory and oppressive merely because in isolated cases such law may impose a hardship.

[For other cases, see Constitutional Law, IV. b, 6, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — privilege tax.

2. Railway franchises cannot be said to be valueless, so as to make the tax imposed by 102 Ohio Laws, 224, upon gross earnings, invalid as confiscatory and taking property without due process of law, merely because the present earnings of the railways are not sufficient to pay more than can be derived from legitimate high grade investment securities readily available on the market, or may even not be sufficient to pay operating expenses.

[For other cases, see Constitutional Law, IV. b, 6, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — discrimination — excise tax — classification.

3. Railway companies doing business in the state are not arbitrarily discriminated against, contrary to the uniformity and equality provisions of the Ohio Constitution, or the equal protection of the laws clause of the 14th Amendment of the Constitution of the United States, by the excise tax imposed upon gross earnings by 102 Ohio Laws, 224, because it does not include all other public utilities carrying on business within the state, or because those public utilities which it does include are not all taxed at the same rate.

[For other cases, see Constitutional Law, IV. a, 4, in Digest Sup. Ct. 1908.]

Commerce — state taxation — railway earnings.

4. An intention to tax the receipts from foreign commerce will not be imputed by the Federal courts to the Ohio legislature when enacting 102 Ohio Laws, 224, imposing an excise tax upon the gross receipts of railway companies, because such commerce is not expressly excepted by the provisions of §§ 83, 88, which provide for ascertaining the railway earnings "from whatever source derived, for business done within this state, excluding therefrom all earnings derived wholly from interstate business, or business done for the Federal government," in view of the intent indicated in § 97, to take into consideration, for the purpose of measuring the tax, only the earnings upon intrastate business, and of the absence of any decision of the Ohio courts calling for a different construction.

[For other cases, see Commerce, III. d, 3, in Digest Sup. Ct. 1908.]

Commerce — state taxation — gross railway receipts.

5. Amending a state law imposing an excise tax on gross railway earnings so as to exclude interstate earnings from the computation, while making a corresponding increase in the tax decimal, is not of itself sufficient evidence of an unlawful effort to burden a privilege that is not a proper subject of state taxation.

[For other cases, see Commerce, III. d, 3, in Digest Sup. Ct. 1908.]

Taxes — uniformity — double taxation.

6. The exaction from railway companies by 102 Ohio Laws, 224, of an excise tax of 4 per cent on their gross intrastate earnings in addition to the taxation of their property is not lacking in the uniformity required by the state Constitution, as being double taxation.

[For other cases, see Taxes, I. b, 1, in Digest Sup. Ct. 1908.]

Statute — when invalidity may be assailed — invalid in part.

7. The possible unconstitutionality of the penalties imposed by 102 Ohio Laws, 224, for withholding the excise tax levied by that statute upon gross railway earnings, will not be considered in actions which do not involve any present attempt to enforce such penalties,—especially in view of the declaration of § 160 as to the severability of the various sections and parts of sections of that act.

[For other cases, see Statutes, I. d, 3; I. d, 4, in Digest Sup. Ct. 1908.]

[Nos. 642 and 643.]

Argued January 7, 1914. Decided February 24, 1914.

TWO APPEALS from the District Court of the United States for the Southern District of Ohio to review decrees refusing to enjoin the collection of an excise tax upon gross railway earnings. Affirmed.

See same case below, 203 Fed. 537.

Statement by Mr. Justice Pitney:

These suits were brought in the United States district court for the southern district of Ohio (eastern division) by appellants, which are Ohio railroad corporations, to enjoin the certification and collection by appellees of a tax which the state was seeking to enforce upon the privilege of carrying on business in that state. This tax appellants claimed to be in violation of the due process and equal protection clauses of the 14th Amendment, and of the commerce clause of the Federal Constitution, and also of the preamble and §§ 2 and 19 of the Ohio Constitution.

A restraining order was allowed by the district court, and afterwards appellants' motions for temporary injunctions came on for hearing before three judges, of whom one was a circuit judge, pursuant to § 266

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taxation—see note to Bacon v. State Tax Comrs. 60 L.R.A. 341.

On corporate taxation and the commerce clause—see note to Sandford v. Poe, 60 L.R.A. 641.

Generally, on statutes part valid and part invalid—see notes to Titusville Iron Works v. Keystone Oil Co. 1 L.R.A. 363; and Fayette County v. People's & D. Bank, 10 L.R.A. 196.

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of the Judicial Code (36 Stat. at L. 1162, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 236), which went into effect shortly after the bills were filed. The two cases were argued and considered together, upon the facts averred in the bills, which were, for the purposes of the motions, conceded to be true by appellees, and, after consideration, the temporary injunctions were refused. 203 Fed. 537.

Appellants come direct to this court, under the same section of the Code.

The tax law in question, the validity of which is attacked generally, and also specially in its application to appellants, was enacted in its present form May 31, 1911. 102 Ohio Laws, 224.

It created a tax commission, with defined powers, and prescribed various taxes, some upon property and others upon franchises and privileges, with sundry provisions, penal and otherwise, for the collection thereof. Some of [579] these taxes were new in Ohio law, others were carried over from previously existing statutes.

The tax here in question is limited in its operation to certain lines of quasi public business, specifically named in the act and therein referred to as "public utilities," including railroads.

As applied to railroads, the act requires the filing with the tax commission, by each railroad doing business in the state, of a statement, on or before September 1, setting forth, among other things, its "entire gross earnings, including all sums earned or charged, whether actually received or not, for the year ending on the 30th day of June next preceding, from whatever source derived, for business done within this state, excluding therefrom all earnings derived wholly from interstate business or business done for the Federal government. Such statement shall also contain the total gross earnings of such company for such period in this state from business done within this state." Sections 81 and 83 of act; §§ 5470 and 5472, General Code of Ohio.

It is further provided that on the first Monday of October the commission "shall ascertain and determine the gross earnings as herein provided, of each railroad company whose line is wholly or partially within this state, for the year ending on the 30th day of June next preceding, excluding therefrom all earnings derived wholly from interstate business or business done for the Federal government. The amount so ascertained by the commission shall be the gross earnings of such railroad company for such year." Section 88 of act; § 5477, Gen. Code.

The act further provides that on the first Monday of November the commission shall certify to the auditor of state the amount of the "gross earnings so determined" (§ 93 of act; § 5482, Gen. Code), and that—"in the month of November, the auditor of state shall charge for [580] collection, from each railroad company, a sum in the nature of an excise tax, for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported to him by the commission, as the gross earnings of such company on its intrastate business for the year . . . by taking 4 per cent of all such gross earnings." Section 97 of act; § 5486, Gen. Code. The tax is imposed equally and alike on corporations, partnerships, and individuals. Section 39 of act; § 5415, Gen. Code.

Messrs. Robert J. King and F. A. Durban argued the cause and filed a brief for appellants:

The equity jurisdiction rests upon prevention of cloud upon real estate title, inadequacy of legal remedies, threatened irreparable damage, and prevention of multiplicity of suits.

Cooley, Taxn. p. 536; Dows v. Chicago, 11 Wall. 108, 112, 20 L. ed. 65, 67; Shelton v. Platt, 139 U. S. 591, 35 L. ed. 273, 11 Sup. Ct. Rep. 646; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

Under the Constitution of Ohio, as construed by the Ohio supreme court in the case of Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564, the legislature is without power to impose a privilege tax which is in excess of the value of the privilege taxed, and inasmuch as the admitted facts show the present tax upon appellants to wholly exceed such value, its exaction as to them violates the state Constitution, and amounts to confiscation and a taking of their property without due process of law.

Adler v. Whitbeck, 44 Ohio St. 539, 9 N. E. 672; Barnes v. Brown, 130 N. Y. 372, 29 N. E. 760; Allegheny v. Western Pennsylvania R. Co. 138 Pa. 383, 21 Atl. 763; Dillon v. Anderson, 43 N. Y. 231; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841; Galigher v. Jones, 129 U. S. 193, 32 L. ed. 658, 9 Sup. Ct. Rep. 335; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 223-226, 52 L. ed. 1036, 1037, 28 Sup. Ct. Rep. 638; Gray, Limitations of Taxing Power, §§ 47a, 1317; Hagerty v. State, 55 Ohio St. 613, 45 N. E. 1046; Hartford v. West Middle Dist. 45 Conn. 462, 29 Am. Rep. 687; Martin v. District of Columbia, 205 U. S. 135, 51 L. ed. 743, 27 Sup. Ct. Rep. 440; Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423; Norwood v. Baker, 172 U. S. 269,

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43 L. ed. 443, 19 Sup. Ct. Rep. 187; O'Brien v. Wheelock, 184 U. S. 450, 46 L. ed. 636, 22 Sup. Ct. Rep. 354; Ohio River & W. R. Co. v. Dittey, 203 Fed. 541; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688–697, 39 L. ed. 311–316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Shoemaker v. United States, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361; Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564; State ex rel. Taylor v. Guilbert, 70 Ohio St. 229, 71 N. E. 636, 1 Ann. Cas. 25; State ex rel. Schwartz v. Ferris, 53 Ohio St. 314, 30 L.R.A. 218, 41 N. E. 579; State R. Tax Cases, 92 U. S. 575–606, 23 L. ed. 663–670; Sutherland, Damages, §§ 88, 89, 657, 692; Walsh v. Barron, 61 Ohio St. 15, 76 Am. St. Rep. 354, 55 N. E. 164; Warren v. Stoddart, 105 U. S. 224, 26 L. ed. 1117; Western U. Teleg. Co. v. Wright, 107 C. C. A. 356, 185 Fed. 257; Western U. Teleg. Co. v. Mayer, 28 Ohio St. 521; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

The tax in question is not a tax upon corporate franchises or privileges, as such, and cannot be saved on that theory.

Adler v. Whitbeck, 44 Ohio St. 539, 9 N. E. 672; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; State ex rel. Steubenville Gas & Electric Co. v. Taylor, 55 Ohio St. 61, 44 N. E. 513.

The tax cannot be regarded as an exercise of the police power, for the purpose of meeting expenses incident to the regulation of railroads and other utilities.

Adler v. Whitbeck, supra; Tennessee v. Whitworth, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645.

The value limitation, as laid down in the case of Southern Gum Co. v. Laylin, supra, is for the protection of the individual and his property.

Cooley, Const. Lim. 7th ed. p. 65; Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474–508, 57 L. ed. 1571–1594, 33 Sup. Ct. Rep. 975; Walsh v. Barron, 61 Ohio St. 15, 76 Am. St. Rep. 354, 55 N. E. 164.

The tax makes an arbitrary and discriminatory classification.

Athens v. New York & P. Teleg. & Teleph. Co. 9 Pa. Dist. R. 253; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Beckett v. Savannah, 118 Ga. 58, 44 S. E. 819; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Cache County ex rel. Matthews v. Jensen, 21 Utah, 207, 61 Pac. 303; Clark v. Titusville, 184 U. S. 329, 46 L. ed. 569, 22 Sup. Ct. Rep. 382; Findlay v. Frey, 51 Ohio St. 390, 38 N. E. 114; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150–165, 41 L. ed. 666–671, 17 Sup. Ct. Rep. 255; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Jaeger v. Burr, 36 Ohio St. 164; Juniata Limestone Co. v. Fagley, 187 Pa. 193, 42 L.R.A. 442, 67 Am. St. Rep. 579, 40 Atl. 977; Kentucky R. Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Peoria v. Gugenheim, 61 Ill. App. 374; Northern Indiana R. Co. v. Connelly, 10 Ohio St. 159; Cincinnati G. & P. R. Co. v. Poland, 10 Ohio N. P. N. S. 617; State v. Hinman, 65 N. H. 103, 23 Am. St. Rep. 22, 18 Atl. 194; State v. Moore, 113 N. C. 697, 22 L.R.A. 472, 18 S. E. 342; State v. Whitcom, 122 Wis. 110, 99 N. W. 468; Upington v. Oviatt, 24 Ohio St. 232; Western U. Teleg. Co. v. Wright, 107 C. C. A. 356, 185 Fed. 250; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; Wyman, Pub. Service Corp. §§ 39–106.

The 4 per cent tax, in the case of railroads, was imposed because of their being extensively engaged in interstate commerce, and was intended to be and is a burden upon interstate commerce, in violation of the commerce clause of the Federal Constitution.

Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 I. C. R. 485, 11 Sup. Ct. Rep. 213; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; United States Exp. Co. v. Minnesota, 223 U. S. 335–341, 56 L. ed. 459–463, 32 Sup. Ct. Rep. 211.

Should it be claimed that the privilege of carrying on appellants' business has a value, if considered as property, sufficient to meet the requirements of the value limitation in the Laylin Case, the result would be a double tax on property.

Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, on rehearing 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604.

The tax is based upon all gross earnings, excepting only such as are derived wholly from interstate business and business for the Federal government. The failure to exclude also earnings from foreign commerce, in which appellants are engaged, renders the act invalid under the commerce clause.

Eidman v. Martinez, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; Hepburn v.

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Ellzey, 2 Cranch, 445, 2 L. ed. 332; Lord v. Goodall, N. & P. S. S. Co. 102 U. S. 541, 26 L. ed. 224; Meyer v. Wells, F. & Co. 223 U. S. 298, 302, 56 L. ed. 445, 448, 32 Sup. Ct. Rep. 218; Veazie v. Moor, 14 How. 568–573, 14 L. ed. 545–547.

The act is unconstitutional because of its effort to prevent judicial inquiry and force obedience to its terms and to administrative acts thereunder, irrespective of their validity. It thereby denies due process and equal protection.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Goldberg, B. & Co. v. Stablemen's Union Local No. 8760, 149 Cal. 429, 8 L.R.A.(N.S.) 460, 117 Am. St. Rep. 145, 86 Pac. 806, 9 Ann. Cas. 1219; Jones v. Davis, 35 Ohio St. 474; Pierce v. Stablemen's Union Local No. 8760, 156 Cal. 70, 103 Pac. 324; Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564; State ex rel. Poe v. Jones, 51 Ohio St. 516, 37 N. E. 945; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

Messrs. **Frank Davis, Jr.**, and **Clarence D. Laylin** argued the cause, and, with Mr. Timothy S. Hogan, Attorney General of Ohio, filed a brief for appellees:

The entire system of taxation of the state applicable to railroad companies must be examined in order to determine the validity and effect of the tax involved in the cases at bar.

Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 226, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 294, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211.

Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564, decides:

1. The general assembly of Ohio, by reason of the grant to it of the legislative power of sovereignty, possesses the general taxing power of the state, which is restrained by article 12, § 2, and similar provisions of the Constitution of Ohio, with respect only to the taxation of property.

2. The exercise of the taxing power in the exaction of contributions from privileges and franchises owing their existence to a grant of the sovereignty itself is limited by certain constitutional provisions to taxing a sum not in excess of the value of the privilege thus conferred or its continuing annual value thereafter.

3. But (the question being as to the state's power to tax corporations as such) the state may, in addition to a franchise tax, levy an excise tax on the privilege of doing business as a corporation under what may perhaps be called the police power of the state; the subject of taxation, in such cases, being the burdens imposed upon the state and the public by reason of the aggregation of capital in the hands of those subject to limited liability. This ground of taxation is separate and apart from the state-created franchise as such, and the exercise of this power is not necessarily subject to the value limitations to which the exercise of the other is subject.

4. The tax exacted by the law in the cases before the court, and measured by a certain proportion of the issued and outstanding capital stock of domestic corporations, was a tax on the state-created franchise, and as such subject to the value limitation.

5. The amount of the tax imposed by the law before the court was considered, in connection with the value limitations imposed by the court's opinion, and was found not to violate that limitation. The consideration thus given was with a view to the effect of the tax upon corporations generally, and not with a view to its effect upon any individual corporation.

Adler v. Whitbeck, 44 Ohio St. 539, 9 N. E. 672; Ashley v. Ryan, 49 Ohio St. 504, 31 N. E. 721, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; Adams Exp. Co. v. State, 55 Ohio St. 69, 44 N. E. 506; Hagerty v. State, 55 Ohio St. 613, 45 N. E. 1046; Ohio River & W. R. Co. v. Dittey, 203 Fed. 537; Western U. Teleg. Co. v. Mayer, 28 Ohio St. 521; State ex rel. Schwartz v. Ferris, 53 Ohio St. 314, 30 L.R.A. 218, 41 N. E. 579.

The privilege taxed by the law involved in Southern Gum Co. v. Laylin was the privilege of corporate existence, as distinguished from the privilege of doing business as a corporation; the tax being one on the franchise, as distinguished from an excise occupation tax.

1 Cooley, Taxn. 3d ed. pp. 31, 37; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564.

The privilege taxed by the law involved in the cases at bar, being described but not defined in the statute, may be resolved into at least three elements, *viz.:*

1. The element of natural monopoly, which is common to all the utilities taxed, and constitutes them such.

Cincinnati Gaslight & Coke Co. v. State, 18 Ohio St. 243; Munn v. Illinois, 94 U. S. 113, 126, 24 L. ed. 77, 84; 1 Wyman, Pub. Service Corp. §§ 1, 50, 90; Zanesville v. Zanesville Gaslight Co. 47 Ohio St. 33, 23 N. E. 55.

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2. The burdens imposed upon the state and the public by the conduct of the business taxed.

Adler v. Whitbeck, 44 Ohio St. 539, 9 N. E. 672; United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Ohio River & W. R. Co. v. Dittey, 203 Fed. 537; Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564.

3. As to corporate public utilities, the corporate franchise itself.

Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 223, 41 L. ed. 965, 978, 17 Sup. Ct. Rep. 604; United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; People ex rel. Interborough Rapid Transit Co. v. Williams, 200 N. Y. 93, 93 N. E. 505; Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564; State v. Cleveland & P. R. Co. 13 Ohio N. P. N. S. 671; State v. Ohio Traction Co. — Ohio —; State ex rel. Steubenville Gas & Electric Co. v. Taylor, 55 Ohio St. 61, 44 N. E. 513; State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. ed. 164.

The so-called "value limitation" referred to in Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564, was not intended to be and cannot be applied to the taxation of the privilege reached by the law involved in the cases at bar.

Adler v. Whitbeck, 44 Ohio St. 539, 9 N. E. 672.

Even if the said "value limitation" could be applied generally to the imposition of the tax involved in the cases at bar, it cannot be invoked by an individual taxpayer to relieve him from the burden of the tax on a showing that his business is unprofitable.

Ashley v. Ryan, 49 Ohio St. 525, 31 N. E. 721; Baker v. Cincinnati, 11 Ohio St. 539; Cincinnati Gaslight & Coke Co. v. State, 18 Ohio St. 238; Cooley, Const. Lim. 6th ed. 587, 588, 598, 606–608, 611, 613; 1 Cooley, Taxn. 3d ed. 3, 9, 31, 84, 181, 192, 225, 254, 390, 391, 684, 2 Cooley, Taxn. 3d ed. 1153; Flint v. Stone Tracy Co. 220 U. S. 108, 151, 55 L. ed. 389, 413, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Lander v. Burke, 65 Ohio St. 542, 63 N. E. 69; Lewis v. State, 69 Ohio St. 479, 69 N. E. 1135; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 664, 22 L. ed. 455, 461; M'Culloch v. Maryland, 4 Wheat. 316, 428, 4 L. ed. 579, 606; McNeill v. Hagerty, 51 Ohio St. 265, 23 L.R.A. 628, 37 N. E. 526; Marmet v. State, 45 Ohio St. 69, 12 N. E. 463; Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 508, 57 L. ed. 1571, 1594, 33 Sup. Ct. Rep. 975; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423; Ohio River & W. R. Co. v. Dittey, 203 Fed. 537; Shotwell v. Moore, 45 Ohio St. 646, 16 N. E. 470; Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564; State ex rel. Schwartz v. Ferris, 53 Ohio St. 326, 30 L.R.A. 218, 41 N. E. 579; State ex rel. Taylor v. Guilbert, 70 Ohio St. 253, 71 N. E. 636, 1 Ann. Cas. 25; State R. Tax Cases, 92 U. S. 575, 23 L. ed. 663; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

Excise taxation in the pure sense is distinguished from taxation of franchises as such.

Century Dict.; Flint v. Stone Tracy Co. 220 U. S. 108, 151, 55 L. ed. 389, 413, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 508, 57 L. ed. 1571, 1594, 33 Sup. Ct. Rep. 975; Thomas v. United States, 192 U. S. 370, 48 L. ed. 483, 24 Sup. Ct. Rep. 305.

The Federal question sought to be raised by appellants depends upon their interpretation of Southern Gum Co. v. Laylin, supra; they do not and cannot claim under the 14th Amendment to the Federal Constitution, independently of that decision.

1 Cooley, Taxn. 3d ed. 55 et seq.; Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564.

The equal protection of the laws of Ohio is not denied by the legislation involved in the cases at bar because of its alleged failure to apply to all "public utilities."

American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 Sup. Ct. Rep. 578; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Kentucky R. Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct.

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Rep. 496; State ex rel. Schwartz v. Ferris, 53 Ohio St. 341, 30 L.R.A. 218, 41 N. E. 579; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423.

The Ohio law does not deny the equal protection of the laws of the state because of the differences in the rates imposed by it upon different public utilities.

Kidd v. Alabama, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Cincinnati, G. & P. R. Co. v. Poland, 10 Ohio N. P. N. S. 617; Savannah, T. & I. of H. R. Co. v. Savannah, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. Rep. 690.

The act does not deny the equal protection of the laws of Ohio because of its failure to classify railroads for excise tax purposes according to any alleged notorious differences among them.

Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; 1 Cooley, Taxn. 3d. ed. 390, 391; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957.

The readjustment of rates of excise taxation made by the Ohio legislature, following the decision in Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638, does not disclose an intention indirectly to burden or to continue to burden interstate commerce as such.

1 Cooley, Taxn. 3d ed. 41, 411; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; People ex rel. Griffin v. Brooklyn, 4 N. Y. 426, 55 Am. Dec. 266; Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 I. C. R. 59, 8 Sup. Ct. Rep. 1127.

The tax imposed by the Ohio law is not in effect an additional tax upon property.

Adler v. Whitbeck, 44 Ohio St. 539, 9 N. E. 672; Anderson v. Brewster, 44 Ohio St. 576, 9 N. E. 683; Ashley v. Ryan, 49 Ohio St. 504, 31 N. E. 721; Adams Exp. Co. v. State, 55 Ohio St. 69, 44 N. E. 506; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564; State ex rel. Schwartz v. Ferris, 53 Ohio St. 314, 30 L.R.A. 218, 41 N. E. 579; Western U. Teleg. Co. v. Mayer, 28 Ohio St. 521.

Foreign commerce is not burdened by the act.

Ratterman v. Western U. Teleg. Co. 127 U. S. 424, 425, 32 L. ed. 232, 233, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127.

The alleged coercive sections of the Ohio law, properly interpreted, violate no constitutional limitation; but even if regarded as unconstitutional, their invalidity does not affect the substantive provisions of the act; nor can their validity be questioned in these cases.

Flint v. Stone Tracy Co. 220 U. S. 177, 55 L. ed. 423, 31 Sup. Ct. Rep. 342; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729; Ohio River & W. R. Co. v. Dittey, 203 Fed. 537; Willcox v. Consolidated Gas Co. 212 U. S. 53, 54, 53 L. ed. 400, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

Mr. Justice Pitney, after making the foregoing statement, delivered the opinion of the court:

These two cases depend upon practically identical facts, and present the same questions of law.

The Federal jurisdiction arose because of the Federal questions presented in the record, and did not depend upon diversity of citizenship; and it extends, of course, to [587] the determination of all the questions presented, irrespective of the disposition that may be made of the Federal questions. Siler v. Louisville & N. R. Co. 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 Sup. Ct. Rep. 451; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 63, 57 L. ed. 417, 419, 33 Sup. Ct. Rep. 192.

The right to invoke the equity jurisdiction is clear; for the act specifically makes the tax a lien upon the real estate of appellants, from the cloud of which they sought to free it by the bringing of these actions (§ 117 of act; § 5506, Gen. Code); and the bills alleged threatened irreparable injury through the enforcement of the penalties and coercive features of the act. Shelton v. Platt, 139 U. S. 591, 598, 35 L. ed. 273, 277, 11 Sup. Ct. Rep. 646; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

The following are the questions to be disposed of:

First, it is insisted by appellants that under the state Constitution, as construed by the Ohio supreme court in Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564, the legislature is without power to impose a privilege tax which is in excess of the value of the privilege; that the admitted facts show the present tax upon appellants respectively to be in excess of such value; and that therefore as to them its exaction violates the state Constitution, and amounts to confiscation, and a taking of property without due process of law.

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As to the facts upon which this contention is based, the bill of complaint of the Marietta, Columbus, & Cleveland Railroad Company shows that the tax charged against it for the year 1911 amounts to $2,301.24; that the capital of the company is all, or practically all, invested in its railroad; that this investment was and is a reasonable and proper one; that due care and prudence have been used in the construction, maintenance, and operation of the property and the conduct of the business; that the greatest economy has been and is being practised in the effort to make the railroad yield a fair return upon the investment; but that, notwithstanding these efforts, it has [588] never been able to earn, and is not now able to earn from interstate or intrastate business, or both combined, after paying necessary and proper expenses, including taxes other than the excise tax, a return on the investment in its railroad, or on the value thereof, equal to the current rate of return on legitimate high-grade investments at all times readily available in the market; nor have its intrastate earnings, after deducting operating expenses properly attributable thereto, been sufficient to yield a return on that portion of its investment properly attributable to intrastate operations, equal to the current rate of return on legitimate high-grade investments; that, on the contrary, the gross earnings have not been and are not sufficient to pay actual operating expenses, and that this condition will continue to exist during the year which the excise tax is intended to cover.

The bill of complaint of the Ohio River & Western Railway Company contains similar averments, except as to its inability to pay actual operating expenses. Its tax amounts to $6,653.60.

The case referred to, Southern Gum Co. v. Laylin, supra, dealt with an act of April 11, 1902, known as the Willis law. The court held it to be an excise or franchise tax, not a property tax, and therefore not subject to the express limitations imposed by the state Constitution upon taxes of the latter kind, but only to such limitations as were to be implied from certain other provisions of the Constitution, respecting which the court said (p. 594):

"The Constitution was established to 'promote our common welfare.' Preamble to the Constitution. Government is instituted for the equal protection and benefit of the people. Section 2 of the Bill of Rights. Private property shall ever be held inviolate, but subservient to the public welfare. Section 19 of the Bill of Rights. These provisions of the Constitution are implied limitations upon the power of taxation of privileges [589] and franchises, and limit such taxation to the reasonable value of the privilege or franchise conferred originally, or to its continued value from year to year. Ashley v. Ryan, 49 Ohio St. 504, 31 N. E. 721; State ex rel. Schwartz v. Ferris, 53 Ohio St. 314, 30 L.R.A. 218, 41 N. E. 579; and Hagerty v. State, 55 Ohio St. 613, 45 N. E. 1046, are examples of taxing the privilege or franchise conferred; while Western U. Teleg. Co. v. Mayer, 28 Ohio St. 521, and Adams Exp. Co. v. State, 55 Ohio St. 69, 44 N. E. 506, are examples of taxing the continued value of the existing privilege or franchise from year to year. These limitations prevent confiscation and oppression under the guise of taxation, and the power of such taxation cannot extend beyond what is for the common or public welfare, and the equal protection and benefit of the people; but the ascertaining and fixing of such values rests largely in the general assembly, but finally in the courts."

This proposition is carried into the syllabus, which, under the rules of practice of the supreme court, is to be prepared by the judge assigned to prepare the opinion, is to be confined to the points of law arising from the facts of the cause that have been determined by the court, is to be submitted to the judges concurring therein for revisal before its publication, and is to be inserted in the book of reports.

An examination of the state decisions cited in the Laylin Case, with others referred to in the opinion of the district court and in the briefs of counsel, convinces us that the district court was correct in its conclusion that the state court, in the Laylin Case, dealt with a general law and its operation on all corporations of given classes throughout the state, and not with its effect upon specific financially weak corporations; that it was not intended to hold that the courts as final arbiters might overthrow a law imposing a tax on privileges and franchises merely because in isolated cases such law might impose a hardship, but only that those excise laws whose general operation is confiscatory and oppressive are unconstitutional.

[590] Nor do we think that from the facts of the present case it is to be inferred that the franchises of plaintiffs in error are valueless merely because it appears that the present earnings of the railroads are not sufficient to pay more than can be derived from legitimate high-grade investment securities that are readily available on the market, or (in the case of one of the roads) are not even sufficient to pay operating expenses. Upon this point we are content to refer to, without repeating, the language employed by Mr. Justice Miller, speaking

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for this court in State R. Tax Cases, 92 U. S. 575, 606, 23 L. ed. 663, 670.

Secondly, it is contended that the act arbitrarily discriminates against plaintiffs in error and other railroad companies in that (a), it does not include all other public utilities carrying on business within the state; those omitted, as is said, being grain elevators, stock yards, ferries, bridge companies, and innkeepers; and (b), the law does not operate uniformly among the utilities that are taxed, since, on electric light, gas, natural gas, water works, telephone, messenger or signal, union depot, heating, coaling, and water transportation companies, the tax amounts to 1.2 per cent of gross intrastate receipts, as to suburban and interurban railroads it is fixed at 1.2 per cent of gross intrastate earnings, and on express and telegraph companies, it is 2 per cent; while on railroads, including plaintiffs in error, it is 4 per cent of such earnings, and the same on pipe line companies.

Both of these contentions turn upon the familiar question of classification, concerning which so much has been written. We agree with the court below that whether the question be considered in view of the uniformity and equality provisions of the Ohio Constitution, or of the "equal protection" clause of the 14th Amendment, the result is the same; it cannot be said that the classification rests upon no reasonable and sufficient basis of distinction. State ex rel. Taylor v. Guilbert, 70 Ohio St. 253, 71 N. E. 636, 1 Ann. Cas. 25; Kentucky [591] R. Tax Cases, 115 U. S. 321, 337, 29 L. ed. 414, 419, 6 Sup. Ct. Rep. 57; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 33; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594; Southwestern Oil Co. v. Texas, 217 U. S. 114, 121, et seq. 54 L. ed. 688, 692, 30 Sup. Ct. Rep. 496.

In the third place, it is insisted that the act, as applied to railroads, is a burden upon their foreign commerce.

This contention is rested in part upon the language of §§ 83 and 88, which in terms provide for ascertaining the earnings of the railroad "from whatever source derived, for business done within this state, excluding therefrom all earnings derived wholly from interstate business or business done for the Federal government." This, it is argued, has the effect of imposing a tax with respect to the gross receipts from foreign commerce, because such commerce is not expressly excepted. Section 97, however, indicates an intent to take into consideration for the purpose of measuring the excise tax only the earnings upon intrastate business, and it seems clear enough that in the former sections the word "interstate" was used as meaning "not intrastate," rather than in its technically correct signification. Certainly, in the absence of a construction by the state court of last resort to the effect that the receipts from foreign commerce are to be included, and without any attempt on the part of the taxing authorities to include them, the Federal courts ought not to place a construction upon the act that would render it unconstitutional.

Fourthly, it is contended that the history of the legislation upon the subject shows that the act of May 31, 1911, was really contrived to impose upon the railroad companies a franchise tax proportionate to their interstate commerce, and that such is its actual as well as intended effect.

It is said that the present act is a reenactment, without material change so far as present purposes are concerned, of an act of March 10, 1910; that prior to the latter act [592] a law known as the Cole law was in force, under which each railroad was compelled to pay a tax equal to 1 per centum of its entire gross earnings, computed by multiplying the average gross earnings per mile over the entire system by the number of miles in Ohio; that this act was obnoxious to the "commerce clause" of the Federal Constitution, for the reasons that entered into the decision of this court in Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; that after the decision of this case in May, 1908, it was anticipated that the Cole law would probably be held unconstitutional (as it has since been held by an inferior state court in Ohio), and so the legislature contrived the act of March 10, 1910, for the purpose of imposing a tax upon the railroads as heavy as that imposed by the Cole law, while avoiding the form of that enactment; and that for this reason the act of March 10, 1910, increased the percentages in accordance with which the taxes were to be severally determined as follows: Railroads and pipe line companies from 1 to 4 per cent; express and telegraph companies from 1 to 2 per cent; all other utilities from 1 to 1 1-5 per cent; but that instead of taking all the gross earnings, the new percentages were to be applied only to intrastate earnings. It is contended that the increase in the percentages as to railroad and pipe line companies was due to the fact that it was conceived that about three fourths of their business was interstate, and that therefore a tax of 4 per cent on the intrastate earnings would be about equal to a tax of 1 per cent on the total:

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in other words, that the tax rate was increased fourfold because such utilities were engaged in interstate commerce.

The tax is, however, in substance as well as in form, an excise or privilege tax. Its reasonableness, unless some Federal right be violated, is within the discretion of the state legislature. We have seen that the classification adopted cannot be deemed illusory; that is, there is no [593] apparent violation of the equality provisions of the state Constitution or of the "equal protection" clause of the 14th Amendment, although railroad and pipe line companies are required to pay at the rate of 4 per cent of the annual intrastate earnings, while other public-service corporations pay a less percentage. It is, of course, entirely settled that a state cannot, consistently with the Federal control of interstate commerce, lay such taxes, either upon property rights or upon franchises or privileges, as in effect to burden such commerce. But the line is not always easily drawn, as recent cases sufficiently show. Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 225, 229, 52 L. ed. 1031, 1036, 1038, 28 Sup. Ct. Rep. 638; United States Exp. Co. v. Minnesota, 223 U. S. 335, 344, 56 L. ed. 459, 464, 32 Sup. Ct. Rep. 211; Williams v. Talladega, 226 U. S. 404, 416, 57 L. ed. 275, 280, 33 Sup. Ct. Rep. 116; Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 82, ante, 127, 132, 34 Sup. Ct. Rep. 15.

The present act does not on its face manifest a purpose to interfere with interstate commerce, and we are unable to accept the historical facts alluded to as sufficient evidence of a sinister purpose, such as would justify this court in striking down the law. We could not do this without in effect denouncing the legislature of the state as guilty of a conscious attempt to evade the obligations of the Federal Constitution. Assuming the law was changed in 1910 because of a fear that the Cole law would be held unconstitutional, the mere fact that, while excluding interstate earnings from the multiplicand, the multiplier was increased, is not of itself deemed sufficient evidence of an unlawful effort to burden a privilege that is not a proper subject of state taxation.

Fifthly, it is contended that the act is in effect a double tax upon property, and hence lacking in the uniformity required by the state Constitution. But, as was pointed out by the district court, the exaction of 4 per cent of the gross intrastate earnings is not a property tax, but an excise tax, whose amount is fixed and measured by such earnings; and double taxation in a legal sense does not [594] exist unless the double tax is levied upon the same property within the same jurisdiction. Plaintiffs in error pay one tax with respect to property, another with respect to the privilege or occupation; hence the taxation is not double. Bradley v. Bauder, 36 Ohio St. 28, 35, 38 Am. Rep. 547; Southern Gum Co. v. Laylin, 66 Ohio St. 578, 596, 64 N. E. 564.

The so-called double tax is also laid hold of as a ground for the contention that there is a denial of equal protection within the meaning of the 14th Amendment. This, however, is but another form of the objection to the classification, which has already been disposed of.

Finally, it is contended that the act is unconstitutional because of the severity of the penalties imposed for withholding the tax. But these actions do not involve any present attempt to enforce the penalties; and the act contains a section (160) which in terms declares: "The sections of this act, and every part of such sections, are hereby declared to be independent sections and parts of sections, and the holding of any section or part thereof to be void or ineffective shall not affect any other section or part thereof." The penalty clauses, if themselves unconstitutional, are severable, and there is therefore no present occasion to pass upon their validity. Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53, 54, 53 L. ed. 382, 400, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Flint v. Stone Tracy Co. 220 U. S. 107, 177, 55 L. ed. 389, 423, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 473, ante, 310, 319, 34 Sup. Ct. Rep. 152.

Decrees affirmed.

Mr. Justice Day took no part in the decision of these cases.

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[595] WILLIAM A. PAINE, Herbert I. Foster, Thomas S. Dee, and Leonard D. Draper, Copartners, Doing Business under the Name and Style of Paine, Webber, & Company, Appts.,

v.

COPPER BELLE MINING COMPANY of Arizona.

(See S. C. Reporter's ed. 595–597.)

Appeal — review of facts — concurrent findings below.

A concurrent finding of the two lower

NOTE.—As to review by the United States Supreme Court of territorial decisions—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

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courts that certain "advances" by a stockholder in a mining corporation, under his written agreement to get the company out of bankruptcy and into the possession of its supposedly valuable properties, were made in consideration of receiving 50 per cent of the capital stock of such company, and not by way of loan, will not be disturbed by the Federal Supreme Court on appeal unless clearly wrong.

[For other cases, see Appeal and Error, VIII. 1, 5, in Digest Sup. Ct. 1908.]

[No. 181.]

Submitted January 21, 1914. Decided March 2, 1914.

APPEAL from the Supreme Court of the Territory of Arizona to review a decree which affirmed a decree of the District Court of Pima County, in that state, in favor of intervening minority stockholders in a suit on a note given by the corporation. Affirmed.

See same case below, 13 Ariz. 406, 114 Pac. 964.

The facts are stated in the opinion.

Mr. **Walter Bennett** submitted the cause for appellants.

Mr. **James F. Mack** submitted the cause for appellees. Mr. **John B. Wright** was on the brief.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action brought by the appellants upon a promissory note for $265,416.72, made by the appellee. The defense is want of consideration, and depends upon the question whether certain payments made by one Moneuse were made by way of loan or for the purchase of stock; the note having been issued as for a loan to the company. The material facts are few. An earlier company, into the shoes of which the appellee has stepped, was in bankruptcy, and Moneuse, a stockholder, was suing certain others for the return to the company of a large part of the stock. On June 4, 1903, a compromise was made, reciting as one ground that the company owned mining claims which in the opinion of all the parties, were of great value, but which the company was in great danger [596] of losing unless money was raised to work them. Moneuse agreed to "provide and supply" enough money to "pay off and discharge" the company's debts, and to work the company's mines for not more than three years until they paid for working themselves. He was to get the company out of bankruptcy and into possession of its property, subject to certain mortgages. The others were to get 50 per cent of the authorized stock into the treasury, and this amount, less what already was held by Moneuse, the company was to issue and deliver to him "in consideration of the advance by [him] of the moneys which are to be paid and advanced by him, as above provided for, and without further consideration whatsoever." Moneuse also was to have control.

This agreement was carried out and the total disbursements of Moneuse were more than the amount of the note. Nine months after the compromise a stockholders' meeting authorized a transfer of the company's property to the appellee on the condition, among others, that it should "assume and discharge the indebtedness of this company to Elie J. Moneuse;" but on February 29, 1904, the characterization of the advance as a loan and the portion of the resolutions quoted were "withdrawn and rescinded" at the suggestion and with the concurrence and vote of Moneuse. Afterwards, on July 17, 1907, Moneuse being still in control of the company, the note in suit was issued. The case was tried on behalf of intervening minority stockholders without a jury. The trial court found for the defendant, and the judgment was affirmed by the supreme court of the territory. 13 Ariz. 406, 114 Pac. 964.

It cannot be said that the finding was wrong as matter of law. It is true that the agreement speaks of the money that was to be furnished by Moneuse as an "advance" by him, but it was an advance to pay off the company's debts, not merely to change the creditor. The clause that throws the clearest light upon the meaning is the recitation [597] that the company's mining claims were of great value in the opinion of all the parties to the contract. That being so, it was natural that a stockholder who had the money should be willing to pay off certain debts (about $45,000) as a consideration for getting the greater part of the stock, and should be willing to work the mines for a time if he had the company and the duration of the experiment under his control. It would seem to have been less natural for the other stockholders to part with the larger share in the rights they deemed so valuable simply as a bonus to induce Moneuse to take the former creditors' place and try his hand at the work. There are set forth in the statement some facts that we have not reproduced, because we think it unnecessary, in view of the present position of the case. It is enough to say that, in our opinion, the appellants would not profit by a fuller consideration. The meaning of the arrangement, to which neither company was a party, seems to have been matter for a find-

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ing. Rankin v. Fidelity Ins. Trust & S. D. Co. 189 U. S. 242, 252, 253, 47 L. ed. 792, 796, 797, 23 Sup. Ct. Rep. 553. Macdonald v. Morrill, 154 Mass. 270, 272, 28 N. E. 259. The evidence is not reported, and the finding has the sanction of two courts. There is not enough before us to enable us to say that it was wrong.

Judgment affirmed.

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[598] UNITED STATES OF AMERICA EX REL. ALPHEUS H. BROWN
v.
FRANKLIN K. LANE, Secretary of the Interior.

(See S. C. Reporter's ed. 598–602.)

Error to District of Columbia court of appeals — frivolousness of Federal question.

The contentions that the exercise by the Secretary of the Interior of his power under the act of June 28, 1906 (34 Stat. at L. 545, chap. 3572), § 9, to remove any member of the Osage Indian tribal council created by that section "for good cause, to be by him determined," is conditioned upon the giving of notice or the affording of an opportunity to be heard and defend, and that if the statute does not require such notice or hearing, it conflicts with the due process of law clause of the 5th Amendment of the Federal Constitution, are so frivolous and wanting in merit as to afford no ground for the exercise by the Federal Supreme Court of its jurisdiction under the Judicial Code, § 250, to review decisions of the court of appeals of the District of Columbia.

[For other cases, see Appeal and Error, 1057–1074; Constitutional Law; 764–773, in Digest Sup. Ct. 1908.]

[No. —.]

Submitted February 24, 1914. Decided March 9, 1914.

APPLICATION for the allowance of a writ of error to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, dismissing a petition for a writ of mandamus to compel the Secretary of the Interior to revoke an order removing a member of the Osage Indian tribal council. Denied.

See same case below, 40 App. D. C. 533.

Mr. Andrew Wilson submitted the cause for petitioner. Messrs. Albert L. Wilson and James P. Schick were on the brief:

The Indians are entitled to have notice and be heard in their defense as well as other residents or citizens of the United States.

Choate v. Trapp, 224 U. S. 677, 56 L. ed. 946, 32 Sup. Ct. Rep. 565.

In the government's dealings with the Indians, statutes should be liberally construed.

Choate v. Trapp, 224 U. S. 675, 56 L. ed. 945, 32 Sup. Ct. Rep. 565; Kansas Indians (Blue Jacket v. Johnson County) 5 Wall. 737, 18 L. ed. 667; Case of Miamis (Wanzop-e-ah v. Miami County) 5 Wall. 760, 18 L. ed. 674; Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1.

The members of the Osage Council and other officers referred to in the petition were elected by the Osage Indians for a definite term and were not appointed by the Secretary of the Interior. The right to the offices became vested and therefore valuable. It could not be devested except by due process of law.

United States ex rel. Turner v. Fisher, 222 U. S. 204–208, 56 L. ed. 165–168, 32 Sup. Ct. Rep. 37; Garfield v. United States, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62.

In a case of this kind power of removal can only be exercised when charges are made against the accused, after notice, with a reasonable opportunity to be heard by the officer or body having power to remove.

Roller v. Holly, 176 U. S. 399, 409, 44 L. ed. 520, 524, 20 Sup. Ct. Rep. 410; Hagar v. Reclamation Dist. 111 U. S. 701, 708, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 393, 40 L. ed. 467, 469, 16 Sup. Ct. Rep. 344; Hovey v. Elliott, 167 U. S. 409, 414, 42 L. ed. 215, 220, 17 Sup. Ct. Rep. 841; Shurtleff v. United States, 189 U. S. 311, 314, 47 L. ed. 828, 831, 23 Sup. Ct. Rep. 535; Mechem, Pub. Off. § 454; State ex rel. Hitchcock v. Hewitt, 3 S. D. 187, 16 L.R.A. 417, 52 N. W. 875; State ex rel. Denison v. St. Louis, 90 Mo. 19, 1 S. W. 757; Hallgren v. Campbell, 82 Mich. 255, 9 L.R.A. 410, 21 Am. St. Rep. 557, 46 N. W. 381; Field v. Com. 32 Pa. 478; Ham v. Boston Bd. of Police, 142 Mass. 90, 7 N. E. 540; Denver v. Darrow, 13 Colo. 460, 16 Am. St. Rep. 215, 22 Pac. 784; Dullam v. Willson, 53 Mich. 393, 51 Am. Rep. 128, 19 N. W. 112; Biggs v. McBride, 17 Or. 640, 5 L.R.A. 117, 21 Pac. 878; Jacques v. Little, 51 Kan. 300, 20 L.R.A. 304, 33 Pac. 106; 2 Kent, Com. p. 298; State ex rel. Hamilton v. Grant, 14 Wyo. 41, 1 L.R.A.(N.S.) 589, 116 Am. St. Rep. 982, 81 Pac. 795, 82 Pac. 2; Williams v. Bagot, 3 Barn. & C. 785, 4 Dowl. & R. 315, 27 Revised Rep. 482; Capel

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Note.—On the appellate jurisdiction of the Federal Supreme Court over the District of Columbia courts—see note to United States ex rel. Taylor v. Taft, 51 L. ed. U. S. 269.

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v. Child, 2 Cromp & J. 558, 2 Tyrw. 689, 1 L. J. Exch. N. S. 205; Ex parte Ramshay, 18 Q. B. 173, 21 L. J. Q. B. N. S. 238, 16 Jur. 684; Page v. Hardin, 8 B. Mon. 648; Com. ex rel. Bowman v. Slifer, 25 Pa. 23, 64 Am. Dec. 680.

Where the statute prescribes no preliminary proceedings, but authorizes a removal "for cause," there must be a notice and hearing, and in such cases the proceeding is judicial.

State v. Donovan, 89 Me. 451, 36 Atl. 982; Andrews v. Biddeford Police Board, 94 Me. 76, 46 Atl. 801; State ex rel. Reid v. Walbridge, 119 Mo. 383, 41 Am. St. Rep. 663, 24 S. W. 457; McGregor v. Gladwin County, 37 Mich. 389; Merrick v. Arbela Twp. 41 Mich. 630, 2 N. W. 922; Hayden v. Memphis, 100 Tenn. 582, 47 S. W. 182; State ex rel. Hart v. Duluth, 53 Minn. 242, 39 Am. St. Rep. 595, 55 N. W. 118; State, Markley, Prosecutor, v. Cape May Point, 55 N. J. L. 105, 25 Atl. 259; Bagg's Case, 11 Coke, 93b; Rex v. Richardson, 1 Burr. 540, 2 Ld. Kenyon, 85; State ex rel. Haight v. Love, 39 N. J. L. 14; State ex rel. Kennedy v. McGarry, 21 Wis. 496; State ex rel. Gill v. Watertown, 9 Wis. 254; People ex rel. Keech v. Thompson, 94 N. Y. 451; Dill. Mun. Corp. p. 255; Andrews v. King, 77 Me. 224.

No appearance for Franklin K. Lane.

[599] Memorandum opinion by direction of the court. By Mr. Chief Justice White:

The act of June 28, 1906, entitled, An Act for "the Division of the Lands and Funds of the Osage Indians in Oklahoma Territory, and for Other Purposes," in its 9th section provided, among other things, for a tribal council composed of eight persons. The members of this council were to be chosen at an election whose date was fixed, and which was to be conducted in the manner directed by the Commissioner of Indian Affairs, provision being made for the biennial recurrence of such election, and consequently for a two years' term for the members of the council. The provision, however, creating the council, contained this express qualification: "And the Secretary of the Interior is hereby authorized to remove from the council any member or members thereof for good cause, to be by him determined." 34 Stat. at L. 545, chap. 3572. On January 2d, 1913, the Secretary of the Interior, in the exertion of the power thus conferred, by a formal order removed "each and every member of the council." It was declared in the order that the power exercised was exerted for good cause, and this statement was followed by a specification of various acts of misfeasance or nonfeasance, which it was deemed rendered the removal necessary. Among those who were thus removed was A. H. Brown, the relator, who, shortly after the action of the Secretary that is, in February, 1913, commenced proceedings by mandamus to vacate the order on the ground that it had been made without previous notice, and without affording an opportunity to be heard and to defend and therefore was not authorized by the statute, and, if it was authorized, was void because repugnant to the due process clause of the 5th Amendment.

The trial court denied the relief, and the court of [600] appeals of the district, in affirming such action, held that the statute conferred upon the Secretary power to remove without necessity of notice or hearing; and moreover, that as so construed the statute was not in conflict with the Constitution (40 App. D. C. 533). This application for the allowance of a writ of error is before us because of the reference of the same to the court by the chief justice, to whom it was primarily presented.

The asserted right to the writ is based upon the third, fifth, and sixth paragraphs of § 250 of the Judicial Code: the third conferring the right to review "in cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States;" the fifth giving such right "in cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States, is drawn in question;" and the sixth also giving the right to review in cases "in which the construction of any law of the United States is drawn in question by the defendant." [36 Stat. at L. 1159, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 231.] On the face of the record from a merely formal point of view it is apparent that the case as presented is embraced within both the third and fifth paragraphs. But it is elementary that where the jurisdiction depends upon the presence of controversies of a particular character, or the existence of prescribed questions or conditions, that substance, and not mere form, is the test of power, and therefore even in a case where the requisite for jurisdiction formally exists, the right to review does not obtain where it is evident that the formal questions, as presented by the record, are so wanting in substance as to cause them to be frivolous and devoid of all merit. Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609, and cases cited. It is true that the doctrine has generally found expression in considering the right

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to review cases coming from state courts, but the principle is here directly and necessarily applicable [601] in consequence of the nature and character of the limitations imposed by the statute upon the right to review cases decided by the court of appeals of the District of Columbia. Coming to test the existence of jurisdiction to review the controversy, and consequently to determine whether the writ prayed for should be allowed, we are clear that the propositions upon which it is asserted jurisdiction to review exists are so wholly unsubstantial and frivolous and devoid of all merit as to afford no ground whatever for the exercise of jurisdiction and the consequent allowance of the writ.

This conclusion is reached because we are of the opinion that, on the face of the statute, it plainly vested the Secretary of the Interior with the power and discretion to remove without the necessity of giving notice or affording a hearing, and because we are unable to perceive any basis whatever for the contention that if the statute gives such power, it conflicts with the 5th Amendment. The right to membership in the council which the statute created, and the power to remove at discretion which it conferred on the Secretary of the Interior, were indissolubly united, and it is impossible to admit the existence of the one without recognizing the other, and therefore to adopt the premise upon which the proposition must rest would be but to destroy the right to continue in office which the proposition is urged to maintain, since the office may not be treated as existing free from the safeguards concerning the discharge of its duties which the statute provides. The argument is not strengthened by confounding the asserted right of the relator to continue to be a member of the tribal council, with rights of property assumed to exist in favor of the members of the tribe, and upon the resulting confusion to urge that the assumed rights of property will be taken without due process if the authority of the Secretary to remove a member of the tribal council without notice and hearing be upheld. On the contrary, if the [602] possession of the asserted property rights be assumed, it must follow that the power to remove, given by the statute, must be sustained. Considering the context of the act, the limitation which it imposes upon the members of the tribe and the tribe itself to contract, and the large administrative supervision over such subjects which the statute confers upon the Secretary, it is not disputable that the right to remove for "good cause to be by him determined" which the statute gives to the Secretary is but an appropriate means provided for the accomplishment of the duties cast upon him with reference to the subject-matters stated. Under these circumstances the proposition could not be maintained without holding that although the duty existed to protect by appropriate legislation the tribe and its members, such legislation, if enacted, would be repugnant to the Constitution.

Writ denied.

MARTHA S. YOUNG, Administratrix of the Estate of Peter B. Young, Deceased, Plff. in Err.,

v.

CENTRAL RAILROAD COMPANY OF NEW JERSEY.

(See S. C. Reporter's ed. 602-604.)

Trial by jury — infringement of right — directing judgment non obstante veredicto.

A Federal circuit court of appeals denies the right of trial by jury guaranteed by the Federal Constitution where, upon reversing a judgment of the district court, entered on a general verdict in favor of plaintiff, because of the opinion that the evidence did not justify the submission of the case to the jury, it directs, in accordance with the state practice, that judgment be entered for defendant.

[For other cases, see Jury, I. d, 1, in Digest Sup. Ct. 1908.]

[No. 389.]

Argued February 26, 1914. Decided March 9, 1914.

IN ERROR to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which, reversing a judgment of the District Court for the Eastern District of Pennsylvania in favor of plaintiff in a negligence action, directed that judgment be entered in favor of defendant notwithstanding the verdict. Modified by eliminating the direction for the

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NOTE.—On the right to judgment *non obstante veredicto* because of the failure of proof—see note to Kirk v. Salt Lake City, 12 L.R.A.(N.S.) 1021.

As to the constitutional power of an appellate court, upon reversing a judgment for plaintiff, entered upon the verdict of a jury, to direct judgment for defendant without remanding case for new trial—see note to Gunn v. Union R. Co. 2 L.R.A.(N.S.) 362.

Generally, on the right to jury trial—see notes to Justices of Supreme Ct. v. United States, 19 L. ed. U. S. 658; Eilenbecker v. District Ct. 33 L. ed. U. S. 801; Gulf, C. & S. F. R. Co. v. Shane, 39 L. ed. U. S. 727; and Perego v. Dodge, 41 L. ed. U. S. 113.

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entry of judgment for defendant, and by substituting a direction for a new trial.

See same case below, — L.R.A.(N.S.) —, 118 C. C. A. 465, 200 Fed. 359.

Mr. Ulysses S. Koons argued the cause, and, with Mr. Vedantus B. Edwards, filed a brief for plaintiff in error.

Mr. Arthur G. Dickson argued the cause, and, with Mr. Arthur W. Rinke, filed a brief for defendant in error.

Memorandum opinion by direction of the court. By Mr. Chief Justice White:

As administratrix of the estate of her deceased husband, the plaintiff in error sued to recover for the loss occasioned by his death, alleged to have resulted from the negligence of the defendant railroad company. Over the objection of the defendant the case was submitted by the trial court to the jury, and from the judgment entered on the verdict rendered against the railroad company, error was by the company prosecuted from the circuit court of appeals. On the hearing that court, concluding that the evidence did not justify the submission of the case to the jury, reversed the judgment, and in passing upon a motion made by the railroad company in the trial court, pursuant to the Pennsylvania practice for judgment in its favor *non obstante veredicto*, it was held that the motion was well taken, and the case was remanded to the trial court, not for a new trial, but with directions to enter a judgment for the defendant. — L.R.A. (N.S.) —, 118 C. C. A. 465, 200 Fed. 359. As the case as made by the pleadings depended not merely upon diverse citizenship, but was expressly based on the employers' liability act, error was prosecuted from this court.

We shall not undertake to analyze the evidence, or review the grounds which led the court below to conclude that error was committed in submitting the case to the jury, because we think it is adequate to say that after a careful examination of the record we see no reason for holding that the court below erred in so deciding. As regards, however, the ruling on the motion for judgment [604] *non obstante veredicto*, it is apparent, in view of the recent decision in Slocum v. New York L. Ins. Co. 228 U. S. 364, 57 L. ed. 879, 33 Sup. Ct. Rep. 523, that error was committed. It follows that our duty is to affirm and modify; that is, to affirm the judgment of reversal, and to modify by reversing so much of the action of the court below as directed the entry of judgment in favor of the defendant. Conformably to this conclusion it is ordered that the judgment of reversal be, and the same is hereby, affirmed, and that the direction for entry of judgment in favor of defendant be reversed, and the case is remanded to the trial court, with directions to set aside its judgment and grant a new trial.

Affirmed and modified.

GEORGE E. PRIEST, Melvin W. Quick, and Charles M. Benjamin, Appts.,

v.

BOARD OF TRUSTEES OF THE TOWN OF LAS VEGAS, in the County of San Miguel, New Mexico.

(See S. C. Reporter's ed. 604–618.)

Appeal — from territorial supreme court — following decision below — impleading and suing unknown claimants.

1. The Federal Supreme Court will accept the ruling of the supreme court of the territory of New Mexico that the town of Las Vegas, to which the Las Vegas land grant was confirmed by the act of Congress of June 21, 1860 (12 Stat. at L. 71, chap. 167), was not properly impleaded nor properly served under the designation "unknown claimants of interests in the premises adverse to the plaintiff" in a subsequent suit to quiet title to land within the boundaries of the grant, brought under a New Mexico statute now appearing as N. M. Comp. Laws 1897, §§ 4010, 4011, which, although authorizing unknown claimants to be so designated, provides for making parties defendant "by their names, as near as the same can be ascertained," those who claim an interest adverse to plaintiff.

[For other cases, see Appeal and Error, VIII. m, 1; Courts, VII. d; Parties, II. a, 2, in Digest Sup. Ct. 1908.]

Judgment — conclusiveness — jurisdiction — collateral attack.

2. A decree in favor of plaintiff in a suit to quiet title to land within the boundaries of the Las Vegas land grant may be collaterally attacked because the town of Las Vegas was not made a party, unless embraced in the designation "unknown claimants of interests in the premises adverse to the plaintiff."

[For other cases, see Judgment, III. 1, 3, c, in Digest Sup. Ct. 1908.]

NOTE.—As to review by United States Supreme Court of territorial decisions—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

On conclusiveness of judgments generally —see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street R. Co. v. Wharton, 38 L. ed. U. S. 429; Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

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Trial — issues — impleading and suing unknown claimants.

3. The question of the right to implead and serve the town of Las Vegas under the designation "unknown claimants" in a suit to quiet title to land within the boundaries of the Las Vegas land grant was not withdrawn from the consideration of the court in an action in mandamus to compel the town trustees to execute a conveyance to the successful plaintiff in the earlier suit by the averment in the answer that neither at the time of the confirmation of the grant, nor at any time subsequent thereto, did the town have a representative upon whom legal process could be served.

[For other cases, see Trial, II., in Digest Sup. Ct. 1908.]

Judgment — conclusiveness — parties.

4. The town of Las Vegas, to which the Las Vegas land grant was confirmed by the act of Congress of June 21, 1860, was not bound by the decree in a suit against some of the inhabitants of the town to quiet title to lands within the boundaries of that grant.

[For other cases, see Judgment, III. k, in Digest Sup. Ct. 1908.]

[No. 218.]

Submitted January 28, 1914. Decided March 9, 1914.

APPEAL from the Supreme Court of the Territory of New Mexico to review a judgment which affirmed a judgment of the District Court of San Miguel County, in that territory, dismissing the petition in an action for mandamus to compel the trustees of the town of Las Vegas to execute a conveyance of land within the boundaries of the Las Vegas land grant. Affirmed.

See same case below, 16 N. M. 692, 120 Pac. 894.

The facts are stated in the opinion.

Mr. John D. W. Veeder submitted the cause for appellants:

This, being a proceeding by mandamus to have the title decreed to appellants authenticated by a deed of conveyance, is obviously a collateral proceeding akin to enforcing satisfaction of a judgment, and appellees are therefore concluded by the decree.

Van Fleet, Collateral Attack, § 3; Rock Island County v. United States, 4 Wall. 435, 444, 18 L. ed. 419, 422; Davenport v. Lord, 9 Wall. 409, 19 L. ed. 704; Washington County v. Durant (Washington County v. United States) 9 Wall. 415, 417, 19 L. ed. 732, 733; Franklin County v. German Sav. Bank, 142 U. S. 93, 98–101, 35 L. ed. 948, 950, 951, 12 Sup. Ct. Rep. 147.

And where, as here, the judgment quieting title discloses the fact that the matter of jurisdiction of the parties has been considered and determined by the court, such determination is as conclusive upon the parties in a collateral proceeding as any adjudication of the court can be.

Freeman, Judgm. 3d ed. § 130; 23 Cyc. 1084; Foster v. Givens, 14 C. C. A. 625, 31 U. S. App. 626, 67 Fed. 690; Scudder v. Cox, 35 Tex. Civ. App. 416, 80 S. W. 872; Brawley v. Ranney, 67 Mo. 280; Reedy v. Camfield, 159 Ill. 254, 42 N. E. 833; Cincinnati, S. & C. R. Co. v. Belle Centre, 48 Ohio St. 273, 27 N. E. 464; Winemiller v. Laughlin, 51 Ohio St. 421, 38 N. E. 111; McCauley v. Fulton, 44 Cal. 355; Bickerdike v. Allen, 157 Ill. 95, 29 L.R.A. 782, 41 N. E. 740; Re Harper, 133 Fed. 970.

The question of the jurisdiction of the defendants through service by publication, having been adjudicated in the decree of 1894, was likewise conclusive upon the court, and not subject to attack in this collateral proceeding, whether as matter of fact it was in issue or not.

Thompson v. Thompson, 226 U. S. 552, 57 L. ed. 347, 33 Sup. Ct. Rep. 129.

The inhabitants of the town of Las Vegas and appellees are privies in estate, and are bound by the decree quieting title.

1 Greenl. Ev. §§ 189, 523, 536; Bigelow, Estoppel, pp. 88, 95.

Originally it was necessary to make the beneficiaries parties to all proceedings affecting their interest, and this rule still prevails where there is any doubt of the power of the trustees to represent the beneficiary and bind him both in what is done for him and what is done against him. The beneficiaries are the persons materially interested and can best represent their interest. Therefore, they ought to be parties in all cases unless there is a trustee fully empowered to represent them, when the court, in its discretion, may proceed without them.

Freeman, Judgm. §§ 162, 167, 173; Iowa County v. Mineral Point R. Co. 24 Wis. 126; Shaw v. Norfolk County R. Co. 5 Gray, 170; Willink v. Morris Canal & Bkg. Co. 4 N. J. Eq. 397; Van Vechten v. Terry, 2 Johns. Ch. 197; Vetterlein v. Barnes, 124 U. S. 169, 31 L. ed. 400, 8 Sup. Ct. Rep. 441; Kerrison v. Stewart, 93 U. S. 155, 23 L. ed. 843.

It follows, we think, from the relation which the trustee sustains to the beneficiary, that of a mere representative of him, that the nonappointment of the trustee cannot operate to suspend either the institution or prosecution of legal proceedings against the trust estate, or to discharge either the trust estate or the beneficiaries from the effect of the judgment rendered, when the latter have been made parties and served with legal process.

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Messrs. Charles A. Spiess and S. B. Davis, Jr., submitted the cause for appellee:

There is no proper statement of facts by the court below, and therefore nothing for review in this case.

Gray v. Howe, 108 U. S. 12, 27 L. ed. 634, 1 Sup. Ct. Rep. 136; Bonnifield v. Price, 154 U. S. 672, 26 L. ed. 1022, 14 Sup. Ct. Rep. 1194; Marshall v. Burtis, 172 U. S. 630, 43 L. ed. 579, 19 Sup. Ct. Rep. 290; Cohn v. Daley, 174 U. S. 539, 43 L. ed. 1077, 19 Sup. Ct. Rep. 802; Armijo v. Armijo, 181 U. S. 561, 45 L. ed. 1002, 21 Sup. Ct. Rep. 707.

The town of Las Vegas was not made a party to the suit of 1894 by designating as defendants the unknown claimants of interests adverse to the complainants.

Rodriguez v. La Cueva Ranch Co. 17 N. M. 246, 134 Pac. 228.

In the absence of manifest error this court will follow the decision of the territorial court.

Albright v. Sandoval, 216 U. S. 331, 54 L. ed. 502, 30 Sup. Ct. Rep. 318; Santa Fé County v. New Mexico, 215 U. S. 296, 54 L. ed. 202, 30 Sup. Ct. Rep. 111; Lewis v. Herrera, 208 U. S. 309, 52 L. ed. 506, 28 Sup. Ct. Rep. 412; Crary v. Dye, 208 U. S. 515, 52 L. ed. 595, 28 Sup. Ct. Rep. 360; English v. Arizona, 214 U. S. 359, 53 L. ed. 1030, 29 Sup. Ct. Rep. 658.

Artificial designations of defendants may be used only in case of necessity, and persons whose names are in fact known, or could with reasonable diligence be ascertained, may not be included among "unknown claimants."

Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 8 L.R.A.(N.S.) 682, 119 Am. St. Rep. 199, 88 Pac. 356; American Land Co. v. Zeiss, 219 U. S. 47, 55 L. ed. 82, 31 Sup. Ct. Rep. 200; Ware v. Easton, 46 Minn. 180, 48 N. W. 775; Gilbreath v. Teufel, 15 N. D. 152, 107 N. W. 49; Floto v. Floto, 213 Ill. 438, 72 N. E. 1092; Bear Lake County v. Budge, 9 Idaho, 703, 108 Am. St. Rep. 179, 75 Pac. 614; Hill v. Henry, 66 N. J. Eq. 150, 57 Atl. 554; Hancock v. First Nat. Bank, 93 N. Y. 82; Bardwell v. Collins (Bardwell v. Anderson) 44 Minn. 97, 9 L.R.A. 152, 20 Am. St. Rep. 547, 46 N. W. 315; Sheperd v. Ware, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773; Eayrs v. Nason, 54 Neb. 143, 74 N. W. 408; German Nat. Bank v. Kautter, 55 Neb. 103, 75 N. W. 566; Walter A. Wood Harvester Co. v. Dobry, 58 Neb. 590, 81 N. W. 611; Topliff v. Richardson, 76 Neb. 114, 107 N. W. 114; Bunker v. Taylor, 13 S. D. 433, 83 N. W. 555; Oziah v. Howard, 149 Iowa, 199, 128 N. W. 364.

Mr. Justice McKenna delivered the opinion of the court:

Action for mandamus brought by appellants in the district court of the county of San Miguel, then in the territory of New Mexico, against appellees as trustees of the town of Las Vegas, to require them to execute a deed or deeds to the property described in the petition. The appellees filed an answer to the petition and also a counterclaim. Those papers set out the history of the Las Vegas grant, preceding and subsequent to its confirmation by the act of Congress hereinafter referred to and the final patent to the town. Motions to strike them out were overruled, and demurrers to them were also overruled. An answer having been filed to the counterclaim by appellants, portions of which were struck out by the court [606] on motion of appellees, after hearing judgment was rendered dismissing the petition. The judgment was affirmed by the supreme court of the territory.

The petition alleges appellants to be the owners in fee simple and holders of a perfect title to the land described therein, and that it lies within the boundaries of "the Las Vegas grant." That they acquired the title thereto between the 4th of October, 1888, and the 1st of July, 1894, by purchase from the then owners and occupants of the several portions comprising the tract, and obtained deeds of conveyance therefor, and afterwards instituted proceedings in the district court of San Miguel county against certain named persons "and all of the unknown claimants of interests in the lands and premises" adverse to appellants, to quiet their title to the lands, and that on September 15, 1894, a decree was duly entered in the cause confirming and establishing in them an estate in fee simple, absolute, against any and all and every adverse claim of all persons whomsoever, and quieting and setting at rest the title to the land against appellees. A copy of the decree is attached to the petition.

The petition also alleges that the Las Vegas grant was confirmed by act of Congress on June 21, 1860 [12 Stat. at L. 71, chap. 167], to the town of Las Vegas, and became thereby segregated from the public domain and the property of the grantee and its privies.

That Jefferson Reynolds, Eugenio Romero, Charles Ilfeld, Elisha V. Long, Isidor V. Gallegos, Felix Esquibel, and F. H. Pierce are the trustees of the town, duly appointed by the district court of San Miguel county under and by virtue of an act of the legislative assembly of the territory of New Mexico, entitled, "An Act to Provide for

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the Management of the Las Vegas Grant, and for Other Purposes," approved March 12, 1903, and that it was made the duty of the board of trustees to make, execute, and deliver deeds of conveyance to all persons who held a [607] title to any lands of the grant, which became or was perfect or entitled them to the possession thereof at the time of the acquisition of New Mexico, under the treaty of Guadalupe Hidalgo, or at any time subsequent thereto.

That appellants made application to the board of trustees to execute and deliver a deed to them of the tract of land described, the title to which had become perfected by the decree hereinbefore specified, but the board declined to recognize the title of appellants and to issue the deed of conveyance asked for.

Mandamus, directed to the board, was prayed.

The ground of appellants' petition, therefore, is that they possess a perfect title established by the suit and decree referred to which entitled them to a deed from the trustees under the act of the legislative assembly of March 12, 1903. Laws of New Mexico, 1903, p. 72. That act becomes a factor for consideration. By it the district court of San Miguel county is vested with jurisdiction to manage, control, and administer the land grant. In the exercise of such jurisdiction power is conferred to appoint a board of trustees from among the residents upon the grant. Provision is made for their organization, and the court is empowered to exercise the same control over their acts as courts of equity exercise over receivers. And it is provided that "this act shall not interfere with or prejudice any vested rights in and to any of the lands embraced within the bounds of said Las Vegas grant, or preclude a judicial examination or adjustment thereof, and it is hereby made the duty of said board of trustees to make, execute, and deliver deeds of conveyance to any and all persons who hold a title to any such lands, which became or was perfect or entitled them to the possession thereof at the time of the acquisition of New Mexico, under the treaty of Guadalupe Hidalgo [9 Stat. at L. 922], or at any other time subsequent thereto."

By § 9 the board has power, under the direction of the [608] court, to lease, sell, or mortgage any part or parts of the grants, the proceeds to be used "for such purpose as said board and court may deem to be for the best interests of the community for the benefit of which such grant was made."

It will be seen, therefore, that the statute makes it the duty of the trustees, it may be under the direction of the court, to execute and deliver deeds of conveyance to anyone having the kind of title described; that is, which had become or was perfect, or entitled such person to land which he claimed at the time of the acquisition of New Mexico, under the treaty of Guadalupe Hidalgo, or at any other time subsequent thereto. Appellants rely upon such title, as we have seen, as established by the suit to quiet title and the decree rendered therein. A consideration of this suit and decree, therefore, becomes necessary.

The suit was brought in the district court of San Miguel county, territory of New Mexico, by appellants against certain named defendants and "all unknown claimants of interests in the premises and lands" which were described. The complaint alleged that appellants were owners in fee simple and the occupants and possessors of the land, that it lay within the exterior boundaries of a grant of land made by the Mexican government to certain named parties in the year 1835 "for the use and benefit of the inhabitants and settlers of the town of Las Vegas;" that the grant was known in the archives of the surveyor general of New Mexico as private land claim number 20, and, as such, on June 21, 1860, duly confirmed by act of Congress of the United States to the town of Las Vegas, and thereby became segregated from the public domain. That the land described in the complaint as belonging to appellants was taken possession of by them and their grantors under and by virtue of the terms and provisions of the said Las Vegas grant, and the laws of the territory of New Mexico applicable thereto, more than [609] ten years prior to the commencement of the suit, and that they and their grantors from whom they claim title and from whom they have deeds of conveyance have been in the actual, exclusive, open, and uninterrupted adverse possession under claim of title, and have therefore a good and indefeasible title in fee simple to the land, and are entitled to occupy and hold possession thereof.

It was alleged that certain persons, naming them, made some claim adverse to the complainants in the suit (appellants here), but what the nature and extent of their claim was complainants were unable to state. And it was alleged that there were certain unknown successors of the Fairview Town Company who made some claim of interest in and title to the land, but the nature and extent of the claim were unknown.

Then the following was alleged: "That your orators are credibly informed and believe that certain unknown persons designated in this bill as 'unknown claimants of interests in the premises adverse to your

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orators' also make some claim of interest and title in and to the said tract of land adverse to the estate of your orators, but what the nature and extent of the said claim of said unknown persons in and to said tract of land is, is likewise to your orators unknown."

It was finally alleged that all of the claims and pretenses of the defendants in the suit, known and unknown, adverse to the estate of complainants, were of no avail against their title, and constituted a cloud upon it. It was prayed that the title of complainants be established against all of the defendants, and that it be forever quieted and set at rest, and process was prayed.

An affidavit for publication of process was filed in which it was recited, among other things, "that the place of residence is unknown and the whereabouts cannot be discovered of any and all of the defendants designated as unknown claimants of interest in the premises and lands [610] described in the bill of complaint, who claim adversely to the complainants, George E. Priest, Melvin W. Quick, and Charles M. Benjamin."

Publication was made. There was no appearance on the part of any of the defendants, and the bill of complaint was ordered to be taken as confessed; and it was decreed that all of the defendants were brought before the court by proper process, and that the court had jurisdiction of them, whether known or unknown, and jurisdiction of the subject-matter of the suit; that the land lay within the exterior boundaries of the Las Vegas grant, as described, was confirmed by Congress as alleged, and that in consequence of the grant and confirmation the land was segregated from the public domain and became and was the private property of the grantees and their privies. That the complainants in the suit and their grantors from whom they claimed and from whom they had deeds of conveyance were in the adverse possession of the land as alleged, and that as a consequence thereof complainants were entitled to the relief for which they prayed. And it was decreed that the right, title, and interest of complainants was an estate in fee simple absolute, and that the same be established in them, and that the defendants be barred and estopped from having or claiming or asserting any right, title, or interest whatsoever adverse to the complainants or any of them, and that their title to the land, and each and every part thereof, be forever quieted and set at rest.

It will be observed that the title set up by appellants in the suit to quiet title, and sustained by the decree, depended upon adverse possession,—in other words, upon the statute of limitations; and the trial court in the case at bar considered that aspect of the case and decree only, and found that the statute did not begin to run until after the passage of the act of 1903 and the appointment of the board of trustees; and that possession of appellants [611] and their predecessors in title for a period of ten years prior to the act and the appointment of the trustees could not ripen any title against appellees.

The court, therefore, adjudged that the decree in favor of appellants of September 15, 1894, quieting title in them, was not binding upon appellees, and the petition herein was dismissed.

The supreme court, however, considered this position untenable, saying that if "the court had jurisdiction, as against defendants, to render the decree of 1894, all the findings upon which that decree proceeds are likewise conclusive against it, and it avails nothing to inquire, as did the trial court, into whether such findings were as a matter of fact properly made." And the court said: "The whole question, therefore, is whether the proceedings of 1894 bind the present defendants," the board of trustees of the town of Las Vegas.

The court answered the question in the negative, basing the answer on the provisions of the laws of the territory. Sections 4010 and 4011 of the Compiled Laws of 1897 of the territory, the court said, provide for an action to quiet title to real property, and permit the complainant to make parties, "by their names as near as can be ascertained," those who claim an interest adverse to him, the unknown heirs of any deceased person who made claim in his lifetime, "and all unknown persons who may claim any interest or title adverse to plaintiff, . . . unknown heirs by the style of unknown heirs of such deceased person, and said unknown persons who may claim any interest or title adverse to plaintiff by the name and style of unknown claimants of interests in the premises adverse to the plaintiff, and the service of process on, and notice of said suit against, defendants, shall be made in the same manner as now provided by law in other civil [612] suits." Service by publication, the court said, is provided by § 2964, and may be ordered upon a sworn pleading or affidavit "showing that the defendant, or any one or more of them in said cause, resides or has gone out of the territory, has concealed himself within it, has avoided service of process on him, or is in any other manner so situated that process cannot be served upon him or them, or that his or their names, or place of residence, is unknown, or that his or their whereabouts cannot be

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discovered." [16 N. M. 695, 696, 120 Pac. 894.]

The provisions of these sections, appellants contended, were pursued by them in their suit to quiet title, and, after citing them, as we have said, and the allegations of the bill of complaint therein, the court considered the effect of the decree therein upon the board of trustees of the town of Las Vegas, appellees herein, and said: "The board was not *eo nomine* a party, nor indeed was it in existence in 1894. Any effect of the decree upon it must therefore result from its holding under some party to the cause. That it is not holding under any of the individuals named is conceded. That it is not affected by the futile provisions of the decree quieting title against 'any person whatsoever' is evident. The only remaining alternative is that it is bound because of the fact that 'all the unknown claimants of interests in the premises adverse to complainants' [are named in the complaint] were cited in the publication, and were decreed against in the court's disposition of the case, and that this was a binding adjudication against the defendant under § 4011, Comp. Laws above quoted. But in 1894, were the owners of the Las Vegas grant, whom defendant now represents, unknown owners? The complainants certainly knew the exact status of the matter, for their complaint, as we have seen, in terms alleged that the premises were a part of the Las Vegas grant 'on June 21, 1860, duly confirmed by act of Congress of the United States to the town of Las Vegas.'

[613] "The complainants thus knew that the town of Las Vegas was the confirmee of the grant, and that if complainants' title had, by adverse possession, been wrested from anyone, it was from such confirmee. Knowing this, we are of opinion that it was their duty to have made the town of Las Vegas a party, and that the term 'unknown owners' could not be utilized to devest title from what the act of Congress, no less than plaintiffs' conceded knowledge, told them was the true ownership of the property." The court commented upon the abuse which may be made of statutes providing for constructive service, and the necessity to so construe them as "to hold that where the real owner may be brought into court by name, his property may not be taken by an advertisement against unknown owners," and that where, "as in this case, the locus of the title is definitely declared of record, and such is confessedly known to the complainant, it is but an exaction of good faith that the holder of such title should be summoned by name in order that he may appear and defend. To exact less is to open the doors wide to insidious attacks upon property rights, and, indeed, to ignore the statute which in terms provides (Comp. Laws, § 4011) that persons claiming interests 'may be made parties defendant by their names, as near as the same can be ascertained.'"

To the contention that the designation of ownership of the Las Vegas grant as "unknown claimants" was justified because the town of Las Vegas, as used in the act of confirmation, was a mere aggregation of people without corporate organization, and that the suit became one practically against the individuals residing on the grant, and that as to these the designation of unknown owners was necessary and proper, the court said it was not impressed, nor by the other contention that there was no officer upon whom process could have been served, and replied to the first contention, as it said it was replied in [614] Maese v. Herman, 183 U. S. 572, 46 L. ed. 335, 22 Sup. Ct. Rep. 91, that "the town and its inhabitants were certainly substantial entities in fact, and were recognized by Congress as having rights, and directed such rights to be authenticated by a patent of the United States." To the second contention the obvious answer was that under § 2964, supra, then in force, service by publication could have been made, "since in that event the defendant 'was so situated that process could not otherwise be served upon it.'"

We have quoted thus at length from the opinion of the supreme court because necessarily the contention of appellants that the town was properly impleaded and properly served under the designation of "unknown claimants of interests" depends upon the local statutes, to the construction of which by the supreme court we have repeatedly decided we refer. In this case the deference is the more justified, if indeed it is not compelled, by the subsequent construction of the statutes in the same way by the supreme court of the state in Rodriguez v. La Cueva Ranch Co. 17 N. M. 246, 134 Pac. 228, in which case § 3181 of the Compiled Laws of New Mexico was considered. By that section it is provided that in suits for partition all persons interested in the premises "whose names are unknown may be made parties to such partition by the name and description of unknown owners or proprietors of the premises, or as unknown heirs of any person who may have been interested in the same." Persons who were in actual possession had not been made parties by name, and the question was whether they were made parties under the designation of "unknown owners." The question was determined in the negative, the

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court holding "that it was not the intention of the legislature to provide for the making of parties by the name of unknown owners, and for the service of process upon them by publication, when they in fact were in the open and notorious adverse possession of a part of the [615] premises." The court further said that the complainants in the suit had the means and it was their duty to ascertain the names of all persons actually holding adverse possession, and that it was not the intention of the legislature to allow the rights of claimants to land in such circumstances "to be foreclosed of their rights by a proceeding in which they are not named, and in which the only service obtained upon them was by publication." The court cited the decision in the case at bar in support of its conclusion, saying, after noting certain differences which strengthened that decision: "In principle we can see no difference between the two cases. In that case the court was construing the statutes of the territory in regard to proceedings to quiet title, which are in substance and effect the same as the partition statute in regard to proceedings against unknown owners, and held that such statutes must be strictly construed, and that the decree in that case was unavailing as against the town of Las Vegas." Other cases were cited, among them being American Land Co. v. Zeiss, 219 U. S. 48, 55 L. ed. 83, 31 Sup. Ct. Rep. 200. It is not necessary to review them, as the construction of the court of the local statute is that it requires the parties defendant in an action to quiet title to be designated "by their names, as near as they can be ascertained," and permits parties defendant to be designated as "unknown claimants" only when their names cannot be ascertained. In other words, requires them to be unknown in fact, not merely in designation. Any other conclusion would make the statute not a facility for removing clouds from titles, but for putting clouds upon them; and the accommodation of the law of its process to an exceptional condition could be perverted, and rights devested by a semblance of notice of adverse claims to them.

It is contended, however, that the distinction which the supreme court of the territory made between the findings of the trial court in the proceedings of 1894, as to [616] jurisdiction, and findings as to other matters in issue, is without foundation, and that "the question of the jurisdiction of the defendants through service by publication having been adjudicated in the decree of 1894" is conclusive, "and not subject to attack in this collateral proceeding, whether as a matter of fact it was in issue or not." To sustain the contention Thompson v. Thompson, 226 U. S. 552, 57 L. ed. 348, 33 Sup. Ct. Rep. 129, is cited. The case was concerned with the faith and credit to be given to a decree of divorce rendered upon service by publication. The publication was attacked because based on an affidavit made on information and belief, and it was hence contended that the court had not acquired jurisdiction. The contention was held untenable, the court saying that if the affidavit could be regarded as defective, it was not in the omission to state a material fact, but in the degree of proof; and that therefore the resulting judgment could not be said to be void on its face. The principle was declared, however, to be established that the full faith and credit clause and the statute enacted thereunder do not apply to judgments rendered by a court having no jurisdiction of the parties or subject-matter, or of the *res* in proceedings *in rem*.

The case at bar is therefore clearly distinct from that case. The town of Las Vegas at the time of the institution of the suit to quiet title and of the publication of process was, whether regarded as an entity separate from its inhabitants, or collectively, as composed of them, either not intended to be made a party under the designation "unknown claimants of interest," or the designation was untrue.

But it is further contended that service by publication was not an issue in this case, the pleadings and the decision of the trial court being based upon the view "that the status of the town was such that no rights by limitation could be adjudicated against it, because of the impossibility of serving it with *legal process*" and that the supreme court having found against appellants on that [617] contention, there was nothing left but to reverse the judgment of the trial court and remand the cause, with instructions to grant the writ prayed for. The supreme court could not, it was further contended, go outside of the record, and of its own motion raise the issue as to the sufficiency of the service upon the defendants, that issue being in express language excluded by appellees from the court's consideration. The answer is immediate. We know of no rule which precludes an appellate court deciding a case for other reasons than those expressed by the trial court, and the contention that the sufficiency of the service was withdrawn from the consideration of the court by appellees is not justified. It is based upon the averment of the town that neither at the time of the confirmation of the grant nor at any time subsequent thereto did it have a representative upon whom legal process

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could have been served, until the 9th of December, 1902, when the board of trustees was appointed.

The supreme court dealt with the fact, and, as we have seen, ascribed a different effect to it than that ascribed by the trial court. The supreme court said, there being no officer of the town upon whom process could have been served, service by publication could have been made, "since in that event the defendant 'was so situated that process could not otherwise be served upon it.'" But the court was of the view, as we have seen, that such fact did not authorize the town to be made defendant under the name of "unknown claimants," or cited as such by publication, and the town having been so named, the decree of 1894 was not binding upon it.

The next contention of appellants is that the inhabitants of the town and appellees are privies in estate, and are bound by the decree quieting title. In other words, that there was such identity of interest between the defendants in the suit to quiet title and the present appellees, the board of trustees, that the latter is bound by the decree. [618] The argument is that the town was the mere representative of the inhabitants, and that the nonappointment of someone to represent it "cannot operate to suspend either the institution or prosecution of legal proceedings against the trust estate, or to discharge either the trust estate or the beneficiaries from the effect of the judgment rendered, when the latter have been made parties and served with legal process." In other words, if we understand the contention, it is that the proceedings of 1894, being against some of the inhabitants of the town, bind all of the other inhabitants, considered as an entity or collectively. We need not pause to consider the soundness of the contention. If justified at all, it would seem to make necessary the present petition. It puts out of view besides the effect of the confirmation to the town. We said, in Maese v. Herman, 183 U. S. 572, 46 L. ed. 335, 22 Sup. Ct. Rep. 91: "The town and its inhabitants were certainly substantial entities in fact, and were recognized by Congress as having rights, and directed such rights to be authenticated by a patent of the United States." The town was the confirmee and represented, it may be, individual interests, but collective interests as well. It was because of the grant to the town that the act of March 12, 1903, supra, was enacted, giving the district court of San Miguel county, "jurisdiction to manage, control, and administer" the grant. It was in the execution of this jurisdiction that the appellees, trustees of the town, were appointed and given the power to make conveyances to individuals if they had the character of title described.

But the town also had rights, and, as we have seen, by § 9 of the act of March 12, 1903, the trustees were given power "to lease, sell, or mortgage any part or parts of the grant." See, as to rights which towns had under the Mexican law, United States v. Pico, 5 Wall. 536, 18 L. ed. 695; Townsend v. Greeley, 5 Wall. 326, 18 L. ed. 547; United States v. Santa Fé, 165 U. S. 675, 41 L. ed. 874, 17 Sup. Ct. Rep. 472.

Judgment affirmed.

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[619] MARGARET H. WILLIAMSON v. KATHERINE OSENTON.

(See S. C. Reporter's ed. 619-626.)

Federal courts — jurisdiction — diversity of citizenship — change of domicil.

1. A change of domicil is effected by removal from one state to another with the intention of making a home there for an indefinite time, *i. e.*, for a time to which no ending is then contemplated, although the bringing of suit in a Federal court on grounds of diverse citizenship is the motive for the change.

[For other cases, see Courts, 691-694; Domicil, 6-12, in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — diverse citizenship — change of wife's domicil.

2. The wife of a citizen who has justifiably left her husband and removed to another state, with no intention of living elsewhere, thereby acquires a domicil in the latter state so that she may maintain an action in the Federal courts against a citizen of the state in which her husband resides.

[For other cases, see Courts, 691-694; Domicil, III., in Digest Sup. Ct. 1908.]

[No. 634.]

Submitted February 24, 1914. Decided March 9, 1914.

NOTE.—Generally, as to diverse citizenship as ground of Federal jurisdiction—see notes to Seddon v. Virginia, T. & C. Steel & I. Co. 1 L.R.A. 108; Myers v. Murray, N. & Co. 11 L.R.A. 216; Roberts v. Lewis, 36 L. ed. U. S. 579; Emory v. Greenough, 1 L. ed. U. S. 640; Strawbridge v. Curtiss, 2 L. ed. U. S. 435; and M'Donald v. Smalley, 7 L. ed. U. S. 287.

On the right of wife to acquire a separate domicil for the purpose of a divorce suit—see notes to Benton's Succession, 59 L.R.A. 146, and Carty v. Carty, 38 L.R.A.(N.S.) 297.

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ON A CERTIFICATE from the United States Circuit Court of Appeals for the Fourth Circuit presenting the question as to whether a wife who has justifiably left her husband and removed to another state may maintain an action in the Federal courts against a citizen of the state in which her husband resides. Answered in the affirmative.

The facts are stated in the opinion.

Mr. W. E. Chilton submitted the cause for Margaret H. Williamson. Messrs. A. O. Bacon and S. W. Walker were on the brief:

A wife can acquire a domicil separate from that of her husband for divorce purposes, and even if separated without judicial decree, the courts of her actual residence, if in New Hampshire and New York, can administer on her estate.

Barber v. Barber, 21 How. 582, 16 L. ed. 226; Bennett v. Bennett, Deady, 299, Fed. Cas. No. 1,318; Ditson v. Ditson, 4 R. I. 87; Harteau v. Harteau, 14 Pick. 181, 25 Am. Dec. 372; Atherton v. Atherton, 155 N. Y. 129, 40 L.R.A. 291, 63 Am. St. Rep. 650, 49 N. E. 933; Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; White v. White, 18 R. I. 292, 27 Atl. 506; Smith v. Smith, 43 La. Ann. 1140, 10 So. 248; Irby v. Wilson, 21 N. C. (1 Dev. & B. Eq.) 582; Colvin v. Reed, 55 Pa. 379; Anderson v. Watt, 138 U. S. 694, 34 L. ed. 1078, 11 Sup. Ct. Rep. 449; Cheely v. Clayton, 110 U. S. 706, 28 L. ed. 300, 4 Sup. Ct. Rep. 328; Loker v. Gerald, 157 Mass. 42, 16 L.R.A. 497, 34 Am. St. Rep. 252, 31 N. E. 709; Re Florance, 54 Hun, 328, 7 N. Y. Supp. 578; Rundle v. Van Inwegan, 9 N. Y. Civ. Proc. Rep. 330; Lyon v. Lyon, 30 Hun, 455; Shute v. Sargent, 67 N. H. 305, 36 Atl. 282; Re Wickes, 128 Cal. 270, 49 L.R.A. 138, 60 Pac. 867.

With the exception of a few probate cases, all the decisions, including those of the United States Supreme Court, hold that a wife who is not judicially separated from her husband can acquire a domicil separate from him only for the purpose of proceeding against him either for divorce or to recover something due from him. For all other purposes she remains his wife and he can only institute legal proceedings as a citizen of his jurisdiction.

Harteau v. Harteau, 14 Pick. 181, 25 Am. Dec. 372; Anderson v. Watt, 138 U. S. 694–706, 34 L. ed. 1078–1082, 11 Sup. Ct. Rep. 449; Thompson v. Stalmann, 139 Fed. 93; Nichols v. Nichols, 92 Fed. 1.

The record does not show that the plaintiff, at the time of the institution of this suit, was a citizen of Virginia.

The Frances, 8 Cranch, 353, 3 L. ed. 587; Morris v. Gilmer, 129 U. S. 328, 32 L. ed. 694, 9 Sup. Ct. Rep. 289; Case v. Clarke, 5 Mason, 70, Fed. Cas. No. 2,490; Mitchell v. United States, 21 Wall, 350, 22 L. ed. 584; Desmare v. United States, 93 U. S. 605, 23 L. ed. 959; Ennis v. Smith, 14 How. 400, 14 L. ed. 472; Alabama G. S. R. Co. v. Carroll, 28 C. C. A. 207, 52 U. S. App. 442, 84 Fed. 772; Chicago & N. W. R. Co. v. Ohle, 117 U. S. 123, 29 L. ed. 837, 6 Sup. Ct. Rep. 632; Watertown v. Greaves, 56 L.R.A. 865, 50 C. C. A. 172, 112 Fed. 183; Allen v. Southern California R. Co. 70 Fed. 370; Loomis v. Rosenthal, 67 Fed. 370; Kingman v. Holthaus, 59 Fed. 305.

The following adjudications of this court show how careful it has been to confine its jurisdiction in cases of this kind to those which arise between actual citizens of different states:

Bernards Twp. v. Stebbins, 109 U. S. 341, 27 L. ed. 956, 3 Sup. Ct. Rep. 252; Eberly v. Moore, 24 How. 147, 16 L. ed. 612; Williams v. Nottawa, 104 U. S. 209, 26 L. ed. 719; Hawes v. Oakland Co. (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 26 L. ed. 827; Detroit v. Dean, 106 U. S. 537, 27 L. ed. 300, 1 Sup. Ct. Rep. 500; Hayden v. Manning, 106 U. S. 586, 27 L. ed. 306, 1 Sup. Ct. Rep. 617; Farmington v. Pillsbury, 114 U. S. 138, 29 L. ed. 114, 5 Sup. Ct. Rep. 807; Cashman v. Amador & S. Canal Co. 118 U S. 58, 30 L. ed. 72, 6 Sup. Ct. Rep. 926; Little v. Giles, 118 U. S. 596, 30 L. ed. 269, 7 Sup. Ct. Rep. 32; Quincy v. Steel, 120 U. S. 241, 30 L. ed. 624, 7 Sup. Ct. Rep. 520; Morris v. Gilmer, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; Shreveport v. Cole, 129 U. S. 36, 32 L. ed. 589, 9 Sup. Ct. Rep. 210; Nashua & L. R. Corp. v. Boston & L. R. Corp. 136 U. S. 356, 34 L. ed. 363, 10 Sup. Ct. Rep. 1004; Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 327, 40 L. ed. 444, 16 Sup. Ct. Rep. 307; Lake County v. Dudley, 173 U. S. 243, 43 L. ed. 684, 19 Sup. Ct. Rep. 398; Corbus v. Alaska Treadwell Gold Min. Co. 187 U. S. 455, 47 L. ed. 256, 23 Sup. Ct. Rep. 157; Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420; Jones v. League, 18 How. 76, 15 L. ed. 263; Anderson v. Watt, 138 U. S. 694, 34 L. ed. 1078, 11 Sup. Ct. Rep. 449.

Messrs. R. G. Linn and C. Beverley Broun submitted the cause for Katherine Osenton. Mr. Connor Hall was on the brief:

Under the common-law cases the rule is that the wife cannot establish a separate domicil for herself. But even at common law, in its strictest days, the rule was not an invariable formula, but admitted of

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qualifications and exceptions. The rule that the domicil follows that of the husband was based upon the legal unity of the two. This legal unity was not an inflexible or irrefragable bond even in the mind of Coke and other champions of logical uniformity.

Cooley's Bl. Com. 443, 4 Wigmore Ev. § 2239, pp. 3056 et seq.; Ringstead v. Lanesborough, 3 Dougl. K. B. 197; Corbett v. Poelnitz, 1 T. R. 7; Compton v. Collinson, 1 H. Bl. 339, 2 Revised Rep. 786; De Gaillon v. L'Aigle, 1 Bos. & P. 359; Marshall v. Rutton, 8 T. R. 545; Carrol v. Blencow, 4 Esp. 27; Tovey v. Lindsay, 1 Dow, P. C. 138.

Recent utterances of English judges show that the courts of that country could not be induced by any argument to enforce in its supposed ancient strictness the fiction of the unity of husband and wife.

Dolphin v. Robins, 7 H. L. Cas. 390, 3 Macq. H. L. Cas. 563, 29 L. J. Prob. N. S. 11, 5 Jur. N. S. 1271, 7 Week. Rep. 674, 9 Eng. Rul. Cas. 714; LeSueur v. LeSueur, L. R. 1 Prob. Div. 139, 45 L. J. Prob. N. S. 73, 34 L. T. N. S. 511, 24 Week. Rep. 616.

In America at an early day it was recognized that the unity of husband and wife was a mere fiction, to be adhered to in ordinary cases, but to be freely departed from whenever the cause of justice in any way demanded it.

Rhea v. Rhenner, 1 Pet. 105, 107, 7 L. ed. 72, 73; Gregory v. Paul, 15 Mass. 31; Clark v. Valentino, 41 Ga. 143; Barber v. Barber, 21 How. 582, 589, 16 L. ed. 226, 228; M'Arthur v. Bloom, 2 Duer, 151; Abbot v. Bayley, 6 Pick. 89.

According to the weight of modern authority in America, the wife has, upon the commission by her husband of an offense entitling her to a divorce, an undoubted right to leave him and establish a domicil for herself for all purposes; certainly for all purposes which are requisite or proper for the protection of any of her rights.

Dutcher v. Dutcher, 39 Wis. 651; Derby v. Derby, 14 Ill. App. 647; Haddock v. Haddock, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1; Re Florance, 54 Hun, 330, 7 N. Y. Supp. 578; Prater v. Prater, 87 Tenn. 78, 10 Am. St. Rep. 623, 9 S. W. 361; Re Colebrook, 26 Misc. 139, 55 N. Y. Supp. 861; Buchholz v. Buchholz, 63 Wash. 213, 115 Pac. 88, Ann. Cas. 1912D, 395; Saperstone v. Saperstone, 73 Misc. 631, 131 N. Y. Supp. 241; White v. White, 18 R. I. 292, 27 Atl. 506; Shute v. Sargent, 67 N. H. 306, 36 Atl. 282; Gordon v. Yost, 140 Fed. 80; Watertown v. Greaves, 56 L.R.A. 865, 50 C. C. A. 172, 112 Fed. 183; Whart. Confl. L. § 46, pp. 105–107.

Having seen that the defendant in error had the capacity to acquire a separate domicil for herself, it is easily seen upon the agreed statement of facts submitted that she had in fact done so.

Mitchell v. United States, 21 Wall. 350, 352, 22 L. ed. 584, 587; White v. Brown, 1 Wall. Jr. 217, Fed. Cas. No. 17,538; Young v. Pollak, 85 Ala. 439, 5 So. 279; Salem v. Lyme, 29 Conn. 80; Smith v. Croom, 7 Fla. 152; Verret v. Donvillain, 33 La. Ann. 1307; Church v. Rowell, 49 Me. 367; Wilton v. Falmouth, 15 Me. 481; Wilbraham v. Ludlow, 99 Mass. 591; McConnell v. Kelley, 138 Mass. 372; Whitney v. Sherborn, 12 Allen, 113; Concord v. Rumney, 45 N. H. 427; Valentine v. Valentine, 61 N. J. Eq. 407, 48 Atl. 593; Hegeman v. Fox, 31 Barb. 475; Kellar v. Baird, 5 Heisk. 46; Ex parte Blumer, 27 Tex. 738; State v. De Casinova, 1 Tex. 401; Frame v. Thormann, 102 Wis. 656, 79 N. W. 39; Brittenham v. Robinson, 18 Ind. App. 502, 48 N. E. 616; Anderson v. Anderson, 42 Vt. 350, 1 Am. Rep. 336; Doucet v. Geohegan, L. R. 9 Ch. Div. 444, 26 Week. Rep. 825; Haldane v. Eckford, L. R. 8 Eq. 640, 21 L. T. N. S. 87, 17 Week. Rep. 1059; Loustalan v. Loustalan [1900] P. 231, 69 L. J. Prob. N. S. 75, 48 Week. Rep. 509, 82 L. T. N. S. 807, 16 Times L. R. 354; Jacobs, Domicil, § 67; Ennis v. Smith, 14 How. 400, 423, 14 L. ed. 472, 482; Morris v. Gilmer, 129 U. S. 315, 328, 32 L. ed. 690, 694, 9 Sup. Ct. Rep. 289; Greene v. Windham, 13 Me. 228; Thorndike v. Boston, 1 Met. 246; Re Austen, 13 App. Div. 247, 42 N. Y. Supp. 1097; Sullivan v. Detroit, Y. & A. A. R. Co. 135 Mich. 661, 64 L.R.A. 673, 106 Am. St. Rep. 403, 98 N. W. 756; Dale v. Irwin, 78 Ill. 170; The Venus, 8 Cranch, 253, 279, 3 L. ed. 553, 562; Story, Confl. L. 8th ed. §§ 41, 43, 46, pp. 43, 50; Guier v. O'Daniel, 1 Binn. 349, note; Phillimore, Domicil, 15; also 4 Int. Law, No. 49; Whart. Confl. L. § 21, pp. 77, 82; White v. Tennant, 31 W. Va. 790, 13 Am. St. Rep. 898, 8 S. E. 596; Johnson v. Smith, 43 Mo. 501, 591; Dicey, Confl. L. pp. 82, 108, Rule 7, 111; Putnam v. Johnson, 10 Mass. 501; Fry's Election Case, 71 Pa. 307, 10 Am. Rep. 698; Thomas v. Warner, 83 Md. 14, 34 Atl. 830; Warren v. Thomaston, 43 Me. 418, 69 Am. Dec. 69; Thayer v. Boston, 124 Mass. 132, 26 Am. Rep. 650; Dean v. Cannon, 37 W. Va. 127, 16 S. E. 444; Hart v. Horn, 4 Kan. 238; Smith v. Croom, 7 Fla. 153; Jefferson v. Washington, 19 Me. 301; King v. King, 155 Mo. 406, 56 S. W. 534; Foss v. Foss, 58 N. H. 283; Wood v. Roeder, 45 Neb. 315, 63 N. W. 853; Venable v. Paulding, 19 Minn. 492, Gil. 422; Krone v. Cooper, 43 Ark. 549; No. 17,538, Re Craignish [1892] 3 Ch. 192, 67 L. T. N. S. 689; Dicey, Domicil, pp. 42–55; Berry

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v. Wilcox, 44 Neb. 82, 48 Am. St. Rep. 706, 62 N. W. 249; Moffett v. Hill, 131 Ill. 239, 22 N. E. 821; Hairston v. Hairston, 27 Miss. 718, 61 Am. Dec. 530; Hart v. Lindsey, 17 N. H. 242, 43 Am. Dec. 597; Horne v. Horne, 31 N. C. (9 Ired. L.) 107; Dickerman v. Northern Trust Co. 176 U. S. 181, 191, 192, 44 L. ed. 423, 430, 431, 20 Sup. Ct. Rep. 311.

Mr. Justice Holmes delivered the opinion of the court:

This case comes here upon the certified question whether the plaintiff, when she began this suit, was a citizen of Virginia in such sense as to be entitled to maintain her action in the district court of the United States for the southern district of West Virginia. The plaintiff (the defendant in error) at that time was the wife of a citizen of West Virginia, but, in consequence of his adultery, as she alleged, had separated from him and had gone to Virginia. Before bringing this action she had brought a suit in West Virginia for divorce, and pending the present proceeding obtained a divorce *a vinculo*. This action is for damages, alleging the defendant to have been a party to the adultery. The defendant pleaded to the jurisdiction, setting up the plaintiff's marriage and the residence of her husband in West Virginia; in other words, that the requisite diversity of citizenship did not exist. The plea seems to have been heard upon a written statement of facts in which it was agreed that the plaintiff went to Virginia "with the intention of making her home in that state for an indefinite time in order that she might institute this suit against the defendant in the United States court," together with the facts already stated. The plea was overruled, there was a trial on the merits, at which the [624] plaintiff got a verdict for $35,000, and thereupon the case was taken to the circuit court of appeals, from which the certified question comes.

On these facts the question certified is divided into two by the argument: first, whether, if able so to do, the plaintiff had changed her domicil from West Virginia to Virginia in fact; and, second, supposing that she had changed it so far as to have enabled her to proceed against her husband in Virginia had she been so minded, whether for other purposes her domicil did not remain that of her husband until the divorce was obtained, which was after the beginning of the present suit. Premising that if the plaintiff was domiciled in Virginia when this suit was begun, she was a citizen of that state within the meaning of the Constitution, art. 3, § 2, and the Judicial Code of March 3, 1911, chap. 231, 36 Stat. at L. 1087, U. S. Comp. Stat. Supp. 1911, p. 128 (Gassies v. Ballon, 6 Pet. 761, 8 L. ed. 573; Boyd v. Nebraska, 143 U. S. 135, 161, 36 L. ed. 103, 109, 12 Sup. Ct. Rep. 375; Minor v. Happersett, 21 Wall. 162, 22 L. ed. 627), we will take these questions up in turn.

The essential fact that raises a change of abode to a change of domicil is the absence of any intention to live elsewhere (Story, Conflict of Laws, § 43); or, as Mr. Dicey puts it in his admirable book, "the absence of any present intention of not residing permanently or indefinitely in" the new abode. Confl. L. 2d ed. 111. We may admit that if this case had been before a jury on testimony merely that the plaintiff intended to live in Virginia for an indefinite time, it might have been argued that the motive assigned for the change, the bringing of this action, showed that the plaintiff, even if telling the literal truth, only meant that she could not tell when the lawsuit would end. It is to be noticed also that the divorce proceedings were carried through in West Virginia, though it is fair to assume that they were begun before the plaintiff moved. But the case was submitted to the court upon a written statement, upon which we presume both sides expected the court to rule. To give the supposed ambiguous [625] meaning to the words "for an indefinite time" in that statement would be to assume that the parties were trying to get the better of each other by a quibble. We must take them to mean: for a time to which the plaintiff did not then contemplate an end. If that is their meaning, the motive for the change was immaterial; for, subject to the second question to be discussed, the plaintiff had a right to select her domicil for any reason that seemed good to her. With possible irrelevant exceptions the motive has a bearing only when there is an issue open on the intent. Cheever v. Wilson, 9 Wall. 108, 123, 19 L. ed. 604, 608; Dickerman v. Northern Trust Co. 176 U. S. 181, 191, 192, 44 L. ed. 423, 430, 431, 20 Sup. Ct. Rep. 311. With that established as agreed, there is no doubt that it was sufficient to work the change. Mitchell v. United States, 21 Wall. 350, 352, 22 L. ed. 584, 587; Dicey, Confl. L. 2d ed. 108, 113, 114.

The second subdivision of the question may be answered with even less doubt than the first. The very meaning of domicil is the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined. Bergner & E. Brewing Co. v. Dreyfus, 172 Mass. 154, 157, 70 Am. St. Rep. 251, 51 N. E. 531. In its nature it

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is one; and if in any case two are recognized for different purposes, it is a doubtful anomaly. Dicey, Confl. L. 2d ed. 98. The only reason that could be offered for not recognizing the fact of the plaintiff's actual change, if justified, is the now vanishing fiction of identity of person. But if that fiction does not prevail over the fact in the relation for which the fiction was created there is no reason in the world why it should be given effect in any other. However it may be in England, that in this country a wife in the plaintiff's circumstances may get a different domicil from that of her husband for purposes of divorce is not disputed and is not open to dispute. Haddock v. Haddock, 201 U. S. 562, 571, 572, 50 L. ed. 867, 870, 871, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1. This she may do without necessity and simply from choice, as the cases [626] show, and the change that is good as against her husband ought to be good as against all. In the later decisions the right to change and the effect of the change are laid down in absolute terms. Gordon v. Yost, 140 Fed. 79; Watertown v. Greaves, 56 L.R.A. 865, 50 C. C. A. 172, 112 Fed. 183; Shute v. Sargent, 67 N. H. 305, 36 Atl. 282; Buchholz v. Buchholz, 63 Wash. 213, 115 Pac. 88, Ann. Cas. 1912D, 395. See Haddock v. Haddock, supra; Barber v. Barber, 21 How. 582, 588, 597, 598, 16 L. ed. 226, 228, 231, 232. We see no reason why the wife who justifiably has left her husband should not have the same choice of domicil for an action for damages that she has against her husband for a divorce. We answer the question, Yes.

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, Plff. in Err., v. C. B. KENNEDY.

(See S. C. Reporter's ed. 626, 627.)

Constitutional law — due process of law — penalizing refusal to pay claim.

The exaction of a double liability from a railway company failing to pay, within sixty days, a claim for the damage caused by fire set by a locomotive, as is done by S. D. Laws 1907, chap. 215, except where the owner recovers a less sum as damages than the amount of any tender by the railway company, in which case the latter is to recover its costs, is a taking of the company's property without due process of law.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

[No. 246.]

Submitted March 9, 1914. Decided March 16, 1914.

IN ERROR to the Supreme Court of the State of South Dakota to review a judgment which affirmed a judgment of the Circuit Court of Lincoln County, in that state, awarding double damages in a suit against a railway company for loss of property caused by a fire set by a locomotive. Reversed and remanded for further proceedings.

See same case below, 28 S. D. 94, 132 N. W. 802.

Messrs. **Burton Hanson** and **William G. Porter** submitted the cause for plaintiff in error. Mr. Ed. L. Grantham was on the brief:

The law is unconstitutional in that it imposes a penalty for delinquency in payment of a debt.

Union P. R. Co. v. De Busk, 12 Colo. 294, 3 L.R.A. 350, 13 Am. St. Rep. 221, 20 Pac. 752; Wadsworth v. Union P. R. Co. 18 Colo. 600, 23 L.R.A. 812, 36 Am. St. Rep. 309, 33 Pac. 515; Denver & R. G. R. Co. v. Outcalt, 2 Colo. App. 395, 31 Pac. 177; Hurtado v. California, 110 U. S. 535, 537, 28 L. ed. 238, 239, 4 Sup. Ct. Rep. 111, 292; St. Louis, I. M. & S. R. Co. v. Wynne, 224 U. S. 354, 56 L. ed. 799, 42 L.R.A. (N.S.) 102, 32 Sup. Ct. Rep. 493; Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; Jolliffe v. Brown, 14 Wash. 155, 53 Am. St. Rep. 868, 44 Pac. 149; Black v. Minneapolis & St. L. R. Co. 122 Iowa, 32, 96 N. W. 984; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Grand Island & W. C. R. Co. v. Swinbank, 51 Neb. 521, 71 N. W. 48; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Stupeck v. Union P. R. Co. 200 Fed. 192; Missouri P. R. Co. v. Merrill, 40 Kan. 404, 19 Pac. 793; San Mateo County v. Southern P. R. Co. 8 Sawy. 238, 13 Fed. 722.

It discriminates against one class of litigants in favor of another, denying to plaintiff in error the equal protection of the laws.

Jolliffe v. Brown, 14 Wash. 155, 53 Am. St. Rep. 868, 44 Pac. 149; Denver & R. G. R. Co. v. Outcalt, 2 Colo. App. 395, 31 Pac. 177; Chicago, St. L. & N. O. R. Co. v. Moss, 60 Miss. 641; Wilder v. Chicago & W. M. R. Co. 70 Mich. 382, 38 N. W. 289; Cotting v. Kansas City Stock Yards Co.

NOTE.—On constitutionality of statute imposing penalty or added liability for failure of railroad company to pay claim—see note to St. Louis, I. M. & S. R. Co. v. Wynne, 42 L.R.A. (N.S.) 102.

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(Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Hocking Valley Coal Co. v. Rosser, 53 Ohio St. 12, 29 L.R.A. 386, 53 Am. St. Rep. 622, 41 N. E. 263; Calder v. Bull, 3 Dall. 387, 388, 1 L. ed. 648, 649; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Builders' Supply Depot v. O'Connor, 150 Cal. 265, 17 L.R.A.(N.S.) 909, 119 Am. St. Rep. 193, 88 Pac. 982, 11 Ann. Cas. 712; South & North Ala. R. Co. v. Morris, 65 Ala. 193; Williamson v. Liverpool L. & G. Ins. Co. 105 Fed. 31.

No brief was filed for defendant in error.

Memorandum opinion by direction of the court by Mr. Chief Justice White:

The ground upon which it is asserted in this case that the statute of the state of South Dakota, upon which the judgment of the court below here under review was based, is repugnant to the Constitution of the United States, was considered and held to be well taken in a case decided this term. Chicago, M. & St. P. R. Co. v. Polt, 232 U. S. 165, ante, 554, 34 Sup. Ct. Rep. 301. As that decision is conclusive upon all the issues here presented, and establishes that the statute in question is inconsistent with the Constitution and void, it results that, for the reasons stated in the case referred to, the judgment in this case must be reversed, and the case remanded to the court below for further proceedings not inconsistent with this opinion.

Reversed.

PEOPLE OF PORTO RICO, Plff. in Err.,
v.
BONOCIO RAMOS.

(See S. C. Reporter's ed. 627–633.)

Porto Rico — immunity from suit — consent.

1. Porto Rico cannot invoke its immunity from suit without its consent to defeat jurisdiction of an action in which, through its attorney general, it voluntarily petitioned, after due deliberation, to be made a party defendant, asserting rights to the property in dispute, and in which it was made such party against the plaintiff's opposition.

Courts — jurisdiction — diverse citizenship — coming in of new party.

2. The jurisdiction of the Federal district court for Porto Rico of an action in ejectment brought by a citizen of Porto Rico against a subject of Great Britain in possession of the land was not ousted because Porto Rico subsequently became, with its consent, the sole party defendant.

[For other cases, see Courts, 718–720, in Digest Sup. Ct. 1908.]

[No. 390.]

Submitted February 25, 1914. Decided March 16, 1914.

IN ERROR to the District Court of the United States for Porto Rico to review a judgment in favor of plaintiff in an action of ejectment. Affirmed.

The facts are stated in the opinion.

Mr. Felix Frankfurter submitted the cause for plaintiff in error.

Messrs. Frank Antonsanti and Frederick S. Tyler submitted the cause for defendant in error:

In the law of escheat, while there is some conflict of authority, the general rule seems to be clear that the state takes escheated property charged with all of the valid debts and liabilities of the intestate, and creditors may enforce such claims against the property in the hands of the state, provided they are presented before being barred by the statutes of limitation.

Congregational Church v. Morris, 8 Ala. 182; Mooers v. White, 6 Johns. Ch. 360; Watson v. Lyle, 4 Leigh, 236.

The state takes only the title which the intestate had and in the same condition, with all of the privileges and appurtenances, and subject to all liens and encumbrances.

Casey v. Inloes, 1 Gill, 430, 39 Am. Dec. 658; 4 Kent, Com. 427; 3 Washb. Real Prop. 6th ed. 64.

In the present case, therefore, the right of the people of Porto Rico to the escheated estate of Eliza Kortright is necessarily subject to this suit, as the people of Porto Rico took only such title as Eliza Kortright had; and if her title to the land which is the subject-matter of this suit was bad, and was subject to ejectment by Ramos, the title that the state now claims is bad, and is subject to the same ejectment.

3 Washb. Real Prop. 64; 4 Kent, Com. 427; Hamilton v. Brown, 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. Rep. 585.

We contend that the very act of the state in receiving and accepting the assets of Eliza Kortright in itself is a consent that creditors or adverse claimants may sue the state, if necessary, to enforce their rights against the escheated assets.

If, when this suit was brought, the court acquired jurisdiction of the parties, no subsequent change of the parties can affect that jurisdiction.

Clarke v. Mathewson, 12 Pet. 164, 9

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L. ed. 1041; Morgan v. Morgan, 2 Wheat. 290-297, 4 L. ed. 242-244; Phelps v. Oaks, 117 U. S. 236, 29 L. ed. 888, 6 Sup. Ct. Rep. 714; Hardenbergh v. Ray, 151 U. S. 112, 38 L. ed. 93, 14 Sup. Ct. Rep. 305; Mollan v. Torrance, 9 Wheat. 537, 6 L. ed. 154; Dunn v. Clarke, 8 Pet. 1, 8 L. ed. 845; Conolly v. Taylor, 2 Pet. 556, 7 L. ed. 518.

Mr. Justice McKenna delivered the opinion of the court:

Action in ejectment for certain described lands in Porto Rico, brought by defendant in error, a citizen of Porto Rico, against Eduardo Wood, a subject of Great Britain.

Defendant in error alleged in his complaint that he was the owner, possessed and entitled to the possession of the lands, and that Wood, claiming that the property belonged to the estate of Eliza Kortright, of which he was the duly appointed administrator, without right or title entered upon the lands and ejected defendant in error therefrom. Restitution of the lands was prayed and damages in the sum of $5,000.

The complaint was filed November 12, 1909, and process duly issued thereon. On November 19, 1909, the defendant, Wood, filed a paper entitled, "Motion to make the People of Porto Rico a Party Defendant, and for an [629] Extension of Time to Plead." It was alleged in the motion that the people of Porto Rico had been declared and adjudged to be the sole heir of Eliza Kortright by an order made by the district court in and for the judicial district of San Juan, she having died intestate and without leaving any legal heirs.

That the people of Porto Rico, by virtue of such declaration of heirship, have an interest in the result of the suit, and ought to be joined as codefendants.

That the defendant desired an extension of time to file a demurrer or answer to the complaint, as he might be advised, to the 2d of December, 1909.

An order was prayed making the people of Porto Rico a party, for service upon them, and that time for pleading be extended.

Subsequently defendant filed an answer denying each and every material allegation of the complaint, and prayed a dismissal of the action.

The case, by consent, was subsequently set for trial and a jury empaneled. Thereupon Harvey M. Hutchinson, representing the attorney general of Porto Rico, petitioned the court for a continuance of the trial for time to enable him to ascertain if the people of Porto Rico should be made a party defendant to the cause. In pursuance of the petition the court continued the case. Upon the date to which the cause was continued, Hutchinson again, as representing the attorney general of Porto Rico, appeared in behalf of the people of Porto Rico, and represented to the court that the people of Porto Rico were interested parties to the action. The court thereupon ordered the people of Porto Rico to be made a party. The jury was excused, the cause continued, and the plaintiff (defendant in error) was "directed to amend his complaint so as to show the people of Porto Rico to be a party defendant."

An amended complaint was filed December 15, 1910. [630] It alleged the plaintiff to be a citizen of Porto Rico and the defendant "a body politic created by the Congress of the United States, being a citizen thereof." That plaintiff was the owner of a "rustic estate," describing it, and in possession thereof, and that one Eliza Kortright, since deceased, ejected plaintiff therefrom and continued in possession thereof up to her death. That therefore her estate was placed under judicial administration under the direction of Eduardo Wood, as judicial administrator, which judicial administration ceased during the month of November, 1910, and the administrator discharged. That therefore the defendant, the People of Porto Rico, was adjudged by the district court of San Juan the only heir to the estate of Eliza Kortright, as she left no heirs. That the people of Porto Rico, as such heir, continues to possess the land without right or title thereto, against the will of plaintiff, and to his damage in the sum of $6,000, which sum was prayed as rents and profits, together with restitution of the land.

Upon motion of the attorney general of Porto Rico, his name was entered as counsel for the people of Porto Rico, and leave granted to file a demurrer.

The demurrer recited that the attorney general appeared specially for the sole purpose of challenging the jurisdiction of the court in the case, and demurred to the amended complaint for the following reasons: (1) Because the suit was one between plaintiff, a citizen of Porto Rico, and the people of Porto Rico as sole defendant, and that both plaintiff and defendant, being citizens of Porto Rico within the meaning of the act of Congress conferring jurisdiction on the court, the court had no jurisdiction. (2) Because the people of Porto Rico, as a recognized entity, was so far a sovereign as to be exempt from suit at the instance of private individuals.

The demurrer was overruled and on the 11th of January, 1911, an answer was filed in which defendant insisted [631] and pleaded that it "had such attributes of sovereignty" as exempted it from suit. The

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rest of the answer denied the allegations of the complaint, and set up judgments obtained in two separate suits brought by Eliza Kortright against defendant in error, in which it was adjudged against him that she was the owner of the lands sued for by plaintiff in the present action.

The action was tried to a jury which found for plaintiff (defendant in error) and assessed damages at $6,000, in accordance with which judgment was entered. A new trial was moved and denied, and this writ of error granted.

But one contention is argued, that is, that the district court had no jurisdiction to entertain the suit against Porto Rico "without its consent and against its active opposition." Porto Rico v. Rosaly y Castillo, 227 U. S. 270, 57 L. ed. 507, 33 Sup. Ct. Rep. 352, is cited to sustain the contention. It was said in that case that the government "established in Porto Rico is of such a nature as to come within the general rule exempting a government sovereign in its attributes from suit without its consent." This case, however, is not within the rule. In that case Porto Rico was a defendant in the first instance. In this case it voluntarily petitioned to be made a party, asserting rights to the property in controversy, and, against the opposition of the plaintiff (defendant in error), it was made a party defendant. And this action was not improvident. Its attorney general took time to consider. He applied for and obtained a continuance of the case to determine the best course to secure the interests of the people of Porto Rico,—whether to assert its rights in the then litigation, or attempt to keep them under the immunity of its sovereignty from attack. His decision had the support of substantial reasons. The property came to Porto Rico as an escheat, and came therefore as it was held by Eliza Kortright and Wood. If held in wrong by them, it was held in wrong by it, and the attorney general may have considered it well worth [632] while to face the controversy rather than remit it to some other proceeding that the plaintiff might institute, fortified, perhaps, by a decision in his favor. United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Stanley v. Schwalby, 147 U. S. 508, 37 L. ed. 259, 13 Sup. Ct. Rep. 418. But, whatever his reasons, he certainly asked for time, as we have seen, "to enable him to ascertain if the people of Porto Rico should be made a party defendant" in the cause; and having been granted the time, he appeared again in the cause and represented to the court that Porto Rico was an interested party to the action, and the court, having heard the arguments of opposing counsel, ordered Porto Rico to be made a party, and directed plaintiff to amend his complaint in execution of the order. Porto Rico, therefore, through its attorney general, not only gave its consent to be a party to the cause, but invoked and obtained the ruling of the court against the resistance of the plaintiff to make it a party to the cause.

The complaint having been amended as moved and directed, and nearly a year having elapsed, there came a change of view; but the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it, and to come in and go out of court at its will, the other party having no right of resistance to either step.

In placing our decision upon the consent of Porto Rico to be made a party defendant under the circumstances presented by this case, we do not wish to imply that Porto Rico could not have been made a party without its consent, the property being an escheat. As to that we express no opinion.

There is an assignment of error based on the proposition that by the amendment of the complaint the plaintiff and Porto Rico became the sole parties to the action, and they, being citizens of Porto Rico, the court lost jurisdiction of it. The proposition is not urged by plaintiff in error in its brief, and if the proposition did not raise a question of [633] jurisdiction, we might pass it without comment. It is, however, enough to say of it that the original defendant, Wood, was properly sued, he then being a subject of Great Britain, and in possession of the land. Porto Rico, subsequently becoming a party, did not oust the jurisdiction. Phelps v. Oaks, 117 U. S. 236, 29 L. ed. 888, 6 Sup. Ct. Rep. 714; Hardenbergh v. Ray, 151 U. S. 112, 38 L. ed. 93, 14 Sup. Ct. Rep. 305.

Judgment affirmed.

SAMUEL W. CURRIDEN, Appt.,
v.
FRANK L. MIDDLETON, Henry S. Blackmore, and William G. Orr.

(See S. C. Reporter's ed. 633-636.)

Equity — jurisdiction — recovery of damages — discovery.

1. A suit, the object of which is the re-

NOTE.—Generally, on the jurisdiction of equity where remedy at law exists—see notes to Meldrum v. Meldrum, 11 L.R.A. 65; Delaware, L. & W. R. Co. v. Central Stock Yards & Transit Co. 6 L.R.A. 855; and Tyler v. Savage, 36 L. ed. U. S. 83.

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covery of the damages sustained as the result of an alleged conspiracy to defraud, is justiciable at law, and not in equity, although the bill, in addition to the prayer for final relief, asks for a discovery.

[For other cases, see Equity, 63-70, in Digest Sup. Ct. 1908.]

Equity — jurisdiction — complicated facts — difficulty of proof.

2. Mere complication of facts alone and difficulty of proof are not a basis of equity jurisdiction.

[For other cases, see Equity, I. c, in Digest Sup. Ct. 1908.]

Equity — jurisdiction — transfer to law side.

3. Equity rule 22 for the transfer of an action at law erroneously begun as a suit in equity cannot be successfully invoked on an appeal to the Federal Supreme Court from a decree of the court of appeals of the District of Columbia, which affirmed a decree of the supreme court of the District, sustaining a demurrer to and dismissing the bill.

[For other cases, see Equity, II., in Digest Sup. Ct. 1908.]

[No. 152.]

Submitted March 4, 1914. Decided March 16, 1914.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, sustaining a demurrer to and dismissing the bill in a suit based upon an alleged conspiracy to defraud. Affirmed.

See same case below, 37 App. D. C. 568.

The facts are stated in the opinion.

Messrs. Lorenzo A. Bailey, William E. Chandler, and William L. Chambers submitted the cause for appellant:

Equity has jurisdiction in cases of complicated fraud.

1 Story, Eq. Jur. §§ 184, 437, 439, pp. 466, 468; 2 Story, Eq. Jur. § 1265, p. 698; 1 Pom. Eq. Jur. §§ 179, 186; 2 Pom. Eq. Jur. §§ 955, 957, note, 963, note 7 (g); Smith v. Kay, 7 H. L. Cas. 750, 30 L. J. Ch. N. S. 45; 17 Harvard, L. Rev. p. 201; Re Hirth [1899] 1 Q. B. 612, 68 L. J. Q. B. N. S. 287, 47 Week. Rep. 243, 80 L. T. N. S. 63, 15 Times L. R. 153, 6 Mason, 10; Re Slobodinsky [1903] 2 K. B. 517, 72 L. J. K. B. N. S. 883, 89 L. T. N. S. 190, 19 Times L. R. 616, 52 Week. Rep. 156, 10 Manson, 341; Treasury Branch Div. 1889, pp. 612, 618, 624.

The details of fraud are not necessary to be stated in the bill.

Harrison v. Nixon, 9 Pet. 483, 9 L. ed. 201; Nesmith v. Calvert, 1 Woodb. & M. 34, Fed. Cas. No. 10,123; 1 Loveland, Forms of Fed. Pr. p. 237.

The need of discovery is a ground of jurisdiction.

1 Pom. Eq. Jur. §§ 223, 299, 314; Reynolds v. Burgess Sulphite Fiber Co. 71 N. H. 332, 57 L.R.A. 949, 93 Am. St. Rep. 535, 51 Atl. 1075.

Jurisdiction is taken in order to secure an adequate accounting. 1 Pom. Eq. Jur. §§ 186, 319; 4 Pom. Eq. Jur. §§ 1420, 1421; Badger v. McNamara, 123 Mass. 117.

Equitable jurisdiction is not lost because only money relief is demanded.

1 Pom. Eq. Jur. § 178, p. 214, 4 Pom. Eq. Jur. § 416, 5 Pom. Eq. Jur. § 11; Tyler v. Savage, 143 U. S. 79, 36 L. ed. 82, 12 Sup. Ct. Rep. 340; Story, Eq. Jur. §§ 64 K. 67, 184, 191; Jones v. Bolles, 9 Wall. 364, 19 L. ed. 734, 5 Mor. Min. Rep. 444.

The remedy at law, in order to exclude equity, must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.

Boyce v. Grundy, 3 Pet. 210, 7 L. ed. 655; Phoenix Mut. L. Ins. Co. v. Bailey, 13 Wall. 616, 20 L. ed. 501.

Mr. E. Hilton Jackson submitted the cause for appellees:

There is an adequate remedy at law as to the substantial relief sought.

Buzard v. Houston, 119 U. S. 347, 351, 352, 30 L. ed. 451–453, 7 Sup. Ct. Rep. 249; Parkersburg v. Brown, 106 U. S. 487, 500, 27 L. ed. 238, 243, 1 Sup. Ct. Rep. 442; Litchfield v. Ballou, 114 U. S. 190, 29 L. ed. 132, 5 Sup. Ct. Rep. 820; Ambler v. Choteau, 107 U. S. 590, 27 L. ed. 324, 1 Sup. Ct. Rep. 556; United States v. Bitter Root Development Co. 200 U. S. 472, 50 L. ed. 560, 26 Sup. Ct. Rep. 318; Hipp v. Babin, 19 How. 271, 278, 15 L. ed. 633, 635; Kramer v. Cohn, 119 U. S. 355, 357, 30 L. ed. 439, 440, 7 Sup. Ct. Rep. 277; Whitehead v. Shattuck, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; Scott v. Neely, 140 U. S. 106, 110, 35 L. ed. 358, 360, 11 Sup. Ct. Rep. 712; Cates v. Allen, 149 U. S. 451, 459, 37 L. ed. 804, 808, 13 Sup. Ct. Rep. 883, 977.

The bill cannot be maintained for discovery only.

United States v. Bitter Root Development Co. 200 U. S. 472, 50 L. ed. 560, 26 Sup. Ct. Rep. 318; Gelston v. Hoyt, 1 Johns. Ch. 543; Bank of United States v. Biddle, 2 Pars. Sel. Eq. Cas. 31; Lyons v. Miller, 6 Gratt. 428, 52 Am. Dec. 129.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity against the defendant Middleton and two others not served, to which Middleton demurred. The demurrer was sustained and the bill dis-

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missed by the supreme court of the District, and the decree was affirmed by the court of appeals. 37 App. D. C. 568. The allegations in brief are that Middleton was a patent lawyer and personal friend of the plaintiff, that he brought to the plaintiff's attention a patent fluid and apparatus, representing them to be valuable, with details of fact confirming the statement, and representing that Middleton was acting as agent of the patentees; that the plaintiff, relying upon the representations, paid money and incurred obligations, amounting in all to some $40,000, all he had, for purchase of the patent rights, with an agreement that a company should be formed to work them; that a company was formed, but that it turned out that the fluid and apparatus were worthless, that Middleton was interested in the patent, and that his representations were false. It is alleged further that Middleton got complete control of the company, that an arrangement was made with it by which the company was to assume and pay outstanding notes of the plaintiff, but that it failed to do so, and is now [636] hopelessly insolvent; that all Middleton's acts were parts of a conspiracy to defraud the plaintiff, and that Middleton has all the books and papers of the company needed to prove the fraud. The prayers are for discovery and a decree that the defendants "shall make due restitution [of his property] to the complainant by paying to him the amounts of money by him paid out as aforesaid," and for general relief.

As there is a prayer for final relief, the prayer for discovery must stand or fall with that; at least, in a case like the present; there is no need to consider whether or how far bills for discovery alone have been displaced by the powers now given in actions at law. The relief sought is simply a decree for damages,—for a large part of the moneys paid and obligations incurred were paid and incurred to others than Middleton, so that although the word "restitution" is used, there is no attempt to rescind, to follow a specific fund, or to establish a trust. Being a suit for damages, the proper remedy is an action at law, as was held below. Buzard v. Houston, 119 U. S. 347, 30 L. ed. 451, 7 Sup. Ct. Rep. 249. It is said that the facts are complicated, but they are not so on the allegations of the bill, which merely disclose a series of acts alleged to have been parts of the plan to deceive; and further, mere complication of facts alone and difficulty of proof are not a basis of equity jurisdiction. See United States v. Bitter Root Development Co. 200 U. S. 451, 472, 50 L. ed. 550, 560, 26 Sup. Ct. Rep. 318. It now is asked that if the suit cannot be maintained in equity, it may be transferred to the law side, and under equity rule 22; but that rule has no application to the case. Rev. Stat. § 913, U. S. Comp. Stat. 1901, p. 683; D. C. Code (act of March 3, 1901, chap. 854), § 85, 31 Stat. at L. 1189, 1202.

Decree affirmed.

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[637] GEORGE H. HOLT, Doing Business as George H. Holt & Company, Appt.

v.

NORVELL L. HENLEY, Trustee; Peninsula Bank of Williamsburg, Va., et al.

(See S. C. Reporter's ed. 637-641.)

Conditional sale — registration — validity as against trustee in bankruptcy — retroactive statute.

1. A retrospective effect will not be given to the provision of the act of June 25, 1910 (36 Stat. at L. 838, chap. 412, U. S. Comp. Stat. Supp. 1911, p. 1500), § 8, amending the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 47a, subdiv. 2, by giving the trustee in bankruptcy, as to all property coming into the custody of the bankruptcy court, the rights of a creditor holding a lien, so as to defeat the title of the bankrupt's conditional vendor under a pre-existing contract of sale, which, because unregistered, was, under Va. Code, § 2462, void as to lien creditors and purchasers without notice, although for a month or two after the amendment was passed the vendor might have registered the contract.

[For other cases, see Sale, I. d; Statutes, II. v. in Digest Sup. Ct. 1908.]

Mortgage — lien — priority — after-acquired property — conditional sale — fixtures.

2. The lien of a mortgage covering an existing manufacturing plant and that "which may be acquired and placed upon the said premises during the continuance of this trust" does not extend to an automatic sprinkler system subsequently installed under a conditional contract of sale, which, because unregistered, was, under Va. Code, § 2462, void as to lien creditors and purchasers for value without notice, where such system, although attached to the free-

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NOTE.—On the right of seller of chattel retaining title or lien as against purchaser of realty to which it is affixed by owner—see note to Lawton Pressed Brick & Tile Co. v. Ross-Kellar Triple Pressure Brick Mach. Co. 49 L.R.A.(N.S.) 396.

On the rights of seller of chattel retaining title thereto or a lien thereon as against existing mortgagees of the realty to which it is affixed by the owner—see note to Tippett v. Barham, 37 L.R.A.(N.S.) 119.

On the rights of seller of fixtures retaining title or lien as against purchasers or encumbrancers of realty—see note to Reynolds v. Ashby, 1 B. R. C. 664.

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hold by bolts and screws, was, until paid for, by the express terms of the contract of sale, to remain personal property.

[For other cases, see Mortgage, I. d, 2; III.; Fixtures, in Digest Sup. Ct. 1908.]

[No. 229.]

Argued March 5, 1914. Decided March 16, 1914.

APPEAL from the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which affirmed a decree of the District Court for the Eastern District of Virginia, holding invalid as against a trustee in bankruptcy the lien of a conditional vendor under an unregistered contract of sale. Reversed.

See same case below, 113 C. C. A. 87, 193 Fed. 1020.

The facts are stated in the opinion.

Mr. S. O. Bland argued the cause, and, with Mr. R. T. Armistead, filed a brief for appellant:

The law in Virginia undoubtedly is that, as between themselves, the parties can fix the status of property to the extent that property otherwise realty will remain personalty.

Shelton v. Ficklin, 32 Gratt. 727; Tunis Lumber Co. v. Dennis Lumber Co. 97 Va. 682, 34 S. E. 613; Auditor v. Andrews, 28 Gratt. 115; Monarch Laundry v. Westbrook, 109 Va. 382, 63 S. E. 1070; 1 Minor, Real Prop. §§ 27, 36.

The reservation of title was good in Virginia.

Monarch Laundry v. Westbrook, 109 Va. 382, 63 S. E. 1070.

States regulate property transfers.

Scott v. Sandford, 19 How. 393, 15 L. ed. 691; Arndt v. Griggs, 134 U. S. 316, 38 L. ed. 918, 10 Sup. Ct. Rep. 557; Walworth v. Harris, 129 U. S. 355, 32 L. ed. 712, 9 Sup. Ct. Rep. 340; Cunnius v. Reading School Dist. 198 U. S. 458, 49 L. ed. 1125, 25 Sup. Ct. Rep. 721, 3 Ann. Cas. 1121; Green v. Van Buskirk, 5 Wall. 307, 18 L. ed. 599; Hervey v. Rhode Island Locomotive Works, 93 U. S. 664, 23 L. ed. 1003; Brown v. Smart, 145 U. S. 454, 36 L. ed. 773, 12 Sup. Ct. Rep. 958; Bryant v. Swofford Bros. Dry Goods Co. 214 U. S. 279, 53 L. ed. 997, 29 Sup. Ct. Rep. 614; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; Holt v. Crucible Steel Co. 224 U. S. 262, 56 L. ed. 756, 32 Sup. Ct. Rep. 414; Etheridge v. Sperry, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 565; Re A. B. Baxter & Co. 83 C. C. A. 106, 154 Fed. 22.

The weight of authority sustains Holt's claim.

Reynolds v. Ashby, 1 B. R. C. 678, note; Tippett v. Barham, 37 L.R.A.(N.S.) 119, note; Hurxthal v. Hurxthal, 45 W. Va. 584, 32 S. E. 237; Northwestern Mut. L. Ins. Co. v. George, 77 Minn. 319, 79 N. W. 1028, 1064; Campbell v. Roddy, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279; Cox v. New Bern Lighting & Fuel Co. 151 N. C. 62, 134 Am. St. Rep. 966, 65 S. E. 648, 18 Ann. Cas. 936; Davis v. Bliss, 187 N. Y. 78, 10 L.R.A.(N.S.) 458, 79 N. E. 851; Tifft v. Horton, 53 N. Y. 377, 13 Am. Rep. 537; Arctic Ice Mach. Co. v. Armstrong County Trust Co. 112 C. C. A. 458, 192 Fed. 114; Fred W. Wolf Co. v. Hermann Sav. Bank, 168 Mo. App. 549, 153 S. W. 1094; Re Sunflower State Ref. Co. 115 C. C. A. 132, 195 Fed. 180; Roberts v. Caple, 8 Ala. App. 444, 62 So. 343; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; New Chester Water Co. v. Holly Mfg. Co. 3 C. C. A. 399, 3 U. S. App. 264, 53 Fed. 19; Manhattan Trust Co. v. Sioux City Cable R. Co. 76 Fed. 658; Warren v. Liddell, 110 Ala. 232, 20 So. 89; Wood v. Holly Mfg. Co. 100 Ala. 326, 46 Am. St. Rep. 56, 13 So. 948; Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107; Schumacker v. Edward P. Allis Co. 70 Ill. App. 556; Ellison v. Salem Coal & Min. Co. 43 Ill. App. 120; Andrews v. Chandler, 27 Ill. App. 103; First Nat. Bank v. Elmore, 52 Iowa, 541, 3 N. W. 547; Anderson v. Creamery Package Mfg. Co. 8 Idaho, 200, 56 L.R.A. 554, 101 Am. St. Rep. 188, 67 Pac. 493; Binkley v. Forkner, 117 Ind. 176, 3 L.R.A. 33, 19 N. E. 753; Baldwin v. Young, 47 La. Ann. 1466, 17 So. 883; Harris v. Hackley, 127 Mich. 46, 86 N. W. 389; Crippen v. Morrison, 13 Mich. 23; Pioneer Sav. & L. Co. v. Fuller, 57 Minn. 60, 58 N. W. 831; Defiance Mach. Works v. Trisler, 21 Mo. App. 69; Edwards & B. Lumber Co. v. Rank, 57 Neb. 323, 73 Am. St. Rep. 514, 77 N. W. 765; Langdon v. Buchanan, 62 N. H. 657; Cochran v. Flint, 57 N. H. 514; General Electric Co. v. Transit Equipment Co. 57 N. J. Eq. 460, 42 Atl. 101; Campbell v. Roddy, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279; Duffus v. Howard Furnace Co. 8 App. Div. 567, 40 N. Y. Supp. 925; Condit v. Godwin, 108 App. Div. 360, 95 N. Y. Supp. 1122; Nichols v. Potts, 35 Misc. 273, 71 N. Y. Supp. 765; Blanchard v. Eureka Planing Mill Co. 58 Or. 37, 37 L.R.A. (N.S.) 133, 113 Pac. 55; Padgett v. Cleveland, 33 S. C. 339, 11 S. E. 1069; Willis v. Munger Improved Cotton Mach. Mfg. Co. 13 Tex. Civ. App. 677, 36 S. W. 1010; Page v. Edwards, 64 Vt. 124, 23 Atl. 917; Davenport v. Shants, 43 Vt. 546; German Sav. & L. Soc. v. Weber, 16 Wash. 95, 38 L.R.A. 267, 47 Pac. 224; Monarch Laundry Co. v. Westbrook, 109 Va. 382, 63 S. E. 1070.

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Does the after-acquired-property clause in the mortgage entitle the bank to the sprinkler system as against appellant's claim?

Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339; Myer v. Western Car Co. 102 U. S. 1, 26 L. ed. 59; Evans v. Kister, 35 C. C. A. 28, 92 Fed. 828; Blanchard v. Eureka Planing Mill Co. 58 Or. 37, 37 L.R.A.(N.S.) 133, 113 Pac. 55; Chase v. Tacoma Box Co. 11 Wash. 377, 39 Pac. 639; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; United States v. New Orleans & O. R. Co. (New Orleans & O. R. Co. v. Mellen) 12 Wall. 362, 20 L. ed. 434; Murray v. Farmville & P. R. Co. 101 Va. 262, 43 S. E. 553; First Nat. Bank v. Turnbull, 32 Gratt. 695, 34 Am. Rep. 791; General Electric Co. v. Transit Equipment Co. 57 N. J. Eq. 471, 42 Atl. 101; Cox v. New Bern Lighting & Fuel Co. 151 N. C. 62, 134 Am. St. Rep. 966, 65 S. E. 648, 18 Ann. Cas. 936; Hickson Lumber Co. v. Gay Lumber Co. 150 N. C. 282, 21 L.R.A.(N.S.) 843, 63 S. E. 1045; Binkley v. Forkner, 117 Ind. 176, 3 L.R.A. 33, 19 N. E. 753; Beall v. White, 94 U. S. 382, 24 L. ed. 173; Pennock v. Coe, 23 How. 117, 16 L. ed. 436; Story, Eq. Jur. 9th ed. § 1040; Dunham v. Cincinnati, P. & C. R. Co. 1 Wall. 254, 17 L. ed. 584.

Concerning the future accessions, the deed of trust is plain. The property must be subsequently "acquired and placed" upon the premises. Under the authorities the sprinkler system was not "acquired."

York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; United States v. New Orleans & O. R. Co. (New Orleans & O. R. Co. v. Mellen) 12 Wall. 362, 20 L. ed. 434; General Electric Co. v. Transit Equipment Co. 57 N. J. Eq. 471, 42 Atl. 104.

The creditors referred to in the Virginia statute are lien creditors, and not general creditors, or persons holding unsecured claims.

McCandlish v. Keen, 13 Gratt. 638; Dulaney v. Willis, 95 Va. 606, 64 Am. St. Rep. 815, 29 S. E. 324; York Mfg. Co. v. Cassell, 201 U. S. 344, 351, 50 L. ed. 782, 784, 26 Sup. Ct. Rep. 481; Jones, Chat. Mortg. 4th ed. § 245.

A retroactive effect should not be given to the act of June 25, 1910, amending the bankrupt act.

Arctic Ice Mach. Co. v. Armstrong County Trust Co. 112 C. C. A. 458, 192 Fed. 114; Winfree v. Northern P. R. Co. 227 U. S. 296, 57 L. ed. 518, 33 Sup. Ct. Rep. 273; Davidson Bros. Marble Co. v. United States, 213 U. S. 10, 53 L. ed. 675, 29 Sup. Ct. Rep. 324; United States Fidelity & G. Co. v. United States, 209 U. S. 306, 52 L. ed. 804, 28 Sup. Ct. Rep. 537; Southwestern Coal & Improv. Co. v. McBride, 185 U. S. 499, 503, 46 L. ed. 1010, 1012, 22 Sup. Ct. Rep. 763; De Lima v. Bidwell, 182 U. S. 1, 199, 45 L. ed. 1041, 1057, 21 Sup. Ct. Rep. 743; Mobile v. Watson, 116 U. S. 289, 29 L. ed. 620, 6 Sup. Ct. Rep. 398; Chew Heong v. United States, 112 U. S. 536, 538, 557, 28 L. ed. 770, 771, 778, 5 Sup. Ct. Rep. 255; Auffm'ordt v. Rasin, 102 U. S. 620, 26 L. ed. 262; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Von Hoffman v. Quincy, 4 Wall. 535, 548, 18 L. ed. 403, 408; Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 457, 17 L. ed. 805, 807; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Carlisle v. United States, 16 Wall. 147, 21 L. ed. 426; United States v. Kirby, 7 Wall. 482, 19 L. ed. 278; United States v. American Sugar Ref. Co. 202 U. S. 564, 50 L. ed. 1149, 26 Sup. Ct. Rep. 717; United States v. Burr, 159 U. S. 78, 40 L. ed. 82, 15 Sup. Ct. Rep. 1002; Twenty Per Cent Cases, 20 Wall. 179, 185, 22 L. ed. 339, 341; Dash v. Van Kleeck, 7 Johns. 447, 5 Am. Dec. 308; Rhodes v. Sperry & H. Co. 193 N. Y. 223, 34 L.R.A.(N.S.) 1143, 127 Am. St. Rep. 945, 85 N. E. 1097, 220 U. S. 502, 55 L. ed. 561, 31 Sup. Ct. Rep. 490; Richmond v. Henrico County, 83 Va. 212, 2 S. E. 26; Campbell & Co. v. Nonpareil Fire Brick & Kaolin Co. 75 Va. 291; Peters v. Auditor, 33 Gratt. 368; Price v. Harrison, 31 Gratt. 114; Stewart v. Vandervort, 12 L.R.A. 50, note; Varick v. Briggs, 6 Paige, 332; Lewis's Sutherland, Stat. Constr. § 580; Duval v. Malone, 14 Gratt. 24.

The law was ineffective so far as existing rights were concerned.

Vance v. Vance, 108 U. S. 514, 27 L. ed. 808, 2 Sup. Ct. Rep. 854; Turner v. New York, 168 U. S. 91, 42 L. ed. 392, 18 Sup. Ct. Rep. 38; Wheeler v. Jackson, 137 U. S. 245, 255, 34 L. ed. 659, 663, 11 Sup. Ct. Rep. 76; McGahey v. Virginia, 135 U. S. 662, 705, 34 L. ed. 304, 317, 10 Sup. Ct. Rep. 972; Parmenter v. State, 135 N. Y. 154, 31 N. E. 1035.

Mr. Norvell L. Henley argued the cause and filed a brief for the Peninsula Bank and Norvell L. Henley, trustee:

The sprinkler system is a fixture, and passes under the deed of trust to Henley, trustee.

Union Trust Co. v. Southern Sawmills & Lumber Co. 92 C. C. A. 101, 166 Fed. 193; Tippett v. Barham, 37 L.R.A.(N.S.) 119, 103 C. C. A. 430, 180 Fed. 76; Green v. Phillips, 26 Gratt. 752, 21 Am. Rep. 323; Morotock Ins. Co. v. Rodefer Bros. 92 Va. 747, 53 Am. St. Rep. 848, 24 S. E. 393; Shelton v. Ficklin, 32 Gratt. 727; Haskin

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Wood Vulcanizing Co. v. Cleveland Ship-Building Co. 94 Va. 439, 26 S. E. 878; Evans v. Kister, 35 C. C. A. 28, 92 Fed. 828; Kane v. Virginia Coal & I. Co. 97 Va. 329, 33 S. E. 627; Phœnix Iron Works Co. v. New York Secur. & T. Co. 28 C. C. A. 76, 54 U. S. App. 408, 83 Fed. 758; Kinkead v. United States, 150 U. S. 485, 37 L. ed. 1153, 14 Sup. Ct. Rep. 172; Van Ness v. Pacard, 2 Pet. 137, 7 L. ed. 374.

In the construction of written instruments the intention of the parties is to be sought and enforced; and in ascertaining this intention, the position of the parties, the nature of the agreement and subject-matter, as well as all the circumstances surrounding the transaction, are material and pertinent facts entitled to great consideration.

Southern R. Co. v. Franklin & P. R. Co. 96 Va. 696, 44 L.R.A. 297, 32 S. E. 485; Albert v. Tidewater R. Co. 107 Va. 256, 58 S. E. 575.

A reservation of title is not good in Virginia, except as between the parties thereto, unless docketed as required by the statute law of Virginia.

Arbuckle Bros. v. Gates, 95 Va. 802, 30 S. E. 496. See also Re Nelson, 191 Fed. 236.

Regardless of the question of fixtures, Holt's claim is not valid, and the weight of authority is against it.

Kesner v. Trigg, 98 U. S. 50, 53, 25 L. ed. 83; Wickham v. Martin, 13 Gratt. 427; Evans v. Kister, 35 C. C. A. 28, 92 Fed. 828; Monarch Laundry v. Westbrook, 109 Va. 382, 63 S. E. 1070; Hash v. Lore, 88 Va. 716, 14 S. E. 365; Brown v. Grand Rapids Parlor Furniture Co. 22 L.R.A. 817, 7 C. C. A. 225, 16 U. S. App. 221, 58 Fed. 286; Murray v. Farmville & P. R. Co. 101 Va. 262, 43 S. E. 553; Arbuckle Bros. v. Gates, 95 Va. 802, 30 S. E. 496; Chapman v. Chapman, 91 Va. 400, 50 Am. St. Rep. 846, 21 S. E. 813; Vest v. Michie, 31 Gratt. 149, 31 Am. Rep. 722; Johnson v. National Exch. Bank, 33 Gratt. 473; Morrison v. Bausemer, 32 Gratt. 225; Kinkead v. United States, 150 U. S. 485, 37 L. ed. 1153, 14 Sup. Ct. Rep. 172; Van Ness v. Pacard, 2 Pet. 137, 7 L. ed. 374; New Orleans Canal & Bkg. Co. v. Montgomery, 95 U. S. 16, 24 L. ed. 346; Wickham v. Martin, 13 Gratt. 436.

The after-acquired property clause in the deed of trust to Henley, trustee, is sufficiently full to cover the property in question, irrespective of whether it is a fixture or whether it remained personalty.

Tippett v. Barham, 37 L.R.A.(N.S.) 119, 103 C. C. A. 430, 180 Fed. 76; Arbuckle Bros. v. Gates, 95 Va. 802, 30 S. E. 496; Hart v. Haynes, 1 Va. Dec. 201; United Lines Teleg. Co. v. Boston Safe Deposit & T. Co. 147 U. S. 431, 37 L. ed. 231, 13 Sup. Ct. Rep. 396; Pennock v. Coe, 23 How. 117, 16 L. ed. 436; Bear Lake & River Waterworks & Irrig. Co. v. Garland, 164 U. S. 1, 15, 41 L. ed. 327, 333, 17 Sup. Ct. Rep. 7; Benjamin, Sales, 2d ed. p. 99; Weil v. State, 46 Ohio St. 450, 21 N. E. 643; Speyer v. Baker, 59 Ohio St. 11, 51 N. E. 442; Collins v. Wilhoit, 108 Mo. 451, 18 S. W. 839; S. H. Sheldon Co. v. Mayers, 81 Wis. 627, 51 N. W. 1082; Vorse v. Loomis, 86 Iowa, 522, 53 N. W. 314; National Cash Register Co. v. Schwab, 111 Iowa, 605, 82 N. W. 1011; Moline Plow Co. v. Witham, 52 Kan. 185, 34 Pac. 751; Knowles Loom Works v. Vacher, 57 N. J. L. 490, 33 L.R.A. 305, 31 Atl. 306; Woolley v. Geneva Wagon Co. 59 N. J. L. 278, 35 Atl. 789; D. M. Osborne Co. v. Plano Mfg. Co. 51 Neb. 502, 70 N. W. 1124; Dorntee Casket Co. v. Gunnison, 69 N. H. 297, 45 Atl. 318; Davis v. Osgood, 69 N. H. 427, 44 Atl. 432; Re Wilcox & H. Co. 70 Conn. 220, 39 Atl. 163; Hirsch v. Graves Elevator Co. 24 Misc. 472, 53 N. Y. Supp. 664; H. H. Babcock Co. v. Williams, 75 Minn. 147, 77 N. W. 791; Brandon Printing Co. v. Bostick, 126 Ala. 247, 28 So. 705; Winchester Wagon Works Mfg. Co. v. Carman, 109 Ind. 31, 58 Am. Rep. 382, 9 N. E. 707; Steele v. Aspy, 128 Ind. 367, 27 N. E. 739.

Where vendor, upon a conditional sale, has delivered specific goods, and vendee has taken possession and used them in all respects as his own, the vendor retaining title until full purchase price is paid, the vendee has an interest which he can convey, and one attachable by his creditors. The vendee incurs an absolute obligation to pay, and he is responsible for goods in the event they are destroyed by fire while in his possession.

Tufts v. Griffin, 107 N. C. 47, 10 L.R.A. 526, 22 Am. St. Rep. 866, 12 S. E. 68.

A vendor under a conditional contract, not recorded, loses his claim against the trustees in bankruptcy under the amendment of 1910.

Re Calhoun Supply Co. 189 Fed. 537; Re Hartdagen, 189 Fed. 547.

It is a principle of real-estate law that permanent improvements placed upon land become a part of the realty, and the owner must take notice that all liens which rest upon the fee will necessarily attach to such permanent structures as he may choose to erect.

1 Minor, Real Prop. §§ 17, 23; Nixdorf v. Blount, 111 Va. 127, 68 S. E. 258.

Mr. O. D. Batchelor argued the cause and filed a brief for the trustees in bankruptcy:

One of the familiar rules governing the construction of a remedial statute is that

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the mischief which it was designed to correct must be looked to in determining its meaning.

York Mfg. Co. v. Cassell, 201 U. S. 352, 50 L. ed. 785, 26 Sup. Ct. Rep. 481.

Every trustee in bankruptcy appointed since June 25, 1910, becomes vested with all the rights and remedies of a judgment and execution creditor of the bankrupt as of the date of the adjudication.

3 Remington, Bankr. 331; Collier, Bankr. 1912, pp. 660, 661; Re Bazemore, 189 Fed. 236; Re Nelson, 191 Fed. 233; Re Gehris-Herbine Co. 188 Fed. 502; Re Calhoun Supply Co. 189 Fed. 537; Re Farmers' Supply Co. 196 Fed. 990; Re Kreuger, 199 Fed. 367; Re Franklin Lumber Co. 187 Fed. 281; Re Gaglione, 200 Fed. 81; Re Farmers' Co-op. Co. 202 Fed. 1008; Re Osborn, 116 C. C. A. 59, 196 Fed. 257; Arctic Ice Mach. Co. v. Armstrong County Trust Co. 112 C. C. A. 458, 192 Fed. 114; Re Hartdagen, 26 Am. Bankr. Rep. 532; Sturdivant Bank v. Schade, 27 Am. Bankr. Rep. 673; Re Calhoun Supply Co. 26 Am. Bankr. Rep. 528; Re Sterne, 26 Am. Bankr. Rep. 540; Re Hammond, 26 Am. Bankr. Rep. 336.

The amendment was intended to apply to every bankruptcy, the petition in which was filed after its passage.

Re Farmers' Co-op. Co. 202 Fed. 1010.

The mortgagee, by virtue of the after-acquired-property clause, takes such title only to after-acquired property as the mortgagor has.

Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 329.

Virginia Code, § 2462, manifestly contemplated subsequent purchasers, for it obviously relates to a purchase of the subject of the conditional sale.

Monarch Laundry v. Westbrook, 109 Va. 384, 63 S. E. 1070.

Is the sprinkler system a permanent fixture?

Green v. Phillips, 26 Gratt. 759, 21 Am. Rep. 323; Monarch Laundry v. Westbrook, supra; Haskin Wood Vulcanizing Co. v. Cleveland Ship-Building Co. 94 Va. 439, 26 S. E. 878.

The local law of Virginia will be followed by the Federal courts in determining whether the sprinkler equipment in question is a fixture.

New York L. Ins. Co. v. Allison, 46 C. C. A. 229, 107 Fed. 179.

Mr. Justice Holmes delivered the opinion of the court:

This is a petition to the district court, sitting in bankruptcy for leave to remove an automatic sprinkler system and equipment from the premises of the bankrupt, the Williamsburg Knitting Mill Company. It is opposed by the trustee of a mortgage of the plant of the company and the holder of the mortgage notes, and by the trustee in bankruptcy, both of which parties claim the property. The referee, the district court, and the circuit court of appeals, decided in favor of the latter claims. 190 Fed. 871, 113 C. C. A. 87, 193 Fed. 1020. The petitioner, Holt, appeals. The facts are as follows: An agreement to install the sprinkler was signed by Holt on August 28, 1909, and by the bankrupt on October 14, 1909. The installation was begun about December 6, 1909, and finished in the latter part of March, 1910, the equipment consisting of a 50,000-gallon tank on a steel tower, bolted to a concrete foundation, pipes connecting the tank with the mill. By the agreement the system was to remain Holt's property until paid for, and Holt was to have a right to enter and remove it upon a failure to pay as agreed. It also was to be personal property during the same time. A large part of the price has not been paid. But by the Code of Virginia, § 2462, unless registered as therein provided, which this was not, such sales are void [639] as to creditors (construed by the Virginia courts to mean lien creditors only), and as to purchasers for value without notice from the vendee. On November 23, 1909, the mortgage deed was executed, covering the plant on the premises, and that "which may be acquired and placed upon the said premises during the continuance of this trust." The mortgagees claim the system by virtue of this clause and the fact that it had been attached to the soil. As bearing on this last it should be added that there now is a smaller tank on the same steel tower, that supplies the mill for domestic purposes, but this was not put there by Holt.

The trustees in bankruptcy join with Holt in disputing the claim of the mortgagees, but set up one of their own, which we will deal with before discussing that of the mortgagees. They rely upon the act of June 25, 1910, chap. 412, § 8, 36 Stat. at L. 838, 840, U. S. Comp. Stat. Supp. 1911, p. 1500, amending § 47a (2) of the bankruptcy act [30 Stat. at L. 557, chap. 541, U. S. Comp. Stat. 1901, p. 3438], and giving them, as to all property coming into the custody of the bankruptcy court, the rights of a creditor holding a lien. Before that amendment, Holt had a better title than the trustees would have got. York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481. We are of opinion that the act should not be construed to impair it. We do not need to consider whether or how far in any event the constitutional power of Congress would have been limited. It is enough that the

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reasonable and usual interpretation of such statutes is to confine their effect, so far as may be, to property rights established after they were passed. If, as they sometimes do, the registry statute had fixed a time within which the registration must take place, and the time had elapsed, we think it clear that the amendment would not be read as attempting to diminish Holt's rights. But the most obvious, if not the only, way of reaching that result, would be by taking the amendment to affect subsequently established rights alone. That is a familiar and natural mode of interpretation, whereas it [640] would be highly artificial to say that it affected existing rights that still might be secured, but not those for which the chance had been lost. Therefore we think it immaterial if true, that for a month or two after the amendment was passed Holt might have docketed a memorandum, as provided by the Virginia act. The retention of title by him, and his refraining from recording it, both were perfectly lawful. His continuing title simply was postponed to purchasers without notice and creditors getting a lien. We are of opinion that it was not affected by the enactment of later date than the conditional sale. The opposite construction would not simply extend a remedy, but would impute to the act of Congress an intent to take away rights lawfully retained, and unimpeachable at the moment when they took their start. We agree with the decision in Arctic Ice Mach. Co. v. Armstrong County Trust Co. 112 C. C. A. 458, 192 Fed. 114; Re Schneider, 203 Fed. 589. See also Southwestern Coal & Improv. Co. v. McBride, 185 U. S. 499, 503, 46 L. ed. 1010, 1012, 22 Sup. Ct. Rep. 763.

We turn now to the claim of the mortgagees. This is based upon the clause extending the mortgage to plant that may be acquired and placed upon the premises while the mortgage is in force, coupled with the subsequent attachment of the system to the freehold. But the foundation upon which all their rights depend is the Virginia statute giving priority to purchasers for value without notice over Holt's unrecorded reservation of title; and as the mortgage deed was executed before the sprinkler system was put in, and the mortgagees made no advance on the faith of it, they were not purchasers for value as against Holt. York Mfg. Co. v. Cassell, 201 U. S. 344, 351, 352, 50 L. ed. 782, 784, 785, 26 Sup. Ct. Rep. 481. There are no special facts to give them a better position in that regard. But that being so, what reason can be given for not respecting Holt's title as against them? The system was attached to the freehold, but it could be removed without any serious harm for which complaint [641] could be made against Holt, other than the loss of the system itself. Removal would not affect the integrity of the structure on which the mortgagees advanced. To hold that the mere fact of annexing the system to the freehold overrode the agreement that it should remain personalty and still belong to Holt would be to give a mystic importance to attachment by bolts and screws. For, as we have said, the mortgagees have no equity and do not bring themselves within the statutory provision. We believe the better rule in a case like this, and the one consistent with the Virginia decisions so far as they have gone, is that "the mortgagees take just such an interest in the property as the mortgagor acquired; no more, no less." Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339; Myer v. Western Car Co. 102 U. S. 1, 26 L. ed. 59; Monarch Laundry v. Westbrook, 109 Va. 382, 384, 385, 63 S. E. 1070; Hurxthal v. Hurxthal, 45 W. Va. 584, 32 S. E. 237; Campbell v. Roddy, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279; Davis v. Bliss, 187 N. Y. 77, 10 L.R.A. (N.S.) 458, 79 N. E. 851; Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107; Binkley v. Forkner, 117 Ind. 176, 3 L.R.A. 33, 19 N. E. 753; Cox v. New Bern Lighting & Fuel Co. 151 N. C. 62, 134 Am. St. Rep. 966, 65 S. E. 648, 18 Ann. Cas. 936; Baldwin v. Young, 47 La. Ann. 1466, 17 So. 883; Re Sunflower State Ref. Co. 115 C. C. A. 132, 139, 195 Fed. 180, 187. The case is not like those in which the addition was in its nature an essential indispensable part of the completed structure contemplated by the mortgage. The system, although useful and valuable, can be removed and the works still go on.

Decree reversed.

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[642] WILLIAM H. GARLAND, Plff. in Err.,

v.

STATE OF WASHINGTON.

(See S. C. Reporter's ed. 642-647.)

Constitutional law — due process of law — criminal case — necessity of arraignment and plea.

A conviction upon a second and amended information after a prior conviction under the original information had been set aside and a new trial granted was not wanting in

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NOTE.—Necessity of arraignment or plea after amendment to indictment or information.

Whether or not it is necessary to arraign defendant and give him an opportunity to plead, after the indictment or information

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the due process of law guaranteed by U. S. Const., 14th Amend., because no arraignment or plea was had upon the second information, where, without raising that specific objection before trial, the accused had made certain objections to such information, and was put to a trial thereon before a jury in all respects as though he had entered a formal plea of not guilty.

[For other cases, see Constitutional Law, IV. b, 9, in Digest Sup. Ct. 1908.]

[No. 226.]

Submitted January 29, 1914. Decided March 16, 1914.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed a conviction of larceny in the Superior Court of King County in that state. Affirmed.

See same case below, 65 Wash. 666, 118 Pac. 907.

The facts are stated in the opinion.

Mr. William H. Gorham submitted the cause for plaintiff in error. Messrs. O. L. Willett and Frank Oleson were on the brief:

It was not due process of law to try, convict, and sentence plaintiff in error on an information on which he had never been arraigned and to which he had never pleaded.

Crain v. United States, 162 U. S. 625, 40 L. ed. 1097, 16 Sup. Ct. Rep. 952.

It is true that in the Crain Case the prosecution had been commenced in the Federal court, and therefore the ruling of the Crain Case is based on the due process of law clause of the 5th rather than the 14th Amendment; but it has been decided by this court that the due process of law clause of the 14th Amendment places the same inhibition on the states as does the 5th Amendment on the Federal government.

Hibben v. Smith, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88.

There cannot legally be two informations in the same case at the same time.

22 Cyc. 275, 276; Rice v. People, 15 Mich. 9.

The public has an interest in the accused's life and liberty. Neither can be lawfully taken except in the mode prescribed by law.

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has been amended, usually depends upon the materiality of the amendment.

Thus, after an amendment to cure a defect in the information which placed the date of the commission of the crime subsequent to the date of the filing of the information, it is error to require the accused, over his objection, immediately to proceed to the trial without arraignment under a plea to such amended information. McKay v. State, 90 Neb. 63, 39 L.R.A. (N.S.) 714, 132 N. W. 741, Ann. Cas. 1913B, 1034, rehearing denied in 91 Neb. 281, 39 L.R.A.(N.S.) 720, 135 N. W. 1024, Ann. Cas. 1913B, 1039.

Where the information has been materially amended, it is reversible error to put the defendant on trial without arraigning him again and giving him an opportunity to plead. State v. Vaughn, 223 Mo. 149, 122 S. W. 677.

It is reversible error not to give the defendant the statutory time to plead, where the information has been materially changed by the amendment. State v. DeWolfe, 29 Mont. 415, 74 Pac. 1084.

The omission to have the defendant arraigned and called on to plead after an amendment was made to the information, which, before the amendment, stated no crime, was held error in People v. Moody, 69 Cal. 184, 10 Pac. 392.

Where there was no arraignment upon a second information, nor any plea by the defendant thereto, it was held, in State v. Hoffman, 70 Mo. App. 271, that the judgment must be reversed.

In McFadin v. State, 44 Tex. Crim. Rep. 471, 72 S. W. 172, where the original prosecution against the defendant was dismissed, and a new complaint and information were filed, it was held that a refusal to give the defendant the full statutory time to plead to the new information was error.

The mere correction of a clerical or other immaterial error in the indictment does not require a second arraignment and plea. State v. Sovern, 225 Mo. 580, 125 S. W. 769; State v. Dargatz, 244 Mo. 218, 148 S. W. 889; State v. Foley, 44 Mont. 311, 120 Pac. 225; Rasmussen v. State, 63 Wis. 1, 22 N. W. 835; State v. Speyer, 194 Mo. 459, 91 S. W. 1079.

Where an amendment was made to the information which was one of form only, and did not change the nature of the offense charged, nor in any way prejudice the rights of the defendant, it was held, in State v. Beatty, 45 Kan. 492, 25 Pac. 899, that a waiver of the arraignment and plea to the original information was sufficient to create the issue and support conviction. And to the same effect was State v. Bugg, 66 Kan. 668, 72 Pac. 236, 14 Am. Crim. Rep. 109.

In Territory v. Marshall, 13 Haw. 76, where it did not appear by the record that the defendant pleaded to an amended charge, it was held that the matter of a plea was a question of form, and in no wise would affect the proceedings unless it could be shown that it had in some wise been prejudicial to the defendant.

If the information has been lost and there is a substituted information, no second arraignment and plea are necessary. Goodman v. State, 161 Ind. 629, 69 N. E. 442.

Generally, upon the effect on conviction of failure to give accused an opportunity to plead, see notes to State v. Walton, 13 L.R.A.(N.S.) 811, and Hack v. State, 45 L.R.A.(N.S.) 664.

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That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or vacated by the consent of the accused; much less by his mere failure, when on trial and in custody, to object to unauthorized methods.

Hopt v. Utah, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417.

A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances. It is a crime to steal goods and chattels, but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny. Therefore, the indictment should state the particulars, informing the court as well as the accused.

United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588.

Mr. Hugh M. Caldwell submitted the cause for defendant in error. Messrs. John F. Murphy and H. B. Butler were on the brief:

The purpose of arraignment is to inform the accused what the charge against him is, and to obtain his answer thereto.

United States v. McKnight, 112 Fed. 982.

The formality of arraignment and plea may be waived either expressly or impliedly.

Hack v. State, 141 Wis. 346, 45 L.R.A. (N.S.) 664, 124 N. W. 492; State v. Straub, 16 Wash. 111, 47 Pac. 227; State v. Garland, 65 Wash. 666, 118 Pac. 907; Bassett v. State, 44 Fla. 12, 33 So. 262; Hudson v. State, 117 Ga. 704, 45 S. E. 66; Feriter v. State, 33 Ind. 283; Meyers v. State, 156 Ind. 388, 59 N. E. 1052; Gaines v. United States, 1 Ind. Terr. 296, 37 S. W. 98; Roper v. United States, 7 Ind. Terr. 185, 104 S. W. 584; Utterback v. Com. 105 Ky. 723, 88 Am. St. Rep. 329, 49 S. W. 479; State v. Rasberry, 113 La. 651, 37 So. 545; State v. Brock, 61 S. C. 141, 39 S. E. 359; McCampbell v. State, 116 Tenn. 98, 93 S. W. 100; United States v. Molloy, 31 Fed. 19; State v. Thompson, 95 Iowa, 464, 64 N. W. 419; State v. Glave, 51 Kan. 330, 33 Pac. 8; People v. Tower, 63 Hun, 624.

We agree that a state could not pass a law providing for trial without arraignment and plea, but do not believe that the Crain Case goes to the extent of holding that a state could not pass a law providing that a defendant had the right to and could waive such formality if he saw fit. In fact, such laws have been passed in some states and their validity has never been questioned.

Hudson v. State, 117 Ga. 704, 45 S. E. 66; Gaines v. United States, 1 Ind. Terr. 296, 37 S. W. 98; Utterback v. Com. 105 Ky. 723, 88 Am. St. Rep. 329, 49 S. W. 479.

The question of filing one or more informations against a defendant, charging the same offense, is a matter of state regulation.

Brannon, 14th Amend. 417; New York v. Eno, 155 U. S. 89, 39 L. ed. 80, 15 Sup. Ct. Rep. 30.

Mr. Justice Day delivered the opinion of the court:

The plaintiff in error was convicted in the superior court of King county, Washington, upon an information charging him with larceny of "a check payable for the sum of $1,000 in money." Upon appeal the conviction was affirmed by the supreme court of Washington (65 Wash. 666, 118 Pac. 907), and the case comes here upon writ of error.

It appears that a previous information had charged the accused with the larceny of "one thousand dollars ($1,000) in lawful money of the United States." Upon that information he was arraigned, entered a plea of not guilty, was tried and convicted. A new trial was awarded, and [644] thereafter the second information was filed, making the charge as above stated. Before trial the plaintiff in error filed a "motion directed to second information," containing a motion to quash, a motion to strike out, and a motion to make more definite and certain, all of which were denied. No arraignment or plea was had upon that information. The case having been called for trial and the jury having been impaneled, the plaintiff in error, by his counsel, objected to the introduction of any evidence upon the ground that the state had no right to try the plaintiff in error on the information then before the court. This general objection was overruled. No specific objection was taken before the trial to the want of formal arraignment upon the second information. The jury, at the conclusion of the trial upon the second information, returned a verdict of guilty, and sentence was passed upon the plaintiff in error.

It is apparent that the accused was tried and convicted upon an information charging an offense against the law; that he had a jury trial, with full opportunity to be heard, and that he was in fact deprived of no right or privilege in the making of his defense, unless such deprivation arises from the fact that he was not arraigned and required to plead to the second information before trial. The object of arraignment being to inform the accused of the charge

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against him and obtain an answer from him was fully subserved in this case, for the accused had taken objections to the second information, and was put to trial before a jury upon that information in all respects as though he had entered a formal plea of not guilty. In this view, the supreme court of Washington, following its former decisions, held that the failure to enter the plea had deprived the accused of no substantial right, and that having failed to make objection upon that ground before trial, it was waived and could not be subsequently taken. This ruling, it is contended, deprived the plaintiff in error of his liberty [645] without due process of law within the meaning of the 14th Amendment of the Constitution.

Due process of law, this court has held, does not require the state to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. Rogers v. Peck, 199 U. S. 425, 435, 50 L. ed. 256, 260, 26 Sup. Ct. Rep. 87, and previous cases in this court there cited. Tried by this test it cannot for a moment be maintained that the want of formal arraignment deprived the accused of any substantial right, or in any wise changed the course of trial to his disadvantage. All requirements of due process of law in criminal trials in a state, as laid down in the repeated decisions of this court, were fully met by the proceedings had against the accused in the trial court. The objection was merely a formal one, was not included in the general language in which the objection to the introduction of evidence was interposed before the trial, and was evidently reserved with a view to the use which is now made of it, in an attempt to gain a new trial for want of compliance with what in this case could have been no more than a mere formality.

It is insisted, however, that this court in the case of Crain v. United States, 162 U. S. 625, 40 L. ed. 1097, 16 Sup. Ct. Rep. 952, held the contrary. In that case the question was specifically made as to the necessity of a plea before trial, duly entered of record. The learned justice who spoke for the majority of the court announced its conclusion approving a number of early cases in the state courts which had held that such form of arraignment entered of record was essential to a legal trial, and holding that in a Federal court no valid trial could be had without the requisite arraignment and plea, and that such must be shown by the record of conviction. If a legal trial cannot be had without a plea to the indictment, duly entered of record before trial, it would follow that such omission in the present case requires a reversal [646] of the judgment of conviction, because the prisoner has been deprived of due process of law.

Technical objections of this character were undoubtedly given much more weight formerly than they are now. Such rulings originated in that period of English history when the accused was entitled to few rights in the presentation of his defense, when he could not be represented by counsel, nor heard upon his own oath, and when the punishment of offenses, even of a trivial character, was of a severe and often of a shocking nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to the mere formalities of trial would seem to have passed away, and we think that the better opinion, when applied to a situation such as now confronts us, was expressed in the dissenting opinion of Mr. Justice Peckham, speaking for the minority of the court in the Crain Case, when he said (p. 649):

"Here the defendant could not have been injured by an inadvertence of that nature. He ought to be held to have waived that which, under the circumstances, would have been a wholly unimportant formality. A waiver ought to be conclusively implied where the parties had proceeded as if defendant had been duly arraigned, and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until, as in this case, the record was brought to this court for review. It would be inconsistent with the due administration of justice to permit a defendant under such circumstances to lie by, say nothing as to such an objection, and then for the first time urge it in this court."

Holding this view, notwithstanding our reluctance to overrule former decisions of this court, we now are constrained to hold that the technical enforcement of formal [647] rights in criminal procedure sustained in the Crain Case is no longer required in the prosecution of offenses under present systems of law, and so far as that case is not in accord with the views herein expressed, it is necessarily overruled.

The other objection to the procedure in the state court which it is alleged deprived the plaintiff in error of due process of law upon his trial, rests in the contention that he was put to trial upon two informations, containing different charges, without notice as to which charge he would be required

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to meet, and sentenced upon a general verdict of guilty. We think that the record discloses that there is nothing in this objection of substantial merit, and that it appears that the accused was put to trial and convicted upon the second information, with every opportunity to defend himself against the offense therein charged.

Judgment of the Supreme Court of Washington is accordingly affirmed.

GRANT BROTHERS CONSTRUCTION COMPANY et al., Plffs. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 647–665.)

Appeal — scope of review — question not raised in intermediate appellate court.

1. Errors not involving anything fundamental or jurisdictional will not be considered by the Federal Supreme Court on writ of error to a territorial supreme court, where they were not brought to the notice of the latter court.

[For other cases, see Appeal and Error, VIII. j, in Digest Sup. Ct. 1908.]

Action — civil or criminal — suit for penalty — depositions — reasonable doubt.

2. An action of debt brought by the United States to recover the prescribed penalty for violations of the contract labor provisions of the alien immigration act of February 20, 1907 (34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1911, p. 499), § 4, is civil, and not criminal, in character, so that the trial court may permit the government to read in evidence the depositions of absent witnesses, and may instruct the jury to return a verdict for the government, if the evidence reasonably preponderates in its favor, and in other ways treat the case as civil in substance as well as in form.

[For other cases, see Action or Suit, 7-9; Criminal Law, 108-111; Depositions, 73-84; Evidence, 2552-2554, in Digest Sup. Ct. 1908.]

Appeal — sufficiency of pleading — first raising question in appellate court.

3. The omission from the petition, in an action of debt brought by the United States to recover the prescribed penalty for violations of the contract labor provisions of the alien immigration act of February 20, 1907, § 4, of any allegation that the acts charged against the defendant were knowingly done, is not ground for reversal of a judgment entered upon a verdict in favor of the government, where such defect was not pointed out in the trial court, but, on the contrary, the case was tried as if the omitted allegations were in the petition, and the jury were instructed that the defendant's knowledge was an essential factor in the case.

[For other cases, see Appeal and Error, VIII. j, 4, in Digest Sup. Ct. 1908.]

Depositions — suppression — errors in notice.

4. Depositions taken by the plaintiff need not be suppressed because the preliminary notice described the case as pending in the district in which it was originally brought, instead of in the district to which the case had been transferred at the defendant's instance, after the notice and the accompanying interrogatories were prepared, but before they were served, where no cross interrogatories were filed in either district, and after the expiration of the time allowed for them the clerk of the district in which the case was pending issued the commission, since counsel for the defendant could not have been misled or confused by the error in the notice.

[For other cases, see Depositions, III. b, in Digest Sup. Ct. 1908.]

Evidence — judgment — admissibility against stranger — alienage.

5. A determination by an immigration board that certain persons brought before the board were aliens is admissible in an action of debt brought by the United States to recover the prescribed penalty for violating the contract labor provisions of the alien immigration act of February 20, 1907, § 4, by aiding or inducing the migration or importation of such persons, as furnishing prima facie, though not conclusive, evidence of their alienage.

[For other cases, see Evidence, IV. k, in Digest Sup. Ct. 1908.]

Aliens — immigration — contract labor — number of penalties.

6. A separate penalty is incurred for each of a number of aliens whose simultaneous migration or importation is knowingly assisted, encouraged, or solicited contrary to the contract labor provisions of the alien immigration act of February 20, 1907, § 4, such statute declaring in § 5 that "separate suits may be brought for each alien thus promised labor or service."

[For other cases, see Aliens, VI. c, in Digest Sup. Ct. 1908.]

Costs — against defendant in suit for penalty.

7. Costs are properly awarded to the government against the unsuccessful defendants in an action of debt brought by the United States to recover the penalties prescribed for violations of the provisions of the alien immigration act of February 20, 1907, § 4, directed against the importation of alien contract labor.

[For other cases, see Costs, I. b, in Digest Sup. Ct. 1908.]

NOTE.—As to review by the United States Supreme Court of territorial decisions—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

On suit for statutory penalty as a civil or criminal prosecution—see note to Hepner v. United States, 27 L.R.A.(N.S.) 739.

On depositions in the Federal courts—see note to Winans v. New York & E. R. Co.

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Argued January 21 and 22, 1914. Decided March 16, 1914.

IN ERROR to the Supreme Court of the Territory of Arizona to review a judgment which affirmed a judgment of the District Court of the First Judicial District in such territory in favor of the United States in a suit to recover the prescribed penalties for violations of the contract labor provisions of the alien immigration act. Affirmed.

See same case below, 13 Ariz. 388, 114 Pac. 955.

The facts are stated in the opinion.

Mr. Isidore B. Dockweiler argued the cause, and, with Messrs. A. C. Baker and Robert B. Murphey, filed a brief for plaintiffs in error:

The statute imposing this penalty is highly penal, and must be strictly construed so as to bring within its condemnation only those who are shown by direct and positive averments in the complaint to be embraced within the terms of the law.

United States v. Edgar, 45 Fed. 46, 1 C. C. A. 52, 4 U. S. App. 41, 48 Fed. 91; McElroy v. United States, 164 U. S. 76, 41 L. ed. 355, 17 Sup. Ct. Rep. 31; United States v. Gay, 37 C. C. A. 46, 95 Fed. 226; United States v. Tsokas, 163 Fed. 129; Regan v. United States, 31 L.R.A.(N.S.) 1073, 105 C. C. A. 505, 183 Fed. 293; United States v. Regan, 121 C. C. A. 543, 203 Fed. 433; Lees v. United States, 150 U. S. 476, 478, 37 L. ed. 1150, 1151, 14 Sup. Ct. Rep. 163; Hepner v. United States, 213 U. S. 103, 53 L. ed. 720, 27 L.R.A.(N.S.) 739, 29 Sup. Ct. Rep. 474, 16 Ann. Cas. 960; United States v. Stevenson, 215 U. S. 190, 54 L. ed. 153, 30 Sup. Ct. Rep. 35.

In order to incur the statutory penalty it is essential that the acts of assistance, encouragement, or solicitation be knowingly done, with knowledge that the person assisted, etc., is an alien contract laborer as defined by the statute.

2 Bishop, New Crim. Law, ¶¶ 504, 523–525; Dunbar v. United States, 156 U. S. 185, 39 L. ed. 390, 15 Sup. Ct. Rep. 325; United States v. Scott, 74 Fed. 213; United States v. Mitchell, 141 Fed. 666; State v. Williams, 139 Ind. 43, 47 Am. St. Rep. 255, 38 N. E. 339; State v. Waterbury, 133 Iowa, 137, 110 N. W. 328; People v. Root, 94 App. Div. 84, 87 N. Y. Supp. 962; Rex v. Lawley, 2 Strange, 904; Rosen v. United States, 161 U. S. 29, 40 L. ed. 606, 16 Sup. Ct. Rep. 434, 480, 1 Am. Crim. Rep. 251; Price v. United States, 165 U. S. 311, 41 L. ed. 727, 17 Sup. Ct. Rep. 366; Verona Central Cheese Co. v. Murtaugh, 50 N. Y. 314; Driskill v. Parrish, 3 McLean, 631, Fed. Cas. No. 4,089; Darnborough v. Joseph Benn & Sons, 109 C. C. A. 270, 187 Fed. 580; United States v. Craig, 28 Fed. 795; United States v. Borneman, 41 Fed. 751; Lees v. United States, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163; Rex v. Hayes, 23 Can. Law Times Occ. N. 88, 5 Ont. L. Rep. 198; State v. Davis, 14 R. I. 284; Pettibone v. United States, 148 U. S. 209, 37 L. ed. 424, 13 Sup. Ct. Rep. 542; United States v. Terry, 42 Fed. 317; United States v. Kirby, 7 Wall. 482, 486, 19 L. ed. 278, 280; United States v. Claypool, 14 Fed. 127; United States v. Koplik, 155 Fed. 919; United States v. Highleyman, Fed. Cas. No. 15,361; United States v. Janke, 183 Fed. 277; First Nat. Bank v. Davis, 135 Ga. 687, 36 L.R.A.(N.S.) 134, 70 S. E. 246; Robinson v. State, 6 Ga. App. 696, 65 S. E. 792; State v. Bridgewater, 171 Ind. 1, 85 N. E. 715; State v. Smith, 18 N. H. 91; Verona Central Cheese Co. v. Murtaugh, 50 N. Y. 314, reversing 4 Lans. 17; Gregory v. United States, 17 Blatchf. 330, Fed. Cas. No. 5,803; Clark & M. Crimes, ¶ 55; McDonald v. Williams, 174 U. S. 397, 406, 43 L. ed. 1022, 1026, 19 Sup. Ct. Rep. 743; Felton v. United States, 96 U. S. 699, 24 L. ed. 875; Potter v. United States, 155 U. S. 438, 39 L. ed. 214, 15 Sup. Ct. Rep. 144; Yates v. Jones Nat. Bank, 206 U. S. 158, 51 L. ed. 1002, 27 Sup. Ct. Rep. 638; St. Louis & S. F. R. Co. v. United States, 94 C. C. A. 437, 169 Fed. 69; St. Joseph Stockyards Co. v. United States, 110 C. C. A. 432, 187 Fed. 104; United States v. Beaty, Hempst. 487, Fed. Cas. No. 14,555; State v. McBarron, 66 N. J. L. 680, 51 Atl. 146; Utley v. Hill, 155 Mo. 232, 49 L.R.A. 323, 78 Am. St. Rep. 569, 55 S. W. 1091; State v. Smith, 119 Tenn. 521, 105 S. W. 68.

None of the forty-five counts of the complaint contain any allegation that the defendant knowingly assisted, encouraged, or solicited the migration or importation to the United States of the person named in each count, or that the defendant knew at the time that such person was an "alien contract laborer," as defined by the statute.

Pettibone v. United States, 148 U. S. 197, 202, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542; United States v. Gay, 37 C. C. A. 46, 95 Fed. 226; Moffitt v. United States, 63 C. C. A. 117, 128 Fed. 375; Ledbetter v. United States, 170 U. S. 606, 42 L. ed. 1162, 18 Sup. Ct. Rep. 774; United States v. Cook, 17 Wall. 168, 174, 21 L. ed. 538, 539; United States v. Cruikshank, 92 U. S. 542, 558, 23 L. ed. 588, 593; United States v. Carll, 105 U. S. 611, 26 L. ed. 1135, 4 Am. Crim. Rep. 246; United States v. Simmons, 96 U. S. 360, 24 L. ed. 819; United States v. Hess, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep.

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571; Evans v. United States, 153 U. S. 584, 38 L. ed. 830, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; Armour Packing Co. v. United States, 209 U. S. 79, 52 L. ed. 693, 28 Sup. Ct. Rep. 428.

Failure to allege an essential element of a statutory offense is fatal, can be taken advantage of at any time, and is not cured by verdict.

Supreme Lodge, K. P. v. McLennan, 171 Ill. 417, 49 N. E. 530, affirming 69 Ill. App. 599; Evans v. Gerken, 105 Cal. 311, 38 Pac. 725; Morris v. Courtney, 120 Cal. 63, 52 Pac. 129; United States v. Carll, 105 U. S. 611, 26 L. ed. 1135, 4 Am. Crim. Rep. 246; 1 Bishop, New Crim. Proc. ¶ 123, subdiv. 3; Teal v. Walker, 111 U. S. 242, 28 L. ed. 415, 4 Sup. Ct. Rep. 420; Kentucky Life & Acci. Ins. Co. v. Hamilton, 11 C. C. A. 42, 22 U. S. App. 386, 548, 63 Fed. 93; Slacum v. Pomery, 6 Cranch, 221, 3 L. ed. 205.

The hearing of the board of special inquiry was a star chamber proceeding.

United States v. Sing Tuck, 194 U. S. 161, 48 L. ed. 917, 24 Sup. Ct. Rep. 621.

The functions of a board of special inquiry are not judicial, but are ministerial.

Pearson v. Williams, 202 U. S. 281, 50 L. ed. 1029, 26 Sup. Ct. Rep. 608.

The hearing of the board "shall be separate and apart from the public," but the determination of the board is not final, even if not appealed from, but subject to collateral attack by the United States, if favorable to the alien.

Li Sing v. United States, 180 U. S. 488, 45 L. ed. 635, 21 Sup. Ct. Rep. 449.

The order of the special board of inquiry is not competent as a public record. It is in the same category as inquisitions of lunacy and coroners' verdicts as to the cause of death of deceased persons. In the following cases, the order of committal of persons to an asylum was excluded as incompetent:

Leggate v. Clark, 111 Mass. 310; Naanes v. State, 143 Ind. 299, 42 N. E. 609; Dewey v. Allgire, 37 Neb. 9, 40 Am. St. Rep. 468, 55 N. W. 276.

As to the competency of coroners' verdicts, they have been held to be incompetent in the following cases:

State v. Turner, Wright (Ohio) 20; Wheeler v. State, 34 Ohio St. 398, 32 Am. Rep. 372; Colquit v. State, 107 Tenn. 381, 64 S. W. 713; Memphis & C. R. Co. v. Womack, 84 Ala. 149, 4 So. 618; Hollister v. Cordero, 76 Cal. 649, 18 Pac. 855; Rowe v. Such, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760; Germania L. Ins. Co. v. Ross Lewin, 24 Colo. 43, 65 Am. St. Rep. 215, 51 Pac. 488; Central R. Co. v. Moore, 61 Ga. 151; State use of Grice v. Cecil County, 54 Md. 426; Supreme Council, R. A. v. Brashears, 89 Md. 624, 73 Am. St. Rep. 244, 43 Atl. 866; Wasey v. Travelers' Ins. Co. 126 Mich. 119, 85 N. W. 459; Cox v. Royal Tribe, 42 Or. 365, 60 L.R.A. 620, 95 Am. St. Rep. 752, 71 Pac. 73.

An agency or the extent of an agency, or the authority of an agent, cannot be proven by the acts and declarations of the person professing authority to act as such agent; nor are the acts and declarations of such a person admissible as admissions against the principal until the authority to bind the principal is shown.

United States v. Boyd, 5 How. 29, 12 L. ed. 36; Regan v. United States, 13 L.R.A. (N.S.) 1073, 105 C. C. A. 505, 183 Fed. 293.

A commission issued without notice having been served is void, for without such, the clerk would have no authority to issue the commission, and the officer taking the depositions likewise did so without authority.

Harris v. Wall, 7 How. 695, 12 L. ed. 875.

If the defendant thought the notice for the second judicial district court was bad, its course was to treat it as a nullity, which in fact it was, and move to suppress the depositions, if taken.

Kline Bros. & Co. v. Liverpool & L. & G. Ins. Co. 184 Fed. 969.

A party who attempts to use a deposition of an absent witness must show that he has given his adversary an opportunity to cross-examine by a notice that is definite and certain.

Knode v. Williamson, 17 Wall. 587, 21 L. ed. 671.

Depositions taken after an adjournment of a week are not taken according to a notice that they will be taken upon a specified day, and, if not completed in one day, the commissioners will adjourn from day to day thereafter until finished.

Buddicum v. Kirk, 3 Cranch, 293, 2 L. ed. 444.

The authority to take depositions in this manner, in derogation of the common law, has always been construed strictly, and therefore it is necessary to establish that all the requisitions of the law have been complied with before such testimony is admissible.

Western U. Teleg. Co. v. Collins, 45 Kan. 94, 10 L.R.A. 515, 25 Pac. 187; Garner v. Cutler, 28 Tex. 183; Harris v. Wall, 7 How. 695, 12 L. ed. 875.

A notice that a party will, at a certain place and time, take a deposition, has been held insufficient to support a deposition taken at a different place, though next door, on the same street.

Indiana Baptist Pub. Co. v. Ayer, 34 Ind. App. 284, 72 N. E. 151.

The use of depositions in this case to re-

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cover a penalty as a punishment for a criminal act was improper, and infringed on the constitutional right to be confronted by the witnesses.

United States v. Stevenson, 215 U. S. 200, 54 L. ed. 157, 30 Sup. Ct. Rep. 37; Lees v. United States, 150 U. S. 476, 480, 37 L. ed. 1150, 1151, 14 Sup. Ct. Rep. 163; Boyd v. United States, 116 U. S. 616, 634, 39 L. ed. 746, 753, 6 Sup. Ct. Rep. 524; Regan v. United States, 13 L.R.A.(N.S.) 1073, 105 C. C. A. 505, 183 Fed. 293, 121 C. C. A. 543, 203 Fed. 433, 232 U. S. 37, ante, 494, 34 Sup. Ct. Rep. 213; Chaffee v. United States, 18 Wall. 518, 21 L. ed. 908; United States v. Shapleigh, 4 C. C. A. 237, 12 U. S. App. 26, 54 Fed. 126; Hepner v. United States, 213 U. S. 103, 53 L. ed. 720, 27 L.R.A.(N.S.) 739, 29 Sup. Ct. Rep. 474, 16 Ann. Cas. 960; United States v. Zucker, 161 U. S. 475, 40 L. ed. 777, 16 Sup. Ct. Rep. 641; United States v. Chouteau, 102 U. S. 611, 26 L. ed. 249; Coffey v. United States, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437; Huntington v. Attrill, 146 U. S. 664, 36 L. ed. 1127, 13 Sup. Ct. Rep. 224.

In any case where a verdict for one of the parties must have been set aside, as being without meritorious support in the evidence, it is proper for the trial court to direct a verdict.

Ryder v. Wombwell, L. R. 4 Exch. 39, 38 L. J. Exch. N. S. 8, 19 L. T. N. S. 491, 17 Week. Rep. 167; Giblin v. McMullen, L. R. 2 P. C. 335, 5 Moore, P. C. C. N. S. 434, 38 L. J. P. C. N. S. 25, 21 L. T. N. S. 214, 17 Week. Rep. 445; Schuylkill & D. Improv. & R. Co. v. Munson, 14 Wall. 448, 20 L. ed. 872; Parks v. Ross, 11 How. 373, 13 L. ed. 735; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 637, 19 L. ed. 1015; Hickman v. Jones, 9 Wall. 201, 19 L. ed. 553; Re Morey, 147 Cal. 495, 82 Pac. 57.

Where but one reasonable inference or conclusion can be drawn from the evidence, it is the duty of the trial court to direct a verdict or set aside a verdict already rendered. An inference from circumstances of a material fact, which is opposed to facts established in the case beyond dispute, and which is opposed to all reasonable probabilities, does not raise a substantial conflict in the evidence, and does not prevent the court from directing a verdict, or from setting aside a verdict already rendered.

Badger v. Janesville Cotton Mills, 95 Wis. 590, 70 N. W. 687, 2 Am. Neg. Rep. 272; Flaherty v. Harrison, 98 Wis. 559, 74 N. W. 360; Vorbrich v. Geuder & P. Mfg. Co. 96 Wis. 277, 71 N. W. 434, 3 Am. Neg. Rep. 750; Cawley v. La Crosse City R. Co. 101 Wis. 145, 77 N. W. 179; O'Brien v. Chicago, St. P. M. & O. R. Co. 102 Wis. 628, 78 N. W. 1084; Collins v. Janesville, 117 Wis. 415, 94 N. W. 309; Pleasants v. Fant, 22 Wall. 116, 22 L. ed. 780; Minahan v. Grand Trunk Western R. Co. 70 C. C. A. 463, 138 Fed. 37; Schaub v. Kansas City Southern R. Co. 133 Mo. App. 444, 113 S. W. 1163.

The governing officers of the defendant corporation, and they only, should be regarded as the corporation in determining whether the defendant corporation knowingly assisted, encouraged, or solicited the migration or importation of any alien contract laborers.

Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. Rep. 261; Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998; Hindman v. First Nat. Bank, 48 L.R.A. 210, 39 C. C. A. 1, 98 Fed. 562; Denver & R. G. R. Co. v. Harris, 122 U. S. 597, 30 L. ed. 1146, 7 Sup. Ct. Rep. 1286; Salt Lake City v. Hollister, 118 U. S. 256, 30 L. ed. 176, 6 Sup. Ct. Rep. 1055; Philadelphia. W. & B. R. Co. v. Quigley, 21 How. 202, 16 L. ed. 73; Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 108, 114, 37 L. ed. 101, 103, 13 Sup. Ct. Rep. 261; United States v. John Kelso Co. 86 Fed. 304; State v. Morris & E. R. Co. 23 N. J. L. 360; Reg. v. Great North of England R. Co. 9 Q. B. 315; Com. v. New Bedford Bridge, 2 Gray, 339.

The general rule is that a master or principal is not liable criminally for the criminal acts of his servant or agent unless he directed, assented to, or acquiesced in, such illegal acts.

Taylor v. Nixon [1910] 2 I. R. 94; Rex v. Huggins, 2 Ld. Raym. 1574; 2 Enc. L. & Pr. 834; 20 Am. & Eng. Enc. Law, 2d ed. 176; 26 Cyc. 1545; 1 Clark & M. Agency, p. 1140; Mechem, Agency, ¶ 746; Franklin F. Ins. Co. v. Bradford, 88 Am. St. Rep. 797, note; Hoover v. Wise, 91 U. S. 311, 23 L. ed. 394; Whitton v. State, 37 Miss. 379; Anderson v. State, 22 Ohio St. 305; Com. v. Nichols, 10 Met. 259, 43 Am. Dec. 432; Com. v. Junkin, 170 Pa. 194, 31 L.R.A. 124, 32 Atl. 617; Cushing v. Dill, 2 Ill. 460; Cushman v. Oliver, 81 Ill. 444; Satterfield v. Western U. Teleg. Co. 23 Ill. App. 446; State v. Baltimore & O. R. Co. 15 W. Va. 362, 36 Am. Rep. 803; Hall v. Norfolk & W. R. Co. 44 W. Va. 36, 41 L.R.A. 669, 67 Am. St. Rep. 757, 28 S. E. 754; Williams v. Hendricks, 115 Ala. 277, 41 L.R.A. 650, 67 Am. St. Rep. 32, 22 So. 439; State v. Bacon, 40 Vt. 456; People v. Parks, 49 Mich. 333, 13 N. W. 618; Whitecraft v. Vandever, 12 Ill. 235; Nall v. State, 34 Ala. 262; Seibert v. State, 40 Ala. 60; Spokane v. Patterson, 46 Wash. 93, 8 L.R.A.(N.S.) 1104, 123 Am. St. Rep. 921, 89 Pac. 402, 13 Ann. Cas. 706; Hipp v. State, 5 Blackf. 149, 33 Am. Dec. 463; Hale, P. C. 114.

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There is an exception to the general rule under statutes in cases where guilty knowledge or intent is not an essential element in the offense, and the act done is absolutely prohibited, whether done by master or servant wittingly or negligently or innocently; also, of course, under statute where the master is, by the express terms of the statute, made criminally liable for acts done.

Greenl. Ev. 16th ed. §§ 21, 26, and notes; State v. Kittelle, 110 N. C. 560, 15 L.R.A. 694, 28 Am. St. Rep. 698, 15 S. E. 103; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 579, 55 L. ed. 582, 590, 31 Sup. Ct. Rep. 612; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617; New York C. & H. R. R. Co. v. United States, 212 U. S. 481, 53 L. ed. 613, 29 Sup. Ct. Rep. 304; Robinson v. State, 38 Ark. 641; Com. v. Emmons, 98 Mass. 6; Hosford v. Mackey, [1897] 2 I. R. 292; Walters v. State, 174 Ind. 545, 92 N. E. 537; People v. Roby, 52 Mich. 577, 50 Am. Rep. 270, 18 N. W. 365; State v. Gilmore, 80 Vt. 514, 16 L.R.A.(N.S.) 786, 68 Atl. 658, 13 Ann. Cas. 321; Nadorff Bros. v. Louisville, 144 Ky. 135, 137 S. W. 854; Olson v. State, 143 Wis. 413, 127 N. W. 975; Lehman v. District of Columbia, 19 App. D. C. 217; State v. Nichols, 67 W. Va. 659, 33 L.R.A.(N.S.) 419, 69 S. E. 304, 21 Ann. Cas. 184; State v. Tomasi, 67 Vt. 312, 31 Atl. 780; State v. Ackerly, 79 Vt. 69, 118 Am. St. Rep. 940, 64 Atl. 450, 8 Ann. Cas. 1103; Carroll v. State, 63 Md. 551, 3 Atl. 29; McCutcheon v. People, 69 Ill. 606, 1 Am. Crim. Rep. 471; Mogler v. State, 47 Ark. 110, 14 S. W. 473; Snider v. State, 81 Ga. 753, 12 Am. St. Rep. 350, 7 S. E. 631; Hall v. Passaic Water Co. 83 N. J. L. 771, 43 L.R.A.(N.S.) 753, 85 Atl. 349; Whitton v. State, 37 Miss. 379; O'Donnell v. Com. 108 Va. 882, 62 S. E. 373; Com. v. Uhrig, 138 Mass. 492, 5 Am. Crim. Rep. 323; People v. Blake, 52 Mich. 566, 18 N. W. 360; State v. O'Connor, 58 Minn. 193, 59 N. W. 999; Com. v. Warren, 160 Mass. 533, 36 N. E. 308; Brown v. Foot, 66 L. T. N. S. 649, 17 Cox, C. C. 509, 61 L. J. Mag. Cas. N. S. 110, 56 J. P. 581.

In the case at bar the guilty knowledge of the defendant company is an essential ingredient of the offense. The general rule applies that the master is not criminally responsible unless he participates in, authorizes, or consents to the unlawful act. The exception to the rule in cases where knowledge is not an essential element of the offense has no application to the present case.

St. Louis & S. F. R. Co. v. United States, 94 C. C. A. 437, 169 Fed. 69; Felton v. United States, 96 U. S. 699, 703, 24 L. ed. 875, 876; United States v. Beaty, Hempst. 487, Fed. Cas. No. 14,555; Chisholm v. Doulton, L. R. 22 Q. B. Div. 736, 58 L. J. Mag. Cas. N. S. 133, 60 L. T. N. S. 966, 37 Week. Rep. 749, 16 Cox, C. C. 675, 53 J. P. 550; Verona Central Cheese Co. v. Murtaugh, 50 N. Y. 314; Conlon v. Muldowney [1904] 2 I. R. 498; State v. Smith, 10 R. I. 258; State v. Hayes, 67 Iowa, 27, 24 N. W. 575, 6 Am. Crim. Rep. 335; Taylor v. Nixon [1910] 2 I. R. 94; Williams v. Hendricks, 115 Ala. 277, 41 L.R.A. 650, 67 Am. St. Rep. 32, 22 So. 439; Patterson v. State, 21 Ala. 571.

Every lawful instruction from principal to agent is to be considered as given in good faith until the contrary is shown.

Com. v. Johnston, 2 Pa. Super. Ct. 317; Hosford v. Mackey [1897] 2 I. R. 292.

Even if the defendant construction company had not positively forbidden Carney to employ or talk to any laborers in Mexico, no implied authority of Carney to do an illegal act can be presumed from his mere employment by the appellant.

Russell v. State, 71 Ala. 348; Sagers v. Nuckolls, 3 Colo. App. 95, 32 Pac. 187; Com. v. Stevens, 155 Mass. 291, 29 N. E. 508; Williams v. Hendricks, 115 Ala. 277, 41 L.R.A. 650, 67 Am. St. Rep. 32, 22 So. 439; Com. v. Nichols, 10 Met. 259, 43 Am. Dec. 432; Reg. v. Holbrook, L. R. 3 Q. B. Div. 60, 47 L. J. Q. B. N. S. 35, 37 L. T. N. S. 530, 26 Week. Rep. 144, 13 Cox, C. C. 650, 2 Am. Crim. Rep. 643; Washington Gaslight Co. v. Lansden, 172 U. S. 534, 43 L. ed. 543, 19 Sup. Ct. Rep. 296.

The knowledge contemplated by the statute, essential to be proven in the case at bar, is actual knowledge, and not constructive knowledge, or notice of facts which, upon inquiry, would lead to actual knowledge.

24 Cyc. 806; Webster's Dict.; Century Dict.; Wigmore, Ev. § 300.

If Congress had intended to make ignorance or failure to make inquiry, where inquiry seems called for, tantamount to actual knowledge itself, it would have so provided, and imposed a penalty upon all those who "knowingly violated the act, or, in the exercise of reasonable diligence, should have known of its violation;" but the statute is positive, clear, and unambiguous. It punishes only a knowing violation. The lower court has wrongfully extended the act of Congress beyond its plain meaning, and has judicially interpolated a limit in the statute which is wholly at variance with the great weight of authority on this subject.

Yates v. Jones Nat. Bank, 206 U. S. 158, 179, 51 L. ed. 1002, 1015, 27 Sup. Ct. Rep. 638; McDonald v. Williams, 174 U. S. 397,

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43 L. ed. 1022, 19 Sup. Ct. Rep. 743; Potter v. United States, 155 U. S. 438, 446, 39 L. ed. 214, 217, 15 Sup. Ct. Rep. 144; Utley v. Hill, 155 Mo. 264, 49 L.R.A. 323, 78 Am. St. Rep. 569, 55 S. W. 1091; Felton v. United States, 96 U. S. 699, 24 L. ed. 875; State v. McBarron, 66 N. J. L. 680, 51 Atl. 146; Quinebaug Bank v. Brewster, 30 Conn. 559; Masterson v. West End Narrow-Gauge R. Co. 5 Mo. App. 64.

The jury were wrongfully instructed to find for the government and against the defendant if they were "satisfied," or if they "find," or if they "believe" from the evidence, or if they find some "circumstance which would warrant the inference" that the defendant company was guilty of the offense charged against it. The jury should have been instructed that the government must prove each and every essential element of its case "beyond a reasonable doubt."

United States v. Stevenson, 215 U. S. 190, 54 L. ed. 153, 30 Sup. Ct. Rep. 35; United States v. Chouteau, 102 U. S. 611, 26 L. ed. 249; Regan v. United States, 31 L.R.A. (N.S.) 1073, 105 C. C. A. 505, 183 Fed. 293, 121 C. C. A. 543, 203 Fed. 433; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Lees v. United States, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163; Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; Equitable Life Assur. Soc. v. Com. 113 Ky. 126, 67 S. W. 388; Coffey v. United States, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437; Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; Atchison, T. & S. F. R. Co. v. People, 227 Ill. 270, 81 N. E. 342; Riker v. Hooper, 35 Vt. 457, 82 Am. Dec. 646; White v. Comstock, 6 Vt. 405; Small & Co. v. Com. 134 Ky. 272, 120 S. W. 361; United States v. The Burdett, 9 Pet. 682, 9 L. ed. 273; Gilbert v. Bone, 79 Ill. 341.

Under the statute in this case one shipment of laborers constitutes but one misdemeanor, and but one penalty is incurred.

Baltimore & O. S. W. R. Co. v. United States, 220 U. S. 94, 55 L. ed. 384, 31 Sup. Ct. Rep. 368; Standard Oil Co. v. United States, 90 C. C. A. 364, 164 Fed. 376.

The complaint contains no allegation of "knowledge" and the general denial raises no such issue. It is erroneous to submit a pretended issue to the jury not raised by the pleading.

11 Enc. Pl. & Pr. p. 159, and cases cited.

There can be no ratification of an act made a "misdemeanor" so as to make the person ratifying the same responsible for such act.

1 Clark & M. Agency, p. 1142; Morse v. State, 6 Conn. 9; Wilson v. Barber, 4 Barn. & Ad. 614, 1 Nev. & M. 409.

One cannot be said "to consent to an act of the commission of which he had no knowledge."

McDonald v. Williams, 174 U. S. 397, 406, 43 L. ed. 1022, 1026, 19 Sup. Ct. Rep. 743.

In criminal proceedings costs are a creature of statute, and the court cannot award them unless some statute has conferred the power.

United States ex rel. Phillips v. Gaines, 131 U. S. clxix, appx. and 25 L. ed. 733; United States v. Ringgold, 8 Pet. 150, 8 L. ed. 899; Antoni v. Greenhow, 107 U. S. 769, 27 L. ed. 468, 2 Sup. Ct. Rep. 91.

If the defendant company had succeeded in securing a verdict in its favor, the court would have had no power to tax costs against the government. The rule should work both ways, and for that reason the government should not have any judgment against the defendant for costs, as the statute creating the penalty contains no such provision, and does not authorize the same.

United States v. Verdier, 164 U. S. 213, 41 L. ed. 407, 17 Sup. Ct. Rep. 42; Pine River Lodging & Improv. Co. v. United States, 186 U. S. 279, 46 L. ed. 1164, 22 Sup. Ct. Rep. 920.

Assistant Attorney General Wallace argued the cause and filed a brief for defendant in error:

For lack of assignment of error below, only such as are mentioned and considered in the opinion of the territorial supreme court are open to review.

Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, ante, 521, 34 Sup. Ct. Rep. 229.

Defendants below have estopped themselves from urging the objection that the complaint fails to state a cause of action because of lack of averments that the acts complained of were knowingly done:

(a) By suffering evidence as to their knowledge to be received without objection on the trial, and themselves introducing all their evidence to show lack of knowledge or connection with the unlawful acts of Carney et al. (which was their entire defense).

Renner v. Bank of Columbia, 9 Wheat. 581–596, 6 L. ed. 166–169; Reynolds v. Stockton, 140 U. S. 266, 35 L. ed. 468, 11 Sup. Ct. Rep. 773.

(b) By asking the court to charge that only when knowledge was proven could a verdict be returned for plaintiff, thereby admitting that with such evidence of knowledge a verdict for plaintiff could be properly returned.

Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 88, 39 L. ed. 624, 630, 15 Sup. Ct. Rep. 491.

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(c) By admitting in the territorial supreme court that Carney and his associates had violated the act, and that the only question as to the judgment of the trial court was whether it was sustained by evidence connecting them with such unlawful acts.

Bigelow, Estoppel, 5th ed. 717, 719, 720.

This case is not criminal in its nature.

United States v. Regan, 232 U. S. 37, ante, 494, 34 Sup. Ct. Rep. 213.

Had the point been presented, the territorial supreme court could not properly (in the face of the allegation that the acts were done "in violation of the act," and the admission of all the evidence on the question of knowledge, both for the plaintiff and defendant, and the request for charge by defendant on the issue of knowledge; *i. e.*, the complete trial on the theory that the issue was raised) have reversed the cause on such ground.

San Juan Light & T. Co. v. Requena, 224 U. S. 89, 56 L. ed. 680, 32 Sup. Ct. Rep. 399; Campbell v. United States, 224 U. S. 99, 106, 56 L. ed. 684, 686, 32 Sup. Ct. Rep. 398; Pickett v. United States, 216 U. S. 456, 462, 54 L. ed. 566, 569, 30 Sup. Ct. Rep. 265; Pico v. United States, 228 U. S. 225, 231, 232, 57 L. ed. 812, 814, 815, 33 Sup. Ct. Rep. 482; Western Stone Co. v. Whalen, 151 Ill. 472, 42 Am. St. Rep. 244, 38 N. E. 241; Pullman Palace Car Co. v. Connell, 74 Ill. App. 447; Morriss Bros. v. Bowers, 105 Tenn. 60, 58 S. W. 328.

The record of the board of special inquiry was properly admitted in evidence upon the issue of alienage.

Zakonaite v. Wolf, 226 U. S. 275, 57 L. ed. 220, 33 Sup. Ct. Rep. 31.

When a cause is tried on the theory that certain facts exist, even though they are put in issue by the pleadings, their existence will be assumed on appeal.

21 Enc. Pl. & Pr. 667, 668; 17 Am. & Eng. Enc. Law, 2d ed. 447, 448; Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 88, 39 L. ed. 624, 630, 15 Sup. Ct. Rep. 491; Davis v. Wakelee, 156 U. S. 680, 689, 39 L. ed. 578, 584, 15 Sup. Ct. Rep. 555; The New Philadelphia (Camden & A. R. & Transp. Co. v. Brady) 1 Black, 62, 17 L. ed. 84; Canton Roll & Mach. Co. v. Rolling Mill Co. 155 Fed. 321; Brown v. Gurney, 201 U. S. 184, 190, 50 L. ed. 717, 720, 26 Sup. Ct. Rep. 509.

And the court will resort to the record below to determine the position there taken.

21 Enc. Pl. & Pr. 669.

Where the question relates to the tendency of certain testimony to throw light upon a particular fact or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appears that the testimony has no legitimate bearing upon the question at issue, and is calculated to prejudice the accused in the minds of the jurors.

Moore v. United States, 150 U. S. 57, 60, 37 L. ed. 996, 997, 14 Sup. Ct. Rep. 26; Clune v. United States, 159 U. S. 590, 593, 40 L. ed. 269, 16 Sup. Ct. Rep. 125; Williamson v. United States, 207 U. S. 425, 451, 52 L. ed. 278, 292, 28 Sup. Ct. Rep. 163.

The irregularity in the depositions was a mere formal one and could not prejudice plaintiffs in error.

Agnew v. United States, 165 U. S. 36, 44, 41 L. ed. 624, 627, 17 Sup. Ct. Rep. 235.

Appellant waived the irregularity.

Killian v. Augusta & K. R. Co. 78 Ga. 752, 3 S. E. 621.

The importation of forty-five laborers incurred forty-five penalties.

Missouri, K. & T. R. Co. v. United States, 231 U. S. 112, ante, 144, 34 Sup. Ct. Rep. 26.

One who has taken a particular position deliberately in the course of a litigation must act consistently with it.

Bigelow, Estoppel, 5th ed. 717, 719, 720.

Mr. Justice Van Devanter delivered the opinion of the court:

In an action of debt, tried to the court and a jury, in one of the district courts of the territory of Arizona, the United States recovered a judgment against the Grant Brothers Construction Company, a California corporation, for the prescribed penalty of $1,000 for each of forty-five alleged violations of § 4 of the alien immigration act of February 20, 1907 (34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1911, p. 499); and upon an appeal to the supreme court of the territory, the judgment was affirmed. 13 Ariz. 388, 114 Pac. 955. The construction company and the surety upon its supersedeas bond then sued out this writ of error, claiming that divers errors had been committed by the trial court which should have been, but were not, corrected by the appellate court.

[657] The portions of the statute upon which the action was founded are as follows:

"Sec. 2. That the following classes of aliens shall be excluded from admission into the United States: . . . persons hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment, or in consequence of agreements, oral, written, or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled; . . . And provided further, That skilled labor may be imported if labor of like kind unemployed cannot be found in this country: And provided fur-

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ther, That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants.

. . . . . .

"Sec. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this act.

"Sec. 5. That for every violation of any of the provisions of section four of this act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States, shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his [658] own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States."

The petition contained forty-five counts, each charging, with considerable detail, that the defendant, by offers and promises of employment and by providing transportation and paying expenses, assisted, encouraged, and solicited the migration and importation into the United States from Mexico of a designated alien laborer who was not within the terms of either of the last two provisos in § 2 of the statute. A different alien laborer was named in each count, and the date of the offending act was given in all as October 29, 1909.

In a preliminary way, the evidence tended to show these facts: The construction company was building a line of railroad in southern Arizona, near Naco, a town on the international boundary. Laborers in large numbers were required for the work, and in August, 1909, the company employed one Carney to procure laborers for it and to take them to the vicinity of the work. For this he was to be paid $1 in gold for each laborer secured, and 20 cents for each meal provided while they were *en route*. It was contemplated that he would arrange with others to aid him, and he secured the assistance of Holler, Rupelius, and Randall, who, like himself, were located at Nogales, another boundary town. Under this employment Carney procured, and the company accepted, prior to the transaction in question, about 450 laborers, 95 per cent of whom were Mexicans. Many of these came across the line on their own initiative and were then engaged by Holler, but a substantial number were engaged in Mexico [659] by Rupelius, and then brought into the United States at Nogales. Only a few days before the transaction in question, Rupelius gathered together 80 or 90 in Mexico, and induced them to enter the United States at Nogales by promising that the construction company would employ them, which it did.

As respects the forty-five laborers named in the petition there was evidence tending to show the following: These men were citizens of Mexico, and were unskilled laborers who were not within the exemptions specified in the last two provisos in § 2 of the statute. They were secured at Hermosillo, Mexico, by Rupelius, October 28, 1909, were brought into the United States, at Naco, by Randall the next day, were there taken into custody by an immigration inspector, and were examined before a board of special inquiry. The board found that they were alien contract laborers, ordered that they be excluded, and notified them of the order and of their right to an appeal. After consulting with the Mexican consul at Naco they waived that right, and most of them were returned to Mexico, a few being detained as witnesses. Rupelius had induced them to leave Hermosillo and come into the United States by offers and promises of employment by the construction company. They were brought to Naco upon a railroad pass procured by Carney, and purporting to have been issued on account of the construction company, and their only meal *en route* was provided by Holler at Carney's suggestion. During the latter part of their journey they were in charge of Randall, who had been directed by Carney to deliver them to McDonald, an agent of the construction company, who was expected to be at Naco to receive them. McDonald was there, having come in from one of the company's camps that day. He endeavored to hasten the proceedings before the board of inquiry in order that he might get the men out to the camp that afternoon, and also provided a meal for them while the proceed-

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ings [660] were in progress. This was the first party of Mexicans that Carney had attempted to bring into the country at Naco. Others had been brought in at Nogales. According to his statement, the inspection officers at the latter place had been particularly liberal in admitting Mexican laborers procured for the construction company; and he suggested to the inspectors at Naco that like action on their part would be appreciated, but the suggestion did not find favor with them.

There were some direct contradictions in the evidence, different portions gave rise to opposing inferences, and parts of it were more or less improbable; but as it was the province of the jury to pass on such matters, which it did by the verdict, they require no other notice than they will receive presently.

As several of the alleged errors, not involving anything fundamental or jurisdictional, were not presented to the appellate court for consideration, they must be regarded as waived, and will be passed without further notice. Montana R. Co. v. Warren, 137 U. S. 348, 351, 34 L. ed. 681, 682, 11 Sup. Ct. Rep. 96; Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, 98, ante, 521, 523, 34 Sup. Ct. Rep. 229.

It is complained that the trial court permitted the government to read in evidence the depositions of absent witnesses, instructed the jury to return a verdict for the government if the evidence reasonably preponderated in its favor, and in other ways treated the case as civil in substance as well as in form. But the trial court was right. An action such as this is civil, and is attended with the usual incidents of a civil action. United States v. Regan, 232 U. S. 37, ante, 494, 34 Sup. Ct. Rep. 213.

The petition did not allege that the acts charged against the construction company were knowingly done, and it is said that this operated to render the recovery erroneous. No doubt the petition was defective. A right to the penalty arises only where § 4 is violated "by knowingly assisting, encouraging, or soliciting the migration or importation" [661] of an alien contract laborer into the United States. Knowledge being an element of what is penalized, it must be included in the statement of a cause of action for the penalty. But there are reasons why the defect did not render the recovery erroneous. The defect was not pointed out in the trial court. On the contrary, the case was tried as if the omitted allegation were in the petition. Both parties introduced evidence bearing upon the company's knowledge, both presented requests for instructions treating it as an essential factor in the case, and the jury was instructed upon that theory. In its charge the court said that before any verdict could be returned for the government it must appear from the evidence that some representative of the defendant company, for whose act it would be responsible, "knowingly assisted, or knowingly encouraged, or knowingly solicited, or knowingly caused others to assist or encourage or solicit, the migration or importation of an alien Mexican contract laborer into the United States." And again: "Where knowledge is an essential ingredient of a cause of action, the existence of the knowledge becomes a question to be determined by the jury upon a consideration of all the facts and circumstances in the case." It is therefore quite plain that the jury found from the evidence that the acts charged against the defendant were knowingly done, and the petition may well be treated as amended to conform to the facts. Ariz. Rev. Stat. 1901, §§ 1288, 1293; Reynolds v. Stockton, 140 U. S. 254, 266, 35 L. ed. 464, 468, 11 Sup. Ct. Rep. 773. The defendant was in no wise prejudiced by the defect, and to make it a ground for reversing the judgment, notwithstanding the theory upon which the trial proceeded, would be most unreasonable. San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 96, 56 L. ed. 680, 683, 32 Sup. Ct. Rep. 399; Campbell v. United States, 224 U. S. 99, 106, 56 L. ed. 684, 686, 32 Sup. Ct. Rep. 398.

Complaint is made of the denial of a motion to suppress certain depositions, subsequently read in evidence, which the government had taken under a commission issued by [662] the clerk. The only ground for the motion to which our attention is invited is that the preliminary notice described the case as pending in the second district when it was pending in the first. The case had been brought in the former, and was transferred to the latter at the defendant's instance. The notice and accompanying interrogatories were prepared before and served after the transfer. The purpose of the notice was to inform defendant's counsel of the intended application for a commission, and of the proposed interrogatories, and to give opportunity for filing cross interrogatories. See Ariz. Rev. Stat. 1901, §§ 2507, 2513. No cross interrogatories were filed in either district, and after the expiration of the time allowed for them the clerk of the district in which the case was pending issued the commission. Counsel for the defendant could not have been misled or confused by the error in the notice, for they were fully informed of the transfer, having perfected it the day before the

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notice was served. In these circumstances the trial court, as also the supreme court of the territory, held that the error was inconsequential and did not require the suppression of the depositions. We perceive no reason for disturbing that conclusion. On the contrary, we think it was plainly correct.

Over the defendant's objection, the decision of the board of special inquiry was admitted in evidence as tending to prove that the forty-five men were aliens, and it is said that this was error because the defendant was not a party to the proceeding. One of the questions committed by law to the board for decision, subject to an appeal to the Secretary of Commerce, was whether the men were aliens. The document admitted in evidence disclosed that, after a hearing, the board determined that question in the affirmative, and that the men acquiesced by waiving their right to an appeal. In that way their status as aliens was conclusively established as between themselves and the United States. It is true that the defendant was not a [663] party to that proceeding, and that, as a general rule, a judgment binds only the parties and their privies. But it is equally true that a judgment in a prior action is admissible, even against a stranger, as prima facie, but not conclusive, proof of a fact which may be shown by evidence of general reputation, such as custom, pedigree, race, death, and the like, and this because the judgment is usually more persuasive than mere evidence of reputation. 1 Starkie, Ev. 380; 1 Greenl. Ev. §§ 139, 526, 555; Patterson v. Gaines, 6 How. 550, 599, 12 L. ed. 553, 573; Pile v. McBratney, 15 Ill. 314, 319; McCollum v. Fitzsimons, 1 Rich. L. 252. In principle, alienage is within the latter rule, and so the board's decision was properly admitted in evidence for the purpose stated.

Considerable evidence was admitted, over the defendant's objection, of the acts and declarations of Carney and his assistants while they were procuring laborers in Mexico and bringing them into the United States, and it is contended that this was violative of the rule that the acts and declarations of a professed agent are not admissible to prove the existence or extent of his agency. See United States v. Boyd, 5 How. 29, 50, 12 L. ed. 36, 45. But the contention rests upon a misconception of what the record discloses. This evidence was not admitted to establish the agency or its extent, but to show that the laborers came into the United States in circumstances which rendered their migration or importation unlawful. Whether the defendant was responsible for what was done was another question. The trial court recognized this, and expressly ruled that the agency must be otherwise shown, and we agree with the territorial courts in thinking there was other evidence tending to prove the agency, and that it embraced what was done.

The evidence disclosed that when the arrangement was made with Carney, and on one or two occasions thereafter, he was in terms instructed not to engage any laborer [664] in Mexico, and not to induce or assist any laborer to migrate thence into the United States, and because of this it is said that the evidence afforded no basis for holding the defendant responsible for the acts of Carney and his assistants in inducing and aiding the migration or importation of the laborers named in the petition. In dealing with this point the courts below held that under the evidence as a whole, it was an admissible conclusion that the instructions to Carney were not given in good faith, or were in effect abrogated by acquiescence in their nonobservance. An examination of the evidence as set forth in the record satisfies us that it afforded reasonable support for either of these conclusions, and therefore that the question was properly one for the jury. And upon looking at the court's charge as incorporated into the record we find that the matter was fairly and adequately submitted.

Although conceding that there was evidence that ten of the men were citizens of Mexico, the company claims that there was no evidence of the alienage of the other thirty-five. It must be held otherwise. Not only did the decision of the board of inquiry constitute such evidence, but it was distinctly testified by some of the men, who became witnesses at the trial, that "they were all Mexicans," meaning thereby, as the context shows, that they were all citizens of Mexico.

Still another contention is that, as all the men named in the petition were brought into the United States at one time, there was but a single violation of the statute, and only one penalty could be recovered. The statute declares that "separate suits may be brought for each alien thus promised labor or service," and this plainly means that a separate penalty shall be assessed in respect of each alien whose migration or importation is knowingly assisted, encouraged, or solicited in contravention of the statute. See Missouri, K. & T. R. Co. v. United States, 231 U. S. 112, ante, 144, 34 Sup. Ct. Rep. 26.

[665] The action of the court in rendering judgment against the defendant for the costs is challenged, but this was so clearly right as to render discussion of it unnecessary. Ariz. Rev. Stat. 1901, §§ 1543, 2639; Kittredge v. Race, 92 U. S. 116, 121, 23

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L. ed. 488, 490; United States v. Verdier, 164 U. S. 213, 219, 41 L. ed. 407, 409, 17 Sup. Ct. Rep. 42.

As we find no prejudicial error in the record, the judgment is affirmed.

DAVID J. STEWART, Plff. in Err.,
v.
PEOPLE OF THE STATE OF MICHIGAN.

(See S. C. Reporter's ed. 665–671.)

Commerce — state regulation — peddlers and drummers.

1. A state may not, consistently with the commerce clause of the Federal Constitution, impose a license tax upon a nonresident merchant traveling from place to place within the state, and soliciting orders by sample, lists, and catalogues for goods which are afterwards shipped into the state in carload lots to his order, and which he delivers from the cars to the persons ordering them.

[For other cases, see Commerce, IV. b, 4, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — decision on non-Federal ground.

2. A conviction in a state court for peddling without a license cannot be deemed to rest upon a non-Federal ground adequate to sustain it, independently of the ruling adverse to rights asserted under the commerce clause of the Federal Constitution, because there was evidence that the defendant made some sales from a railway car or storeroom not under previous orders, and not within the protection of the commerce clause, since peddling being the only charge made against defendant, this latter ground, if upheld, would amount to a condemnation without hearing, and therefore constitute a denial of due process of law.

[For other cases, see Appeal and Error, 1465–1528, in Digest Sup. Ct. 1908.]

[No. 239.]

Argued and submitted March 6, 1914. Decided March 23, 1914.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment which affirmed a conviction in the Circuit Court of Berrien County, in that state, for peddling without a license. Reversed and remanded for further proceedings.

See same case below, 167 Mich. 417, 132 N. W. 1071.

The facts are stated in the opinion.

Mr. George M. Valentine submitted the cause for plaintiff in error. Mr. G. W. Bridgman was on the brief:

The decisions of this court determine the case in favor of the plaintiff in error.

Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; Dill. Mun. Corp. 5th ed. p. 2328, § 1356.

Importation of goods from outside the state, as ordered by purchasers, is an act of interstate commerce, although the goods are shipped to a general agent in the state, who repacks them and sends them to subordinate agents, who deliver them to the purchasers.

Huntington v. Mahan, 142 Ind. 695, 51 Am. St. Rep. 200, 42 N. E. 463; Bloomington v. Bourland, 137 Ill. 534, 3 Inters. Com. Rep. 667, 31 Am. St. Rep. 382, 27 N. E. 692; McLaughlin v. South Bend, 126 Ind. 471, 10 L.R.A. 357, 26 N. E. 185; Martin v. Rosedale, 130 Ind. 109, 29 N. E. 410; Carstairs v. O'Donnell, 154 Mass. 357, 28 N. E. 271; People v. Bunker, 128 Mich. 160, 87 N. W. 90; Stone v. State, 117 Ga. 292, 43 S. E. 740; Turner v. State, 41 Tex. Crim. Rep. 545, 55 S. W. 834; Re Spain, 14 L.R.A. 97, 3 Inters. Com. Rep. 738, 47 Fed. 208; State v. Glasby, 50 Wash. 598, 21 L.R.A. (N.S.) 797, 97 Pac. 734.

NOTE.—On peddlers and drummers, as related to interstate commerce—see notes to Stockard v. Morgan, 46 L. ed. U. S. 785; Re Spain, 14 L.R.A. 97; State v. Bayer, 19 L.R.A.(N.S.) 297; and Dozier v. State, 28 L.R.A(N.S.) 265.

On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

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Mr. Grant Fellows, Attorney General of Michigan, argued the cause and filed a brief for defendant in error:

The state court found as a matter of fact that the plaintiff in error was not only engaged in interstate commerce, but that he was also engaged in domestic commerce. If he was maintaining a warehouse in the city of Benton Harbor, from which he filled orders and did business, he was engaged in intrastate commerce, and the case falls squarely within the holding of this court in American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365.

See also Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367.

This court will not determine the question as to whether the findings of fact by the state court are supported by the evidence, but will take the findings of fact of the state court as conclusive.

Telluride Power Transmission Co. v. Rio Grande Western R. Co. 175 U. S. 639, 647, 44 L. ed. 305, 308, 20 Sup. Ct. Rep. 245; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; Noble v. Mitchell, 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 110; Gardner v. Bonestell, 180 U. S. 362, 370, 45 L. ed. 574, 577, 21 Sup. Ct. Rep. 399; Chrisman v. Miller, 197 U. S. 313, 49 L. ed. 770, 25 Sup. Ct. Rep. 468.

Neither will this court review the construction put upon a state statute by a state court upon error to that court.

Noble v. Mitchell, 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 110; Telluride Power Transmission Co. v. Rio Grande Western R. Co. 187 U. S. 569, 584, 47 L. ed. 307, 313, 23 Sup. Ct. Rep. 178; Gardner v. Bonestell, 180 U. S. 362, 370, 45 L. ed. 574, 577, 21 Sup. Ct. Rep. 399; American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365.

Mr. Chief Justice White delivered the opinion of the court:

Plaintiff in error was tried and convicted in a justice court upon a criminal information which charged that "one David J. Stewart did travel from place to place within the county of Berrien, state of Michigan, for the purpose of taking orders for the purchase of goods, ware, and merchandise, by sample, lists, and catalogues, without having then and there obtained a license as a hawker and peddler, as required and provided by chapter 136 of the Compiled Laws of Michigan of 1897, as amended." From that judgment an appeal was taken to the county court where the cause was tried *de novo* by a jury, resulting again in a conviction, and that judgment was affirmed by the supreme court of the state (167 Mich. 417, 132 N. W. 1071). This writ of error was then prosecuted.

There are several assignments of error of a Federal nature, but the consideration of one—the asserted repugnancy of the statute upon which the warrant was based to the commerce clause of the Constitution of the United States—will enable us to dispose of the case. The statute provides:

"No person shall be authorized to travel from place to place within this state, for the purpose of carrying to sell or exposing to sale any goods, wares, or merchandise, or to take orders for the purchase of goods, wares, or merchandise, by sample, lists, or catalogues, unless he shall have obtained a license as a hawker and peddler in the manner hereinafter directed." [Comp. Laws 1897, § 5324.]

Violation of the statute was made a misdemeanor punishable by fine or imprisonment.

Briefly stated, the material facts, which are uncontroverted, [668] are as follows: The defendant resided in the city of Chicago, where he was engaged in the general merchandise business, but much of his time was spent in the state of Michigan, soliciting orders for groceries and other merchandise to be shipped from his Chicago store. Duplicates of the orders secured were mailed by him to his manager in Chicago, and goods corresponding to the orders were shipped in carload lots from the Chicago store, consigned to the defendant at St. Joseph and other points in Berrien county, Michigan. Upon the arrival of the cars at St. Joseph the goods were delivered to the customers by draymen employed by the defendant, who filled the orders at the car by checking from the original orders, there being no identifying marks on the packages, except as to their contents. Customers living at a distance received notice by mail of the arrival of the cars, and called or sent for their goods. If for any reason any orders were undelivered, the goods corresponding to such orders were returned to the Chicago store, or placed in a storeroom which the defendant hired in Benton Harbor, Michigan, and there is some evidence tending to show that occasional sales were made by the defendant from the storeroom and from the car without previous solicitation.

Upon the above facts the trial court charged the jury as follows:

"In this case it is claimed by the defendant that he was engaged in interstate commerce, and that he was protected by the interstate commerce law.

"Now, it is true that a wholesale merchant or grocer, in the city of Chicago, for instance, can solicit orders through an

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agent in this state, and he can send an agent here to deliver the goods.

"The facts, however, in this case, are different. The goods were shipped here in a car consigned to the defendant himself. The goods were never consigned to the man who made the order, and when they got here they were [669] not the goods of the man who made the order, because if any of those men who had made an order had gone down to the car, they could not have claimed the goods that were there because they could not be identified. The packages were mixed promiscuously in boxes, and there were no names on the packages. Moreover, those goods were not shipped according to the usual course of business, promptly, but there was a delay of some two or three months in the shipment of those goods.

"I hold, gentlemen, that there was no sale ever consummated until the goods were actually delivered by the drayman at the house. Ordinarily the sale is consummated at Chicago (where goods are ordered from Chicago), and the sale is consummated the moment they are shipped at the city of Chicago, directed to the consignee. In this case no sale was consummated whatever until the goods were actually delivered at the house.

"So I hold, practically, that the car was a mere warehouse or place of doing business by the defendant, and it was there that he distributed the goods as he pleased. For that reason, gentlemen, I hold that the defendant comes within the law, and that he is what is called a hawker and peddler.

. . . . . .

"In this case, as it is only a matter of law, and there are no facts in dispute, it will be your duty of course, as a matter of form, to follow the direction of the court. I find, gentlemen of the jury, in this case, that the defendant, under the evidence and the law, is guilty of the charge. . . ."

And the correctness of the charge thus given was in terms sustained by the supreme court of the state in its opinion.

The charge as thus given and affirmed is clearly in conflict with the rule announced in Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294, and the cases there reviewed. Indeed, [670] reference to authority is unnecessary, since it was admitted in the argument at bar that the judgment below, in so far as it affirmed the action of the trial court in holding that there could be a conviction because of the deliveries of merchandise from the cars to fill orders previously solicited and obtained, was erroneous because in conflict with the commerce clause of the Constitution. But it is said although there was manifestly reversible error from this point of view, nevertheless, as from another point of view there was a ground adequate to sustain the judgment, there should be an affirmance. The court below, it is said, not only placed its affirmance upon the erroneous ruling as to the sales made under orders, but also upon the ground that there was evidence showing some sales made from the car or storeroom not under previous orders, and as the latter sales were not within the shelter of the commerce clause, therefore the affirmance on that ground was an independent non-Federal conclusion sustaining the action of the court and calling for the duty of affirmance. But this proposition disregards the fact that the only charge made against the accused was for peddling, and that the instructions of the court and the whole course of the trial conclusively established that the sales made from the car, as the result of the orders solicited, formed the sole basis for the prosecution, and the conviction therefore related to that, and to that alone. If, then, it be admitted that the judgment below was placed upon two grounds, such admission would not establish that the judgment rested upon an independent state ground adequate to sustain it, since the first ground, it is admitted, was Federal and erroneous, and the second ground, if upheld, would amount to a condemnation without hearing, and therefore constitute a denial of due process of law. Thus the proposition, if sustained, would require us to hold that an admitted violation of one constitutional right must be left uncorrected because at the same time another and equally [671] fundamental constitutional right was disregarded; a conclusion which would give effect to both wrongs obviously demonstrates our plain duty to reverse and remand for further proceedings not inconsistent with this opinion.

Reversed.

RICHARD G. RILEY, Plff. in Err.,
v.
COMMONWEALTH OF MASSACHUSETTS.

(See S. C. Reporter's ed. 671-681.)

Constitutional law — due process of law — freedom to contract — hours of women employees.

1. The employment of women for more than ten hours in any one day, or more than

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NOTE.—Constitutionality of statutes limiting hours of labor by women and children.

This question was discussed in a note to Atkin v. Kansas, 48 L. ed. U. S. 148, on Validity of legislation regulating hours of

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fifty-six hours a week, in any manufacturing or mechanical establishment, may be forbidden as is done by Mass. Laws 1909, chap. 514, § 48, which makes the exception that a different apportionment of the hours may be made for the sole purpose of making a shorter day's work for one day of the week, without infringing the liberty of contract assured by the 14th Amendment to the Federal Constitution.

[For other cases, see Constitutional Law, 605-607, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — freedom to contract — hours of women employees.

2. Forbidding the employment of women at a time other than is stated in the notice which the employer must post in a conspicuous place, as is done by Mass. Laws 1909, chap. 514, § 48, regulating the hours of labor for women, is not such an arbitrary and unreasonable provision as to be wanting in the due process of law secured by the 14th Amendment to the Federal Constitution.

[For other cases, see Constitutional Law, 605-607, in Digest Sup. Ct. 1908.]

[No. 228.]

Argued March 4 and 5, 1914. Decided March 23, 1914.

IN ERROR to the Superior Court of the Commonwealth of Massachusetts in and for the County of Bristol to review a judgment entered pursuant to the mandate of the Supreme Judicial Court of that state upon affirmance of a conviction in the Su-

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labor, and only cases reported since the publication of that note are here considered.

The police power of the state generally has been regarded by the courts as broad enough to sustain legislation limiting hours of labor by women and children as essential to their welfare, while recognizing that like legislation for men might not be necessary or valid.

The Illinois "woman's ten-hour law," providing that no female shall be employed in any mechanical establishment or factory or laundry more than ten hours during any one day, was upheld in W. C. Ritchie & Co. v. Wayman, 244 Ill. 509, 27 L.R.A.(N.S.) 904, 91 N. E. 695 (distinguishing Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454, where a similar eight-hour law had been held invalid), as a legitimate exercise of the police power, against the objections that it denied due process of law and was special legislation. In reply to the latter objection, the court said in effect that the peculiar physical structure and maternal functions of women, and the special pressure and spur to which employees in establishments like those named in the statute, whose product is produced by machinery, are subject, furnish a sufficient basis of classification, and justify confining the statute to women and to the kinds of establishments enumerated.

W. C. Ritchie & Co. v. Wayman, supra, was followed in People v. Bowes-Allegretti Co. 244 Ill. 557, 91 N. E. 701.

The daily hours of labor of women in hotels may be limited to ten. People v. Elerding, 254 Ill. 579, 40 L.R.A.(N.S.) 893, 98 N. E. 982.

The constitutionality of a statute making it a misdemeanor to require a female to work in any factory, laundry, or mechanical establishment more than ten hours a day was also upheld in State v. Muller, 48 Or. 252, 120 Am. St. Rep. 805, 85 Pac. 855, 11 Ann. Cas. 88, as a legitimate exercise of the police power, and against the objection that it unduly restricted the freedom of contract, and also against the objection of discrimination with respect to kinds of employment.

This case was affirmed by the United States Supreme Court (Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957). The latter court said in effect that the inequality between men and women in respect of the struggle for existence places woman in a class by herself; and that legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133, was distinguished on that ground.

Females over eighteen years of age may constitutionally be forbidden to work more than ten hours in any one day, or more than fifty-four hours in any one week, in or in connection with any factory, workshop, telephone or telegraph office, millinery or dressmaking establishment, restaurant, or in the distributing and transmission of messages. Ex parte Hawley, 12 Ohio N. P. N. S. 1.

The constitutionality of provisions prohibiting the employment of a child under sixteen years for longer than ten hours in any one day was upheld in State v. Shorey, 48 Or. 396, 24 L.R.A.(N.S.) 1121, 86 Pac. 881.

The Indiana statute which in effect prohibits the employment of persons under sixteen years of age for more than sixty hours in any one week, and the employment of a child under fourteen years of age altogether, in any manufacturing or mercantile establishment, mine, quarry, laundry, renovating works, bakery, or printing office, was upheld in Inland Steel Co. v. Yedinak, 172 Ind. 423, 139 Am. St. Rep. 389, 87 N. E. 229, against the objections that it impaired the obligation of contracts (the statute being in force prior to the making of any contract involved in the action); that it abridged the privileges and immunities of the defendant as a citizen of the United States (the defendant being a corporation, and therefore not within the protection of that provision); that it denied defendant the equal protection of laws, and deprived it of property without due process of law (the legislation in question coming within the police

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perior Court for violating the state statute regulating the hours of women employees. Affirmed.

See same case below, 210 Mass. 387, 97 N. E. 367, Ann. Cas. 1912D, 388.

The facts are stated in the opinion.

Mr. Andrew J. Jennings argued the cause, and, with Messrs. Israel Brayton and Edward T. Fenwick, filed a brief for plaintiff in error:

The plaintiff in error contends, in view of the language of this court in its decisions upon the question of the right of a state to restrict the employment of labor, that Mass. Laws 1909, chap. 514, § 48, is in violation of the 14th Amendment to the United States Constitution.

Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957.

The state legislature virtually admits in the statute itself that it does not deem it necessary for a woman's health to limit her employment in laboring to ten hours a day,

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power); and that the statute was a species of class legislation (the classification being a natural, just, and reasonable one).

The limitation of the working hours of women in manufacturing and mercantile establishments to nine in every twenty-four does not deprive them of any right guaranteed to them by the 14th Amendment of the Federal Constitution. Withey v. Bloem, 163 Mich. 419, 35 L.R.A.(N.S.) 628, 128 N. W. 913.

Hours of labor by minors and women in factories may constitutionally be limited to nine hours a day and fifty-four hours a week. People ex rel. Hoelderlin v. Kane, 79 Misc. 140, 139 N. Y. Supp. 350.

A statute prohibiting the employment of any woman in any mechanical or mercantile establishment, laundry, hotel, or restaurant more than eight hours during the day is a valid exercise of the police power of the state, and does not deprive employers and employees in the enumerated factories and callings of their constitutional right to contract. State v. Somerville, 67 Wash. 638, 122 Pac. 324.

Forbidding the employment of women in certain specified establishments for more than eight hours in one day or forty-eight hours in one week, as is done by Cal. Stat. 1911, p. 437, does not, as applied to women employed in hotels, violate a constitutional prohibition against discrimination based on distinctions of sex. Nor does such statute unconstitutionally infringe upon the freedom of contract; nor is the statute invalid as special legislation because there may be other occupations followed by women which need similar protection and regulation. Re Miller, 162 Cal. 687, 124 Pac. 427.

That individual instances exist where women are not injured or overworked by being kept on duty for more than the prescribed period does not render the law invalid. People v. Elerding, 254 Ill. 579, 40 L.R.A.(N.S.) 893, 98 N. E. 982.

Nor does the fact that a particular factory is modern, well equipped, sanitary, and healthful, and that the labor performed by the women employees therein is light and harmless, and that they could be thus employed for nine hours per day without endangering or impairing their health or physical condition, render invalid, as an unreasonable, arbitrary, and unwarranted exercise of the police power, a statute prohibiting the employment of any woman in any mechanical or mercantile establishment, laundry, hotel, or restaurant more than eight hours during any day. State v. Somerville, supra.

The state may forbid women employed in hotels from working more than a prescribed number of hours without imposing a similar restriction upon women employed in lodging and boarding houses. People v. Elerding and Re Miller, supra.

Express exemptions of certain employments from the operation of such legislation have uniformly been sustained.

Unconstitutional class legislation does not result from excepting from the operation of a law limiting the hours of woman's labor persons engaged in preserving perishable goods in fruit and vegetable canning establishments. Withey v. Bloem, supra.

Exempting persons employed in harvesting, curing, canning, or drying perishable fruits or vegetables from the operation of Cal. Stat. 1911, p. 437, forbidding the employment of women in certain specified establishments for more than eight hours in one week, does not render the statute unconstitutionally discriminatory. Re Miller, supra.

Exempting women employed in harvesting, packing, curing, canning, or drying any variety of perishable fruit or vegetable, or in canning fish or shellfish, from the operation of a statute prohibiting the employment of any women in any mechanical or mercantile establishment, laundry, hotel, or restaurant more than eight hours during any day, does not render the statute invalid as denying the equal protection of the laws, or as granting special privileges and immunities. State v. Somerville, supra.

Exempting work in canning factories from June 15 to October 15 from the operation of the provision of the New York labor law, § 77, limiting the hours of labor by women and minors in factories to nine hours a day and fifty-four hours a week, does not render the law unconstitutional as denying the equal protection of the laws. People ex rel. Hoelderlin v. Kane, supra.

The Ohio statute is not invalid because it exempts from its operation work in can-

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and it gives to every different employer the right, by posting a printed notice, to employ a woman in laboring eleven hours a day on five days in the week, provided he employs the woman such a number of hours on the sixth day as not to exceed fifty-six hours in the whole week. If it be claimed that such a notice must first be approved by the attorney general of the state, our reply is that the statute says the form shall be approved; but if it is held that the attorney general is to approve the number of hours, and that the attorney general may say what the number of hours shall be, then he could approve or disapprove different notices stating different numbers of hours of employment by different employers. This seems to us to be a violation of the 14th Amendment as denying equal protection of the laws.

Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064.

The law is to be judged not by what may be done, but by what can be done, under it.

Curtin v. Benson, 222 U. S. 78, 56 L. ed. 102, 32 Sup. Ct. Rep. 31.

The state statute is not only a denial of the equal protection of the laws, but it is unreasonable and arbitrary in forbidding the employment of women more than ten

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neries or establishments engaged in preparing perishable goods for use. Ex parte Hawley, 12 Ohio N. P. N. S. 1.

The validity of legislation prohibiting employment during certain hours of the day is not so clear. As applied to children such laws are probably valid.

Such was the opinion expressed in Re Spencer, 149 Cal. 396, 117 Am. St. Rep. 137, 86 Pac. 896, 9 Ann. Cas. 1105, where the court held that provisions of a statute to the effect that no minor under sixteen years of age shall work in any mercantile institution, office, laundry, any manufacturing establishment, or workshop between 10 o'clock in the evening and 6 o'clock in the morning, and that no child under sixteen years of age shall work at any gainful occupation during the hours that the public schools are in session, unless such child can read English at sight and write simple English sentences, or is attending night school, —were not so indispensable to the integrity of the statute as a whole that, if unconstitutional, they would invalidate the other provisions entirely prohibiting the employment of children under certain ages in certain kinds of employment.

And in State v. Shorey, 48 Or. 396, 24 L.R.A.(N.S.) 1121, 86 Pac. 881, the court, while declining to pass upon the constitutionality of provisions forbidding the employment of such a child at any work before the hour of 7 in the morning or after the hour of 6 at night, for the reason that the appellant had not been convicted of a violation of such provision, said that laws regulating the right of minors to contract do not come within the principle applicable to adults. They are not *sui juris*, and can only contract to a limited extent. They are wards of the state and subject to its control. As to them the state stands in the position of *parens patriæ*, and may exercise unlimited supervision and control over their contracts, occupation, and conduct, and the liberty and right of those who assume to deal with them.

But, as applied to adult females, the provision of N. Y. labor law, § 77, that minors and females shall not be employed or permitted or suffered to work in a factory before 6 o'clock in the morning, or after 9 o'clock in the evening, has been held to be invalid as discriminatory and as an invasion of the constitutional freedom to contract. People v. Williams, 189 N. Y. 131, 12 L.R.A.(N.S.) 1130, 121 Am. St. Rep. 854, 81 N. E. 778, 12 Ann. Cas. 798. "If this enactment is to be sustained," said Gray, J., "then an adult woman, although a citizen, and entitled as such to all the rights of citizenship under our laws, may not be employed nor contract to work in any factory for any period of time, no matter how short, if it is within the prohibited hours; and this, too, without any regard to the healthfulness of the employment. It is clear, as it seems to me, that this legislation cannot, and should not, be upheld as a proper exercise of the police power. It is certainly discriminative against female citizens in denying to them equal rights with men in the same pursuit. The courts have gone very far in upholding legislative enactments framed clearly for the welfare, comfort, and health of the community; and that a wide range in the exercise of the police power of the state should be conceded I do not deny; but when it is sought, under the guise of a labor law, arbitrarily, as here, to prevent an adult female citizen from working at any time of the day that suits her, I think it is time to call a halt. It arbitrarily deprives citizens of their right to contract with each other. The tendency of legislatures, in the form of regulatory measures, to interfere with the lawful pursuits of citizens, is becoming a marked one in this country, and it behooves the courts firmly and fearlessly to interpose the barriers of their judgments when invoked to protect against legislative acts plainly transcending the powers conferred by the Constitution upon the legislative body. In this section of the labor law it will be observed that women are classed with minors under the age of eighteen years, for which there is no reason. The right of the state as *parens patriæ* to restrict or to regulate the labor and employment of children is unquestionable; but an adult female is not to be regarded as a ward of the state, or in any other light than the man is regarded when the question relates to the business pursuit or calling. She is no more a ward of the state than is the man. She is entitled to enjoy, unmolested, her liberty of person

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hours in any one day or fifty-six hours a week in any mechanical and manufacturing establishment.

Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; People v. Williams, 116 App. Div. 379, 101 N. Y. Supp. 562.

The clause prohibiting the employment of women at a time other than as stated in the notice is clearly unconstitutional, and may be so declared without affecting the two prohibitions of the statute forbidding the employment of women more than ten hours a day and more than fifty-six hours a week.

Edwards v. Bruorton, 184 Mass. 529, 69 N. E. 328; Huntington v. Worthen, 120 U. S. 97, 101, 30 L. ed. 588, 589, 7 Sup. Ct. Rep. 469; Marshall Field & Co. v. Clark, 143 U. S. 649, 696, 36 L. ed. 294, 311, 12 Sup. Ct. Rep. 495.

The court will give the law a constitutional construction if possible.

Newburyport v. Essex County, 12 Met. 211; Com. v. Anthes, 5 Gray, 185; Opinion of Justices, 207 Mass. 604, 34 L.R.A.(N.S.) 604, 94 N. E. 558; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145.

There is nothing in the record to show that the work in which the woman was employed at the time stated in the complaint was or could be dangerous to the woman's health.

People v. Williams, 116 App. Div. 379, 101 N. Y. Supp. 562.

The clause, if regarded as evidential, is, we submit, an unjustifiable exercise of the police power of the state, which cannot do indirectly what it cannot do directly.

Huntington v. Worthen, 120 U. S. 97, 101, 30 L. ed. 588, 589, 7 Sup. Ct. Rep. 469.

A state has no right to make an act, innocent in itself, and protected by the 14th Amendment, conclusive evidence of another act, properly forbidden or required, in another part of the statute.

Bailey v. Alabama, 219 U. S. 219, 238, 55 L. ed. 191, 200, 31 Sup. Ct. Rep. 145.

The only way to make the clause a reasonable health regulation was for the state court to hold that it applied only to women who were working more than ten hours a day, under the rule that the court will give a statute a constitutional construction if possible. If the state court had given this clause such a construction, it seems to us that the court would have departed no

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and her freedom to work for whom she pleases, where she pleases, and as long as she pleases, within the general limits operative on all persons alike. And shall we say that this is valid legislation, which closes the doors of a factory to her before and after certain hours? I think not."

A few years after this decision, the New York legislature, in accordance with the recommendation of a factory investigation commission which had emphasized in its report the injurious physical and moral effect of night work, added the following section to the labor law:

"§ 93b. Period of rest at night for women. —In order to protect the health and morals of females employed in factories by providing an adequate period of rest at night, no woman shall be employed or permitted to work in any factory in this state before 6 o'clock in the morning or after 10 o'clock in the evening of any day." When the validity of this law came up for decision in the appellate division of the New York supreme court, a majority of the judges were of the opinion that People v. Williams, supra, was not controlling, and upheld the statute. People v. Charles Schweinler Press, 163 App. Div. 620, 148 N. Y. Supp. 725. Special importance was attached by the judges whose views prevailed to the observation of Judge Gray in People v. Williams, supra: "I find nothing in the language of the section which suggests the purpose of promoting health, except as it might be inferred that for a woman to work during the forbidden hours of night would be unhealthful." The difference in the language of the two statutes and the revelations of the factory investigation commission and others engaged in similar investigation work were held sufficient to distinguish the Williams Case. "If the facts as now presented are true," said Ingraham, P. J., "and they are based upon the official report of a commission authorized by law to investigate the subject, and if women who work in factories at night are exposed to dangers which affect them both physically and morally, and which justify, under the police power, legislation for their protection, this legislation is directed to accomplish that purpose. There is here disclosed, as the general result of a scientific investigation by the state into the conditions existing in the factories of the state, a condition which would subject a large proportion of the women of the state to both physical and moral danger from its continuance, and we have legislation directly enacted for the purpose of procuring, as to a large proportion of the people, the prevention of physical and moral impairment. Such legislation I conceive to be within the police power of the state." Two judges dissented on the ground that if the Williams Case is no longer an authority, it is for the court of appeals to say so.

In Stettler v. O'Hara, — Or. —, 139 Pac. 743, a statute creating an industrial welfare commission with power to fix the maxi-

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farther from the literal meaning of the words of the clause than it did in deciding that the statute did not apply "to any except women employed permanently in labor for full working days, whatever the length may be;" and had the court so held, its construction would have been accepted by this court.

Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160.

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into these contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?

Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133.

Mr. James M. Swift argued the cause, and, with Mr. Thomas J. Boynton, Attorney General of Massachusetts, filed a brief for defendant in error:

In the exercise of the police power, the state may limit the right of contract or the use of private property within reasonable limits.

Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182; Barrett v. Indiana, 229 U. S. 26, 57 L. ed. 1050, 33 Sup. Ct. Rep. 692.

The mere failure to include within the operation of an act certain persons or classes to whom it might have applied will not render the legislation invalid as discriminatory. The classification of employment of women and children confined to manufacturing and mechanical establishments, such as a cotton factory, as here, is within the legislative power.

Com. v. Hamilton Mfg. Co. 120 Mass. 383; Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151, 31 Sup. Ct. Rep. 132; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; Assaria State Bank v. Dolley, 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. Rep. 189; Com. v. Riley, 210 Mass. 387, 97 N. E. 367, Ann. Cas. 1912D, 388; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957.

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mum hours of labor and minimum wage for women and children was held to be within the police power of the state, and therefore not to abridge the privileges of citizenship, nor interfere with the rights of liberty and property, and such statute was further held not to amount to an unconstitutional delegation of legislative power, and not to be discriminatory, although the order of the commission complained of applies to but one city in the state, there being nothing to indicate that the forbidden conditions exist elsewhere; nor is an employer deprived of his property without due process of law because he is denied the right to appeal from the findings of the commission if he has the right to a hearing before such commission.

An amendment seeking to enlarge the number of callings in which the hours of the employment of women are limited by a former act is not in conflict with a constitutional requirement that no act shall embrace more than one subject, which shall be expressed in its title, because the title merely recites that it is an act to amend certain sections of the former act and the title, while the amendment of the title appears as a section of the statute. People v. Chicago, 256 Ill. 558, 43 L.R.A.(N.S.) 954, 100 N. E. 194, Ann. Cas. 1913E, 305.

But the provisions of § 3 of the Colorado "women and children labor act" of 1903, to the effect that no woman of sixteen years of age or more shall be required to work or labor for more than eight hours in the twenty-four-hours day, in any mill, factory, manufacturing establishment, shop or store where such labor, work, or occupation, by its nature, requires the woman to stand or be upon her feet, were held in Burcher v. People, 41 Colo. 495, 124 Am. St. Rep. 143, 93 Pac. 14, not to be within the scope of the title of the act, "An Act to Prescribe and Regulate the Hours of Employment for Women and Children in Mills, Factories, Manufacturing Establishments, Shops, Stores, and Any Other Occupation which May Be Deemed Unhealthful or Dangerous." The decision was upon the ground that the title had to do with occupations which, in and of themselves, may be deemed unhealthful or dangerous, whereas the provisions in question treat of occupations which, for aught that is said therein to the contrary, are entirely safe and healthful, or refer only to labor that might inferentially be deemed injurious or unhealthful, so that they were not within the scope of the title, even assuming that it is competent for the legislature, under the "eight-hour" constitutional amendment, to regulate the hours of employment, not only where the occupation or branch of industry in itself is injurious or dangerous, but also where, though the particular occupation or place of work is perfectly safe and healthful, the labor performed is injurious or unhealthful.

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The construction and interpretation given by the highest court of Massachusetts to the provisions of law in question are conclusive upon this court.

Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904; Osborne v. Florida, 164 U. S. 650, 654, 41 L. ed. 586, 587, 17 Sup. Ct. Rep. 214; Stockard v. Morgan, 185 U. S. 27, 30, 46 L. ed. 785, 789, 22 Sup. Ct. Rep. 576; Howard v. Kentucky, 200 U. S. 164, 173, 50 L. ed. 421, 425, 26 Sup. Ct. Rep. 189; Twining v. New Jersey, 211 U. S. 90, 53 L. ed. 102, 29 Sup. Ct. Rep. 14.

Mr. Justice McKenna delivered the opinion of the court:

Criminal complaint brought against plaintiff in error in the superior court within and for the county of Bristol, charging him with the violation of a statute of the state in that he, being superintendent of the Davol Mills, a corporation duly established by law, and conducting a mill for the manufacture of cotton goods, in which establishment women were employed, employed two women by the names of Annie Manning and Nora Callahan at a time other than the time which the statute required to be posted in a conspicuous place in the mill where women were required to work in laboring. The specific charge is that the women were employed at 5 minutes of 1 o'clock (12:55 P. M.) on the 24th of February, 1910, in a room wherein was posted a notice in which it was stated that the time of commencing work was 6:50 A. M., and of stopping work was 6 P. M., and that the time allowed for dinner began at 12 M., and ended at 1 P. M.

A demurrer and motion to quash were filed, alleging the unconstitutionality of the statute.

The charge was dismissed as to Annie Manning, and plaintiff in error was convicted as to the charge in regard to Nora Callahan, and sentenced to pay a fine of $50. The sentence was affirmed by the supreme judicial court, and its rescript having been sent to the trial court, this writ of error was sued out.

[679] The statute of the state which is assailed provides that no child or woman shall be employed in laboring in any manufacturing or mechanical establishment more than ten hours in any one day, except as hereinafter provided in this section, unless a different apportionment of the hours of labor is made for the sole purpose of making a shorter day's work for one day of the week, and in no case shall the hours of labor exceed fifty-six in a week. It is provided: "Every employer shall post in a conspicuous place in every room in which such persons are employed a printed notice stating the number of hours' work required of them on each day of the week, the hours of commencing and stopping work, and the hours when the time allowed for meals begins and ends. . . . The employment of such persons at any time other than as stated in said printed notice shall be deemed a violation of the provisions of this section," punishable by a fine of not less than $50 nor more than $100.

The first contention of plaintiff in error is that the statute restricts the right to sell and buy labor, and therein infringes the liberty of contract assured by article 14 of the Amendments to the Constitution of the United States. The contention is untenable expressed in this generality. In Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957, against a similar contention, a statute of Oregon was sustained which prohibited the employment of women in mechanical factories or laundries working more than ten hours during any one day, with power, as in the Massachusetts statute, to apportion the hours through the day.

But special objections are made which, it is contended, make Muller v. Oregon inapplicable. The prohibition of the statute under review, it is said, "is not restricted to times and places which relate to and naturally and logically affect a woman's health, safety, or morals, or the welfare of herself or the public." Such are the conditions necessary to the validity of a statute restricting employment, [680] it is contended, and that those conditions are not satisfied by the statute. Section 48, it is urged, not only prohibits the employment of women more than ten hours a day, but that (quoting the section) "the employment of such person [woman] at a time other than as stated in said printed notice, shall be deemed a violation of the provisions of this section."

The provision is arbitrary and unreasonable, it is insisted, in that it requires the employer to post a notice in a room in which women and minors are permanently employed in laboring only six hours a day, and makes it a crime if such person is allowed to work for five minutes at a time other than as stated in the notice. But if we might imagine that an employer would so enlarge the restrictions of the statute, or be charged with violating it if he did, we yet must remember that, as it was competent for the state to restrict the hours of employment, it is also competent for the state to provide administrative means against evasion of the restriction. Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; St. John

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v. New York, 201 U. S. 633, 50 L. ed. 896, 26 Sup. Ct. Rep. 554, 5 Ann. Cas. 909. Neither the wisdom nor the legality of such means can be judged by extreme instances of their operation. The provision of § 48 cannot be pronounced arbitrary. As said by the supreme judicial court, the statute "requires the hours of labor to be stipulated in advance, and then to be followed until a change is made. It does not by its terms establish a schedule of hours. This is left to the free action of the parties. Nor does it in the sections now under consideration restrict the right to labor to any particular hours. See People v. Williams, 189 N. Y. 131, 12 L.R.A.(N.S.) 1130, 121 Am. St. Rep. 854, 81 N. E. 778, 12 Ann. Cas. 798. It simply makes imperative strict observance of any one table of hours of labor while it remains posted.

"The end of the statute is the protection of women within constitutional limits, and the requirement that the hours posted in the notice shall be followed is a means to [681] effectuate the attainment of that end." [210 Mass. 394, 97 N. E. 367, Ann. Cas. 1912D, 388.] In other words, the purpose of the posting of the hours of labor is to secure certainty in the observance of the law, and to prevent the defeat or circumvention of its purpose by artful practices.

There is a contention somewhat tentatively made by plaintiff in error that the statute offends the equal protection clause of the 14th Amendment. It will be observed that § 48 provides that the printed form of the "notice shall be provided by the chief of the district police, after approval by the attorney general." And counsel say: "If it be claimed that such a notice must first be approved by the attorney general of the state, our reply is that the statute says the *form* shall be approved; but if it is held that the attorney general is to approve the number of hours, and that the attorney general may say what the number of hours shall be, then he could approve or disapprove different notices stating different numbers of hours of employment by different employers. This seems to us to be a violation of the 14th Amendment, as denying equal protection of the laws."

And again counsel say, as a specification of the unreasonableness of the statute as an exercise of the police power of the state: "By approval of different schedules by the attorney general, the law may operate unequally in different employments." This supposition is based on the other; that is, that something else than the form of notice is to be prescribed by the attorney general. But counsel assert that it is the form only which the attorney general is to approve, and the assertion is not denied. There is, therefore, nothing tangible in the contention. Besides, it has no justification in the opinion of the supreme judicial court.

Judgment affirmed.

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[682] MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, National Surety Company, and American Surety Company of New York, Plffs. in Err.,

v.

IVOLUE B. WEST.

(See S. C. Reporter's ed. 682-693.)

Error to state court — Federal question — decision on facts.

A decision of a state court having substantial support in the record that the pleadings and evidence in an action for death against an interstate railway company demonstrate that the deceased was in the employ of an express company rather than of the railway company, and that therefore the defendant's liability was not controlled by the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), involves no denial of any asserted Federal right, and is not reviewable in the Federal Supreme Court.

[For other cases, see Appeal and Error, 1324-1326, 1596-1600, 2175-2208, in Digest Sup. Ct. 1908.]

[No. 696.]

Argued March 3, 1914. Decided March 23, 1914.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court for the Third Judicial District in that state in favor of plaintiff in

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NOTE.—On the general subject of writs of error from United States Supreme Court t. state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On review of questions of fact on writ of error to a state court—see note to Smiley v. Kansas, 49 L. ed. U. S. 546.

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an action for death. Dismissed for want of jurisdiction.

See same case below, 38 Okla. 581, 134 Pac. 655.

The facts are stated in the opinion.

Mr. W. R. Allen argued the cause, and, with Messrs. Clifford L. Jackson and Joseph M. Bryson, filed a brief for plaintiffs in error:

This court will examine the entire record, including the evidence, to determine whether what purports to be a finding upon questions of fact by the highest state court is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter, and if so, whether such questions of law, being Federal in character, were properly decided.

St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; Southern P. R. Co. v. Schuyler, 227 U. S. 601, 57 L. ed. 662, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277; Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316; Creswill v. Grand Lodge, K. P. 225 U. S. 246, 56 L. ed. 1074, 32 Sup. Ct. Rep. 822; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 56 L. ed. 594, 32 Sup. Ct. Rep. 389; Graham v. Gill, 223 U. S. 643, 56 L. ed. 586, 32 Sup. Ct. Rep. 396; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 21 Am. Neg. Rep. 464, 28 Sup. Ct. Rep. 616.

At the close of the evidence, a motion was made by counsel for the railway company for the court to instruct a verdict in its favor. This request for an instructed verdict is in itself sufficient, under the decisions of this court, to present the Federal question.

St. Louis, I. M. & S. R. Co. v. McWhirter, supra; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651.

It was alleged by the defendant in error in her pleadings that the deceased was an employee of the railway company, and this fact was admitted by the pleadings of the railway company.

Missouri, K. & T. R. Co. v. Reasor, 28 Tex. Civ. App. 302, 68 S. W. 332.

The evidence introduced is the controlling feature in determining whether the case is one within the Federal statute, rather than the pleadings.

St. Louis, S. F. & T. R. Co. v. Seale, supra.

The evidence conclusively shows that the deceased was an employee of the railway company, and the record likewise shows that such was the understanding of the trial court and of all parties.

Missouri, K. & T. R. Co. v. Blalack, 105 Tex. 296, 147 S. W. 559; Vary v. Burlington, C. R. & M. R. Co. 42 Iowa, 246; Oliver v. Northern P. R. Co. 196 Fed. 435; Ringue v. Oregon Coal & Nav. Co. 44 Or. 407, 75 Pac. 703; Rummell v. Dilworth, P. & Co. 111 Pa. 343, 2 Atl. 355, 363; Goodrich v. Kansas City, C. & S. R. Co. 152 Mo. 222, 53 S. W. 917.

Mr. Charles H. Taylor argued the cause, and, with Messrs. Benjamin Martin, Jr., S. Grant Harris, and Thomas D. O'Brien, filed a brief for defendant in error:

On writ of error to the highest court of a state, nothing is removed for re-examination in this court but questions of law arising upon the record; and the findings of fact made by the supreme court of the state will be the basis of the decision of this court.

Thayer v. Spratt, 189 U. S. 346, 347, 47 L. ed. 845, 846, 23 Sup. Ct. Rep. 576; Telluride Power Transmission Co. v. Rio Grande Western R. Co. 175 U. S. 639, 647, 44 L. ed. 305, 308, 20 Sup. Ct. Rep. 245; Crary v. Devlin, 154 U. S. 619, 23 L. ed. 510, 14 Sup. Ct. Rep. 1199; Wood v. Chesborough, 228 U. S. 672, 676, 57 L. ed. 1018, 1020, 33 Sup. Ct. Rep. 706; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 97, 53 L. ed. 417, 424, 29 Sup. Ct. Rep. 220; Chrisman v. Miller, 197 U. S. 313, 319, 49 L. ed. 770, 772, 25 Sup. Ct. Rep. 468; Vandalia R. Co. v. Indiana, 207 U. S. 359, 367, 52 L. ed. 246, 248, 28 Sup. Ct. Rep. 130; Kerfoot v. Farmer's & M. Bank, 218 U. S. 281, 288, 54 L. ed. 1042, 1043, 31 Sup. Ct. Rep. 14; Mammoth Min. Co. v. Grand Central Min. Co. 213 U. S. 72, 77, 53 L. ed. 702, 706, 29 Sup. Ct. Rep. 413; Delmar Jockey Club v. Missouri, 210 U. S. 324, 335, 52 L. ed. 1080, 1084, 28 Sup. Ct. Rep. 732; Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 222, 48 L. ed. 944, 948, 24 Sup. Ct. Rep. 632; Hedrick v. Atchison, T. & S. F. R. Co. 167 U. S. 673, 677, 42 L. ed. 320, 321, 17 Sup. Ct. Rep. 922; Egan v. Hart, 165 U. S. 188, 189, 41 L. ed. 680, 681, 17 Sup. Ct. Rep. 300; Dower v. Richards, 151 U. S. 658, 663, 38 L. ed. 305, 307, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704.

If no Federal question were presented for decision in the state court, or if the decision of the Federal question presented was unnecessary to the determination of the case, or if it was not actually decided, or if it appeared that the judgment as rendered could have been given without deciding the Federal question, the Supreme Court has no jurisdiction to review the decision of the

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state court. In such cases, the writ of error should be dismissed.

Vandalia R. Co. v. Indiana, 207 U. S. 359, 368, 52 L. ed. 246, 249, 28 Sup. Ct. Rep. 130; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 576, 40 L. ed. 536, 540, 16 Sup. Ct. Rep. 389; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 487, 56 L. ed. 1171, 1176, 32 Sup. Ct. Rep. 790; Johnson v. Risk, 137 U. S. 300, 307, 34 L. ed. 683, 686, 11 Sup. Ct. Rep. 111; DeSaussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 84, 35 L. ed. 943, 944, 12 Sup. Ct. Rep. 142; O'Neil v. Vermont, 144 U. S. 323, 336, 36 L. ed. 450, 457, 12 Sup. Ct. Rep. 693; Northern P. R. Co. v. Ellis, 144 U. S. 458, 36 L. ed. 504, 12 Sup. Ct. Rep. 724; Davidson v. Connelly, 154 U. S. 580, 38 L. ed. 1088, 14 Sup. Ct. Rep. 1200; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Cook County v. Calumet & C. Canal & Dock Co. 138 U. S. 635 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; Sayward v. Denny, 158 U. S. 180, 183, 184, 39 L. ed. 941–943, 15 Sup. Ct. Rep. 777.

If the Federal question was raised in the state court, yet, if the case was decided on grounds broad enough in themselves to sustain the judgment without reference to the Federal question, the Supreme Court will not entertain jurisdiction.

Connecticut ex rel. New York & N. E. R. Co. v. Woodruff, 153 U. S. 689, 38 L. ed. 869, 14 Sup. Ct. Rep. 976; Sherman v. Grinnell, 144 U. S. 198, 202, 36 L. ed. 403, 405, 12 Sup. Ct. Rep. 574.

It has been held, it is true, by this court, that where a finding of fact of a state supreme court, which has the effect of denying a Federal question, has no support whatever in the record, or where a conclusion of a state supreme court is based upon facts in the record which will not, under any reasonable construction, support the conclusion of the state supreme court, then this court may still entertain jurisdiction.

St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651.

But it has never been held by this court that where the findings of fact of a state supreme court (in effect, denying the existence of a Federal question, and hence the jurisdiction of this court) have any support in the record, under any reasonable construction of the pleadings and the evidence upon which the findings of fact are based, such findings can be questioned by this court by writ of error.

A motion to dismiss will be granted where it appears on the face of the opinion, when it forms a part of the record, that the decision of the state supreme court did not rest on a Federal question.

Jacks v. Helena, 115 U. S. 288, 29 L. ed. 392, 6 Sup. Ct. Rep. 39; Kreiger v. Shelby R. Co. 125 U. S. 39, 44, 31 L. ed. 675, 677, 8 Sup. Ct. Rep. 752.

But assuming that the opinions of the highest court of the state of Oklahoma do not show conclusively on their face that the findings of fact as therein made with respect to the employment of West are supported by the record, nevertheless, this court, on motion to dismiss the writ of error or affirm the judgment, will look to the pleadings and evidence sufficiently to ascertain if the findings of fact of the state supreme court in that regard are supported.

Egan v. Hart, 165 U. S. 189, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Vandalia R. Co. v. Indiana, 207 U. S. 367, 52 L. ed. 248, 28 Sup. Ct. Rep. 130.

The petition in the case at bar cannot be construed to allege any employment of West, the express messenger, by the railroad company.

Missouri, K. & T. R. Co. v. Blalack, 105 Tex. 296, 147 S. W. 559.

Under the allegations of plaintiff in error, West, so far as the railroad company was concerned, was a passenger.

Ibid.; Fordyce v. Jackson, 56 Ark. 594, 20 S. W. 528, 597; Brewer v. New York, L. E. & W. R. Co. 124 N. Y. 59, 11 L.R.A. 483, 21 Am. St. Rep. 647, 26 N. E. 324; Yoemans v. Contra Costa Steam Nav. Co. 44 Cal. 71, 9 Am. Neg. Cas. 78; Blair v. Erie R. Co. 66 N. Y. 313, 23 Am. Rep. 55; Jennings v. Grand Trunk R. Co. 15 Ont. App. Rep. 477; Foulkes v. Metropolitan Dist. R. Co. L. R. 5 C. P. Div. 157, 49 L. J. C. P. N. S. 361, 42 L. T. N. S. 345, 28 Week. Rep. 526; Southern R. Co. v. Harrington, 166 Ala. 630, 139 Am. St. Rep. 59, 52 So. 57; Gulf, C. & S. F. R. Co. v. Wilson, 79 Tex. 371, 11 L.R.A. 486, 23 Am. St. Rep. 345, 15 S. W. 280; Davis v. Chesapeake & O. R. Co. 122 Ky. 528, 5 L.R.A.(N.S.) 458, 121 Am. St. Rep. 481, 92 S. W. 339, 12 Ann. Cas. 723; Voight v. Baltimore & O. S. W. R. Co. 79 Fed. 566; Prince v. International & G. N. R. Co. 64 Tex. 144; Collett v. London & N. W. R. Co. 16 Q. B. 984, 20 L. J. Q. B. N. S. 411, 15 Jur. 1053; Cleveland, C. C. & St. L. R. Co. v. Ketcham, 133 Ind. 346, 19 L.R.A. 339, 36 Am. St. Rep. 550, 33 N. E. 116; Jones v. St. Louis S. W. R. Co. 125 Mo. 666, 26 L.R.A. 718, 46 Am. St. Rep. 514, 28 S. W. 883.

The mere fact that West might have been termed "a joint express messenger and baggage man," and that he did the work of both companies, clearly is not proof of employment by the railroad company, nor is it inconsistent with the allegation of the

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railroad company that, in handling the passenger baggage, West was doing so "under and by virtue of his employment by the American Express Company."

Missouri, K. & T. R. Co. v. Blalack, supra.

[683] Mr. Justice McKenna delivered the opinion of the court:

Action for damages, brought by defendant in error against plaintiff in error (herein called the railway company) for the death of William B. West, husband of the defendant in error, caused by the collision of two trains of the railway company. The case was tried to a jury and resulted in a verdict and judgment for defendant in error in the sum of $15,000. The judgment was affirmed by the supreme court of the state, and error was prosecuted from this court.

There is no dispute about the collision, the cause of it, or that it resulted in the death of the deceased. He and the plaintiff below were residents of Kansas, and she brought the suit, as she alleged in her complaint, as his widow, and for the benefit of herself as such widow and their three minor children. No personal representative of his estate was appointed.

She alleged that the deceased at the time of his death was employed by the American Express Company as express messenger upon the express cars operated by the railway company over its line of railroad from Parsons, Kansas, through the state of Oklahoma, to points in the state of Texas. That in addition to his duties as express messenger he was also engaged in handling passenger baggage upon the express cars of the railway company. The plaintiff then alleged the deceased came to his death in the course of his employment while riding in the express car, by reason of a head-on collision of the train with a freight train between certain stations in Oklahoma.

A demurrer was filed which attacked the legal capacity of the plaintiff to sue for her minor children, and the sufficiency of the complaint, and alleged as well that there was a defect of parties. The demurrer was overruled, and the case put at final issue by a third amended answer [684] (amended again at the trial) filed by the railway company. It denied negligence on its part, and alleged negligence on the part of the deceased, and that it was engaged in moving interstate commerce. It alleged also that the deceased had made application to the American Express Company at Parsons, Kansas, for a position as a driver of one of its wagons, and was engaged by the express company in pursuance of a written application (copy of which was attached to the answer), that he was employed by the express company (a copy of the contract being attached to the answer), and in consideration of his employment he assumed all risk of accident and injury which he should meet with or sustain in the course of his employment, whether occasioned by or resulting from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel or vehicle, or of any employee of any such corporation or person, or otherwise, and whether resulting in his death or otherwise. That in case of injury he would at once and without demand execute and deliver a good and sufficient release of all claims, demands, and causes of action arising out of such injury, or connected with or resulting therefrom. That by the terms of his contract he ratified all agreements made by the express company and any such corporation or person that its employees should have no cause of action for injuries sustained in the course of their employment, and agreed to be bound by such agreements as though he were a party thereto, and authorized the express company to contract for him that neither he nor any of his personal representatives, nor any person claiming under him, should claim compensation because of injury sustained by him, whether resulting from gross or other negligence of such corporations, persons, or employees. That such contract should enure to the benefit of any corporation or person over whose railroads or steamboat lines the express company should forward merchandise.[685] and this in consideration of his employment by the express company. That in pursuance of his contract of employment by the express company he was in the express car of the railway company, and that he was barred from maintaining the action.

The answer concluded with the following paragraph:

"Further answering, defendant admits that at and prior to the death of said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by the defendant railway company over its line of road . . . and admits that the deceased, William B. West, in addition to his employment as express messenger by the said American Express Company, was also engaged in handling passenger baggage upon the express car of said defendant railway company, and . . . in performing said duties in handling said baggage was doing so under and by virtue of his said employment by the said American Express Company, and that such handling of such baggage by said West was for and in behalf of and under the direction of said railway company."

Defendant in error filed a reply to the

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answer in which she affirmed the allegations of her complaint and denied those of the answer, and alleged besides that at the time the contracts set out in the answer were made and ever since the statutes of Kansas provided as follows:

"That railroads in this state shall be liable for all damages done to persons or property when done in consequence of any neglect on the part of the railroad company.

"Every railroad company organized and doing business in the state of Kansas shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage. Provided that notice in writing that an injury [686] has been sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured to such railroad company within eight months after the occurrence of the injury."

A demurrer to the reply was overruled.

The simple question which is presented here is whether the deceased was employed at the time of his death by the railway company or by the American Express Company. On those alternates depends the jurisdiction of this court; and defendant in error, asserting that such employment was a question of fact decided by the state courts against the railway company, makes a motion to dismiss the writ of error.

There were two opinions delivered by the supreme court of the state. In its first opinion the court said that the railway company contended that the defendant's liability was controlled by the "employers' liability act" [35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322]; but the court, after quoting its provisions, decided that the pleadings and evidence demonstrated that the deceased was in the employment of the American Express Company at the time of his death, and that therefore the national act did not apply. The court also noticed the other rulings which were called to its attention; among others, one based on the action of the trial court refusing to admit in evidence the contracts attached to the answer. The court declined to consider the latter ruling, holding that, under the practice of the court, the error was not properly before it for review, and for the further reason that in the brief and argument of the railway company the ruling was "not attempted to be insisted upon or urged as error," citing Noble State Bank v. Haskell, 22 Okla. 48, 97 Pac. 590. And the court said the omission could not be cured by a reply brief when the same was not predicated upon a specification of error, permission not having been first obtained for the purpose of amending the specifications of error.

[687] The court was also of opinion that the contract of the deceased by which, it was contended, he assumed the risk of injuries, and released all rights of action for them, was "void as against public policy, on account of being in contravention of the laws of the state of Kansas, and against the public policy" of Oklahoma.

The second opinion was delivered upon a petition for rehearing in which the railway company earnestly combated the conclusions of the court, expressed in the first opinion, repeated its contentions, and insisted that the case was tried on the theory that the issue made by the pleadings was whether the deceased was an employee of the railway company, and that the evidence showed that he was such employee. The court rejected the contentions and decided that the pleadings alleged, and the evidence was consistent with the allegation, that West was employed by the express company.

There is, therefore, a sharp antagonism between the views of the court and of the railway company, and yet there is not much dispute over the elements of the controversy, but rather in the inferences from them.

The essential facts pleaded we have given. The allegation of the complaint is that West, "at and prior to the time" of his death, "was employed by the American Express Company as express messenger upon the express cars operated by said defendant company," and "that in addition to his duties and employment as messenger" he was "also engaged in handling passenger baggage upon" such cars, and "in the course of his employment . . . was riding in one of the express cars" of the railway company. The direct averment, therefore, is that West was employed by the express company, and that he handled baggage and was riding in the express cars in the course of this employment and as part of its duties. A relation with the railway company is, it is true, averred. He handled its baggage and rode in its cars. But this did not [688] make him its employee. If he was, such is not disclosed by the complaint, nor is it alleged in the answer of the railway company. Indeed, his employment by the express company is emphasized by the contracts attached to the answer, and a defense is based upon them. It is averred that West, by these contracts, assumed all the risks of his employment by the express company, ratified the contracts of the latter, authorized it in his name to release any demand he might have for injuries, agreed to be bound by whatever covenants the company should make, and that neither he nor any of his personal representatives would

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claim compensation for injuries, whether resulting from negligence or otherwise. These contracts are explicitly averred, as constituting the consideration for West's "employment by said express company;" and it is alleged that he was "being transported by this defendant . . . in pursuance of said contract, hereinbefore referred to as 'Exhibit B,'" and "that plaintiff is therefore now barred from maintaining this action."

These allegations do not deny, but rather aver, the employment of West by the express company, and were intended as a security to that company, and through it to any transportation company or person. Their basis distinctly is that injury might result to West in his employment, and they were intended to prevent legal liability for it. Whether they had that effect is not a Federal question.

The railway company, however, contends that the evidence conclusively shows that the deceased was an employee of the railway company, and that certainty of proof is no doubt asserted for it to countervail the combined judgments of the jury and of the trial and supreme courts. The latter court, in its second opinion, however, considering the effect of the contracts between the express company and the deceased, and the oral evidence upon which the railway company relied, said: "We therefore find with the court below that the pleadings and the evidence conclusively [689] show that the deceased suffered the injuries that resulted in his death while he was employed by the express company, and not while he was employed by the railway company in interstate commerce within the meaning of the Federal employers' liability act." The court hence decided that the action was governed by the statutes of Oklahoma.

What the pleadings alleged and what the contracts showed we have already adverted to. The testimony relied on is that of one of the superintendents of the express company, who, in testifying as to the relation between the deceased and the railway company, said that the deceased was "agent, messenger, and baggageman," and by this was meant that he "worked for both companies," and that the proportion of payment by the companies was an "equal division." That his duties were that he "received the baggage at the stations, made a record of it, and put it off at its destination in the same manner any baggageman did." The witness further said that the deceased knew that he was to handle the baggage of the railway company and act as joint employee of it and the express company, and was "told to post himself in the work of both companies." On cross-examination, however, the witness testified that all of the salary of the deceased "came from the express company." The railway company "paid us one half of his salary; we drew a bill against them in his name and the other baggageman."

Counsel for the railway company urge that the strength of this testimony is such that it needs no reinforcement from argument, and they say that it has confirmation besides in a circular letter addressed by the superintendent of the express company to all of the messengers of the company. The letter, however, was not admitted in evidence, and no error was assigned in the supreme court upon the ruling. We are unable, therefore, to consider it, notwithstanding counsel's plaint—often repeated—that [690] they were deceived by their conception, justified, it is insisted, that the case was tried upon the theory that the deceased was an employee of the railway company.

This theory the railway company makes a great deal of. It constituted the basis of the petition for rehearing, and, by disregarding it, it was contended and is contended, the court was led into error. The court, however, rejected the theory, deciding that it was not justified by the pleadings, complaint, or answer, nor by the evidence in the case.

The court grouped the contentions of the railway company under four heads: (1) Plaintiff in the action (defendant in error here) was not the proper party to maintain the action; (2) error in instructions; (3) error in excluding the three written contracts attached to the answer; (4) amount of damages.

The first contention is the determining one, as we have already said. Upon it depends the Federal question; that is, whether the laws of Oklahoma controlled the action or the employers' liability act. And this turns necessarily upon the other question, whether the deceased was employed by the railway company or by the express company,—a question of fact found in the first instance by the jury against the present contention of the railway company, and sustained by the trial court on motion for a new trial, and the supreme court in two opinions.

The finding having support in the record, it is contended that this court cannot question it, and that therefore the writ of error should be dismissed. The railway company cites in resistance the case of St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1170, 33 Sup. Ct. Rep. 858, and St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651. The cited cases are not like the case at bar. In the McWhirter Case the

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action was in express terms based on a statute of the United States,—the hours of service act of 1907 [34 Stat. at L. 1415, chap. 2939, U. S. Comp. Stat. Supp. 1911, p. 1321]. It was contended that the pleadings embraced as well an action at common law, and that such cause of action was sustained and was [691] broad enough to support the judgment, irrespective of what may have been decided concerning the statute of the United States, and a motion to dismiss was made. The contention was rejected and the motion was denied. It was recognized that the case coming from a state court, the power to review was controlled by Revised Statutes, § 709 (U. S. Comp. Stat. 1901, p. 575), but it was said, however, that "where in a controversy of a purely Federal character the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law."

In the Seale Case the question was whether the plaintiff in error in the case (the railway company) was engaged in interstate commerce. There was no question of the employment by the railway company. The state court decided the question in the negative, holding that the evidence did not bring the case within the employers' liability act. The case was brought here by writ of error and jurisdiction entertained against a motion to dismiss, and, after examining the evidence, we reversed the ruling of the state court.

In the case under review the pleadings state a cause of action under the state law, and there is no question of the character of the commerce in which the railway company was engaged; the only question is whether the deceased was its employee or that of the express company. If the answer to the question depended upon evidence, it might be said that the cited cases are the same in principle, both the fact of interstate commerce and the fact of employment by the railway company of the deceased being conditions which would bring the case under the Federal enactment; or that such employment was one of those subsidiary or connecting facts into which this court will inquire as determining its jurisdiction, of which there are examples. Kansas City Southern R. Co. v. C. H. Albert Commission Co. 223 [692] U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316; Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 56 L. ed. 594, 32 Sup. Ct. Rep. 389; Brinkmeier v. Missouri P. R. Co. 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412; Creswill v. Grand Lodge, K. P. 225 U. S. 246, 56 L. ed. 1074, 32 Sup. Ct. Rep. 822. At any rate, we might, if the fact turned on the evidence, say that the Federal question asserted was not manifestly lacking in color of merit, and follow, therefore, the ruling in Swafford v. Templeton, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783.

But the supreme court of the state rested its decision upon the allegation of fact of employment of the deceased by the express company, and the admission of the fact in the answer of the railway company, and held that there was nothing in the course of the trial which obviated the effect of the allegations and admissions of the pleadings. The court, after quoting the paragraph of the answer which we have given above, said that its "admissions are in entire harmony with the balance of the answer, which contains allegation after allegation positively stating that the deceased was employed by the express company continuously for a great many years prior to his death, and the contracts of employment between the express company and the deceased are attached to the answer and made a part thereof, and certain waivers contained therein are relied upon as a defense." And, further, "From the pleadings alone it is clear that the deceased suffered the injuries which resulted in his death while he was employed by the express company, and not while he was employed by the railway company; and that the parties did not attempt to join an issue of fact upon that question." The expression in the opinion was that if the evidence disclosed a case different from that alleged in the pleadings, the Federal statute would control and St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, would be applicable. But the court said that the testimony of Adams, the superintendent of the express company, relied on by the railway company, was "in no way inconsistent with the allegations of the petition and the admissions of the answer," because [693] "the witness merely drew erroneous conclusions from admitted facts, and that his testimony as a whole supplemented the allegations of the petition and the admissions of the answer by more fully disclosing the relations existing between the express company and the deceased, and the express company and the railway company, and made it more clearly apparent that the decedent was rightfully on the train." [134 Pac. 658.]

The court, therefore, considered the case distinguishable from the cases cited by the railway company (Missouri, K. & T. R. Co. v. Reasor, 28 Tex. Civ. App. 302, 68 S. W. 332; Vary v. Burlington, C. R. & M. R. Co. 42 Iowa, 246; Oliver v. Northern P. R.

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Co. 196 Fed. 432), and made no comment upon them except to say that they in no way conflicted with the conclusion reached.

The state court having decided, with substantial grounds for the decision, that the pleadings and evidence show an action under the employment by the express company, no denial of Federal right is involved, and, therefore, motion to dismiss must be granted. And, as the action was brought under the state law, and not under the Federal law, it becomes unnecessary to notice errors assigned by the railway company, including that based on the instruction of the trial court that a verdict could be rendered by three fourths of the jury.

Dismissed.

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[694] SANTA FE CENTRAL RAILWAY COMPANY and W. S. Hopewell and Thomas P. Gable, its Sureties, Plffs. in Err.,

v.

HARRY SLOCUM FRIDAY, by John H. Friday, His Next Friend.

(See S. C. Reporter's ed. 694–700.)

Territorial courts — jurisdiction — cases involving Federal question.

The jurisdiction of the territorial judicial district courts, which, under the New Mexico organic act of September 9, 1850 (9 Stat. at L. 446, chap. 49), § 10, was to be "as limited by law," was not withdrawn as to cases arising under the Federal Constitution and laws which that section made justiciable in those courts by N. M. Comp. Laws 1897, §§ 900, 901, giving the county district courts "exclusive original jurisdiction in all civil cases which shall not be cognizable before probate judges and justices of the peace," and "jurisdiction in all civil causes in said counties which, according to law, belong to the district courts," enacted in pursuance not only of the organic act, but of U. S. Rev. Stat. § 1874, authorizing the judges of the territorial supreme courts to hold court in the counties of their respective districts "wherein, by the laws of the territory, courts have been or may be established, for the purpose of hearing and determining all matters and causes, except those in which the United States is a party."

[For other cases, see Courts, III. a, 1, in Digest Sup. Ct. 1908.]

[No. 230.]

Submitted March 5, 1914. Decided March 23, 1914.

IN ERROR to the Supreme Court of the Territory of New Mexico to review a judgment which affirmed a judgment of the District Court of the First Judicial District of that territory, in favor of plaintiff in a personal injury action. Affirmed.

See same case below, 16 N. M. 434, 120 Pac. 316.

The facts are stated in the opinion.

Mr. E. W. Dobson submitted the cause for plaintiffs in error.

Mr. T. B. Catron submitted the cause for defendant in error. Mr. George W. Prichard was on the brief.

Mr. Justice Holmes delivered the opinion of the court:

This is an action for personal injuries, brought by the defendant in error against the railway company under the act of June 11, 1906, chap. 3073, 34 Stat. at L. 232, U. S. Comp. Stat. Supp. 1911, p. 1316, held valid for the territories in El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21. The plaintiff got a verdict and judgment which the supreme court of the territory affirmed. 16 N. M. 434, 120 Pac. 316.

The only argument addressed to us is an attack upon the jurisdiction of the court that tried the case. That court was the district court, sitting for the trial of causes arising under the Constitution and laws of the United States in the first judicial district in the territory of New Mexico. The organic act of September 9, 1850, chap. 49, 9 Stat. at L. 446, provided in § 10 for three judicial districts, and for a district court to be held in each by a justice [699] of the supreme court, as should be prescribed by law. It further enacted that the jurisdiction of the several courts therein provided for "shall be as limited by law;" that "each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States;" and that the first six days of every term, or so much of them as necessary, "shall be appropriated to the trial of causes arising under the said Constitution and laws." See also Rev. Stat. § 1910. The court where the trial was held was one of these district courts provided for by the organic act, and the case was one arising under the laws of the United States.

But it is said that the jurisdiction of these courts was to be "as limited by law;" that that means by territorial legislation, and that a territorial statute provided for the holding of district courts in the counties, and enacted that the district courts in the counties should have "exclusive original jurisdiction in all civil cases which shall not be cognizable before probate judges and justices of the peace." Comp.

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Laws 1897, § 900. By a later territorial act the district courts in the various counties were given "jurisdiction in all civil causes in said counties which, according to law, belong to the district courts," id. § 901. And this was in pursuance not only of the organic act, but of another act of Congress of 1858 [11 Stat. at L. 366, chap. 166], afterwards Rev. Stat. § 1874, by which the judges of the supreme court were "authorized to hold court within their respective districts, in the counties wherein, by the laws of the territory, courts have been or may be established, for the purpose of hearing and determining all matters and causes, except those in which the United States is a party." Thus, it is argued, exclusive jurisdiction of cases like the present was transferred to the county district courts.

[700] But it has been held for many years that the purpose and effect of these statutes was to give the judges of the supreme court sitting in the county district courts authority to hear cases arising under territorial laws, and to make the jurisdiction over such cases exclusive in those courts. Lincoln-Lucky & L. Min. Co. v. District Ct. 7 N. M. 486, 490–501, 38 Pac. 580; Murphy v. Murphy, 4 Dak. 107, 25 N. W. 806. The statutes, we believe, have not been understood to attempt to withdraw from the courts of the larger districts the authority expressly conferred upon them by the Revised Statutes and the organic act,—a thing that, of course, territorial statutes could not do. See The City of Panama, 101 U. S. 453, 25 L. ed. 1061. We should not decide against the local understanding of a matter of purely local concern unless we thought it clearly wrong, instead of thinking it, as we do, plainly right. Phœnix R. Co. v. Landis, 231 U. S. 578, 579, ante, 377, 380, 34 Sup. Ct. Rep. 179.

Judgment affirmed.

CARL EBERLE and Stephen H. Carroll, Plffs. in Err.,
v.
PEOPLE OF THE STATE OF MICHIGAN.

(See S. C. Reporter's ed. 700–707.)

Statutes — validity — invalid amendments.

1. The validity of the original Michigan local option law (Mich. Pub. Acts 1889, act. No. 207) could not be impaired by the subsequent adoption of Pub. Acts 1899, act. No. 183, and Pub. Acts 1903, act. No. 170, enacting what in form were amendments, but which, in legal effect, because of their unlawfully discriminatory character, were nullities.

[Partial validity of statute, see Statutes, I. d. 4, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — question of local law.

2. Whether or not an election at which a county went "dry" was void because the question apparently submitted was the adoption of the original Michigan local option law (Mich. Pub. Acts 1889, act. No. 207) with its amendments (Pub. Acts 1899, act. No. 183, and Pub. Acts 1903, act. No. 170) permitting the manufacture of wine and cider in dry counties, when in reality only the original law was submitted, the amendments being invalid, is for the state court to decide, and its conclusion cannot be revised by the Federal Supreme Court on writ of error.

[For other cases, see Appeal and Error, 2072–2226, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws.

3. Permitting the sale of intoxicating liquors by druggists for medicinal, art, scientific, and mechanical purposes, while forbidding its sale by merchants, as is done by the Michigan local option law (Mich. Pub. Acts 1889, act. No. 207, § 15), does not deny the equal protection of the laws.

[For other cases, see Constitutional Law, 347–355, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — prohibitory law.

4. The subsequent manufacture of beer in a "dry" county for use in starting refermentation of other beer on hand when the Michigan local option law (Mich. Pub. Acts 1889, act. No. 207) became operative in that county as the result of a local election may be made a criminal offense, as is done by that statute, without depriving the brewers of their property without due process of law.

[For other cases, see Constitutional Law, 479–481, in Digest Sup. Ct. 1908.]

[No. 164.]

Argued January 16 and 19, 1914. Decided March 23, 1914.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment which affirmed a conviction in the Circuit Court of Jackson County, in that state, for violating the local option law. Affirmed.

See same case below, 167 Mich. 477, 133 N. W. 519.

The facts are stated in the opinion.

NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

Generally, on the validity of state regulation of sales of intoxicating liquors—see notes to Foster v. Kansas, 28 L. ed. U. S. 696, and Rhodes v. Iowa, 42 L. ed. U. S. 1089.

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Mr. Richard Price argued the cause and filed a brief for plaintiffs in error:

The statute is unlawfully discriminatory in character.

Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 42 L.R.A.(N.S.) 1123, 33 Sup. Ct. Rep. 76; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

The construction which the supreme court of the state of Michigan places upon the law is such as to forbid even the manufacture of a new brew of beer for the purpose of preserving the old beer which was on hand at the time the law took effect. This would lead to the destruction of the beer on hand at the time the law took effect, as the same could only be kept alive and in a marketable condition by inserting a new brew from time to time as occasion required. It is true that the courts have held that so far as the machinery, plant, and appliances of liquor and beer manufactories are concerned, the fact that the adoption of a prohibition law makes them practically useless does not make the law unconstitutional; but no case which I have found has yet gone to the extent of holding that the legislature of a state would have a right to pass a law, the effect of which would necessitate the destruction of the manufactured article in existence at the time the law took effect.

Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; Bartemeyer v. Iowa, 18 Wall. 129, 21 L. ed. 929; Wynehamer v. People, 13 N. Y. 486; Kidd v. Pearson 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989.

Can the wine and cider clause be declared unconstitutional and the remainder of the act be saved?

Cooley, Const. Lim. 7th ed. pp. 246, 247, 249; State ex rel. Huston v. Perry County, 5 Ohio St. 497.

An amendment to a statute will generally be considered as a part of the original act, and the entire act as amended will be given the construction which would be given it if the amendment were a part of the original act.

People ex rel. Atty. Gen. v. Michigan C. R. Co. 145 Mich. 140, 108 N. W. 772; Endlich, Interpretation of Statutes, §§ 44, 294; Black, Constr. & Interpretation of Laws, pp. 356, 357.

Where such a law creates a system, and the part which is legal cannot stand by itself without the aid of the rest, or is so much affected or disturbed by the rejection of the rest that it could not be supposed the legislature would have adopted it by itself, the whole shall be rejected, because the part cannot be regarded as the expression of the legislative will.

People ex rel. Atty. Gen. v. Detroit, 29 Mich. 114.

The legislature of the state of Michigan having made a certain trade in liquor, including beer, lawful in dry counties, it could not make the manufacture of beer in those counties to supply that trade unlawful. It could not oblige the people to purchase elsewhere, nor deny them the right to supply a lawful trade. What the government of the state could not monopolize it could not turn over to, and create a monopoly of, in favor of the foreign manufacturer.

Herman v. State, 8 Ind. 545; Allgeyer v. Louisiana, 165 U. S. 578–589, 41 L. ed. 832–835, 17 Sup. Ct. Rep. 427; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 766, 28 L. ed. 585, 590, 4 Sup. Ct. Rep. 652.

Mr. Grant Fellows, Attorney General of Michigan, argued the cause and filed a brief for defendant in error:

The original act in question was a complete act in and of itself; it was capable of being executed independently of such amendment, and therefore it was not affected by the invalidity of such amendment.

Cooley, Const. Lim. 7th ed. pp. 246, 247; Presser v. Illinois, 116 U. S. 252, 263, 29 L. ed. 615, 618, 6 Sup. Ct. Rep. 580.

The fact that the plaintiffs in error were engaged in a business made unlawful by a valid section of this act does not render them immune from prosecution because of the invalidity of certain other provisions.

Tiernan v. Rinker, 102 U. S. 123, 26 L. ed. 103.

The plaintiffs in error have not been deprived of their property without due process of law and in violation of the 14th Amendment.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Rippey v. Texas, 193 U. S. 504, 48 L. ed. 767, 24 Sup. Ct. Rep. 516; Ohio ex rel. Lloyd v. Dollison, 194 U. S. 445, 48 L. ed. 1062, 24 Sup. Ct. Rep. 703.

Mr. Justice Lamar delivered the opinion of the court:

The Michigan local option law of 1889 makes it unlawful to manufacture or sell malt, vinous, spirituous, or intoxicating liquors in any county where a majority of the electors vote in favor of prohibition.

The provisions of the law, however, do not (§ 1) apply to druggists selling such liquors in compliance with the restrictions

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imposed upon them by the general laws of this state. It was also provided (§ 15) that "nothing in this act shall be so construed as to prohibit the sale of wine for sacramental purposes, nor shall anything herein contained [703] prohibit druggists from selling pure alcohol for medicinal, art, scientific, and mechanical purposes." Pub. Acts (Mich.) 1889, pp. 287, 293.

By amendments passed in 1899 and 1903 (Acts of 1899, p. 280; Acts of 1903, p. 229), it was further provided that the act should not be construed to "prohibit the sale of wine or cider made from home-grown fruit in quantities of not less than 5 gallons, nor . . . to prohibit the manufacture of wine or cider, nor . . . to prohibit the sale at wholesale of wine or cider manufactured in said [dry] county to parties who reside outside of said county."

As a result of an election held April 13, 1909, the law became operative in Jackson county on May 1st, 1909. The defendants, who were officers of a brewing company, were charged with having thereafter manufactured beer in that county, in violation of the statute. They moved to quash the information, upon the ground that the act was void because it interfered with interstate commerce, took property without due process of law, and so discriminated against them and other manufacturers residing in dry counties as to deny them the equal protection of the law. These defenses were overruled. On the trial they offered evidence tending to show that the beer which they had manufactured had not been made for sale, but to be used in causing re-fermentation of 1,600 barrels of beer, worth $5 a barrel, which was on hand at the date of the election, with a view of making it salable, and thereby save themselves against loss. Under the charge of the court, the jury returned a verdict of guilty. The case was then taken to the supreme court of Michigan, which held (167 Mich. 477, 133 N. W. 519) that the amendments of 1899 and 1903 (permitting the manufacture and sale of wine and cider in dry counties) were void as an unlawful discrimination against the products and citizens of other states, and [704] a violation of the equal protection clause of the Constitution. The court, however, sustained the conviction and sentence of defendants upon the ground that the original local option act was constitutional and had not been rendered invalid by the void amendments of 1899 and 1903. The case was then brought here, where, in addition to the errors previously assigned, the plaintiffs in error—defendants in the trial court—insisted that the court erred in holding that the act could be valid if the amendments relative to wine and cider were stricken—said provisions "being a part of the act at the time the local option law was adopted in Jackson county, where defendants reside, and operating, together with the other provisions of the act, to bring about such adoption."

1. The argument here was principally directed to a discussion of this assignment of error,—the defendants contending that the discriminatory wine-and-cider amendments formed an integral part of the law (Endlich, Statutes, §§ 94, 294) which had been submitted to the voters, and which, when adopted, it was claimed, was adopted as a whole. It was insisted that the provisions permitting the manufacture and sale of wine and cider induced many to vote for the law as amended, and it was, in effect, argued that these amendments could not be treated as a part of the statute for the purpose of carrying the election, and then be held void in order to save the law from being set aside as discriminatory. In support of this contention, defendants relied on State ex rel. Huston v. Perry County, 5 Ohio St. 497, where the court was considering a local option statute, one section of which provided for an election to determine whether a county seat should be removed, and another (§ 5) contained unconstitutional provisions which were such "as would naturally influence the vote upon the adoption or rejection of the main section." It was held that "the provisions of both sections are made equally to depend upon [705] the result of the election. They were submitted by the legislature collectively to the voters, and could only be passed upon as a whole, and . . . must therefore stand or fall together." But in that case the valid and invalid provisions formed an inseparable part of a single act which was void as a whole, whether treated as having been adopted by the legislature or the people. On the other hand, in the case at bar the original local option law of 1889 had been held to be constitutional as a whole, and its validity could not be impaired by the subsequent adoption of what were in form amendments, but, in legal effect, were mere nullities.

2. It is true that the fact that these amendments were on the statute book may have influenced electors. Some may have voted for the law because of the supposed permission to make wine. Others may have opposed its adoption because of the supposed exemption of wine from the operation of the act. But in either event these void amendments were not a part of the law, but extraneous inducements which may or may not have determined the result. The attack, therefore, goes rather to the regularity of the adoption than to the consti-

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tutionality of the statute after it had been adopted for Jackson county. But it was for the state court to determine that matter, and to decide whether the election was void because the question apparently submitted was the adoption of the law and amendments, when, in reality, only the law itself was submitted. This court, on writ of error from a state court, cannot inquire into the motives or arguments which influence men to vote for or against a measure. Neither can we reverse the decision of the state court, and declare the act inoperative in Jackson county because the electors thereof may have voted under a misapprehension as to the matter submitted, any more than we could set aside a statute because it had been enacted contrary to parliamentary rules relating to the introduction, debate, and [706] passage of a bill. The original local option statute had been held to be constitutional, and prohibited, without discrimination, the manufacture of all liquors. That valid act the defendants violated, and their conviction cannot be set aside on the ground that some or all of the electors voted to make the law operative in Jackson county under the supposition that, as wine could be manufactured, the equal protection clause of the Constitution would make it likewise lawful to manufacture beer and other liquors.

3. Nor can the judgment be reversed because the original act, while prohibiting liquor to be sold by merchants, permitted it to be sold by druggists for medicinal, mechanical, or scientific purposes. The contention that this was an unlawful discrimination is answered by Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Rippey v. Texas, 193 U. S. 504, 48 L. ed. 767, 24 Sup. Ct. Rep. 516; Ohio ex rel. Lloyd v. Dollison, 194 U. S. 447, 48 L. ed. 1065, 24 Sup. Ct. Rep. 703. Those cases show that the state may prohibit the sale of liquor absolutely or conditionally; may prohibit the sale as a beverage, and permit the sale for medicinal and like purpose; that it may prohibit the sale by merchants and permit the sale by licensed druggists.

4. It was further contended that the act takes property without due process of law because it made no provision for the sale of liquor on hand at the time the law became operative. But the record does not call for a decision of that question, nor does it bring the case within the principle, suggested in Bartemeyer v. Iowa, 18 Wall. 129, 133, 21 L. ed. 929, 930, that a statute absolutely prohibiting the sale of property in existence at the time of the passage of the law would amount to confiscation and be void as depriving the owner of his property without due process of law. The defendants were not charged with selling property which was in their possession when the law went into effect in May, 1909, but with manufacturing beer in September, 1909, several months after its adoption. The fact that such beer may have been made for use in starting re-fermentation of [707] other beer that was on hand when the law became operative does not bring the case within the principle for which the decision is cited. For the right to manufacture beer to be utilized in giving value to an unfinished brew is no more protected by the Constitution than the right to manufacture beer in order to utilize the brewery, and thereby preserve the value of the plant as a going concern.

Liquor laws are enacted by virtue of the police power to protect the health, morals, and welfare of the public. Such laws may operate to depreciate the principal value of distilleries, breweries, and other property, in use and on hand when the law is passed, but it has been held in many cases that such depreciation is not the taking of property prohibited by the Constitution. Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. There is nothing in the record calling for a discussion of the assignment of error relating to interstate commerce. The judgment must be affirmed.

SIDNEY S. SCHUYLER, John R. Chadwick, and Charles L. Burnham, Co-Partners, Trading under the Firm Name and Style of Schuyler, Chadwick, & Burnham, Appts.,

v.

CHARLES E. LITTLEFIELD, as Trustee in Bankruptcy of A. O. Brown & Company.

(See S. C. Reporter's ed. 707-713.)

Trusts — following trust property — bank deposits.

1. Trust funds deposited by a trustee in his individual bank account are dissipated if the mingled fund is at any time wholly depleted, and cannot be treated as reappearing in sums subsequently deposited to the same account.

[For other cases, see Trusts, V. b, in Digest Sup. Ct. 1908.]

Evidence — burden of proof — identifying trust funds.

2. Persons seeking to recover trust funds which they claim to have traced into the possession of the trustee's trustee in bankruptcy are under the burden of proving their title, and if the evidence leaves the identification in doubt, that doubt must be

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resolved in favor of the trustee in bankruptcy.

[For other cases, see Evidence, II. k; XII. e, in Digest Sup. Ct. 1908.]

[No. 213.]

Argued January 29, 1914. Decided March 23, 1914.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which, reversing a decree of the District Court for the Southern District of New York, dismissed a claim to funds in the hands of a trustee in bankruptcy. Affirmed.

See same case below, 113 C. C. A. 348, 354, 193 Fed. 24, 30.

The facts are stated in the opinion.

Mr. W. Benton Crisp argued the cause, and, with Mr. Theodore M. Crisp, filed a brief for appellants:

The bankrupts commingled the proceeds of appellants' property with that of their own, and the combined or commingled funds having been traced into the Hanover National Bank funds, a part of which are now in the hands of the trustee, so long as any portion of said funds remained, the appellants were entitled to have their money paid out of them; and if said funds were used to release collateral in the bank, which collateral, or the proceeds of which collateral, went into the hands of the trustee, they should be impressed with a lien in favor of the appellants.

Gorman v. Littlefield, 229 U. S. 19, 57 L. ed. 1047, 33 Sup. Ct. Rep. 690; Peters v. Bain, 133 U. S. 670, 693, 33 L. ed. 696, 704, 10 Sup. Ct. Rep. 354; Frelinghuysen v. Nugent, 36 Fed. 239; Re Marsh, 116 Fed. 396; Erie R. Co. v. Dial, 72 C. C. A. 183, 140 Fed. 689; Re Royea, 143 Fed. 182; Smith v. Mottley, 80 C. C. A. 154, 150 Fed. 266; Smith v. Au Gres Twp. 9 L.R.A.(N.S.) 876, 80 C. C. A. 145, 150 Fed. 257; Re Stewart, 178 Fed. 463; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504; Knatchbull v. Hallett, L. R. 13 Ch. Div. 696, 49 L. J. Ch. N. S. 415, 42 L. T. N. S. 421, 28 Week. Rep. 732.

Every equity in this case is in favor of the appellants' position. They have been fraudulently deprived of their property, and if they are unable to obtain it in this proceeding, the general creditors of the bankrupts will profit by the fraudulent acts of the latter. This is not in keeping with the policy of the bankruptcy law.

Hurley v. Atchison, T. & S. F. R. Co. 213 U. S. 126, 134, 53 L. ed. 729, 734, 29 Sup. Ct. Rep. 466; Re Chase, 59 C. C. A. 629, 124 Fed. 753.

Mr. Edwin D. Hays argued the cause, and, with Messrs. Daniel P. Hays and Ralph Wolf, filed a brief for appellee:

The burden was on the appellants to show that their property, or the proceeds thereof, came into the hands of the trustee.

First Nat. Bank v. Littlefield, 226 U. S. 110, 57 L. ed. 145, 33 Sup. Ct. Rep. 78; Re T. A. McIntyre & Co. 104 C. C. A. 424, 181 Fed. 960; American Can Co. v. Williams, 101 C. C. A. 634, 178 Fed. 420; Re Hicks, 170 N. Y. 195, 63 N. E. 276.

All trust funds deposited by the bankrupts in the Hanover National Bank prior to the certification on August 25 of the check of $146,600 to the order of A. H. Combs & Company were dissipated by the certification of said check, and no funds so deposited came into the hands of the receiver or trustee.

First Nat. Bank v. Littlefield, supra.

The contention of the appellants that the check of $266,600 helped to pay off on August 24 loans aggregating $285,000, and that therefore they are entitled to share in the securities which were held as collateral for the other loans, is without merit.

Ibid.

[710] Mr. Justice Lamar delivered the opinion of the court:

This record presents for determination another of the many questions arising out of the tangled and complicated affairs of Brown & Company, stockbrokers of New York city, who made an assignment on August 25th, 1908, and who were subsequently adjudged bankrupts. The proceeding is by Schuyler, Chadwick, & Burnham, to recover trust funds which they claim to have traced into the possession of Brown & Company's trustee in bankruptcy. The case involves an application of the rule that where one has deposited trust funds in his individual bank account, and the mingled fund is at any time wholly depleted, the trust fund is thereby dissipated, and cannot be treated as reappearing in sums subsequently deposited to the credit of the same account. Knatchbull v. Hallett, L. R. 13 Ch. Div. 696, 49 L. J. Ch. N. S. 415, 42 L. T. N. S. 421, 28 Week. Rep. 732; Peters v. Bain, 133 U. S. 671 (1), 693, 33 L. ed. 696, 704, 10 Sup. Ct. Rep. 354; Crawford County v. Strawn, 15 L.R.A.(N.S.) 1100, 84 C. C. A. 553, 157 Fed. 49, 54.

There is no controversy about the law, but a complete disagreement about matters of fact where it is necessary to decide with certainty, on the one hand, the exact time and order in which a series of checks were

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deposited; and, on the other, to determine, with equal certainty, the exact order in which a series of checks drawn on that account were paid and what use was made of the money so drawn. As the bankruptcy occurred on August 25, 1908, and as the testimony was taken several months later, it is not surprising that the witnesses were not able to establish definitely the order in which these transactions took place, nor that the referee, district judge, and court of appeals each differed from the other as to what had been proved. The referee found that Schuyler, Chadwick, & Burnham had traced their funds into the hands of the trustee, and were therefore entitled to recover. The district judge agreed with the referee in this conclusion, but disagreed with him as to some of the findings of fact [711] on which that conclusion was based. The circuit court of appeals disagreed with both, and held that the trust fund had not been traced into the hands of the trustee, and thereupon dismissed the complaint. The appeal from that degree involves a consideration of the facts, which may be thus briefly stated:

Brown & Company were brokers in New York city, and on August 24th, 1908, by false representations of solvency obtained from Schuyler, Chadwick, & Burnham, 300 shares of Interborough stock (worth $32 per share), agreeing at once to send in payment a check for $9,600, capable of certification. This was not done, and in spite of repeated demands the check was not delivered until after banking hours on August 24th, and too late to have it certified that day. In the meantime Brown & Company sold to Miller the

300 shares Interborough, for	$ 9,600
1000 shares Northern Pacific ..	143,000
1000 shares Great Northern	137,000
Total	$289,600

Miller thereupon gave Brown & Company a check for $266,600, which was deposited in the Hanover National Bank on August 24. Miller retained the balance of $23,000 on some claim which was not admitted by Brown & Company. They later that day obtained from Miller a check for $23,000, which was deposited in the bank the next morning, but after the bank had refused to pay or certify the Schuyler, Chadwick, & Burnham check for $9,600.

It thus appeared that the stock fraudulently obtained by Brown & Company had been sold by them, with other stock, to Miller, who paid for the whole in two checks,—one for $266,600 deposited to Brown & Company's account in the Hanover National Bank on August 24th, and another for $23,000, deposited in the same bank on August 25th.

1. If the trust fund of $9,600 was included in the check [712] for $266,600, then it was dissipated except to the extent of $6,180.17, which was the sum left to Brown & Company's credit at the close of business on August 24th. And inasmuch as all of that balance was paid out early the next day, the trust fund was thereby wholly dissipated so far as the bank account was concerned.

If, however, the trust fund of $9,600 is to be treated as having been included in Miller's check for $23,000, then a similar result follows, though on this point the evidence of the witnesses and the findings of the two courts are in conflict. The controlling question was whether the $23,000 had been deposited before or after the payment of a check for $146,000 which absorbed the whole amount then in bank. We see no reason to disturb the finding of the circuit court of appeals that the check for $23,000 was deposited soon after the bank opened on August 25th, and that it, with other money deposited during the morning, was used at about 11:30 A. M. to pay this check for $146,000 given by Brown & Company to Combs & Company. The payment of this large sum depleted the account and dissipated the trust fund in bank.

2. The appellants, however, presented their case in a double aspect. They contended that even if the trust fund of $9,600 was checked out of the bank, they are able to trace the fund into stocks that subsequently came into the hands of the trustee in bankruptcy. This was based on the claim that out of the proceeds of the Miller checks, Brown & Company had paid notes due to the bank, and thereby released collateral which ultimately came into the possession of the trustee.

But the record fails to show when the $266,600 was deposited, and it also fails to show with the requisite certainty the particular use made by Brown & Company of that money. The banking transactions on August 24th involved several millions of dollars. Money was deposited by Brown & Company in the bank, and money was borrowed by [713] Brown & Company from the bank. Part of the loans were deposited to their bank account, and a part, represented by cashier's checks, did not appear in that account. Money was paid by Brown & Company to outsiders and to the bank. Payments to the bank were made on account of notes, some of which represented loans appearing in the deposit account, and others represented loans which had not been so entered. Some of the loans were secured and others were unsecured, and whether

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the money received from Miller (which included the trust fund of $9,600) was used to pay the secured or unsecured loans does not appear with certainty.

It would serve no useful purpose to make a detailed statement of the testimony. The evidence has been fully discussed by the court of appeals (113 C. C. A. 348–357, 193 Fed. 24–33) in considering this claim of appellants along with that of several other parties seeking, on somewhat similar facts, to trace trust funds into the bank, and thence into collateral which ultimately came into the hands of the trustee. All these claims were disallowed because of the failure to make the requisite proof. Our investigation of the facts leads us to the same conclusion so far as concerns the appellants' claim. They were practically asserting title to $9,600, said to have been traced into stock in the possession of the trustee. Like all other persons similarly situated, they were under the burden of proving their title. If they were unable to carry the burden of identifying the fund as representing the proceeds of their Interborough stock, their claim must fail. If their evidence left the matter of identification in doubt, the doubt must be resolved in favor of the trustee, who represents all of the creditors of Brown & Company, some of whom appear to have suffered in the same way. Like them, the appellants must be remitted to the general fund.

The decree is affirmed.

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MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

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[714] STAR CHRONICLE PUBLISHING COMPANY, Plaintiff in Error, v. UNITED PRESS ASSOCIATIONS. [No. 776.]

Error to circuit court of appeals—jurisdiction below.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 122 C. C. A. 489, 204 Fed. 217.

Mr. Shepard Barclay for plaintiff in error.

Mr. Campbell Cummings for defendants in error.

January 12, 1914. *Per Curiam:* Dismissed for want of jurisdiction. Omaha Electric Light & P. Co. v. Omaha, 230 U. S. 123, 57 L. ed. 1419, 33 Sup. Ct. Rep. 974; Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704; Chicago Junction R. Co. v. King, 222 U. S. 223, 56 L. ed. 174, 32 Sup. Ct. Rep. 79; Re Metropolitan R. Receivership (Re Reisenberg) 208 U. S. 109, 52 L. ed. 412, 28 Sup. Ct. Rep. 219.

LEON CARDENAS MARTINEZ, Plaintiff in Error, v. STATE OF TEXAS. [No. 356.]

Error to state court—Federal question.

In Error to the Court of Criminal Appeals for the State of Texas.

See same case below, — Tex. Crim. Rep. —, 145 S. W. 959.

No counsel appeared for plaintiff in error.

Mr. B. F. Looney for defendant in error.

January 12, 1914. *Per Curiam:* Dismissed for want of jurisdiction. Ex parte Siebold, 100 U. S. 371, 375, 25 L. ed. 717, 718; Ex parte Crouch, 112 U. S. 178, 28 L. ed. 690, 5 Sup. Ct. Rep. 96; Andrews v. Swartz, 156 U. S. 272, 39 L. ed. 422, 15 Sup. Ct. Rep. 389; Barrington v. Missouri, 205 U. S. 483, 51 L. ed. 895, 27 Sup. Ct. Rep. 582; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; Fullerton v. Texas, 196 U. S. 192, 49 L. ed. 443, 25 Sup. Ct. Rep. 221; McCorquodale v. Texas, 211 U. S. 432, 53 L. ed. 269, 29 Sup. Ct. Rep. 146.

CHARLES MAIBAUM, Appellant, v. UNITED STATES. [No. 4.]

Aliens—naturalization—impeaching certificate.

Appeal from the District Court of the United States for the Northern District of Illinois.

Messrs. Elijah N. Zoline and James Hamilton Lewis for appellant.

Mr. Assistant Attorney General Harr for appellee.

[715] January 19, 1914. *Per Curiam:* Decree affirmed on the authority of Johannessen v. United States, 225 U. S. 227, 56 L. ed. 1066, 32 Sup. Ct. Rep. 613, and Luria v. United States, 231 U. S. 9, ante, 101, 34 Sup. Ct. Rep. 10.

F. O. NORRIS et al., Appellants, v. J. E. JOHNSON et al. [No. 149.]

Appeal—from circuit court of appeals—bankruptcy case.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, — L.R.A.(N.S.) —, 111 C. C. A. 291, 190 Fed. 459.

Mr. Thomas N. Kennerly for appellants.

Mr. Henry F. Ring for appellees.

January 19, 1914. *Per Curiam:* Dismissed for want of jurisdiction. Holden v. Stratton, 191 U. S. 115, 48 L. ed. 116, 24 Sup. Ct. Rep. 45; First Nat. Bank v. Chicago Title & T. Co. 198 U. S. 280, 288, 49 L. ed. 1051, 1054, 25 Sup. Ct. Rep. 693; Hatch v. Ketcham, 198 U. S. 580, 49 L. ed. 1172, 25 Sup. Ct. Rep. 801; Duryea Power Co. v. Sternbergh, 218 U. S. 299, 301, 54 L. ed. 1047, 1048, 31 Sup. Ct. Rep. 25.

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Error to state court—Federal question.

In Error to the Supreme Court of the State of California.

See same case below, 161 Cal. 120, 118 Pac. 535.

Messrs. James F. Peck and Charles C. Boynton for plaintiffs in error.

Messrs. William J. Hunsaker, E. W Britt, and Frank H. Short for defendants in error.

January 19, 1914. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of: First. Pomeroy v. State Bank, 1 Wall. 592, 597, 17 L. ed. 638, 640; New Orleans & N. E. R. Co. v. Jopes, 142 U. S. 18, 22, 35 L. ed. 919, 922, 12 Sup. Ct. Rep. 109; Ward v. Joslin, 186 U. S. 142, 153, 46 L. ed. 1093, 1100, 22 Sup. Ct. Rep. 807; Holt v. United States, 218 U. S. 245, 54 L. ed. 1021, 31 Sup. Ct. Rep. 20, 20 Ann. Cas. 1138. Second. Arkansas Southern R. Co. v. German Nat. Bank, 207 U. S. 270, 52 L. ed. 201, 28 Sup. Ct. Rep. 78; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 431, 29 Sup. Ct. Rep. 227.

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[716] Fred W. Lake et al., Plaintiffs in Error, v. Superior Court of the State of California in and for the County of Kern. [No. 681.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of California.

See same case below, 165 Cal. 182, 131 Pac. 371.

Messrs. James F. Peck and Charles C. Boynton for plaintiffs in error.

Messrs. William J. Hunsaker, E. W. Brett, Frank H. Short, and D. S. Ewing for defendants in error.

January 19, 1914. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Lake v. Bonynge, 232 U. S. 715, supra, 34 Sup. Ct. Rep. 330.

Woodward Cotton Company, Appellant, v. City of Woodward et al. [No. 154.]

Constitutional law—impairing contract obligations — electric franchise — municipal competition.

Appeal from the Circuit Court of the United States for the Western District of Oklahoma.

Mr. John Devereux for appellant.

[illegible] Charles A. Loomis and Webster [illegible]

[illegible] *Curiam:* Af-

Knoxville, [illegible]

Sup. Ct. Rep. 224; Bien[illegible]

Co. v. Mobile, 175 U. S. 109, 44 L. [illegible]

20 Sup. Ct. Rep. 40.

Cause remanded to the District Court of the United States for the Western District of Oklahoma.

District of Columbia, Plaintiff in Error, v. Philadelphia, Baltimore, & Washington Railroad Company. [No. 174.]

Error to District of Columbia courts—Federal question.

In Error to the Court of Appeals of the District of Columbia; petition for Writ of Certiorari.

See same case below, 38 App. D. C. 143.

Messrs. Conrad H. Syme and F. H. Stephens for plaintiff in error.

Messrs. F. D. McKenney and J. S. Flannery for defendant in error.

[717] January 26, 1914. *Per Curiam:* Dismissed for want of jurisdiction. American Security & T. Co. v. District of Columbia, 224 U. S. 491, 56 L. ed. 856, 32 Sup. Ct. Rep. 553.

The petition for a Writ of Certiorari is denied.

J. E. Arnott et al., Plaintiffs in Error, v. Southern Railway Company. [No. 196.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Tennessee.

Mr. C. J. St. John for plaintiffs in error.

Mr. L. E. Jeffries for defendant in error.

February 2, 1914. *Per Curiam:* Dismissed for want of jurisdiction.

S. W. Washington et al., Surviving Trustees, etc., Appellants, v. Joseph F. Tearney et al., Surviving Executors, etc. [No. 316.]

Appeal—from circuit court of appeals— jurisdiction.

Appeal from the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 114 C. C. A. 534, 194 Fed. 830, on rehearing 117 C. C. A. 53, 197 Fed. 307.

Messrs. James M. Mason, Jr., and B. M. Ambler for appellants.

Messrs. Forrest W. Brown and R. T. Barton for appellees.

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[718] CITY OF BLACKWELL, Plaintiff in Error, v. CITY OF NEWKIRK et al. [No. 214.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Oklahoma.

See same case below, 31 Okla. 304, 121 Pac. 260, Ann. Cas. 1913E, 441.

Messrs. Frank Dale, A. G. C. Bierer, and J. W. Bailey for plaintiff in error.

Messrs. C. L. Pinkham and J. F. King for defendants in error.

February 2, 1914. *Per Curiam:* Dismissed for want of jurisdiction.

ANNA HAWLEY, Plaintiff in Error, v. JOSEPH W. WALKER, Constable, etc. [No. 217.]

Constitutional law—regulating hours of women employees.

In Error to the Supreme Court of the State of Ohio.

See same case below in Ohio Court of Common Pleas, 22 Ohio S. & C. P. Dec. 39.

Mr. J. M. Sheets for plaintiff in error.

Messrs. Clarence D. Laylin and Louis D. Brandeis for defendant in error.

February 24, 1914. *Per Curiam:* Judgment affirmed with costs upon the authority of Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 78, 79, 55 L. ed. 369, 377, 378, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160.

COMMONWEALTH OF PENNSYLVANIA, Appellant, v. YORK SILK MANUFACTURING COMPANY, Bankrupt. [No. 200.]

Appeal—from circuit court of appeals—bankruptcy case.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 112 C. C. A. 613, 192 Fed. 81.

Mr. Jackson H. Ralston for appellant.

Mr. Henry C. Niles for appellee.

March 2, 1914. *Per Curiam:* Dismissed for want of jurisdiction. Holden v. Stratton, 191 U. S. 115, 48 L. ed. 116, 24 Sup. Ct. Rep. 45.

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[719] LOUIS ELIE JOSEPH HENRY DE GALARD DE BRASSAC DE BEARN, Count and Prince of Béarn and Chalais, Plaintiff in Error, v. ROSS R. WINANS and Ferdinand C. Latrobe, Trustees, et al. [No. 557.]

Error to state court—Federal question.

In Error to the Court of Appeals of the State of Maryland.

See same case below, 119 Md. 390, 86 Atl. 1044.

Mr. Maurice Léon for plaintiff in error.

Messrs. J. Kemp Bartlett, Edward Duffy, Edgar Allan Poe, Albert C. Ritchie, and Shirley Carter for defendants in error.

March 9, 1914. *Per Curiam:* Dismissed for want of jurisdiction. First Nat. Bank v. Estherville, 215 U. S. 341, 346, 54 L. ed. 223, 227, 30 Sup. Ct. Rep. 152; Rogers v. Clark Iron Co. 217 U. S. 589, 54 L. ed. 895, 30 Sup. Ct. Rep. 693. See De Bearn v. De Bearn, 225 U. S. 695, 56 L. ed. 1261, 32 Sup. Ct. Rep. 834; De Bearn v. De Bearn, 231 U. S. 741, ante, 462, 34 Sup. Ct. Rep. 318.

C. H. ALBERS COMMISSION COMPANY, Plaintiff in Error, v. MARY E. SPENCER and Harlow B. Spencer, Executrix and Executor of the Estate of Corwin H. Spencer, Deceased, et al. [No. 581.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Missouri.

See same case below, 245 Mo. 368, 150 S. W. 712.

Messrs. Shepard Barclay, P. H. Cullen, and Thomas T. Faunleroy for plaintiff in error.

Messrs. Frederick N. Judson and John F. Green for defendants in error.

March 9, 1914. *Per Curiam:* Dismissed for want of jurisdiction. Kansas City Star Co. v. Julian, 215 U. S. 589, 590, 54 L. ed. 340, 30 Sup. Ct. Rep. 406; Wood v. Chesborough, 228 U. S. 672, 57 L. ed. 1018, 33 Sup. Ct. Rep. 706.

J. F. SHULTZ, Plaintiff in Error, v. FRED W. RITTERBUSCH, County Treasurer, etc., et al. [No. 817.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Oklahoma.

See same case below, 34 Okla. 478, 134 Pac. 961.

Mr. Milton Brown for plaintiff in error.

Mr. D. C. Westenhaver for defendants in error.

[720] March 9, 1914. *Per Curiam:* Dismissed for want of jurisdiction. (1) Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609 and cases cited; (2) Louisville & N. R. Co. v. Barber Asphalt Paving Co. 197 U. S. 430, 434, 49 L. ed. 819, 821, 25 Sup. Ct. Rep. 466, and cases cited.

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/. SCHNEIDER WHOLESALE WINE & LIQUOR COMPANY, Appellant, v. AUGUST DIEDERICH. [No. 243.]

Appeal—from circuit court of appeals—trademark case.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, — L.R.A.(N.S.) —, 115 C. C. A. 37, 195 Fed. 35.

Messrs. James Love Hopkins and Alphonso Howe for appellant.

Mr. James A. Carr for appellee.

March 16, 1914. *Per Curiam:* Dismissed for want of jurisdiction. Street & Smith v. Atlas Mfg. Co. 231 U. S. 348, ante, 262, 34 Sup. Ct. Rep. 73.

THOMAS MAY, JR., et al., Plaintiffs in Error, v. PEOPLE OF THE STATE OF ILLINOIS FOR THE USE OF EDWARD GOBIN, etc. [No. 262.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Illinois.

See same case below, 251 Ill. 54, 95 N. E. 999.

Mr. Fred B. Merrills for plaintiffs in error.

Messrs. Charles H. Burton and James M. Graham for defendant in error.

March 16, 1914. *Per Curiam:* Dismissed for want of jurisdiction. Rogers v. Clark Iron Co. 217 U. S. 589, 54 L. ed. 895, 30 Sup. Ct. Rep. 693; Preston v. Chicago, 226 U. S. 447, 450, 57 L. ed. 293, 295, 33 Sup. Ct. Rep. 177.

MRS. CARMELITE PONS, wife of George A. Louque, Plaintiff in Error, v. YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY et al. [No. 341.]

Error to state court—final judgment.

In Error to the [721] Supreme Court of the State of Louisiana.

See same case below, 131 La. 313, 59 So. 721.

Messrs. Henry L. Lazarus and Edgar H. Farrar for plaintiff in error.

Messsr. Blewett Lee, Charles N. Burch. Hunter C. Leake, and Gustave Lemle for defendants in error.

March 16, 1914. *Per Curiam:* Dismissed for want of jurisdiction. Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 57 L. ed. 138, 33 Sup. Ct. Rep. 78; [illegible] Beatty, 232 U. S. 463, ante,

EX PARTE: [illegible] GRIMSINGER, Petitioner. [illegible] nal.]

Motion for leave to file amended petition for Writ of Habeas Corpus.

Mr. George F. Curtis for petitioner.

The Solicitor General for respondent.

March 16, 1914. Denied.

STAR CHRONICLE PUBLISHING COMPANY, Plaintiff in Error, v. UNITED PRESS ASSOCIATIONS. [No. 776.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 122 C. C. A. 489, 204 Fed. 217.

Mr. Shepard Barclay for plaintiff in error.

Mr. Campbell Cummings for defendants in error.

January 12, 1914. Denied.

PROVIDENCE WASHINGTON INSURANCE COMPANY, Petitioner, v. HARVEY GRANGER and Charles E. [722] Lewis. [No. 791.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 119 C. C. A. 174, 200 Fed. 730.

Mr. Howard S. Harrington for petitioner.

Mr. Nelson Zabriskie for respondents.

January 12, 1914. Denied.

JEHEIL ROSEN, Petitioner, v. WILLIAM WILLIAMS, Commissioner of Immigration. [No. 820.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 118 C. C. A. 632, 200 Fed. 538.

Mr. William S. Bennet for petitioner.

The Solicitor General and Assistant Attorney General Wallace for respondent.

January 12, 1914. Denied.

TOWN OF AURORA, Petitioner, v. MARTHA L. GATES [No. 846]; and TOWN OF AURORA, Petitioner, v. ROBERT P. WILDER [No. 847].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below (No. 846), — L.R.A. (N.S.) —, 208 Fed. 101.

Mr. William A. Bryans for petitioner.

Mr. Edward P. Costigan for respondent.

January 12, 1914. Denied.

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THE STEAMSHIP GEORGE W. ELDER, etc., et al., Claimants, Petitioners, v. PORT OF PORTLAND. [No. 840.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 124 C. C. A. 336, 206 Fed. 272.

Mr. Arthur A. Birney for petitioners.

Mr. C. E. S. Wood for respondent.

January 19, 1914. Denied.

JOHN S. TALBOTT, Petitioner, v. UNITED STATES. [No. 819.]

Petition for a Writ [723] of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 208 Fed. 144.

Mr. Joseph U. Sweeney for petitioner.

The Attorney General for defendant in error.

January 26, 1914. Denied.

AMERICAN NATIONAL BANK OF MACON, GEORGIA, et al., Petitioners, v. S. H. STILL et al. [No. 860.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 209 Fed. 749.

Mr. George S. Jones for petitioners.

Messrs. Stanwix G. Mayfield, Charles Carroll Simms, and Alexander Akerman for respondents.

January 26, 1914. Denied.

F. O. NORRIS et al., Trustees, etc., et al., Petitioners, v. J. E. JOHNSON et al. [No. 348.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, — L.R.A.(N.S.) —, 111 C. C. A. 291, 190 Fed. 459.

Messrs. Thomas M. Kennerly and Charles T. Butler for petitioners.

Mr. Henry F. Ring for respondents.

February 2, 1914. Denied.

HOUSTON OIL COMPANY OF TEXAS et al., Petitioners, v. CAROLINE C. MIDDLESWORTH et al. [No. 844.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 119 C. C. A. 665, 201 Fed. 1020.

Messrs. Thomas M. Kennerly and Charles T. Butler for petitioners.

Mr. Thomas N. Hill for respondents.

February 2, 1914. Denied.

E. I. DU PONT DE NEMOURS POWDER COMPANY, Petitioner, v. THE STEAMSHIP "CHARLTON HALL," [724] etc. [No. 790.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 207 Fed. 343.

Mr. Howard S. Harrington for petitioner.

Mr. Charles C. Burlingham for respondent.

February 24, 1914. Denied.

THOMAS S. NOWELL et al., Petitioners, v. INTERNATIONAL TRUST COMPANY et al. [No. 881.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 121 C. C. A. 499, 203 Fed. 395.

Messrs. John P. Hartman and George M. Nowell for petitioners.

Messrs. L. P. Shackleford, A. B. Browne, Alex. Britton, and Evans Browne for respondents.

February 24, 1914. Denied.

STREET & SMITH, a Copartnership, Appellant, v. ATLAS MANUFACTURING COMPANY et al. [No. 618.]

Second Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 47 L.R.A.(N.S.) 1002, 122 C. C. A. 568, 204 Fed. 398.

Mr. Hugh K. Wagner for appellant.

Mr. James Love Hopkins for appellees.

March 2, 1914. Denied.

COMMONWEALTH OF PENNSYLVANIA, Appellant, v. YORK SILK MANUFACTURING COMPANY, Bankrupt. [No. 200.]

Petition for a Writ of Certiorari.

See same case below, 112 C. C. A. 613, 192 Fed. 81.

Mr. Jackson H. Ralston for appellant.

Mr. Henry C. Niles for appellee.

March 2, 1914. Denied.

WALTHAM WATCH COMPANY, Petitioner, v. CHARLES A. KEENE. [725] [No. 869.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 209 Fed. 1007.

Messrs. Nathan Matthews and Romney Spring for petitioner.

No counsel appeared for respondent.

March 2, 1914. Denied.

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KERSHAW OIL MILL et al., Petitioners, v. NATIONAL BANK OF SAVANNAH. [No. 884.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, first writ of error 120 C. C. A. 362, 202 Fed. 90, second writ of error 209 Fed. 835.

Messrs. Thomas J. Kirkland, E. D. Blakeney, and Thomas Ruffin for petitioners.

Messrs. William Garrard and Jos. A. McCullough for respondent.

March 2, 1914. Denied.

DAVID A. NEASE, Petitioner, v. COAL & COKE RAILWAY COMPANY et al. [No. 895.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 124 C. C. A. 507, 207 Fed. 237.

Messrs. W. E. Chilton and Charles D. Merrick for petitioner.

Mr. B. M. Ambler for respondents.

March 2, 1914. Denied.

ROBERT MOODY & SON, a Copartnership, etc., Appellant, v. CENTURY SAVINGS BANK. [No. 906.]

Petition for a Writ of Certiorari.

Mr. S. F. Prouty for appellant.

Messrs. Horatio F. Dale and Wm. G. Harrison for appellee.

March 2, 1914. Denied.

CITY OF CAMDEN, Petitioner, v. ARMSTRONG CORK COMPANY. [No. 880.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals [726] for the Third Circuit.

See same case below, 210 Fed. 818.

Messrs. Edwin G. C. Bleakly and Henry F. Stockwell for petitioner.

Messrs. Norman Grey and F. Morse Archer for respondent.

March 9, 1914. Denied.

FRANK M. RYAN et al., Petitioners, v. UNITED STATES. [No. 882.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. Chester H. Krum and Elijah N. Zoline for petitioners.

The Attorney General for respondents.

March 9, 1914. Denied.

GODFREY M. HYAMS, Petitioner, v. OLD DOMINION COMPANY. [No. 919.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 209 Fed. 808.

Mr. Edward M. Colie for petitioner.

Messrs. Louis D. Brandeis and Edward F. McClennen for respondent.

March 9, 1914. Denied.

W. SCHNEIDER WHOLESALE WINE & LIQUOR COMPANY, Appellant, v. AUGUST DIEDERICH. [No. 243.]

Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

See same case below, — L.R.A.(N.S.) —, 115 C. C. A. 37, 195 Fed. 35.

Messrs. James Love Hopkins and Alphonso Howe for appellant.

Mr. James A. Carr for appellee.

March 10, 1914. Denied.

GEORGE W. NORTON, as Executor, etc., Appellant, v. ROBERT B. WHITESIDE et al. [No. 868.]

Petition for a Writ of Certiorari.

Mr. Evans Browne in behalf of [727] Mr. Jed L. Washburn for appellant and petitioner.

Messrs. Theodore T. Hudson, Luther C. Harris, and J. B. Richards for appellees and respondents.

March 16, 1914. Denied.

WILLIAM R. HOPKINS et al., Petitioners, v. A. LOUISA M. GILBERT et al. [No. 912.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 122 C. C. A. 432, 204 Fed. 196.

Messrs. Wade H. Ellis, C. B. Matthews, F. A. Sondley, and Theodore F. Davidson for petitioners.

Messrs. James H. Merrimon and Thomas S. Rollins for respondents.

March 16, 1914. Denied.

W. R. HOPKINS, Petitioner, v. A. LOUISA M. GILBERT et al. [No. 913.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 122 C. C. A. 440, 204 Fed. 204.

Messrs. Wade H. Ellis, C. B. Matthews, F. A. Sondley, and Theodore F. Davidson for petitioner.

Messrs. James H. Merrimon and Thomas S. Rollins for respondents.

March 16, 1914. Denied.

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COMPAGNIE GÉNÉRALE TRANSATLANTIQUE, Petitioner, v. LAURA RIVERS. [No. 915.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 211 Fed. 294.

Mr. Joseph P. Nolan for petitioner.

Mr. Charles H. Tuttle for respondent.

March 16, 1914. Denied.

VICTOR-AMERICAN FUEL COMPANY, Petitioner, v. FRANK PECCARICH. [No. 917.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 209 Fed. 568.

Mr. Caldwell Geaman for petitioner.

Mr. George S. Keock for respondent.

March 16, 1914. Denied.

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[728] SMITH INCANDESCENT LIGHT COMPANY, Petitioner, v. WELSBACH GAS LAMP COMPANY. [No. 931.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 210 Fed. 450.

Mr. Timothy D. Merwin for petitioner.

Mr. C. P. Byrnes for respondent.

March 23, 1914. Denied.

JULIAN MUNSURI, Appellant, v. C. O. LORD, Trustee, etc. [No. 477.]

On Writ of Certiorari to the District Court of the United States for Porto Rico.

Messrs. Frederic R. Coudert and Howard Thayer Kingsbury for appellant.

Messrs. N. B. K. Pettingill and William H. Hawkins for appellee.

January 7, 1914. Dismissed without costs to either party, per stipulation.

FREEMAN H. TILLOTSON, Plaintiff in Error, v. STATE OF KANSAS. [No. 183.]

In Error to the Supreme Court of the State of Kansas.

Messrs. W. L. Sturdevant and Clinton A. Welsh for plaintiff in error.

No counsel appeared for defendant in error.

January 20, 1914. Dismissed with costs, pursuant to the Tenth Rule.

JAMES P. ALLEN, Plaintiff in Error, v. H. H. OLIVER. [No. 193.]

In Error to the Supreme Court of the State of Oklahoma.

Mr. S. T. Bledsoe for plaintiff in error.

No counsel appeared for defendant in error.

January 21, 1914. Dismissed with [729] costs, pursuant to the Tenth Rule.

EDWARD A. ROEHRIG et al., Plaintiffs in Error, v. FORD SMITH. [No. 194.]

In Error to the Supreme Court of the State of Nebraska.

Messrs. Alfred G. Ellick and Harrison C. Brome for plaintiffs in error.

No counsel appeared for defendant in error.

January 22, 1914. Dismissed with costs, pursuant to the Tenth Rule.

NOEL CONSTRUCTION COMPANY, Plaintiff in Error, v. GEORGE W. SMITH & COMPANY, Incorporated. [No. 197.]

In Error to the District Court of the United States for the District of Maryland.

Messrs. J. Kemp Bartlett and Edgar Allan Poe for plaintiff in error.

No counsel appeared for defendant in error.

January 22, 1914. Dismissed with costs, pursuant to the Tenth Rule.

REPUBLIC IRON & STEEL COMPANY, Plaintiff in Error, v. HOWARD CARLTON. [No. 205.]

In Error to the District Court of the United States for the District of Maryland.

Mr. J. Kemp Bartlett for plaintiff in error.

No counsel appeared for defendant in error.

January 26, 1914. Dismissed with costs, pursuant to the Tenth Rule.

CALDWELL & DRAKE, A Firm, etc., Plaintiffs in Error, v. JOHN R. JOBE, Auditor, etc. [No. 211.]

In Error to the Supreme Court of the State of Arkansas.

Mr. J. W. Blackwood for plaintiffs in error.

No counsel appeared for defendants in error.

[730] January 27, 1914. Dismissed with costs, pursuant to the Tenth Rule.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error, v. JOHN JACKSON et al. [No. 201.]

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 113 C. C. A. 576, 193 Fed. 948.

Mr. Charles Payne Fenner for plaintiff in error.

Messrs. George Whitfield Jack and W. P. Hall for defendants in error.

January 27, 1914. Dismissed, per stipulation.

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St. Paul City Railway Company, Plaintiff in Error, v. State of Minnesota ex rel. City of St. Paul. [No. 277.]

In Error to the Supreme Court of the State of Minnesota.

Mr. N. M. Thygeson for plaintiff in error.

No counsel appeared for defendant in error.

February 24, 1914. Dismissed with costs, on motion of counsel for plaintiff in error

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Majestic Theater Company et al., Plaintiffs in Error, v. City of Cedar Rapids et al. [No. 312.]

In Error to the Supreme Court of the State of Iowa.

Mr. James H. Trewin for plaintiffs in error.

No counsel appeared for defendants in error.

February 24, 1914. Dismissed with costs, on motion of counsel for the plaintiff in error.

Adams Express Company, Plaintiff in Error, v. Annie P. Mellichamp. [No. 371.]

In Error to the Court [731] of Appeals of the State of Georgia.

Mr. Robert C. Alston for plaintiff in error.

No counsel appeared for defendant in error.

February 24, 1914. Dismissed with costs, on motion of counsel for the plaintiff in error.

Helene Marequa, Appellant, v. Samuel W. Backus, Commissioner of Immigration, etc. [No. 388.]

Appeal from the District Court of the United States for the Northern District of California.

Mr. Corry M. Stadden for appellant.

No counsel appeared for appellee.

February 24, 1914. Dismissed with costs, on motion of counsel for the appellant, and mandate granted.

Clarence B. Wood, Plaintiff in Error, v. United States. [No. 800.]

In Error to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. G. A. Hanson for plaintiff in error.

The Attorney General for defendant in error.

February 24, 1914. Dismissed, pursuant to the Tenth Rule.

Beaumont Rice Mills, a Copartnership, etc., et al., Plaintiffs in Error, v. Port Arthur Rice Milling Company. [No. 504.]

In Error to the Supreme Court of the State of Texas.

See same case below, first opinion, — Tex. —, 143 S. W. 926, 2d opinion, — Tex. —, 148 S. W. 283, 3d opinion, — Tex. —, 150 S. W. 884, 4th opinion, — Tex. —, 152 S. W. 629.

Messrs. A. D. Lipscomb and Hannis Taylor for plaintiffs in error.

Mr. T. N. Hill for defendant in error.

February 26, 1914. Dismissed with costs, on motion of counsel for the plaintiffs in error.

United States, Appellant, v. Jane Leecy. [No. 248.]

Appeal from the United States Circuit Court of [732] Appeals for the Eighth Circuit.

See same case below, 111 C. C. A. 254, 190 Fed. 289.

The Attorney General for appellant.

Mr. George B. Edgerton for appellee.

March 2, 1914. Dismissed, on motion of Mr. Solicitor General Davis for the appellant.

Minneapolis & St. Louis Railroad Company, Plaintiff in Error, v. O. S. Burho. [No. 648.]

In Error to the Supreme Court of the State of Minnesota.

Messrs. W. H. Bremner and F. M. Miner for plaintiff in error.

Messrs. N. M. Thygeson and W. R. Duxbury for defendant in error.

March 2, 1914. Dismissed with costs, per stipulation.

Southern Railway Company, Appellant, v. Ephraim Simon. [No. 708.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. John K. Graves and J. Blanc Monroe for appellant.

No counsel appeared for appellee.

March 3, 1914. Dismissed with costs, on motion of counsel for the appellant.

Kansas City Gunning Advertising Company, Plaintiff in Error, v. Kansas City, Missouri, et al. [No. 235.]

In Error to the Supreme Court of the State of Missouri.

Mr. John T. Harding for plaintiff in error.

No counsel appeared for defendants in error.

March 5, 1914. Dismissed with costs, pursuant to the Tenth Rule.

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KANSAS CITY GUNNING ADVERTISING COMPANY, Plaintiff in Error, v. KANSAS CITY, Missouri, [733] et al. [No. 236.]

In Error to the Supreme Court of the State of Missouri.

Mr. John T. Harding for plaintiff in error.

No counsel appeared for defendants in error.

March 5, 1914. Dismissed with costs, pursuant to the Tenth Rule.

R. A. AITON, Appellant, v. BOARD OF MEDICAL EXAMINERS OF ARIZONA. [No. 237.]

Appeal from the Supreme Court of the Territory of Arizona.

Mr. C. F. Ainsworth for appellant.

No counsel appeared for appellee.

March 5, 1914. Dismissed with costs, pursuant to the Tenth Rule.

SUE M. ROGERS, as Executrix, etc., Appellant, v. OSAGE NATION OF INDIANS. [No. 238.]

Appeal from the Court of Claims.

Mr. John J. Hemphill for appellant.

Messrs. Charles J. Kappler, Charles H. Merillat, and Mr. Preston A. Shinn for appellees.

March 5, 1914. Dismissed pursuant to the Tenth Rule.

EDWARD A. MANN, Appellant, v. TERRITORY OF NEW MEXICO EX REL. GEORGE S. KLOCK. [No. 240.]

Appeal from the Supreme Court of the Territory of New Mexico.

Mr. Edward W. Dobson for appellant.

Mr. George S. Klock, appellee, *pro se*.

March 6, 1914. Dismissed with costs, pursuant to the Tenth Rule.

BELT LINE RAILWAY COMPANY, Appellant, v. CITY OF MONTGOMERY et al. [No. 366.]

Appeal from the District Court of the United States for the Middle [734] District of Alabama.

See same case below, 201 Fed. 411.

Mr. Alexander Hamilton for appellant.

Mr. W. A. Gunter for appellees.

March 9, 1914. Decree reversed with costs upon confession of error, and cause remanded for further proceedings. Mandate granted.

HENRY MEYER, Plaintiff in Error, v. STATE OF KANSAS. [No. 258.]

In Error to the Supreme Court of the State of Kansas.

Mr. John W. Gerkes for plaintiff in error.

Mr. John S. Dawson for defendant in error.

March 10, 1914. Dismissed with costs, pursuant to the Tenth Rule.

W. S. RHEA, Appellant, v. JAMES A. PITCOCK, Warden, etc. [No. 321.]

Appeal from the District Court of the United States for the Eastern District of Arkansas.

Mr. Baldy Vinson for appellant.

No counsel appeared for appellee.

March 12, 1914. Dismissed with costs, on motion of counsel for the appellant.

J. FRANKLIN CUNNINGHAM et al., Plaintiffs in Error, v. STATE OF LOUISIANA. [No. 283.]

In Error to the Supreme Court of the State of Louisiana.

Mr. Taliaferro Alexander for plaintiffs in error.

Mr. R. G. Pleasant for defendant in error.

March 12, 1914. Dismissed with costs, pursuant to the Tenth Rule.

YEE TING WOH, Appellant, v. A. J. HIRSTIUS, Sheriff. [No. 287.]

Appeal from the District Court of the United States for the Northern District of Ohio.

Mr. Francis J. Wing for appellant.

No counsel appeared for appellee.

March 13, 1914. [735] Dismissed with costs, pursuant to the Tenth Rule.

CHOY GUM ALIAS LO KING, Appellant, v. SAMUEL W. BACKUS, Commissioner, etc. [No. 856.]

Appeal from the District Court of the United States for the Northern District of California.

Mr. Corry M. Stadden for appellant.

The Attorney General for appellee.

March 16, 1914. Dismissed with costs on motion of counsel for the appellant.

LEONG TOE, Appellant, v. SAMUEL W. BACKUS, Commissioner, etc. [No. 857.]

Appeal from the District Court of the United States for the Northern District of California.

Mr. Corry M. Stadden for appellant.

The Attorney General for appellee.

March 16 1914. Dismissed with costs on motion of counsel for the appellant.

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Bluefields Steamship Company, Limited, et al., Appellants, v. Frederick M. Steele et al. [No. 296.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Charles Payne Fenner, Edgar H. Farrar, and H. Generes Dufour for appellants.

Mr. William Lee Hughes for appellees.

March 16, 1914. Dismissed with costs on motion of counsel for the appellants.

Hyman, Hiller, & Company, Limited, Plaintiff in Error, v. Philip Veith. [No. 300.]

In Error to the Supreme [736] Court of the State of Louisiana.

Messrs. E. D. Saunders and Edgar H. Farrar for plaintiff in error.

Mr. Benjamin Rice Forman for defendant in error.

March 16, 1914. Dismissed with costs, pursuant to the Tenth Rule.

Margarita Oyanguren, Heirs, etc., Appellant, v. Ana Louisa and Ana Teresa Orama, etc., et al. [No. 811.]

Appeal from the Supreme Court of Porto Rico.

Mr. Charles F. Carusi for appellant.

No counsel appeared for appellees.

March 16, 1914. Dismissed with costs on motion of counsel for the appellant.

Southern Pacific Company et al., Appellants, v. United States et al. [No. 318.]

In Error to the United States Commerce Court.

Messrs. Maxwell Evarts, H. A. Scandrett, Joseph Paxton Blair, Fred H. Wood, and A. A. Hoehling, Jr., for appellants.

The Attorney General and Mr. Patrick H. Farrell for appellees.

March 17, 1914. Dismissed on motion of counsel for the appellants.

Charles R. Fahringer, Plaintiff in Error, v. State of Wisconsin. [No. 310.]

In Error to the Supreme Court of the State of Wisconsin.

Mr. E. M. McVicker for plaintiff in error.

No counsel appeared for defendant in error.

March 17, 1914. Dismissed with costs, pursuant to the Tenth Rule.

Frank D. Bartlett, Appellant, v. W. A. Arnold, Sheriff, etc. [No. 315.]

Appeal from the District Court of [737] the United States for the Eastern District of Wisconsin.

Mr. Horace B. Walmsley for appellant.

No counsel appeared for appellee.

March 18, 1914. Dismissed with costs, pursuant to the Tenth Rule.

Louisville & Nashville Railroad Company, Plaintiffs in Error, v. Ohio Valley Tie Company. [No. 317.]

In Error to the Court of Appeals of the State of Kentucky.

See same case below, 148 Ky. 718, 147 S. W. 421.

Mr. Helm Bruce for plaintiffs in error.

Mr. Edward W. Hines for defendant in error.

March 18, 1914. Dismissed with costs on motion of counsel for the plaintiff in error.

Lytle Logging & Mercantile Company, Plaintiff in Error, v. C. O. Sandberg. [No. 737.]

In Error to the Supreme Court of the State of Washington.

Mr. W. H. Abel for plaintiff in error.

No counsel appeared for defendant in error.

March 23, 1914. Dismissed per stipulation.

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COUR

OF THE

UNITED STATES

AT

OCTOBER TERM, 1913.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1913.

---

[1] JOHN MILLER, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 1-16.)

Postoffice — carrying mails — construction of contract — discontinuance.

1. The express authority to discontinue the execution of a contract to carry the mails upon payment of one month's extra pay, and after such discontinuance to make such contracts as are deemed best, which is given to the United States by the explicit terms of the proposal that led up to the contract, of the text of the contract itself, and of the postoffice rules and regulations which by the text were incorporated in and made a part of the contract, cannot be read out of such contract as inapplicable to the situation to which the contract relates, *viz.*, the carriage of the mails over a designated route in Alaska, whatever may be the difficulties of performance.

[For other cases, see Postoffice, IV. a, in Digest Sup. Ct. 1908.]

Courts — review of discretion of Postmaster General — discontinuing contract for carrying mails.

2. The exercise by the Postmaster General of his authority to discontinue a contract for the carriage of the mails over a designated route in Alaska cannot be revised by the courts in the absence of the existence of a fraudulent motive or of bad faith.

[For other cases, see Courts, I. e, 4, in Digest Sup. Ct. 1908.]

[No. 178.]

Argued January 19 and 20, 1914. Decided April 6, 1914.

NOTE.—On interference by courts with rulings of Postoffice Department—see note to National L. Ins. Co. v. National L. Ins. Co. 52 L. ed. U. S. 808.

APPEAL from the Court of Claims to review a judgment sustaining a demurrer to and dismissing the petition in a suit to recover damages caused by the alleged unlawful discontinuance of a contract for the carriage of the mails. Affirmed.

See same case below, 47 Ct. Cl. 146.

The facts are stated in the opinion.

Mr. Louis T. Michener argued the cause, and, with Mr. Perry G. Michener, filed a brief for appellant:

In the construction of the contract, or any particular clause or part of it, the court is to examine the entire contract, consider the relations of the parties, their connection with the subject-matter, the circumstances under which it was signed, the state of things existing at the time it was made, the nature of the obligations between the parties, and is to look carefully to the substance of the agreement as contradistinguished from its mere form, in order to give it a fair and just construction, and ascertain the substantial intent of the parties.

Chesapeake & O. Canal Co. v. Hill, 15 Wall. 94, 99-101, 21 L. ed. 64, 67, 68; Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co. 143 U. S. 596, 609, 36 L. ed. 277, 281, 12 Sup. Ct. Rep. 479; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 531, 40 L. ed. 247, 249, 16 Sup. Ct. Rep. 83; United States v. Utah, N. & C. Stage Co. 199 U. S. 414, 423, 50 L. ed. 251, 255, 26 Sup. Ct. Rep. 69.

The discontinuance stipulation should be so construed as not to apply to a case in which the payment of one month's extra pay would be grossly inadequate as indemnity or compensation to the contractor.

United States v. Utah, N. & C. Stage Co. supra; Serralles v. Esbri, 200 U. S. 103, 113,

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50 L. ed. 391, 395, 26 Sup. Ct. Rep. 176; Schuylkill Nav. Co. v. Moore, 2 Whart. 491.

This contract is not to be so construed as to give the officer the power to do arbitrary, capricious, oppressive, or unreasonable things, to the cost or damage of the contractor, for it is implied that the officer will do nothing of the kind.

United States v. North American Commercial Co. 74 Fed. 149; Lewman v. United States, 41 Ct. Cl. 478; Ripley v. United States, 223 U. S. 695, 701, 56 L. ed. 614, 617, 32 Sup. Ct. Rep. 352; Chicago, M. & St. P. R. Co. v. Hoyt, 149 U. S. 1, 15, 37 L. ed. 625, 630, 13 Sup. Ct. Rep. 779; United States v. Utah, N. & C. Stage Co. 199 U. S. 414, 50 L. ed. 251, 26 Sup. Ct. Rep. 69.

Assistant Attorney General Thompson argued the cause and filed a brief for appellee:

If the language is clear and unambiguous, it must be taken according to its plain meaning as expressive of the intention of the parties; and under settled principles of judicial decision should not be controlled by the supposed inconvenience or hardship that may follow such construction.

Loud v. Pomona Land & Water Co. 153 U. S. 576, 577, 38 L. ed. 827, 828, 14 Sup. Ct. Rep. 928.

Actual or constructive bad faith on the part of the Postmaster General must be alleged.

Hudson, Bldg. Contr. pp. 580, 596–598; Kihlberg v. United States, 97 U. S. 398, 24 L. ed. 1106; Martinsburg & P. R. Co. v. March, 114 U. S. 549–553, 29 L. ed. 255, 256, 5 Sup. Ct. Rep. 1035; Chicago, S. F. & C. R. Co. v. Price, 138 U. S. 185–195, 34 L. ed. 917–919, 11 Sup. Ct. Rep. 290; United States v. Gleason, 175 U. S. 588, 44 L. ed. 284, 20 Sup. Ct. Rep. 228.

Since it is not alleged or claimed that there was actual or constructive bad faith on the part of the Postmaster General, it would appear that the charge of capricious or unreasonable conduct on his part would not vitiate his act.

United States v. Gleason, 175 U. S. 588–607, 44 L. ed. 284–291, 20 Sup. Ct. Rep. 228; McLaughlin v. United States, 37 Ct. Cl. 190.

The language of the contract making one month's extra pay "full indemnity" for all losses sustained by the contractor on account of the contract being terminated is too clear for argument.

Slavens v. United States, 196 U. S. 229, 49 L. ed. 457, 25 Sup. Ct. Rep. 229, 38 Ct. Cl. 574; Garfielde v. United States, 93 U. S. 242, 23 L. ed. 779.

Mr. Chief Justice White delivered the opinion of the court:

The petition claimed $51,736 because of an alleged violation of a contract to carry the mails over a mentioned route in Alaska. The United States demurred on the ground that no cause of action was stated, and the court having sustained the demurrer and dismissed the petition, the case is here. The text of the petition, therefore, is the matter we are called upon to consider. It covers sixteen pages of the printed record. We shall seek to rearrange its contents so as to enable us with accuracy and yet with brevity to state the substance of the petition in order to determine whether a cause of action was stated.

It was alleged that on September 15th, 1905, the United States advertised for proposals to carry the mails over a route in Alaska from Valdez to Eagle, a distance of 428 miles, and back. The advertisement conveyed information concerning the route and the duty which would rest upon the contractor, and contained the following:

"The Postmaster General may order an increase of service on a route by allowing therefor not to exceed a *pro rata* increase on the contract pay. He may change schedules of departure and arrivals in all cases, and particularly to make them conform to connections with railroads, without increase of pay, provided the running time be not abridged. The Postmaster General may also discontinue, change, or curtail the service in order to place on the route superior service, or whenever the public [6] interest, in his judgment, shall require such discontinuance, change, or curtailment for any other cause, he allowing as full indemnity to contractor one month's extra pay on the amount of service dispensed with, and not to exceed *pro rata* compensation for the amount of service retained and continued; but the Postmaster General reserves the right to rescind any acceptance of a proposal at any time before the signing on behalf of the United States of the formal contract, without the allowance of any indemnity to the accepted bidder."

Under this proposal the bid of John B. Crittenden to do the called-for work at $46,000 per annum was accepted, and on the 1st of February, 1906, a contract was entered into between the government and Crittenden and his sureties, John Miller and Charles H. Cramer, for performing the services for the sum of the bid for the period of four years from the 1st of July, 1906, to June 30th, 1910. The written contract contained specifications as to the character of the work, its requirements and the mode of its performance, which it is not here necessary to detail. Besides a full

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stipulation giving the Postmaster General authority to enforce the contract and all its provisions by imposing penalties and forfeitures, and by discontinuing the contract in case of nonperformance, as embodied by the provisions which are reproduced in the margin,† the contract contained the following:

[7] "It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service, in accordance with law, by allowing not to exceed a *pro rata* increase of compensation for any additional service thereby required; and, in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor, one month's extra pay on the amount of service dispensed with, and not to exceed a *pro rata* compensation for the service retained; but no increase of compensation shall be allowed for a change of service not amounting to an increase, nor indemnity of month's extra pay for any change of service not involving a decrease of service."

In addition the statutory provisions governing the subject and the Postoffice regulations having the force of law which had been stated in the advertisement for proposals were by reference incorporated and made a part of the contract by the following provision:

"That this contract is further to be subject to all the conditions imposed by law, and by the several acts of Congress relating to postoffices and post roads, and to the conditions stated in the pamphlet advertisement of September 15, 1905."

It was averred that shortly after the making of the contract Miller, the petitioner, who was one of the sureties of [8] Crittenden, found that he was not able to supply the capital needed for the performance of the contract, and therefore he, Miller, as surety, was obliged to and did expend the moneys needed to buy "harness, sleds, horse feed, horses, and dogs to carry the mails" under the contract, so that by the 1st of July, 1906, the contractor was ready to perform and did commence the performance of his duties under the contract, and continued to perform them until the time when subsequently the contract was discontinued by the Postmaster General. It was averred that after thus advancing the money as surety of Crittenden, Miller, finding that further advances were necessary to enable Crittenden to go on with his work, formed a partnership with him, and under this partnership advanced large sums of money to meet the heavy expenses which were required, and continued to do so, during a period of nearly two years; that is, up to or on or about the 1st of May, 1908, when he was compelled, in order to protect himself and the United States, to take a transfer of the contract from Crittenden; that is, to become the sublessee of the contract, his written agreement dated the 1st of May, 1908, with Crittenden to that effect having been approved by the Postoffice authorities; indeed, it was alleged that such agreement was written by those authorities. This subletting contract which was set out in full in the petition bound Miller, the subcontractor, by all the obligations of the original contract, made him liable for all fines, forfeitures, etc., imposed under the original contract, and expressly subjected him to the risk of the power to change, increase, modify, or discontinue the service as provided in the original contract, the clauses covering these two latter subjects being in the margin.†

†And it is hereby further stipulated and agreed by the said contractor and his sureties that the Postmaster General may annul the contract or impose forfeitures in his discretion for repeated failures or for failure to perform service according to contract; for violating the postal laws or regulations; for disobeying the instructions of the Postoffice Department; for refusing to discharge a carrier, or any other person having charge of the mail by the contractor's direction, when required by the Department; for subletting service without the consent of the Postmaster General, or assigning or transferring this contract; for combining to prevent others from bidding for the performance of postal service; for transmitting commercial intelligence or matter which should go by mail, contrary to the stipulations herein; for transporting persons so engaged as aforesaid; or for the failure of the contractor to give his personal supervision to the performance of the service, and to reside upon or contiguous to the route; that the Postmaster General may annul the contract whenever the contractor shall become a postmaster, assistant postmaster, or member of Congress, or otherwise legally incompetent to be concerned in such contract; and whenever, in the opinion of the Postmaster General, the service cannot be safely continued, the revenues collected, or the laws maintained on the road or roads herein.

†And it is hereby further agreed that liability for all fines and deductions imposed upon a party of the first part by the Postmaster General, for failures and delinquencies in the performance of service under his contract, shall be assumed and borne by the party of the second part, and, if necessary, the Auditor for the Postoffice Department may enforce this agreement by proper deductions from any compensation

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[9] It was alleged that the petitioner as sub-contractor performed the contract as long as he was permitted to do so by the United States; that on the 11th of August, 1908, the Postmaster General issued an order discontinuing the contract service over the route which the contract embraced, to take effect on the 30th of September, 1908, and this order was enforced at the time mentioned and an indemnity allowance of pay for one month only was made the contractor. The petition alleged that for many years "the regulations adopted and enforced by the Postoffice Department have authorized the Postmaster General to discontinue or curtail the service in whole or in part, in order to secure 'a better degree of service,' or 'superior service,' or whenever the public interest in his judgment should require its discontinuance or curtailment for any other cause, he allowing as a full indemnity to the contractor, one month's extra pay on the amount of service dispensed with and *pro rata* compensation for the amount of service retained and continued." The continuance of this regulation was alleged, and the various changes in the mere form in which it was expressed up to and including the time when the regulation then existing found statement in the contract and in the proposals subject to which, as we have seen, the contract was made. The petition, however, averred as follows:

[10] "The regulation, whatever its language or its number, was not drawn and promulgated with reference to the conditions existing in Alaska on Route No. 78,108 during the period covered by the contract sued on, but it was drawn and promulgated with reference to conditions existing within the limits of the United States and exclusive of that route in Alaska, and particularly without reference to the hereafter described conditions existing in that part of Alaska covered by the contract sued on.

"In the preparation of the forms of advertisement, proposal, and contract in suit, the government officials adopted the regulation in force, and such advertisement, proposal, and contract were drawn and printed for general use, and the proposal and contract were presented for execution without particular regard to the physical, climatic, or other conditions then existing or that might exist along the line of that route during the contract period of four years. At the execution of the proposal and contract, and of the subsequent contract of subletting, Crittenden and petitioner did not think or believe that the contract in suit would be discontinued or terminated in any manner or form, but, on the contrary, they believed that the contract in suit would be in full force and effect during the whole contract period, and they named the amount of annual compensation in that belief. They expected that they would encounter losses of profits in a portion of the contract period, but would earn good profits before the contract period ended and for the whole contract period. Had Crittenden and the petitioner believed otherwise than as above stated, they would not have executed either of the contracts for that annual compensation, nor would petitioner have made the arrangements and expenditures in the early part of 1903 (1908) hereinafter described. On the contrary, petitioner made such arrangements and expenditures in the belief that the contract would be in force for the full contract period. Petitioner [11] avers that if the government had asked bids for a two-year contract on that route, Crittenden would not have submitted a bid at all, and petitioner would not have become surety on any contract for less than $92,000 per annum, because the conditions were such that the expenses of carrying the mails on the route would be far heavier for carrying them in 1906 than in 1907, and in 1907 than in 1908, and in 1908 than in 1909. As an illustration, the petitioner avers that it cost, to wit: $151,169.55 to perform the contract until it was discontinued by order of the Postmaster General, that amount being to wit: $48,595.08 more than the total sum received from the government, but it would only have cost him, to wit: $43,390 to perform the contract for the remaining twenty-two months of the contract period, during which time he would have received, to wit: $84,326 for carrying the mails; a profit of, to wit: $40,936."

The petition moreover alleged that the conditions which existed at the time the contract was made in the region covered by the mail route which it embraced caused it to be extremely difficult and hazardous to human life and property to carry the mails over the route described and within the time specified in the contract. In many

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due the party of the second part for service performed under this subcontract.

And it is hereby further agreed that for any additional service required by the Postmaster General, and not hereinbefore expressly stipulated, the party of the second part shall be allowed not to exceed a *pro rata* increase of compensation; and, in case of decrease, curtailment, or discontinuance of service, as full indemnity a *pro rata* of the one month's extra pay allowed by the United States to the party of the first part, and, unless previously herein stipulated, not to exceed a *pro rata* compensation for the service retained.

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places, it was averred, the government trails were not fit to be used because of their bad condition, and it became necessary to build new ones. With much amplitude, the petition described the almost insurmountable difficulties with which the performance of the contract was environed: the cutting of trails, the building or repairing of bridges, the erecting of sheds, the transporting at an enormous expense along the route of the means to sustain men and horses; the struggle in doing so in winter through ice and snow, and in spring and summer, the overcoming of obstacles resulting from flood and many other causes. Indeed, the facts detailed, being taken as true, establish that the performance of the contract was surrounded by difficulty of the [12] gravest character, to overcome which called for the manifestation on the part of the contractor of courage, the exertion of great energy, and a willingness to make sacrifices in order to discharge the duties imposed by the contract. It was alleged that the making of the strenuous exertion and the incurring of the hazards to life and property which, as we have stated, the petition described, were necessary, "as the government did not make allowance for delays, whether caused by snows, storms, blizzards, the freeze-up in the fall, the break-up in the spring, or any other consideration, but fines were charged at every opportunity."

It was alleged that counting on the fact that the contract would be allowed to go to its termination, after the petitioner became the sublessee he spent a large amount of money in putting the route in fair condition, in provisioning the same by shipping food for men and horses at freight rates which were enormous, all of which he would not have done had he been informed of the intention of the government to discontinue the contract before the end of the contract period. That upon the same reliance, as a means of utilizing his equipment, he bought out the rights and assumed the obligations of a contract which had been made by a firm known as Scott & Frase for carrying the mails from a point known as Tanana Crossing to Eagle, the place where the contract of which the petitioner was the subcontractor terminated.

It was alleged that although in September, 1908, the government discontinued the contract of petitioner, it did not discontinue the mail service to which that contract related, but only restricted it,—that is, cut out about 190 of the 428 miles between Valdes and Eagle, and in the balance had the mails carried by contracts exacting a less onerous and less frequent service, these contracts having been made as emergency contracts, without advertisement, without affording the petitioner any opportunity to bid [13] for them or to take them under the prior contract which was discontinued by the order of 1908. The sum which was claimed was the alleged loss resulting from having been obliged to discontinue the contract, the calculation in effect on the subject charging the amount spent under the contract as well as $41,129.52 as the result of the purchase of the Scott & Frase contract, and crediting the total amount received from the government.

These being the averments of the petition, it is obvious, the questions are as follows: First, did the contract confer the authority on the United States to discontinue its performance, and, if so, did it give power to the Postoffice authorities after the contract was discontinued to deal with the mail routes which the contract had previously embraced in such a manner as was found necessary to subserve the public interest; second, if yes, did the averments of the bill show such a state of facts as would justify the conclusion that the action of the Postoffice authorities in exerting the lawful power of discontinuance was so impelled by bad faith as to cause the exertion of the otherwise lawful power to be invalid and void?

That in explicit terms the express authority was given to the United States to discontinue the execution of the contract is so plainly the result of the proposal which led up to the contract, if the text of the contract itself, of the Postoffice rules and regulations which by the text were incorporated in and made a part of the contract, as to leave no room for discussion. Indeed, this result was in terms admitted by the allegations of the petition to which we have referred, and the challenge of the power to discontinue therein made conceded that the terms of the contract gave the power, but relied only upon the assertion that such terms, although express and positive, should be read out of the contract as inapplicable to the situation to which the contract related; that is, the carriage of the mail over the designated route in Alaska. [14] But we must be governed by the contract, and cannot, as we are asked to do, first destroy it in part and then enforce that which would remain, which would be the result of holding that the stipulations of the contract conferring power upon the government may be obliterated, and the contract, with those stipulations wiped out, be enforced as against the government for the benefit of the petitioner. And the absolutely conclusive force of this view, when considered as a general proposition, is at once additionally demonstrated by a par-

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ticular consideration of the case in hand, since the reserve power on the part of the government to discontinue the contract which is here in question found its place in the proposal and contract in consequence of the postal regulations having the effect of law which had prevailed for many years, and which therefore caused the contract with the reservation of the right to discontinue to be but the expression of a rule of public policy limiting in the public interest the power to contract,—a limitation sanctioned over and over again at least by an unerring implication by statutory approval. Of course, under this condition of things, the suggestion that the contractor would not have bound himself to the government if he had considered that the unambiguous words of the contract would be enforced can be of no avail. And it is equally manifest that it is impossible to give any effect to the suggestion that the terms of the contract did not apply because of the place where the work covered by the contract was to be performed. The presumption is that whatever may have been the difficulties of performance, they were in the minds of the contracting parties, and were elements entering into the offer by the contractor to do the work for a stated compensation, and also constituted elements of danger against which the government protected itself by the express reservation of the right to discontinuance which was explicitly exerted. While it is not necessary to do so, we observe in passing that the averments [15] of the petition itself give rise to inferences sustaining this very natural conclusion.

That the power to discontinue the contract left the government free after such discontinuance to make such contracts as were deemed best is also the unambiguous result of the proposals submitted by the government, of the text of the contract itself, and of the context of the postal rules and regulations which by reference were incorporated into the contract. In fact, while the context establishes this result so clearly and so obviously as to leave no room for extraneous reasoning, if such were not the case, and purpose and intent required to be looked at, it is manifest that to deny that such power existed would be to set aside and frustrate the public policy upon which the right to discontinue rests. It would render the exertion of the power futile—or cause it to be inadequate to protect the public interest, since it would deprive of means of remedying the evil to cure which the right to discontinue was exerted. The irresistible force of the contract itself on the subject has been previously pointed out by this court in a case which was cited by the court below in its clear opinion. Slavens v. United States, 196 U. S. 229, 233, 236, 49 L. ed. 457, 459, 460, 25 Sup. Ct. Rep. 229.

Making the assumption, for the sake of the argument only, that the existence of a fraudulent motive or of bad faith impelling the exercise by the Postmaster General of the authority conferred upon him to discontinue be a factor in determining whether an otherwise valid power had been lawfully exerted, such concession could have no possible reference to this case, since it is expressly conceded in the argument at bar that no such charge was made in the petition and none is relied upon, the only claim being that a power not conferred was exerted, or that, if one which was given was exercised, the circumstances disclosed were of such a character as to justify the legal conclusion that it was so grossly inequitable to bring [16] the power into play that its exertion ought not to receive judicial sanction. But this simply calls upon us to substitute judicial discretion for the discretion lodged by the law and the contract in the Postmaster General,—a power which, of course, it is beyond our competency to exercise. Let it be conceded that if the truth be admitted of all the facts as to the unforeseen difficulties, the stress of storm and blizzard and snow and ice and freshet, which prevailed as averred over the trackless wilderness through which the mail route extended, a case of great hardship would be established, the very truth of the averments referred to also naturally suggests the reasons which, in the exercise of a wise discretion, may have called into play the exertion of the power to discontinue the contract in the public interest and for the public benefit. As under the conditions stated the hardships alleged were but the result of a mistake of the petitioner in making an improvident contract, relief can only be obtained at the hands of Congress.

Affirmed.

E. A. BROWNING, Plff. in Err.,
v.
CITY OF WAYCROSS.

(See S. C. Reporter's ed. 16–23.)

Commerce — state regulation — occupation tax — erecting lightning rods.

The business of erecting lightning rods within the corporate limits as the agent of

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Note.—On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107, and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

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a nonresident manufacturer on whose behalf such agent had solicited orders for the sale of such rods, and from whom he had received the rods when shipped into the state on such orders, may be subjected to a municipal license tax without violating the commerce clause of the Federal Constitution, although the contracts under which the rods were shipped bound the seller at his own expense to attach them to the houses of the persons who ordered them.

[or other cases, see Commerce, IV. b, 4, in Digest Sup. Ct. 1908.]

[No. 259.]

Argued and submitted March 11, 1914. Decided April 6, 1914.

IN ERROR to the Court of Appeals of the State of Georgia to review a judgment which affirmed a conviction in the Superior Court of Ware County, in that state, of erecting lightning rods without paying an occupation tax. Affirmed.

See same case below, 11 Ga. App. 46, 74 S. E. 564.

The facts are stated in the opinion.

Mr. Richard A. Jones argued the cause, and, with Messrs. J. L. Sweat and Nathan Frank, filed a brief for plaintiff in error:

The sale and purchase of these lightning rods located in another state, to be transported in pursuance thereof in interstate traffic to the place of delivery in the state of Georgia, fixed under the terms of such contract of purchase, was a transaction coming within the description of commerce among the states.

Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159.

It is established by the record that the erection of lightning rods by the plaintiff in error was in pursuance of and as a part of sale transactions constituting interstate commerce, and a necessary incident thereof, and the tax sought to be collected from him for the exercise of such function is within the prohibition against burdening commerce among the states by licenses, direct or indirect tax, or any system of state regulation.

Crutcher v. Kentucky, 141 U. S. 47, 62, 35 L. ed. 649, 654, 11 Sup. Ct. Rep. 851; Caldwell v. North Carolina, 187 U. S. 622, 628, 47 L. ed. 336, 339, 23 Sup. Ct. Rep. 229; Barrett v. New York City, 232 U. S. 14, ante, 483, 34 Sup. Ct. Rep. 203.

Aside from such as may properly be put in effect in the exercise of its police power, any regulation or enactment of a state or political subdivision thereof, which tends to materially interfere with, hinder, or obstruct the making or performance of contracts for commerce among the states, or anything reasonably incident thereto, is a burden upon such commerce which may not be laid other than by authority of the national government. The character of the incidents allowed to constitute parts of such contracts within the protection of the commerce clause of the Constitution and of the acts which have been held to constitute unwarranted interference therewith are illustrated by the following cases:

Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; Barrett v. New York City, 232 U. S. 14, ante, 483, 34 Sup. Ct. Rep. 203; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Brown v. Maryland, 12 Wheat. 436, 444, 6 L. ed. 684, 687.

A license tax upon a vocation is a tax upon the object to which such vocation is applied.

Brown v. Maryland, supra.

Mr. Thomas S. Felder, Attorney General of Georgia, and Mr. W. W. Lambdin submitted the cause for defendant in error:

With reference to the facts involved in this case, interstate commerce may be defined to be the "negotiation in one state of sales of goods which are in another state, for the purpose of their introduction into the former state."

Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592: Williams v. Fears, 110

State licenses or taxes generally as affecting interstate commerce—see notes to Rothermel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

On peddlers and drummers as related to interstate commerce—see notes to Stockard v. Morgan, 46 L. ed. U. S. 785; Re Spain, 14 L.R.A. 97; State v. Bayer, 19 L.R.A. (N.S.) 297; and Dozier v. State, 28 L.R.A. (N.S.) 265.

On the validity of occupation tax under the commerce clause—see note to Western U. Teleg. Co. v. Taggart, 60 L.R.A. 691.

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Ga. 590, 50 L.R.A. 685, 35 S. E. 699; 17 Am. & Eng. Enc. Law, 2d ed. 65.

Defendant was not tried for taking orders or for selling the lightning rods, but was tried for exercising an entirely different and an independent vocation, to wit: putting up lightning rods—which vocation required him to sort out suitable lengths from the mass of materials sent him, and put them together and affix them to the houses of his customers. This work of erecting the lightning rods requires skill and considerable time, and is a work and a vocation carried on strictly within the state of Georgia, and is independent and separate from the sale of the goods, and consequently is subject to regulation by the state. Even if this license tax imposed by the city upon the erection of lightning rods could in the least degree affect the sale of same, its effect upon interstate commerce would be so incidental and remote as not to amount to a regulation of such commerce.

Ficklen v. Taxing Dist. 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; State v. Gorham, 115 N. C. 721, 25 L.R.A. 810, 44 Am. St. Rep. 494, 20 S. E. 179; State v. Sheppard, 142 N. C. 586, 55 S. E. 146.

As well might tailors in Georgia claim that they were exempt from an occupation tax because their home office in another state shipped the cloth to them upon orders for suits given by their customers, and all they did in Georgia was to make and put together the garments out of this material.

Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; Browning v. Waycross, 11 Ga. App. 46, 74 S. E. 564; State v. Gorham, 115 N. C. 721, 25 L.R.A. 810, 44 Am. St. Rep. 494, 20 S. E. 179; American Amusement Co. v. East Lake Chutes Co. 174 Ala. 526, 56 So. 961.

When the carload of materials reached Waycross and the bulk was broken, such materials being then the property of the shipper, and not dedicated to any particular purchaser, they became a part of the general property of the state, and were therefore subject to regulation by the state.

State v. Gorham, 115 N. C. 721, 25 L.R.A. 810, 44 Am. St. Rep. 494, 20 S. E. 179; General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; Merchant's Transfer Co. v. Board of Review, 128 Iowa, 732, 2 L.R.A.(N.S.) 662, 105 N. W. 211, 5 Ann. Cas. 1016; Croy v. Obion County (Croy v. Epperson) 104 Tenn. 525, 51 L.R.A. 254, 78 Am. St. Rep. 931, 58 S. W. 235.

According to the form of the order set out in the record, the customer did not order rods at all, but only ordered materials, and did not even order any definite quantity of materials, but the same had to be measured up after the rods were affixed to his house. Therefore, in order to make the sale, everything pertaining thereto had to be done within the state of Georgia and in the city of Waycross; the materials had to be separated indiscriminately from the mass and suitable lengths selected and measured up in order to make the sale. Therefore, even the sale, under these circumstances, was intrastate, and not interstate, commerce.

35 Cyc. 281–286; Butler v. Lawshe, 74 Ga. 352; People v. Smith, 147 Mich. 391, 110 N. W. 1102; Muskegon v. Hanes, 149 Mich. 460, 112 N. W. 1077; Newcastle v. Cutler, 15 Pa. Super. Ct. 612; Kimmell v. State, 104 Tenn. 184, 56 S. W. 854; Croy v. Obion County (Croy v. Epperson) 104 Tenn. 525, 51 L.R.A. 354, 78 Am. St. Rep. 931, 58 S. W. 235; General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; Merchant's Transfer Co. v. Board of Review, 128 Iowa, 732, 2 L.R.A.(N.S.) 662, 105 N. W. 211, 5 Ann. Cas. 1016.

The police power of the state is supreme, and reasonable exercise of it does not violate the commerce clause of the Federal Constitution.

Atlantic Coast Line R. Co. v. State, 135 Ga. 545, 32 L.R.A.(N.S.) 20, 69 S. E. 725; State v. Harrington, 68 Vt. 622, 34 L.R.A. 100, 35 Atl. 515; State v. Wheelock, 95 Iowa, 577, 30 L.R.A. 429, 58 Am. St. Rep. 442, 64 N. W. 620; Com. v. Newhall, 164 Mass. 338, 41 N. E. 647; Kolb v. Boonton, 64 N. J. L. 163, 44 Atl. 873.

In State v. Smithson, 106 Mo. 149, 17 S. W. 221, it was held that a statute requiring persons dealing in the selling of patents, patent medicines, lightning rods, etc., to take out a license, was not obnoxious to the commerce clause of the United States Constitution.

The several states have the right to regulate persons and things within their own jurisdiction, under their police power, notwithstanding the regulation may have a bearing on interstate commerce, provided no discrimination is made against nonresidents.

Slaughter-house Cases, 16 Wall. 62, 21 L. ed. 404; Passenger Cases, 7 How. 548, 12 L. ed. 813; Sherlock v. Alling, 93 U. S.

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99, 23 L. ed. 819; Bartenmeyer v. Iowa, 18 Wall. 129, 138, 21 L. ed. 929, 932; Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; Howe Mach. Co. v. Gage, 100 U. S. 676, 25 L. ed. 754.

Doubts are always resolved in favor of the constitutionality of a statute. The violation must be clear and palpable in order for the statute to be held unconstitutional.

Cooley, Const. Lim. 6th ed. pp. 216, 220; Plumley v. Massachusets, 155 U. S. 461, 479, 480, 39 L. ed. 223, 229, 230, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Wellborn v. Estes, 70 Ga. 390; Howell v. State, 71 Ga. 224, 51 Am. Rep. 259; Scoville v. Calhoun, 76 Ga. 269.

Under the facts of the case as shown in the answer to the certiorari, the court could well have concluded that the plaintiff in error was conducting the business for himself, and was buying the materials from the St. Louis company. The form of the order tends to show this. Furthermore, it is significant that the plaintiff in error did not disclose the nature of his contract with the St. Louis company. The business was therefore not interstate commerce.

Banker Bros. Co. v. Pennsylvania, 222 U. S. 210, 56 L. ed. 168, 32 Sup. Ct. Rep. 38; American Steel & Wire Co. v. Speed, 192 U. S. 521, 48 L. ed. 546, 24 Sup. Ct. Rep. 365; Croy v. Obion County (Croy v. Epperson) 104 Tenn. 525, 51 L.R.A. 254, 78 Am. St. Rep. 931, 58 S. W. 235.

When one sought to be taxed under a municipal ordinance, for carrying on a particular business in a named city, seeks to set aside its provisions as to him because of the alleged unconstitutionality of such ordinance when applied to the business in which he is engaged, the burden is on him to show clearly and unmistakably the nature and character of his business, as well as his exemption from the tax imposed, before he will be entitled to an injunction to restrain its enforcement.

Price Co. v. Atlanta, 105 Ga. 358, 31 S. E. 619.

The burden of proof was clearly upon the plaintiff to show that the domestic business was a mere incident to the interstate business.

Kehrer v. Stewart, 197 U. S. 69, 49 L. ed. 668, 25 Sup. Ct. Rep. 403.

[19] Mr. Chief Justice White delivered the opinion of the court:

The plaintiff in error was charged in a municipal court with violating an ordinance which imposed an annual occupation tax of $25 upon "lightning rod agents or dealers engaged in putting up or erecting lightning rods within the corporate limits" of the city of Waycross. Although admitting that he had carried on the business, he pleaded not guilty, and defended upon the ground that he had done so as the agent of a St. Louis corporation on whose behalf he had solicited orders for the sale of lightning rods; had received the rods when shipped on such orders from St. Louis, and had erected them for the corporation, the price paid for the rods to the corporation including the duty to erect them without further charge. This it was asserted constituted the carrying on of interstate commerce which the city could not tax without violating the Constitution of the United States. Although the facts alleged were established without dispute, there was a conviction and sentence, and the same result followed from a trial *de novo* in the superior court of Ware county, where the case was carried by certiorari. On error to the court of appeals that judgment was affirmed, the court stating its reasons for doing so in a careful and discriminating opinion reviewing and adversely passing upon the defense under the Constitution of the United States (11 Ga. App. 46, 74 S. E. 564). From that judgment this writ of error is prosecuted because of the constitutional question, and because under the law of Georgia the court of appeals had final authority to conclude the issue.

The general principles by which it has been so frequently determined that a state may not burden by taxation or otherwise the taking of orders in one state for goods to be shipped from another, or the shipment of such goods in the channels of interstate commerce up [20] to and including the consummation by delivery of the goods at the point of shipment, have been so often stated as to cause them to be elementary, and as to now require nothing but a mere outline of the principle. The sole question, therefore, here, is whether carrying on the business of erecting lightning rods in the state, under the conditions established, was interstate commerce beyond the power of the state to regulate or directly burden. The solution of the inquiry will, we think, be most readily reached by briefly reviewing a few of the more recently decided cases which are relied upon to establish that although the interstate transit of the lightning rods had terminated and they had been delivered at the point of destination to the agent of the seller, the business of subsequently attaching them to the houses for which they were intended constituted the carrying on of interstate commerce. The cases relied on are Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep.

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159; and Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649.

Caldwell v. North Carolina concerned the validity of an ordinance of the village of Greensboro, imposing a tax upon the business of selling or delivering picture frames, photographs, etc. The question was whether Caldwell, the agent of an Illinois corporation, was liable for this tax, because in Greensboro he had taken from a railroad freight office certain packages of frames and pictures which were awaiting delivery, and which had been shipped to Greensboro by the selling corporation to its own order, for the purpose of filling orders previously obtained by its agents in North Carolina. After the packages of frames and pictures were received by Caldwell, in a room in a hotel, the pictures and frames were fitted together and were delivered to those who had ordered them. The assertion that there was liability for the tax was based on the contention that the act of Caldwell in receiving the pictures and frames and bringing them together was not under the [21] protection of the commerce clause, but was the transaction of local business after the termination of interstate commerce; especially because the pictures and frames had been shipped from Chicago in separate packages, and because the pictures and frames were incomplete on their arrival, and were made complete in the state by the union accomplished after the end of their movement in interstate commerce. Both of these propositions were decided to be unsound, and it was adjudged that as both the pictures and frames had been ordered from another state, and their shipment was the fulfilment of an interstate commerce transaction, the mere fact that they were shipped in separate packages and brought together at the termination of the transit did not amount to the transaction of business within North Carolina which the state could tax without placing a direct burden upon interstate commerce. In Rearick v. Pennsylvania, where the right to levy a tax was decided not to exist because to sustain it would be a direct burden upon interstate commerce, the only question was whether the form in which certain shipments of goods were made from Ohio into Pennsylvania to fill orders was of such a character as to cause the act of the agent of the shipper, who opened the packages for the purpose of distributing the goods to those for whom they were intended, to amount to the carrying on of business in the state of Pennsylvania. Dozier v. Alabama in substance concerned the principles applied in the two previous cases, with the modification that it was there held that because there was no binding obligation on a purchaser to accept the frame which was to accompany a picture ordered from another state, and transmitted through interstate commerce, did not take the case out of the previous ruling.

It is evident that these cases when rightly considered, instead of sustaining, serve to refute, the claim of protection under the interstate commerce clause which is here [22] relied upon, since the cases were concerned only with merchandise which had moved in interstate commerce, and where the transactions which it was asserted amounted to the doing of local business consisted only of acts concerning interstate commerce goods, dissociated from any attempt to connect them with or make them a part in the state of property which had not and could not have been the subject of interstate commerce. Thus, in Caldwell v. North Carolina, the court laid emphasis upon the fact that the shipment of the pictures in interstate commerce in one package and the frames in another was not essential but accidental, for the two could have been united at the point of shipment before interstate commerce began as well as be brought together after delivery at the point of destination. And this was also the condition in the Rearick Case. Indeed, it is apparent in all three cases that there was not the slightest purpose to enlarge the scope of interstate commerce so as to cause it to embrace acts and transactions theretofore confessedly local, but simply to prevent the recognized local limitations from being used to put the conceded interstate commerce power in a straight jacket so as to destroy the possibilities of its being adapted to meet mere changes in the form by which business of an inherently interstate commerce character could be carried on.

We are of the opinion that the court below was right in holding that the business of erecting lightning rods under the circumstances disclosed was within the regulating power of the state, and not the subject of interstate commerce, for the following reasons: (a) Because the affixing of lightning rods to houses was the carrying on of a business of a strictly local character, peculiarly within the exclusive control of state authority. (b) Because, besides, such business was wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce, or of the right to complete [23] an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated. It is true that it was shown that the contract under which the rods were shipped bound the seller, at his own expense.

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to attach the rods to the houses of the persons who ordered rods, but it was not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business, protected by the commerce clause. It is manifest that if the right here asserted were recognized, or the power to accomplish by contract what is here claimed were to be upheld, all lines of demarcation between national and state authority would become obliterated, since it would necessarily follow that every kind or form of material shipped from one state to the other, and intended to be used after delivery in the construction of buildings or in the making of improvements in any form, would or could be made interstate commerce.

Of course we are not called upon here to consider how far interstate commerce might be held to continue to apply to an article shipped from one state to another, after delivery and up to and including the time when the article was put together or made operative in the place of destination in a case where, because of some intrinsic and peculiar quality or inherent complexity of the article, the making of such agreement was essential to the accomplishment of the interstate transaction. In saying this we are not unmindful of the fact that some suggestion is here made that the putting up of the lighning rods after delivery by the agent of the seller was so vital and so essential as to render it impossible to contract without an agreement to that effect,—a suggestion, however, which we deem it unnecessary to do more than mention in order to refute it.

Affirmed.

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[24] LOUIS ELIE JOSEPH HENRY DE GALARD DE BRASSAC DE BEARN, Count and Prince of Bearn and Chalais, Appt.,

v.

SAFE DEPOSIT & TRUST COMPANY OF BALTIMORE, American Bonding Company of Baltimore, et al.

(See S. C. Reporter's ed. 24–35.)

Appeal — from district court — frivolousness of Federal question.

1. A direct appeal from a Federal district court to the Supreme Court may not be maintained on the theory that rights under the Federal Constitution were involved, where the supposed constitutional questions have already been twice decided by the Supreme Court to be so wanting in merit as not to afford ground for the exercise of jurisdiction to review the judgments of a state court of last resort.

[For other cases, see Appeal and Error, 938–989, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — due process of law — attachment of property of nonresident.

2. The attachment conformably to local law, at the instance of a foreign creditor, of bonds of a foreign corporation, for a debt of their nonresident owner, does not deny such owner either the equal protection of the laws or the due process of law guaranteed by U. S. Const., 14th Amend., where such bonds had been deposited with a custodian in the state, under the directions of the state court, in the exercise of admittedly lawful powers, and could not be removed therefrom without obtaining the authority of the state court,—an authority which was unaffected by the fact that the bonds were registered in the names of the attachment debtor's minor children, since they were so registered solely because of the previous action of the state court.

[For other cases, see Constitutional Law, IV. a, 7; IV. b, 8, in Digest Sup. Ct. 1908.]

[No. 301.]

Argued March 17 and 18, 1914. Decided April 6, 1914.

APPEAL from the District Court of the United States for the District of Maryland to review a decree sustaining a demurrer to and dismissing the bill in a suit over the right of access to a safe deposit box. Dismissed for want of jurisdiction.

See same case below, 196 Fed. 981.

The facts are stated in the opinion.

Messrs. **Maurice Léon** and **George C. Holt** argued the cause and filed a brief for appellant:

Appellant was entitled to show in the Federal court below that a state court, sitting in the same state, had not acquired jurisdiction of the bonds, although the sheriff had filed a return stating that they had been seized.

Cooper v. Newell, 173 U. S. 555, 43 L. ed. 808, 19 Sup. Ct. Rep. 506.

Upon the conceded facts the state court had not acquired prior jurisdiction over the bonds.

Bates v. New Orleans, J. & G. N. R. Co. 4 Abb. Pr. 72, 13 How. Pr. 516; Smith v. Kennebec & P. R. Co. 45 Me. 547; Bowker v. Hill, 60 Me. 172; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; Tweedy v. Bogart, 56

NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741; B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

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Conn. 419, 15 Atl. 374; Ward v. Boyce, 152 N. Y. 191, 36 L.R.A. 549, 46 N. E. 180; Simpson v. Jersey City Contracting Co. 165 N. Y. 193, 55 L.R.A. 796, 58 N. E. 896.

Treating the bonds as capable of transfer by manual delivery, it is manifest upon the conceded facts that they have not been subjected to such proceedings as would bring them within the jurisdiction of the state court.

Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931; Pelham v. Rose, 9 Wall. 103, 19 L. ed. 602; Pelham v. Way, 15 Wall. 196, 21 L. ed. 55; Pennoyer v. Neff, 95 U. S. 714, 730, 24 L. ed. 565, 571.

The Federal court, having acquired prior jurisdiction by process served *in personam* on the lessor and on the nominal lessees of the box as parties defendant in an original suit to determine the status of the leasehold of the safe deposit box, should protect its jurisdiction to render a decree by preventing interference with the *res*.

Freeman v. Howe, 24 How. 450, 461, 16 L. ed. 749, 753; Rickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 258, 54 L. ed. 1032, 31 Sup. Ct. Rep. 11; Helm v. Zarecor, 222 U. S. 32, 56 L. ed. 77, 32 Sup. Ct. Rep. 10.

Mr. Charles McH. Howard argued the cause, and, with Messrs. Albert C. Ritchie and Edward Duffy, filed a brief for appellees.

Mr. Chief Justice White delivered the opinion of the court:

In this case the court below sustained a demurrer to the complaint, and this direct appeal was then taken on the theory that rights under the Constitution of the United States were involved. To determine whether there is a constitutional question, and, if so, to decide it, requires a statement of the averments of the complaint.

The complainant was the appellant and the defendants were the Safe Deposit & Trust Company of Baltimore, American Bonding Company of Baltimore, Alexander Brown & Sons, a commercial firm established in Baltimore, and Theodore P. Weis, sheriff of the city of Baltimore. It was alleged that the complainant was the owner of coupon bonds of $29,000 issued by the New York Central & Hudson River R. R., and of $156,000 of bonds issued by the Chicago, St. Paul, Minneapolis, & Omaha Railway Company, [27] a specified amount of the bonds being registered in the name of a minor son and a stated amount being likewise registered in the name of a minor daughter of the complainant. It was averred that the bonds were in a safe deposit box in the vault of the defendant Safe Deposit & Trust Company, "where your orator, by means of a guardianship proceeding in the orphans' court of Baltimore, which has since been declared illegal and void, was induced to place said bonds, said box being rented and standing recorded on the books of the said Safe Deposit Company in the joint names of Messrs. Alexander Brown & Sons and the American Bonding Company; that for the purposes of such guardianship proceeding your orator had, in the year 1908, been required by the said American Bonding Company as surety on your orator's bond in said guardianship proceeding to agree not to remove the said bonds without the consent of said surety; and had further been required by said surety to consent that said surety and said Alexander Brown & Sons should only have joint access to said bonds and the same for the sole purpose of enabling said Alexander Brown & Sons to remove interest warrants from said bonds during the said guardianship, and forward the same for payment to the city of New York as they became due.

"That in December, 1909, the court of appeals of Maryland, by a decree founded upon personal jurisdiction over all the parties to said guardianship proceeding, declared the said guardianship and certain releases given by your orator in connection therewith null and void; that by said adjudication, the said suretyship of the said American Bonding Company of Baltimore was extinguished, and that neither said Bonding Company nor said Alexander Brown & Sons have, since said adjudication, had any right of access to or other right or control whatsoever in, over, or as to said safe deposit box and the contents of the same, and said adjudication has established the [28] lack of jurisdiction over said property on the part of the courts which had so undertaken to deal therewith.

"That your orator is entitled to the immediate possession of the said evidences of debt, to wit, registered bonds, for all purposes, and is in urgent need of them for the purpose of causing said debts to be transferred upon the books of the debtor corporations in the state of New York to the name of your orator, or at his option, of surrendering said bonds to the said corporations respectively in exchange for the issuance to your orator of other evidences of said debts, to take the place of said bonds now so registered, as he would have done in the year 1908 but for the illegal guardianship proceeding already referred to.

"That your orator has been, since the month of October, 1908, and still is, the true lessee of said box, the rental of which has been paid with funds furnished by your orator, and, as above shown, at all times owner of the contents thereof; that said

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Alexander Brown & Sons have not been and are not in any manner responsible either for said box or for the custody of the contents of the same, or in or for any matter growing out of the arrangement under which said box was rented and said registered bonds placed therein; that as to the American Bonding Company, it has had no connection with or interest in the rental of said box or the custody of the contents of the same except as surety of your orator upon his bond as guardian, which said suretyship was undertaken in the aforesaid illegal guardianship proceeding which has been declared void and set aside."

After reciting the provisions of a memorandum agreement between the plaintiff and defendant Brown & Sons and the Bonding Company by which the joint access to the box in which the bonds were deposited should be had for the purpose of cutting the coupons from the bonds and turning them over to the complainant, it was averred that neither the American Bonding Company nor Brown & [29] Sons set up any interest antagonistic to the complainant, but that he was unable to get access to the box where the bonds were deposited without a decree authorizing him to do so, and that such a decree was necessary for the protection of Brown & Sons and the Safe Deposit & Trust Company. It was then averred that the defendant sheriff of Baltimore county "has filed in the superior court of Baltimore, a court of law of the state of Maryland, returns to certain writs of attachment stating that he has seized the aforesaid particular debts under such writs issued out of said court in five suits brought by divers nonresidents of the state of Maryland against your orator upon the ground of your orator's nonresidence in said state, to recover upon divers claims alleged to have arisen out of said state; that the said proceedings of the said defendant sheriff under said writs, purporting under color of the attachment statutes of Maryland and of said writs to seize said debts which are owned by your orator in the state of New York, are illegal and void; that your orator has not been personally served with process in said suits; that said debts have not and cannot be seized under said writs, not being property in the state of Maryland; that the defendant sheriff by his said proceedings under said writs has attempted and is attempting to interfere with said box and its contents, and to encumber your orator's title to said particular debts, and has sought and is seeking to deprive your orator of his property and of the effective control thereof and of the use thereof without due process of law, and to deprive your orator of the equal protection of the laws, in violation of the Constitution of the United States, and particularly of § 1 of the 14th Amendment thereto; that said superior court of Baltimore city has no personal jurisdiction over your orator, and has not gained jurisdiction over the aforesaid box or its contents, or over the debts owned by your orator in the state of New York, and the said defendant sheriff [30] has no lawful authority to impede or seek to impede or hinder your orator in the premises, nor to do any act tending to defeat your orator's control of the said debts or the evidences thereof, or to prevent your orator from securing the relief applied for herein, and which this court has jurisdiction to grant your orator, and that the said unlawful proceedings of the said sheriff, under color of said writs, will, if persisted in, constitute an unlawful interference with the jurisdiction of this court in the premises."

The prayer was that the complainant be decreed to be the lessee of the safe deposit box, and entitled to access to the same, and to withdraw the contents, and that the sheriff be enjoined from in any way interfering with the accomplishment of these results.

The demurrers which were filed to this bill by the respective defendants were based first upon the absence of necessary parties; that is, those in whose behalf the attachments had been issued, as referred to in the bill, and second, because, as the bill discloses that the bonds referred to in the bill were under levy by attachment issued out of the state court, there was no power in the United States court to interfere. The court below rested its decree sustaining the demurrer and dismissing the bill on both these grounds. In disposing of the latter, the court said:

"This court may not take anything, be it safe deposit boxes, bonds, evidences of debt, or what not, out of the custody of a state court. The complainant does not question the general rule. He claims that it is not here applicable. He says that while the superior court has jurisdiction to issue writs of nonresident attachment, the things which its officer has sought to attach in this case are not attachable. It follows, he argues, that this court may and must, when properly applied to, altogether ignore such void proceedings.

"The court of appeals of Maryland has expressly decided [31] that a court of equity may not assume to declare such attachments altogether nugatory. De Bearn v. Winans, 115 Md. 139, 80 Atl. 730.

"See also: De Bearn v. Winans, 115 Md. 604, 80 Atl. 1071; De Bearn v. De Bearn, 115 Md. 668, 36 L.R.A.(N.S.) 421, 81 Atl. 223; De Bearn v. De Bearn, 115 Md. 685, 81 Atl. 222.

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"It was there decided that such evidences of debt or bonds as are involved in the pending case may be attached in Maryland.

"Neither the superior court of Baltimore city nor this court have any control over the other. If it should be here held that the things in question were not attachable, that court would be under no obligation to subordinate its judgment to that of this court. A conflict of jurisdiction would follow. The rule that one court of concurrent jurisdiction may not attempt to exercise control over anything which has previously come into and still is in the control of the other court is intended to render such unseemly controversies impossible. The facts of this case bring it within both the letter and spirit of that rule."

After further pointing out that ample remedy would be afforded the complainant by asserting his constitutional rights, if any, in the state court where the attachments were pending, and, if such Federal rights were denied, by prosecuting error to this court, the court observed:

"Technically, as this is a hearing upon demurrer, this court may not be entitled to take judicial notice of the fact that to all the cases in 111 and 115 Md., cited in this opinion, the complainant was a party. The conclusions herein stated have been reached, therefore, without considering whether the question as to whether a court of equity may interfere with these attachment proceedings, and whether the evidences of debt are, under the circumstances of this case, attachable, have been decided contrary to the contention of the complainant in a case to which he was a party, and which had reference to the very attachment [32] proceedings which he seeks here to have declared invalid."

We are not constrained by the limitations which the lower court considered prevented it from taking notice of the judicial proceedings in the courts of Maryland in which the attachments issued. We say this because, as was declared in Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 217, 46 L. ed. 1132, 1134, 22 Sup. Ct. Rep. 820: "We take judicial notice of our own records, and, if not *res judicata*, we may, on the principle of *stare decisis*, rightfully examine and consider the decision in the former case as affecting the consideration of this;" and again, as further declared in Dimmick v. Tompkins, 194 U. S. 540, 548, 48 L. ed. 1110, 1113, 24 Sup. Ct. Rep. 780: "The court has the right to examine its own records and take judicial notice thereof in regard to proceedings formerly had therein by one of the parties to the proceedings now before it." Availing of this power and making reference to the records of this court, it appears that the controversy as to the validity of the attachments with which the appeal before us is concerned has, on three different occasions, been here considered. De Bearn v. De Bearn, 225 U. S. 695, 56 L. ed. 1261, 32 Sup. Ct. Rep. 834; De Bearn v. De Bearn, 231 U. S. 741, ante, 462, 34 Sup. Ct. Rep. 318; De Bearn v. Winans, 232 U. S. 719, ante, 813, 34 Sup. Ct. Rep. 601. In the first, an attempt to bring a controversy on the subject here was dismissed because of its prematurity. In the other two cases it appears that at the time the bill in this case was filed, the complainant was engaged in litigating in the courts of the state of Maryland the very grounds of opposition to the attachments which were made the basis of the bill in this case, and that after filing such bill he continued such litigation in the state courts, and when, after a full consideration of his grounds of complaint, both state and Federal, in the court of last resort of Maryland, there were decisions against him, error was prosecuted from this court because of the asserted existence of the Federal rights which were alleged in the bill now before us. The records disclose that in both cases motions to dismiss [33] for want of jurisdiction were sustained by *per curiam* opinions, reference being made in the one case (231 U. S. 741) to authorities upholding the doctrine that no power to review exists in a case where, although there is a Federal question, the conclusion of the court below rests upon a non-Federal or state ground completely adequate to sustain it, and in the other case (232 U. S. 719) the motion to dismiss was sustained by authorities to the same effect, and additionally upon authorities establishing the rule that a wholly frivolous and unsubstantial Federal question was not adequate to give jurisdiction.

Indeed, the record in the case last cited establishes that in that proceeding the appellant filed a pleading in which he expressly set up the pendency of the bill in the United States court which is now before us, and urged the supposed Federal rights upon which the bill was rested as a basis for relief.

From these considerations it obviously comes to pass that the supposed constitutional questions upon which our right to directly review the action of the court below can alone rest have been already here twice decided to be so wanting in merit as not to afford ground for jurisdiction. It is true that the cases referred to involved the jurisdiction to review the judgments of the court of last resort of the state of Maryland under § 237 of the Judicial Code [36 Stat. at L. 1156, chap. 231. U. S. Comp. Stat. Supp. 1911, p. 227] out that differ-

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ence affords no reason for distinguishing this case from the previous cases, since it is impossible to conceive that the assertion of an alleged constitutional right which was decided to be so unsubstantial and frivolous as to afford no ground to review the action of the state court of Maryland concerning the attachments should yet now be held to be of sufficient merit to give jurisdiction to directly review the action of the court below in refusing to interfere with the same attachments. Applying the previous cases, therefore, it plainly follows that we have no jurisdiction on this writ of error, and therefore [34] our duty is to dismiss. Before, however, discharging that duty without going into the labyrinth of pleadings, of motions, of supplementary papers, etc., etc., with which this and the previous records before us abound, and by the use of which this case has been taken many times to the court of last resort of Maryland, and is here now for the fourth time, as it is in the "interest of the Republic that litigation should come to an end," we pause to say that considering again the whole field, and weighing every Federal right asserted, we see no ground for doubting the correctness of the conclusions which constrained us to hold that the controversies presented in the previous cases were beyond our cognizance. Briefly speaking, it is to be observed that the error which in this and the previous cases underlies all the assumptions of Federal right arises from disregarding the distinction between a controversy as to whether the attachments were authorized by the law of the state and the contention as to the power in the state to have given authority to its courts to issue such attachments. The two are widely different, the one being concerned with what state action has been taken and the other with the power of the state to confer authority to take such action. Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229. As to the first, there is no room for controversy, since the decisions of the Maryland court of last resort have explicitly declared not only that the attachments were authorized by the state law, but that as the result of the authority to issue them there was imposed upon the state courts the duty under the facts disclosed by the record to exert their authority to the full extent required to protect the rights of the attaching creditors by seeing to it that the property attached, which was in the custody of the court and subject to its control, be not permitted to be removed or taken out of the reach of that authority for the purpose of frustrating the rights arising from the attachments. The second, the question of power of the [35] state of Maryland to authorize its courts to perform the duty thus cast upon them, would seem to be free from all possible doubt in view of the following facts: (a) that the coupon bonds were in the state, deposited under the directions of the state court in the exercise of admittedly lawful powers; (b), that in that situation it was impossible to remove them from the state without obtaining the authority of the state courts,—an authority which was unaffected by the fact that the bonds were registered, since they were so registered solely because of the previous action of the state court,—an action which the court of last resort of Maryland decided was no obstacle to the attachments of the bonds, since the effect of the state law empowering the attachments was to impose upon the court the duty of seeing to it that this registry should be removed to the extent necessary to protect the rights of attaching creditors. And the force of these suggestions is illustrated by bearing in mind that the denial of all judicial power by the state over the bonds by way of attachment is asserted by the appellant in a proceeding in which he is the actor, invoking the exertion of the state judicial power for the purpose of enabling him to obtain possession of the bonds and do away with the effect of the previous state decree concerning the deposit and registry of the same.

Dismissed for want of jurisdiction.

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[36] METZGER MOTOR CAR COMPANY, Plff. in Err.,
v.
JOHN W. PARROTT.

(See S. C. Reporter's ed. 36-42.)

Appeal — matters arising after decision below — state statute held invalid pending appeal.

A judgment of a Federal district court based solely upon a state statute creating the cause of action, which otherwise would not exist, will be reversed by the Federal Supreme Court on writ of error, where, since the trial of the case, the statute has been held by the highest state court to violate the Constitution.

[For other cases, see Appeal and Error, VIII. n, in Digest Sup. Ct. 1908.]

[No. 309.]

Argued March 18 and 19, 1914. Decided April 6, 1914.

IN ERROR to the District Court of the United States for the Eastern District of Michigan to review a judgment in favor of plaintiff in a personal-injury action. Reversed.

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Mr. Henry L. Lyster argued the cause, and, with Mr. John C. Donnelly, filed a brief for plaintiff in error.

Mr. Silas B. Spier argued the cause, and, with Mr. Thomas A. E. Weadock, filed a brief for defendant in error.

Memorandum opinion by direction of the court, by Mr. Chief Justice White:

This action, brought in the state court to recover for personal injuries and other damages, was removed by the defendant to the circuit court of the United States on the ground of adverse citizenship, and there tried, resulting in a verdict and judgment for the plaintiff. Direct error is prosecuted to that court (now the district court) because of the asserted repugnancy of the following statute of the state upon which the recovery was based, to the due process clause of the 14th Amendment:

"The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation by any person of such motor vehicle, whether such negligence consists in violations of the provision of a statute of this state, or in the failure to observe such ordinary care in such operation as the rules of the common law require; but such owner shall not be so liable in case such motor vehicle shall have been stolen." [2 How. Anno. Stat. 1913, § 2496.]

The injuries complained of were caused by the negligence [41] of a chauffeur in operating an automobile owned by the defendant company, resulting in a collision on the highway with plaintiff's horses and the cart in which he, with two others, was riding. Although the driver of the automobile was in the employ of the defendant company as a car tester and chauffeur, he was not at the time of the accident (about midnight) engaged in the company's business, but had taken the car without the knowledge or consent of the company, and in violation of its rules, for the purpose of pleasure-riding with his friends. Under these facts, aside from the statute, the court below charged the jury, and it is not here disputed, that the plaintiff could not recover under the law of Michigan for the injuries suffered, and hence that his right to recover, if any, was exclusively under the statute.

The duty of considering the contention here urged, the unconstitutionality of the statute, is rendered unnecessary by decisions of the supreme court of the state since the trial of this case, in which the statute was held void because in conflict with both the state and the United States Constitutions. Daugherty v. Thomas, 174 Mich. 371, 45 L.R.A.(N.S.) 699, 140 N. W. 615; Barry v. Metzger Motor Car Co. 175 Mich. 466, 141 N. W. 529. We say this because while it is undoubtedly our duty to decide for ourselves whether the statute is repugnant to the Constitution of the United States, we must accept the ruling of the state court as to the repugnancy of the statute to the state Constitution. As the effect of the state decision on that subject is to determine that *ab initio* the statute was void, and as there was admittedly no right to recover in the absence of a valid statute, the obvious duty to reverse results.

There is a suggestion in the argument that prior to the decisions of the state court to which we have referred, which expressly held the statute to be unconstitutional, there had been a ruling of that court deciding it not to be repugnant to the state Constitution. Johnson v. Sergeant, 168 Mich. 444, 134 N. W. 468, 2 N. C. C. A. 334. [42] But it is to be observed that as to that ruling the court in the Daugherty Case declared that the statement as to the constitutionality of the statute made in the Johnson Case was merely *obiter*. Even, however, if this were not the case, we cannot now treat as existing a statute which the court of last resort of the state declares cannot be enforced compatibly with the state Constitution. And as here there is no claim of rights acquired under contract in the light of a settled rule of state interpretation of a state law or Constitution, there is no foundation whatever for upholding assumed rights which can alone rest upon the existence of a state statute when the state court of last resort has held there is no valid statute to sustain them.

Reversed.

GRAND TRUNK WESTERN RAILWAY COMPANY, Plff. in Err.,

v.

GEORGE LINDSAY.

(See S. C. Reporter's ed. 42–50.)

Pleading — necessity of invoking statute — employers' liability.

1. A case which, by allegations and proof, is brought within the Federal Employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), is controlled by that act, although its provisions may not have been referred to in express terms in the pleadings or pressed at the trial.

[For other cases, see Pleading, II; Evidence, I. b, in Digest Sup. Ct. 1908.]

Note.—On the constitutionality, application, and effect of the Federal employers' liability act—see note to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38.

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Trial — refusing requested instructions — contributory negligence — employers' liability act.

2. A request to charge as a matter of law that a switchman whose arm was crushed between two cars moving in interstate commerce could not recover from the carrier if he gave the "come ahead" signal as he entered between the cars to examine the defective coupling mechanism is properly refused as incompatible with the provisions of the employers' liability act of April 22, 1908, establishing the rule of comparative negligence.

[For other cases, see Trial, VII. d, in Digest Sup. Ct. 1908.]

Master and servant — contributory negligence — employers' liability act.

3. The contributory negligence of a switchman whose arm was crushed between two cars moving in interstate commerce while he was examining the defective coupling mechanism which had several times refused to work automatically by impact, as required by the Federal safety appliance act, does not operate even to diminish his recovery, in view of the proviso to the employers' liability act of April 22, 1908, § 3, establishing the rule of comparative negligence, that "no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

[For other cases, see Master and Servant, II. b, in Digest Sup. Ct. 1908.]

[No. 425.]

Argued and submitted February 27, 1914.
Decided April 6, 1914.

IN ERROR to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern District of Illinois in favor of plaintiff in a personal-injury action brought by an employee against a carrier. Affirmed.

See same case below, 120 C. C. A. 166, 201 Fed. 836.

The facts are stated in the opinion.

Mr. **George W. Kretzinger, Jr.**, argued the cause and filed a brief for plaintiff in error:

Plain error was committed by the lower courts within the meaning of the rulings of this court in Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 37 L. ed. 1204, 33 Sup. Ct. Rep. 840, 3 N. C. C. A. 826.

The judgment against defendant, having been obtained upon the trial by plaintiff upon the theory of a violation by defendant of the safety appliance act, cannot be sustained upon appeal upon a different theory, —one which defendant was not called upon to defend.

Hatcher v. Northwestern Nat. Ins. Co. 106 C. C. A. 225, 184 Fed. 23; New York, L. E. & W. R. Co. v. Estill, 147 U. S. 592, 37 L. ed. 292, 13 Sup. Ct. Rep. 444; San Juan Light & Transit Co. v. Requena, 224 U. S. 97, 56 L. ed. 683, 32 Sup. Ct. Rep. 399; Yazoo & M. Valley R. Co. v. Greenwood Grocery Co. 227 U. S. 1, 3, 57 L. ed. 389, 391, 33 Sup. Ct. Rep. 213; St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703.

It is the duty of the court, upon proper request, to give the jury a statement of any distinct doctrine or proposition which is fairly and justly applicable to the issues or to an important phase of the case.

Mobile & O. R. Co. v. Wilson, 22 C. C. A. 101, 46 U. S. App. 214, 76 Fed. 127.

If it be considered, as held by the court of appeals, that plaintiff's act in giving the signal was contributory negligence alone, still contributory negligence is a complete defense to the action under the safety appliance act.

Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617; Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561.

Signals were given by the plaintiff and obeyed by the engineer, and the cars were moved under plaintiff's orders. If the plaintiff gave the "come ahead" signal and then went between the cars, whether for the purpose of adjusting the coupler or crossing to the other side of the track, or if he gave the "come ahead" signal for any purpose and then went between the cars, his act was the sole and moving cause of his injury. Clearly the engineer was not guilty of any negligence in obeying plaintiff's signal. The moving and proximate cause was therefore plaintiff's own act.

Thornton, Federal Employers' Liability & Safety Appliance Acts, p. 104, § 72a.

It is not necessary that the proximate cause of an injury be necessarily a negligent act. Any act or omission which is the direct cause of an injury, or the last conscious agent in producing it, is the proximate cause thereof.

Atchison, T. & S. F. R. Co. v. Calhoun, 213 U. S. 1, 53 L. ed. 671, 29 Sup. Ct. Rep. 321; Cincinnati, N. O. & T. P. R. Co. v. Mealer, 1 C. C. A. 633, 6 U. S. App. 86, 50 Fed. 725; Miner v. McNamara, 81 Conn. 690, 21 L.R.A.(N.S.) 477, 72 Atl. 138; Scheffer v. Washington City, V. M. & G. S. R. Co. 105 U. S. 249, 26 L. ed. 1070; Union P. R. Co. v. Callaghan, 6 C. C. A. 205, 12

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U. S. App. 541, 56 Fed. 988; Cooley, Torts, 3d ed. 99.

It will be noted that the plaintiff was injured, not by negligence in whole or in part of defendant's officers, agents, or employees, but, as he contends, by reason of a defect in the automatic coupling apparatus of one of its cars. This distinction was lost sight of by the court of appeals in its opinion in this case, and we think in this respect error was committed by the court of appeals.

Chicago & R. I. R. Co. v. McKean, 40 Ill. 229; Indianapolis & St. L. R. Co. v. Blackman, 63 Ill. 117; Caswell v. Worth, 5 El. & Bl. 849, 25 L. J. Q. B. N. S. 121, 2 Jur. N. S. 116, 4 Week. Rep. 231.

The court erred in refusing the instruction requested by defendant as to the weight to be attributed to the testimony of the car inspector.

Norfolk & W. R. Co. v. United States, 101 C. C. A. 249, 177 Fed. 630.

Mr. James C. McShane submitted the cause for defendant in error:

The first count is clearly based upon both the safety appliance act and the Federal employers' liability act.

Chicago, R. I. & P. R. Co. v. Brown, 107 C. C. A. 301, 185 Fed. 80, 229 U. S. 317, 57 L. ed. 1204, 33 Sup. Ct. Rep. 840, 3 N. C. C. A. 826; Johnson v. Great Northern R. Co. 102 C. C. A. 89, 178 Fed. 643.

The safety appliance act merely prescribes the carrier's duty, and it is settled that the breach of such duty is negligence *per se*.

Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 14, 51 L. ed. 687, 27 Sup. Ct. Rep. 407.

The allegations that plaintiff was in the exercise of ordinary care were inserted so as to make the counts good in the event that the employers' liability act should be declared invalid, but since the act has been sustained these allegations may be treated as surplusage.

Lucas v. Peoria & E. R. Co. 171 Ill. App. 1; Carterville Coal Co. v. Abbott, 181 Ill. 495, 55 N. E. 131, 7 Am. Neg. Rep. 40.

What is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256.

It is evident that, as plaintiff's contributory negligence would not defeat recovery, defendant is seeking to defeat plaintiff's action merely by referring to his alleged conduct by another name. This it cannot do.

Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; Chicago Junction R. Co. v. King, 94 C. C. A. 657, 169 Fed. 372; Southern P. R. Co. v. Allen, 48 Tex. Civ. App. 66, 106 S. W. 441.

In cases like this, where a statute relieves the injured servant from the charge of contributory negligence, his conduct, so far as the question of proximate cause is concerned, is treated the same as the conduct of a stranger.

Brunnworth v. Kerens-Donnewald Coal Co. 260 Ill. 215, 13 N. E. 178; Freeman v. Swan, — Tex. Civ. App. —, 143 S. W. 724.

The intervening act of an employee in going between the cars to operate defective couplers is but a result or consequence of the defective condition of the couplers, and it is such a result or consequence as the carrier might reasonably anticipate would follow from the use of defective or inoperative couplers, and hence such conduct upon the part of the employee does not break the causal connection between the defective and inoperative condition of the coupler and his injury.

Illinois C. R. Co. v. Siler, 229 Ill. 390, 15 L.R.A.(N.S.) 819, 82 N. E. 362, 11 Ann. Cas. 368.

A trial court is not bound to submit any question to the jury, if, notwithstanding the verdict, it would be compelled to set aside the finding, as not being supported by substantial evidence.

Chicago G. W. R. Co. v. Price, 38 C. C. A. 243, 97 Fed. 423.

The great preponderance, if not all, of the evidence, showed that defendant was guilty of a violation of the safety appliance act; and the clear preponderance, if not all, of the evidence, showed that plaintiff did not give the "come ahead" signal, which was the only conduct upon his part complained of; and in view of the evidence, and of the jury's general verdict and special findings, it is practically certain that the modification of the requested instruction did not affect the result, and that therefore the error, if any, was harmless. Judgments should not be reversed for alleged errors of this kind.

United States Smelting Co. v. Parry, 92 C. C. A. 165, 166 Fed. 407; Press Pub. Co. v. Monteith, 103 C. C. A. 508, 180 Fed. 356.

It was a question for the jury to determine as to whether negative evidence was entitled to the same consideration as positive testimony, and it was not the right or duty of the court to so declare as a matter of law.

Atchison, T. & S. F. R. Co. v. Feehan, 149 Ill. 212, 36 N. E. 1036.

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Mr. Chief Justice White delivered the opinion of the court:

The right of the plaintiff, who is defendant in error here, to recover for an alleged personal injury, was stated in two counts. In both, the wrong was alleged to have been occasioned by the negligence of the railway company, while it was engaged in carrying on interstate commerce, and while the plaintiff was employed by it in such commerce. In the first count, however, the act of Congress known as the safety appliance act [27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174] was expressly declared on. For the purposes of the writ of error which was prosecuted by the railroad company from the circuit court of appeals, numerous assignments of error were made and were all disposed of by the court in a full opinion. 120 C. C. A. 166, 201 Fed. 836. In view of the complexion of the case as here presented we need address ourselves to only one of such assignments, and to state the facts only so far as essential to its consideration.

The proof showed that the plaintiff was one of a crew working a switch engine, and that in a yard near Chicago such engine, coupled with four loaded freight cars, moving [45] in interstate commerce, were held in order to make a coupling with a number of other loaded freight cars moving in interstate commerce, to the end that an interstate train bound eastward might be made up and depart. When by impact it was attempted to make the coupling, the cars failed to couple automatically, and after several efforts to cause them to do so, the plaintiff as switchman walked along beside the end of the car as it approached again the point of coupling, signaled to the engineer to stand fast, and entered between the cars for the purpose of ascertaining and remedying if possible the cause of the trouble. While between the cars and engaged in handling the coupler, the cars were pushed up and he was caught and his arm crushed. There was some proof tending to show that the switchman stepped in before the moving cars had entirely stopped, and some that he gave a signal to come ahead as he stepped in; but there was evidence tending to show to the contrary, and to support the inference that the act of the engineer in moving up was the result of a signal with a lantern, for it was dark, mistakenly given by some other employee in the vicinity, or a mistake of the engineer in misconceiving the movement of a lantern in the hands of some of those who were standing around. There was evidence tending to show that the coupler had been inspected shortly before the accident and no defect was observed by the inspector, but it was shown without dispute that it was defective at the time of the accident, and would not couple automatically because of a bent pin.

Among the errors assigned in the court below was the refusal of the trial court to give an instruction relating to the action of the switchman in entering between the cars and his supposed giving of the come-ahead signal. This instruction, while leaving to the jury the determination of whether the switchman, in going between the cars to examine the coupling mechanism, gave a come-ahead signal, [46] nevertheless asked the court to instruct as a matter of law that if he had done so, his act was the proximate cause of his injury, and therefore he could not recover. Instead of giving this instruction the court modified it by leaving it to the jury to determine whether, under all the circumstances, the action of the switchman had been reasonably careful. The court, in its general charge on this subject, said:

"If, after he started to go between the cars, he has done something which was carelessly done, or which you can say from a preponderance of the evidence contributed approximately to the accident, then he cannot recover. . . . If there be contributory negligence at all, it depends not upon his assuming the risk under the circumstances in evidence in this case, but upon the care with which he acted while in the performance of the work which he assumed.

"You are further instructed that if you believe from the preponderance of the evidence that the plaintiff gave a 'come-ahead' signal to the switchman or engineer,—one or both,—and after that went between the cars and was injured, then you have a right to consider whether the giving of the 'come-ahead' signal by the plaintiff was the proximate cause of the injury as distinguished from the condition of the coupler, and if you find that, under the circumstances, the 'come-ahead' signal was the proximate cause of the injury, then your verdict must be for the defendant.

"You are also instructed that where there is a safe and a dangerous way of doing an act, and the servant uses a dangerous way and is injured thereby, he is charged with negligence on his part and may not recover."

The court below disposed of the refusal of the trial court to charge as a matter of law that there was no right to recover if the proof showed that the switchman had given the "come-ahead" signal, upon the ground that there [47] was no foundation for giving it, as there was no evidence whatever tending to show that such signal was given by the switchman. A petition for

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rehearing was, however, granted, and after a reargument, the particular objection concerning the charge referred to, as well as other matters, was disposed of in an additional opinion. As to the charge referred to, the court held that a mistake had been committed in the first opinion in saying that there was not any evidence tending to show that the switchman had given the "come-ahead" signal as he entered, and therefore the ground upon which the previous ruling had been based was inadequate. It was nevertheless held that the ruling as previously made was right, because the request to charge as a matter of law that the plaintiff was not entitled to recover if it was found that he had given the "come-ahead" signal as he entered to examine the mechanism was incompatible with the rule of comparative negligence established by the employers' liability act. [35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 911, p. 1322]. On this subject the court said:

"If, under the employers' liability act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act, by whatever name it be called. It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act."

As in the argument at bar reliance is solely placed, except in one particular, upon error which is assumed to have arisen from the refusal of the trial court to give the charge previously referred to, and the judgment of the court [48] below in approving this action of the trial court upon the theory that it was right in view of the provisions of the employers' liability act, we come to consider this subject.

(a) In the trial court it is insisted the operation and effect of the employers' liability act upon the rights of the parties was not involved because that act was not in express terms referred to in the pleadings or pressed at the trial, and was hence not considered by the court in acting upon the requested charge, and therefore, it is urged, it was error in the reviewing court to test the correctness of the ruling of the trial court by the provisions of the employers' liability act instead of confining the subject exclusively to the safety appliance law and the rules of the common law governing negligence. But the want of foundation for this contention becomes apparent when it is considered that in the complaint it was expressly alleged and in the proof it was clearly established that the injury complained of was suffered in the course of the operation of interstate commerce, thus bringing the case within the employers' liability act. It is true that to avoid the irresistible consequences arising from this situation it is insisted in argument that as no express claim was made under the employers' liability act, therefore there was no right in the plaintiff to avail of the benefits of its provisions, or in the court to apply them to the case before it. But this simply amounts to saying that the employers' liability act may not be applied to a situation which is within its provisions unless in express terms the provisions of the act be formally invoked. Aside from its manifest unsoundness, considered as an original proposition, the contention is not open, as it was expressly foreclosed in Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 482, 56 L. ed. 1171, 1174, 32 Sup. Ct. Rep. 790.

(b) Coming to consider the proposition that although the case be governed by the employers' liability act error [49] was nevertheless committed in sustaining the action of the trial court in refusing to give the requested instruction, we think that even if, for the sake of the argument, it be assumed that the proof brought the case within the principle of comparative negligence established by the employers' liability act, the correctness of the ruling of the court below is clearly made manifest by the reasoning given by the court for its conclusion. But having regard to the state of the proof as to the defect in the coupling mechanism, its failure to automatically work by impact after several efforts to bring about that result, all of which preceded the act of the switchman in going between the cars, in the view most favorable to the railroad, the case was one of concurring negligence; that is, was one where the injury complained of was caused both by the failure of the railway company to comply with the safety appliance act and by the contributing negligence of the switchman in going between the cars. Under this condition of things it is manifest that the charge of the court was greatly more favorable to

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the defendant company than was authorized by the statute for the following reasons: Although by the 3d section of the employers' liability act a recovery is not prevented in a case of contributory negligence, since the statute substitutes for it a system of comparative negligence, whereby the damages are to be diminished in the proportion which his negligence bears to the combined negligence of himself and the carrier,—in other words, the carrier is to be exonerated from a proportional part of the damages corresponding to the amount of negligence attributable to the employee (Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 122, 57 L. ed. 1096, 1101, 33 Sup. Ct. Rep. 654),—nevertheless, under the terms of a proviso to the section, contributory negligence on the part of the employee does not operate even to diminish the recovery where the injury has been occasioned in part by the failure of the carrier to comply with the exactions of an act of Congress [50] enacted to promote the safety of employees. In that contingency the statute abolishes the defense of contributory negligence, not only as a bar to recovery, but for all purposes. The proviso reads:

"Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The only other objection pressed in the argument at bar concerns an instruction asked and refused by the trial court with reference to the weight to be attributed to the testimony of a car inspector who inspected the coupler in question before the accident. The subject of this asserted error was evidently carefully considered by the trial court and was adversely disposed of by the court below, both in its original and in the opinion on the rehearing. Under these circumstances, without going into detail, in view of the doctrine to be applied to cases of this character as announced in Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 57 L. ed. 1204, 33 Sup. Ct. Rep. 840, 3 N. C. C. A. 826, we are of the opinion that we need do no more than say that after a careful examination of the subject, we are of the opinion that no reversible error was committed by the court below, and its judgment is therefore affirmed.

Affirmed.

[51] CHARLES CARLESI, alias Charles Carlese, Plff. in Err.,

v.

PEOPLE OF THE STATE OF NEW YORK.

(See S. C. Reporter's ed. 51-59.)

States — relation to Federal government — criminal prosecution — second offenders — President's pardon of prior conviction.

No rights under the Federal Constitution are infringed by the provision of N. Y. Penal Law (Consol. Laws, chap. 40), § 1941, under which a person committing a crime against the laws of that state may be punished as a second offender because of a prior conviction of an offense against the United States, notwithstanding a pardon granted by the President of the United States after the convict had completed his term of imprisonment under such prior conviction.

[For other cases, see States, IV. k, in Digest Sup. Ct. 1908.]

[No. 679.]

Argued March 2, 1914. Decided April 6, 1914.

NOTE.—Pardon as affecting enhanced punishment for later offense.

The authorities are in conflict as to the effect of a pardon upon the liability of the defendant to suffer an enhanced penalty for a subsequent crime.

In a Pennsylvania case an application by the district attorney for the imposition of double the ordinary punishment because of prior conviction was withdrawn because of the fact that the governor had pardoned the defendant for his first offense, whereupon the court said: "Upon reflection I do not feel disposed to sentence the prisoner as for a second offense. It is at least questionable whether it could be done legally, in view of the pardon. Without, however, deciding this point, it is sufficient to say that it would seem to be a harsh administration of the law to visit the prisoner with any of the consequences of an offense for which he has received a full and free pardon from the governor." Com. v. Morrow, 9 Phila. 583.

In Virginia it is expressly decided that pardon of the first offense takes away the right to inflict additional punishment for a second offense under Va. Code 1893, chap. 195, § 25, providing that a convict sentenced to the penitentiary shall have five years added to his term if it is proved that he has before been sentenced in the United States to a like punishment. Edwards v. Com. 78 Va. 39, 49 Am. Rep. 377, 4 Am. Crim. Rep. 460. The court says pardon relieved the defendant not only "of the punishment annexed to the offense for which he had been convicted, but of all penalties and consequences except political disabilities growing out of his conviction and sentence. One of those consequences was the liability to which it subjected him to receive the addi-

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IN ERROR to the Court of General Sessions of the Peace in and for the County of New York in the State of New York, to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which had affirmed a judgment of the Appellate Division of the Supreme Court, First Department, affirming a conviction in the Court of General Sessions of the crime of forgery in the second degree as a second offense. Affirmed.

See same case below in Appellate Division, 154 App. Div. 481, 139 N. Y. Supp. 309; in Court of Appeals, 208 N. Y. 547, 101 N. E. 1114.

The facts are stated in the opinion.

Mr. Almuth C. Vandiver argued the cause, and, with Messrs. George Gordon Battle, John Caldwell Myers, James E. Brande, Joseph Weber, and J. Joseph Lilly, filed a brief for plaintiff in error:

When the President of the United States, acting pursuant to the authority conferred upon him by the Constitution, grants a full pardon for an offense against the United States, the effect of the pardon is to blot out of existence the guilt of the offender, so that, in the eye of the law, he is as innocent as if he had never committed the offense.

Ex parte Garland, 4 Wall. 380, 18 L. ed. 370.

The pardon of the plaintiff in error by

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tional punishment prescribed by the statute in case he should be afterwards sentenced to the penitentiary in this state. And that additional punishment has been imposed in this case, not by reason of the sentence for the second offense alone, but in consequence of that sentence and the sentence in the former case. Both causes must exist together to produce the effect contemplated by the statute; in the absence of either, no case is made for the imposition of the additional punishment the statute prescribes. But as the first offense was, in legal contemplation, blotted out, and its consequences removed by the pardon of the governor, it must be regarded for the purposes of this case as though it had never been committed."

If imprisonment for a felony is terminated by an unconditional pardon, it is not to be regarded as one of the two former imprisonments for felony required by § 7388–11, 2 Bates's Anno. Stat. to place the accused in the category of habitual criminals. State v. Martin, 59 Ohio St. 212, 43 L.R.A. 94, 69 Am. St. Rep. 762, 52 N. E. 188. And to the same general effect was the decision in State v. Anderson, 7 Ohio N. P. 562, 5 Ohio S. & C. P. Dec. 548.

On the other hand, it is the settled rule in Kentucky that a pardon of a convict does not relieve him from liability for the enhanced punishment provided for by statute for subsequent crimes. Mount v. Com. 2 Duv. 94; Stewart v. Com. 2 Ky. L. Rep. 386; Herndon v. Com. 105 Ky. 197, 88 Am. St. Rep. 303, 48 S. W. 989.

The court in Mount v. Com. supra, says: "The pardon relieved the convict of the entire penalty incurred by the offense pardoned, and nothing else or more. It neither did nor could relieve from any penal consequence resulting from a different offense committed after the pardon, and never pardoned. The increased punishment prescribed by statute for the subsequent offense was no part of the penal consequences of the first offense, but applied exclusively to the last as aggravated by its repetition of the same crime. The legislature, as required by justice and policy, ought to have provided a severer punishment for repeated than for only one crime; and whether it had done so by duplicating for a second offense the punishment of the first, or by any other measure of augmentation, cannot be material. In any aspect the augmented punishment is for the last, and not at all for the first, offense; and, of course, a pardon of the first could in no way or degree operate as a pardon of the last offense, or remission of any portion of the punishment denounced for the perpetration of it."

The reasoning of the Kentucky court is in harmony with all the decisions which sustain statutes of this character against constitutional objections, as they all proceed on the theory that the enhanced penalty is not in any sense a new punishment for the prior offense. If it were, the statutes would violate constitional provisions. *Vide* notes to Re Miller, 34 L.R.A. 398, and Com. v. McDermott, 24 L.R.A.(N.S.) 432. But if the statutes are to be upheld on the ground that the enhanced penalty is not a new or additional punishment of the prior offense, a pardon of that offense does not relieve from that penalty.

In agreement with this doctrine, it is held in a New York case that a pardon by the governor of another state of a person there convicted of an offense will not prevent the effect of such former conviction from operating under the New York statute to make him liable to an increased punishment for a subsequent offense in New York. People v. Price, 53 Hun, 185, 6 N. Y. Supp. 833 affirmed on opinion below in 119 N. Y. 650, 23 N. E. 1149.

If, on a trial of the defendant upon an information charging larceny as a second offense, a conditional pardon from the first offense can avail the defendant as a defense to any extent, it constitutes a defense simply in mitigation of the penalty to be imposed on conviction of the second offense, and to avail the defendant as such mitigation of the penalty it should be proven at the trial for such second offense. Henderson v. State, 55 Fla. 36, 46 So. 151.

The fact that a defendant has been pardoned upon one former conviction does not take him out from under the operation of the habitual criminal act, where he has admitted two other convictions. Williams v. People, 196 Ill. 173, 63 N. E. 681.

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the President of the United States obliterated the first offense, so that the plaintiff in error could not thereafter be prosecuted as a second offender.

De Villeneuve & Carrette, vol. 1825, 1827, pt. 1, p. 135; Ex parte Garland, 4 Wall. 333–380, 381, 18 L. ed. 366–370, 371; Carlisle v. United States, 16 Wall. 147, 151, 21 L. ed. 426, 428; United States v. Wilson, 7 Pet. 150, 159, 160, 8 L. ed. 640, 643, 644; 24 Am. & Eng. Enc. Law, 2d ed. 584; United States v. Klein, 13 Wall. 128, 147, 20 L. ed. 519, 525; Re Monroe, 46 Fed. 52; United States v. Athens Armory, 35 Ga. 362, 2 Abb. (U. S.) 150, Fed. Cas. No. 14,473; People v. Pease, 3 Johns. Cas. 333; Locklin v. State, — Tex. Crim. Rep. —, 75 S. W. 305; Osborn v. United States, 91 U. S. 474, 477, 23 L. ed. 388, 389; Knote v. United States, 95 U. S. 149, 153, 24 L. ed. 442, 443; 29 Cyc. 1566, 1567; Territory v. Richardson, 9 Okla. 579, 49 L.R.A. 440, 60 Pac. 244, 15 Am. Crim. Rep. 552, 10 Okla. 217, 61 Pac. 1135; Knapp v. Thomas, 39 Ohio St. 381, 48 Am. Rep. 462; Diehl v. Rodgers, 169 Pa. 319, 47 Am. St. Rep. 908, 32 Atl. 424; Fite v. State, 114 Tenn. 656, 1 L.R.A.(N.S.) 520, 88 S. W. 941, 4 Ann. Cas. 1108; Pargoud v. United States, 13 Wall. 156, 20 L. ed. 646; United States v. Padelford, 9 Wall. 531, 19 L. ed. 788; Boyd v. United States, 142 U. S. 450, 454, 35 L. ed. 1077, 1078, 12 Sup. Ct. Rep. 292; 1 Bishop, New Crim. Law, § 919; Edwards v. Com. 78 Va. 39, 49 Am. Rep. 377, 4 Am. Crim. Rep. 460; Puryear v. Com. 83 Va. 51, 1 S. E. 512; State v. Martin, 59 Ohio St. 212, 43 L.R.A. 94, 69 Am. St. Rep. 762, 52 N. E. 188; State v. Anderson, 7 Ohio N. P. 562, 5 Ohio S. & C. P. Dec. 548; State v. Williams, 7 Ohio N. P. 562, 5 Ohio S. & C. P. Dec. 545; Easterwood v. State, 34 Tex. Crim. Rep. 410, 31 S. W. 294; Jones v. Board of Registrars, 56 Miss. 766, 31 Am. Rep. 385; Perkins v. Stevens, 24 Pick. 277; Re Deming, 10 Johns. 233, 483; 24 Am. & Eng. Enc. Law, 2d ed. 589, 590; Cuddington v. Wilkins, Hobart, 81; Leyman v. Latimer, L. R. 3 Exch. Div. 15, 352, 47 L. J. Exch. N. S. 470, 37 L. T. N. S. 819, 26 Week. Rep. 305, 14 Cox, C. C. 51; Hay v. Tower Division, L. R. 24 Q. B. Div. 561, 59 L. J. Mag. Cas. N. S. 79, 62 L. T. N. S. 290, 38 Week. Rep. 414, 54 J. P. 500; Graham v. West Virginia, 224 U. S. 616, 625, 56 L. ed. 917, 921, 32 Sup. Ct. Rep. 583; Armstrong v. United States, 13 Wall. 154, 20 L. ed. 614; Hart v. United States, 118 U. S. 67, 30 L. ed. 97, 6 Sup. Ct. Rep. 961; Illinois C. R. Co. v. Bosworth, 133 U. S. 103, 33 L. ed. 554, 10 Sup. Ct. Rep. 231; Brown v. Walker, 161 U. S. 601, 40 L. ed. 823, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644.

The pardon granted by the President to the plaintiff in error was full, absolute, and unconditional; and its absolute and unconditional character was in no wise restricted or impaired by the fact that it contained the recital that it was granted "to restore his civil rights."

Ex parte Garland, 4 Wall. 333, 18 L. ed. 366; Boyd v. United States, 142 U. S. 450, 35 L. ed. 1076, 12 Sup. Ct. Rep. 292.

The pardon should be liberally construed.

Ex parte Hunt, 10 Ark. 286; 24 Am. & Eng. Enc. Law, 574; 11 Ops. Atty. Gen. 230; People v. Pease, 3 Johns. Cas. 333; Osborn v. United States, 91 U. S. 474, 23 L. ed. 388; 24 Am. & Eng. Enc. Law, 2d ed. 577.

The pardon obliterated the former conviction, though it was granted after the completion of the term of imprisonment.

24 Am. & Eng. Enc. Law, 2d ed. 594; United States v. Jones, 2 Wheeler, C. C. 451; 9 Ops. Atty. Gen. 478; Singleton v. State, 38 Fla. 297, 34 L.R.A. 251, 56 Am. St. Rep. 177, 21 So. 21; State v. Baptiste, 26 La. Ann. 134; Sutton v. McIlhany, 1 Ohio Dec. Reprint, 235; Stetier's Case, 1 Phila. 302; Boyd v. United States, 142 U. S. 450, 35 L. ed. 1077, 12 Sup. Ct. Rep. 292; State v. Foley, 15 Nev. 69, 37 Am. Rep. 458.

Among the "civil rights" restored to plaintiff in error by the presidential pardon was the right of immunity from punishment as a second offender, common to all other citizens of the community in which he lives.

Bowles v. Habermann, 95 N. Y. 247.

Mr. **Robert S. Johnstone** argued the cause, and, with Messrs. Charles S. Whitman and Stanley L. Richter, filed a brief for defendant in error:

It is the second offense alone that is punishable, and that is punished; but the prior conviction, whether it be alleged in the indictment and found by the jury as an ingredient of the crime charged "as a second offense," or ascertained after the plea or verdict, goes to the degree of punishment which may be inflicted for the later crime. The increased punishment is not inflicted for the former crime or criminal act. The idea is that the fact of previous conviction increases the magnitude of his later crime or criminal act.

Graham v. West Virginia, 224 U. S. 616, 623, 56 L. ed. 917, 920, 32 Sup. Ct. Rep. 583; McDonald v. Massachusetts, 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389, affirming 173 Mass. 322, 73 Am. St. Rep. 293, 53 N. E. 874; Moore v. Missouri, 159 U. S. 673, 676, 40 L. ed. 301, 302, 16 Sup. Ct. Rep. 179, affirming 121 Mo. 514, 42 Am. St. Rep. 542, 26 S. W. 345; People ex rel. Cosgriff v. Craig, 195 N. Y. 194, 88 N. E. 38; People v. Sickles, 156 N. Y. 547, 51 N. E. 288; People v. Raymond, 96 N. Y. 38, 4 Am. Crim. Rep. 124; People v. Price, 53 Hun,

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189, 119 N. Y. 650, 23 N. E. 1149; People v. Reilly, 49 App. Div. 218, 63 N. Y. Supp. 18, affirmed in 164 N. Y. 600, 59 N. E. 1128; Ross's Case, 2 Pick. 171; People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401; People v. Coleman, 145 Cal. 609, 79 Pac. 283; Rand v. Com. 9 Gratt. 738; Ingalls v. State, 48 Wis. 647, 4 N. W. 785; Mount v. Com. 2 Duv. 93; Herndon v. Com. 105 Ky. 197, 88 Am. St. Rep. 303, 48 S. W. 989.

It has been uniformly held that statutory provisions such as are here involved—

1. Are not void as *ex post facto* laws, even though the former conviction was had prior to the enactment of the statute permitting the increased punishment.

McDonald v. Massachusetts, 180 U. S. 311, 313, 45 L. ed. 542, 547, 21 Sup. Ct. Rep. 389; Com. v. Graves, 155 Mass. 164, 16 L.R.A. 256, 29 N. E. 579; Ross's Case, 2 Pick. 169; Re Miller, 110 Mich. 676, 34 L.R.A. 398, 64 Am. St. Rep. 376, 68 N. W. 990; Ex parte Gutierrez, 45 Cal. 429; Rand v. Com. 9 Gratt. 738; Blackburn v. State, 50 Ohio St. 428, 36 N. E. 18; People v. Raymond, 32 Hun, 123, affirmed in 96 N. Y. 38, 4 Am. Crim. Rep. 124.

2. Are valid as against objections that they impose cruel and unusual punishments.

Moore v. Missouri, 159 U. S. 673, 677, 40 L. ed. 301, 303, 16 Sup. Ct. Rep. 179; People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401; State v. Hodgson, 66 Vt. 134, 28 Atl. 1089; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; Leeper v. Texas, 139 U. S. 467, 35 L. ed. 226, 11 Sup. Ct. Rep. 577.

3. Do not infringe constitutional provisions against double jeopardy, the increased punishment being inflicted solely for the later crime, which is aggravated by the fact of the prior conviction.

Graham v. West Virginia, 224 U. S. 616, 56 L. ed. 917, 32 Sup. Ct. Rep. 583; Moore v. Missouri, 159 U. S. 673, 677, 40 L. ed. 301, 303, 16 Sup. Ct. Rep. 179; McDonald v. Massachusetts, 180 U. S. 311, 313, 45 L. ed. 542, 547, 21 Sup. Ct. Rep. 389; People v. Sickles, 156 N. Y. 548, 51 N. E. 288; Kelly v. People, 115 Ill. 583, 56 Am. Rep. 184, 4 N. E. 644, 6 Am. Crim. Rep. 135; Ingalls v. State, 48 Wis. 647, 4 N. W. 785; People v. Lewis, 64 Cal. 401, 1 Pac. 490; People v. Coleman, 145 Cal. 609, 79 Pac. 283.

4. Are valid as against objections that they impose a penalty on crimes committed outside the jurisdiction.

McDonald v. Massachusetts, 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389, affirming 173 Mass. 322, 73 Am. St. Rep. 293, 53 N. E. 874; People v. Cæsar, 1 Park. Crim. Rep. 648.

5. Do not deny the equal protection of the laws or due process of law.

Moore v. Missouri, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179; McDonald v. Massachusetts, 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389.

It is immaterial whether the "former offense" of which the defendant was convicted was pardoned or not.

8 Am. & Eng. Enc. Law, 2d. ed. 492; State v. Manicke, 139 Mo. 547, 41 S. W. 223; State v. Austin, 113 Mo. 538, 21 S. W. 31; Evans v. Com. 3 Met. 453; Wood v. People, 53 N. Y. 513; Johnson v. People, 55 N. Y. 512; Mount v. Com. 2 Duv. 93; Stewart v. Com. 2 Ky. L. Rep. 386; Herndon v. Com. 105 Ky. 197, 88 Am. St. Rep. 303, 48 S. W. 989; People v. Price, 53 Hun, 185, 6 N. Y. Supp. 833, 119 N. Y. 650, 23 N. E. 1149; Re Miller, 34 L.R.A. 403, note; 24 Am. & Eng. Enc. Law, 2d ed. 585, 587.

The prisoner may not even show that the prior conviction was erroneous on his trial for a subsequent offense as a second offender (Kelly v. People, 115 Ill. 583, 56 Am. Rep. 184, 4 N. E. 644, 6 Am. Crim. Rep. 135). Collateral attack on a judgment, except for want of jurisdiction, is not permitted (People ex rel. Hubert v. Kaiser, 206 N. Y. 46, 99 N. E. 195; Andersen v. Treat, 172 U. S. 24, 31, 43 L. ed. 351, 353, 19 Sup. Ct. Rep. 67).

A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.

United States v. Wilson, 7 Pet. 150, 160, 8 L. ed. 640, 643; 29 Cyc. "Pardons," p. 1559, note 1; Osborn v. United States, 91 U. S. 474, 477, 23 L. ed. 388, 389; Young v. United States, 97 U. S. 39, 68, 24 L. ed. 992, 1000; Brown v. Walker, 161 U. S. 591, 638, 40 L. ed. 819, 835, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; Knote v. United States, 95 U. S. 149, 24 L. ed. 442; Re Spenser, 5 Sawy. 195, Fed. Cas. No. 13,234; United States v. Athens Armory, 35 Ga. 344, Fed. Cas. No. 14,473; United States v. Morris, 1 Paine, 206, Fed. Cas. No. 15,816.

A pardon does not annul a judgment of conviction.

Roberts v. State, 30 App. Div. 106, 51 N. Y. Supp. 691, 160 N. Y. 217, 54 N. E. 678; Re an Attorney, 86 N. Y. 563; Baum v. Clause, 5 Hill, 196; Eighmy v. People, 78 N. Y. 333; Cook v. Middlesex County, 26 N. J. L. 333, affirmed in 27 N. J. L. 637; 4 Bl. Com. 402; 23 Ops. Atty. Gen. 360; 1 Ops. Atty. Gen. 359; 2 Wigmore, Ev. § 980, (3), p. 1107; Curtis v. Cochran, 50 N. H. 242; 22 Ops. Atty. Gen. 36.

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The pardoning power, vested in the executive authority by the Constitution, is logically vested in that branch of the government, because it is executive in its nature, being practically a suspension of the execution of the judgment; but it is fundamental that the executive branch of the government is not clothed with judicial authority, nor authorized to perform judicial functions.

Cooley, Const. Lim. 7th ed. pp. 162, 128 et seq; Roberts v. State, 30 App. Div. 106, 51 N. Y. Supp. 691, 160 N. Y. 217, 54 N. E. 678.

One of the basic principles upon which our system of government, both state and Federal, is founded, is that the judicial, legislative, and executive branches thereof are each supreme in the exercise of the functions allotted to them, and that none of these branches of government can interfere with the functions of either of the others. That, we take it, is fundamental, except in so far as the power of interference is expressly conferred by constitutional provision or due legislative enactment.

Re Davies, 168 N. Y. 101, 56 L.R.A. 855, 61 N. E. 118; Ware v. Hylton, 3 Dall. 199, 266, 1 L. ed. 568, 596; 6 Am. & Eng. Enc. Law, 2d ed. 1006, 1008; 24 Am. & Eng. Enc. Law, 557; Kilbourn v. Thompson, 103 U. S. 168, 190, 26 L. ed. 377, 386; United States v. Klein, 13 Wall. 128, 147, 148, 20 L. ed. 519, 525, 526; Black, Const. Law, pp. 91, 121, 122, 322; 2 Am. & Eng. Enc. Law, 307; 2 Cyc. 284, 285.

There is no difference between a President's pardon and that of a governor.

People v. Bowen, 43 Cal. 439, 13 Am. Rep. 148; Ex parte Powell, 73 Ala. 517, 49 Am. Rep. 71; Hunnicutt v. State, 18 Tex. App. 517, 51 Am. Rep. 330; 24 Am. & Eng. Enc. Law, 2d ed. 565; 6 Am. & Eng. Enc. Law, 1010; Ex parte Wells, 18 How. 307, 15 L. ed. 421; United States v. Wilson, 7 Pet. 150, 8 L. ed. 640.

The limitations imposed by the Federal Constitution are limitations on the powers of the Federal government only, except in so far as it contains express limitations on the powers of the states.

Barron v. Baltimore, 7 Pet. 243, 250, 8 L. ed. 672, 675; Fox v. Ohio, 5 How. 410, 12 L. ed. 213; Smith v. Maryland, 18 How. 71, 76, 15 L. ed. 269, 271; Livingston v. Moore, 7 Pet. 469, 8 L. ed. 751; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Presser v. Illinois, 116 U. S. 252, 265, 29 L. ed. 615, 619, 6 Sup. Ct. Rep. 580; Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22; Cooley, Const. Lim. 7th ed. p. 46.

Within the sphere of the enumerated powers which have been granted by the Constitution to the Federal government, that government is, of course, supreme; and no state can pass or enforce a law which, by its necessary effect and operation, usurps a power granted by the Constitution to the government of the United States. In such case, where a state law comes in conflict with a function vested exclusively in the Federal government, under which the Federal government had acted, the state law must yield (McCray v. United States, 195 U. S. 27, 60, 49 L. ed. 78, 97, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561). But the conflict must be manifest, and the state law inconsistent with the Federal law, to render it invalid.

But except in so far as the people of the states have surrendered powers to the general government, the power of the state is supreme. It is subject to no limitations, except those expressly placed upon it by its own or the Federal Constitution.

Ware v. Hylton, 3 Dall. 199, 224, 1 L. ed. 568, 579; Rhode Island v. Massachusetts, 12 Pet. 657, 720, 9 L. ed. 1233, 1258; Martin v. Hunter, 1 Wheat. 304, 325, 4 L. ed. 97, 102; Calder v. Bull, 3 Dall. 386, 387, 1 L. ed. 648, 649; Chisholm v. Georgia, 2 Dall. 419, 435, 1 L. ed. 440, 447; Com. v. Klaus, 145 App. Div. 802, 130 N. Y. Supp. 713.

The police power of the state, which extends to all the great public needs (Noble State Bank v. Haskell, 219 U. S. 104, 111, 55 L. ed. 112, 116, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487), reserved by the states, includes within its scope the right to declare what shall be a proper punishment for offenses against its laws, and its action in that respect is not subject to Federal interference.

McDonald v. Com. 173 Mass. 328, 73 Am. St. Rep. 293, 53 N. E. 874, affirmed in 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; Com. v. Murphy, 165 Mass. 66, 30 L.R.A. 734, 52 Am. St. Rep. 496, 42 N. E. 504, 10 Am. Crim. Rep. 67; People v. Sickles, 156 N. Y. 541, 51 N. E. 288; People v. Price, 53 Hun, 185, 6 N. Y. Supp. 833, 119 N. Y. 650, 23 N. E. 1149; Barker v. People, 3 Cow. 704, 15 Am. Dec. 322; Coffey v. Harlan County, 204 U. S. 659, 662, 663, 51 L. ed. 666, 668, 669, 27 Sup. Ct. Rep. 305.

It is within the acknowledged power of every legislature to declare what shall be evidence, and the effect of that evidence in the courts of its own government. The only limitation is that there must be some fair and logical relationship between the *factum probans* and the *factum probandum* of which it is declared to be evidential.

Adams v. New York, 192 U. S. 585, 599,

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48 L. ed. 575, 581, 24 Sup. Ct. Rep. 372; Fong Yue Ting v. United States, 149 U. S. 698, 729, 37 L. ed. 905, 918, 13 Sup. Ct. Rep. 1016; Ogden v. Saunders, 12 Wheat. 213, 262, 349, 6 L. ed. 622, 653; Bailey v. Alabama, 219 U. S. 219, 238, 55 L. ed. 191, 200, 31 Sup. Ct. Rep. 145; People v. Cannon, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759.

It is always open to a defendant to show that he was not the person who was previously convicted, so that he may meet the main fact produced against him. There is no denial of due process.

People v. Sickles, 156 N. Y. 541, 51 N. E. 288; Coffey v. Harlan County, 204 U. S. 659, 663, 51 L. ed. 666, 668, 27 Sup. Ct. Rep. 305; Bailey v. Alabama, 219 U. S. 219, 238, 55 L. ed. 191, 200, 31 Sup. Ct. Rep. 145; Graham v. West Virginia, 224 U. S. 616, 56 L. ed. 917, 32 Sup. Ct. Rep. 583.

The situation here is analogous to that in the Hawker Case (Hawker v. New York, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573). See also People v. Sickles, 156 N. Y. 541, 51 N. E. 288.

A pardon by the President does not remove disabilities imposed by state laws.

1 Bishop, Crim. Law, § 920; Black, Const. Law, p. 327; Ex parte Hunter, 2 W. Va. 122; Ridley v. Sherbrook, 3 Coldw. 569; 8 Ops. Atty. Gen. 284; 7 Ops. Atty. Gen. 760.

Mr. Chief Justice White delivered the opinion of the court:

The plaintiff in error was accused of the crime "of forgery in the second degree as a second offense." The indictment contained a recital of the prior offense relied on, that is, a conviction in the circuit court of the United States for the southern district of New York, and a sentence for three and one-half years in the penitentiary for the crime of selling and having in possession counterfeit coin. The statute of the state of New York, which was the authority for referring to the prior conviction, was as follows:

"A person who, after having been convicted within this state, of a felony, or an attempt to commit a felony, or of petit larceny, or, under the laws of any other state, government, or country, of a crime which, if committed within this state, would be a felony, commits any crime, within this state, is punishable, upon conviction of such second offense, as follows:

"1. If the subsequent crime is such that, upon a first conviction, the offender might be punished, in the discretion of the court, by imprisonment for life, he must be sentenced to imprisonment in a state prison for life.

[56] "2. If the subsequent crime is such that, upon the first conviction, the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for a term not less than the longest term nor more than twice the longest term, prescribed upon the first conviction." [Penal Laws (Consol. Laws, chap. 40) § 1941.]

The accused pleaded not guilty, and while admitting the truth of the recitals in the indictment as to his prior conviction, sentence, and service of time in the penitentiary, moved to strike from the indictment all reference to those subjects, and insisted on his right to be tried without at all considering or in any manner referring to the prior conviction and sentence on the ground of a pardon granted to him by the President of the United States after he had completed his term of service under the prior conviction. The pardon relied upon was offered in evidence. On the trial which followed the refusal of the court to grant the motion to strike out or to rule as requested, the alleged Federal right based upon the pardon was further urged upon the court in every conceivable form, and was adversely acted upon, and after conviction was also pressed and adversely passed upon in both the appellate division (154 App. Div. 481, 139 N. Y. Supp. 309) and in the court of appeals of New York (208 N. Y. 547, 101 N. E. 1114). And it is the adverse ruling of the court of appeals concerning such asserted Federal right which forms the sole basis for this writ of error, addressed to the trial court because of the action of the court of appeals in remitting the entire record to that court.

The arguments at bar cover a wider field than is essential to be considered in order to pass upon the question for decision. As the state courts held that the statute directed the consideration of the prior conviction despite the pardon, we must treat the case as if the statute so expressly commanded, and test its repugnancy to the Constitution [57] of the United States upon that assumption. The issue is a narrow one, and involves not the determination of the operation and effect of a pardon within the jurisdiction of the sovereignty granting it, but simply requires it to be decided how far a pardon granted as to an offense committed against the United States operates, so to speak, extraterritorially as a limitation upon the states, excluding them from considering the conviction of a prior and pardoned offense against the United States in a prosecution for a subsequent state offense. It may not be questioned that the states are without right directly or indirectly to restrict the national government in the exer-

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tion of its legitimate powers. It is therefore to be conceded that if the act of the state in taking into consideration a prior conviction of an offense committed by the same offender against the laws of the United States despite a pardon was in any just sense a punishment for such prior crime, that the act of the state would be void because destroying or circumscribing the effect of the pardon granted under the Constitution and laws of the United States. And of course, conversely, it must be conceded that if it be that the act of the state in taking into consideration a prior offense committed against the United States after pardon under the circumstances stated was not in any degree a punishment for the prior crime, but was simply an exercise by the state of a local power within its exclusive cognizance, there could be no violation of the Constitution of the United States. The whole controversy therefore is to be resolved by fixing the nature and character of the action of the state under the circumstances for the purpose of deciding under which of these two categories it is to be classed. When the issue is thus defined and limited its solution is free from difficulty, as it has been repeatedly and conclusively foreclosed by the prior adjudications of this court.

In McDonald v. Massachusetts, 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389, the court [58] considered and adversely disposed of a contention that a statute of the state of Massachusetts was repugnant to the Constitution of the United States because it provided for a punishment as an habitual criminal of any person convicted of a felony in Massachusetts who was found to have been "twice convicted of crime, sentenced and committed to prison, in this or any other state, or once in this and once at least in any other state, . . ." In holding that the statute was not in conflict with the Constitution, the court said:

"The fundamental mistake of the plaintiff in error is his assumption that the judgment below imposes an additional punishment on crimes for which he had already been convicted and punished in Massachusetts and in New Hampshire.

"But it does no such thing. The statute under which it was rendered is aimed at habitual criminals; and simply imposes a heavy penalty upon conviction of a felony committed in Massachusetts since its passage, by one who had been twice convicted and imprisoned for crime for not less than three years, in this or in another state, or once in each. The punishment is for the new crime only, but is the heavier if he is an habitual criminal. . . . It is within the discretion of the legislature of the state to treat former imprisonment in another state as having the like effect as imprisonment in Massachusetts, to show that the man is an habitual criminal. . . . The statute, imposing a punishment on none but future crimes, is not *ex post facto*. It affects alike all persons similarly situated, and therefore does not deprive anyone of the equal protection of the laws. Moore v. Missouri, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179; Ross's Case, 2 Pick. 165; Com. v. Graves, 155 Mass. 163, 16 L.R.A. 256, 29 N. E. 579; Sturtevant v. Com. 158 Mass. 598, 33 N. E. 648; Com. v. Richardson, 175 Mass. 202, 55 N. E. 988.

"The statute does not impair the right of trial by jury, [59] or put the accused twice in jeopardy for the same offense, or impose a cruel or unusual punishment." (pp. 312, 313.) The subject again came under consideration in Graham v. West Virginia, 224 U. S. 616, 56 L. ed. 917, 32 Sup. Ct. Rep. 583, and was re-examined in all its aspects, and after a full reference to the English and American authorities, the doctrine announced in the McDonald Case was re-expounded and reapplied so as to now leave no room for any further controversy whatsoever on the subject. Applying the principles thus settled, the case before us clearly comes within the second category which we have stated, and therefore the contention as to the effect of the pardon here pressed is devoid of all merit, and the court below was right in so holding.

Determining as we do only the case before us, that is, whether the granting of a pardon by the President for a crime committed against the United States operates to restrict and limit the power of the state of New York to punish crimes thereafter committed against its authority, and in so doing to prescribe such penalties as may be deemed appropriate in view of the nature of the offense and the character of the offender, taking in view his past conduct, we must not be understood as in the slightest degree intimating that a pardon would operate to limit the power of the United States in punishing crimes against its authority to provide for taking into consideration past offenses committed by the accused as a circumstance of aggravation, even although for such past offenses there had been a pardon granted.

Indeed, we must not be understood as intimating that it would be beyond the legislative competency to provide that the fact of the commission of an offense after a pardon of a prior offense should be considered as adding an increased element of aggravation to that which would otherwise result alone from the commission of the prior offense.

Affirmed.

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[60] KATE C. ARCHER, Petitioner,
v.
GREENVILLE SAND & GRAVEL COMPANY et al.

(See S. C. Reporter's ed. 60–70.)

Equity — jurisdiction — continuing trespass.

1. A continuing trespass of such nature and of such character of injury that remedies at law by actions for damages would be inadequate and would entail repeated litigation, and hence a wrong redressable in equity, is disclosed by a bill filed by a riparian owner to restrain extensive and continued unlawful dredging of sand and gravel from the river bed owned by her, although an injunction is prayed for only after hearing of the cause, and although then the rights of the contestants may be finally adjudicated in her favor, or the dredging may cease before that time.

[For other cases, see Equity, I. d, in Digest Sup. Ct. 1908.]

Waters — riparian rights — local law — title to bed.

2. Whether the title to the beds of the navigable rivers of the United States is in the state in which the rivers are situated, or in the owners of the land bordering upon such rivers, is a question of local law.

[For other cases, see Waters, I. d, 2, a; Courts, VII. c, 9, in Digest Sup. Ct. 1908.]

Waters — riparian rights — title to bed.

3. The bed of the Mississippi river above tide water belongs, in the state of Mississippi, to the riparian owner up to the thread of the channel.

[For other cases, see Waters, I. d, 2, a, in Digest Sup. Ct. 1908.]

Waters — riparian rights — unlawful dredging in bed of stream.

4. A riparian owner on the Mississippi river above tide water, whose title under the local law extends to the middle of the stream, is not powerless to prevent a trespasser from dredging sand and gravel in the bed of the river in front of her land, even if she herself, under the river and harbor act of September 19, 1890 (26 Stat. at L. 454, chap. 907), § 7, could not take out such sand and gravel without the permission of the Secretary of War.

[For other cases, see Waters, II. a, in Digest Sup. Ct. 1908.]

Pleading — defense — trespass in bed of stream — authority from War Department.

5. Authority from the Secretary of War to dredge out sand and gravel in the bed of the Mississippi river in front of the land of a riparian owner whose title under the local law extends to the middle of the stream is a matter of defense, to be pleaded to a bill by a riparian owner to restrain such dredging as a continuing trespass.

[For other cases, see Pleading, III. g, in Digest Sup. Ct. 1908.]

[No. 271.]

Argued March 13, 1914. Decided April 6, 1914.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which affirmed a decree of the Circuit court for the Southern District of Mississippi, dismissing the bill of a riparian owner to restrain the dredging of sand and gravel from the bed of the river in front of her lands. Reversed.

See same case below, 114 C. C. A. 664, 194 Fed. 1020.

The facts are stated in the opinion.

Messrs. Percy Bell and T. M. Miller argued the cause and filed a brief for petitioner:

It is established by the decisions of the highest court in Mississippi that a grant of lands bounded by the waters of a navigable stream above tide water extends to the thread of the channel.

The Magnolia v. Marshall, 39 Miss. 109; Morgan v. Reading, 3 Smedes & M. 366; New Orleans, M. & C. R. Co. v. Frederic, 46 Miss. 9.

While this court has strongly approved the rule repudiated by the supreme courts of Mississippi and many other states, it has left it to the courts of the several states to determine the effect of riparian grants.

Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; St. Louis v. Rutz, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984; Jones v. Soulard, 24 How. 41, 16 L. ed. 604; Packer v. Bird, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210.

Equity alone can give relief to petitioner, and if the court below meant to hold that it was without jurisdiction, it was a grave error.

Warren Mills v. New Orleans Seed Co. 65 Miss. 391, 7 Am. St. Rep. 671, 4 So. 298; 1 Pom. Eq. Jur. § 245; 3 Pom. Eq. Jur. § 1357; 5 Pom. Eq. Jur. § 496; 22 Cyc. 760, 760b, 768, 768b, 771, 771a, 826, 826b, 836; 1 Cyc. 421e.

NOTE.—On injunction against repeated trespass—see notes to De Pauw v. Oxley, 13 L.R.A.(N.S.) 173, and Cragg v. Levinson, 21 L.R.A.(N.S.) 417.

On jurisdiction of equity to restrain trespasses and wrongs—see note to Northern Indiana R. Co. v. Michigan C. R. Co. 14 L. ed. U. S. 674.

On title to land under water—see note to Goff v. Cougle, 42 L.R.A. 161.

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Mr. John W. Yerkes argued the cause, and, with Messrs. George E. Hamilton and John J. Hamilton, filed a brief for respondents:

Bills of discovery are no longer necessary in equity, for the remedy at law is adequate and complete.

Rindskopf v. Platto, 29 Fed. 130; Brown v. Swann, 10 Pet. 497, 9 L. ed. 508; Drexel v. Berney, 14 Fed. 268; Ex parte Boyd, 105 U. S. 647, 657, 658, 26 L. ed. 1200, 1204; Ellis v. Davis, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327; Root v. Lake Shore & M. S. R. Co. 105 U. S. 189, 26 L. ed. 975.

The bill prays an accounting, but fails utterly to contain allegations sufficient to support the prayer, or to disclose facts necessary to obtain the equitable remedy of accounting.

Fowle v. Lawrason, 5 Pet. 495, 503, 8 L. ed. 204, 207.

No opinion can be relied upon as binding authority unless the case called for the expression of that opinion.

United States v. County Ct. 96 U. S. 211, 217, 218, 24 L. ed. 628–630; Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000; McCormick Harvesting Mach. Co. v. C. Aultman Co. 169 U. S. 606, 611, 42 L. ed. 875, 877, 18 Sup. Ct. Rep. 443.

In the voluntary and necessarily gratuitous argument (because not germane to the question before the court) made by the court in Morgan v. Reading, 3 Smedes & M. 366, in support of the common-law doctrine as to the ebb and flow of the tide constituting a navigable stream, the court was in direct opposition and antagonism to the reasoning and opinion of this court in the frequently cited and approved case of The Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. ed. 1058, decided in 1851, nine years before the opinion of the state court was handed down.

The proposition that the right of property between high and low water mark is a corollary of the proposition that the proprietor's ownership extends to the thread of the channel is not supported by the authorities, which differentiate distinctly between those rights which are admittedly riparian, and rights of ownership of or to the bed of the river.

Lyon v. Fishmongers' Co. L. R. 1 App. Cas. 662, 23 Eng. Rul. Cas. 141; Delaplaine v. Chicago & N. W. R. Co. 42 Wis. 226, 24 Am. Rep. 386; Diedrich v. Northwestern Union R. Co. 42 Wis. 262, 24 Am. Rep. 399; Indianapolis Water Co. v. American Strawboard Co. 53 Fed. 974; Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984; St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 19 L. ed. 74.

The lands owned by Mrs. Archer were originally public lands, and this court has distinctly held that grants of the government on navigable streams extend only to the limits of high water.

Barney v. Keokuk, 94 U. S. 324, 338, 24 L. ed. 224, 228; Packer v. Bird, 137 U. S. 661, 669, 34 L. ed. 819, 820, 11 Sup. Ct. Rep. 210; Scranton v. Wheeler, 179 U. S. 141–163, 45 L. ed. 126–137, 21 Sup. Ct. Rep. 48; United States v. Chandler-Dunbar Water Power Co. 229 U. S. 53–60, 57 L. ed. 1063–1074, 33 Sup. Ct. Rep. 667.

Mr. Justice McKenna delivered the opinion of the court:

Bill in equity to restrain respondent, herein called the Gravel Company, from trespassing upon the lands of petitioner, herein called plaintiff, and from taking sand and gravel therefrom. The bill also prayed for discovery of the amount of gravel which had been taken and an accounting therefor.

The bill alleges the ownership of the lands by plaintiff, and describes them by section, range, and township, and as "lying west of the levee along the river front . . . and fronting on the said Mississippi river," excepting therefrom two strips 100 feet wide each. That lying in the bed of the river in front of the lands and between the bank of the stream and the thread of the river are valuable deposits of sand and gravel which, under the laws of [64] Mississippi, are on the lands of plaintiff, her right and title extending to the lands under the river to the thread of the stream.

That the Gravel Company entered into a contract with the Yazoo & Mississippi Valley Railroad Company to supply sand and gravel for the purpose of grading and raising the line of the railroad, and that the Gravel Company employed the E. A. Voight Company to dredge from the bed of the river in front of the lands of plaintiff, and between the river bank and the thread of the stream, the sand and gravel required by it. That the Voight Company is dredging the same over the protest of plaintiff, and has taken therefrom large quantities of sand and gravel which it has delivered to the Gravel Company, and the latter company is selling the same to the public and to the railroad company.

That the Gravel Company has refused to cease dredging or to make compensation therefor. That petitioner does not know how much of such material has been taken, but great quantities thereof have been taken, the amounts of which are peculiarly within the knowledge of the Gravel Company.

That the dredging constitutes a continuing trespass upon the lands and property of plaintiff, and she is entitled to have the

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same restrained and to an injunction and accounting, and that she is remediless except in a court of equity. She prayed for such relief.

The deeds constituting her title were attached to the bill. The deed conveying title to her, after describing the lands and stating they consisted of 1,300 acres, contained the expression, "excepting such parts thereof as have been washed away by the river."

The suit, on the petition of the Gravel Company, was removed to the United States circuit court for the southern district, western division, of the state of Mississippi, in which court the Gravel Company filed a demurrer [65] under nine specifications, alleging want of equity in the bill because of an adequate remedy at law, and want of substance in it because petitioner was not the owner of the sand and gravel in the bed of the river.

The demurrer was sustained, and as plaintiff declined to amend her bill, a decree was entered dismissing it. The decree was affirmed by the circuit court of appeals without opinion. A petition for rehearing was made, which was denied without comment, and we are without knowledge of the views of the lower courts or of the grounds upon which their judgments were based, except that counsel for plaintiff asserts the circuit court sustained the demurrer "solely on the ground of the jurisdiction of the court."

The grounds of demurrer, we think, and the contentions of the parties, present two propositions—(1) the right of plaintiff to relief in equity and (2) that she does not show ownership of the property in question as a matter of law. In the latter is involved the question whether a grant of lands bounded by the waters of the Mississippi river, a navigable stream above tidewater, extends to the thread of the channel.

The first proposition is easily disposed of, and, passing by the prayer for discovery and an accounting, we think the bill shows a continuing trespass of such nature and of such character of injury that remedies at law by actions for damages would be inadequate, and would, besides, entail repeated litigation. Warren Mills v. New Orleans Seed Co. 65 Miss. 391, 7 Am. St. Rep. 671, 4 So. 298. Nor is this conclusion disturbed by the fact urged by the Gravel Company, that plaintiff prays for an injunction to be granted only after the hearing of the cause, and although then the rights of the contestants may be finally adjudicated in her favor or the dredging might cease before that time. The contention is somewhat strange. A plaintiff's right of suit cannot be defeated by a mere supposition that he or she may be successful, or that [66] the defendant may cease to offend against the right asserted. It is in the hope of one or the other of such results that the suit is brought against a present or threatened violation of rights. If wrongs are endured in the meantime, there is no loss of rights or remedies.

We are therefore brought to the second proposition, Is plaintiff the owner of the sand and the gravel in the bed of the river?

The law of Mississippi is an element in the case. It first found elaborate discussion and decision in Morgan v. Reading, 3 Smedes & M. 366, and it was held that the common law was adopted for the government of the Mississippi territory, and that the line of the territory was the middle of the Mississippi river, and that it hence followed that the rights of riparian owners on the east shore must be determined in the state of Mississippi by the common law, and that it was a principle of that law "that he who owns the bank, owns to the middle of the river, subject to the easement of navigation." 3 Kent, Com. 5th ed. 427, and notes were cited.

The case involved the right of the owner of the bank of the river to charge for mooring purposes on the river above low water mark. The right was sustained upon the principle which we have stated above.

The same principle was announced in the Magnolia v. Marshall, 39 Miss. 109. The case was said by the court to be identical in its facts with Morgan v. Reading. The opinion is too long to review or to quote from at any length. It left no case or authority unreviewed, nor any consideration untouched, and carefully distinguished the public and private interest in the Mississippi river, the court saying: "There is therefore no inconsistency, but, on the contrary, as before suggested, perfect harmony between the *jus privatum* of riparian ownership in public fresh-water streams, to the middle of [67] the river, and the *jus publicum* of free navigation thereof. The *soil* is granted to the riparian proprietor, subject to this public easement." And, again, in criticism of what the court considered an untenable view expressed by the court of another state, it said: "This general doctrine is as old as the Year-books, that, prima facie, every proprietor on each bank of a river is entitled to the *land* covered with water to the middle of the stream." This being declared to be the law of the state, judgment was entered for charges for the use by the Magnolia of a landing on the river.

But it is said by the Gravel Company that according to the agreed facts "there was no use or occupation" of the lands of the plaintiff in the case "beyond high-water mark; the only portion used and occupied

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being the bank of the river between high and low water mark;" and that the court, identifying the facts with those in the Morgan Case, said: "What are the rights of the riparian owners, and what the *jus publicum* incident to the free navigation of the Mississippi, are questions there presented, and are the main questions here again presented." This statement, it is hence contended, limits the binding authority of the opinions "as judicial determinations to a decision of what are the rights of a riparian owner between high and low water marks as connected with the rights of the public in using the Mississippi river as a public highway and navigable stream." And it is further contended that that "question is in no way connected with the ownership of the bed of the stream, or ownership of the gravel and sand in the channel of the stream," It is therefore insisted that "the case called for nothing more than a decision as to these bank rights, and if more was intended by the judge who delivered the opinion, it was purely *obiter*."

We cannot concur in this view. The court deduced the right to charge for the occupation of the water between high and low water marks from the ownership of the soil [68] to the middle thread of the stream. The elaborate reasoning and research of the opinion were directed to demonstrate that under the common law of the state, riparian ownership extends *ad filum*, and, as a consequence, embraces the right to charge for the use of the water between high and low water marks for landing purposes, although not for purposes of transit. The case is cited as having that purport in 3 Kent Com. 14th ed. *427, where the doctrine of riparian rights as they obtain in the states of the Union is considered and the cases collected. In the sixth edition of Kent the Magnolia Case is commended as "a frank and manly support of the binding force of the common law, on which American jurisprudence essentially rests." See also Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548, for a discussion by this court of riparian rights.

The Morgan and Magnolia Cases were cited in New Orleans, M. & C. R. Co. v. Frederic, 46 Miss. 1, 9, 10, to sustain "the right of the owner of the land on the bank of the river to the thread of the stream, subject only to a right of passage thereon as a highway when the stream admits it."

It is further urged that the argument in the Morgan Case "in support of the common-law doctrine as to the ebb and flow of the tide constituting a navigable stream is in direct opposition and antagonism to the reasoning and opinion of this court in the frequently cited and approved case of The Genesee Chief, 12 How. 443, 13 L. ed. 1058, decided in 1851, nine years before the opinion of the state court was handed down." Other cases are also cited in which it is decided that riparian rights pertain to the bank, and distinguished, as it is asserted, between rights admittedly riparian and rights of ownership of or to the bed of the river. We need not enter into a discussion of those cases, or assign their exact authority. This court has decided that it is a question of local law whether the title to the beds of the navigable rivers of the United States is in the [69] state in which the rivers are situated or in the owners of the land bordering upon such rivers. Packer v. Bird, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; United States v. Chandler-Dunbar Water Power Co. 229 U. S. 53, 57 L. ed. 1063, 33 Sup. Ct. Rep. 667; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; St. Louis v. Rutz, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Jones v. Soulard, 24 How. 41, 16 L. ed. 604.

Plaintiff owning the land to the middle of the stream, it would seem to follow that she must have such property in its soil as to resist a trespasser upon it, such as the bill alleges the Gravel Company to be. The right, however, is denied, and it is said that she is powerless to prevent the Gravel Company from dredging in front of her land because, under the laws of the United States, she herself could not do so without permission from the Secretary of War. For this, § 7 of the rivers and harbors appropriation act of September 19 1890 (26 Stat. at L. 454 chap. 907), is cited as making it unlawful for any person to excavate or fill, or in any manner to alter or modify, the course, location, condition, or capacity of the channel of said navigable water of the United States unless approved and authorized by the Secretary of War. Whether if she took gravel from the front of her land she would incur the condemnation of this act it is not necessary to decide. She certainly had such an interest in the conditions to prevent one without right from disturbing them. We cannot help observing that the Gravel Company by its conduct has given an interpretation of the act against its contention, unless, indeed, it wishes to confess itself a violator of public law in order to escape responsibility for a private injury.

The Gravel Company tries to avoid this situation, saying that a violation of the law cannot be imputed to it because it can-

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not be assumed that the "extensive and continued dredging, as alleged in the bill, affecting necessarily the channel of the river, would be undertaken without proper authorization and authority, or that [70] the proper officers of the government would have allowed these operations to continue." The supposition is easily answered. There is no scheme of improvement of navigation suggested by the bill, and it cannot be supposed that the Secretary of War would authorize the Gravel Company to take material from the river for commercial purpose, and the bill alleges such to be the purpose. Besides, if the Gravel Company had authority from the Secretary of War, it is a matter of defense to be pleaded.

The Gravel Company further charges that, considering the allegations of the bill and the muniments of title attached to it, there is exhibited a possible failure to plead such title in plaintiff as would carry with it even a qualified ownership in the bed of the stream. We do not think so. At any rate, the bill is sufficient against a general demurrer.

Judgment reversed.

H. L. HERBERT, Plff. in Err.,
v.
HENRY BICKNELL, William Henry, and William Henry, Secretary of Benton G. Mining Company.

(See S. C. Reporter's ed. 70–75.)

Error to territorial supreme court — following decision below — local practice.

1. The decision of the territorial supreme court that the question whether the evidence was sufficient to support a default judgment cannot be raised by appearing specially before the time for suing out a writ of error has expired, and moving specially to quash the service and set aside the judgment for lack of valid service, would be followed by the Federal Supreme Court on writ of error even if it seemed less obviously reasonable than it does.

[For other cases, see Appeal and Error, VIII. m, 1; Courts, VII. d, in Digest Sup. Ct. 1908.]

Error to territorial supreme court — following decision below — local practice.

2. The Federal Supreme Court will not disturb the ruling of the territorial supreme court that leaving a copy of a summons at the place where the principal defendant in a garnishment suit last had stopped satisfied the requirement of Hawaii Rev. Laws, § 2114, that it be left at his last and usual place of abode.

[For other cases, see Appeal and Error, VIII. m, 1; Courts, VII. d, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — service of summons in garnishment suit.

3. The principal defendant in a garnishment suit in a territorial court having jurisdiction over small debts only is not deprived of his property without due process of law because judgment was taken by default, appropriating property within the jurisdiction to the payment of defendant's debt, with no other service of process upon him than that provided for in Hawaii Rev. Laws, § 2114, by leaving a copy of the summons at his last and usual place of abode, where he had actual knowledge of the suit before the time for suing out a writ of error had expired, and when it might still have been possible to set aside the judgment and retry the case.

[For other cases, see Constitutional Law, 710–715, in Digest Sup. Ct. 1908.]

[No. 269.]

Note.—As to review by the United States Supreme Court of territorial decisions—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

Service of process on resident in action *in personam* by leaving copy at residence as due process of law.

As is shown by the notes to Pinney v. Providence Loan & Invest. Co. 50 L.R.A. 585, and Raher v. Raher, 35 L.R.A.(N.S.) 292, the doctrine that a personal judgment upon constructive or substituted service upon a nonresident who does not appear is contrary to due process of law is not generally regarded as applicable to a judgment *in personam* rendered upon constructive or substituted service upon a resident of the state, even though he may have been absent from the state at the time.

One form of constructive or substituted service which enables a court, consistently with due process of law, to render a personal judgment against a resident, is the leaving of a copy of the process at his residence. Bimeler v. Dawson, 5 Ill. 536, 39 Am. Dec. 430; Sturgis v. Fay, 16 Ind. 429, 79 Am. Dec. 440 (defendant absent from state); Cassidy v. Leitch, 2 Abb. N. C. 315, 53 How. Pr. 105 (defendant probably absent from state); Huntley v. Baker, 33 Hun, 578 (defendant absent from state); Biescnthall v. Williams, 1 Duv. 329, 85 Am. Dec. 629; Harryman v. Roberts, 52 Md. 64; Hamill v. Talbott, 72 Mo. App. 22 (defendant absent from state); Chatham v. Mansfield, 1 Cal. App. 298, 82 Pac. 343.

It is competent for the legislature of a state to provide for service upon one of its own citizens by leaving a copy of the summons at his residence. Bimeler v. Dawson, supra.

The manner of serving process must necessarily be regulated by every country for itself, and if a state permits process to be served upon one of its own citizens by the leaving of it, in his absence, at his domicil, with an adult member of his household, that method of service is not so repugnant to the

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Submitted March 12, 1914. Decided April 6, 1914.

IN ERROR to the Supreme Court of the Territory of Hawaii to review a judgment which affirmed a judgment of the District Court of Honolulu, refusing to quash the service of process on the principal defendant in a garnishment suit and to set aside the default judgment for lack of sufficient service. Affirmed.

See same case below, 20 Haw. 132, Ann. Cas. 1913A, 1186.

The facts are stated in the opinion.

Mr. David L. Withington submitted the cause for plaintiff in error. Messrs. William R. Castle, W. A. Greenwell, and Alfred L. Castle were on the brief:

The district court of Honolulu is a court of special and limited jurisdiction, and there is no presumption in favor of that jurisdiction.

Hang Lung Kee v. Bickerton, 4 Haw. 584.

The existence of property of the defendant within the jurisdiction, in a case like this, is essentially necessary to the exertion of the power of the court to render a binding decree.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Chase v. Wetzlar, 225 U. S. 79, 56 L. ed. 990, 32 Sup. Ct. Rep. 659.

It is only in proceedings strictly *in rem* that the constructive notice resulting from the seizure is sufficient.

Hollingsworth v. Barbour, 4 Pet. 466, 7 L. ed. 922.

The defendant in garnishment must be notified "in time to have protected his rights" by personal service or some form of substituted service (Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797), the proper publication being made.

Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084, 20 Cyc. 1033, 1048, 1054.

A fundamental condition under the 5th and 14th Amendments to the Constitution of the United States is "that there shall be notice and opportunity for hearing given the parties."

Twining v. New Jersey, 211 U. S. 78, 111, 53 L. ed. 97, 111, 29 Sup. Ct. Rep. 14; Earle v. McVeigh, 91 U. S. 503, 23 L. ed. 398.

A lodging house where the defendant is temporarily stopping is not a last and usual place of abode, within the meaning of the statute.

Fitzgerald v. Salentine, 10 Met. 436; White v. Primm, 36 Ill. 416; Hennings v. Cunningham, — N. J. L. —, 59 Atl. 12; Zacharie v. Richards, 6 Mart. N. S. 467; Wright v. Oakley, 5 Met. 400; Craig v. Gisborne, 13 Gray, 270; Missouri, K. & T.

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principles of natural justice that a foreign tribunal should refuse to recognize it, and treat a sentence founded on it as a nullity. A foreign judgment rendered against a citizen of the state in which it was pronounced stands on a very different footing from a foreign judgment against one who owed no allegiance to, and was not subject to, the jurisdiction of the state in which it was rendered. Cassidy v. Leitch, supra.

There is nothing to the contrary in Currier v. Gilman, 55 N. H. 364, or First Nat. Bank v. Holmes, 12 N. D. 38, 94 N. W. 764. The former decision is merely to the effect that service by leaving a summons in due form at the usual place of abode of the defendant in the state, as provided by a statute, when the defendant was in fact absent from the state, and did not return until after the judgment had been rendered against him by default, was not a "personal service" within a statute providing that when no personal service has been made on defendant in an action which may be entered without such service, the court, on suggestion thereof, may order the action to be continued, and direct notice to be given by publication. The latter case merely involved the sufficiency of the service to sustain an attachment against a nonresident; and the decision is merely to the effect that a provision of the statute that service by leaving a copy of the process at the dwelling house of the defendant when he cannot be found shall be equivalent to personal service does not apply to service by leaving a copy at the residence of the defendant in another state. The statute further provided that when publication is ordered, personal service of a copy of the summons and complaint out of the territory is equivalent to publication and deposit in the postoffice; and the court said that personal service within that provision means actual service by delivering to the person, and not to the proxy. In this connection, the court said the term "personal service" has a fixed and definite meaning in law. It is service by delivery of the writ to the defendant. Other modes of service may be given the force of such service by legislative enactment. But the use of the words "personal service," unqualified, in a statute, means actual service by delivering to the person, and not to a proxy.

The decision in Amsbaugh v. Exchange Bank, 33 Kan. 100, 5 Pac. 384, denying the right to maintain an action in Kansas upon a personal judgment obtained in Iowa upon service by leaving a copy of the process with the defendant's wife at the place where he had formerly resided in Iowa, was upon the ground that the defendant had become a nonresident of Iowa prior to the service in question; but the court seems to have been of the opinion that, even if the defendant had been a resident, the service would not have been sufficient to entitle the personal judgment to recognition in another state.

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Trust Co. v. Norris, 61 Minn. 256, 63 N. W. 634; Sturgis v. Fay, 16 Ind. 429, 79 Am. Dec. 440; Honeycutt v. Nyquist, 12 Wyo. 183, 109 Am. St. Rep. 975, 74 Pac. 90.

The provision for substituted service by leaving at the last and usual place of abode refers either to one who is an inhabitant, or is a resident at the time of service; therefore, as defendant had left, the attempted service gave the court no jurisdiction.

Earle v. McVeigh, 91 U. S. 503, 23 L. ed. 398.

Notice by service on the same day does not fulfil the constitutional requirement.

United States ex rel. Turner v. Fisher, 222 U. S. 204, 56 L. ed. 165, 32 Sup. Ct. Rep. 37; Roller v. Holly, 176 U. S. 399, 44 L. ed. 520, 20 Sup. Ct. Rep. 410.

No brief was filed for defendants in error.

Mr. Justice Holmes delivered the opinion of the court:

This is an action of assumpsit begun on June 30, 1909, in the district court of Honolulu, by garnishment and leaving a copy of the summons at a place which, according to the return, was the defendant's last and usual place of abode, he being absent from the territory. The defendant did not appear and the plaintiff got judgment against the fund on July 2, 1909. No appeal or writ of error was [73] taken, but on December 31, 1909, the time for suing out a writ of error not having expired, the defendant appeared specially and moved to quash the service and set aside the judgment on the ground that the record showed that there was not sufficient service upon him to comply with the 14th Amendment and the laws of Hawaii. The motion was accompanied by an affidavit to the effect that the defendant had changed his domicil to Australia before the beginning of this suit, that he had returned and lived for a month in January and February, 1909, at the place where the summons was left, and then had gone back to Australia; and that his last and usual place of abode (before his change of domicil, as we understand it) was at Waikiki. The district court overruled the motion and its judgment was affirmed by the supreme court.

The argument for the plaintiff in error assumes a wider range than is open upon this motion. The supreme court says that the question whether the evidence was sufficient to support the judgment cannot be raised in this way, and we should follow the decision even if it seemed less obviously reasonable than it does. Montoya v. Gonzales, 232 U. S. 375, 376, ante, 645, 34 Sup. Ct. Rep. 413. Moreover, the only errors assigned here are in holding that the service prescribed by § 2114 of the Revised Laws of Hawaii, as construed by the court, and that leaving a copy of the summons as above stated after garnishment of a debt due to the defendant, were sufficient to meet the requirements of the 5th Amendment (the court having assumed that the defendant referred to the 5th when he mentioned the 14th in his motion below).

The supreme court was of opinion that, if the question was open, leaving a copy of the summons at the place where the defendant last had stopped was leaving it at his last and usual place of abode within § 2114. On that point we see no sufficient reason for disturbing the judgment. Phœnix R. Co. v. Landis, 231 U. S. 578, 579, ante, 377, 34 Sup. Ct. Rep. 179. Really the only matter before us that calls for a word is [74] the decision that a judgment appropriating property within the jurisdiction to payment of the owner's debt, which would be good if the property itself were the defendant, is not made bad by the short and somewhat illusory notice to the owner. Upon this point the court below relied upon the above § 2114 and Pennoyer v. Neff, 95 U. S. 714, 727, 24 L. ed. 565, 570: "The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale." It has been said from of old that seizure is notice to the owner. Scott v. Shearman, 2 W. Bl. 977, 979, 11 Eng. Rul. Cas. 17; Mankin v. Chandler, 2 Brock. 125, 127, Fed. Cas. No. 9,030. See Cooper v. Reynolds, 10 Wall. 308, 317, 19 L. ed. 931, 932.

Summons of the defendant's debtor by garnishment is given like effect in express terms by § 2114. "Such notice [*i. e.*, service on the garnishee] shall be sufficient notice to the defendant to enable the plaintiff to bring his action to trial unless the defendant be an inhabitant of this territory, or has sometime resided therein, and then a like copy shall be served personally upon him, or left at his last and usual place of abode." This statute was in force, no doubt, before the debt garnisheed was contracted, and gave the defendant notice that he must be ready to be represented in order to save a default if the debt was attached. If he had appeared, nothing shows that proper time would not have been allowed to produce evidence at the trial. The district court has jurisdiction over small debts only.

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Rev. Laws of Hawaii, § 1662. Its proceedings naturally are somewhat summary. It appears that the defendant had knowledge of the action before the time for a writ of error had expired, and when it may be that it still would have been possible to set aside the judgment and to retry the case. He did not adopt the course that [75] would have opened effective ground of attack even as the record stood. We cannot discover that he has suffered any injustice —still less that he has been subjected to an unconstitutional wrong.

Judgment affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Plff. in Err.,
v.
KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS. (No. 313.)

KANSAS CITY TERMINAL RAILWAY COMPANY, Plff. in Err.,
v.
KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS. (No. 314.)

(See S. C. Reporter's ed. 75–80.)

Commerce — exclusiveness of Federal power — state police power.

1. The police power of a state cannot justify a direct interference with interstate commerce.

[For other cases, see Commerce, I. d, in Digest Sup. Ct. 1908.]

Commerce — state interference — ordering removal of interstate railway bridge.

2. The removal of the existing railway bridges over a navigable stream which form necessary parts of lines of interstate commerce cannot be ordered by a state court even in the avowed expectation that such order will lead to the desired elevation of the bridges, which the state court could not order directly without the authority of the Secretary of War.

[For other cases, see Commerce, II. c, in Digest Sup. Ct. 1908.]

[Nos. 313, 314.]

Argued March 19 and 20, 1914. Decided April 6, 1914.

TWO WRITS of Error to the Supreme Court of the State of Kansas to review the issuance of peremptory writs of mandamus requiring the removal of interstate railway bridges over a navigable stream. Reversed.

See same case below, 87 Kan. 272, 123 Pac. 991.

The facts are stated in the opinion.

Mr. Samuel W. Moore argued the cause, and, with Messrs. Samuel W. Sawyer and James M. Souby, filed a brief for plaintiffs in error:

The police power of a state, for whatever purpose sought to be exercised, cannot legitimately be exerted so as substantially to prohibit or unnecessarily to burden interstate commerce.

West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488.

To be repugnant to the commerce clause of the Constitution, or the acts of Congress thereunder, the action complained of need not be that of the legislature, but may be any exercise of state authority by any agency of the state government.

Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 334, 52 L. ed. 234, 28 Sup. Ct. Rep. 121.

Of course, action by the state, if otherwise unobjectionable, may be upheld, even though it affects interstate commerce, provided its operation on such commerce is only indirect and remote.

Austin v. Tennessee, 179 U. S. 343, 349, 45 L. ed. 224, 228, 21 Sup. Ct. Rep. 132.

Thus, it has been said that the states may legislate with respect to the instrumentalities of interstate commerce, so far as such legislation is within their ordinary police powers.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714.

Such cases have always been sustained, however, upon the theory that such regulations aid rather than burden such commerce; and it is clear that a state cannot make such requirements of an interstate carrier as will impair or destroy the usefulness of its facilities.

Atlantic Coast Line R. Co. v. Wharton,

NOTE.—On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107, and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

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207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed 209, 27 Sup. Ct. Rep. 90; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Illinois C. R. Co. v. Illinois, 163 U. S. 154, 41 L. ed. 111, 16 Sup. Ct. Rep. 1096.

From the cases cited last above it appears that whether or not a requirement sought to be made by a state of an interstate carrier amounts to a direct regulation of interstate commerce, or merely affects it indirectly and remotely, may be tested by considering whether or not such a requirement is reasonably necessary. If it affects or burdens interstate commerce unnecessarily, it will be held to be invalid as a direct interference with the exclusive power of Congress to regulate such commerce.

Mr. Thomas A. Pollock argued the cause and filed a brief for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

These cases arise upon petitions for mandamus filed by the defendant in error, the Kaw Valley Drainage District. The allegations are that the Kansas river flows through the district, is a navigable stream, and in 1903 overflowed its banks, flooded a large part of Kansas City, Kansas, and caused great loss; that the harbor lines established by the United States and the lines for a levee along the banks established by the plaintiff substantially coincide; that the defendants respectively own bridges across the river, which, at their present elevation, cause it to overflow; and that the plaintiff, in pursuance of the power given to it by the state, has ordered the defendants respectively to raise these bridges to specified heights and to remove the old ones, which the defendants have refused to do. On these petitions alternative writs issued, and thereupon the defendants made return, each making a general denial and setting up that its railway tracks across the bridge were used in commerce among the states, and that such commerce would be cut off and destroyed by enforcement of the order, and claiming the protection of the Constitution, art. 1, § 8 (cl. 3). They each alleged also that to raise the bridges would require a raising of the grades of the streets for the approaches, and that the right to raise them depended on the consent of Kansas City, which the city refused to give; that the raising would cut in two intersecting [77] tracks of other roads, that this could not be done without the consent of such roads, which they also refused; that the raising would do permanent damage to private property abutting on the streets that would have to be raised, and that the plaintiff had taken no steps to compensate the owners; that the damage to the defendant would exceed large sums mentioned; and that the plans for the new bridges have not been approved by the Secretary of War. Act of March 3, 1899, chap. 425, § 9, 30 Stat. at L. 1151, U. S. Comp. Stat. 1901, p. 3540. Each defendant relied upon the 14th Amendment. The Terminal Company also alleged a contract with the drainage district which was thought to preclude its present requirement, and to be protected by the Constitution, article 1, § 10. The cases were heard on the alternative writs and the returns, and the supreme court of the state issued peremptory writs requiring the defendants to clear the channel to specified heights. 87 Kan. 272, 123 Pac. 991.

Motions to dismiss were presented at the last term, but were denied, as the record shows not only that rights under the Constitution and laws of the United States were specially set up and claimed, but that the questions concerning them are not of a kind to be dismissed.

The supreme court recognized that it could not order the bridges to be raised to the required height without the authority of the Secretary of War. Therefore we may lay on one side the somewhat surprising answer made to the allegations that the consent of the city and other railroads was necessary and was refused,—the suggestion, namely, that if the defendants wanted to do it they would find some way of reaching their end. See Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 144, 53 L. ed. 441, 446, 29 Sup. Ct. Rep. 246. It was not suggested that the railroads had the power to reach the result by eminent domain. See Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 27, 51 L. ed. 933, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398. We lay on one side also various [78] over-refined objections to the defendants' pleadings made in the argument here, saying only that we read them as alleging what they fairly would convey to an ordinarily intelligent lawyer by a fairly exact use of English speech. Swift & Co. v. United States, 196 U. S. 375, 395, 49 L. ed. 518, 523, 25 Sup. Ct. Rep. 276. But the court went on, on the assumption that it would lead to the elevation of the bridges, and seemingly for the purpose of accomplishing indirectly what it admitted that

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it could not do directly, to make an unqualified absolute order, as we have said, that the defendants should clear the channel of all obstructions on their lines up to the specified heights,—in other words, to remove the bridges as they stand.

These judgments must be taken as they read upon their face. They are not conditional orders to raise the bridge if the defendants can obtain the consent of parties not before the court, and of one authority, at least, not subject to its control. They cannot be qualified by speculation as to what is likely to happen in fact. They are out-and-out orders to remove bridges that are a necessary part of lines of commerce by rail among the states. But that subject-matter is under the exclusive control of Congress, and is not one that it has left to the states until there shall be further action on its part. The freedom from interference on the part of the states is not confined to a simple prohibition of laws impairing it, but extends to interference by any ultimate organ. It was held that under the permissive statute authorizing telegraph companies to maintain lines on the post roads of the United States a state could not stop the operation of the lines by an injunction for failure to pay taxes. Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961. Williams v. Talladega, 226 U. S. 404, 415, 416, 57 L. ed. 275, 279, 280, 33 Sup. Ct. Rep. 116. It would seem that the same principle applies to railroads under the commerce clause of the Constitution, especially if taken in connection with the somewhat similar statute now Rev. [79] Stat. § 5258, U. S. Comp. Stat. 1901, p. 3564. And so it is held. Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 334, 52 L. ed. 230, 234, 28 Sup. Ct. Rep. 121; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90.

The decisions also show that a state cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the states could not be justified in this way. "The state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic." Illinois C. R. Co. v. Illinois, 163 U. S. 142, 154, 41 L. ed. 107, 111, 16 Sup. Ct. Rep. 1096; Austin v. Tennessee, 179 U. S. 343, 349, 45 L. ed. 224, 228, 21 Sup. Ct. Rep. 132; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 334, 57 L. ed. 230, 234, 28 Sup. Ct. Rep. 121. To destroy the bridges across which these railroad lines necessarily pass is at least as direct an interference with such commerce as to prohibit the importation of cattle or oleomargarin, or the export of natural gas. Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; West v. Kansas Natural Gas Co. 221 U. S. 229, 262, 55 L. ed. 716, 729, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564. Furthermore, in the present case it is not pretended that local welfare needs the removal of the defendants' bridges at the expense of the dominant requirements of commerce with other states, but merely that it would be helped by raising them. The fact that the court cannot order them to be raised does not justify a judgment that they be destroyed even in the avowed expectation that what it wants but cannot command is all that will come to pass.

A strong argument was made for the plaintiffs in error that they never had been allowed their day in court, as matters put in issue by them, such as the necessity of the change, were assumed against them. It was urged with seeming justice that, granting that, as was said by the court, the order of the drainage district was prima facie correct, still, when that order was challenged in the pleadings, it could not be assumed to be valid at a hearing upon [80] the writs and returns. But we express no opinion upon this point or upon claims under the 14th Amendment, as what we have said sufficiently decides the cases. The argument of the terminal company upon the contract with the drainage district does not impress us. By way of compromise the Terminal Company's predecessor agreed to build a permanent bridge according to a plan, and the drainage district "hereby consents to the construction of said permanent bridge . . . and declares that the same when constructed shall constitute a lawful structure . . . not waiving any right . . . to require the construction of an additional span." This, coming from a board created to exercise police power, not unnaturally would be construed rather as a license than as an abdication of a continuing duty, on which we are asked to take notice that new light had been shed by a subsequent flood that has given rise to cases before this court. But, for the reasons that we have given, the judgment must be reversed.

Judgments reversed.

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SOUTHERN RAILWAY—CAROLINA DIVISION and Southern Railway Company, Plffs. in Err.,
v.
HATTIE E. BENNETT, Administratrix of the Estate of Luther W. Bennett, Deceased.

(See S. C. Reporter's ed. 80–87.)

Appeal — reversible error — instruction as to prima facie negligence.

1. Instructing the jury in an action under the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), for the death of a railway fireman, caused by the falling of his engine through a burning trestle, to the effect that if a servant is injured through defective instrumentalities (in this case a defective ash pan or damper in another engine and rotten wood in the trestle, likely to take fire), it is prima facie evidence of the master's negligence, and that the master "assumes the burden" of showing that he exercised due care in furnishing them, is not reversible error where the charge recognized and stated later that the burden of proving negligence rests on the plaintiff throughout.

[For other cases, see Appeal and Error, 5071–5126, in Digest Sup. Ct. 1908.]

Appeal — excessive damages — review of verdict.

2. A case of a mere excessive verdict upon the evidence is a matter to be dealt with by the trial court; it does not present a question for re-examination in the Federal Supreme Court upon writ of error.

[For other cases, see Appeal and Error, 4755–4781, in Digest Sup. Ct. 1908.]

[No. 796.]

Argued March 2, 1914. Decided April 6, 1914.

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment which affirmed a judgment of the Court of Common Pleas for Fairfield County, in that state, in favor of plaintiff in an action for death, brought under the Federal employers' liability act. Affirmed.

NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see note to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38.

On the applicability of the doctrine *res ipsa loquitur* as between master and servant—see notes to Fitzgerald v. Southern R. Co. 6 L.R.A.(N.S.) 337, and Byers v. Carnegie Steel Co. 16 L.R.A.(N.S.) 214.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockey, 63 L.R.A. 571.

On review of questions of fact on writ of error to state court—see note to Smiley v. Kansas, 49 L. ed. U. S. 546.

See same case below, — S. C. —, 79 S. E. 710.

The facts are stated in the opinion.

Mr. J. E. McDonald argued the cause, and, with Messrs. L. E. Jeffries and B. L. Abney, filed a brief for plaintiffs in error:

In all actions by the servant against the master, brought in the Federal courts, for injuries sustained through negligence on account of defective machinery, the plaintiff must show affirmatively throughout the entire case that the master was negligent.

Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707, 1 Am. Neg. Rep. 745; Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Looney v. Metropolitan R. Co. 200 U. S. 480, 50 L. ed. 564, 26 Sup. Ct. Rep. 303, 19 Am. Neg. Rep. 627; Chicago & N. W. R. Co. v. O'Brien, 67 C. C. A. 421, 132 Fed. 593; Shandrew v. Chicago, St. P. M. & O. R. Co. 73 C. C. A. 430, 142 Fed. 320; Mexican C. R. Co. v. Townsend, 52 C. C. A. 369, 114 Fed. 737; Northern P. R. Co. v. Dixon, 71 C. C. A. 555, 139 Fed. 737, 19 Am. Neg. Rep. 637; Shankweiler v. Baltimore & O. R. Co. 78 C. C. A. 353, 148 Fed. 195; Rogers v. Louisville & N. R. Co. 88 Fed. 462; Garnett v. Phœnix Bridge Co. 98 Fed. 192; Peirce v. Kile, 26 C. C. A. 201, 53 U. S. App. 291, 80 Fed. 865.

The law having placed the positive duty upon the master to furnish reasonably safe appliances, the presumption of law is that the master has discharged his duty; and there is also another presumption, that if they were defective, the master did not know of it.

4 Thomp. Neg. § 3864.

It is not sufficient merely to prove that the servant was injured through defective machinery or appliances, but it must be shown that the master knew of the defects, or by reasonable care ought to have known of them.

1 Labatt, Mast. & S. §§ 119–121, 128–133, 832–838; 2 Thomp. Neg. § 1053; 3 Elliott, Ev. § 2519; 4 Thomp. Neg. § 4362; 6 Thomp. Neg. §§ 4362, 7528, 7529; Fitzgerald v. Southern R. Co. 6 L.R.A.(N.S.) 345, note; Walkowski v. Penokee & G. Consol. Mines, 41 L.R.A. 47, note; Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707, 1 Am. Neg. Rep. 745; Mountain Copper Co. v. Van Buren, 66 C. C. A. 151, 133 Fed. 1; Re California Nav. & Improv. Co. 110 Fed. 674; Looney v. Metropolitan R. Co. 200 U. S. 480, 50 L. ed. 564, 26 Sup. Ct. Rep. 303, 19 Am. Neg. Rep. 627.

It was error of law not to grant a new

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trial or reduce the verdict to conform to the true measure of damages provided for by the act of Congress, upon the ground that the verdict was so excessive under the undisputed facts, as well as the charge of the court, that it deprived the plaintiffs in error of their rights under the Federal employers' liability act.

Duval v. Hunt, 34 Fla. 85, 15 So. 876, 13 Am. Neg. Cas. 848; Louisville & N. R. Co. v. Trammell, 93 Ala. 350, 9 So. 870; Reiter-Connolly Mfg. Co. v. Hamlin, 144 Ala. 192, 40 So. 280; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192; American R. Co. v. Didricksen, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806; Alabama Mineral R. Co. v. Jones, 62 Am. St. Rep. 132, note; Pickett v. Wilmington & W. R. Co. 117 N. C. 616, 30 L.R.A. 257, 53 Am. St. Rep. 611, 23 S. E. 264; Louisville, N. A. & C. R. Co. v. Goodykoontz, 119 Ind. 111, 12 Am. St. Rep. 371, 21 N. E. 472.

For the purpose of ascertaining whether full force and effect have been given the act of Congress regulating the liability of interstate common carriers to their employees, and the measure of damages allowed under such statute, this court will examine the entire evidence.

Mackay v. Dillon, 4 How. 421, 11 L. ed. 1038; Republican River Bridge Co. v. Kansas P. R. Co. 92 U. S. 315, 23 L. ed. 515; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Laing v. Rigney, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316; Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 56 L. ed. 594, 32 Sup. Ct. Rep. 389.

Mr. W. Boyd Evans argued the cause, and, with Messrs. Edwin C. Brandenburg, F. Walter Brandenburg, E. J. Best, G. W. Ragsdale, and P. A. McMaster, filed a brief for defendant in error:

The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the damages awarded by the verdict, was within the discretion of the trial court.

Northern P. R. Co. v. Herbert, 116 U. S. 642, 646, 29 L. ed. 755, 758, 6 Sup. Ct. Rep. 590.

This court will not reverse a judgment upon a writ of error because the verdict is excessive.

New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 31, 25 L. ed. 531, 534; Herencia v. Guzman, 219 U. S. 44, 55 L. ed. 81, 31 Sup. Ct. Rep. 135; New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 75, 36 L. ed. 71, 80, 12 Sup. Ct. Rep. 356, 8 Am. Neg. Cas. 690; Lincoln v. Power, 151 U. S. 436, 438, 38 L. ed. 224, 225, 14 Sup. Ct. Rep. 387.

A nice criticism of words will not be indulged when the meaning of the instruction is plain and obvious and cannot mislead the jury.

Rogers v. The Marshal (United States use of Rogers v. Conklin) 1 Wall. 644, 17 L. ed. 714.

In examining the charge of the court for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages, and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally flow from other parts of the instruction.

Magniac v. Thompson, 7 Pet. 348, 8 L. ed. 709; Western Massachusetts Ins. Co. v. Norwich & N. Y. Transp. Co. 12 Wall. 201, 20 L. ed. 380; Congress & E. Spring Co. v. Edgar, 99 U. S. 645, 659, 25 L. ed. 487, 491.

Although detached sentences in a charge may be open to criticism, still, if, upon the whole, it is right, the jury could not have failed to understand it correctly, and the case will not be reversed upon that ground.

Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 87, 39 L. ed. 624, 629, 15 Sup. Ct. Rep. 491; Washington & G. R. Co. v. Gladmon, 15 Wall. 401, 410, 21 L. ed. 114, 116; Evanston v. Gunn, 99 U. S. 660, 25 L. ed. 306; Chicago & N. W. R. Co. v. Whitton, 13 Wall. 270, 291, 20 L. ed. 571, 578; New York, L. E. & W. R. Co. v. Estill, 147 U. S. 591, 614, 37 L. ed. 292, 303, 13 Sup. Ct. Rep. 444; Northern P. R. Co. v. Babcock, 154 U. S. 190, 201, 38 L. ed. 958, 961, 14 Sup. Ct. Rep. 978.

Assuming error was committed in the charge, it was cured by specific instructions.

Gamache v. Piquignot, 16 How. 451, 468, 14 L. ed. 1012, 1019; Columbia Heights Realty Co. v. Rudolph, 217 U. S. 547, 557, 54 L. ed. 877, 881, 30 Sup. Ct. Rep. 581, 19 Ann. Cas. 755; Garrard v. Reynolds, 4 How. 123, 126, 11 L. ed. 903, 905; Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 86, 39 L. ed. 624, 629, 15 Sup. Ct. Rep. 491; Choctaw, O. & G. R. Co. v. Tennessee, 191 U. S. 326, 334, 48 L. ed. 201, 207, 24 Sup. Ct. Rep. 99, 15 Am. Neg. Rep. 240; Gila Valley, G. & N. R. Co. v. Lyon, 203

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U. S. 465, 474, 51 L. ed. 276, 281, 27 Sup. Ct. Rep. 145.

Courts are not inclined to grant a new trial merely on account of ambiguity in the charge of the court to the jury, while it appears that the complaining party made no effort at the trial to have the point explained.

The Sybil, 4 Wheat. 98, 4 L. ed. 522; Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 87, 39 L. ed. 624, 629, 15 Sup. Ct. Rep. 491.

Under the peculiar circumstances we submit that the rule laid down by this court in numerous cases, that where no exception is noted at the time of the charge, it is not subject to review, should be followed in this case.

Humes v. United States, 170 U. S. 210, 212, 42 L. ed. 1011, 1012, 18 Sup. Ct. Rep. 602; Tucker v. United States, 151 U. S. 164, 170, 38 L. ed. 112, 115, 14 Sup. Ct. Rep. 299; St. Clair v. United States, 154 U. S. 134, 153, 38 L. ed. 936, 943, 14 Sup. Ct. Rep. 1002; Stewart v. Wyoming Cattle Ranche Co. 128 U. S. 383, 32 L. ed. 439, 9 Sup. Ct. Rep. 101; McDermott v. Severe, 202 U. S. 600, 610, 50 L. ed. 1162, 1168, 26 Sup. Ct. Rep. 709.

No Federal question was involved.

San Francisco v. Scott, 111 U. S. 768, 769, 28 L. ed. 593, 4 Sup Ct. Rep. 688; Chicago & A. R. Co. v. Wiggins Ferry Co. 119 U. S. 615, 624, 30 L. ed. 519, 523, 7 Sup. Ct. Rep. 398; Bank of Old Dominion v. McVeigh, 98 U. S. 332, 25 L. ed. 110; Rockhold v. Rockhold, 92 U. S. 129, 23 L. ed. 507; New York L. Ins. Co. v. Hendren, 92 U. S. 286, 23 L. ed. 709; Dugger v. Bocock, 104 U. S. 596, 604, 26 L. ed. 846, 849.

Messrs. W. Boyd Evans and E. J. Best also filed a separate brief for defendant in error:

So long as the state tribunals in administering rights created by Congress observe the limitations of the due process of law clause of the Federal Constitution, the action, especially the questions as to the character of action, the order and manner of trial, the rules of pleading and evidence, the quantity and quality of proof, must necessarily be committed to such state tribunals without remedy of review by the Supreme Court, except where it is pointed out that such judgment and proceedings of state tribunals in some way or manner violate the fundamental law of the land.

Fleming v. Norfolk Southern R. Co. 160 N. C. 196, 76 S. E. 212.

The rule of evidence as embodied in the charge of the trial judge in respect to the doctrine of a prima facie case and the manner of its establishment, as distinguished and differentiated from the burden of proof or the preponderance of evidence, is not to be confounded, and the rule announced in the charge of the trial court as to a prima facie case, burden of proof or preponderance of evidence, is not *novo impressio*, but such principle is so firmly imbedded in our jurisprudence that the same is not longer open to debate.

United States v. Denver & R. G. R. Co. 191 U. S. 90–93, 48 L. ed. 108, 109, 24 Sup. Ct. Rep. 33.

Presumptions and inferences are coequal with substantive law itself. For the very nature of the occurrence or happening of an event, especially if caused by an agency or instrumentality under the control and management of another, makes a prima facie case and establishes the negative of the proposition. Examples might be mentioned in cases of lost freight, injuries to passengers, fires from locomotive engines. When circumstances are proven which establish a prima facie case, the burden is devolved upon the defendant to meet such prima facie case, and should not be confounded with the rule in reference to the preponderance of evidence, the establishment of which generally rests upon the plaintiff.

Ibid.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action under the employers' liability act of April 22, 1908, chap. 149, 35 Stat. at L. 65, U. S. Comp. Stat. Supp. 1911, p. 1322, for causing the death of the plaintiff's intestate. The plaintiff got a verdict for $25,000, on which the court ordered judgment upon the plaintiff's remitting $5,000. Exceptions were taken, but the judgment was affirmed by the supreme court of the state. — S. C. —, 79 S. E. 710. The exceptions related to the instructions of the court on the matter of liability, and to the entering of judgment upon a verdict alleged to be excessive. As to rulings of the former class, we have indicated that when the statute is made a ground for bringing up ordinary questions of negligence, we shall deal with them in a summary way, and usually content ourselves with stating results. Whether such questions are open in a case coming from a state court we need not decide, as, if open, they can be disposed of in a few words.

The defendant was killed by the falling of his engine through a burning trestle bridge. There was evidence tending to show that the trestle was more or less rotten, that the fire was caused by the dropping of coals from an earlier train, and that the engine might have been stopped had a proper look-

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out been kept. The first complaint is against an instruction to the effect that, if a servant is injured through defective instrumentalities, it is prima facie evidence of the master's negligence, and that the master "assumes the burden" of showing that he exercised due care in furnishing them. Of course the burden of [86] proving negligence in a strict sense is on the plaintiff throughout, as was recognized and stated later in the charge. The phrase picked out for criticism did not controvert that proposition, but merely expressed in an untechnical way that, if the death was due to a defective instrumentality and no explanation was given, the plaintiff had sustained the burden. The instruction is criticized further as if the judge had said *res ipsa loquitur*—which would have been right or wrong according to the *res* referred to. The judge did not say that the fall of the engine was enough, but that proof of a defect in appliances which the company was bound to use care to keep in order, and which usually would be in order if due care was taken, was prima facie evidence of neglect. The instruction concerned conditions likely to have existed for some time (defective ash pan or damper on the engine and rotten wood likely to take fire), about which the company had better means of information than the plaintiff, and concerning which it offered precise evidence, which, however, did not satisfy the jury. We should not reverse the judgment on this ground, even if an objection was open to an isolated phrase to which no attention was called at the time.

The supposed error most insisted upon is the entering of judgment upon a verdict said to be manifestly excessive. It is admitted that the judge charged the jury correctly, according to principles established by Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, but it is thought to be apparent as matter of law that the jury found more than the charge or the law allowed. The argument is this: The deceased was making not more than $900 a year, and the only visible ground of increase was the possibility that he might be promoted from fireman to engineer, with what pay was not shown. He could not have given more than $700 a year to his family. His expectation of life was about thirty years by the tables of mortality. Therefore at the legal rate of interest the income from $10,000 [87] for thirty years was all that the plaintiff was entitled to, whereas she was given the principal of $20,000 out and out. It may be admitted that if it were true that the excess appeared as matter of law,—that if, for instance, the statute fixed a maximum and the verdict exceeded it,—a question might arise for this court. But a case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for re-examination here upon a writ of error. Lincoln v. Power, 151 U. S. 436, 38 L. ed. 224, 14 Sup. Ct. Rep. 387; Herencia v. Guzman, 219 U. S. 44, 45, 55 L. ed. 81, 82, 31 Sup. Ct. Rep. 135. The premises of the argument for the plaintiff in error were not conclusive upon the jury, and although the verdict may seem to us too large, no such error appears as to warrant our imputing to judge and jury a connivance in escaping the limits of the law.

Judgment affirmed.

TERRITORY OF ARIZONA AT THE RELATION AND TO THE USE OF J. N. GAINES, Tax Collector in and for the County of Cochise, in the Territory of Arizona, Appt.,

v.

COPPER QUEEN CONSOLIDATED MINING COMPANY.

(See S. C. Reporter's ed. 87-97.)

Appeal — from territorial supreme court — following decision below — equalization of tax assessment.

1. The Federal Supreme Court will not disturb on appeal the ruling of the territorial supreme court that Ariz. Rev. Stat. 1887, § 2654, empowering the county board of equalization to determine whether the assessed value of any property is too small or too great, and to change and correct any valuation, either by adding thereto or deducting therefrom, gave such board no authority to raise the assessment of some only of a group of mining claims originally assessed *en masse* on the return of the owner.

[For other cases, see Appeal and Error, VIII. m, 1; Courts, VII. d, in Digest Sup. Ct. 1908.]

Estoppel — to contest enforcement of tax — listing — part payment.

2. Neither the listing of a number of mining claims *en masse* for taxation, nor the payment of a part of the unlawful tax as a condition of injunctive relief, nor payments under an attempted compromise subsequently held invalid, will estop the owner from contesting the enforcement of the tax because the county board of equalization unlawfully increased the assessment upon a part of the property by singling out some of the claims.

[For other cases, see Estoppel, III., in Digest Sup. Ct. 1908.]

[No. 89.]

NOTE.—As to review by United States Supreme Court of territorial decisions—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

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Argued March 3 and 4, 1914. Decided April 6, 1914.

APPEAL from the Supreme Court of the Territory of Arizona to review a decree which affirmed a decree of the District Court of the Second Judicial District of that territory, refusing to enforce a tax lien. Affirmed.

See same case below, 13 Ariz. 198, 108 Pac. 960.

The facts are stated in the opinion.

Mr. George P. Bullard, Attorney General of Arizona, and Mr. Elias S. Clark, argued the cause, and, with Messrs. William G. Gilmore and William C. Prentiss, filed a brief for appellant.

Mr. Frederick N. Judson argued the cause, and, with Messrs. E. E. Ellinwood and John F. Green, filed a brief for appellee:

Under the repeated decisions of this court in the exercise of its appellate jurisdiction over territorial courts, the court will not disturb the decision of the territorial courts in a construction of revenue or other local statutes unless there is manifest error disclosed. In the case at bar the assignments of error disclose no basis for consideration under this rule.

Idaho & O. Land Improv. Co. v. Bradbury, 132 U. S. 509, 33 L. ed. 433, 10 Sup. Ct. Rep. 177; Fox v. Haarstick, 156 U. S. 676, 39 L. ed. 577, 15 Sup. Ct. Rep. 457; Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization, 206 U. S. 474–477, 51 L. ed. 1143, 27 Sup. Ct. Rep. 695; English v. Arizona, 214 U. S. 359, 53 L. ed. 1030, 29 Sup. Ct. Rep. 658; Treat v. Grand Canyon R. Co. 222 U. S. 449, 56 L. ed. 265, 32 Sup. Ct. Rep. 125; Straus v. Foxworth, 231 U. S. 162, ante, 168, 34 Sup. Ct. Rep. 42; Works v. United Globe Mines, 231 U. S. 595, ante, 389, 34 Sup. Ct. Rep. 274; Phœnix R. Co. v. Landis, 231 U. S. 578, ante, 377, 34 Sup. Ct. Rep. 179.

There was no estoppel upon the appellee, in the fact that its manager gave a list of the sixty-five separate parcels by name in a group, which can cure the failure to show specific assessment upon the separate properties of the taxes sought to be enforced. No such estoppel was pleaded, nor could one exist under the facts found.

8 Enc. Pl. & Pr. 7; State ex rel. Hudson v. Carr, 178 Mo. 229, 77 S. W. 544; State ex rel. Musser v. Birch, 186 Mo. 205, 85 S. W. 363; State ex rel. Flentge v. Burrough, 174 Mo. 707, 74 S. W. 610; Centennial Eureka Min. Co. v. Jaub County, 22 Utah, 395, 62 Pac. 1024; Chicago & N. W. R. Co. v. Auditor General, 53 Mich. 79, 18 N. W. 586; Sommers v. Boyd, 48 Ohio St. 663, 29 N. E. 497; Dunnell Mfg. Co. v. Pawtucket, 73 Mass. 277; Henshaw v. Bissell, 18 Wall. 271, 21 L. ed. 840; Power v. Bowdle, 3 N. D. 107, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404; Detroit v. Detroit City R. Co. 60 Fed. 161; Bank of America v. Banks, 101 U. S. 240, 25 L. ed. 850.

There is no merit in the assignments of error warranting even their consideration on the question whether there was manifest error in the construction by a territorial court of a local statute. This is clearly shown by the shifting position of appellant.

Baker v. Kaiser, 61 C. C. A. 303, 126 Fed. 319; New York, L. E. & W. R. Co. v. Estill, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444.

Mr. Justice Day delivered the opinion of the court:

This was a special statutory proceeding (Laws of Territory of Arizona, 1903, act No. 92, p. 148) brought in the district court of the second judicial district of the territory of Arizona in and for the county of Cochise to enforce the lien of the territory for the payment of taxes for the year 1901, assessed against certain patented mining claims in the county of Cochise, amounting to $120,039.35, the tax being assessed upon the increased valuation of the mining claims of the company, made by the board of supervisors of Cochise county. In the trial court judgment was rendered for the defendant. Upon appeal to the supreme court of the territory of Arizona the judgment was affirmed (13 Ariz. 198, 108 Pac. 960). An appeal was prosecuted to this court under the statute regulating appeals from territorial courts (18 Stat. at L. 27, chap. 80).

[89] The supreme court of the territory of Arizona made a statement of facts in the nature of a special verdict, and upon that finding this court must consider the case on this appeal. Eagle Min. & Improv. Co. v. Hamilton, 218 U. S. 513, 515, 54 L. ed. 1131, 1132, 31 Sup. Ct. Rep. 27; Zeckendorf v. Steinfeld, 225 U. S. 445, 449, 56 L. ed. 1156, 1161, 32 Sup. Ct. Rep. 728. From the facts thus found the following appears:

The appellee, a corporation doing business and owning real and personal property in Cochise county, Arizona, listed and returned for assessment in 1901 sixty-five mining claims belonging to it, by name, but as one tract, said to contain 636 acres, and valued at $3,180, with improvements valued at $55,431.76. Some of the claims are not contiguous to the others.

On July 17, 1901, the county board of supervisors, sitting as the board of equalization for Cochise county, after notice to the company and hearing at which appel-

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lee's superintendent and agent appeared, raised the assessment upon eight of the sixty-five claims originally assessed *en masse*, in amounts varying from $50,000 to $1,000,000.

Prior to September, 1901, the appellee brought suit in the district court of Cochise county to enjoin the collection of the tax, alleging that the increase had been fraudulently made and the property overvalued. It tendered the sum of $14,133.12, being the amount of the tax upon all of its property before the increase. The district court found that the increase was not based upon information or evidence, but was made arbitrarily and capriciously for the purpose of imposing an unjust share of the burden of taxation upon the appellee, and granted the injunction, upon condition, however, that the appellee pay the $14,133.12 into court and also the further sum of $9,589.20, the tax upon the increase in valuation of certain personal property, which the district court found to be valid. The $14,133.12 was accepted by the county treasurer, who was *ex officio* tax collector, "on account of any [90] moneys which might ultimately be determined as due from said company for its taxes for said year." The supreme court, upon appeal, reversed the case and remanded it for new trial (Cochise County v. Copper Queen Consol. Min. Co. 8 Ariz. 221, 71 Pac. 946). Subsequently, an agreement of compromise was made, under authority of a resolution of the board of supervisors, the appellee paying the further sum of $5,661.44 in full settlement of taxes for the year 1901, and the injunction suit being dismissed. This last amount has been retained by the county.

Thereafter a mandamus suit was instituted to compel the tax collector to commence suit against the appellee for the balance of the 1901 tax, upon the ground that the compromise was void. The supreme court held that the board of supervisors had no authority to compromise the tax, and granted the writ (Territory v. Gaines, 11 Ariz. 270, 93 Pac. 281), in pursuance of which the present action was instituted.

The uncontradicted testimony showed that the raise in the assessment of the eight claims was not based upon evidence as to value, and that it was in fact arbitrary, and also that some of the claims were assessed far in excess of their full cash value. The duplicate assessment roll made out by the assessor contained the increase made by the board of equalization, the eight claims which were raised being separately itemized by name, with the amounts of the respective increases set opposite the names, but with no statement of their original valuation or the total valuation of them or any of them.

On the third Monday of December, 1901, the tax being unpaid, the tax collector turned in the delinquent list, certified by the board, giving the property of the defendant as shown in the assessment returned by the appellee, with the increases as they appeared on the duplicate assessment roll.

Under the 1903 law delinquent property was carried [91] into the back-tax book of that year, and this suit was brought to foreclose the territory's lien upon the pieces of property therein appearing. That book, which was put in evidence, gave the appellee's property, its total valuation, total tax, amount paid on account, and balance due. In enumerating the several tracts remaining unredeemed it showed sixty-five mining claims, containing 636 acres, valued *en masse* at $3,180, with improvements at $55,431, and named sixty-four claims; the number of acres, and all other valuations for real estate and improvements, were the same as in the other lists; and the list of increased valuations of the several claims and improvements was shown, but no total valuation of such separate pieces of property after the addition of the increase was given.

The discrepancies in description of the claims between the complaint and the tax documents are stated, and mention is made that in none of the latter is the total assessed valuation of any individual piece of real estate or the amount of taxes due on any of the separate claims disclosed. And it is said that the testimony of the assessor showed that there were 280 patented mining claims in Cochise county at the time the 1901 assessment was made, and that they were and had been assessed at a uniform rate of $5 per acre as a rule.

In its opinion the supreme court stated that the most important question raised upon the record was the validity of the action of the board of supervisors, sitting as a board of equalization, in raising the assessment upon eight of the group of sixty-five claims originally assessed in mass. After stating the minutes of the board's action, the court quotes § 2654 of the Revised Statutes of 1887.

". . . The board of equalization shall have power to determine whether the assessed value of any property is too small or too great, and may change and correct any valuation, either by adding thereto or deducting therefrom, [92] if the sum fixed in the assessment roll be too small or too great, whether said sum was fixed by the owner or the assessor; . . . and the clerk of the board of equalization shall note

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upon the assessment roll all changes made by the board. During the session of the board of equalization the assessor shall be present, and also any deputy whose testimony may be required by the parties appealing to the board, and they shall have the right to make any statement touching such assessment, and producing evidence relating to questions before the board, and the board of equalization shall make use of all other information that they can gain otherwise, in equalizing the assessment roll of the county, and may require the assessor to enter upon such assessment roll any other property which has not been assessed; and the assessment and equalization so made shall have the same force and effect as if made by the assessor before the delivery of the assessment roll to (by) him by (to) the clerk of the board of equalization . . ."

The court said (p. 212):

"It is apparent from an examination of this roll [the duplicate assessment roll] that there are in effect two assessments for the same year against each of the eight claims raised. One, an assessment, commingles with that of sixty-four other claims, *en bloc;* the other separate and distinct. This is no mere irregularity. The legality of the original assessment as an entirety has been sustained solely upon the ground that the property was so returned by the taxpayer. The board disregarded such return, and the validity of its action must be determined under the statute alone. It might be argued successfully that had the board of supervisors raised the assessment upon the group, such a raise would have been valid. But the board segregated from the group certain claims, and imposed thereon an additional assessment. It is a fundamental rule of taxation in this territory that a taxpayer may pay [93] upon any one of parcels separately assessed, discharging the lien thereon, without paying upon the remainder. Rev. Stat. 1887, ¶ 2676.

. . . . . .

"By the action of which complaint is made here, the board deprived the appellee of this right. Upon the raise being made it had the legal right to determine upon which, if any, of the claims so raised, it would pay. If it determined to pay upon none, it was nevertheless obliged to pay a portion of the tax thereon if it exercised its right to pay upon the fifty-seven claims remaining, for the tax collector, under ¶ 2676, supra (re-enacted, ¶ 3900, Revised Statutes of 1901), could not receive the tax upon less than the entire sixty-five claims, that being the least subdivision appearing on the assessment roll. If it determined to pay upon one or more of the eight so raised, and to abandon the remainder, it would have to pay the tax upon the raise, together with the tax upon the entire sixty-five claims as originally assessed. The undisputed testimony discloses that these claims were noncontiguous, in instances which would have invalidated an original assessment, except for the return. The board, in raising this assessment, disregarding the original classification, which has been held good as against the appellee solely by reason of its return. The board of supervisors, sitting as a board of equalization, had no power under ¶ 2654 of the Revised Statutes of 1887 to segregate, from a tract of land returned and assessed as one parcel, a portion thereof, and impose thereon an additional assessment, without first determining that such tract was improperly assessed as a whole, and causing such tract to be reassessed and raised in subdivisions in such manner as to preserve the right of the taxpayer to discharge the lien of taxes upon such of the several separate tracts as he might elect."

It is evident that in reaching this conclusion the supreme [94] court based its decision upon its construction of the statute in this respect. In exercising appellate jurisdiction over the territorial courts, where the construction placed upon a statute of the territory by the highest court thereof is brought in question, this court has frequently held that it will not reverse the action of the territorial court except in cases where manifest error in such construction appears. Straus v. Foxworth, 231 U. S. 162, ante, 168, 34 Sup. Ct. Rep. 42; Phœnix R. Co. v. Landis, 231 U. S. 578, ante, 377, 34 Sup. Ct. Rep. 179; Work v. United Globe Mines, 231 U. S. 595, ante, 389, 34 Sup. Ct. Rep. 274. Applying this rule we are not prepared to say that there was manifest error in the conclusion reached by the supreme court in construing the statute. Indeed, the appellant in its brief filed in this case extracts from its motion for rehearing in the court below, and prints as a part of its argument, a statement to the effect that it is convinced that the board could not lawfully segregate the eight claims from the mass and raise the valuation separately, there being no separate assessment originally; but it contends that the value of the whole tract is equal to all its parts, so that when the value of a part is raised it merely increases the aggregate value of the whole tract. We are not prepared to say that the Arizona supreme court erred in its conclusion concerning what the board actually did. The original assessment, as the finding shows, contains a return of sixty-five mining claims, naming them as 636 acres of land. There was no separate statement of the amount of acreage in any one claim.

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The claims were not described except by name, and that as a part of the 636 acres returned as a whole. The supreme court found, and we think correctly, that the reassessment picked out eight claims by name and raised the valuation of each by a given sum.

It is further contended by the appellant that certain things have happened as set forth in the findings which amount to an estoppel upon the appellee from denying [95] the right to have a lien charged, as claimed in this proceeding, upon specific property, and to have the lien enforced by the sale of the specific lot or tract covered by it. The statute (part of which is quoted in the margin†) is a peculiar one, and is said to have been adopted from the statutes of Missouri. It provides for a civil action against the owners of the property, to the end that a lien be charged upon land the taxes on which have become delinquent, and that such lien be foreclosed. In Missouri it has been decided that no personal judgment shall be rendered in the proceedings against the owner of the property, nor any execution issue except upon the property charged with the tax. State ex rel. Rosenblatt v. Sargeant, 76 Mo. 557; State ex rel. Hayes v. Snyder, 139 Mo. 549, 41 S. W. 216. And the supreme court of the territory of Arizona held that the construction of the statute by the court of last resort of Missouri was binding upon it.

In such a proceeding it is difficult to see how the principles of estoppel because of the description of the land made by the owner in returning the property or the payment of taxes, as appears from the finding in this case, could have application. Estoppel ordinarily proceeds upon principles which prevent one from denying the truth of statements upon which others have acted, where the denial would have the effect to mislead them to their prejudice. In this case the territory is undertaking to [96] collect its revenues by certain statutory proceedings duly provided for that purpose, and it would seem to be elementary that such enforcement of collection must depend upon a valid assessment as its basis, and this again was the holding in Missouri. Hannibal ex rel. Bassen v. Bowman, 98 Mo. App. 103, 71 S. W. 1122; State ex rel. Morris v. Cunningham, 153 Mo. 642, 55 S. W. 249. The fact that the taxpayer furnished the list of mining claims which included those upon which increased assessments had been made, and thereby acknowledged the ownership of the property by the description stated, would not permit the board, if authority was wanting, to increase the assessment upon a part of the property by picking out certain claims only, as was done in this case. If for such action the assessment was void, the description furnished by the property owner could not supply the defect. State ex rel. Flentge v. Burrough, 174 Mo. 700, 707, 74 S. W. 610. Nor do we think there is substance in the claim that the payment made by the appellee estopped it from contesting the lien sought to be imposed in this case. The finding of facts sets forth specifically the payment of the sum of $14,133.12 and of the further sum of $9,589.20 as a condition for granting the injunction in the original suit brought by the appellee in the district court; and the finding shows that the payment of the sum of $14,133.12 was "on account of any moneys which might ultimately be determined as due from said company for its tax for said year," and that the sum of $5,661.44 was paid on the attempted compromise which was subsequently held to be invalid. We do not find anything in these payments which, upon principles of estoppel, or as an affirmation of the validity of the assessment, would prevent the appellee from contending against the legality of the action here in question.

In the decision as made in the supreme court it was not found necessary to rule upon the attempted defenses based upon the arbitrary character of the assessment, nor [97] the fact that it was in excess of the cash value of the property. The conclusion which we have reached renders it unnecessary for us to pass upon the findings in this respect, which, notwithstanding the decision in the court below, are placed in the special findings upon which the case is sent here.

Nor de we need to pass upon the alleged violation of the equality protection of the Constitution in the finding that other patented mining claims in Cochise county at the time of the assessment in 1901 were assessed as a rule at the uniform rate of $5 per acre. Nor need we consider the ground upon which the supreme court of Arizona seems to have acted in part, that

†The judgment, if against the defendant, shall describe the land upon which the taxes are found to be due, shall state the amount of taxes and interest found to be due upon each tract or lot, and the year or years for which the same are due, up to the rendition thereof, and shall decree that the lien of the territory be enforced, and that the real estate, or so much thereof as may be necessary to satisfy such judgment, interest and costs, be sold, and execution shall be issued thereon, which shall be executed as in other cases of judgment and execution, and said judgment shall be a first lien upon said land. Laws of 1903, pp. 148, 153, act No. 92, § 88.

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the assessment rolls and tax book varied from the complaint in the description of the property.

It follows that the judgment of the Supreme Court of the Territory of Arizona must be affirmed.

BOSTON & MAINE RAILROAD, Plff. in Err.,
v.
KATHARINE HOOKER.

(See S. C. Reporter's ed. 97–157.)

Carriers — published tariffs — limitation of baggage liability.

1. A limitation as to the baggage liability of an interstate carrier, based upon the requirement to declare its value when more than $100, and pay an excess charge, is a regulation determinative of the rate to be charged and affecting the service to be rendered to the passenger within the meaning of the act to regulate commerce of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), § 6, as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), which requires regulations of that character to be filed and posted in accordance with its provisions as a part of the carrier's tariff schedules.

[For other cases, see Carriers, III. g, in Digest Sup. Ct. 1908.]

Carriers — limiting baggage liability — effect of regulation in published tariff.

2. A regulation contained in the published tariffs of an interstate railway carrier on file with the Interstate Commerce Commission, limiting its baggage liability to $100 unless a greater value is declared and stipulated by the owner and the excess charges paid, is binding upon the passenger in case of loss of the baggage through the carrier's negligence, regardless of the passenger's lack of knowledge of or assent to such regulation, and regardless of the carrier's failure to inquire as to the value of the baggage, or of its outward appearance as indicating greater value, any state law or policy to the contrary having been superseded when Congress, by the amendment of June 29, 1906, to the act to regulate commerce of February 4, 1887, took possession of the subject of the interstate railway transportation of property.

[For other cases, see Carriers, II. a, 9; Commerce, I. c, in Digest Sup. Ct. 1908.]

Carriers — baggage — receipts.

3. A railway carrier receiving a passenger's baggage for interstate transportation is not required to give any other receipt than the customary baggage check by the provision of the act to regulate commerce of February 4, 1887, § 20, as amended by the act of June 29, 1906, that a railway company receiving property for transportation in interstate commerce shall issue a receipt or bill of lading therefor.

[For other cases, see Carriers, II. a, 9, in Digest Sup. Ct. 1908.]

NOTE.—On limitation of carrier's liability for passenger's baggage—see notes to Wells v. Great Northern R. Co. 34 L.R.A. (N.S.) 818, and French v. Merchants' & M. Transp. Co. 19 L.R.A.(N.S.) 1006.

[No. 121.]

Argued December 10 and 11, 1913. Decided April 6, 1914.

IN ERROR to the Superior Court of the State of Massachusetts for the County of Middlesex to review a judgment entered pursuant to the mandate of the Supreme Judicial Court of that state, overruling the exceptions to a judgment of the Superior Court against a carrier for the full value of certain lost baggage notwithstanding a limitation of such liability to the declared value, contained in the carrier's published tariffs. Reversed and remanded for further proceedings.

See same case below, 209 Mass. 598, 95 N. E. 945, Ann. Cas. 1912B, 669.

The facts are stated in the opinion.

Mr. Frederick N. Wier argued the cause, and, with Mr. Edgar J. Rich, filed a brief for plaintiff in error:

Congress has assumed exclusive jurisdiction of the subject-matter in issue, thereby making the determination of the effect and validity of the baggage regulations of the plaintiff in error a Federal question.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 672, 57 L. ed. 690, 698, 33 Sup. Ct. Rep. 397.

Rates, parts of rates, and regulations affecting or determining rates, fares, and charges, or the value of the service rendered, have the force of law, and therefore enter into and become a part of all contracts for interstate transportation.

Texas & P. R. Co. v. Mugg, 202 U. S. 242, 245, 50 L. ed. 1011, 1013, 26 Sup. Ct. Rep. 628; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 445, 51 L. ed. 553, 560, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Armour Packing Co. v. United States, 209 U. S. 56, 81, 52 L. ed. 681, 694, 28 Sup. Ct. Rep. 428; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 656, 57 L. ed. 683, 690, 33 Sup. Ct. Rep. 391; Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151.

The reasonableness of the regulation is not in issue.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Kansas City

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Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391.

The regulations do not offend any principle of common law or public policy.

Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25, 25 L. ed. 531, 533.

The regulations do not offend any Federal statute.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397.

The rule allowing a common carrier to graduate its rates according to the value of the goods shipped, that is, according to the extent of the risk it assumes in relation to goods accepted by it for shipment, has been sanctioned by this court whenever such a rule has been before it for interpretation.

New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 24 L. ed. 531; Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151.

The interstate commerce act of 1887 and its subsequent amendments were enacted not for the purpose of establishing new principles of law in the operation and control of the business of interstate transportation, but for the purpose of applying the principles calling for equality of treatment to all shippers under similar conditions, already established at common law, to the present needs of the railroad business. The object of this legislation was to establish and maintain, free from preferences and discrimination, a just and reasonable relationship between the rates, fares, and charges paid by the public and the service rendered by the railroads.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265.

When the filing of schedules of rates—regulations affecting rates—was made obligatory on the part of the carrier, this court held, in order to accomplish the purpose of the act, that the rates and the regulations affecting rates, when filed under the provisions of this act, have the force of law, and are conclusive and binding on all shippers and passengers, regardless of actual knowledge.

Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397.

The valuation, or the amount to which the carrier was to be answerable in damages, was an essential element in determining the rate paid by the shipper.

Re Released Rates, 13 Inters. Com. Rep. 550; York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 112, 18 L. ed. 170, 171; Squire v. New York C. R. Co. 98 Mass. 239, 93 Am. Dec. 162; New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25, 24 L. ed. 531, 533; Hart v. Pennsylvania R. Co. 112 U. S. 331, 337, 343, 28 L. ed. 717, 719, 721, 5 Sup. Ct. Rep. 151; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 650, 57 L. ed. 683, 687, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 671, 57 L. ed. 690, 697, 33 Sup. Ct. Rep. 397.

Giving a regulation, such as is in issue in this case, the force and the effect of a rate, of which it must be concluded to be an essential part, is doing no more than to bind the public by a regulation which the carrier has always had the power to enforce provided it gave the public actual or inferable notice of such a regulation. The notice required at common law has been provided for by the general effect of the Hepburn act.

Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 654, 656, 57 L. ed. 683, 689, 690, 33 Sup. Ct. Rep. 391; Barstow v. New York, N. H. & H. R. Co. 158 App. Div. 665, 143 N. Y. Supp. 983.

A fact agreed or assumed to be true as the basis of a contract must be taken to be true specifically until the contract itself is lawfully impeached by plaintiff or by defendant, or until such legal proceeding is taken to impeach the truth of the (supposed) fact.

Hoeger v. Chicago, M. & St. P. R. Co. 63 Wis. 100, 53 Am. Rep. 271, 23 N. W. 435; Fourth Nat. Bank v. Olney, 63 Mich. 58, 29 N. W. 513; Bigelow, Estoppel, p. 459.

A misrepresentation acted on by the estoppel-asserter is not the less a ground for relief because he had the means of knowledge.

Ewart, Estoppel, p. 137.

The defendant in error was bound to take notice of the rates, and of their relation to the value of the baggage.

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Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 166, 56 L. ed. 1033, 1038, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 652, 656, 57 L. ed. 683, 688, 689, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 671, 57 L. ed. 690, 697, 33 Sup. Ct. Rep. 397.

When a shipper or passenger has actual or presumptive knowledge that rates or charges are based upon valuation, he is held in effect to declare that the value of his goods shipped is in fact that valuation applicable to the rate of freight he assumes to pay.

Hart v. Pennsylvania R. Co. 112 U. S. 331, 337, 28 L. ed. 717, 719, 5 Sup. Ct. Rep. 151; Adams Exp. Co. v. Croninger, 226 U. S. 491, 508, 57 L. ed. 314, 321, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 476, 57 L. ed. 600, 602, 33 Sup. Ct. Rep. 267.

When a shipper or passenger has declared or represented, by the act of taking advantage of a rate which he was bound to know was applicable to a certain valuation, that the value of his property was in fact that valuation, he cannot later show that the baggage had in fact a greater value, as his action in accepting this rate constitutes such a misrepresentation as will estop him from recovering more than the valuation which might rightfully have been shipped at this rate.

Hart v. Pennsylvania R. Co. 112 U. S. 331, 338, 341, 28 L. ed. 717, 720, 721, 5 Sup. Ct. Rep. 151; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 475, 477, 57 L. ed. 600, 602, 603, 33 Sup. Ct. Rep. 267; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 651, 57 L. ed. 683, 688, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 670, 57 L. ed. 690, 697, 33 Sup. Ct. Rep. 397.

The effect of the defendant in error being estopped by her implied misrepresentation of the value of her baggage will not be that of exempting the plaintiff in error from liability for its negligence in contravention of either the principles of the common law or the spirit of the Carmack amendment to the Hepburn act.

Bernard v. Adams Exp. Co. 205 Mass. 260, 28 L.R.A.(N.S.) 293, 91 N. E. 325, 18 Ann. Cas. 351; Alair v. Northern P. R. Co. 53 Minn. 160, 19 L.R.A. 764, 39 Am. St. Rep. 588, 54 N. W. 1072.

Mr. Samuel Williston argued the cause and filed a brief for defendant in error:

By the rule of the common law a limitation of liability was invalid unless a special contract was made by which the shipper agreed thereto, or unless the shipper was estopped by misrepresentation.

Brown v. Eastern R. Co. 11 Cush. 97; Malone v. Boston & W. R. Co. 12 Gray, 388, 74 Am. Dec. 598; Graves v. Adams Exp. Co. 176 Mass. 280, 57 N. E. 462; John Hood Co. v. American Pneumatic Service Co. 191 Mass. 27, 77 N. E. 638; The Majestic, 166 U. S. 375, 41 L. ed. 1039, 17 Sup. Ct. Rep. 597, 2 Am. Neg. Rep. 282; Henderson v. Stevenson, L. R. 2 H. L. Sc. App. Cas. 481, 32 L. T. N. S. 709; Cau v. Texas & P. R. Co. 194 U. S. 427, 431, 48 L. ed. 1053, 1056, 24 Sup. Ct. Rep. 663, 16 Am. Neg. Rep. 659; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed. 465; York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 18 L. ed. 170; New York C. R. Co. v. Lockwood, 17 Wall. 357, 361, 21 L. ed. 627, 634; Hart v. Pennsylvania R. Co. 112 U. S. 331, 343, 28 L. ed. 717, 721, 5 Sup. Ct. Rep. 151; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 441, 442, 32 L. ed. 788, 792, 9 Sup. Ct. Rep. 469; Saunders v. Southern R. Co. 62 C. C. A. 523, 128 Fed. 15; Williams v. Central R. Co. 183 N. Y. 518, 76 N. E. 1116, affirming without opinion the decision as reported in 93 App. Div. 582, 88 N. Y. Supp. 434; Martin v. Central R. Co. 121 App. Div. 552, 106 N. Y. Supp. 226; Homer v. Oregon Short Line R. Co. — Utah, —, 128 Pac. 522; Black v. Atlantic Coast Line R. Co. 82 S. C. 478, 64 S. E. 418; Elliott, Railroads, 4th ed. § 1510; Hutchinson, Carr. 3d ed. § 401.

No jurisdiction, it is believed, has given any less protection to the shipper of goods, whether of freight or baggage, than that sanctioned by the decisions just cited; but some states have given more. In a few states, even though a limitation of liability had been agreed to, it has been held, nevertheless, either wholly invalid, or invalid so far as concerns the carrier's liability for negligence.

Hutchinson, Carr. 3d ed. § 405; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Adams Exp. Co. v. Green, 112 Va. 527, 72 S. E. 102.

And in a few states, of those which form the great majority and have upheld to its full extent a contract of valuation or limited liability, it has been held that no merely formal assent inferred from accepting a bill of lading or a receipt without actual knowledge of its contents, and without the shipper's attention being called by the carrier to the limitation, is valid, though an agreement made with full knowledge of the situation would bind the shipper.

Hutchinson, Carr. 3d ed. § 410; Plaff v. Pacific Exp. Co. 251 Ill. 243, 95 N. E. 1089;

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Hill v. Adams Exp. Co. 82 N. J. L. 373, 81 Atl. 859; Wichern v. United States Exp. Co. 83 N. J. L. 241, 83 Atl. 776.

The ground upon which the validity of a limitation upon a recovery for loss or damage due to negligence depends is that of estoppel.

Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 476, 57 L. ed. 600, 602, 33 Sup. Ct. Rep. 267; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 651, 57 L. ed. 683, 688, 33 Sup. Ct. Rep. 391.

The refinements of the law in different jurisdictions are only important in this case to indicate the scope of the recent decision of Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148, and the cases which follow it. These cases in effect hold that the Federal government has declared its purpose to exercise supervision over all interstate contracts of carriage, and that therefore this court will pass upon their validity. In effect, therefore, this court will decide both whether a contract limiting liability is valid in law and whether such a contract was made in fact. These decisions must necessarily affect the law hereafter laid down in a number of states. Those states which have had a different rule from that of this court, regarding either what is necessary to prove the existence of a contract to limit liability, or the extent to which such a limitation is valid, must modify their rules so far as interstate shipments are concerned; but the law of Massachusetts will remain unchanged, for that law is precisely the same as that laid down in the Croninger Case, both with reference to the validity of agreements to limit liability and with reference to what constitutes such an agreement. In Massachusetts it has long been the law that the acceptance of a document binds one who receives it, though he may not choose to read it (Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; Grinnell v. Western U. Teleg. Co. 113 Mass. 299, 18 Am. Rep. 485; Hoadley v. Northern Transp. Co. 115 Mass. 304, 15 Am. Rep. 106; Clement v. Western U. Teleg. Co. 137 Mass. 463; Graves v. Adams Exp. Co. 176 Mass. 280, 57 N. E. 462). And such had indeed been the law laid down by this court prior to the decision of the Croninger Case (Cau v. Texas & P. R. Co. 194 U. S. 427, 431, 48 L. ed. 1053, 1056, 24 Sup. Ct. Rep. 663, 16 Am. Neg. Rep. 659).

But it should be observed that it has also been the law both of this court and of the Massachusetts court that a public notice of an asserted limitation by the carrier, even though the shipper was aware of it (which was not the fact in the case at bar), does not have the effect of an agreement or representation. Some actual assent is necessary.

New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 382, 383, 12 L. ed. 465, 482; Michigan C. R. Co. v. Mineral Springs Mfg. Co. 16 Wall. 318, 328, 329, 21 L. ed. 297, 302, 303; Judson v. Western R. Corp. 6 Allen, 491, 83 Am. Dec. 646; Buckland v. Adams Exp. Co. 97 Mass. 124.

And this is the generally accepted law of the United States.

1 Hutchinson, Carr. 3d ed. § 406.

It is suggested in the opinion of the Massachusetts court in the present case that the English rule is slightly more favorable to the carrier, but it is hard to find any warrant for this statement.

Henderson v. Stevenson, L. R. 2 H. L. Sc. App. Cas. 470, 32 L. T. N. S. 709; Richardson v. Rowntree [1894] A. C. 217, 63 L. J. Q. B. N. S. 283, 6 Reports, 95, 70 L. T. N. S. 817, 58 J. P. 493, 7 Asp. Mar. L. Cas. 482; Parker v. South Eastern R. Co. L. R. 2 C. P. Div. 416.

The Carl Case, Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 654, 57 L. ed. 683, 689, 33 Sup. Ct. Rep. 391, is not to be understood as meaning that a limitation of liability, or the valuation on which such a limitation is based, is literally part of the rate itself.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 509, 57 L. ed. 314, 321, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 475, 57 L. ed. 600, 602, 33 Sup. Ct. Rep. 267.

The amendments to the interstate commerce act in 1906 did not change the law either as to what a rate is or what the effect is of a rate duly filed. Whatever is now binding as a rate upon a shipper was binding before 1906. The statements in The Majestic, 166 U. S. 375, 41 L. ed. 1039, 17 Sup. Ct. Rep. 597, 2 Am. Neg. Rep. 282; Cau v. Texas & P. R. Co. 194 U. S. 427, 431, 48 L. ed. 1053, 1056, 24 Sup. Ct. Rep. 663, 16 Am. Neg. Rep. 659, and Saunders v. Southern R. Co. 62 C. C. A. 523, 128 Fed. 15, all made shortly before 1906, would all have been inaccurate as general statements in asserting that the assent of the shipper was necessary for the validity of a limitation of liability. Moreover, the decisions in Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289, and in Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132, which admitted the efficacy of state laws forbidding limitations of liability would have been wholly wrong. For, if the limitation of liability is literally part of the rate, not only must it be assumed that the schedules of the railroad showed the rate and the asserted limitation of liability, but the

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special contracts of limitation proved in the cases would have been clearly within exclusive Federal control prior to the amendments of 1906. It has been decided that the Carmack amendment gives full control to the Federal government of all contracts for interstate carriage, but it does not change the definition of what is a rate, and, if a limitation of liability is now part of a rate, it was part of a rate when these cases were decided.

A limitation of liability in any form except by contract or a representation by the shipper has never been permitted by the law. The attempt to escape from this rule of the common law is as ineffectual as the attempt to escape the statutory liability cast upon an initial carrier by the Carmack amendment, which was held futile in Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205; Norfolk & W. R. Co. v. Dixie Tobacco Co. 228 U. S. 593, 57 L. ed. 980, 33 Sup. Ct. Rep. 609.

A limitation of liability is not within the meaning of the words "rule, regulation, or practice."

Curry v. Marvin, 2 Fla. 411; Re Leasing of State Lands, 18 Colo. 359, 32 Pac. 988; Martin v. Central R. Co. 121 App. Div. 552, 106 N. Y. Supp. 226.

There is no provision for the filing of contracts with shippers, and no method of making them public defined in the statute.

Armour Packing Co. v. United States, 209 U. S. 56, 81, 52 L. ed. 681, 694, 28 Sup. Ct. Rep. 428; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 479, 55 L. ed. 297, 302, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265.

A law or a statute is binding, whether persons subject to the law are aware of it or not. A rate duly filed is unquestionably equally binding; but it is not, perhaps, a fortunate mode of expression, even in regard to the rate itself, to say that shippers are conclusively presumed to know it. It is submitted that the exact expression is that in Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 652, 57 L. ed. 683, 689, 33 Sup. Ct. Rep. 391, "want of knowledge is no excuse," or that in Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 197, 57 L. ed. 1446, 1451, 33 Sup. Ct. Rep. 893, "the tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike."

That the law recognizes the fact that a shipper may or may not know the rate is obvious from the criminal sections of the act. The words "wilfully," "willingly," and "knowingly" recur in the criminal provisions applicable to shippers. It can hardly be claimed that a shipper who ignorantly violated a prohibition of the act which was qualified by one of these words is guilty of a misdemeanor. Potter v. United States, 155 U. S. 438, 39 L. ed. 214, 15 Sup. Ct. Rep. 144. Yet, if it were true that he was conclusively presumed to know the contents of schedules duly filed, he would be violating the act wilfully, willingly, and knowingly.

Even in prosecutions under the Elkins act, which contains no express qualifying word such as "wilfully" or "knowingly," a shipper who ignorantly ships goods at a preferential rate is not criminally liable.

Standard Oil Co. v. United States, 90 C. C. A. 364, 164 Fed. 376; Standard Oil Co. v. United States, 103 C. C. A. 172, 179 Fed. 614.

There is no estoppel barring the defendant in error from showing the value of her baggage.

Re Released Rates, 13 Inters. Com. Rep. 550.

There is nothing in the decisions under the interstate commerce acts which is in conflict with the construction of the statute for which the defendant in error contends. It is, of course, well settled that a shipper has no redress because a rate is unreasonable, except by the direct proceedings allowed by the act (Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916), and the unreasonableness of a rule, regulation, or practice of a carrier must be objected to in the same way.

Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct. Rep. 938.

There is nothing in the decisions of this court at variance with these principles, nor does the case of Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148, and the cases which followed it (Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Chicago, St. P. M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep.

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391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397), limit the principle that there is no provision for the filing of contracts with shippers, and no method of making them public defined in the statute.

On the exact facts of Adams Exp. Co. v. Croninger, the Massachusetts court, shortly before it decided this case in favor of the shipper, had decided in favor of the carrier (Bernard v. Adams Exp. Co. 205 Mass. 254, 28 L.R.A.(N.S.) 293, 91 N. E. 325, 18 Ann. Cas. 351); and the court of appeals of New York had reached the same result (Greenwald v. Barrett, 199 N. Y. 170, 35 L.R.A.(N.S.) 971, 92 N. E. 218).

Yet neither the New York court nor the Massachusetts court felt that such decisions in the least interfered with the general rule that a passenger, or, indeed, any shipper of goods, could recover their full value if lost by negligence of the carrier, in the absence of a special contract of valuation or of limitation of liability. In the cases where the liability of the carrier has been held to be limited, there was, in fact, a special contract to that effect or an agreed valuation. In Adams Exp. Co. v. Croninger the shipper had accepted a receipt stating a valuation and limitation of liability as one of the terms of the contract contained in the receipt. This also was true in Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267.

In other recent cases (Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; and Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391), there was unquestionably assent in fact to the limitation of value.

Where a contract is made with a carrier which requires the court to choose between the alternative of saying that the rate is illegal or that the service contracted for is illegal, it is settled that the former alternative is the correct one.

Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802.

If it be assumed that the schedules do not permit the carrier to fulfil the contract which it made to carry goods at full liability because the value was not previously declared and the rate paid in advance, what is the consequence? Certainly, under the decision of Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501, the carrier would not be liable on its contract. But that the unenforceability of the contract would permit the carrier to destroy negligently the baggage intrusted to it, and pay for the consequences of its negligence at its own valuation, is emphatically denied. It is not a special service or privilege which the defendant seeks to enforce. Whether the agreement to carry baggage was valid or not, in any of its terms, is immaterial. The duty to restore the bailed goods without negligence is another matter.

Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A. 151 U. S. 368, 388, 38 L. ed. 195, 205, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367.

Nor is the railroad, on the assumption that its contract of carriage was invalid, in the position of a gratuitous bailee. It received the baggage as part of a business transaction in which it had a beneficial interest, and, in addition to the price of the passenger's ticket, received a payment on account of the weight of the baggage.

Judge v. Northern P. R. Co. 189 Fed. 1014.

The schedules filed make the defendant in error liable for the excess charge for value, and the railroad liable for the full value of the baggage.

Re Released Rates, 13 Inters. Com. Rep. 550; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 650, 57 L. ed. 683, 687, 33 Sup. Ct. Rep. 391.

There is no hardship on the carrier in the decision of the supreme court of Massachusetts. The obligation imposed by that decision is no greater than that which everywhere existed prior to the passage of the interstate commerce acts, and still exists as to intrastate shipments. To make inquiry from the passenger or shipper, or at least to give a receipt or bill of lading which states the terms upon which the carrier is willing to accept the goods, is all that is requisite. It is immaterial whether in any case the person presenting the goods has any knowledge of their value or authority to declare the same. The carrier may nevertheless demand from the person presenting the goods an acceptance or rejection of its terms, and the action of this person will bind the owner.

York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 113, 18 L. ed. 170, 172; Squire v. New York C. R. Co. 98 Mass. 239, 93 Am. Dec. 162; Hill v. Boston, H. T. & W. R. Co. 144 Mass. 284, 10 N. E. 836.

Mr. Justice **Day** delivered the opinion of the court:

Katharine Hooker brought an action in the superior court of Middlesex county, Massachusetts, to recover from the Boston & Maine Railroad as a common carrier on account of the loss of certain baggage belonging to her, which had been transported

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by the defendant in interstate commerce from Boston, Massachusetts, to Sunapee Lake station, New Hampshire, on September 15, 1908. The plaintiff recovered a judgment for the value of the baggage lost, with interest. The case was taken to the supreme judicial court of Massachusetts upon exceptions of the defendant, and upon its rescript, returned to the [107] superior court, overruling the exceptions (209 Mass. 508, 95 N. E. 945, Ann. Cas. 1912B, 669), judgment was there entered for the plaintiff for $2,253.77.

The defendant insists that the recovery of the plaintiff should have been limited to the sum of $100, in view of certain requirements made by it concerning the transportation of baggage, and filed with the Interstate Commerce Commission. From the findings of fact it appears that the baggage was checked upon a first-class ticket purchased for the plaintiff (although not used by her, she traveling upon another similar ticket purchased by herself); that at the time the baggage was checked the plaintiff had no notice of the regulations hereinafter referred to, limiting the liability of the defendant (further than such notice is to be presumed from the schedules filed and posted as hereinafter stated); that no inquiry was made by the defendant on receiving the plaintiff's baggage as to its value; that there was no evidence that any more expensive or different mode of transportation was adopted for baggage the value of which was declared to exceed $100 than for other baggage; that any reasonable person would infer from the outward appearance of the plaintiff's baggage when tendered to the defendant for transportation that the value largely exceeded $100, and that the loss of plaintiff's baggage was due to the negligence of defendant.

The court further found that previous to and during September, 1908, the defendant had published and kept open for inspection and filed with the Interstate Commerce Commission, in accordance with the act of Congress relating to interstate commerce and amendments thereto and the orders and regulations of the Commission, schedules giving the rates, fares, and charges for transportation between different points, including Boston and Sunapee Lake station, all terminal, storage, and other charges required by the Commission, all privileges and facilities granted or allowed, and all rules or regulations [108] which in any way affected or determined such rates, fares, and charges or the value of the service rendered to passengers; that during the same time, in accordance with an order of the Commission of June 2, 1908, making comprehensive regulations as to rate and fare schedules, the defendant had placed with its agent in Boston all rate and fare schedules and the terminal and other charges applicable to that station, and had enabled and required him to keep in accessible form a file of such schedules, and had instructed him to give information contained therein to all seeking it, and to afford to inquirers opportunity to examine the schedules, and that the defendant in the manner shown and in all other ways conformed to the acts of Congress and the orders and regulations of the commission with reference to such schedules. The court also found that the schedules contained provisions limiting the free transportation of baggage to a certain weight, and the liability of the defendant to $100, followed by a table of charges for excess weight, and also contained the following provision:

"For excess value the rate will be one half of the current excess baggage rate per 100 pounds for each $100, or fraction thereof, of increased value declared. The minimum charge for excess value will be 15 cents.

"Baggage liability is limited to personal baggage not to exceed $100 in value for a passenger presenting a full ticket and $50 in value for a half ticket, unless a greater value is declared and stipulated by the owner and excess charges thereon paid at time of checking the baggage;"

that the excess charge for transporting baggage valued at $1,904.50, which was the value of the baggage lost, from Boston to Sunapee Lake station during September, 1908, according to the schedules, was $4.75; that notices were posted at or near the offices where passenger's tickets were sold in the Boston [109] station, stating that tariffs naming the rates on interstate traffic were on file with the agent, and would be furnished for inspection upon application, and that notices were posted in the baggage room of that station, in a conspicuous place, and in sight of persons using the room for checking baggage, reading that personal baggage not exceeding $100 in value would be checked free for each passenger on presentation of a first-class ticket, and containing information with reference to excess weight. And the court further found that the plaintiff did not declare at the time her baggage was checked that it exceeded $100 in value, and did not pay any charges for valuation in excess of that amount.

It is to be borne in mind that the action as tried and decided in the state court was not for negligence of the railroad company as a warehouseman for the loss of the baggage after its delivery at Sunapee Lake

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station, but was solely upon the contract of carriage in interstate commerce.

The supreme judicial court of Massachusetts, in deciding the case, held that the interstate commerce act did not in any wise change the common-law rule, applicable in Massachusetts, that regulations of this character, limiting the amount of recovery for baggage lost, must be brought home to the knowledge of the shipper and assented to, or circumstances shown from which assent might be implied. In reaching this conclusion that learned court relied upon the case of Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132, in which case it was held that a state might apply its local law and policy to recovery for the loss of a horse shipped in interstate commerce from Albany, New York, to Cynwyd, in the state of Pennsylvania, and injured by the negligence of a carrier in the latter state, notwithstanding the bill of lading contained an express condition that the carrier assumed liability to the extent only of the agreed valuation in event of loss. [110] It was further held in the Hughes Case that the interstate commerce act, in the respect then under consideration, had not enacted an exclusive rule upon which recovery might be had governing responsibility for loss, and that as the law then stood the state might enforce its own regulations authorized by statute or judicial decision as to responsibility for such negligence.

Since the decision in the Hughes Case the Hepburn act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), has been passed, and this court has held that by virtue of that act (particularly § 7, the Carmack amendment) the subject of interstate transportation of property has been regulated by Federal law to the exclusion of the power of the states to control in such respect by their own policy or legislation. In this connection we may refer to the cases of Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman Bros. 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397.

The cases in 226 and 227 U. S., it is true, involved liability for express or freight shipments made upon express receipts, bills of lading, or separate contracts, showing on their face or by reference to tariffs the opportunity for valuation for the purpose of fixing the rate and liability, and the limitation appearing in such form of contract was declared to be valid and effectual to relieve the carrier from a greater liability than that therein expressed. But the court did not stop there: In Adams Exp. Co. v. Croninger, 226 U. S. 509, 57 L. ed. 321, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148, it said: "The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission." In Kansas City Southern R. Co. v. Carl, 227 U. S. 652, 57 L. ed. 688, 33 Sup. Ct. Rep. 391, this court said: "The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable, [111] and actual want of knowledge is no excuse. The rate, when made out and filed, is notice, and its effect is not lost, although it is not actually posted in the station. Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648. It would open a wide door to fraud and destroy the uniform operation of the published tariff rate sheets. When there are two published rates, based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value. Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. . . . To the extent that such limitations of liability are not forbidden by law, they become, when filed, a part of the rate." And in Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 669, 57 L. ed. 697, 33 Sup. Ct. Rep. 397, this court said that the shipper was compelled to take notice of the rate sheets contained in tariff schedules, "not only because referred to in the contract signed by them, but because they had been lawfully filed and published. . . . When the carrier graduates its rates by value and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation automatically determines which of the rates is the lawful rate." In Chicago, R. I. & P. R. Co. v. Cramer, 232 U. S. 490, ante, 697, 34 Sup. Ct. Rep. 383, this court said: "That rule of liability [the uniform rule established by the Hepburn act] is to be enforced in the light of the fact that the provisions of the tariff enter into and form a part of the contract of shipment, and if a regularly filed tariff offers two rates, based on value, and the goods are forwarded at the low value in order to secure the low

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rate, then the carrier may avail itself of that valuation when sued for loss or damage to the property." And in Great Northern R. Co. v. O'Connor, 232 [112] U. S. 508, ante, 703, 34 Sup. Ct. Rep. 380, this court said: "But so long as the tariff rate, based on value, remained operative, it was binding upon the shipper and carrier alike, and was to be enforced by the courts in fixing the rights and liabilities of the parties. The tariffs are filed with the Commission and are open to inspection at every station. In view of the multitude of transactions, it is not necessary that there shall be an inquiry as to each article, or a distinct agreement as to the value of each shipment. If no value is stated, the tariff rate applicable to such a state of facts applies. If, on the other hand, there are alternative rates based on value, and the shipper names a value to secure the lower rate, the carrier, in the absence of something to show rebating or false billing, is entitled to collect the rate which applies to goods of that class, and if sued for their loss it is liable only for the loss of what the shipper had declared them to be in class and value."

Before these cases were decided this court had held that the effect of filing schedules of rates with the Interstate Commerce Commission was to make the published rates binding upon shipper and carrier alike, thus making effectual the purpose of the act to have but one rate, open to all alike, and from which there could be no departure. Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Armour Packing Co. v. United States, 209 U. S. 56, 81, 52 L. ed. 681, 694, 28 Sup. Ct. Rep. 428; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 476, 55 L. ed. 297, 301, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265. This principle, it will be perceived, was fully recognized in the series of cases decided since the passage of the Hepburn act, beginning with the case of Adams Exp. Co. v. Croninger, supra. It is true that the Carmack amendment requires a receipt or bill of lading to be issued concerning shipments of property in interstate commerce, and that in the cases construing that amendment a bill of lading was issued, and according to the circumstances of the case, the bill of lading and its effect are discussed in each of these, but the [113] effect of filing the schedule is not lost sight of, and the doctrine of the previous cases as to purpose of filing and the necessity of adherence to such schedule is uniformly recognized.

The court below, after conceding that the subject-matter of passenger's baggage in interstate travel is within the control of Congress, and saying that there was no specific regulation respecting it, said:

"The precise position of the defendant is that, as the limitation of liability for baggage was filed and posted as a part of its schedules for passenger tariff, the limitation thereby became and was an essential part of its rate, from which, under the interstate commerce law, it could not deviate, and by which the plaintiff was bound, regardless of her knowledge of or assent to it. If the premise is sound, then the conclusion follows, for the public are held inexorably to the rate published, regardless of knowledge, assent, or even misrepresentation. Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Melody v. Great Northern R. Co. 25 S. D. 606, 30 L.R.A. (N.S.) 568, 127 N. W. 543, Ann. Cas. 1912C, 727.

It follows, therefore, from the previous decisions in this court, that if it be found that the limitation of liability for baggage is required to be filed in the carrier's tariffs, the plaintiff was bound by such limitation. Having the notice which follows from the filed and published regulations, as required by the statute and the order of the Interstate Commerce Commission, she might have declared the value of her luggage, paid the excess tariff rate, and thus secured the liability of the carrier to the full amount of the value of her baggage, or she might, for the purpose of transportation, have valued it at $100, and received free transportation and liability to that extent only, or, as she did, she might have made no valuation of her baggage, in which event the rate and the corresponding liability would have automatically attached. As to the finding [114] that the plaintiff's baggage was apparently worth more than $100, as above set forth, it appears that the contents of the two trunks and suit case were not disclosed or known to the carrier, and the finding in this respect, necessarily based on the appearance of the baggage, cannot be said to show a procurement of transportation in violation of the requirements of the filed schedules at a rate disproportionate to its known value.

Let us now turn to the interstate commerce act and see whether the matter of the limitation of baggage liability is covered by that act. Section 6 provides:

"That every common carrier subject to the provisions of this act shall file with the Commission created by this act, and print and keep open to public inspection, schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route

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of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by and such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or [115] consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public, and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this act.

. . . . . .

"No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. . . ." [24 Stat. at L. 380, chap. 104, U. S. Comp. Stat. 1901, p. 3156, as amended by § 2 of act of 1906, 34 Stat. at L. 586, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1289.]

It is to be observed that the schedules are required to state, among other things, in naming certain charges, "all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee." The question then is, did the limitation as to liability for baggage, based [116] upon the requirement to declare its value when more than $100 was to be recovered, come within that provision?

It seems to us that the ordinary signification of the terms used in the act would cover such requirements as are here made for the amount of recovery for baggage lost by the carrier. It is a regulation which fixes and determines the amount to be charged for the carriage in view of the responsibility assumed, and it also affects the value of the service rendered to the passenger. Such requirements are spoken of, in decisions dealing with them, as regulations; as, a common carrier "may prescribe *regulations* to protect himself against imposition and fraud, and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter." York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 112, 18 L. ed. 170, 171. "It is undoubtedly competent for carriers of passengers, by specific *regulations*, distinctly brought to the knowledge of the passenger, which are reasonable in their character, and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk. And in order that such *regulations* may be practically effective and the carrier advised of the full extent of its responsibility, and, consequently, of the degree of precaution necessary upon its part, it may rightfully require, as a condition precedent to any contract for the transportation of baggage, information from the passenger as to its value; and if the value thus disclosed exceeds that which the passenger may reasonably demand to be transported as baggage without extra compensation the carrier, at its option, can make such additional charges as the risk fairly justifies." New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 27, 25 L. ed. 531, 533.

Mr. Justice Brewer, sitting in the circuit court, in Ames v. Union P. R. Co. 64 Fed. 165, 178, thus defined the term "regulation:" "Within the term 'regulation'[117] are embraced two ideas: one is the mere control of the operation of the roads, prescribing the rules for the management thereof,—matters which affect the convenience of the

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public in their use. Regulation, in this sense, may be considered as purely public in its character, and in no manner trespassing upon the rights of the owners of railroads. But within the scope of the word 'regulation,' as commonly used, is embraced the idea of fixing the compensation which the owners of railroad property shall receive for the use thereof; and when regulation in this sense is attempted, it necessarily affects the property interests of the railroad owners; and it is 'regulation' in this sense of the term."

Turning to the act itself we think the conclusion that this limitation is a regulation required to be filed by the act is strengthened by § 22, which provides: "But before any common carrier, subject to the provisions of this act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, *together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this act.*" [As amended 28 Stat. at. L. 643, chap. 61, U. S. Comp. Stat. 1901, p. 3171.] This section would indicate that Congress thought that § 6 of the act had to do with specifications of the amount of baggage which would be carried free, and that such regulations should be filed under the requirement of § 6 to which it referred.

This conclusion is further strengthened by the action of the Interstate Commerce Commission, in requiring by its Tariff Circular No. 15-A, entitled, "Regulations Governing the Construction and Filing of Freight Tariffs and Classification [118] and Passenger Fare Schedules," effective April 15, 1908, and in force at the time of the loss here in question, that:

"34. Tariffs shall contain, in the order named:

"(g) Rules and regulations which govern the tariff, the title of each rule or regulation to be shown in bold type. Under this head all of the rules, regulations, or conditions which in any way affect the fares named in the tariff shall be entered. . . . These rules shall include . . . the general baggage regulations, and also schedule of excess-baggage rates, unless such excess-baggage rates are shown in tariff in connection with the fares."

This requirement is a practical interpretation of the law by the administrative body having its enforcement in charge, and is entitled to weight in construing the act.

The act of June 18, 1910 (36 Stat. at L. 539, 546, chap. 309, U. S. Comp. Stat. Supp. 1911, p. 1288), defining, in § 1, the duties of carriers to make just and reasonable regulations affecting, among other things, the carrying of personal, sample, and excess baggage, may be noted in passing. This statute was before the Commission in a case involving such regulations. Regulations Restricting the Dimensions of Baggage, 26 Inters. Com. Rep. 292. Concerning it the Commission, by Clark, Chairman, said:

"Prior to June 18, 1910, the act to regulate commerce contained no specific provision relating to the interstate transportation of baggage, except in connection with the issuance of joint interchangeable mileage tickets. The Commission had, however, under authority of § 6, required carriers to publish and file their general baggage regulations and their schedules of excess baggage rates. Section 1 was amended on the date named, the amendment, in so far as it is material, reading as follows:

"'It is hereby made the duty of all common carriers subject to the provisions of this act to establish, observe, [119] and enforce . . . just and reasonable regulations and practices affecting classifications, . . . the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, . . . the carrying of personal, sample, and excess baggage.'"

And it is to be observed that the Commission considers its requirement with reference to including baggage regulations in the tariff schedules, quoted above, as adequate, for the same provisions appear in its current circular.

We are therefore of the opinion that the requirement published concerning the amount of the liability of the defendant, based upon additional payment where baggage was declared to exceed $100 in value, was determinative of the rate to be charged, and did affect the service to be rendered to the passenger, as it fixed the price to be paid for the service rendered in the particular case, and was, therefore, a regulation within the meaning of the statute.

By permitting the baggage regulations, including the excess valuation rate, to be filed and become part of the tariff schedules, the rule of the common law that the carrier becomes an insurer of the safety of baggage against accidents not the act of God or the public enemy or the fault of the passenger (the rule established in this country, 3 Hutchinson, Carr. § 1241) was not changed. The effect of such filing is

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to permit the carrier by such regulations to obtain commensurate compensation for the responsibility assumed for the safety of the passenger's baggage, and to require the passenger, whose knowledge of the character and value of his baggage is peculiarly his own, to declare its value and pay for the excess amount. There is no question of the reasonableness or propriety of making such regulations, which would be binding upon the passenger if brought to his knowledge in such wise as [120] to make an agreement or what is tantamount thereto. This much is conceded by the learned counsel for the plaintiff in error. The liability of a carrier under the interstate commerce act was said, in the Croninger Case (p. 511), to be (aside from the responsibility for the default of a connecting carrier) "not beyond the liability imposed by the common law, as that body of law applicable to carriers has been interpreted by this court as well as many courts of the states." And in that case (p. 509) it was laid down as the established rule of common law "as declared by this court in many cases that such a carrier may by a fair, open, just, and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk." And see the previous cases in this court there cited. But the effect of the regulations, filed as required, giving notice of rates based upon value when the baggage to be transported was of a higher value than $100, and the delivery and acceptance of the baggage without declaration of value or notice to the carrier of such higher value, charges the carrier with liability to the extent of $100 only.

The language of the regulation filed reads: Baggage liability is limited to personal baggage not to exceed $100 in value, etc., unless a greater value is declared, etc. We have said that this limitation does not relieve from the insurer's liability when the loss occurs otherwise than by negligence, and we think applies equally when negligence of the carrier is the cause of loss, as is found in this case. The effect of the filing gives the regulation as to baggage the force of a contract determining "Baggage liability." In Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151, followed in the later cases in this court, it was held that a recovery may not be had above the amount stipulated though the loss results from the carrier's negligence. "The carrier [121] must respond for negligence up to that value." The discussion and conclusion reached in the Croninger and Carl Cases, supra, leave nothing to be said on this point. This rule is recognized in New York (Tewes v. North German Lloyd S. S. Co. 186 N. Y. 151, 8 L.R.A.(N.S.) 199, 78 N. E. 864, 9 Ann. Cas. 909, 20 Am. Neg. Rep. 701; Gardiner v. New York C. & H. R. R. Co. 201 N. Y. 387, 34 L.R.A.(N.S.) 826, 94 N. E. 876, Ann. Cas. 1912B, 281).

If the charges filed were unreasonable, the only attack that could be made upon such regulation would be by proceedings contesting their reasonableness before the Interstate Commerce Commission. While they were in force they were equally binding upon the railroad company and all passengers whose baggage was transported by carriers in interstate commerce. This being the fact, we think the limitation of liability to $100 fixed the amount which the plaintiff could recover in this case, and there was error in affirming the recovery for the full value of the baggage, in the absence of a declaration of such value and payment of the additional amount required to secure liability in the greater sum.

We do not think the requirement of the Carmack amendment, that a railway company receiving property for transportation in interstate commerce shall issue a receipt or bill of lading therefor, required other receipts than baggage checks, which it is shown were issued when the baggage was received in this case. When the amendment was passed Congress well knew that baggage was not carried upon bills of lading, and that carriers had been accustomed to issue checks upon receipt of baggage. We do not think it was intended to require a departure from this practice when the matter was placed under regulation by schedules filed and subject to change for unreasonableness upon application to the Commission. Such checks are receipts, and there is no special requirement in the statute as to their form. It is doubtless in the power of the Interstate Commerce Commission to make requirements as to the checks or receipts to be given for baggage if that [122] subject needs regulation. Act of June 18, 1910, §§ 1 and 15 (36 Stat. at L. 539, chap. 309.)

Reversed and remanded to the Superior Court of Massachusetts for further proceedings not inconsistent with this opinion.

Mr. Justice Pitney, dissenting:

I have been unable to find a previous instance where any court, in this country, at least, in an action by shipper or passenger against common carrier for loss of freight or baggage, occasioned by the negligence of the carrier or its employees, has held the recovery to be limited to an arbitrary sum unrelated to the value of the goods lost, and this without any previous

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valuation or agreement assented to by the shipper or passenger, without any representation of value made by him, and without even notice brought home to him of any rule or regulation upon which the limitation of liability is based. The effect given by the present decision to a "regulation" prescribed by the carrier, that, while formally promulgated, was in fact unknown to the passenger, seems to me an entire departure from the principles governing the duties and responsibilities of common carriers as heretofore recognized by this court and by the courts of the states generally, as laid down in the text-books and cyclopedias of law, and as reiterated and applied by this court in a recent series of notable decisions.

We are referred to the "act to regulate commerce" of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), as amended in 1906 by the Hepburn act (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), with citation of the provision in § 6 of the act respecting the filing and publication of schedules showing the rates, fares, and charges for transportation, etc., and with particular emphasis upon the so-called Carmack amendment. I do not find in either of these any phrase or expression that manifests a legislative intent to lessen or limit in any way [123] the carrier's liability as quasi insurer, much less its responsibility for losses due to its own negligence or that of its employees. Neither enactment in terms imposes any duty or burden upon the shipper or passenger affecting the question at issue; and the Carmack amendment, at least, contains a clear expression of the legislative purpose to enforce the carrier's responsibility for losses of property caused by it, without regard to any rule or regulation exempting it.

The result reached in the present case—which seems so contrary to all previous adjudications and to the apparent meaning of the acts of Congress—is based (if I understand the opinion) not upon any legislation directly addressed to the particular subject, but upon inferences deduced by indirect reasoning from the assumed policy of the law. The reasoning, as I am constrained to believe, disregards familiar principles established by repeated decisions of this court, in the light of which Congress undoubtedly legislated; and it has the effect of placing honest but unskilled shippers and passengers at a serious disadvantage in dealing with common carriers, enabling the latter, by "regulations" never called to the attention of the former, to obtain practical immunity from responsibility for losses due to their own negligence.

The consequences are so serious that I have been unable to convince myself that I should acquiesce in silence.

The salient facts are mentioned in the opinion, but some are not noticed, and it is proper to state that plaintiff traveled, in September, 1908, as an interstate passenger upon defendant's train from Boston, Massachusetts, to Sunapee Lake, New Hampshire, having in fact paid two first-class fares, one ticket being used for the checking of her baggage, the other for her personal transportation. Defendant's schedules, filed with the Interstate Commerce Commission and published in the mode prescribed by the act of Congress, showed the rates of fares between [124] these places, and contained a provision stating that "one hundred and fifty pounds of personal baggage, not exceeding $100 in value, will be checked free for each passenger on presentation of a full ticket. . . . For excess weight, charge will be made as follows [here was inserted a table of charges for excess weights, and at the foot of it the following]: For excess value, the rate will be one half of the current excess baggage rate per 100 pounds for each $100, or fraction thereof, of increased value declared. The minimum charge for excess value will be 15 cents. Baggage liability is limited to personal baggage not to exceed $100 in value for a passenger presenting a full ticket . . . unless a greater value is declared and stipulated by the owner and excess charges thereon paid at time of checking the baggage." Plaintiff's baggage consisted of three pieces, of the value of $1,904.50, and the charge on this valuation for transportation from Boston to Sunapee Lake, acording to the schedules, would have been 25c. for each excess $100 or fraction thereof, or $4.75 in all. Plaintiff did not declare and stipulate at the time the baggage was checked that it exceeded $100 in value, and did not pay any charge for valuation in excess of that amount. Defendant's agents did not request any such declaration, and made no inquiry respecting value; but it is found as a fact that from the outward appearance of the baggage when tendered to defendant for transportation any reasonable person would have inferred that its value largely exceeded $100. There was nothing to show that any more expensive or different mode of transportation was adopted for baggage whose value was declared to exceed $100 than for other baggage. Nor was there anything to show that plaintiff, or her agent who attended to the checking of the baggage for her, had notice of defendant's regulations for limiting its liability. In the Boston passenger station notices were posted that "Freight [125] and passenger tariffs naming rates on interstate

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traffic are on file with the agent, and will be furnished for inspection upon application;" and in the baggage room was a notice that "One hundred and fifty pounds of personal baggage, not exceeding $100 in value, will be checked free for each passenger on presentation of a full ticket." There was nothing in either of these notices to call attention to any charge for excess value, nor any statement in terms that the baggage liability was limited to $100. Nor was it shown that the notices themselves were ever seen by plaintiff or her agent. It appears, however, that because the weight of her baggage exceeded by 45 pounds the weight allowable under the company's rules, a payment of 23 cents was made for checking the baggage. Ordinary numbered baggage checks appear to have been delivered to plaintiff's agent, but nothing else in the form of a receipt or bill of lading. The baggage was not lost in transit, but was destroyed by fire while in defendant's charge, more than twenty-six hours after its arrival at defendant's Sunapee Lake station. It was distinctly found as a fact that the loss was due to defendant's negligence.

In the trial court, plaintiff relied wholly upon a count of her declaration which, after reciting the status of defendant as a common carrier, and the contract of carriage in interstate commerce, averred as ground of recovery the neglect and refusal of defendant to deliver the baggage to plaintiff at Sunapee Lake upon demand made, accompanied with a tender of the checks. But the course of the trial shows that negligence was a principal issue, if not the only vital issue; both parties requested findings upon the question, and findings were made in response to their respective requests; and upon review the state supreme court treated negligence as the asserted ground of liability, saying (209 Mass. 599, 95 N. E. 945, Ann. Cas. 1912B, 669): "The plaintiff, an interstate passenger of the defendant, claims [126] damages in excess of $2,000 for loss of her baggage occurring through the negligence of the defendant."

Although, according to the well-known Massachusetts doctrine, the railroad company's responsibility strictly as carrier would seem to have terminated with the completion of the transit and the safe deposit of the baggage in the railroad station, its responsibility thereafter being that of warehouseman (Thomas v. Boston & P. R. Corp. 10 Met. 472, 477, 43 Am. Dec. 444; Norway Plains Co. v. Boston & M. R. Co. 1 Gray, 263, 273, 61 Am. Dec. 423; Barron v. Eldredge, 100 Mass. 455, 459, 1 Am. Rep. 126; Lane v. Boston & A. R. Co. 112 Mass. 455, 462; Stowe v. New York, B. & P. R. Co. 113 Mass. 521, 523; Rice v. Hart, 118 Mass. 201, 207, 19 Am. Rep. 433), the distinction appears to have been ignored by the Massachusetts court in discussing the case, perhaps because it does not affect the responsibility for loss of goods attributable to negligence; there being in this respect no difference between a carrier and a warehouseman. But it might affect the question whether defendant's responsibility is to be determined in the light of the interstate commerce act; and I concede that it is.

It is, of course, true that in Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148, this court held that by the Carmack amendment (34 Stat. at L. 595, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1307, set forth in the margin†) the [127] subject-matter of the liability of railroads under bills of lading issued for interstate freight is placed under Federal regulation so as to supersede the local law and policy of the several states, whether evidenced by judicial decision, by statute, or by state Constitution.

And I concede that the supreme court of Massachusetts erred if it intended to hold that the carrier's responsibility for interstate passengers' baggage is not likewise within the sweep of the amendment.

The concrete question, therefore, is whether, under the interstate commerce act and the Carmack amendment, this defendant's liability to plaintiff, upon the facts stated, is properly to be limited to $100.

My views, in brief, are:

(a) That the baggage regulation limiting the liability to the amount named (if construed as operative without the knowledge or consent of the passenger, and in the absence of an actual valuation of the goods, assented to by the passenger), is not authorized or sanctioned by the commerce act, and is invalid because contrary to the established policy of the law governing the common carrier in the performance of its

†"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

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public duties, and because contrary to the letter and spirit of the Carmack amendment.

(b) That the regulation had not received the approval of the Interstate Commerce Commission, but, on the contrary, was covered by an adverse administrative ruling made by the Commission a few months before the occurrences that gave rise to this action.

(c) That, being invalid *per se*, the regulation derived no legal force or vitality from being included in the filed and published schedules.

(d) That the filing of the regulation cannot give it the force of a contract, because (1) plaintiff was ignorant of the regulation in fact; (2) to make it a part of her contract without her knowledge would render it a contract limiting [128] the carrier's liability for negligence to an arbitrary sum, without any agreement or representation of value on the part of plaintiff, and therefore void as being contrary to the established public policy; and (3) the law will not raise by implication an agreement that is contrary to the policy of the law.

(e) That plaintiff is not estopped to recover the full value of her goods, for she was entirely free from blame in the matter, made no representation as to value, and sought no special advantage.

(f) That even were the contract of carriage as actually made invalid, this would not render the bailment unlawful, and (at least) the carrier would be responsible for the loss of the goods through negligence, irrespective of the contract.

(g) That by the terms of the Carmack amendment the railroad company in this case is precluded from setting up a limitation of liability, (1) because the limitation, as asserted against a passenger who was ignorant of the regulation, and had made no contract under it, amounts to a rule or regulation for exempting the carrier from liability for a loss of property caused by the carrier's negligence, contrary to the terms of the amendment; and (2) because the carrier waived any benefit of the regulation (if that were valid) by failing to deliver to plaintiff a receipt or bill of lading embodying the terms of the contract as required by the same enactment.

The importance of the subject seems to warrant a somewhat extended discussion.

(1) Reference is made to § 6 of the commerce act as amended by the Hepburn act; the portion relied upon being that which requires the filed and published schedules to state "any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee." [129] In this respect the act has remained substantially unchanged since the amendment of March 2, 1889 (25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. 1911, p. 3158), quoted in the margin.†

It is important to observe that § 6, either before or since the Hepburn act, *does not prescribe what the rules and regulations shall be.* Neither this section nor any other section of the act confers upon the carrier any authority over the subject. It is implied that there may be, indeed must be, rules and regulations for carrying on the business of a common carrier, in order to secure system, efficiency, and a just performance of its public duties; and § 6, recognizing this, prescribes—and, as I think, only prescribes—that whatever rules and regulations may be duly established which "in anywise change, affect, or determine the rates, fares, and charges, or the value of the [130] service rendered," shall be included in the filed and published schedules. But does it follow from this that the carrier may make any rules and regulations it chooses? Is the carrier to be a law unto

†"Sec. 6. That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing *the rates and fares and charges for the transportation of passengers and property* which any such common carrier has established and which are in force at the time upon its route. *The schedules* printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and *shall contain* the classification of freight in force, and shall also state separately the terminal charges and *any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges.* Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. . . . And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force."

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itself? And, if not, what are the limitations upon its power? The answer, I think, is plain. The authority to establish rules and regulations, unless it arise from express legislative authority, is derived by implication from the necessities of the case, in view of the nature of the business, and is plainly subject to the limitation that the rules and regulations shall not be such as to contravene the letter or the policy of the law, nor such as to evade responsibility for the due performance of the public duties of the carrier.

This is a principle universally recognized from an early day by the courts of this country, and it lies at the foundation of the rule everywhere prevalent (differing, in this regard, from the rule that prevailed in England for a time prior to the railway and canal traffic act 1854, 17 and 18 Vict. chap. 31, § 7), that the carrier cannot limit his liability by any general regulation or published notice.

It is for this reason, primarily, that the regulation here in question,—"Baggage liability is limited to personal baggage not to exceed $100 in value . . . unless a greater value is declared," etc., if treated as intended to be effective without the knowledge or assent of the passenger, seems to me to be a regulation entirely beyond the power of the carrier to establish. The state reports are full of cases recognizing the principle, and applying and enforcing it with respect to the particular subject-matter now under conisderation. It is not necessary, however, to go outside of our own reports, for this court from the beginning until now has constantly recognized and steadfastly enforced this limitation of the authority of the common carrier with respect to regulations of the same essential character as the one now in question.

[131] Thus, in New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 382, 12 L. ed. 465, 482, the court held that the carrier could not by published notices seeking to limit its responsibility exonerate itself from the duties which the law annexed to its employment. And, dealing with an express stipulation, the court, by Mr. Justice Nelson (p. 382), said: "But admitting the right thus to restrict his obligation, it by no means follows that he can do so by any act of his own. *He is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to.* He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. And we agree with the court in the case of Hollister v. Nowlen, 19 Wend. 234, 247, 32 Am. Dec. 455, that, if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and *nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment.*"

In York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 112, 18 L. ed. 170, 171, the court, speaking by Mr. Justice Field, said: "The law prescribes the duties and responsibilities of the common carrier. He exercises, in one sense, a public employment, and has duties to the public to perform. Though he may . . . prescribe regulations to protect himself against imposition and fraud, and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter, he can make no discrimination between persons, or vary his charges from their condition or character. [132] He is bound to accept all goods offered within the course of his employment, and is liable to an action in case of refusal. He is chargeable for all losses except such as may be occasioned by the act of God or the public enemy. He insures against all accidents which result from human agency, although occurring without any fault or neglect on his part; and *he cannot by any mere act of his own avoid the responsibility which the law thus imposes. He cannot screen himself from liability by any general or special notice, nor can he coerce the owner to yield assent to a limitation of responsibility by making exorbitant charges when such assent is refused.* The owner of the goods may rely upon this responsibility imposed by the common law, which *can only be restricted and qualified when he expressly stipulates for the restriction and qualification.* But when such stipulation is made, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement."

In Michigan C. R. Co. v. Mineral Springs Mfg. Co. 16 Wall. 318, 329, 21 L. ed. 297, 302, the court, after repeating the language I have quoted from the opinion in 6 How., proceeded to say: "These considerations against the relaxation of the common-law responsibility by public advertisements *apply with equal force to notices having the same object,* attached to receipts given by carriers on taking the property of those

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who employ them into their possession for transportation. Both are attempts to obtain, by indirection, exemption from burdens imposed in the interests of trade upon this particular business. *It is not only against the policy of the law, but a serious injury to commerce, to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to the public or special to a particular person, merely because he does not expressly dissent from them.* If the parties were on an equality in their dealings with each other there might be some show of reason for assuming acquiescence from silence, but in [133] the nature of the case this equality does not exist, and, therefore, every intendment should be made in favor of the shipper when he takes a receipt for his property, with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights. *It can readily be seen, if the carrier can reduce his liability in the way proposed, he can transact business on any terms he chooses to prescribe. . . . The law, in conceding to carriers the ability to obtain any reasonable qualification of their responsibility by express contract, has gone as far in this direction as public policy will allow.*"

So, in New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 27, 25 L. ed. 531, 533, the court said: "It is undoubtedly competent for carriers of passengers, by *specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character, and not inconsistent with any statute or their duties to the public,* to protect themselves against liability as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk. And in order that such regulations may be practically effective, and the carrier advised of the full extent of its responsibility, and, consequently, of the degree of precaution necessary upon its part, *it may rightfully require, as a condition precedent to any contract for the transportation of baggage, information from the passenger as to its value;* and if the value thus disclosed exceeds that which the passenger may reasonably demand to be transported as baggage without extra compensation, the carrier, at its option, can make such additional charge as the risk fairly justifies."

(2) And if it is against the policy of the law for a common carrier to limit its "common-law liability"—that of quasi insurer of goods—by general regulation or published notice not assented to by the passenger or shipper, this is more emphatically true with respect to its responsibility for losses due to the negligence of the carrier or of its servants; for, even by express contract, upon whatever [134] consideration, the carrier is not permitted to obtain exemption from liability for negligence. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 383, 12 L. ed. 465, 482; York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 113, 18 L. ed. 170, 172; New York C. R. Co. v. Lockwood, 17 Wall. 357, 375, 384, 21 L. ed. 627, 638, 641, 10 Am. Neg. Cas. 624; Bank of Kentucky v. Adams Exp. Co. 93 U. S. 174, 183, 23 L. ed. 872, 876.

The rule admits of but one exception, and that is hedged with important qualifications. It is, that where a contract of carriage is fairly made between shipper and carrier agreeing upon a valuation of the property carried, or based upon a valuation declared by the shipper and relied on by the carrier, with a rate of freight based upon a condition limiting the carrier's liability to the amount of the agreed or declared valuation, and the valuation is in good faith relied upon by the carrier, and is not a mere cover for an attempt by the carrier to escape liability for negligence, the contract will be recognized as a proper mode of securing a due proportion between the amount for which the carrier is responsible and the freight he receives, and the shipper will be estopped from claiming more than the agreed or declared valuation, even in case of a loss due to negligence. So it was laid down by this court in Hart v. Pennsylvania R. Co. 112 U. S. 331, 338, 28 L. ed. 717, 720, 5 Sup. Ct. Rep. 151, and the grounds of decision were expressed in the opinion of the court (by Mr. Justice Blatchford) in terms so clear that besides being uniformly followed by this court until now, they have been adopted generally by states that adhere to the common-law rules of liability. To quote from the opinion (112 U. S. 340): "As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. [135] *If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed* [citing cases]. This qualifi-

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cation of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract. The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. *The shipper is estopped from saying that the value is greater.*"

(3) Such was the state of the common law of this country, as universally recognized, when the interstate commerce act was passed, and I am unable to see in § 6, or elsewhere in that act, any purpose to change it. During the entire time that intervened between the passage of the act and the passage of the Hepburn act (including the Carmack amendment) in 1906, the courts of the states [136] (except in the few states that adopted a policy less favorable to the carrier) and the Federal courts generally administered the law as before, and without a suggestion, so far as I have observed, that § 6, in requiring that all rules and regulations having a bearing upon rates should be filed and published, had in any way authorized common carriers by any mere rule or regulation, although properly promulgated, to limit the liability for damages by negligence in the absence of an express agreement as to value assented to by the shipper, or some representation of value made by him.

Indeed, this court, in the recent case of Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 488, 48 L. ed. 268, 272, 24 Sup. Ct. Rep. 132, held that § 6, as it stood after the amendment of March 2, 1889, and before the Hepburn act, did not amount to a regulation of the matter of a limitation of the carrier's liability to a particular sum in consideration of lower freight rates for transportation. To quote from the opinion (pp. 487, 488): "It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms of the law relied upon we fail to find any such provision therein. The sections of the interstate commerce law relied upon by the learned counsel for plaintiff in error, 24 Stat. at L. 379, 382, chap. 104, U. S. Comp. Stat. 1901, p. 3154; 25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. 1901, p. 3158, provide for equal facilities to shippers for the interchange of traffic; for nondiscrimination in freight rates; *for keeping schedules of rates open to public inspection; for posting the same in public places, with certain particulars as to charges, rules, and regulations;* . . . giving remedies for the enforcement of the foregoing provisions, and providing penalties for their violation. . . . While under these provisions it may be said that Congress [137] has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, *we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations*, and, until Congress shall legislate upon it, is there any valid objection to the state enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate-commerce contracts of carriage?"

This query was by the decision answered in the negative. And as a result, notwithstanding § 6 of the commerce act, the courts of Pennsylvania were left free to disregard the rule laid down in Hart v. Pennsylvania R. Co. and to follow their own declared doctrine denying the right of a common carrier to limit its liability for losses due to negligence, even by a special agreement including a valuation assented to by the shipper. In this respect the situation was changed by the Carmack amendment to the Hepburn act, but not (so far as I can see) by any of the changes made in § 6 by that act.

(4) And I had supposed that since as before the Carmack amendment, under the decisions of this court in Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148, and the other cases that have followed it along the same line, the general rules of

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law that disabled the common carrier from establishing regulations for limiting its liability by general notice not brought home to the shipper, and debarred the carrier from limiting its liability for losses due to negligence except by a special agreement including a fair valuation assented to by the shipper, had remained in full force and vigor, and indeed, by the effect of the amendment, had been made the exclusive rule of conduct for interstate carriers by rail. For the Croninger Case not only held (negatively) that the amendment superseded state laws upon the subject, but (affirmatively) [138] that in matters not covered by its own express terms it had the effect of establishing the common-law rules respecting the carrier's liability, as laid down in previous decisions of this court, and adopted generally by the Federal courts. To quote from the opinion (p. 504): "Prior to that amendment the rule of carrier's liability, for an interstate shipment of property, as enforced in both Federal and state courts, was either that of the general common law as declared by this court and enforced in the Federal courts throughout the United States (Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151), or that determined by the supposed public policy of a particular state (Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132), or that prescribed by statute law of a particular state (Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289). Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject" (Page 505): "That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it." (Page 507): "But it has been argued that the nonexclusive character of this regulation is manifested by the proviso of the section, and that state legislation upon the same subject is not superseded, and that the holder of any such bill of lading may resort to any right of action against such a carrier conferred by existing state law. This view is untenable. It would result in the nullification of the regulation of a national subject and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress [139] to put an end to. . . . *To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing Federal law at the time of his action gives to it a more rational interpretation* than one which would preserve rights and remedies under existing state laws, for the latter view would cause the proviso to destroy the act itself."

It was upon this construction of the act that we proceeded to determine the validity of the provision in the receipt or bill of lading there in question, which limited the liability of the carrier to the agreed value of $50; and we applied thereto the familiar rules to which I have already referred. Thus (p. 509): "That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary. York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 18 L. ed. 170; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624; Bank of Kentucky v. Adams Exp. Co. 93 U. S. 174, 23 L. ed. 872; Hart v. Pennsylvania R. Co. 112 U. S. 331, 338, 28 L. ed. 717, 720, 5 Sup. Ct. Rep. 151. The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this, and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. *But the rigor of this liability might be modified through any fair, reasonable, and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants.* The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported. It has therefore become *an established rule of the common law as declared by this court in many cases that such a carrier may by a fair, open, just, and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the* [140] *purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk.*"

The other decisions that have followed the Croninger Case (Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Chicago, St. P. M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; Kansas

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City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman Bros. 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Chicago, R. I. & P. R. Co. v. Cramer, 232 U. S. 490, ante, 697, 34 Sup. Ct. Rep. 383; Great Northern R. Co. v. O'Connor, 232 U. S. 508, ante, 703, 34 Sup. Ct. Rep. 380) have simply applied the doctrine therein laid down, under varying circumstances.

In each of these cases there was a special contract, held by the court to have been fairly made, and to amount to a valuation by the shipper of the goods in question for the purposes of the shipment. In short, the court in each instance applied the rule of liability laid down in Hart v. Pennsylvania R. Co. supra.

(5) Because of this firmly established policy of the law respecting the carrier's responsibility for the consequences of his negligence, I should have construed the "regulation" in question, limiting the baggage liability to $100, in subordination to that policy. According to the canon uniformly applied in construing statutes, that of giving them no meaning beyond that which the legislature may constitutionally enact, I should have construed the baggage regulation as a formula for standardizing the contracts proposed to be made by the carrier with the assent of passengers; not that the formula of itself constituted a substitute for a contract, or was intended to become binding upon the passenger until directly brought to his notice and in some way consciously assented to by him.

But my brethren construe it as binding in the absence of any knowledge or assent on the part of the passenger. So considered, I deem it void as being a regulation that it was beyond the power of the common carrier to adopt. And if I am right about this, the fact that it was included [141] in the filed and published schedules does not in the least add to its efficacy.

It is not a question of mere unreasonableness. A carrier may resort to practices that are so clearly unwarranted by law as to require no preliminary application to the Commission, and that not even the sanction of the Commission could validate. I think the attempt to enforce, *ex parte*, such a limitation of liability, is in that category.

(6) But, in fact, the Commission had distinctly ruled against the validity of the regulation in question, construed as the court now construes it; and had done this prior to the time this action arose.

I find nothing savoring of approval in ¶ 34(g) of Tariff Circular No. 15A, effective April 15, 1908. The reference to "excess-baggage rates" is to charges for excess weight, as I think sufficiently appears from 26 Inters. Com. Rep. 292. But, if intended to apply to excess value, it does not suggest that a limitation of liability for losses attributable to negligence, effective without the knowledge or consent of the passenger, is to be made a part of such regulations.

And in Re Released Rates, 13 Inters. Com. Rep. 550, decided May 14, 1908, the Commission, after full hearing and consideration, made an administrative interpretation of the Carmack amendment, holding distinctly that it did not abrogate the law of the Lockwood Case, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624, and the Hart Case, 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151. Among other rules laid down (Mr. Commissioner Lane writing) were these (p. 553): "(b) When the shipper has placed upon his goods a specific value, the carrier accepting the same in good faith as their real value, the rate of freight being fixed in accordance therewith, the shipper cannot recover an amount in excess of the value he has disclosed, even when loss is caused by the carrier's negligence" [citing the Hart Case, and quoting in italics from the opinion to the effect that under the circumstances disclosed "*the shipper is estopped* [142] *from saying that the value is greater*"]. And again (p. 554): "The same principle is applicable when the shipper has in some other way concealed the nature or the value of his goods in order to secure a lower rate of freight. . . . It does not appear that this principle is in any respect in derogation of the provisions of § 20 [meaning the Carmack amendment]. The carrier is made liable 'for any loss, damage, or injury,' and 'no contract, receipt, rule, or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed.' But it is of the highest importance to note that this limitation is not secured by contract or notice—the contract has no validity *per se*. It is only right that a carrier who has acted in good faith should be protected against the frauds and misrepresentations of the shipper, and the law accomplishes this through the operation of the principle of estoppel. The shipper is estopped from recovering an amount in excess of the declared value, and the rule is in perfect harmony with the law as it stands to-day. 6 Cyc. title 'Carriers,' p. 401, note 5. (c) *If the specified amount does not purport to be an agreed valuation, but represents an attempt on the part of the carrier to limit the amount of recovery to a fixed sum, irrespective of the actual value, the stipulation is void as against loss due to the carrier's negligence or other miscon-*

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duct. Much confusion has arisen from failure to distinguish between this situation and the situation comprehended in Hart v. Pennsylvania R. Co. supra. That decision was expressly predicated upon the principle of estoppel; the shipper had misrepresented the value of his property, and had thereby secured the benefit of a lower rate than he was properly entitled to by virtue of the real value. He was estopped by his fraudulent conduct from recovering an amount in excess of the value he had declared. In the case we are now considering, the requisites of estoppel are wanting. An estoppel cannot [143] arise unless the party invoking it has been the victim of misrepresentation, and has himself acted in good faith. Can it possibly be argued that when a carrier has arbitrarily placed in its bill of lading a stipulation limiting the amount of its liability, regardless of the actual value of the property, it may claim the benefit of an estoppel? Obviously not; it has not acted in good faith, neither has it been the victim of misrepresentation." And again (p. 556): "(d) *If the specified amount, while purporting to be an agreed valuation, is in fact purely fictitious, and represents an attempt to limit the carrier's liability to an arbitrary amount, liability for the full value cannot be escaped in event of loss due to negligence.* This situation is substantially identical with that just considered,—the difference is one in form only."

(7) In the Hart Case, 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151, the fundamental ground of decision, as appears from what has been quoted from the opinion, was that since the shipper had entered into a special agreement for the purpose of cheapening the freight, *he was estopped from saying that the value of the goods was greater than the value represented by him for the purposes of the agreement.* So, also, in the Croninger Case, and the other recent cases referred to, *estoppel was the ground of decision,* as the opinions clearly show (226 U. S. p. 510, bottom; 227 U. S. p. 476, top; 227 U. S. p. 651, top; 227 U. S. p. 668, bottom). When participating in these decisions, I, for one, so understood them. In each case the principle of estoppel is essential to the reasoning. In the Carl Case, 227 U. S. 651, 57 L. ed. 688, 33 Sup. Ct. Rep. 391, it was said: "When a shipper delivers a package for shipment and declares a value, either upon request or voluntarily, and the carrier makes a rate accordingly, the shipper is estopped upon plain principles of justice from recovering, in case of loss or damage, any greater amount. The same principle applies if the value be declared in the form of a contract. If such a valuation be made in good faith for [144] the purpose of obtaining the lower rate applicable to a shipment of the declared value, there is no exemption from carrier liability due to negligence forbidden by the statute when the shipper is limited to a recovery of the value so declared. The ground upon which such a declared or agreed value is upheld is that of estoppel" [citing the Hart Case upon this precise point]. And in the Harriman Case (227 U. S. 668, 57 L. ed. 696, 33 Sup. Ct. Rep. 397), the topic is summed up as follows: "The ground upon which the shipper is limited to the valuation declared is that of estoppel, and presupposes the valuation to be one made for the purpose of applying the lower of two rates based upon the value of the cattle. This whole matter has been so fully considered in Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148, and Kansas City Southern R. Co. v. Carl, supra, that we only need to refer to the opinions in those cases without further elaboration."

That these decisions are inconsistent with the theory that the mere act of including the regulations upon the subject in the filed schedules would operate to limit the liability of the carrier, without any representation or agreement as to value, assented to by the shipper, seems to me equally clear. Although in each case the relation of the rate differential to the question of valuation was brought home to the shipper, so that it appeared that the shipper had actual notice of the regulation upon the subject contained in the filed and published schedules, it was not suggested that the mere existence of such a regulation, coupled with the fact that the shipment was made at the more advantageous freight rate, had the effect of limiting the liability of the carrier in the event of a loss attributable to negligence. On the contrary, while the relation of the rate differential to the valuation was discussed, it was treated as merely showing that there was consideration for the agreement made by the shipper limiting the responsibility of the carrier, and as showing [145] the reasonableness of that agreement and the grounds of the estoppel that grew out of it. It was in each case plainly implied, if not expressed, that some representation or valuation, consciously assented to by the shipper, was essential to the limitation of the carrier's liability.

In the present case there is no ground for an estoppel against the plaintiff. She made no representation of any kind, her silence being attributable to her ignorance of the existence of the baggage regulation. No estoppel arises where the conduct of the party sought to be estopped is due to igno-

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rance founded upon an innocent mistake; and the same is more evidently true when the innocent party is silent because not asked to speak, and unaware that there is occasion—much less, duty—to speak. There is, I think, no support in reason or authority for holding that a person acting in good faith, but in ignorance of his rights or of the rights of the other party, should be estopped on the ground of knowledge imputed to him by a mere fiction of the law. It is only when good faith requires one to speak that silence estops him; and in the findings of fact in this case there is not the slightest ground to attribute to the plaintiff any want of good faith. Estoppel *in pais* presupposes an actual fault or a culpable silence. Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 605, 19 L. ed. 1008; Morgan v. Chicago & A. R. Co. 96 U. S. 716, 720, 24 L. ed. 743, 744.

And it seems sufficiently obvious that the railroad company did not in anywise rely upon plaintiff's silence to its disadvantage. There would, I think, be more reason for holding the company itself estopped, because it, and not the plaintiff, had knowledge of the baggage regulation; and, according to the findings, it was charged with notice that the baggage was worth much more than $100; and the circumstances appearing from the facts as found clearly indicate that plaintiff, through her agent, in effect tendered herself ready and willing to pay for her fare and baggage charges whatever was proper under the [146] circumstances; and the company set its own price for the service it was to render.

When the carrier was thus applied to by one of the traveling public for the performance of a transportation service in the line of its public duty, without any intimation that anything less than the full measure of the carrier's responsibility would be accepted, it was the carrier's duty, I think, according to principles hitherto recognized, to quote a rate commensurate with the service demanded, including an unlimited responsibility where nothing less was mentioned. If the law required it to charge a higher rate for unlimited than for limited responsibility, it was its duty to quote such higher rate. Having failed to do this, it ought not afterwards to be permitted to take advantage of its own wrong. In view of the commerce act, I do not think the carrier, under such circumstances, is estopped from afterwards claiming the additional compensation that it ought to have exacted when quoting the rate. But I do think it ought to be held estopped from setting up any limitation of its responsibility, when no such limitation was in the contemplation of the patron on demanding the service.

(8) As I read the interstate commerce act, it expresses in its own terms the extent of the prohibition of special contracts of carriage. As has often been said, the main purpose of the act was to prevent discrimination, and the filing of the schedules is the principal means to that end. Section 6, as amended in 1906 (34 Stat. at L. 587, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1290), prohibits the carrier from transporting passengers or property unless the rates, fares, and charges upon which the same are transported have been filed and published in accordance with the act; from charging or collecting a different compensation for such transportation or for any service in connection with it than as specified in the tariff; and from refunding or remitting in any manner or by any device any portion of the specified rates, or extending [147] to any shipper or person any privileges or facilities except such as are specified in the tariff. When, therefore, a carrier has established and promulgated its tariff, with regulations as to service such as it has a lawful right to establish, the effect of § 6 is to render unlawful any special contract of carriage made in contravention of the rates and regulations thus standardized in accordance with the law. Such is the effect of § 6 of the act, and it was held to have that effect before the passage of the Hepburn act. Gulf, C. & S. F. R. Co. v. Hefley (1895) 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Texas & P. R. Co. v. Mugg (1906) 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648. All of these cases arose before the Hepburn act, and the decisions were based upon § 6 of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), as amended by act of March 2, 1889 (25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. 1901, p. 3158, set forth above in the margin), which required the carrier to print and publicly post at each station for the inspection and information of the public the schedules of fares and rates for carriage of passengers and property, and provided that it should be unlawful for the carrier to depart from the published schedules; and upon the 3d section of the original act, which made it unlawful to give any undue or unreasonable preference or advantage to any particular shipper. In the Hefley Case the question decided was simply that a statute of Texas imposing a penalty for a failure to deliver goods on tender of the rate named in the bill of lading was not applicable to interstate ship-

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ments. But the effect of the decision was to declare that one who had obtained from a common carrier transportation of goods from one state to another at a rate specified in the bill of lading, but less than the published schedule of rates filed with and approved by the Interstate Commerce Commission and in force at the time, whether he did or did not know that the rate obtained was less than the scheduled rate, was not entitled to recover the goods upon the tender of payment [148] of the amount of charges named in the bill of lading, or of any sum less than the scheduled rates; in other words, that a special contract inconsistent with the published tariff could not avail. This principle was adopted as the ground of decision in the Mugg Case. And in the Kirby Case, likewise, it was held that as the broad purpose of the act was to compel the establishment of reasonable rates and their uniform application, a special contract by which advantage was given to a particular shipper could not be enforced. The distinction between a ground of action based upon the breach of such a special contract and one based upon the carrier's liability for negligence was clearly recognized in the opinion (p. 166), and the latter ground of liability rejected because not presented by the record. To the same effect is Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 476, 55 L. ed. 297, 301, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265, which arose after the Hepburn act.

These cases rest fundamentally upon the ground that to allow the shipper to have the benefit of a special agreement for lower rates or for better service than the standard rates and service prescribed by the published schedules would in effect compel the carrier to violate the provisions of the act. In this sense, and to this extent, all shippers are "bound" by the provisions of the act that bind the carrier. But to say that because of this a shipper or a passenger who has made no special contract at all, and claims the benefit of none, shall be conclusively deemed to have made a special contract, involving terms and conditions of which he was wholly ignorant, strikes me as a manifest *non sequitur*. And to hold that a passenger whose rights rest not upon any contract of shipment, but upon the negligence of the carrier, shall be barred from recovering full redress for the consequences of that negligence, upon the theory that he has unconsciously attempted to make a special contract in contravention of the act, is, I submit with respect, equally illogical. It seems also a [149] complete reversal of the Hart Case and the Croninger Case, which declare that a carrier's liability for negligence can only be limited by such a contract or representation as shall estop the shipper,—to now hold that without any express contract or representation by the shipper the liability is limited, on the theory that he is legally charged with notice of requirements of which he was in fact ignorant.

It is true that in the case at bar, the supreme court of Massachusetts (209 Mass. at p. 602) unnecessarily, and, as I think, erroneously, conceded that if the regulation limiting the baggage liability to $100 in value was so related to the rates of transportation of passengers as to be a part of such rate, the plaintiff was "bound," regardless of her knowledge or assent, and therefore her recovery in this action would be limited accordingly. The error, as it seems to me, arose from a misconception of the effect of the decisions in the Hefley and Mugg Cases. The fallacy, if I am correct in deeming it to be such, lies in the double sense of the word "bound." I respectfully suggest that this court, in a matter of such far-reaching importance, ought not to accept the concession without testing its soundness.

If it were said that because she did not know of, and therefore did not assent to, a limitation of liability to $100, she remained still liable to pay to the railroad company the amount of money properly chargeable for the excess of valuation, and that the company had a lien upon the baggage for this amount on its arrival at destination, I could see the force of the suggestion. This would, perhaps, be within the doctrine of the Hefley and Mugg Cases. (Of course, I do not mean to say that the lien would survive after the goods were lost through the company's negligence.) But I can find nothing in any of the cases referred to that lends support to the view that a railroad company can limit its liability by limiting the rate charged, [150] without according to the shipper or passenger any voice in the matter.

The expressions employed in the Carl Case, 227 U. S. 652, 57 L. ed. 688, 33 Sup. Ct. Rep. 391, that "the valuation the shipper declares determines the legal rate where there are two rates based upon valuation," and that "when there are two published rates, based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value," had reference to the effect of a voluntary declaration made by a shipper who fixes the valuation of his goods for the purposes of the shipment, knowing that the valuation determines the rate that must be charged, although perhaps unaware what the precise rate may be. The same is true of similar language used in the Harriman Case, 227

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U. S. at p. 669, 57 L. ed. 697, 33 Sup. Ct. Rep. 397, the Cramer Case, 232 U. S. at p. 493, ante, 698, 34 Sup. Ct. Rep. 383, and the O'Connor Case, 232 U. S. at p. 515, ante, 706, 34 Sup. Ct. Rep. 380. I am unable to see that the reasoning applies to the case of a shipper or passenger who has declared no valuation, has exercised no choice, and is unaware that a choice is open.

To say that constructive notice of the filed regulation, of which plaintiff was in fact ignorant, gave her an actual opportunity to declare the value of her baggage, pay the excess tariff rate, and thus secure the liability of the carrier to the full amount of her baggage, is to say that a fiction is the same as a fact.

(9) In the Croninger Case, and the others of the same class, the shipper consciously accepted a benefit in the form of a reduced freight charge as the consideration of an agreement voluntarily made, valuing the goods for the purposes of the shipment. But here the plaintiff did nothing of the kind. She paid the full price asked by the carrier for transportation of herself and her baggage, unaware of any regulation of the carrier that would require the payment of an additional charge for an unlimited liability for baggage. If she were setting up and relying upon any special contract made in violation of the law, [151] the doctrine of the Hefley, Mugg, and Kirby Cases would apply. But her cause of action is complete without resort to any contract, special or general; and the contract of which her passage tickets and the baggage checks were the tokens was merely the medium by which the carrier became possessed of her baggage. Having that baggage in its possession, the responsibility of the carrier for the exercise by itself and its employees of reasonable care for the safety of the goods arose under general principles of law independent of the contract; and those general principles as administered in the Federal courts (the same as in the courts of Massachusetts), entitled her to compensation upon the basis of the actual value of the goods lost, in the absence of a special agreement or of some representation of value made by her, limiting that liability.

Conceding, for argument's sake, that the contract of carriage as made between plaintiff and defendant, if deemed to import responsibility for the entire value of the baggage, was invalid because not made in accordance with the regulations filed and published in connection with the rate schedules, and because of the provisions of the interstate commerce act that in effect forbid the making of contracts otherwise than in accord with those schedules,—even so, the plaintiff was in nowise at fault. She was unaware that she was at liberty to exercise any option, to say nothing of being under an obligation to do so. The fault was wholly with defendant, for it made no inquiry respecting the value of her baggage, and gave her no notice of any limitation of liability, although itself charged with notice from the very appearance of the baggage that it must have been worth more than $100. And her present action is based upon the carrier's negligence, and not upon an affirmance of the contract.

Irrespective of the contract, the carrier, like any other bailee for hire, was bound to take reasonable care to preserve the property ready for delivery to its owner. I can [152] find nothing in the letter or the spirit of the commerce act that forfeits her property or any part of its value because of her violation of the act, supposing her to have violated it. And since, through the carriers' negligence, the property was lost, it follows, on general principles, that her right of action, upon grounds independent of the contract, remains; it being based upon the general obligation of the bailee to do justice. The principle is fundamental and familiar, and has been applied in a great variety of cases. Planters' Bank v. Union Bank, 16 Wall. 483, 500, 21 L. ed. 473, 480; Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co. 23 How. 209, 217, 16 L. ed. 433, 435; Congress & E. Spring Co. v. Knowlton, 103 U. S. 49, 58, 26 L. ed. 347, 350; Armstrong v. American Exch. Nat. Bank, 133 U. S. 433, 466, 33 L. ed. 747, 759, 10 Sup. Ct. Rep. 450; Logan County Nat. Bank v. Townsend, 139 U. S. 67, 75, 35 L. ed. 107, 111, 11 Sup. Ct. Rep. 496; Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 151, 43 L. ed. 108, 114, 18 Sup. Ct. Rep. 808. And see Newbury v. Luke, 68 N. J. L. 189, 191, 52 Atl. 625; Dunlop v. Mercer, 86 C. C. A. 435, 156 Fed. 545, 555; Re T. H. Bunch Co. 180 Fed. 519, 527.

In Merchants' Cotton Press Co. v. Insurance Co. of N. A. 151 U. S. 368, 388, 38 L. ed. 195, 205, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367, this court held that while an agreement for special rates, rebates, or drawbacks was void under the interstate commerce act, the law did not make the contract of affreightment otherwise void, nor prevent liability on the part of the carrier for the freight received; that such a construction would encourage rather than discourage unlawful agreements for rebates, since the carrier might prefer them to a liability for the freight; and that although the contract for rebate was void and unenforceable, the shipper could nevertheless recover for loss of his freight through the carrier's negligence. This decision has never

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been overruled or qualified, and it seems to me quite decisive of the present question.

(10) Thus far I have treated the case as one arising under the common-law rules respecting the carrier's liability, as laid down in the decisions of this court and adopted generally by the Federal courts. I have endeavored [153] to show that a limitation of the carrier's liability is not permitted except it result from some actual representation or contract consciously assented to by the shipper, valuing the goods for the purposes of the shipment; that the sole ground for limiting the responsibility to this extent is that the shipper is estopped by his contract or his representations; that no different result is to be derived by any implication from the provisions of § 6 of the interstate commerce act, which merely prevents the making of a special agreement inconsistent with the schedules, and does not compel the assumption (contrary to the fact) that a special agreement was made in conformity to them; that an agreement inconsistent with the schedules, even if void in itself, does not make the contract of affreightment otherwise void, nor prevent liability on the part of the carrier for loss of the goods attributable to its negligence; and that a shipper who has acted in good faith is not to be estopped upon the theory that a fiction or presumption of knowledge is equivalent to actual knowledge, or amounts to the same as conscious misrepresentation. I have hitherto refrained from attributing any special force to the Carmack amendment as regulative of the subject-matter.

But let us now consider the specific force of that amendment (34 Stat. at L. 595, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1307, quoted in marginal note, ante, p. 534). It declares (*inter alia*) that a railroad company receiving property for interstate transportation "shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it . . . , and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed." It was concerning this provision that the court said in the Croninger Case, speaking by Mr. Justice Lurton, 226 U. S. 505, 57 L. ed. 319, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148: "That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces [154] the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract." This was equivalent to saying that because the carrier was obliged to issue to the shipper a receipt or bill of lading for the goods, and because the terms of the contract of carriage and rules and regulations pertaining thereto are presumably embodied in the receipt or bill of lading, therefore the act must be deemed an exercise by Congress of its general and exclusive power over the subject-matter.

And the language of the enactment shows that it was framed in view of the general and familiar practice of embodying in the receipt or bill of lading all the terms of the contract, including the valuation of the goods and the rules and regulations for limiting the liability of the carrier. Is it not perfectly manifest that when Congress declared that the carrier "shall issue a receipt or bill of lading" it intended that this document should embody the "contract, receipt, rule, or regulation" that are mentioned in the same clause? Is it possible, without twisting the words from their plain meaning, to read this so that the duty of the carrier shall be performed if it issues a receipt or bill of lading that does not evidence the contract between the parties, and the whole of that contract?

But in the present case there was no receipt or bill of lading within the meaning of the Carmack amendment as thus interpreted. There was nothing but three baggage checks, each bearing an identifying number, but, so far as the case shows, nothing else. I cannot agree that the statute leaves the carrier free to give a mere identifying token, instead of a "receipt or bill of lading." But, if I am wrong in this, it seems too clear for argument that so far as the carrier intends that any of its rules or regulations respecting its responsibility for the baggage are to be imported into the contract, it is incumbent upon it to set [155] them forth plainly in a bill of lading delivered to the shipper or passenger. If the act admits of the construction that a mere identifying token or check can be used in the place of a formal receipt or bill of lading, it for that reason must require the construction that the carrier may, and that he does thereby, waive the benefit and protection of the rules and regulations. For I cannot believe that the Carmack amendment is open to the construction that the shipper shall be bound by special terms or conditions respecting anything pertaining to the contract of carriage and the carrier's responsibility, while the shipper is in fact ignorant of them. This would leave the carrier free to set a trap for the innocent shipper or passenger. Nor can I agree that the act requires any affirmative regulation by the Interstate Commerce Commission prescribing the form of receipts to be given for baggage. I con-

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cede the Commission may regulate the matter, so long as it does so in conformity to the letter and spirit of the statute; but not that the act remains without vitality until the Commission breathes into it the breath of life. In my view, the railroad company in the present case, having failed to give such a receipt or bill of lading as the statute contemplates, cannot be heard to set up any limitation of its liability for the value of the goods, for it would thereby in effect claim a benefit from its own violation of the law.

I submit that the Hepburn act, like the original act and its other amendments, is intended to impose duties upon the carrier,—the public servant,—not upon the shipper or passenger. There is nothing in the letter or the policy of the acts to absolve the carrier from its long-recognized duty to treat all shippers and passengers fairly, and to give them an actual opportunity to make a choice, where a choice is legally open to them. A carrier may not absolve himself in whole or in part from his responsibilities by any *ex parte* action. And where the rate schedules and accompanying regulations are designed to give an option [156] to the shipper, it is, I submit, incumbent upon the carrier to see that the option is in good faith tendered, or else abide by the more onerous of the alternatives. The Carmack amendment means this, at least, if it means nothing more. Therefore, the failure to deliver a bill of lading evidencing the limitation of liability should impose upon the carrier the highest responsibility, not the least, that the regulations admit of; that is to say, an unlimited responsibility for the goods.

(11) The serious consequences of the present decision are sufficiently manifest. Heretofore, shippers and passengers have been entitled to rest in the assurance that a common carrier who accepted their goods for transportation in the ordinary course of a carrier's public employment became responsible, without any express contract upon the subject, for the full value of the goods, in case of their destruction through any negligence of the carrier or its agents, unless there was a distinct understanding to the contrary, participated in by the shipper or passenger. Hereafter, so far as interstate shipments by rail are concerned, the traveler or shipper cannot rest upon any such assurance, and will not be safe in dealing with a railroad company without being authoritatively instructed respecting the latest regulations filed by the carrier with the Interstate Commerce Commission at Washington. He cannot rely upon finding the regulations posted in the railroad station, for this is not essential to the efficacy of the schedules (Texas & P. R. Co. v. Cisco Oil Mill, 204 U. S. 449, 51 L. ed. 562, 27 Sup. Ct. Rep. 358). He cannot rely upon public notices that may be in fact posted in the station, for these may be misleading, as they were in the present case. He cannot rely upon receiving information from the company's local agents, for this may be withheld, as it was in this case. Unless he is possessed of a copy of the tariff schedules as filed, with time enough to scrutinize them, and skill enough to comprehend them, he must perforce accept [157] whatever terms the railroad company may see fit to offer, and may not hope to be furnished with even a scrap of paper to indicate what those terms are.

I can find no support for the result thus reached, either in the statute or in any previous decision.

UNITED STATES UPON THE RELATION AND FOR THE USE AND BENEFIT OF TEXAS PORTLAND CEMENT COMPANY et al.

v.

D. C. McCORD and National Surety Company of New York.

(See S. C. Reporter's ed. 157–164.)

Action — on bond of public contractor — prematurity.

1. An action upon the bond of a public contractor by persons supplying him with labor and materials is prematurely brought if begun within six months from the completion and final settlement of the contract, although it appears that after such performance and settlement the United States neither had nor asserted any claim, demand, or cause of action against the contractor or his sureties, since such right of action created by the act of February 24, 1905 (33 Stat. at L. 811, chap. 778, U. S. Comp. Stat. Supp. 1911, p. 1071), is specifically conditioned upon the fact that no suit shall be brought by the United States within such six months' period.

[For other cases, see Action or Suit, I. b, in Digest Sup. Ct. 1908.]

Action — prematurity — curing by intervention — suit on contractor's bond.

2. Intervention by other creditors after the expiration of the six months' period could not cure the premature bringing of the original suit on the bond of a public contractor by persons supplying him with labor and material, which right of action under the act of February 24, 1905, amending the act of August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), creating it, is specifically conditioned upon the fact that no suit shall be brought by the United States within six months from the

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completion and final settlement of the contract.

[For other cases, see Action or Suit, I. b, in Digest Sup. Ct. 1908.]

Action — prematurity — intervention as original suit.

3. The intervention by other creditors in a suit on the bond of a public contractor, brought under the act of February 24, 1905, by persons supplying him with labor and material, cannot be treated as an original suit so as to cure the prematurity of the original bill where no service was made or attempted to be had upon the intervention, as required by the statute when original actions are begun by creditors.

[For other cases, see Action or Suit, I. b, in Digest Sup. Ct. 1908.]

Action — prematurity — curing by amendment — suit on contractor's bond.

4. The premature bringing of a suit upon the bond of a public contractor within six months after the completion and final settlement of the contract by persons furnishing him with labor and materials is not cured by filing an amended bill more than one year after such completion and final settlement, since, under the act of February 24, 1905, suit to enforce this right of action created by such statute must not only be brought after the six months named, but within a year after such final settlement.

[For other cases, see Action or Suit, I. b, in Digest Sup. Ct. 1908.]

[No. 234.]

Argued March 6, 1914. Decided April 6, 1914.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Third Circuit, presenting the questions whether an action on the bond of a public contractor by persons furnishing him with labor and materials can be brought within six months from the completion and final settlement of the contract, and whether, if such action was prematurely brought, was the right of action saved by intervention or amendment. Both questions answered in the negative.

The facts are stated in the opinion.

Mr. Francis Marion Etheridge argued the cause, and, with Mr. Joseph Manson McCormick, filed a brief for the Texas Portland Cement Company:

Relators had the right to institute their suit on January 3, 1910, because they pleaded and proved that the contract was completely performed on October 12, 1909, and that a final settlement thereof was made on November 11, 1909, and that in such settlement the United States was fully satisfied and neither had nor asserted any claim against the contractor or his surety, and therefore that they neither would nor could institute or maintain on their behalf, either within or without the six months' period, any action whatsoever.

Title Guaranty & T. Co. v. Crane Co. 219 U. S. 24, 55 L. ed. 72, 31 Sup. Ct. Rep. 140; United States v. Ansonia Brass & Copper Co. 218 U. S. 452, 471, 54 L. ed. 1107, 1114, 31 Sup. Ct. Rep. 49; United States use of Hill v. American Surety Co. 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 168; United States Fidelity & G. Co. v. Golden Pressed & Fire Brick Co. (United States Fidelity & G. Co. v. United States) 191 U. S. 416, 48 L. ed. 242, 24 Sup. Ct. Rep. 142; American Surety Co. v. Lawrenceville Cement Co. 110 Fed. 717; United States use of Anniston Pipe & Foundry Co. v. National Surety Co. 34 C. C. A. 526, 92 Fed. 549; United States use of Fidelity Nat. Bank v. Rundle, 40 C. C. A. 450, 100 Fed. 400; United States use of Edward Hines Lumber Co. v. Henderlong, 102 Fed. 2; Howard v. United States, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543.

The Illingsworth bill, seasonably filed on his own behalf, and for the use and benefit of each and every of the relators herein by name, incorporated therein by express reference the bill previously filed by the relators, and even though it should be held that the bill of relators was prematurely filed, yet it became a part of the Illingsworth bill, and supplied the details of the claim of the respective relators, and it should have been treated as an intervention in the Illingsworth suit. The Illingsworth bill, being in the nature of a creditors' suit, inured to the benefit of the relators herein, and the subsequent dismissal thereof by Illingsworth did not affect them.

Richmond v. Irons, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; Nix v. Dukes, 58 Tex. 96; Foote v. O'Roork, 59 Tex. 215.

Even though it should be held that the suit of the relators herein was prematurely instituted, yet the contingency which matured the cause of action having happened prior to the dismissal thereof, the only effect would be to cast the relators in the cost of the action up to the time of the occurrence of the contingency which matured the same. The institution of the suit, even though premature, arrested limitation, and the amendment subsequently filed, following the happening of the contingency, cured the defect. The relators' amended original petition merely elaborated the allegations of their original petition, and did not constitute a new suit after the expiration of one year from the completion of the contract and the final settlement with the government.

Kauffman v. Wooters, 79 Tex. 214, 13 S. W. 549; Burns v. True, 5 Tex. Civ. App.

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74, 24 S. W. 338; Kinney v. Lee, 10 Tex. 155; Crescent Ins. Co. v. Camp. 64 Tex. 521; Morgan v. E. Bement & Sons, 24 Tex. Civ. App. 564, 59 S. W. 907; Queen Ins. Co. v. May, — Tex. Civ. App. —, 35 S. W. 829; Howard v. Windom, 86 Tex. 560, 26 S. W. 483; Becker v. Gulf City Street R. & Real Estate Co. 80 Tex. 486, 15 S. W. 1094; St. Louis & S. F. R. Co. v. Kinman, 9 Kan. App. 633, 58 Pac. 1037; Seaton v. Hixon, 35 Kan. 663, 12 Pac. 22; Hall v. Hurd, 40 Kan. 374, 19 Pac. 802; Barrow v. Shields, 13 La. Ann. 57; Titus v. Poole, 145 N. Y. 414, 40 N. E. 228; Conolly v. Hyams, 176 N. Y. 403, 68 N. E. 662; Meekins v. Norfolk & S. R. Co. 131 N. C. 1, 42 S. E. 333; Terre Haute & I. R. Co. v. Zehner, 3 L.R.A.(N.S.) 294.

Mr. **Charles W. Starling** argued the cause, and, with Mr. W. F. Robertson, filed a brief for D. C. McCord et al:

The district court having simply sustained a plea in abatement, there is no jurisdiction to review its action.

Cunningham v. Rodgers, 96 C. C. A. 508, 171 Fed. 835; Leitensdorfer v. Webb, 20 How. 176, 15 L. ed. 891; Piquignot v. Pennsylvania R. Co. 16 How. 104, 14 L. ed. 863; Stephens v. Monongahela Nat. Bank, 111 U. S. 197, 28 L. ed. 399, 4 Sup. Ct. Rep. 336.

The suit was prematurely brought, as no right of action existed during the first six months after final settlement between the government and the contractor.

United States use of Watson-Flagg Engineering Co. v. Winkler, 162 Fed. 397; Mankin v. United States, 215 U. S. 537, 54 L. ed. 317, 30 Sup. Ct. Rep. 174; Stitzer v. United States, 105 C. C. A. 51, 182 Fed. 513; United States Fidelity & G. Co. v. United States, 209 U. S. 315, 52 L. ed. 808, 28 Sup. Ct. Rep. 537; United States v. McGee, 171 Fed. 209; United States ex rel. Williamson Bros. Co. v. United States Fidelity & G. Co. 171 Fed. 247.

Subsequent proceedings in a case prematurely filed did not cure the fatal defect.

American Bonding & T. Co. v. Gibson County, 76 C. C. A. 155, 145 Fed. 871, 7 Ann. Cas. 522.

The Illingsworth intervention related back to premature commencement of suit.

Carter-Crume Co. v. Peurrung, 40 C. C. A. 150, 99 Fed. 888.

As Illingsworth's petition was dismissed after one year from final settlement, and no service of its filing was had on creditors, no cause of action was thereby preserved to any creditor.

United States use of Hollinger v. Stannard, 206 Fed. 326.

The exception at a subsequent term is not sufficient to show the claiming of any rights before the district court, now claimed on appeal.

Michigan Ins. Bank v. Eldred, 143 U. S. 293, 36 L. ed. 162, 12 Sup. Ct. Rep. 450.

It is an open question in Texas whether, when there is a statute fixing a time or a condition precedent to the filing of a suit, its premature filing can be cured by an amendment.

Burrows v. Gonzales County, 5 Tex. Civ. App. 232, 23 S. W. 829; El Paso v. Ft. Dearborn Nat. Bank, — Tex. Civ. App. —, 71 S. W. 799, 96 Tex. 496, 74 S. W. 21; Foote v. O'Roork, 59 Tex. 215; Kinney v. Lee, 10 Tex. 155; Howard v. Windom, 86 Tex. 560, 26 S. W. 483; Cotulla v. Urbahn, 104 Tex. 208, 34 L.R.A.(N.S.) 345, 126 S. W. 1108, 135 S. W. 1159.

This court, therefore, has no authoritative precedent from the courts of Texas which it may consider itself bound to follow. In such absence this court, it is submitted, should follow the case of American Bonding & T. Co. v. Gibson County, 76 C. C. A. 155, 145 Fed. 871, 7 Ann. Cas. 522.

The action declared upon being created by an act of Congress, and the limitations and conditions being imposed by such act, the effect of the premature filing of a suit thereon and without the authority granted by the act is not to be determined by the laws of the state in which the action is brought, but by the act itself, construed in reference to the common law as applied by the Federal courts.

Arnson v. Murphy, 109 U. S. 238, 27 L. ed. 920, 3 Sup. Ct. Rep. 184, 115 U. S. 583, 29 L. ed. 493, 6 Sup. Ct. Rep. 185.

The amendment of original relators, filed more than one year after final settlement, and thus after right of action ceased to exist, neither preserved nor revived any rights.

Baker Contract Co. v. United States, 122 C. C. A. 560, 204 Fed. 396; Eberhart v. United States, 123 C. C. A. 180, 204 Fed. 884.

Mr. Justice **Day** delivered the opinion of the court:

This case is here upon a certificate from the United States circuit court of appeals for the fifth circuit. The pertinent facts certified are:

The United States, upon the relation and for the use and benefit of the Texas Portland Cement Company and others, brought suit in the United States circuit court for the northern district of Texas, on January 3, 1910, against D. C. McCord, as the principal, and the National Surety Company of New York, as surety, on a certain bond dated March 19, 1906, given in conformity

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to the act of February 24, 1905 (33 Stat. at L. 811, chap. 778, U. S. Comp. Stat. Supp. 1911, p. 1071), for the performance by McCord of a contract for the erection of certain public works for which they had furnished labor and material. The petition was filed after the completion of the contract and final settlement between the contractor and the United States, and it was alleged that the United States had no claim or cause of action against the defendants, and would not bring suit within six months from the completion and settlement of the contract, nor at any other time. An appropriate order for service and publication was had. Many creditors intervened in the case, among others W. Illingsworth, who, on May 25, 1910 (more than six and less than twelve months after final completion and settlement), filed an intervention in accordance with the act, which constituted a complete bill, purporting to be also for the benefit of the plaintiffs in the [159] original suit and others intervening in the cause, and in which he prayed, if the recovery on the bond should be inadequate to pay all claims in full, for a *pro rata* judgment.

Subsequently, on January 9, 1911, the original plaintiffs filed an amended original petition, elaborating the allegations of their original petition, and averring among other things that the government had no claim against the defendants, and therefore had not, within six months from the completion and settlement of the contract, brought suit against them, and did not have the legal right to maintain such suit, except upon the relation of a creditor. Illingsworth dismissed his intervention on February 2, 1911, and thereafter the court ordered that his petition and petition in intervention be dismissed.

The allegations of the petition were sustained by proof, and a plea in abatement filed by the Surety Company was heard upon an agreement and statement in open court to the effect that the contract was completed on October 12, 1909, and settlement was made on November 11, 1909, and that the government thereafter neither had nor asserted any claim, demand, or cause of action against the defendants on the contract or bond. The circuit court thereupon dismissed the suit, and the case was taken to the circuit court of appeals upon error.

The questions certified are:

"First. Under the provisions of the act of August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), as amended by the act of February 24, 1905 (33 Stat. at L. 811, chap. 778, U. S. Comp. Stat. Supp. 1911, p. 1071), may persons who furnish material and perform labor in the construction of governmental works bring suit on the bond of the contractor in the Federal court in the name of the United States, for their use and benefit, within six months from the completion of the works and final settlement of the contract, where it appears of record and was agreed by the parties in open court, that after performance and settlement of the contract, the United States neither had nor asserted any [160] claims, demands, or cause of action either against the contractor or the sureties on his bond?

"Second. If the original bill was prematurely filed, was a right of action saved to the parties so filing the same, by the intervention of Illingsworth, which was filed after the six months, but before the expiration of the twelve months' period, and the amended bill, filed more than one year after the completion and settlement of the contract between the government and the contractor?"

The differences in the act of February 24, 1905, and the former statute of August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), were pointed out by this court in the case of Mankin v. United States, 215 U. S. 533, 54 L. ed. 315, 30 Sup. Ct. Rep. 174, and need not be repeated here. The act of 1905† provides that the persons [161] named as beneficiaries under the bond may intervene and have their rights adjudicated in an action instituted by the United States in which priority of claim is to be given to the United States for any judgment recovered in the case. It

†That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed

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is also provided that, "if no suit should be brought by the United States within six months from the completion and final settlement of said contract," then the persons supplying [162] labor, etc., upon taking certain steps to get a certified copy of the bond, "are hereby authorized to bring suit in the name of the United States," etc., provided that suits by creditors of the contractor "shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later." And it is further provided "that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later." It is further provided that in all suits instituted under the act such personal notice of the pendency of the suit shall be given as the court may order, informing known creditors of their right to intervene, and newspaper publication, to serve as notice of pendency of the suit to other creditors, shall also be made.

By this statute a right of action upon the bond is created in favor of certain creditors of the contractor. The cause of action did not exist before, and is the creature of the statute. The act does not place a limitation upon a cause of action theretofore existing, but creates a new one upon the terms named in the statute. The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well-settled principles the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself. Pollard v. Bailey, 20 Wall. 520, 526, 527, 22 L. ed. 376, 378; Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 756, 30 L. ed. 825, 829, 7 Sup. Ct. Rep. 757; Globe Newspaper Co. v. Walker, 210 U. S. 356, 52 L. ed. 1096, 28 Sup. Ct. Rep. 726; United States use of Gibson Lumber Co. v. Boomer, 106 C. C. A. 164, 183 Fed. [163] 726 (circuit court of appeals for the eighth circuit).

The purpose of Congress to give the United States the exclusive right to bring suit within six months is stated in terms too plain to be mistaken or to require construction, because of any possible uncertainty in their meaning. When this is so it becomes unnecessary to inquire into the reasons which induced the legislation. It may be that Congress wished to give the government six months in which to test the

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pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action and shall be, and are hereby, authorized to bring suit in the name of the United States in the circuit court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: And provided further, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor *pro rata* of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: Provided further, That in all suits instituted under the provision of this act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.

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work and fully ascertain its character and whether it fulfilled the contract or not. Whatever the motive, the language used clearly expresses the legislative intention and admits of no doubt as to its meaning. This being so, it is only the province of the courts to enforce the statute in accordance with its terms. Lake County v. Rollins, 130 U. S. 662, 670, 32 L. ed. 1060, 1063, 9 Sup. Ct. Rep. 651; United States v. Lexington Mill & Elevator Co. 232 U. S. 399, 409, ante, 661, 34 Sup. Ct. Rep. 337.

We think, therefore, that the action was prematurely brought, in view of the facts stated in the certificate. This view of the statute was also taken in a well-considered opinion in the circuit court of appeals for the third circuit. Stitzer v. United States, 105 C. C. A. 51, 182 Fed. 513.

As to the intervention of Illingsworth, in which, it is claimed, other creditors' claims were incorporated: without passing upon the effect of the dismissal of Illingsworth's intervention, we fail to see that this mends the matter. The right to intervene is given in the statute when the action is brought by the United States, and the creditors may have their rights adjudicated in such action. And in the case of an action begun by a creditor in accordance with the statute, the right to file a claim is given to creditors. These rights to intervene and to file a claim, conferred by the statute, presuppose an action duly brought under its terms. In this case the cause of action had not accrued to the creditors who undertook to bring the suit originally. The intervention could not cure this vice in the [164] original suit. Nor do we think that the intervention could be treated as an original suit. No service was made or attempted to be had upon it, as required by the statute when original actions are begun by creditors. As we read the certificate, the intervention was what it purported to be,—an appearance in the original suit, already brought, and in our view must abide the fate of that suit.

As to the effect of the filing of the amendment by the original plaintiffs on January 9, 1911, it is elementary that an amendment dates back to the filing of the petition, and is to supply defects in the cause of action then existing, or at most to bring into the suit grounds of action which existed at the beginning of the case. In this case there was no cause of action to amend. Nor was the amendment of January 9, 1911, the introduction of a new cause of action existing at the beginning of the suit. See in this connection, American Bonding & T. Co. v. Gibson County, 76 C. C. A. 155, 145 Fed. 871, 7 Ann. Cas. 522 (circuit court of appeals for the sixth circuit, opinion by Mr. Justice Lurton). If this amended petition can be regarded as an intervention in a pending suit, and it is contended that it may be, it was too late, as it was filed more than a year after the final settlement under the contract to which time such rights of action are limited by the statute. Eberhart v. United States, 123 C. C. A. 180, 204 Fed. 884. The same objection would lie if the amended petition could be regarded as the bringing of an original suit. See Baker Contract Co. v. United States, 122 C. C. A. 560, 204 Fed. 390.

It follows that both questions certified must be answered in the negative.

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[165] ARCHIBALD HOLLERBACH and Samuel L. May, Partners, Doing Business as Hollerbach & May, Appts.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 165–172.)

United States — contracts for public work — representation of existing conditions.

The damage incurred by persons contracting to repair a dam for the United States because the existing dam was not backed with broken stone, sawdust, and sediment, as positively stated in the specifications, may be recovered from the government notwithstanding the cautionary provisions of other paragraphs of the specifications that the quantities given are approximate only, that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative in the same, and that bidders or their authorized agents are expected to visit the site, ascertain the nature of the work, and make their own estimates.

[For other cases, see United States, VI. d, in Digest Sup. Ct. 1908.]

[No. 250.]

Argued and submitted March 9, 1914. Decided April 6, 1914.

APPEAL from the Court of Claims to review a judgment dismissing in part the petition in a suit for damages alleged to be due under a contract for a public work. Reversed.

See same case below, 47 Ct. Cl. 236.

The facts are stated in the opinion.

Mr. William B. King argued the cause, and, with Messrs. George A. King and William E. Harvey, filed a brief for appellants:

Paragraph 33 of the contract contains a warranty.

Atlantic Dredging Co. v. United States, 35 Ct. Cl. 463; Delafield v. Westfield, 77

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Hun, 124, 28 N. Y. Supp. 440, 41 App. Div. 24, 58 N. Y. Supp. 277; Wescott v. Higgins, 169 N. Y. 582, 62 N. E. 1101.

Even if there is an inconsistency between the different portions of the same contract, they must be reconciled by construction in accordance with the well-settled legal maxim, *generalia specialibus non derogant.*

Munro v. Alaire, 2 Caines, 327, 2 Am. Dec. 330; Bock v. Perkins, 139 U. S. 628, 636, 35 L. ed. 314, 317, 11 Sup. Ct. Rep. 677; Lauman v. Young, 31 Pa. 306; Hoffman v. Eastern Wisconsin R. & Light Co. 134 Wis. 603, 115 N. W. 383; Richmond Ice Co. v. Crystal Ice Co. 99 Va. 239, 37 S. E. 851; Newport Waterworks v. Taylor, 34 R. I. 478, 83 Atl. 833; Miller v. Wagenhauser, 18 Mo. App. 11; Scudder v. Perce, 159 Cal. 429, 114 Pac. 571; New York v. American R. Traffic Co. 66 Misc. 166, 121 N. Y. Supp. 221, 143 App. Div. 928, 128 N. Y. Supp. 1118; United States v. Utah, N. & C. Stage Co. 199 U. S. 414, 50 L. ed. 251, 26 Sup. Ct. Rep. 69; Horgan v. New York, 160 N. Y. 516, 55 N. E. 204.

Assistant Attorney General **Thompson** submitted the cause for appellee:

If we construe the contract as a whole, the court was not only warranted but compelled to hold that the condition of the backing of the dam was not peculiarly and only within the knowledge of the government, but was a subject about which the appellants were expected to inform themselves, and that the representation as to the condition back of the dam cannot be regarded as a warranty.

Smith v. Curran, 138 Fed. 150; Shappirio v. Goldberg, 192 U. S. 232, 48 L. ed. 419, 24 Sup. Ct. Rep. 259; Huse v. United States, 44 Ct. Cl. 19, 222 U. S. 496, 56 L. ed. 285, 32 Sup. Ct. Rep. 119; Burgwyn v. United States, 34 Ct. Cl. 348; Lewman v. United States, 41 Ct. Cl. 470; Griefen v. United States, 43 Ct. Cl. 107; Simpson v. United States, 172 U. S. 372, 43 L. ed. 482, 19 Sup. Ct. Rep. 212, 31 Ct. Cl. 217.

It is only when there is an inconsistency or repugnance which is totally irreconcilable that a discrimination will be made as to which part will be made to yield to the other.

Page, Contr. § 1113; Elliott, Contr. § 3665; Sutherland, Stat. Constr. § 279; United States v. Mescall, 215 U. S. 26, 54 L. ed. 77, 30 Sup. Ct. Rep. 19; Lindeke v. Associates Realty Co. 77 C. C. A. 56, 146 Fed. 630.

The following authorities cited by appellants uphold the government's contention that the contract must be considered as a whole:

Hoffman v. Eastern Wisconsin R. & Light Co. 134 Wis. 603, 115 N. W. 383; Richmond Ice Co. v. Crystal Ice Co. 99 Va. 239, 37 S. E. 851; Bock v. Perkins, 139 U. S. 628, 35 L. ed. 314, 11 Sup. Ct. Rep. 677.

[167] Mr. Justice **Day** delivered the opinion of the court:

This suit was brought to recover upon a contract between the appellants, doing business as Hollerbach & May, and the United States, for the repair of Dam No. 1, Green river, Kentucky. In the aspect in which it is now presented the question involved concerns the right of the claimants to recover because of certain damages alleged to have been suffered by them which would not have accrued had the dam been backed with broken stone, sawdust, and sediment, as was stated in paragraph 33 of the specifications attached to the contract.

The determination of this controversy requires reference to certain parts of the contract and the findings of the court of claims. The specifications provide, among other things:

"20. It is understood and agreed that the quantities given are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders, or their authorized agents, are expected to examine the maps and drawings in this office, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies.

. . . . . .

"33. Work to be done. . . . The present dam, a wooden crib structure, is 528 feet long between abutments and about 52 feet wide at its base. The expected depth of concrete work is shown on the blue prints, but it may be made greater as the condition of the old timber may render it necessary. The work shall be carried out in sections, generally from 50 to 100 feet long, and no more of the old work shall be torn out than can be rebuilt in a few days in [168] case of necessity. All the exterior surfaces of the concrete shall be faced with the facing described in paragraph 59, which shall be placed before the concrete below has set, and shall be smoothly finished off. The dam is now backed for about 50 feet with broken stone, sawdust, and sediment to a height of within 2 or 3 feet of the crest, and it is expected that a cofferdam can be constructed with this stone, after which it can be backed with sawdust or other material. The excavation behind the dam will be required to go to the bottom, and it is thought

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that a slope of 1 horizontal to 1.2 vertical will give ample room.

. . . . . .

"60. Blue prints. Blue print drawings showing the method of construction may be seen at this office; they shall form a part of these specifications and shall not be departed from except as may be found necessary by the condition of the old timber encountered.

. . . . . .

"70. Investigation. It is expected that each bidder will visit the site of this work, the office of the lock master, and the office of the local engineer, and ascertain the nature of the work, the general character of the river as to floods and low water, and obtain the information necessary to enable him to make an intelligent proposal."

The court of claims found as a matter of fact, among other things:

"As the contractors proceeded with the work of removing the material behind the dam it was found that said dam was not backed with broken stone, sawdust, and sediment, as stated in paragraph 33 of the specifications, but that said backing was composed of a soft, slushy sediment from a height of about 2 feet from the crest to an average depth of 7 feet, and below that to the bottom of the required excavation said dam was backed by cribwork of an average height of 4.3 feet, consisting of sound logs filled with stones."

[169] The court of claims refused to enter judgment for the damages suffered by reason of the difference in the backing of the dam as found by the court, but estimated the damages for the matters in dispute in that respect to aggregate $6,549.23 (47 Ct. Cl. 236).

In the course of its opinion the court below said that if paragraph 33 stood alone it would be a warranty of the material backing the dam. "It was," said the court, "a positive and material representation as to a condition presumably within the knowledge of the government, and upon which, in the absence of any other provision or warning, the plaintiffs had a right to rely." But the court held that the cautionary provisions of paragraph 20 and 70 required the claimants to inform themselves of the condition of the backing of the dam, and that when those paragraphs were read with paragraph 33 the statements and representations of the last-named paragraph could not be regarded as a warranty upon which the claimants had the right to rely, and the court reached this conclusion upon the authority of certain cases of its own and Simpson v. United States, 172 U. S. 372, 43 L. ed. 482, 19 Sup. Ct. Rep. 212.

In Simpson v. United States, supra, suit was brought upon a contract for the construction of a dry dock at the Brooklyn Navy Yard. It was discovered that the foundations upon which the dry dock rested contained quicksands which were unknown, and which were not shown in the drawings and plans inspected by the contractors before the making of the contract, and upon the strength of which the contractors had made their bid. This court held that the written contract merged all previous negotiations and must be presumed in law to express the final understanding of the parties. Of the contract itself the court said that it was clear that there was nothing in its terms which supported, even by remote implication, the premise upon which the claimants rested their right of recovery; that the contract contained no statement or [170] agreement or even intimation of a warranty, express or implied, concerning the character of the underlying soil at the place where the dock was to be built; that the only word in the contract which supported the contention of warranty was that the dock was to be built in the navy yard upon a site which was "available," and that the word "available" did not warrant against the quicksands which were found, and it certainly did appear that the site was available, for the dock was constructed upon it. It is therefore apparent that this case is entirely different from the one now under consideration, in the contents of the contract and specifications made part thereof, and that in the Simpson Case the claimants relied upon previous negotiations and information as to the site for the dock, developed in the plans showing the result of an examination made by government officers upon a portion of the yard, and did not depend, as here, upon the terms of the contract.

In this case the claimants rely upon the contract, read in the light of the findings of the court of claims. Turning to paragraphs 20 and 70, the court of claims justified its conclusion in that part of paragraph 20 which provides that "quantities given are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders, or their authorized agents, are expected . . . to visit the locality of the work, and to make their own estimates," etc.; and in that part of paragraph 70 which reads, "it is expected that each bidder will visit the site of this work, . . . and ascertain the nature of the work," etc. The term "quantities," as used in paragraph 20, may doubtless refer to estimates of the amount of different kinds of work which are specified in the contract. We do not see how it could con-

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trol the statement of paragraph 33, definitely made, as to the character of the material back of the dam. Pertinent parts of the paragraphs [171] referred to would seem to be those which required bidders or their authorized agents to investigate for themselves and to visit the locality of the work to ascertain its nature and make their own estimates thereof. The specifications attached to the contract set forth the work to be performed in great detail, as to its nature and character, and many particulars as to manner and extent of the work to be done, the removal of old timber and material, etc., the general character of the river as to floods and low water, etc., and the difficulties attending the execution of the contract, and as to all these things the bidder was required by paragraphs 20 and 70 to make examination for himself and at his own peril.

In paragraph 33 the government sets forth with particularity a description of the old dam, its length and width, and it was there added: "The dam is now backed for about 50 feet with broken stone, sawdust, and sediment to a height within 2 or 3 feet of the crest," etc. The specifications provided that the excavations behind the dam must be to the bottom. In the light of this specification, turn to the finding of fact, and we learn that the claimants, as they proceeded with the work, found that the dam "was not backed with broken stone, sawdust, and sediment, as stated in paragraph 33 of the specifications," and below 7 feet from the top to the bottom there was a backing of cribbing of an average height of 4.3 feet of sound logs filled with stone. Obviously, this made it much more expensive to do the work than if the representation inserted by the government in the specifications of its own preparation had been true, and only the character of material had been found which the specification unequivocally asserted was there.

A government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms [172] of the instrument. In paragraph 33 the specifications spoke with certainty as to a part of the conditions to be encountered by the claimants. True, the claimants might have penetrated the 7 feet of soft slushy sediment by means which would have discovered the log crib work filled with stones which was concealed below, but the specifications assured them of the character of the material,—a matter concerning which the government might be presumed to speak with knowledge and authority. We think this positive statement of the specifications must be taken as true and binding upon the government, and that upon it, rather than upon the claimants, must fall the loss resulting from such mistaken representations. We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the government as a basis of the contract left in no doubt. If the government wished to leave the matter open to the independent investigation of the claimants, it might easily have omitted the specification as to the character of the filling back of the dam. In its positive assertion of the nature of this much of the work it made a representation upon which the claimants had a right to rely without an investigation to prove its falsity. See United States v. Utah, N. & C. Stage Co. 199 U. S. 414, 424, 50 L. ed. 252, 255, 26 Sup. Ct. Rep. 69.

It follows that the judgment of the Court of Claims must be reversed and the case remanded to that court with directions to enter judgment for the claimants for the damages incurred because of the different character of material found behind the dam than that described in the specifications.

Reversed.

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[173] ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Plff. in Err.,

v.

C. E. ROBINSON.

(See S. C. Reporter's ed. 173-182.)

Error to state court — Federal question — defense set up under Federal statute.

1. A decree of a state court denying to the defendant the benefit of a Federal statute compliance with which was set up in the answer and supported by testimony tending to show the truth of the allegations thereof is an adverse ruling on the Federal right which, under the Judicial Code, § 237 (36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227), warrants bring-

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 908.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order

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ing the case up to the Federal Supreme Court by writ of error.

[For other cases, see Appeal and Error, 1751–2049, in Digest Sup. Ct. 1908.]

Commerce — exclusiveness of Federal regulation — carrier's liability.

2. The exclusive rule on the subject of the liability of a railway carrier under contracts for interstate shipment is furnished by the Carmack amendment of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), § 7, to the interstate commerce act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), § 20, under which a carrier receiving property for interstate transportation is made liable for any loss, damage, or injury to such property caused by it or any connecting carrier to which the property may be delivered.

[For other cases, see Commerce, I. c, in Digest Sup. Ct. 1908.]

Carriers — limiting liability to agreed value — published tariffs — special contract.

3. A special contract for an interstate railway shipment without limitation of the carrier's liability to an agreed value can have no binding force where the carrier's published tariffs on file with the Interstate Commerce Commission graduate the rates according to declared value and limit the carrier's liability accordingly, since the shipper as well as the carrier is bound to take notice of the filed tariff rates, and so long as they remain operative they are conclusive as to the rights of the parties in the absence of facts or circumstances showing an attempt at rebating or false billing.

[For other cases, see Carriers, II. b, 7, b, in Digest Sup. Ct. 1908.]

[No. 450.]

Argued February 26, 1914. Decided April 6, 1914.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court of Lincoln County, in that state, against a carrier for the entire damage to an interstate shipment, contrary to the carrier's published rates on file with the Interstate Commerce Commission. Reversed and remanded for further proceedings.

See same case below, 36 Okla. 435, 129 Pac. 20.

The facts are stated in the opinion.

Mr. S. T. Bledsoe argued the cause, and, with Messrs. J. R. Cottingham and George M. Green, filed a brief for plaintiff in error:

This case presents to this court for review a well defined and vital Federal question.

Mackay v. Dillon, 4 How. 421–447, 11 L. ed. 1038–1050; Dower v. Richards, 151 U. S. 658, 667, 38 L. ed. 305, 308, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Stanley v. Schwalby, 162 U. S. 255, 274, 277, 279, 40 L. ed. 960, 966–968, 16 Sup. Ct. Rep. 754; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573–591, 56 L. ed. 556–565, 32 Sup. Ct. Rep. 316; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Adams Exp. Co. v. Croninger, 226 U. S. 491–499, 57 L. ed. 314–317, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Chicago, St. P. M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155; Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. ed. 662, 669, 43 L.R.A. (N.S.) 901, 33 Sup. Ct. Rep. 277; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Railroad Commission v. Texas & P. R. Co. 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 474–476, 57 L. ed. 600, 602, 603, 33 Sup. Ct. Rep. 267; Cau v. Texas & P. R. Co. 194 U. S. 427, 48 L. ed. 1053, 24 Sup. Ct. Rep. 663, 10 Am. Neg. Rep. 659.

The limited-liability contract executed by the plaintiff and the rate paid were both pursuant to and in accordance with the published tariff of the defendant, of the terms of which the plaintiff was and is charged with knowledge.

Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 160, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Kansas City South-

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to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On Carmack amendment as affecting state regulations as to stipulations limiting liability of common carrier for loss or damage to goods—see note to Adams Exp. Co. v. Croninger, 44 L.R.A.(N.S.) 257.

On validity of stipulation limiting carrier's liability to agreed valuation as affected by the Hepburn act—see note to Bernard v. Adams Exp. Co. 28 L.R.A.(N.S.) 293.

On the construction of the Hepburn act generally—see note to Galveston, H. & S. A. R. Co. v. Wallace, 56 L. ed. U. S. 516.

On contracts fixing rates other than those established in accordance with the interstate commerce act—see note to Atchison, T. & S. F. R. Co. v. Bell, 38 L.R.A.(N.S.) 351.

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ern R. Co. v. Carl, 227 U. S. 639, 642, 57 L. ed. 683, 684, 33 Sup. Ct. Rep. 391; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Chicago, St. P. M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397.

Nothing short of an absolute misconception of the legal rights of the parties under the act to regulate commerce, and of the effect of the printed tariffs, and a limited-liability contract executed pursuant thereto, could have led the court to the conclusion that this contract, based upon and made in accordance with such tariff, and fairly and freely executed, was not binding upon the parties thereto.

Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 672, 57 L. ed. 690, 698, 33 Sup. Ct. Rep. 397; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Chicago, St. P. M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155; Wells F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391.

A shipper is charged with notice of the rate applicable, and an actual want of knowledge is no excuse, and the effect of such rate is not lost, although not actually published in the station.

Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 160, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 652, 57 L. ed. 683, 688, 33 Sup. Ct. Rep. 391.

Mr. **John B. Daish** argued the cause, and Messrs. H. H. Smith and J. W. Beller filed a brief for defendant in error:

The findings of the supreme court of Oklahoma became a question of law to this court, and are not reviewable.

Hilton v. Dickinson, 108 U. S. 165, 27 L. ed. 688, 2 Sup. Ct. Rep. 424; United States v. Burchard, 125 U. S. 178, 31 L. ed. 663, 8 Sup. Ct. Rep. 832; Waters-Pierce Oil Co. v. Texas, 212 U. S. 97, 53 L. ed. 424, 29 Sup. Ct. Rep. 220; Chrisman v. Miller, 197 U. S. 319, 49 L. ed. 772, 25 Sup. Ct. Rep. 468.

The Supreme Court of the United States will not take jurisdiction of a case decided on a theory not necessary to determine a Federal question.

Williams v. Bruffy, 102 U. S. 248, 26 L. ed. 135; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; Hammond v. Whittredge, 204 U. S. 547, 51 L. ed. 611, 27 Sup. Ct. Rep. 396; Rogers v. Jones, 214 U. S. 204, 53 L. ed. 969, 29 Sup. Ct. Rep. 635; Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; California Powder Works v. Davis, 151 U. S. 393, 38 L. ed. 207, 14 Sup. Ct. Rep. 350; Gaar, S. & Co. v. Shannon, 223 U. S. 468, 56 L. ed. 510, 32 Sup. Ct. Rep. 236; Lawler v. Walker, 14 How. 149, 14 L. ed. 364; The Victory, 6 Wall. 382, 18 L. ed. 848; Bachtel v. Wilson, 204 U. S. 36, 51 L. ed. 357, 27 Sup. Ct. Rep. 243; Conde v. York, 168 U. S. 642, 42 L. ed. 611, 18 Sup. Ct. Rep. 234; Williams v. Oliver, 12 How. 126, 13 L. ed. 921; Harrison v. Morton, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Case Mfg. Co. v. Soxman, 138 U. S. 431, 34 L. ed. 1019, 11 Sup. Ct. Rep. 360.

Matters of practice in inferior courts do not constitute subjects upon which error can be assigned in the appellate courts.

Earnshaw v. United States, 146 U. S. 60, 36 L. ed. 887, 13 Sup. Ct. Rep. 14; Parsons v. Bedford, 3 Pet. 433, 7 L. ed. 732; Case Mfg. Co. v. Soxman, 138 U. S. 431, 34 L. ed. 1019, 11 Sup. Ct. Rep. 360; The Francis Wright, 105 U. S. 381, 26 L. ed. 1100; Merced Min. Co. v. Boggs, 3 Wall. 304, 18 L. ed. 245; Spies v. Illinois, 123 U. S. 171, 31 L. ed. 87, 8 Sup. Ct. Rep. 21, 22.

The interstate commerce act does not contemplate either a written or an oral contract, and neither has been legislated about by Congress, and until Congress exercises authority over these contracts, they will be regulated by the law of the place where they are made. An oral contract is valid in Missouri, in reference to an interstate shipment, so long as its terms do not contravene the provisions of the act.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A. 151 U. S. 368, 38 L. ed. 195, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367.

The cases cited by counsel for plaintiff in error are not applicable, because, in all of the cases cited, the question presented was that the shipment moved upon the written contract, but there was no bona fide valuation.

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Mr. Justice Day delivered the opinion of the court:

The defendant in error, plaintiff below, and herein so designated, brought suit in the district court of Lincoln county, Oklahoma, to recover for damages to a race horse, the property of the plaintiff, which was shipped with [177] other race horses from Kansas City, Missouri, to Lawrence, Kansas. Upon verdict in favor of the plaintiff, judgment was entered accordingly, which was affirmed by the supreme court of Oklahoma (36 Okla. 435, 129 Pac. 20).

The plaintiff alleged that the contract of consignment was a verbal one, made by calling up the agent of the railway company at Kansas City by telephone on the day the shipment was made, advising him that the plaintiff had race horses which he desired to ship to Lawrence in time for the races next day; that he was informed by the agent that such shipment could be made, and that if the horses could be loaded between 4 and 6 o'clock of that afternoon they would be carried by the fast freight known as the "Red Ball," making no stops for local freight, and reaching Lawrence about 12 o'clock that night; that it was agreed between them that the shipment should be made by that train; that the plaintiff was instructed where to bring the horses, and informed that a car would be placed to receive them; and that the horses were taken to the place designated by the agent, loaded into a car between 5 and 6 o'clock in the afternoon, the car being closed and labeled "Red Ball," meaning that it should go with the "Red Ball" train on that evening. The car was not taken out that night, and there was testimony tending to show that it was switched about in the yard and on the next morning was started with local freight to Lawrence, arriving there about 2 o'clock next day, too late for the races. And there was evidence that the horse of the plaintiff had been badly injured through the negligence of the defendant.

By an amended answer the railway company set up the fact that the shipment was in interstate commerce, and the filing and approval by the Interstate Commerce Commission of certain tariff rates duly posted, as required by the act, wherein it was provided:

"(A) Rates named in § 2 apply on shipments [178] of ordinary live stock, where contracts are executed by shippers on blanks furnished by these companies, and are based on the declared valuation by the shipper at time contract is signed, not to exceed the following:

"Each horse or pony (gelding, mare, stallion), mule or jack, $100. Each ox, bull, or steer, $50. Each cow, $30. Each calf, $10. Each hog, $10. Each sheep or goat, $3.

"(B) Where the declared value exceeds the above, an addition of 25 per cent will be added to the rate for each 100 per cent or fractional part thereof of additional declared valuation per head. Animals exceeding in value 800 per head will be taken only by special arrangement.

"(C) Table of rates named will be charged on shipments of live stock made with limitation of company's liability at common law, and under this status shippers will have the choice of executing or accepting contracts for shipments of live stock with or without limitation of liability and rates accordingly;"

and alleged that the shipper obtained the benefit of the reduced rate applicable to the value fixed in the written contract governing the shipment of horses; that the shipment was made under the tariffs so filed with the Interstate Commerce Commission, and that the rates and liability of the company were governed by the act of Congress. The plaintiff contended that the complete contract was made in the oral arrangement without reference to or mention of any particular rate or the value of the stock other than that it was a race horse. Taking the most favorable view of the testimony for the plaintiff, it tended to show that after the car had started from the place of loading, an agent of the company presented to the plaintiff a printed contract made in conformity to the schedules filed with the Interstate Commerce Commission, but without calling his attention to its provisions, without [179] informing him of its contents, and without procuring his assent to the terms therein stated, although he admitted executing the contract.

The trial court charged the jury over the exception of the railway company that if they found that at the time of the shipment the contract was entered into by the plaintiff and the defendant, and that the plaintiff represented to the defendant that the horse did not exceed $100 in value, and that the defendant relied upon the representation, and gave a rate less than the regular one for that class of shipment, and was misled by such misrepresentation, and induced to fix a lower rate than the regular one, and if they found the defendant guilty of negligence, they were limited in their findings to the sum of $100; but that if they found that the representation was not made by the plaintiff, but was arbitrarily inserted by defendant, or printed in its contract when signed, then the plaintiff was not bound by the limitation, and they should find his actual damages. The

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jury rendered a verdict in favor of the plaintiff for $1,500.

Upon writ of error to the supreme court of Oklahoma that court affirmed the judgment rendered in the district court and held:

"Where a shipment of live stock is made under a verbal contract, and where every move made, every step taken toward a shipment, up to and including a complete consignment and surrender of control by the shipper, the starting in transit of the shipment, and the assumption of liability for negligence by the carrier, is all under and pursuant to such parol agreement, and after this a printed shipping contract is presented to the shipper to sign, he has the right to assume that it embodies the terms of the verbal agreement, and the carrier will not be permitted to escape liabilities accruing to the shipper under the verbal agreement by reason of certain provisions in the written contract at variance with the parol contract, [180] unless the shipper's attention has been called to such provisions and fair opportunity given him to assent to same."

It is thus seen that the defendant specially set up a defense under the interstate commerce act, a Federal statute, which, if denied to him, was an adverse ruling of Federal right which would warrant the bringing of the case to this court from the highest court of a state under former § 709 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 575), now § 237 of the Judicial Code [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227]. It is apparent from the foregoing statement that the Federal question now presented involves the ruling of the state court denying to the carrier the benefit of the interstate commerce act, a compliance with which was set up in the amended answer and supported by testimony tending to show the truth of the allegations thereof.

That the effect of the Carmack amendment to the Hepburn act (§ 20, act of June 29, 1906, 34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288) was to give to the Federal jurisdiction control over interstate commerce, and to make supreme the Federal legislation regulating liability for property transported by common carriers in interstate commerce, has been so recently and repeatedly decided in this court as to require now little more than a reference to some of the cases. Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman Bros. 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Chicago, R. I. & P. R. Co. v. Cramer, 232 U. S. 490, ante, 697, 34 Sup. Ct. Rep. 383; Great Northern R. Co. v. O'Connor, 232 U. S. 508, ante, 703, 34 Sup. Ct. Rep. 380. We regard these cases as settling the proposition that the shipper as well as the carrier is bound to take notice of the filed tariff rates, and that so long as they remain operative they are conclusive as to the rights of the parties, in the absence of facts or circumstances showing an attempt at rebating or false billing. Great Northern R. Co. v. O'Connor, supra. To give to the oral agreement upon which the suit was brought, the prevailing [181] effect allowed in this case by the charge in the trial court, affirmed by the judgment of the supreme court of the state, would be to allow a special contract to have binding force and effect though made in violation of the filed schedules which were to be equally observed by the shipper and carrier. If oral agreements of this character can be sustained, then the door is open to all manner of special contracts, departing from the schedules and rates filed with the Commission. Kansas City Southern R. Co. v. Carl, 227 U. S. 652, 57 L. ed. 688, 33 Sup. Ct. Rep. 391. To maintain the supremacy of such oral agreements would defeat the primary purposes of the interstate commerce act, so often affirmed in the decisions of this court, which are to require equal treatment of all shippers and the charging of but one rate to all, and that the one filed as required by the act.

The supreme court of the state in this case affirmed the instruction of the trial court upon which the case was given to the jury, and held that the oral contract was binding unless it was affirmatively shown that the written agreement, based upon the filed schedules, was brought to the knowledge of the shipper, and its terms assented to by him. This ruling ignored the terms of shipment set forth in the schedules and permitted recovery upon the contract made in violation thereof in a case where there was no proof that there was an attempt to violate the published rates by a fraudulent agreement showing rebating or false billing of the property, and no circumstances which would take the case out of the rulings heretofore made by this court as to the binding effect of such filed schedules and the duty of the shipper to take notice of the terms of such rates, and the obligation to be bound thereby, in the absence of the exceptional circumstances to which we have referred.

It follows that the ruling of the state court, affirmed in the Supreme Court, deprived the plaintiff in error of rights secured by the Federal statute, when prop-

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erly [182] construed, which were set up and claimed in the state court.

Judgment reversed and case remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Pitney dissents.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Plff. in Err.,
v.
H. F. MOORE, C. E. Robinson, and S. H. Smith.

(See S. C. Reporter's ed. 182, 183.)

This case is governed by the decision in Atchison, T. & S. F. R. Co. v. Robinson, ante, 901.

[No. 451.]

Argued February 26, 1914. Decided April 6, 1914.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court of Lincoln County, in that state, against a carrier for the entire damage to an interstate shipment, contrary to the carrier's published rates on file with the Interstate Commerce Commission. Reversed and remanded for further proceedings.

See same case below, 36 Okla. 433, 129 Pac. 24.

The facts are stated in the opinion.

Mr. S. T. Bledsoe argued the cause, and, with Messrs. J. R. Cottingham and George M. Green, filed a brief for plaintiff in error.

Mr. John B. Daish argued the cause, and Messrs. H. H. Smith and J. W. Beller filed a brief for defendants in error.

For contentions of counsel, see their briefs as reported in Atchison, T. & S. F. R. Co. v. Robinson, ante, 901.

Mr. Justice Day delivered the opinion of the court:

The defendants in error brought suit in the district court of Lincoln county, Oklahoma, against the plaintiff in error, for damages, alleging that they were the owners of a certain race horse which had been shipped by [183] them over the railroad of the plaintiff in error from Kansas City, Missouri, to Lawrence, Kansas, and which had been injured in transit. There was a verdict and judgment for the defendants in error, which was affirmed by the supreme court of Oklahoma (36 Okla. 433, 129 Pac.

It appears that the horse, for the injury to which this suit was brought, was a part of the shipment under which the horse in the previous case of Atchison, T. & S. F. R. Co. v. Robinson, just decided [233 U. S. 173, ante, 901, 34 Sup. Ct. Rep. 556], was carried as therein stated, and that the facts relating to the shipment and cause of injury set forth in the present case are the same as those in the Robinson Case. The supreme court of Oklahoma, after noticing the fact that, except as to the value of the animals, the extent of their injuries and the resulting damages, the two cases were identical in every material feature, followed the Robinson Case.

The present case, therefore, is controlled by the decision in the Robinson Case, and from what we have there said it follows that the judgment here under review must be reversed.

Judgment reversed and case remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Pitney dissents.

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[184] ANNIE MYERS, Petitioner,
v.
PITTSBURGH COAL COMPANY.

(See S. C. Reporter's ed. 184–195.)

Trial by jury — infringement of right — directing judgment non obstante veredicto.

1. A Federal circuit court of appeals cannot, consistently with the right to trial by jury guaranteed by the Federal Constitution, reverse the judgment below, entered on a verdict in favor of plaintiff, on the ground that, upon the facts shown, such plaintiff had not made out the right to recover, without directing a new trial, and without sending the case back to the court below for that purpose.

[For other cases, see Jury, I. d, in Digest Sup. Ct. 1908.]

NOTE.—On the right to judgment *non obstante veredicto* because of the failure of proof—see note to Kirk v. Salt Lake City, 12 L.R.A.(N.S.) 1021.

As to constitutional power of an appellate court upon reversing a judgment for plaintiff, entered upon the verdict of a jury, to direct judgment for defendant without remanding case for a new trial—see note to Gunn v. Union R. Co. 2 L.R.A.(N.S.) 362.

Generally, on the right to jury trial—see notes to Supreme Justices v. Murray, 19 L. ed. U. S. 658; Eilenbecker v. District Ct. 33 L. ed. U. S. 801; Gulf, C. & S. F. R. Co. v. Shane, 39 L. ed. U. S. 727; and Perego v. Dodge, 41 L. ed. U. S. 113.

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Appeal — review of verdict.

2. A verdict in favor of plaintiff in an action for death should not be set aside by an appellate court for the lack of evidence to support it unless the testimony was such that no recovery could be had upon the facts shown in any view which can properly be taken of them.

[For other cases, see Appeal and Error, VIII. 1, 2, in Digest Sup. Ct. 1908.]

Appeal — reversible error — refusal of requested instruction.

3. The refusal to give a requested instruction that a coal company's electrical hauling system was in charge of a mine foreman for whose negligence toward another employee the company would not be responsible is not error where the court submitted to the jury the question arising on the evidence whether the coal company had intrusted such electrical system to the mine foreman or to an electrical engineer not accountable to such mine foreman, distinctly telling them that if the mine foreman was in charge in this respect the company could not be held responsible, but that it would be responsible for the negligent operation of the electric hauling system if it was excluded from the control of the mine foreman.

[For other cases, see Appeal and Error, 5127-5141, in Digest Sup. Ct. 1908.]

Appeal — reversible error — refusal of requested instruction.

4. Failure to give an instruction requested by the defendant is not reversible error, where, if given, such instruction would only have served possibly to confuse the jury upon a point immaterial to the plaintiff's recovery, in view of the manner in which the case was submitted to the jury.

[For other cases, see Appeal and Error, 5127-5141, in Digest Sup. Ct. 1908.]

Appeal — question not raised below — failure to instruct.

5. Failure to charge as to the assumption of risk in an action for death cannot be regarded as error where the record does not show that the court was requested to make any charge on that subject, or that any exception was taken to the court's failure so to charge.

[For other cases, see Appeal and Error, 4644-4646, 5135a-5138, in Digest Sup. Ct. 1908.]

[No. 816.]

Argued February 27, 1914. Decided April 6, 1914.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which reversed a judgment of the District Court for the Western District of Pennsylvania in favor of plaintiff in an action for death. Reversed, and judgment of District Court affirmed.

See same case below, 121 C. C. A. 427, 203 Fed. 221.

The facts are stated in the opinion.

Mr. Charles K. Robinson argued the cause, and, with Messrs. Edward C. Goodwin and Frank H. Kennedy, filed a brief for petitioner:

The instincts of self-preservation and the presumption of care, in the absence of any evidence showing negligence on the part of John Myers, rebut any suggestion of injury or death from these causes.

McManamon v. Hanover Twp. 232 Pa. 446, 81 Atl. 440.

The company continued to operate its mines in defiance of the law, and must bear the consequences.

Bartlett Coal & Min. Co. v. Roach, 68 Ill. 175, 10 Mor. Min. Rep. 682; Saylor v. Chartiers Coal & Coke Co. 31 Pa. Super. Ct. 447; Bisko v. Braznell Gas Coal Co. 223 Pa. 190, 72 Atl. 504; Collins v. Northern Anthracite Coal Co. 241 Pa. 59, 88 Atl. 75; Kless v. Youghiogheny Min. Co. 18 Pa. Super. Ct. 551; Thomp. Neg. § 4184.

The presumption of life continued until the decedent was shown to be dead.

Greenl. Ev. 15th ed. p. 62, § 41.

Without regard to what is known as the mine foreman doctrine in Pennsylvania, the company is responsible for the negligence of the machine boss in permitting the car to be operated without the headlight burning.

Rau v. Pittsburg-Buffalo Co. 54 Pa. Super. Ct. 579.

The maintenance of a cross-over trolley wire at an insufficient height without any warning thereof was negligence on the part of the company.

Burns v. Vesta Coal Co. 223 Pa. 473, 72 Atl. 800; Pittsburgh, S. & N. R. Co. v. Lamphere, 69 C. C. A. 542, 137 Fed. 20.

The duty of the company to construct and provide a safe place in which to work is one which belongs primarily to the employer, and cannot be shifted to anyone else.

Vanesse v. Catsburg Coal Co. 159 Pa. 409, 28 Atl. 200; Lillie v. American Car & Foundry Co. 209 Pa. 161, 58 Atl. 272; Golden v. Mt. Jessup Coal Co. 225 Pa. 166, 73 Atl. 1103; Toward v. Meadow Lands Coal Co. 229 Pa. 556, 79 Atl. 129; Shoemaker v. Lehigh Valley R. Co. 236 Pa. 123, 84 Atl. 763; Gulla v. Lehigh Valley Coal Co. 28 Pa. Super. Ct. 11; Texas & P. R. Co. v. Archibald, 170 U. S. 665, 671, 672, 42 L. ed. 1188, 1191, 18 Sup. Ct. Rep. 777, 4 Am. Neg. Rep. 746; Simmons v. Lehigh Valley Coal Co. 240 Pa. 358, 87 Atl. 568.

If there is a divided authority between the mine foreman and some officer of the company, the company is liable. The mine foreman does not have to be entirely excluded from any authority in the premises to render the company liable.

Wolcutt v. Erie Coal & Coke Co. 226 Pa.

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210, 75 Atl. 197; Reeder v. Lehigh Valley Coal Co. 231 Pa. 576, 80 Atl. 1121.

The coal company was negligent with respect both to the operation of the motor car without a burning headlight, and the construction and maintenance of a low cross wire without any warning thereof. These being the two causes which contributed to the death of John Myers, the question of proximate cause does not arise, the defendant company being responsible for both causes.

Shearm. & Redf. Neg. 6th ed. § 31; Burrell Twp. v. Uncapher, 117 Pa. 362, 2 Am. St. Rep. 664, 11 Atl. 619; Kraut v. Frankford & S. P. City Pass. R. Co. 160 Pa. 327, 28 Atl. 783.

It was a proper case for the jury to determine the question of the negligence of the company and the proximate cause of the death of John Myers.

Tucker v. Pittsburg, C. C. & St. L. R. Co. 227 Pa. 66, 75 Atl. 991; McManamon v. Hanover Twp. 232 Pa. 439, 81 Atl. 440; Donegan v. Baltimore & N. Y. R. Co. 91 C. C. A. 555, 165 Fed. 869; Hammill v. Pennsylvania R. Co. 56 N. J. L. 378, 24 L.R.A. 531, 29 Atl. 151; Eagle Hose Co. v. Priceburg Electric Light Co. 33 Pa. Super. Ct. 581; Brenisholtz v. Pennsylvania R. Co. 229 Pa. 96, 78 Atl. 37; Madden v. Lehigh Valley R. Co. 236 Pa. 108, 84 Atl. 672; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Texas & P. R. Co. v. Swearingen, 196 U. S. 51, 49 L. ed. 382, 25 Sup. Ct. Rep. 164, 17 Am. Neg. Rep. 422; 4 Thomp. Neg. § 3857; Northern P. R. Co. v. Tynan, 56 C. C. A. 192, 119 Fed. 293; Grand Trunk R. Co. v. Ives, 144 U. S. 408–417, 36 L. ed. 485–489, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; Texas & P. R. Co. v. Cox, 145 U. S. 593–606, 36 L. ed. 829–833, 12 Sup. Ct. Rep. 905; Gardner v. Michigan C. R. Co. 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; Texas & P. R. Co. v. Archibald, 170 U. S. 665, 666, 42 L. ed. 1188, 1189, 18 Sup. Ct. Rep. 777, 4 Am. Neg. Rep. 746.

Questions of negligence do not become questions of law except where all reasonable men must draw the same conclusions from the evidence, nor would a case be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery can be had upon any view which can be properly taken of the facts which the evidence tends to establish.

Kreigh v. Westinghouse, C. K. & Co. 214 U. S. 249, 53 L. ed. 984, 29 Sup. Ct. Rep. 619.

The question of assumption of risk was attempted to be raised by counsel for the coal company for the first time in this case in the circuit court of appeals on the argument, although it was not included in the assignments of error.

Jones v. United States, 103 C. C. A. 142, 179 Fed. 592; Robinson v. Belt, 187 U. S. 41–50, 47 L. ed. 65–69, 23 Sup. Ct. Rep. 16; Mercantile Trust Co. v. Hensey, 205 U. S. 298–306, 51 L. ed. 811–814, 27 Sup. Ct. Rep. 535, 10 Ann. Cas. 572; Insurance Co. v. Mordecai, 22 How. 111, 117, 16 L. ed. 329, 331; First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; Wheeler v. Sedgwick, 94 U. S. 1, 24 L. ed. 31; Wilson v. McNamee, 102 U. S. 572, 26 L. ed. 234; Edwards v. Elliott, 21 Wall. 532, 22 L. ed. 487; Clark v. Fredericks (Davis v. Fredericks) 105 U. S. 4, 26 L. ed. 938.

The statute expressly provided that there should be kept on hand at all times, at the mines, a supply of materials necessary for the health and safety of the miners. This statute was manifestly violated by the superintendent, in failing to have a supply of carbons on hand, and under the decisions of the supreme court of Pennsylvania, the employee could not assume a risk which arose by reason of the failure of the company to comply with the terms of the statute.

Valjago v. Carnegie Steel Co. 226 Pa. 519, 75 Atl. 728; Jones v. American Caramel Co. 225 Pa. 644, 74 Atl. 613; Fegley v. Lycoming Rubber Co. 231 Pa. 446, 80 Atl. 870; Amiano v. Jones & L. Steel Co. 233 Pa. 523, 82 Atl. 780; Welsh v. Barber Asphalt Paving Co. 93 C. C. A. 101, 167 Fed. 465; Carstens Packing Co. v. Swinney, 108 C. C. A. 152, 186 Fed. 56.

The mine foreman, in assuming duties imposed upon him by the company, and not by the statute, is not a statutory officer to that extent, and his conduct in respect to these duties is controlling upon the company.

Wolcutt v. Erie Coal & Coke Co. 226 Pa. 204, 75 Atl. 197; Hood v. Connell Anthracite Min. Co. 231 Pa. 647, 81 Atl. 56.

In any event, the petitioner is entitled to a new trial.

Slocum v. New York L. Ins. Co. 228 U. S. 364, 57 L. ed. 879, 33 Sup. Ct. Rep. 523; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 153, 57 L. ed. 1125, 1128, 33 Sup. Ct. Rep. 648, 3 N. C. C. A. 779.

Mr. Don Rose argued the cause, and, with Mr. Charles Marshall Johnston, filed a brief for respondent:

An employer is not bound to furnish for his workmen the safest methods, nor to furnish the best machinery and appliances, in order to save himself from responsibility for accidents resulting from their use. He is only required to furnish machinery,

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appliances, and equipment that are in ordinary use in the particular line of business, and the fact that they are in ordinary use is conclusive evidence that they are reasonably safe. Whatever methods or appliances or equipment are according to the general, usual, and ordinary course adopted by those in the same business are reasonably safe within the meaning of the law, and negligence of the employer can never be imputed from use of machinery, appliances, and equipment and methods in general use in the business.

Titus v. Bradford, B. & K. R. Co. 136 Pa. 618, 20 Am. St. Rep. 944, 20 Atl. 517; Kehler v. Schwenk, 144 Pa. 357, 13 L.R.A. 374, 27 Am. St. Rep. 633, 22 Atl. 910; Reese v. Hershey, 163 Pa. 257, 43 Am. St. Rep. 795, 29 Atl. 907; Keenan v. Waters, 181 Pa. 247, 37 Atl. 342, 2 Am. Neg. Rep. 454; Higgins v. Fanning, 195 Pa. 599, 46 Atl. 102; Service v. Shoneman, 196 Pa. 63, 69 L.R.A. 792, 79 Am. St. Rep. 689, 46 Atl. 292, 8 Am. Neg. Rep. 130; McCarthy v. Shoneman, 198 Pa. 568, 48 Atl. 493; Boop v. Laurelton Lumber Co. 212 Pa. 523, 61 Atl. 1021; Fick v. Jackson, 3 Pa. Super. Ct. 386; Washington & G. R. Co. v. McDade, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; Southern P. Co. v. Seley, 152 U. S. 145, 151, 38 L. ed. 391, 393, 14 Sup. Ct. Rep. 530; Kilpatrick v. Choctaw, O. & G. R. Co. 57 C. C. A. 255, 121 Fed. 11, 195 U. S. 624, 49 L. ed. 349, 25 Sup. Ct. Rep. 789; Law v. Central Dist. Printing & Teleg. Co. 140 Fed. 562; Keats v. National Heeling Mach. Co. 13 C. C. A. 221, 21 U. S. App. 656, 65 Fed. 940; Crawley v. The Edwin, 87 Fed. 540; Donegan v. Baltimore & N. Y. R. Co. 91 C. C. A. 555, 165 Fed. 869.

The negligence of a state mine foreman whose competency has been certified to by the department of mines of the state of Pennsylvania is not the negligence of the mine operator.

Durkin v. Kingston Coal Co. 171 Pa. 193, 29 L.R.A. 808, 50 Am. St. Rep. 801, 33 Atl. 237; Wolcutt v. Erie Coal & Coke Co. 226 Pa. 210, 75 Atl. 197; Hall v. Simpson, 203 Pa. 146, 52 Atl. 4; Golden v. Mt. Jessup Coal Co. 225 Pa. 164, 73 Atl. 1103; D'Jorko v. Berwind-White Coal Min. Co. 231 Pa. 164, 80 Atl. 77; Rafferty v. National Min. Co. 234 Pa. 66, 82 Atl. 1089; Pittsburgh-Buffalo Co. v. Cheko, 124 C. C. A. 451, 204 Fed. 353.

The failure of a device to work is no evidence that it is out of repair or defective, and no evidence of negligence on the part of the master.

Southern R. Co. v. Carr, 82 C. C. A. 240, 153 Fed. 110; Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Ash v. Verlenden Bros. 154 Pa. 246, 26 Atl. 374; Brunner v. Blaisdell Bros. 170 Pa. 25, 32 Atl. 607; Snodgrass v. Carnegie Steel Co. 173 Pa. 228, 33 Atl. 1104; Spees v. Boggs, 198 Pa. 112, 52 L.R.A. 933, 82 Am. St. Rep. 792, 47 Atl. 875; Surles v. Kistler, 202 Pa. 289, 51 Atl. 887; Bauman v. Best Mfg. Co. 284 Pa. 416, 83 Atl. 293; Shandrew v. Chicago, St. P. M. & O. R. Co. 73 C. C. A. 430, 142 Fed. 320.

The jury cannot be permitted to guess, and the trial judge did permit them to guess, as to what caused Myers's death.

Alexander v. Pennsylvania Water Co. 201 Pa. 252, 50 Atl. 991; Marsh v. Lehigh Valley R. Co. 206 Pa. 560, 56 Atl. 52; Allen v. Kingston Coal Co. 212 Pa. 55, 61 Atl. 572; Snodgrass v. Carnegie Steel Co. 173 Pa. 228, 33 Atl. 1104; Welsh v. Erie & W. Valley R. Co. 181 Pa. 461, 37 Atl. 513, 2 Am. Neg. Rep. 777; Zeigler v. Simplex Foundation Co. 228 Pa. 64, 77 Atl. 239; Ault v. Cowan, 20 Pa. Super. Ct. 616; Bube v. Weatherly, 25 Pa. Super. Ct. 88; Cawley v. Baltimore & O. R. Co. 44 Pa. Super. Ct. 340; Eigenbrodt v. Williamsport, 44 Pa. Super. Ct. 437; Fahey v. Steel Foundry Co. 19 Pa. Dist. R. 314; Rogers v. Louisville & N. R. Co. 88 Fed. 462; Minneapolis General Electric Co. v. Cronon, 20 L.R.A. (N.S.) 816, 92 C. C. A. 345, 166 Fed. 658; Clare v. New York & N. E. R. Co. 167 Mass. 39, 44 N. E. 1054; Leary v. Fitchburg R. Co. 173 Mass. 373, 53 N. E. 817; Warner v. St. Louis & M. River R. Co. 178 Mo. 125, 77 S. W. 67; Owen v. Illinois C. R. Co. 77 Miss. 142, 24 So. 899; Kenneson v. West End Street R. Co. 168 Mass. 1, 46 N. E. 114, 1 Am. Neg. Rep. 446.

Mr. Justice Day delivered the opinion of the court:

Annie Myers brought an action in the United States circuit court for the western district of Pennsylvania to recover for the death of her husband, John Myers, alleged to have been caused by the negligence of the defendant, the Pittsburgh Coal Company. Under the law of Pennsylvania she might bring this action for the benefit of herself and minor children. A verdict was rendered against the Coal Company; on writ of error the case was reversed by the circuit court of appeals for the third circuit (121 C. C. A. 427, 203 Fed. 221), and it was brought here on writ of certiorari to that court.

The circuit court of appeals was of the opinion that upon the facts shown the plaintiff had not made out the right to recover, and the judgment was reversed without directing a new trial, and without sending the case back to the district court, which had succeeded to the jurisdiction of the

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circuit court, for that purpose. This was error within the doctrine of Slocum v. New York L. Ins. Co. 228 U. S. 364, 57 L. ed. 879, 33 Sup. Ct. Rep. 523; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 153, 57 L. ed. 1125, 1128, 33 Sup. Ct. Rep. 648, 3 N. C. C. A. 779. It is further contended that, apart from the question just noticed, the circuit court of appeals erred in reversing the judgment of the district court, as it did, upon the ground that there was not sufficient testimony in the case to show that the deceased came to his death by the negligence charged in the petition. To determine this question involves a brief consideration of the facts in the case.

[190] John Myers, at the time of his death, was, and for several months had been, in the employ of the Coal Company as "snapper" or brakeman in underground operations, taking part in the movement of cars in and about the mine. It appears that on the morning of the injury, a train of empty coal cars, some thirty or forty in number, was being taken down the main entry and then further down a side entry into the mine, where the cars were to be subsequently distributed in the work. The manner of operation was that empty cars were hauled by a large electric motor car down the main entry to a side entry where a flying switch was made by which the motor car continued in the main entry beyond the junction of the side entry, and the cars ran down the side entry for a considerable distance, then, upon signal from Myers, whose duty it was to ride upon the rear car of the train, by the waving of his cap, which contained a lamp, or by the movement of his head with cap on, the motor car followed on down the entry, the purpose being to overtake the empty cars and distribute them in the mine. Down the side entry, about 157 feet from the main entry, was an automatic switch, which would turn the current into the trolley wire and permit the motor car to proceed farther into the mine. It was not working properly, and the motorman alighted and turned the switch by hand, returned to the motor car, and proceeded. Up to the time the motor car reached the automatic switch Myers had been seen signaling for the motor car to come on. Some distance further there was a branch of the trolley system running into another entry, and the trolley wire passed over the tracks in the side entry at a distance of about 5 feet, 7½ inches above the rail, making it necessary for one of ordinary height to remain seated in the car or to stoop down. The roof of the entry was about 9 feet above the rail at this point. There was no light at this switch, nor was the wire guarded in any [191] way. It also appears that because of ineffective carbons the headlight on the motor car was not burning, and had not been burning for several days; that requisition had been made upon the superintendent of the mine for new carbons, but that there were none at the mine. The motorman testified that when the headlight was burning he could see objects on the track clearly at a distance of 25 or 30 yards, and that he could stop his car in about 13 feet. Continuing on from the switch, as we have said, the motor car suddenly ran upon something, was stopped, and it was found that Myers had been run over. He was lying in the middle of the track with his head toward the motor and his cap, upright, with the light still burning, was lying beside the track. Myers' body was badly torn and mangled before the motor car could be stopped. His tongue was found to be moving, but he shortly died from his injuries. It was also shown that Myers was a man of unusual strength and vigor, twenty-nine years of age, and to all appearances in full health and strength shortly before the injury.

The trial court submitted the case to the jury to determine whether the defendant had failed to discharge its duty of using reasonable care to provide a proper and safe place for Myers to work; that is, in failing to provide adequate lights at a dangerous place, and permitting the motor car to be operated without the headlight, and also in permitting an exposed live trolley wire to cross the main track at insufficient elevation. An inspection of the record satisfies us that there was testimony enough in the case to carry these questions to the jury under the instructions which were given. The duty of the master to use reasonable diligence to provide a safe place for the employees to work, to carry on the occupation in which they are employed, is too well settled to require much consideration now. This duty is a continuing one, and discharged only when the master provides and maintains a place of that [192] character. Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 87, 39 L. ed. 624, 629, 15 Sup. Ct. Rep. 491; Union P. R. Co. v. O'Brien, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Kreigh v. Westinghouse, C. K. & Co. 214 U. S. 249, 255, 53 L. ed. 984, 987, 29 Sup. Ct. Rep. 619. Under the case made, the jury might well have found that the overhead wire was hung too low for the safety of the men; that there was want of adequate light at this place; and that it was negligence to run the motor car into such a place without the light which it was its duty to provide. Where

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workmen are engaged in such mines in occupations more or less hazardous, it is the duty of the master to exercise reasonable care for their safety, and not to expose them to injury by use of dangerous appliances or unsafe places to work, when the exercise of due skill and care will make the appliances and places reasonably safe. Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 66, 48 L. ed. 99, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Kreigh v. Westinghouse, C. K. & Co. 214 U. S. 256, 53 L. ed. 988, 29 Sup. Ct. Rep. 619.

The opinion of the circuit court of appeals placed the reversal largely upon the want of definite proof as to the manner in which Myers came to his death,—whether by contact with the wire, or, if so, whether that merely disabled him or he was only injured or stunned by the fall, was seized with vertigo or other sudden sickness and fell from the car for that reason, or lost his footing by some unexpected movement of the train, or voluntarily got off the car and stumbled and fell upon the track, or became bewildered in the dark, and mistakenly supposed himself to be in a place of safety. The court held that all these situations were more or less probable, and, in the absence of some more accurate means of ascertaining the true condition in this regard, no recovery could be had for the wrongful causing of his death, and that an examination of the testimony brought the court to the conclusion that the jury should not have been permitted to guess as to the proximate cause of death. This question, however, was submitted to the jury and found against the defendant in [193] the trial court. Unless the testimony was such that no recovery can be had upon the facts shown in any view which can be properly taken of them, the verdict and judgment of the district court must be affirmed.

That there was ample testimony to carry the question of negligence to the jury we have already said, and in any case it cannot be said as a matter of law that there was no evidence tending to show that Myers came to his death by the negligence of defendant in one or more of the ways charged in the petition. Considering the testimony, as it must be considered in determining questions of this character in appellate courts, in its most favorable aspect to the plaintiff below, we think the jury might well have found, in view of the place at which the body of Myers was found near to the wire, with his cap gone from his head, that he came in contact with that wire and was thrown to the ground, and that he survived from contact with the wire, carrying the voltage which it did, and while in this situation was run over and killed by the approaching motor car, the operator being unable to see his body upon the track because of the want of efficient light in the entry or in the motor car. We think reasonable men, considering the testimony adduced, might well have come to this conclusion, and that it was error in the appellate court to set aside the verdict for entire absence of testimony upon this subject. In our opinion, the trial court properly left the question to the jury upon testimony which, when fairly considered, might sustain the verdict. See Humes v. United States, 170 U. S. 210, 42 L. ed. 1011, 18 Sup. Ct. Rep. 602.

As to the contention that the trial court erred in refusing to give the instruction requested by the Coal Company to the effect that the equipment and operation of the electric haulage plant and all persons employed in the mine were in charge and subject to the orders and direction of a duly qualified mine foreman, and that, if decedent's death occurred by reason of negligence, such negligence [194] was that of the mine foreman, and the Coal Company could not be held liable: The record shows that there was testimony tending to show that the electrical system was in charge of the electrician of the Coal Company employed as superintendent of electrical equipment, who had charge of the purchase, installation, care, operation, and maintenance of the electrical equipment used by the Company, and who was not subject to the mine foreman. The court submitted to the jury the question whether the Coal Company had committed to the mine foreman the electric system of hauling in the interior of the mine, or whether such system was in charge of an electrical engineer not accountable to the mine foreman, distinctly telling the jury that if the mine foreman was in charge in this respect, the company would not be responsible, but if they found that the Coal Company had excluded from the control of the mine foreman the electric haulage system, and that the negligence of the Coal Company was the direct and proximate cause of the death of the plaintiff's husband, there must be a recovery. The charge in this respect was as favorable as the company was entitled to have given.

As to the objection that the court erred in failing to give the instruction requested by the defendant concerning the operation of the automatic switch, to the effect that if it did not work on the trip on which the decedent was run over, and even if it was out of order, those conditions would not contribute to the running over of the decedent by the motor car or to his death, it is sufficient to say that the court in its charge to the jury did not submit a question of

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negligence specifically concerning this automatic switch and its effect if out of repair, and to have affirmed this point by giving it to the jury would only have served to possibly confuse the jury upon a point immaterial to the plaintiff's recovery, in view of the manner in which the case was given in charge to the jury.

[195] We have examined the charge and the exceptions thereto and requests for instructions, and are of opinion that the trial court fairly submitted the questions involved to the jury in a charge to which there was no substantial objection.

As to the suggestion that the deceased had assumed the risk of the want of proper appliances and the defective character of the light at the place in which he worked and was injured, we do not find that the court was requested to make any charge upon that subject, or that any exception was taken to the court's failure to charge as to assumption of risk. In that state of the record, the appellate court was not called upon to consider that question. See Humes v. United States, supra. The circuit court of appeals reversed the case for the reason, which we have stated, that there was an entire failure of adequate testimony to show that Myers came to his death by the negligence of the company in the manner charged. As we have said, we think that was an erroneous conclusion.

It follows that the judgment of the Circuit Court of Appeals must be reversed, and the judgment of the District Court affirmed, and the case remanded to that court.

ROBERT RUSSELL, Plff. in Err.,
v.
CHARLES E. SEBASTIAN.

(See S. C. Reporter's ed. 195–210.)

Constitutional law — impairing contract obligations — corporate franchise — acceptance of state's offer.

1. The grant resulting from the acceptance by the establishment of a plant devoted to the prescribed public use of the state's offer in Cal. Const. 1879, art. 11, § 19, as amended in 1885, to permit persons or corporations duly incorporated for the purpose "in any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light" to lay pipes in the city streets for the purpose specified, constituted a contract, and vested in the accepting individual or corporation a property right protected by the Federal Constitution against impairment.

[For other cases, see Constitutional Law, 1201–1213, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — rights of gas company — extending mains in city streets.

2. The contract rights of a gas company accepting, by the establishment of its plant, the state's offer in Cal. Const. 1879, art. 11, § 19, as amended in 1885, of the privilege of laying pipes in the streets of a city so far as may "be necessary for introducing into and supplying such city and its inhabitants" with artificial light, include the continuing authority to lay its gas mains in streets not previously used in order to extend its distributing system within the city, subject only to the limitations which such constitutional provision prescribes; *viz.*, local superintendence of the execution of the work, regulations for indemnity with respect to damage, and the right of the municipality to regulate the rates; and such rights were unconstitutionally impaired by the amendment of such constitutional provision on October 10, 1911, and by the municipal ordinances adopted in pursuance thereof, under which extensions cannot be made unless the gas company first seeks and obtains a franchise by purchase.

[For other cases, see Constitutional Law, 1212, 1213, 1435–1439, in Digest Sup. Ct. 1908.]

[No. 415.]

Argued January 6, 1914. Decided April 6, 1914.

IN ERROR to the Supreme Court of the State of California to review a decree refusing relief by habeas corpus to a person arrested upon the charge of excavating in a city street in violation of a municipal ordinance. Reversed and remanded for further proceedings.

See same case below, 163 Cal. 668, 126 Pac. 875.

The facts are stated in the opinion.

Mr. Oscar Trippet argued the cause, and, with Mr. H. H. Trowbridge, filed a brief for plaintiff in error:

The assignments of error present questions which this court is bound to decide for itself, independent of decisions of the state court.

Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 57 L. ed. 633, 44 L.R.A. (N.S.) 405, 33 Sup. Ct. Rep. 303.

The constitutionality of an ordinance of a city may be tested upon an application for a writ of habeas corpus.

Re Johnston, 137 Cal. 115, 69 Pac. 973.

Section 19 of article 11 of the Constitution of the state of California is a grant of

NOTE.—On the privilege of using streets as a contract within the constitutional provision against impairing the obligation of contracts—see note to Clarksburg Electric Light Co. v. Clarksburg, 50 L.R.A. 142.

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a franchise to any gas company that accepted the same prior to the amendment thereof, and such grant and the acceptance constituted a contract between the people of the state and such gas company, which could not be impaired by any change in the provisions of the Constitution.

People v. Stephens, 62 Cal. 209; Pereria v. Wallace, 129 Cal. 397, 62 Pac. 61; Mercantile Trust Co. v. Denver, 161 Fed. 769; People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787; Welsh v. Bramlet, 98 Cal. 224, 33 Pac. 66; McDonald v. Patterson, 54 Cal. 247; Western U. Teleg. Co. v. Hopkins, 160 Cal. 106, 116 Pac. 557; Re Johnston, 137 Cal. 115, 69 Pac. 973; Stockton Gas & Electric Co. v. San Joaquin County, 148 Cal. 314, 5 L.R.A. (N.S.) 174, 83 Pac. 54, 7 Ann. Cas. 511; Denninger v. Pomona, 145 Cal. 629, 79 Pac. 360; Bank of California v. San Francisco, 142 Cal. 276, 64 L.R.A. 918, 100 Am. St. Rep. 130, 75 Pac. 832; San Jose Gas Co. v. January, 57 Cal. 614; People ex rel. Spiers v. Lawley, 17 Cal. App. 331, 119 Pac. 1089; Nevada Bank v. Steinmitz, 64 Cal. 301, 30 Pac. 970; Workman v. Southern P. R. Co. 129 Cal. 536, 62 Pac. 185, 316; Merced Falls Gas & Electric Co. v. Turner, 2 Cal. App. 720, 84 Pac. 239; Southern P. Co. v. Portland, 177 Fed. 958; Indianapolis Cable Street R. Co. v. Citizens' Street R. Co. 127 Ind. 369, 8 L.R.A. 539, 24 N. E. 1054, 26 N. E. 893; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 206, 48 L. ed. 406, 410, 24 Sup. Ct. Rep. 241; Hovelman v. Kansas City Horse R. Co. 79 Mo. 639; State, Hudson Teleph. Co. Prosecutor, v. Jersey City, 49 N. J. L. 303, 60 Am. Rep. 619, 8 Atl. 123; Rutland Electric Light Co. v. Marble City Electric Light Co. 65 Vt. 377, 20 L.R.A. 821, 36 Am. St. Rep. 868, 26 Atl. 635; Northwestern Teleph. Exch. Co. v. Minneapolis, 81 Minn. 140, 53 L.R.A. 175, 83 N. W. 527, 86 N. W. 69; Boisé Artesian Hot & Cold Water Co. v. Boisé City, 230 U. S. 84, 57 L. ed. 1400, 33 Sup. Ct. Rep. 997; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; Capital City Light & Fuel Co. v. Tallahassee, 186 U. S. 401, 46 L. ed. 1219, 22 Sup. Ct. Rep. 866; Detroit v. Detroit & H. Pl. Road Co. 43 Mich. 140, 5 N. W. 275; Elliott, Roads & Streets, 2d ed. § 759; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 57 L. ed. 633, 44 L.R.A. (N.S.) 405, 33 Sup. Ct. Rep. 303.

The franchise granted by the Constitution of 1879 to gas and water companies is what is generally spoken of as a "blanket" franchise. This kind of a franchise is a valid grant, and when accepted is as binding as if the corporation had occupied all the streets of the city.

People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787; San Antonio Traction Co. v. Altgelt, — Tex. Civ. App. —, 81 S. W. 106, 200 U. S. 304, 50 L. ed. 492, 26 Sup. Ct. Rep. 261; Houston v. Houston City Street R. Co. 83 Tex. 548, 29 Am. St. Rep. 679, 19 S. W. 127; Burlington v. Burlington Street R. Co. 49 Iowa, 144, 31 Am. Rep. 145; Nash v. Lowry, 37 Minn. 261, 33 N. W. 787; Citizens' Street R. Co. v. City R. Co. 56 Fed. 746, 64 Fed. 647; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; Indianapolis Cable Street R. Co. v. Citizens' Street R. Co. 127 Ind. 369, 8 L.R.A. 539, 24 N. E. 1061, 26 N. E. 893; Gulf City Street R. Co. v. Galveston City R. Co. 65 Tex. 502; Paterson & P. Horse R. Co. v. Paterson, 24 N. J. Eq. 158; People ex rel. Chicago v. Chicago Teleph. Co. 220 Ill. 238, 77 N. E. 245; Des Moines Street R. Co. v. Des Moines Broad-Gauge Street R. Co. 73 Iowa, 513, 33 N. W. 610, 35 N. W. 602; Des Moines City R. Co. v. Des Moines, 151 Fed. 854; Mercantile Trust Co. v. Denver, 161 Fed. 769, 120 C. C. A. 100, 201 Fed. 808; Elliott, Roads & Streets, 2d ed. 752.

The extent of the right conferred by the constitutional provision is not the quantum of the acceptance, but the quantum of the offer.

San Diego Water Co. v. San Diego, 118 Cal. 568, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 57 L. ed. 633, 44 L.R.A. (N.S.) 405, 33 Sup. Ct. Rep. 303, 306; Nevada Bank v. Steinmitz, 64 Cal. 301, 30 Pac. 970; Workman v. Southern P. R. Co. 129 Cal. 536, 62 Pac. 185, 316; Merced Falls Gas & Electric Co. v. Turner, 2 Cal. App. 720, 84 Pac. 239; Elliott, Roads & Streets, 3d ed. § 949.

The obligations of a valid contract cannot be impaired by the adoption of a new Constitution any more than they can be by the enactment of a law by the legislature.

Ede v. Knight, 93 Cal. 159, 28 Pac. 860; McCracken v. Hayward, 2 How. 608, 11 L. ed. 397; Western U. Teleg. Co. v. Hopkins, 160 Pac. 106, 116 Pac. 557.

The provision of the California Constitution that laws relating to corporations may at any time be altered, amended, or repealed has no application to the case at bar.

Capital City Light & Fuel Co. v. Tallahassee, 186 U. S. 401, 46 L. ed. 1219, 22 Sup. Ct. Rep. 866; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; Western U. Teleg. Co. v. Hopkins, 160 Cal. 106, 116 Pac. 563.

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Mr. Garret W. McEnerney also argued the cause, and, with Messrs. Oscar Trippet and Warren Gregory, filed a brief for plaintiff in error:

It is not denied that in 1909 the Economic Gas Company, here represented by the plaintiff in error, acquired, and that it now holds, a franchise to supply gas within the city of Los Angeles, and, to that end, to occupy streets of that city with its mains.

People v. Stephens, 62 Cal. 209; Pereria v. Wallace, 129 Cal. 397, 62 Pac. 61; Re Johnston, 137 Cal. 115, 69 Pac. 973; Denninger v. Pomona, 145 Cal. 629, 79 Pac. 360; Stockton Gas & Electric Co. v. San Joaquin County, 148 Cal. 313, 5 L.R.A.(N.S.) 174, 83 Pac. 54, 7 Ann. Cas. 511; Re Russell, 163 Cal. 668, 126 Pac. 875, Ann. Cas. 1914A, 152; People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787; Illinois C. R. Co. v. Chicago, 176 U. S. 646, 666, 44 L. ed. 622, 629, 20 Sup. Ct. Rep. 509; Boisé Artesian Hot & Cold Water Co. v. Boisé City, 230 U. S. 84, 57 L. ed. 1400, 33 Sup. Ct. Rep. 997.

Once it is conceded that the Economic Gas Company possesses a franchise, it necessarily follows that it must possess the precise franchise offered in § 19 of article 11 of the Constitution of California, because the acceptance of a franchise must conform to the offer thereof, and such an offer can only be accepted *in toto* or rejected altogether.

7 Am. & Eng. Enc. Law, 2d ed. 660; Rex v. Westwood, 7 Bing. 1, 2 Dow & C. 21, 4 Bligh. N. R. 213, 7 Dowl. & R. 267, 4 Barn. & C. 781; Collins v. Amsterdam Street R. Co. 76 App. Div. 252, 78 N. Y. Supp. 470; Brooklyn & R. B. R. Co. v. Long Island R. Co. 72 App. Div. 496, 76 N. Y. Supp. 777; Detroit v. Detroit City R. Co. 37 Mich. 558; Canastota Knife Co. v. Newington Tramway Co. 69 Conn. 146, 36 Atl. 1107; People v. Albany & V. R. Co. 24 N. Y. 263, 82 Am. Dec. 295.

It is no impeachment of the extent of the franchise that all rights conferred thereby are not exercised at once.

Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 57 L. ed. 633, 44 L.R.A. (N.S.) 405, 33 Sup. Ct. Rep. 303; Workman v. Southern P. R. Co. 129 Cal. 536, 62 Pac. 185, 316; Los Angeles v. Southern P. R. Co. 157 Cal. 363, 108 Pac. 65.

It is the established rule that the grantee of a franchise to furnish water or artificial light to a municipality and its inhabitants is in duty bound by contract to serve the whole public, and when necessary, having regard to the reasonable circumstances of the case, gradually to extend its plant so that the municipality and all of its inhabitants may be so served.

People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787; Illinois C. R. Co. v. Chicago, 176 U. S. 646, 665–667, 44 L. ed. 622, 629, 630, 20 Sup. Ct. Rep. 509; Lukrawka v. Spring Valley Water Co. 15 Cal. App. Dec. 793; Dooley v. People's Water Co. (decided by Cal. R. Commission, Dec. 3, 1913); Des Moines Street R. Co. v. Des Moines Broad-Gauge Street R. Co. 73 Iowa, 513, 33 N. W. 610, 35 N. W. 602; People v. Detroit United R. Co. 162 Mich. 460, 139 Am. St. Rep. 582, 125 N. W. 700, 127 N. W. 748; Indiana R. Co. v. Hoffman, 161 Ind. 393, 69 N. E. 399, 15 Am. Neg. Rep. 527; Truesdale v. Newport, 28 Ky. L. Rep. 840, 90 S. W. 589; St. Louis Gaslight Co. v. St. Louis, 46 Mo. 121; Carroll v. Silver Creek Natural Gas & Improv. Co. 153 App. Div. 630, 139 N. Y. Supp. 161; Tulsa Street R. Co. v. Oklahoma Union Traction Co. 27 Okla. 339, 113 Pac. 180; Los Angeles v. Pomeroy, 124 Cal. 649, 57 Pac. 585.

Section 19 of article 11 of the Constitution of California, adopted in 1879, was intended to grant, and in fact did grant, when accepted, franchises to supply water and artificial gas to the entire municipality and to all of its inhabitants; and the acceptance of the offer created correlative duties of an equal extent.

People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787; Illinois C. R. Co. v. Chicago, 176 U. S. 646, 666, 44 L. ed. 622, 629, 20 Sup. Ct. Rep. 509; Boisé Artesian Hot & Cold Water Co. v. Boisé City, 230 U. S. 84, 57 L. ed. 1400, 33 Sup. Ct. Rep. 997; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572; Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 57 L. ed. 1389, 33 Sup. Ct. Rep. 988.

The very nature of the subject-matter of franchises for supplying water and artificial light to municipalities presupposes that the grantee will, at the beginning, occupy but a small portion of the area in which the franchise is to operate, and later, with growth and expansion, will occupy the whole area.

San Diego Water Co. v. San Diego, 118 Cal. 568, 50 L.R.A. 633, 62 Am. St. Rep. 261, 50 Pac. 633; Boisé Artesian Hot & Cold Water Co. v. Boisé City, 230 U. S. 84, 91, 57 L. ed. 1400, 1406, 33 Sup. Ct. Rep. 997; People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787; Re Consolidated Gas Co. 56 Misc. 49, 106 N. Y. Supp. 407; Mercantile Trust Co. v. Denver, 161 Fed. 769, affirmed in 120 C. C. A. 100, 201 Fed. 808.

Franchises of the type here involved are coextensive with the limits of the municipality.

People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787; Boisé

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Artesian Hot & Cold Water Co. v. Boisé City, 230 U. S. 84, 57 L. ed. 1400, 33 Sup. Ct. Rep. 997; Quincy v. Bull, 106 Ill. 337; Williamsport Pass. R. Co. v. Williamsport, 120 Pa. 1, 13 Atl. 496; West Springfield v. West Springfield Aqueduct Co. 167 Mass. 128, 44 N. E. 1063; Northwestern Teleph. Exch. Co. v. Minneapolis, 81 Minn. 140, 53 L.R.A. 175, 83 N. W. 527, 86 N. W. 69; Duluth v. Duluth Teleph. Co. 84 Minn. 486, 87 N. W. 1127; Michigan Teleph. Co. v. St. Joseph, 121 Mich. 502, 47 L.R.A. 87, 80 Am. St. Rep. 520, 80 N. W. 383; State v. Nebraska Teleph. Co. 127 Iowa, 194, 103 N. W. 120; Com. ex rel. Bell Teleph. Co. v. Warwick, 185 Pa. 623, 40 Atl. 93.

The franchises granted by § 19 of article 11 of the Constitution of California, as it existed between 1879 and 1911, are in perpetuity.

Boisé Artesian Hot & Cold Water Co. v. Boisé City, 230 U. S. 84, 57 L. ed. 1400, 33 Sup. Ct. Rep. 997; Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 57 L. ed. 1389, 33 Sup. Ct. Rep. 988; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 663, 56 L. ed. 940, 32 Sup. Ct. Rep. 572; San Diego Water Co. v. San Diego, 118 Cal. 568, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; South Pasadena v. Pasadena Land & Water Co. 152 Cal. 579, 93 Pac. 490; Atty. Gen. v. Haverhill Gaslight Co. 215 Mass. 394, 101 N. E. 1061.

The disposition of this case should be controlled by four recent decisions of this court.

Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 57 L. ed. 633, 44 L.R.A.(N.S.) 405, 33 Sup. Ct. Rep. 303; Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 57 L. ed. 1389, 33 Sup. Ct. Rep. 988; Boisé Artesian Hot & Cold Water Co. v. Boisé City, 230 U. S. 84, 57 L. ed. 1400, 33 Sup. Ct. Rep. 997. See also, Illinois C. R. Co. v. Chicago, 176 U. S. 646, 666, 44 L. ed. 622, 629, 20 Sup. Ct. Rep. 509; People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787.

Messrs. Warren Gregory and W. H. Chickering also filed a brief for plaintiff in error:

The Supreme Court of the United States will determine for itself the question of the existence or nonexistence of a contract in cases of this character, and whether the state law complained of impairs its obligation.

Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 57 L. ed. 633, 44 L.R.A. (N.S.) 405, 33 Sup. Ct. Rep. 303; Mercantile Trust & D. Co. v. Columbus, 203 U. S. 311, 51 L. ed. 198, 27 Sup. Ct. Rep. 83; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 590, 52 L. ed. 630, 633, 28 Sup. Ct. Rep. 341.

The provision of the Federal Constitution that no state shall pass a law impairing the obligation of a contract applies to a contract to which the state is a party, as well as to contracts wholly between individuals.

Fletcher v. Peck, 6 Cranch, 87, 2 L. ed. 162; New Jersey v. Wilson, 7 Cranch, 164, 3 L. ed. 303; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447.

No question of regulation under the police power is here involved. The police power may reasonably regulate, but it cannot destroy, a vested contract or right.

Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 57 L. ed. 1389, 33 Sup. Ct. Rep. 988; Hawes v. Chicago, 158 Ill. 653, 30 L.R.A. 225, 42 N. E. 373.

The grant of a right to use the public streets of a municipality by laying down pipes and conduits therein in order to supply the city and its inhabitants with gaslight is not a mere license, but is the grant of a property right which is assignable and taxable as such.

Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 57 L. ed. 1389, 33 Sup. Ct. Rep. 988; Boisé Artesian Hot & Cold Water Co. v. Boisé City, 230 U. S. 84, 57 L. ed. 1400, 33 Sup. Ct. Rep. 997; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572; New Orleans, S. F. & L. R. Co. v. Delamore, 114 U. S. 501, 29 L. ed. 244, 5 Sup. Ct. Rep. 1009; Knoxville v. Africa, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 501; Morristown v. East Tennessee Teleph. Co. 53 C. C. A. 132, 115 Fed. 307.

Although the grant contained in the California Constitution was general in character, and named no specific grantee or municipality, nevertheless, when accepted by any person or corporation, it became, as to that person or corporation, a special franchise or charter of equal effect as if the people of the state, through authorized authorities, had issued to that person or corporation a distinct franchise or charter.

Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; East Saginaw Salt Mfg. Co. v. East Saginaw, 13 Wall. 373, 20 L. ed. 611.

A right given by the Constitution to lay down pipes and conduits in the streets of a city is constitutionally impaired by a subsequent change in the law, which exacts a franchise, or requires a payment to the city of a rental for such use and occupation.

Boisé Artesian Hot & Cold Water Co. v. Boisé City, 230 U. S. 84, 57 L. ed. 1400, 33 Sup. Ct. Rep. 997; Re Johnston, 137 Cal. 115, 69 Pac. 973.

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The words "so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light" define and indicate with certainty the compelling motive and object of the enactment. The grant was designedly made coextensive with the object sought to be attained.

People v. Stephens, 62 Cal. 234.

It is not necessary that a privilege or license to use the streets of a city for the purpose of supplying its inhabitants with these necessities be accepted expressly by the grantee. It is only necessary to ascertain the intention of the parties, and the grantee, unless specifically required by the ordinance to accept it in writing, may do so by acting thereunder in a substantial manner.

Chicago Municipal Gaslight & Fuel Co. v. Lake, 130 Ill. 42, 22 N. E. 616; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 568, 41 L. ed. 1114, 1118, 17 Sup. Ct. Rep. 653.

The Constitution contemplated a single grant for the purpose of supplying the city and its inhabitants with gaslight, and not a series of separate and detached grants.

Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 57 L. ed. 633, 44 L.R.A. (N.S.) 405, 33 Sup. Ct. Rep. 303; Africa v. Knoxville, 70 Fed. 729; Workman v. Southern P. R. Co. 129 Cal. 536, 62 Pac. 185, 316; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572; Merced Falls Gas & Electric Co. v. Turner, 2 Cal. App. 720, 84 Pac. 239; Mercantile Trust Co. v. Denver, 161 Fed. 769; People's Pass. R. Co. v. Baldwin, 14 Phila. 231; Chicago, St. L. & P. R. Co. v. Eisert, 127 Ind. 156, 26 N. E. 759; White v. Chicago, St. L. & P. R. Co. 122 Ind. 317, 7 L.R.A. 257, 23 N. E. 782; Indianapolis Cable Street R. Co. v. Citizens' Street R. Co. 127 Ind. 369, 8 L.R.A. 539, 24 N. E. 1054, 26 N. E. 893.

The obligation of this contract was impaired by the subsequent legislation because the value of the construction already made by the Economic Gas Company in the streets of Los Angeles was thereby lessened.

Bartemeyer v. Iowa, 18 Wall. 129, 21 L. ed. 929; United States v. Lynah, 188 U. S. 469, 47 L. ed. 548, 23 Sup. Ct. Rep. 349; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 179, 20 L. ed. 557, 560; Pearsall v. Great Northern R. Co. 161 U. S. 646, 661, 40 L. ed. 838, 843, 16 Sup. Ct. Rep. 705; Denver v. Mercantile Trust Co. 120 C. C. A. 100, 201 Fed. 790; Des Moines Street R. Co. v. Des Moines Broad-Gauge Street R. Co. 73 Iowa, 513, 33 N. W. 610, 65 N. W. 602; People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787; Wyman, Pub. Service Corp. § 281; Pocatello Water Co. v. Standley, 7 Idaho, 155, 61 Pac. 518; Hovelman v. Kansas City Horse R. Co. 79 Mo. 632.

A company operating under a single franchise cannot discontinue its service on any particular part of its system, which, considered by itself, is unprofitable, because the operation of the system as a whole may show a profit.

Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 27, 51 L. ed. 933, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398.

A public service corporation having begun the exercise of its franchise, its duty to properly serve the public thereunder is recognized and enforced. Mandamus will lie to compel the performance of this public duty.

Savannah & P. Canal Co. v. Shuman, 91 Ga. 400, 44 Am. St. Rep. 43, 17 S. E. 937; Union P. R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 428.

The municipalities of California are not without a concrete and signal illustration of the consequences that must result from a construction that limits the public utility to the streets occupied prior to the constitutional change.

Lukrawka v. Spring Valley Water Co. 15 Cal. App. Dec. 793.

Messrs. Charles S. Wheeler and John F. Bowie filed a brief as *amici curiæ:*

Ordinarily a constitutional provision is to be liberally construed for the purpose of carrying into effect the object for which it was enacted. If the provision contains a grant or an offer of a grant for the purpose of inducing public service, the offer should be construed in case of doubt as sufficiently extensive to induce people to undertake the performance of the service.

Winona & St. P. R. Co. v. Barney, 113 U. S. 625, 28 L. ed. 1111, 5 Sup. Ct. Rep. 606; United States v. Denver & R. G. R. Co. 150 U. S. 1, 14, 37 L. ed. 975, 979, 14 Sup. Ct. Rep. 11.

The object for which § 19 of article 11 was enacted has been repeatedly declared.

Stockton Gas & Electric Co. v. San Joaquin County, 148 Cal. 313, 5 L.R.A. (N.S.) 174, 83 Pac. 54, 7 Ann. Cas. 511; South Pasadena v. Pasadena Land & Water Co. 152 Cal. 594, 93 Pac. 490.

The true construction is that which will effectuate this object.

People v. Stephens, 62 Cal. 233.

By its own terms, the provision ceases to operate in any municipality which owns its own works. Accordingly, if the rule of strict construction be adopted, the court must declare that people were expected to understand by this provision that:

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(1) An invitation was extended to enter into the field of public service, and assume the obligations to serve the city and its existing and future inhabitants;

(2) No monopoly was given, but competition with existing public service, protected by definite franchises, was desired;

(3) A person devoting property to this public service could never free it from the use to which it had been put;

(4) Though service of this class involved the investment of vast sums in inconvertible capital, yet the investment was invited upon a license revocable at will by the people of the state, and revocable by the construction of similar work by the municipality served.

It is obvious that such an interpretation would defeat the object for which this provision was adopted, and should therefore be rejected.

Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 663, 56 L. ed. 940, 32 Sup. Ct. Rep. 572.

Neither the common-law rules nor the statutes in force authorize resort to the rule of strict construction.

Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 497, 24 L. ed. 1097; King v. Samuel, 7 Cal. App. 69, 93 Pac. 391; Chitty, Prerogatives, 393, 394; People v. Stephens, 62 Cal. 233; United States v. Denver & R. G. R. Co. 150 U. S. 14, 37 L. ed. 979, 14 Sup. Ct. Rep. 11; Clary v. Rolland, 24 Cal. 148.

The territorial extent of the franchise is so clearly defined that, as to this, there is no room for construction.

Clark v. Los Angeles, 160 Cal. 30, 116 Pac. 722.

Under elementary rules of law relating to contracts, a grant must be accepted according to its terms. The extent of the grant cannot be measured by the acceptance, certainly not by the evidence of acceptance. In order to constitute an acceptance, the assent to the terms of the offer must be absolute and unqualified.

Brogden v. Metropolitan R. Co. L. R. 2 App. Cas. 691, 6 Eng. Rul. Cas. 94; Smith v. Hughes, L. R. 6 Q. B. Div. 597, 40 L. J. Q. B. N. S. 221, 25 L. T. N. S. 329, 19 Week. Rep. 1059.

If the words of the grant itself, defining territorial extent, were open to interpretation, the cases and decisions showing the extent of the obligations assumed by the grant remove any uncertainty.

Lukrawka v. Spring Valley Water Co. 15 Cal. App. Dec. 796; Bothwell v. Consumers' Co. 13 Idaho, 568, 24 L.R.A.(N.S.) 485, 92 Pac. 533; Pocatello Water Co. v. Standley, 7 Idaho, 155, 61 Pac. 518; Hyndman Water Co. v. Hyndman, 7 Pa. Super. Ct. 191.

Even if the rule of strict construction were applicable, the decision could not be supported on the theory on which it is based.

Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 57 L. ed. 633, 44 L.R.A. (N.S.) 405, 33 Sup. Ct. Rep. 303; Bewley's Case, 9 Coke, 131a.

Messrs. **Ray E. Nimmo** and **Albert Lee Stephens** argued the cause, and, with Messrs. John W. Shenk and William J. Carr, filed a brief for defendant in error:

A lighting company which constructed its system under the provisions of § 19 of article 11 of the California Constitution, as it was formerly written, obtained no vested rights as to streets not used. As to such streets there could be no contract.

St. Louis v. Western U. Teleg. Co. 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. Rep. 990; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 385, 48 L. ed. 229, 230, 24 Sup. Ct. Rep. 107; Northwestern Teleph. Exch. Co. v. St. Charles, 154 Fed. 386; Muskogee Nat. Teleph. Co. v. Hall, 4 Ind. Terr. 18, 64 S. W. 600; Belleville v. Citizens' Horse R. Co. 152 Ill. 184, 26 L.R.A. 681, 38 N. E. 584; Sunset Teleph. & Teleg. Co. v. Pasadena, 161 Cal. 265, 118 Pac. 796; Western U. Teleg. Co. v. Hopkins, 160 Cal. 106, 116 Pac. 557; Stockton Gas & Electric Co. v. San Joaquin County, 148 Cal. 315, 5 L.R.A. (N.S.) 174, 83 Pac. 54, 7 Ann. Cas. 511; 3 Elliott, Railroads, § 1079; Atchison Street R. Co. v. Nave, 38 Kan. 752, 5 Am. St. Rep. 800, 17 Pac. 587; Nellis, Street Railways, § 50; Blocki v. People, 220 Ill. 444, 77 N. E. 172; Re Russell, 163 Cal. 668, 126 Pac. 875, Ann. Cas. 1914A, 152; London Mills v. Fairview-London Teleph. Circuit, 105 Ill. App. 150.

There is no consideration or a promise where no benefit is conferred upon the one making it, nor detriment suffered by the promisee, and the promisor neither undertakes to do anything which he is not bound to do, nor forbears from doing something which he has a right to do.

9 Cyc. 316.

It makes no difference that the one to whom a naked promise was made has suffered damage by relying on it.

9 Cyc. 317.

The constitutional provision was permissive merely.

Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 385, 48 L. ed. 229, 230, 24 Sup. Ct. Rep. 107; St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep.

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961; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241.

An act or charter of incorporation is nothing more than an offer, to be consummated by acceptance.

Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705.

And until such acceptance, either by direct act or commencing business, the legislature can alter or repeal.

Capital City Light & Fuel Co. v. Tallahassee, 186 U. S. 401, 46 L. ed. 1219, 22 Sup. Ct. Rep. 866, affirming 42 Fla. 462, 28 So. 810; Cincinnati, H. & I. R. Co. v. Clifford, 113 Ind. 460, 15 N. E. 524; State use of Washington County v. Baltimore & O. R. Co. 12 Gill & J. 399, 38 Am. Dec. 317; Nashville, M. & S. Turnp. Co. v. Davidson County, 106 Tenn. 258, 61 S. W. 68.

Corporations may not with impunity neglect to embrace the offers made by states and municipalities, and then later step into the courts and demand redress for the withdrawal of those offers.

Baltimore v. Baltimore Trust & G. Co. 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. Rep. 696.

It has been said that a franchise can be lost by nonuser (Given v. Wright, 117 U. S. 648, 29 L. ed. 1021, 6 Sup. Ct. Rep. 907). It must, then, follow, as a logical conclusion, that, if the franchise may be lost by nonuser, it cannot be acquired except by user.

Statutory grants are strictly construed.

Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689; Hughes v. Northern P. R. Co. 9 Sawy. 313, 18 Fed. 106; La Plaisance Bay Harbor Co. v. Monroe, Walk. Ch. (Mich.) 155; Scranton Electric Light & Heat Co. v. Scranton Illuminating Heat & P. Co. 3 Pa. Co. Ct. 628; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047; Detroit United R. Co. v. Detroit, 229 U. S. 39, 57 L. ed. 1056, 33 Sup. Ct. Rep. 697; Clark v. Los Angeles, 160 Cal. 39, 116 Pac. 722; Charles River Bridge v. Warren Bridge, 11 Pet. 543, 547, 9 L. ed. 822, 824; Helena Waterworks Co. v. Helena, 195 U. S. 392, 49 L. ed. 250, 25 Sup. Ct. Rep. 40; Blair v. Chicago, 201 U. S. 400, 472, 50 L. ed. 801, 831, 26 Sup. Ct. Rep. 427; Knoxville Water Co. v. Knoxville, 200 U. S. 33, 50 L. ed. 359, 26 Sup. Ct. Rep. 224; Pearsall v. Great Northern R. Co. 161 U. S. 646, 664, 40 L. ed. 838, 844, 16 Sup. Ct. Rep. 705.

Governmental functions expressed in offers of franchises may be changed or enlarged until a definite right flowing from the offer has become permanently acquired by user.

Aspinwall v. Daviess County, 22 How. 364, 16 L. ed. 296; Dartmouth College v. Woodward, 4 Wheat. 663, 4 L. ed. 665; Wadsworth v. Eau Claire County, 102 U. S. 534, 26 L. ed. 221; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; Norton v. Taxing Dist. 129 U. S. 479, 32 L. ed. 774, 9 Sup. Ct. Rep. 322; Concord v. Portsmouth Sav. Bank, 92 U. S. 625, 23 L. ed. 628; Falconer v. Buffalo & J. R. Co. 69 N. Y. 491; Covington & L. R. Co. v. Kenton County Ct. 12 B. Mon. 144; Wilson v. Polk County, 112 Mo. 126, 20 S. W. 469.

Until there was an actual physical occupancy of the streets, under the former § 19 of article 11, there could be no franchise. It was a mere offer.

Belleville v. Citizens' Horse R. Co. 152 Ill. 184, 26 L.R.A. 681, 38 N. E. 584; 3 Elliott, Railroads, § 1079; Atchison Street R. Co. v. Nave, 38 Kan. 752, 5 Am. St. Rep. 800, 17 Pac. 587; Indianapolis Cable Street R. Co. v. Citizens' Street R. Co. — Ind. —, 24 N. E. 1054.

Where a municipal corporation has granted to a street railway company a right to lay its tracks, but required it to have its railway in operation within a certain time, such grant is a mere license to lay, maintain, and operate such railway upon the conditions named in the ordinance, and should be construed most strongly against the grantee.

1 Nellis, Street Railways, § 50; Blocki v. People, 220 Ill. 444, 77 N. E. 172.

No perpetual rights vested in the Economic Gas Company.

St. Louis v. Western U. Teleg. Co. 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. Rep. 990; Wabash R. Co. v. Defiance, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748; Hodges v. Western U. Teleg. Co. 72 Miss. 910, 29 L.R.A. 770, 18 So. 84; St. Clair County Turnp. Co. v. Illinois, 96 U. S. 63, 24 L. ed. 651; Omaha Electric Light & P. Co. v. Omaha, 102 C. C. A. 601, 179 Fed. 455; Wyandotte Electric Light Co. v. Wyandotte, 124 Mich. 43, 82 N. W. 821; Virginia Canon Toll Road Co. v. People, 22 Colo. 429, 37 L.R.A. 711, 45 Pac. 398; Rock Island v. Central U. Teleph. Co. 132 Ill. App. 248; East Tennessee Teleph. Co. v. Frankfort, 141 Ky. 588, 133 S. W. 565.

Mr. Justice **Hughes** delivered the opinion of the court:

This is a writ of error to review a judgment in a habeas corpus proceeding. 163 Cal. 668, 126 Pac. 875.

The plaintiff in error was arrested, on or about February 27, 1912, [198] upon the

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charge of excavating in a street of Los Angeles in violation of a municipal ordinance. He was acting on behalf of the Economic Gas Company, a corporation supplying inhabitants of the city with gas, and was engaged in preparing to lay its pipes in a street which it had not previously used. The company was proceeding under a claim of right based upon § 19 of article 11 of the state Constitution of 1879, as amended in 1885, which was as follows:

"Sec. 19. In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

On October 10, 1911, this section of the Constitution was amended by the substitution of the following provision:

"Sec. 19. Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service, or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate [199] works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries, provided, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants without the consent of such other municipality, expressed by ordinance."

Thereupon, by ordinance approved October 26, 1911, the city of Los Angeles provided that no one should exercise any franchise or privilege to lay or maintain pipes or conduits in the streets for conveying gas, water, etc., without having obtained a grant from the city in accordance with the city's charter and the procedure prescribed by the ordinance, unless such person (or corporation) might be "entitled to do so by direct and unlimited authority of the Constitution of the state of California, or of the Constitution or laws of the United States." Another ordinance, approved February 21, 1912, declared that it should be unlawful to make any excavation in a street for any purpose without written permission from the board of public works, and that before issuing the permit the board should require the applicant to show legal authority to use the streets for the purpose specified.

It was under the last-mentioned ordinance that the charge was laid against the plaintiff in error. A writ of habeas corpus was sued out upon the ground that the municipal legislation, and the constitutional amendment upon which it rested, so far as they interfered with the extension by the company of its lighting system within the city, impaired the obligation of the company's contract with the state in violation of article I, § 10, of the Federal Constitution, and also deprived it of its property [200] without due process of law, and denied to it the equal protection of the laws, contrary to the 14th Amendment. The writ was returnable before the supreme court of the state.

It appeared that the Economic Gaslight Company was organized in 1909 and thereupon undertook to manufacture and distribute gas within the city for lighting purposes. As there were no gas works owned and controlled by the city, the constitutional provision (as it stood before the amendment of 1911) applied. Having acquired an existing plant, which had been established under the authority of that provision, the company had extended its system so that, prior to October 10, 1911, it had many miles of mains and was serving upwards of 3,500 customers. Its plant had been established with a view to an increased demand for its service. Its situation, as disclosed by the petition, which was not traversed, was thus described by the state court: The petitioner "shows that the works of said company were established and operated with the intent to supply gas in every section of the city, and to lay pipes in every street, if necessary for that purpose; that to this end it constructed works of a size sufficient to supply gas to a much larger territory than it was supplying prior to October 10, 1911, and had expended in so doing $100,000 more than would have been required for works to supply only the territory reached by its pipes

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at that date, that it had laid and maintained its pipes in many streets of the city, and had supplied gas thereby to the inhabitants in such streets for more than two years before said date; that prior to said date, said company had made contracts with many of the inhabitants of the city to supply gas to them, that said contracts were still in force, and that, in order to perform them, it must extend its mains into streets not before used by it. All its works before that date were constructed in accordance with the provisions of the Constitution existing [201] prior to said amendment, and in compliance with existing regulations and directions of the city authorities." The petition also sets forth that by reason of the increased expense of construction of its plant, as above stated, it could not supply at a profit the territory contiguous to the streets actually used by it at the date of the amendment, and that to confine its service to that territory would entail upon the company a constant loss of more than $2,000 a month.

It was further averred that on February 23, 1912, the company had applied to the board of public works for permission to excavate in the designated street, not theretofore occupied by it, for the purpose of extending its distributing system in accordance with the former provision of the Constitution, offering to comply with the general regulations of the city with respect to damages and indemnity for damages. The board informed the company that there were no general regulations on the subject with which it had not complied, but that the company would not be permitted to open the street, or to lay its pipes therein, unless it first sought and obtained a franchise by purchase in accordance with the ordinance of October 26, 1911. Thereupon, the company notified the board that it would extend its mains at the time and place stated, and requested the board to direct and superintend the work. It was proceeding accordingly to open a trench for its mains when it was stopped by the arrest of the plaintiff in error.

The supreme court of the state held that the constitutional amendment authorized the city to enact the ordinances in question and thus to prescribe the terms and conditions upon which franchises of the character described might thereafter be obtained and exercised. It was further decided that the grant under the former constitutional provision took effect only upon acceptance; that the only means whereby an effectual manifestation [202] of acceptance could be made was the act of taking possession and occupying the street for the purpose allowed; and hence, that the vested right of the Economic Gas Company, at the time the Constitution was changed, went only so far as its actual occupancy and use of the streets then extended. Concluding, upon this ground, that the company had no authority to lay pipes in the new street in order to extend its service into new territory within the city, the petitioner was remanded to custody. 163 Cal. 677, 678, 681, 126 Pac. 875.

It is at once apparent that the question thus raised does not concern the power of the city to supervise the execution of the work. That, as well as the authority to regulate rates, was expressly secured by the constitutional provision upon which the claim is founded. Nor does that provision permit the assertion of an exclusive franchise. The city may not only authorize others to compete, but it may compete itself. Madera Waterworks v. Madera, 228 U. S. 454, 57 L. ed. 915, 33 Sup. Ct. Rep. 571.

Within these recognized limits, the question remains as to the nature and extent of the right acquired by the company prior to the constitutional amendment,—a question which, in view of the appeal to the clause of the Federal Constitution prohibiting state legislation impairing the obligation of contracts, it is the duty of this court to determine for itself. Douglas v. Kentucky, 168 U. S. 488, 502, 42 L. ed. 553, 557, 18 Sup. Ct. Rep. 199; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 590, 52 L. ed. 630, 633, 28 Sup. Ct. Rep. 341; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 551, 57 L. ed. 633, 638, 44 L.R.A.(N.S.) 405, 33 Sup. Ct. Rep. 303; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 556, ante, 725, 34 Sup. Ct. Rep. 364.

1. Before the Constitution of 1879, the right to lay pipes in streets rested in grant from the legislature. It could delegate to the municipality, or itself exercise, the power. Experience had produced the conviction that this authority was abused; that favoritism had fostered monopolies and restrained the competition that was then thought to be desirable. In order to terminate these [203] evils, the unique plan was decided upon of making street franchises, for the purpose of supplying water and artificial light, the subject of direct grant by the Constitution itself without requiring any action on the part of the legislature to give it force. That this was the purpose and effect of § 19 of article 11 of the Constitution of 1879 was decided by the supreme court of California in People v. Stephens, 62 Cal. 209, shortly after that Constitution was adopted. See also Pereria v. Wallace, 129 Cal. 397, 62 Cal. 61; Re

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Johnston, 137 Cal. 115, 69 Pac. 973; Denninger v. Recorder's Ct. 145 Cal. 629, 79 Pac. 360; Stockton Gas & Electric Co. v. San Joaquin County, 148 Cal. 313, 5 L.R.A. (N.S.) 174, 83 Pac. 54, 7 Ann. Cas. 511; South Pasadena v. Pasadena Land & Water Co. 152 Cal. 579, 93 Pac. 490.

It is pointed out that the language of the provision was general both with respect to persons and to places; that it embraced all the cities in the state; and that it did not provide for any formal or written acceptance of the offer. But the lack of a requirement of an acceptance of a formal character did not preclude acceptance in fact. Nor did the generality of the provision with respect to all persons and cities make it impossible for particular persons to acquire rights thereunder in particular cities. It is clear that the offer was to be taken distributively with respect to municipalities. It referred to "any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light;" and when as to such a city the offer was accepted, the grant became as effective as if it had been made specially to the accepting individual or corporation. See Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 206, 48 L. ed. 406, 410, 24 Sup. Ct. Rep. 241.

In the case of Re Johnston, 137 Cal. 115, 69 Pac. 973, the court said: "In People v. Stephens, supra, the above section" (referring to § 19 of article 11 "was construed by this court to be a direct grant from the people to the persons therein designated of the right to lay pipes in the [204] streets of a city for the purposes specified, without waiting for legislative authority or being subject to any restrictions from that branch of the government. . . . The only limitations upon this privilege are those contained in the language in which it is granted,—*viz.*, that the work shall be done 'under the direction of the superintendent of streets, or other officer in control thereof,' and 'under such general regulations as the municipality may prescribe for damages and indemnity for damages.'" As it was succinctly stated in Clark v. Los Angeles, 160 Cal. 30, 39, 116 Pac. 722: "The express grant made by § 19 is of the privilege, franchise, or easement to place in the public streets of a city the conduits necessary or convenient for the business of supplying light or power to the city and its inhabitants. It may be accepted by any person, or by any company duly incorporated to engage in that business."

When the voice of the state declares that it is bound if its offer is accepted, and the question simply is with respect to the scope of the obligation, we should be slow to conclude that only a revocable license was intended. Moreover, the provision plainly contemplated the establishment of a plant devoted to the described public service and an assumption of the duty to perform that service. That the grant, resulting from an acceptance of the state's offer, constituted a contract, and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court. New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 660, 29 L. ed. 516, 520, 6 Sup. Ct. Rep. 252; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 680, 681, 29 L. ed. 525, 527, 528, 6 Sup. Ct. Rep. 273; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 9, 43 L. ed. 341, 345, 19 Sup. Ct. Rep. 77; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 663, 664, 56 L. ed. 934, 940, 941, 32 Sup. Ct. Rep. 572; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 552, 57 L. ed. 633, 639, 44 L.R.A.(N.S.) 405, 33 Sup. Ct. Rep. 303; Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 65, 57 L. ed. 1389, 1393, 33 Sup. Ct. Rep. 988; Boisé Artesian Hot & Cold Water Co. v. Boisé City, 230 U. S. 84, 90, 91, 57 L. ed. 1400, 1406, 1407, 33 Sup. Ct. Rep. 997; Dill. Mun. Corp. 5th ed. § 1242.

[205] 2. The controversy in the present case relates to the extent to which the grant had become effective through acceptance. It is not contended that the change in the Constitution could disturb the company's rights in the streets used previous to the amendment; but it is insisted that such actual user measured the range of the acceptance of the grant, and hence defined the limits of its operation.

In support of this view, the established and salutary rule is invoked that public grants are to be construed strictly in favor of the public; that ambiguities are to be resolved against the grantee. Charles River Bridge v. Warren Bridge, 11 Pet. 420, 546, 549, 9 L. ed. 773, 823, 824; Slidell v. Grandjean, 111 U. S. 412, 437, 28 L. ed. 321, 329, 4 Sup. Ct. Rep. 475; Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48, 54, 43 L. ed. 67, 71, 18 Sup. Ct. Rep. 732; Knoxville Water Co. v. Knoxville, 200 U. S. 34, 50 L. ed. 359, 26 Sup. Ct. Rep. 224; Blair v. Chicago, 201 U. S. 400, 471, 50 L. ed. 801, 830, 26 Sup. Ct. Rep. 427. It has often been stated, as one of the reasons for the rule, that statutes and ordinances embodying such grants are usually drawn by interested parties, and that it serves to frustrate efforts through the skilful use of words to accomplish purposes which are

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not apparent upon the face of the enactment. Dubuque & P. R. Co. v. Litchfield, 23 How. 66, 88, 16 L. ed. 500, 509; Slidell v. Grandjean, 111 U. S. 412, 437, 28 L. ed. 321, 329, 4 Sup. Ct. Rep. 475; Blair v. Chicago, 201 U. S. 400, 471, 50 L. ed. 801, 830, 26 Sup. Ct. Rep. 427. But it must also be recognized that this principle of construction does not deny to public offers a fair and reasonable interpretation, or justify the withholding of that which it satisfactorily appears the grant was intended to convey. Winona & St. P. R. Co. v. Barney, 113 U. S. 618, 625, 28 L. ed. 1109, 1111, 5 Sup. Ct. Rep. 606; United States v. Denver & R. G. R. Co. 150 U. S. 1, 14, 37 L. ed. 975, 979, 14 Sup. Ct. Rep. 11; Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 427, 54 L. ed. 259, 267, 30 Sup. Ct. Rep. 118. Here, the provision was presented by a constitutional convention for adoption by the people as the deliberate expression of the policy of the state in order to secure the benefits of competition in public service, and it will not be questioned that it must receive, as the state court said in People v. Stephens, 62 Cal. p. 233, "a practical, common-sense construction."

[206] There is no ambiguity as to the scope of the offer. It was not simply of a privilege to maintain pipes actually laid, but to lay pipes so far as they might be required in order to effect an adequate distribution. The privilege was defined as that "of using the streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes upon the condition that the municipal government shall have the right to regulate the charges thereof."

The breadth of the offer was commensurate with the requirements of the undertaking which was invited. The service to which the provision referred was a community service. It was the supply of a municipality—which had no municipal works—with water or light. This would involve, in the case of waterworks, the securing of sources of supply, the provision of conduits for conveying the water to the municipality, and the permanent investment in the construction of reservoirs with suitable storage capacity; and, in the case of gasworks, the establishment of a manufacturing plant on a scale large enough to meet the demands that could reasonably be anticipated. But waterworks and gasworks constructed to furnish a municipality with water or light would, of course, be useless without distributing systems; and the right of laying in the streets the mains needed to carry the water or gas to the inhabitants of the community was absolutely essential to the undertaking as a practical enterprise. This, the constitutional provision recognized. It was clearly designed to stop favoritism in granting such rights, not to withhold them. It is not to be supposed that it was expected that waterworks and gasworks of the character required to supply cities would be erected without grants of franchises to use the streets for laying the necessary [207] distributing pipes. Boisé Artesian Hot & Cold Water Co. v. Boisé City, 230 U. S. 84, 91, 57 L. ed. 1400, 1406, 33 Sup. Ct. Rep. 997. The scheme of the constitutional provision was not to make it impossible to secure such grants, or to restrict the street rights to be acquired, but, as already stated, to end the existing abuses by making these grants directly through the Constitution itself, instead of permitting them to be made by the legislature, or by municipalities acting under legislative authority. People v. Stephens, supra.

In deciding upon the policy of making these direct grants it was for the state to determine their terms and their scope; it could have imposed whatever conditions it saw fit to impose. But it did not attempt to confine the privilege to particular streets or areas, or to make the laying of the necessary pipes conditional upon the renewal of the offer street by street, or foot by foot, as the pipes were put in the ground. The people of the state decided that local superintendence of the execution of the work, regulations and indemnity with respect to damages, and the continuing authority of the municipality to regulate rates, would be adequate protection. It was upon this basis that the state offered the privilege of laying pipes in the streets so far as might "be necessary for introducing into and supplying such city and its inhabitants" either with water or light, as the case might be. The individual or corporation undertaking to supply the city with water or light was put in the same position as though such individual or corporation had received a special grant of the described street rights in the city which was to be served. Such a grant would not be one of several distinct and separate franchises. When accepted and acted upon it would become binding—not foot by foot, as pipes were laid, but as an entirety, in accordance with its purpose and express language. Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 555, 556, 57 L. ed. 633, 640, 641, 44 L.R.A.(N.S.) 405, 33 Sup. Ct. Rep. 303.

It is urged that, in the absence of any provision for [208] formal or written acceptance, the only way the offer could be accept-

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ed was by use of the streets, and that for this reason the rights of the company could not extend beyond the length of its pipes in place. But this is to say that the offer as made could not be accepted at all; that the right to *lay* pipes could not in any event be acquired. It is to assume, despite the explicit statement of the constitutional provision, that the investment in extensive plants—in the construction of reservoirs, and in the building of manufacturing works—was invited without any assurance that the laying of the distributing system could be completed, or that it could even be extended far enough to afford any chance of profit. It would be to deny the right offered, although essential to the efficacy of the enterprise, and in its place to give a restricted and inadequate right, which was unexpressed.

In view of the nature of the undertaking in contemplation, and of the terms of the offer, we find no ground for the conclusion that each act of laying pipe was to constitute an acceptance *pro tanto*. We think that the offer was intended to be accepted in its entirety as made, and that acceptance lay in conduct committing the person accepting to the described service. The offer was made to the individual or corporation undertaking to serve the municipality, and when that service was entered upon and the individual or corporation had changed its position beyond recall, we cannot doubt that the offer was accepted. City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 568, 41 L. ed. 1114, 1118, 17 Sup. Ct. Rep. 653; Grand Trunk Western R. Co. v. South Bend, supra. In this view, the grant embraced the right to lay the extensions that were needed in furnishing the supply within the city.

This construction of the constitutional provision is the only one that is compatible with the existence of the duty which it was intended, as it seems to us, that the recipient of the state's grant should assume. The service, as has been said, was a community service. Incident to the [209] undertaking in response to the state's offer was the obligation to provide facilities that were reasonably adequate. Lumbard v. Stearns, 4 Cush. 60; Cumberland Teleph. & Teleg. Co. v. Kelly, 87 C. C. A. 268, 160 Fed. 316, 324, 15 Ann. Cas. 1210; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 27, 51 L. ed. 933, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N. Y. 528, 533, 47 N. E. 787; Morawetz, Priv. Corp. § 1129. It would not be said that either a water company or a gas company, establishing its service under the constitutional grant, could stop its mains at its pleasure and withhold its supply by refusing to extend its distributing conduits so as to meet the reasonable requirements of the community. But this duty and the right to serve, embracing the right under the granted privilege to install the means of service, were correlative.

In People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N. Y. 528, 533, 47 N. E. 787 (approved in Illinois C. R. Co. v. Chicago, 176 U. S. 646, 666, 44 L. ed. 622, 629, 20 Sup. Ct. Rep. 509), a grant of authority to lay conduits for conveying gas through the streets of a town, so as to render service to the people of the town, was held to extend as a property right not only to the streets then existing, but to those subsequently opened. The court said: "It is well known that business enterprises such as the relator is engaged in are based upon calculations of future growth and expansion. A franchise for supplying gas not only confers a privilege, but imposes an obligation upon the corporation to serve the public in a reasonable way. The relator is bound to supply gas to the people of the town upon certain conditions and under certain circumstances, and it would be most unjust to give such a construction to the consent as to disable it from performing its obligations. It cannot reasonably be contended that the relator is obliged to apply for a new grant whenever a new street is opened or an old one extended, as would be the case if the consent applied only to the situation existing when made. When the right to use the streets has been [210] once granted in general terms to a corporation engaged in supplying gas for public and private use, such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege may be exercised in the new streets as well as in the old."

As to the question of fact, the present case presents no controversy. It was averred, and not denied, that the works of the gas company were established and operated with the intent to furnish gas throughout the city, wherever needed, and that this enterprise had been diligently prosecuted; that a large investment had been made in a plant which was adequate to supply a much greater territory than that reached by the distributing mains when the amendment of 1911 was adopted; that the expense of this installation made it impossible to supply at a profit the limited territory contiguous to the streets then actually occupied by the company; and that if it were confined in its service to that territory it would sustain a constant loss. The company, by its investment, had irrevocably committed itself to the undertaking, and its acceptance of

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the offer of the right to lay its pipes, so far as necessary to serve the municipality, was complete.

We conclude that the constitutional amendment of 1911, and the municipal ordinances adopted in pursuance thereof, were ineffectual to impair this right, and that the company was entitled to extend its mains for the purpose of distributing its supply to the inhabitants of the city, subject to the conditions set forth in the constitutional provision as it stood before the amendment.

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[211] UNION LIME COMPANY, Plff. in Err.,
v.
CHICAGO & NORTHWESTERN RAILWAY COMPANY and Eden Independent Lime & Stone Company.

(See S. C. Reporter's ed. 211–223.)

Constitutional law — due process of law — taking private property for private use — railway spur track.

Private property is not taken for private use contrary to U. S. Const., 14th Amend., by the exercise of the power of eminent domain under Wis. Stat. § 1831a to condemn the land needed for the extension of a railroad spur track ordered by the state railroad commission conformably to §§ 1797–11m, 1797–12n, although such extension may be for the present benefit of a single industry which is to bear the initial cost, where the state courts declare the use to be a public one, holding that, subject to the subsequent equitable division of initial cost, the track is at the service of the public and constitutes an integral part of the railroad system.

[For other cases, see Constitutional Law, 445–449; Eminent Domain, I. d, in Digest Sup. Ct. 1908.]

[No. 529.]

Argued March 2, 1914. Decided April 6, 1914.

IN ERROR to the Supreme Court of the State of Wisconsin to review a judgment which affirmed a judgment of the Circuit Court of Fond du Lac County, in that state, ordering the condemnation of the land needed for the extension of a railroad spur track. Affirmed.

See same case below, 152 Wis. 633, 140 N. W. 346.

The facts are stated in the opinion.

Mr. George Lines argued the cause, and, with Messrs. Willet M. Spooner, Fred C. Ellis, and Louis Quarles, filed a brief for plaintiff in error:

The statute in question is invalid because it does not declare in terms or by necessary implication that the use for which it authorizes the taking of private property is a public one.

1 Lewis, Em. Dom. 3d ed. §§ 251, 371, 388; 3 Dill. Mun. Corp. 5th ed. § 1039; Hairston v. Danville & W. R. Co. 208 U. S. 598, 52 L. ed. 637, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132–144, 53 L. ed. 441–446, 29 Sup. Ct. Rep. 246; Security Trust & S. V. Co. v. Lexington, 203 U. S. 323–333, 51 L. ed. 204–208, 27 Sup. Ct. Rep. 87; Nickey v. Stearns Ranchos Co. 126 Cal. 150, 58 Pac. 459; Reeves v. The Treasurer, 8 Ohio St. 333; Gifford Drainage Dist. v. Shroer, 145 Ind. 572, 44 N. E. 636; Fleming v. Hull, 73 Iowa, 598, 35 N. W. 673; Re Tuthill, 163 N. Y. 133, 49 L.R.A. 781, 79 Am. St. Rep. 574, 57 N. E. 303; Atty. Gen. v. Eau Claire, 37 Wis. 437; Re Theresa Drainage Dist. 90 Wis. 304, 63 N. W. 288; Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 42 L.R.A. (N.S.) 1123, 33 Sup. Ct. Rep. 76.

While the Federal courts are bound by the decision of a state court as to the proper construction or meaning of a state statute or Constitution, they are not bound by the decision of the court as to the statute's purpose or effect. A decision involving the latter invokes general reasoning and applies general principles, and is not a local question.

Olcott v. Fond du Lac County, 16 Wall. 678, 21 L. ed. 382; Pana v. Bowler, 107 U. S. 529, 27 L. ed. 424, 2 Sup. Ct. Rep. 704; Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Venice v. Murdock, 92 U. S. 494, 23 L. ed. 583.

No such statute as that of Wisconsin which is here involved has ever been before this court for consideration as to its validity, and after diligent search we have been unable to find its parallel in any other state. The cases which have hitherto come to this court for review of the action of

NOTE.—On the right of railroad to condemn private property for spur tracks or sidings—see notes to Henderson v. Lexington, 22 L.R.A. (N.S.) 129; St. Louis, I. M. & S. R. Co. v. Petty, 20 L.R.A. 434; Pere Marquette R. Co. v. United States Gypsum Co. 22 L.R.A. (N.S.) 181; and Riley v. Louisville, H. & St. L. R. Co. 35 L.R.A. (N.S.) 636.

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state courts in upholding the taking of private property under the power of eminent domain have been of two classes:

(1) Those arising under general condemnation statutes, in which class of cases the question has been whether the facts of the particular case showed a taking for some recognized public use.

Hairston v. Danville & W. R. Co. 208 U. S. 598, 52 L. ed. 637, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; Chicago, B. & Q. R. Co. v. Porter, 43 Minn. 527, 46 N. W. 75; Ulmer v. Lime Rock R. Co. 98 Me. 579, 66 L.R.A. 387, 57 Atl. 1001; Chicago & N. W. R. Co. v. Morehouse, 112 Wis. 1, 56 L.R.A. 240, 88 Am. St. Rep. 918, 87 N. W. 849; St. Louis, I. M. & S. R. Co. v. Petty, 57 Ark. 359, 20 L.R.A. 434, 21 S. W. 884; South Chicago R. Co. v. Dix, 109 Ill. 237; Bedford Quarries Co. v. Chicago, I. & L. R. Co. 175 Ind. 303, 35 L.R.A.(N.S.) 641, 94 N. E. 326; Contra Costa Coal Mines R. Co. v. Moss, 23 Cal. 323; State, De Camp, Prosecutor, v. Hibernia Underground R. Co. 47 N. J. L. 43.

(2) Those arising under special statutes declaring the furtherance of some particular branch of industry to be a public use, in aid of which the power of eminent domain may be exercised.

Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174; Bankhead v. Brown, 25 Iowa, 540; New Central Coal Co. v. George's Creek Coal & I. Co. 37 Md. 537; Phillips v. Watson, 63 Iowa, 28, 18 N. W. 659; Chesapeake Stone Co. v. Moreland, 126 Ky. 656, 16 L.R.A.(N.S.) 479, 104 S. W. 762; Kipp v. Davis-Daly Copper Co. 41 Mont. 509, 36 L.R.A.(N.S.) 666, 110 Pac. 237, 21 Ann. Cas. 1372; Zircle v. Southern R. Co. 102 Va. 17, 102 Am. St. Rep 805, 45 S. E. 802.

This court has repeatedly denied the right to take property under the power of eminent domain, or of taxation for the promotion of industrial enterprise, or the development of natural resources, except under unusual circumstances.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Cole v. La Grange, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 273. 35 L. ed. 1004, 1010, 12 Sup. Ct. Rep. 173; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989.

This Wisconsin statute can only be upheld upon the theory that the words "public use" mean the same as "public interest" or "public advantage." This the decisions of this court deny, in harmony with the great weight of authority upon the subject.

Lewis, Em. Dom. 3d ed. §§ 256-258; Cooley, Const. Lim. 6th ed. p. 655.

Under the Wisconsin statutes the duty of the railroad to build a sidetrack, and its right to condemn a right of way therefor, are not limited to any particular class of industries, and are not made to depend upon the relation of such industries to the public welfare, but extend to all industries and enterprises alike, great and small, and depend only upon their necessities. This, under the authorities above cited, is not a proper basis upon which to rest the exercise of governmental power, and in all cases which we have found, involving statutes which made private interest the test, they have been declared invalid.

Re Tuthill, 163 N. Y. 133, 49 L.R.A. 781, 79 Am. St. Rep. 574, 57 N. E. 303; Apex Transp. Co. v. Garbade, 32 Or. 582, 62 L.R.A. 513, 52 Pac. 573, 54 Pac. 367, 882; Healy Lumber Co. v. Morris, 33 Wash. 490, 63 L.R.A. 820, 99 Am. St. Rep. 964, 74 Pac. 681; Pere Marquette R. Co. v. United States Gypsum Co. 154 Mich. 290, 22 L.R.A. (N.S.) 181, 117 N. W. 733; Ryerson v. Brown, 35 Mich. 333, 24 Am. Rep. 564; Berrien Springs Water Power Co. v. Berrien Circuit Judge, 133 Mich. 48, 103 Am. St. Rep. 438, 94 N. W. 379; Great Western Natural Gas & Oil Co. v. Hawkins, 30 Ind. App. 557, 66 N. E. 765; Welton v. Dickson, 38 Neb. 767, 22 L.R.A. 496, 41 Am. St. Rep. 771, 57 N. W. 559; Fleming v. Hull, 73 Iowa, 598, 35 N. W. 673; Alfred Phosphate Co. v. Duck River Phosphate Co. 120 Tenn. 260, 22 L.R.A.(N.S.) 701, 113 S. W. 410; Donnelly v. Decker, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389; Priewe v. Wisconsin State Land & Improv. Co. 93 Wis. 534, 33 L.R.A. 645, 67 N. W. 918; Maginnis v. Knickerbocker Ice Co. 112 Wis. 385, 69 L.R.A. 833, 88 N. W. 300; Huber v. Merkel, 117 Wis. 355, 62 L.R.A. 589, 98 Am. St. Rep. 933, 94 N. W. 354.

It is essential to the validity of proceedings for the taking of land for spur track purposes that the track, when built, will in fact be accessible to the public. The mere theoretical right of the public to use it is not sufficient.

Hairston v. Danville & W. R. Co. 208 U. S. 598, 52 L. ed. 637, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; State, De Camp, Prosecutor, v. Hibernia Underground R. Co. 47 N. J. L. 43; Wallman v. R. Connor Co. 115 Wis. 617, 92 N. W. 374.

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Mr. Edward M. Smart argued the cause, and, with Mr. Edward M. Hyzer, filed a brief for defendant in error the Chicago & Northwestern Railway Company:

Assuming that the judgment of condemnation in this case was in a proceeding initiated by the railroad, and based upon a sustainable finding of necessity, then, under the statutes and facts in the case, is it clearly shown that the taking is not for a "public use?"

Hairston v. Danville & W. R. Co. 208 U. S. 598, 52 L. ed. 637, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; Chicago & N. W. R. Co. v. Morehouse, 112 Wis. 1, 56 L.R.A. 240, 88 Am. St. Rep. 918, 87 N. W. 849; Union Lime Co. v. Railroad Commission, 144 Wis. 523, 129 N. W. 605; Illinois C. R. Co. v. East Sioux Falls Quarry Co. — S. D. —, 144 N. W. 727.

Is it material that the statute authorized the railroad commission, after hearing and investigation, upon a finding that the spur track is practically indispensable to a particular establishment, to order the railroad company to condemn?

Mr. Walter Drew argued the cause, and, with Mr. L. E. Lurvey, filed a brief for defendant in error the Eden Independent Lime & Stone Company:

The legislature of the state, either directly or through an administrative officer, board, or commission, as in this case, has authority under its police power to regulate railroads.

Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115.

The matter of spur tracks is a recognized class of railroad service which the railroad should provide as a matter of public duty, for a reasonable compensation.

Chicago & A. R. Co. v. Suffern, 129 Ill. 274, 21 N. E. 824; People ex rel. Spruance v. Chicago & N. W. R. Co. 57 Ill. 436; State v. Chicago, M. & St. P. R. Co. 115 Minn. 51, 131 N. W. 859; North Carolina Corp. Commission v. Seaboard Air Line R. Co. 140 N. C. 239, 52 S. E. 941.

The only question then left to consider is whether the regulation is reasonable; and that is as to whether the order in the case before the court, and under the circumstances of this case, is reasonable.

Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398.

The use is public under decisions in condemnation cases.

15 Cyc. 590; Kansas City, S. & G. R. Co. v. Louisiana Western R. Co. 116 La. 178, 5 L.R.A.(N.S.) 512, 40 So. 627, 7 Ann. Cas. 835; 2 Elliott, Railroads, 2d ed. p. 515; St. Louis, I. M. & S. R. Co. v. Petty, 57 Ark. 359, 20 L.R.A. 434, 21 S. W. 884; Roberts v. Williams, 15 Ark. 43; Madera R. Co. v. Raymond Granite Co. 3 Cal. App. 668, 87 Pac. 27; Ulmer v. Lime Rock R. Co. 98 Me. 581, 66 L.R.A. 387, 57 Atl. 1001; People ex rel. Rinne v. Blocki, 203 Ill. 363, 67 N. E. 809; South Chicago R. Co. v. Dix, 109 Ill. 237; Bedford Quarries Co. v. Chicago, I. & L. R. Co. 175 Ind. 303, 35 L.R.A. (N.S.) 641, 94 N. E. 326; Dubuque & S. C. R. Co. v. Ft. Dodge, D. M. & S. R. Co. 146 Iowa, 666, 125 N. W. 672; Dotson v. Atchison, T. & S. F. R. Co. 81 Kan. 816, 106 Pac. 1045; Hurd v. Atchison, T. & S. F. R. Co. 73 Kan. 83, 84 Pac. 553; Chesapeake Stone Co. v. Moreland, 126 Ky. 656, 16 L.R.A.(N.S.) 479, 104 S. W. 762; Riley v. Louisville, H. & St. L. R. Co. 142 Ky. 67, 35 L.R.A.(N.S.) 636, 133 S. W. 971, Ann. Cas. 1912D, 230; Kansas City, S. & G. R. Co. v. Louisiana Western R. Co. 116 La. 178, 5 L.R.A.(N.S.) 512, 40 So. 627, 7 Ann. Cas. 831; Chicago & N. W. R. Co. v. Morehouse, 112 Wis. 1, 56 L.R.A. 240, 88 Am. St. Rep. 918, 87 N. W. 849; Ulmer v. Lime Rock R. Co. 98 Me. 579, 66 L.R.A. 387, 57 Atl. 1001; New Central Coal Co. v. George's Creek Coal & I. Co. 37 Md. 537; State v. Chicago, M. & St. P. R. Co. 115 Minn. 51, 131 N. W. 859; Kettle River R. Co. v. Eastern R. Co. 41 Minn. 461, 6 L.R.A. 111, 43 N. W. 469; Chicago, B. & N. R. Co. v. Porter, 43 Minn. 527, 46 N. W. 75; Kansas & T. Coal R. Co. v. Northwestern Coal & Min. Co. 161 Mo. 288, 51 L.R.A. 936, 84 Am. St. Rep. 717, 61 S. W. 684; Kipp v. Davis-Daly Copper Co. 41 Mont. 509, 36 L.R.A.(N.S.) 666, 110 Pac. 237, 21 Ann. Cas. 1372; Butte, A. & P. R. Co. v. Montana Union R. Co. 16 Mont. 504, 31 L.R.A. 298, 50 Am. St. Rep. 508, 41 Pac. 232; National Docks R. Co. v. Central R. Co. 32 N. J. Eq. 755; Watson v. New York C. R. Co. 47 N. Y. 157; State ex rel. Sumner v. Toledo R. & Terminal Co. 24 Ohio C. C. 321; Wolfard v. Fisher, 48 Or. 479, 7 L.R.A. (N.S.) 991, 84 Pac. 850, 87 Pac. 530; Rochester & P. Coal & I. Co. v. Berwind-White Coal Min. Co. 24 Pa. Co. Ct. 104; Rudolph v. Pennsylvania Schuylkill Valley R. Co. 166 Pa. 430, 31 Atl. 131; Getz v. Philadelphia & R. R. Co. 105 Pa. 547; Alfred Phosphate Co. v. Duck River Phosphate Co. 120 Tenn. 260, 22 L.R.A.(N.S.) 701, 113 S. W. 410; Ryan v. Louisville & N. Terminal Co. 102 Tenn. 111,

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45 L.R.A. 303, 50 S. W. 744; Stockdale v. Rio Grande Western R. Co. 28 Utah, 201, 77 Pac. 849; Zircle v. Southern R. Co. 102 Va. 17, 102 Am. St. Rep. 805, 45 S. E. 802; State ex rel. Ami Co. v. Superior Ct. 42 Wash. 675, 85 Pac. 669; Caretta R. Co. v. Virginia-Pocanontas Coal Co. 62 W. Va. 185, 57 S. E. 401; State, Re Camp, Prosecutor, v. Hibernia Underground R. Co. 47 N. J. L. 43; Hairston v. Danville & W. R. Co. 208 U. S. 598, 52 L. ed. 637, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; Chicago & N. W. R. Co. v. Morehouse, 112 Wis. 1, 56 L.R.A. 240, 88 Am. St. Rep. 918, 87 N. W. 852.

Mr. Walter Drew and W. C. Owen, Attorney General of Wisconsin, filed a brief as *amici curiæ:*

A common carrier railroad is a public highway, a public purpose, a public use, a public institution.

Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 641, 657, 34 L. ed. 295, 302, 10 Sup. Ct. Rep. 965; Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co. 139 U. S. 79, 90, 35 L. ed. 97, 101, 11 Sup. Ct. Rep. 490; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 332, 41 L. ed. 107, 1024, 17 Sup. Ct. Rep. 540; Smyth v. Ames, 169 U. S. 466, 544, 42 L. ed. 819, 848, 18 Sup. Ct. Rep. 418; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 301, 43 L. ed. 702, 708, 19 Sup. Ct. Rep. 465; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 296, 297, 45 L. ed. 194, 199, 200, 21 Sup. Ct. Rep. 115; Donovan v. Pennsylvania Co. 199 U. S. 279, 293, 50 L. ed. 192, 199, 26 Sup. Ct. Rep. 91; Olcott v. Fond du Lac County, 16 Wall. 678, 694, 695, 21 L. ed. 382, 388; Queensbury v. Culver, 19 Wall. 83, 91, 22 L. ed. 100, 104; Pine Grove Twp. v. Talcott, 19 Wall. 666, 676, 677, 22 L. ed. 227, 233.

A spur track belonging to a public railroad, connected with and used as a part of its railroad system, is a public use for which property may be taken under the power of eminent domain.

Chicago & N. W. R. Co. v. Morehouse, 112 Wis. 1, 56 L.R.A. 240, 88 Am. St. Rep. 918, 87 N. W. 849; State, De Camp, Prosecutor, v. Hibernia Underground R. Co. 47 N. J. L. 43; Contra Costa Coal Mines R. Co. v. Moss, 23 Cal. 323; Chicago, B. & N. R. Co. v. Porter, 43 Minn. 527, 46 N. W. 75; Dietrich v. Murdock, 42 Mo. 279; Brown v. Corey, 43 Pa. 495, 5 Mor. Min. Rep. 368; Boyd v. Negley, 40 Pa. 377; Waddell's Appeal, 84 Pa. 90; New Central Coal Co. v. George's Creek Coal & I. Co. 37 Md. 537; Phillips v. Watson, 63 Iowa, 28, 18 N. W. 659; Lower v. Chicago, B. & Q. R. Co. 59 Iowa, 563, 13 N. W. 718; National Docks R. Co. v. Central R. Co. 32 N. J. Eq. 755; Ex parte Bacot, 36 S. C. 125, 16 L.R.A. 586, 15 S. E. 204; St. Louis, I. M. & S. R. Co. v. Petty, 57 Ark. 359, 20 L.R.A. 434, 21 S. W. 884; Bridal Veil Lumbering Co. v. Johnson, 30 Or. 205, 34 L.R.A. 368, 60 Am. St. Rep. 818, 46 Pac. 790; Butte, A. & P. R. Co. v. Montana Union R. Co. 16 Mont. 504, 31 L.R.A. 298, 50 Am. St. Rep. 508, 41 Pac. 232; Lewis, Em. Dom. § 171; Mills, Em. Dom. § 14; Randolph, Em. Dom. § 54; Union Lime Co. v. Railroad Commission, 144 Wis. 523, 129 N. W. 605.

Under the statutes of the state of Wisconsin, which provide that railroads shall pay taxes and license fees to the state, and that the property of railway companies "necessarily used in the operation of such railroads" shall be exempt from local taxation, the same rule is applied to determine what railroad property is used for public railroad purposes.

State ex rel. Northwestern Coal R. Co. v. Willcuts, 140 Wis. 448, 122 N. W. 1048.

The public use of a spur track operated as a part of a public railroad system, even though it be constructed to a single industry, is real and substantial. Connected with the main line, it is accessible over the main line to all receivers or forwarders of freight on the entire system, and to those on connecting systems.

State, De Camp, Prosecutor, v. Hibernia Underground R. Co. 47 N. J. L. 43; Union Lime Co. v. Railroad Commission, 144 Wis. 523, 129 N. W. 605; Chicago, Dock & Canal Co. v. Garrity, 115 Ill. 155, 3 N. E. 448; Western U. Teleg. Co. v. Pennsylvania R. Co. 195 U. S. 540, 570, 49 L. ed. 312, 323, 25 Sup. Ct. Rep. 133, 1 Ann. Cas. 517.

A railroad, having once established a public facility like a spur track, cannot at its own pleasure abandon it so long as there is any reasonable demand for its continued operation.

Rex v. Severn & W. R. Co. 2 Barn. & Ald. 646, 21 Revised Rep. 433, 7 Eng. Rul. Cas. 445; People v. Albany & V. R. Co. 37 Barb. 222; Chicago & A. R. Co. v. Suffern, 129 Ill. 274, 21 N. E. 824.

Whether property sought to be taken by a railroad is taken for a public use is determined by the situation resulting from the employment of the property for the construction proposed, the public rights arising with respect to it, and the public duties with which it becomes by law impressed. These criteria have been, by this court, applied upon the question of public use with respect to a railroad under a grant by Congress of the power of eminent domain.

Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 641, 657, 658, 34 L. ed. 295, 302, 303, 10 Sup. Ct. Rep. 965.

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Whether the use is public depends upon the right of the public to use under the Constitution and laws of the state, as construed by its courts. The construction adopted by the state court upon a local question will be deferred to by this court. Hairston v. Danville & W. R. Co. 208 U. S. 598, 52 L. ed. 637, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; Fairfield v. Gallatin County, 100 U. S. 47, 52, 25 L. ed. 544, 546, 9 Rose's Notes (U. S.) 784; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 508, 46 L. ed. 298, 302, 22 Sup. Ct. Rep. 95.

Mr. Justice Hughes delivered the opinion of the court:

This proceeding was instituted by the Chicago & Northwestern Railway Company to take land for a spur, the construction of which had been ordered by the Railroad Commission of the state. The land was owned by the Union Lime Company, the plaintiff in error, and the application was resisted upon the ground that it was sought to be taken for a private, and not a public, use, and therefore that its taking would operate as a deprivation of the property of the plaintiff in error without due process of law, and a denial to it of the equal protection of the laws, contrary to the 14th Amendment. This contention was overruled by the supreme court of the state, which affirmed the judgment in condemnation (152 Wis. 633, 140 N. W. 346), and this writ of error was sued out.

The proposed track was to form an extension of an [217] existing spur, owned and operated by the railway company, which leads from its main line to the quarries and kilns of two lime companies; one of these companies is the plaintiff in error, at whose works the spur now terminates. Beyond these works lie those of the Eden Independent Lime & Stone Company, which applied to the Railroad Commission for an order requiring the railway company to extend the spur to its plant. It is provided by § 1797-11m of the Wisconsin Statutes that every railroad shall acquire the necessary right of way and shall construct and operate a "reasonably adequate and suitable spur track" whenever it does not necessarily exceed 3 miles in length, is "practically indispensable to the successful operation" of any existing or proposed manufacturing establishment, and is not "unusually unsafe" or "unreasonably harmful." The railroad may require the person, firm, or corporation primarily to be served thereby to pay the legitimate cost of acquiring, by condemnation or purchase, the necessary right of way for the spur and of its construction, as determined by the Railroad Commission. By § 1797-12n, the Commission is authorized to receive complaints, in case of the failure or refusal of railroads to perform the prescribed duty, and to make appropriate orders.† Acting under these sections, the [218] Commission directed the railway company to extend the spur as desired by the Eden Company, and thereupon this proceeding was brought to condemn the land for the right of way.

The assignments of error come to the single point,—as to the character of the use. The state, through its highest court, declares the use to be a public one, and we should accept its judgment unless it is clearly without ground. [219] Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 160, 41 L. ed. 369, 389, 17 Sup. Ct. Rep. 56; Clark v. Nash, 198 U. S. 361, 369, 49 L. ed. 1085, 1088, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 531, 50 L. ed. 581, 583, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174; Offield v. New York, N. H. & H. R. Co. 203 U. S. 372, 377, 51 L. ed. 231, 236, 27 Sup. Ct. Rep. 72; Hairston v. Danville & W. R. Co. 208 U. S. 598, 607, 52 L. ed. 637, 641, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008. The general authority to exercise the power of eminent domain for the construction of spurs is found in § 1831a, Stat. (Wis.), which provides: "Every railway company . . . may build, maintain, and operate branches and spur tracks from its road or any branch thereof to and upon the grounds of any mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise, . . . ; and every such company may acquire by purchase or condemnation in the manner provided in this chapter for the acquisition of real estate for railway purposes, other than for its main track, all necessary roadways and rights [220] of way

† These sections, enacted by chapter 352 of the Laws of 1907, as amended by chapter 481 of the Laws of 1909 and chapter 137 of the Laws of 1911, are as follows:

"Section 1797-11m. 1. Every railroad shall acquire the necessary rights of way for, and shall construct, connect, maintain, and operate a reasonably adequate and suitable spur track, whenever such spur track does not necessarily exceed 3 miles in length, is practically indispensable to the successful operation of any existing or proposed mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise, and its construction and operation is not unusually unsafe and dangerous and is not unreasonably harmful to public interest.

"2. Such railroad may require the person or persons, firm, corporations, or association primarily to be served thereby, to pay the legitimate cost and expense of acquiring,

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for such branches, spur tracks," etc. The supreme court of the state sustained the validity of this provision in Chicago & N. W. R. Co. v. Morehouse, 112 Wis. 1, 56 L.R.A. 240, 88 Am. St. Rep. 918, 87 N. W. 849, holding (p. 11) that "the fact that a spur track may run to a single industry does not militate against the devotion of the property thereto being a public use thereof, so long as the purpose of maintaining the track is to serve all persons who may desire it, and all can demand, as a right, to be served, without discrimination."

In Union Lime Co. v. Railroad Commission, 144 Wis. 523, 129 N. W. 605, the court had under review an earlier order of the Commission requiring the railroad to build the spur extension now in question, and, while that order was set aside because a proper hearing had not been afforded, it was held that the spur would not be a private track, but would be devoted to a public use. In the view that the tracks contemplated would be of this character, the court sustained the statutes (§§ 1797–11m and 1797–12n), under which the Commission was proceeding, against the same objections that are now raised. The court said (id. pp. 533, 534): "Such track when built becomes a portion of the trackage of the railroad. The fact that its initial cost is borne by the party primarily to be served, with provisions for subsequent equitable division of such cost, does not make it a private track nor change the nature of its use. Over it the products of the industry find their way into the markets of the world, and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof. That these products are supplied by a single owner, or by a limited number of owners, affects the extent, and not the nature, of its use,—the track is none the less a part of the avenue through which the commodities reach the public. Subject to the equitable division of initial cost, the track is at the service of the public as much as any other, and it constitutes an integral part of the railroad system. The [221] duty to maintain and operate it rests upon the railroad. Except that it is relieved of the initial cost of right of way and construction, the track stands in the same relation to it

by condemnation or purchase, the necessary rights of way for such spur track, and of constructing the same, as shall be determined in separate items by the commission, in which case the total estimated cost thereof shall be deposited with the railroad before the railroad shall be required to incur any expense whatever therefor; provided, however, that when any such person, firm, or corporation, or association shall be required by the commission to deposit with the railroad the total estimated cost, as herein provided, such person, firm, corporation, or association may offer or cause to be offered a proposition in writing to such railroad, to construct such spur track, such proposition to be accompanied by a surety company bond, running to such railroad, and conditioned upon the construction of such spur track in a good and workmanlike manner, according to the plans and specifications provided by such railroad, and approved by the commission, and deposit with such railroad the estimated cost of the necessary right of way for such spur track; and whenever such proposition and security company bond shall be offered, the person, firm, corporation, or association primarily to be served thereby shall not be required to deposit as herein provided, as the total estimated cost of such construction, an amount in excess of the estimated cost of the right of way, and the total amount stated in such written proposition. Provided further that before the railroad shall be required to incur any expense whatever in the construction of said spur track, the person, firm, corporation, or association primarily to be served thereby shall give the railroad a bond to be approved by the commission as to form, amount, and surety, securing the railroad against loss on account of any expense incurred beyond the amount so deposited with the railroad.

"3. Whenever such spur track is so connected with the main line, as herein provided, at the expense of the owner of such proposed or existing mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise, and any person, firm, corporation, or association shall desire a connection with such spur track, application therefor shall be made to the commission, and such person, firm, corporation, or association shall be required to pay to the person, firm, corporation, or association that shall have paid or contributed to the primary cost and expense of acquiring the right of way for such original spur track, and of constructing the same, an equitable proportion thereof, to be determined by the commission, upon such application and notice, to the persons, firms, corporations, or associations that have paid or contributed toward the original cost and expense of acquiring the right of way of constructing the same.

"Section 1797–12n. In case of the failure or refusal of any railroad to comply with any of the provisions of §§ 1797–11m and 1797–12n, the person or persons, firm, corporation, or association aggrieved thereby, may file a complaint with the railroad commission, setting forth the facts, and the said commission shall investigate and determine the matter in controversy, in accordance with the provisions of §§ 1797–1 to 1797–38, inclusive, and any order it shall make in said proceeding shall have the same force and effect as an order in any other proceeding properly begun under and by virtue of the provisions of said sections."

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that any other portion of its track does. The owner of the industry obtains no interest in or control over it beyond that of being served by it equally with anyone else who may desire to use it." This decision was followed in the present case. 152 Wis. 633, 637, 140 N. W. 346.

Assailing this ruling, the plaintiff in error insists that the statute itself (referring to §§ 1797-11m and 1797-12n) authorizes the taking of property for private use, and that, being unconstitutional on its face, it cannot form the basis of any valid proceeding. It is said, in the first place, that the statute does not declare in terms or by necessary implication that the use for which the property is to be taken is a public use. But this contention is plainly without merit, as the statute must be read in the light of the construction placed upon it by the state court, which has held the described use to be a public one. The judgment of the state, so far as it is competent to determine the matter, has thus been fully expressed.

It is urged, further, that the statute is necessarily invalid because it establishes as the criterion of the Commission's action the exigency of a private business. This objection, however, fails to take account of the distinction between the requirements of industry and trade which may warrant the building of a branch track, and the nature of the use to which it is devoted when built. A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the products of a particular plant; its cost may be defrayed by those in special need of its service at the time. But none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service, and are [222] subject to the regulation of public authority. As was said by this court in Hairston v. Danville & W. R. Co. 208 U. S. 598, 608, 52 L. ed. 637, 641, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008: "The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost." There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings. See State, De Camp, Prosecutor v. Hibernia Underground R. Co. 47 N. J. L. 43; Chicago, B. & N. R. Co. v. Porter, 43 Minn. 527, 46 N. W. 75; Ulmer v. Lime Rock R. Co. 98 Me. 579, 66 L.R.A. 387, 57 Atl. 1001; St. Louis, I. M. & S. R. Co. v. Petty, 57 Ark. 359, 20 L.R.A. 434, 21 S. W. 884; Dietrich v. Murdock, 42 Mo. 279; Bedford Quarries R. Co. v. Chicago I. & L. R. Co. 175 Ind. 303, 35 L.R.A.(N.S.) 641, 94 N. E. 326.

While common carriers may not be compelled to make unreasonable outlays (Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989), it is competent for the state, acting within the sphere of its jurisdiction, to provide for an extension of their transportation facilities, under reasonable conditions, so as to meet the demands of trade; and it may impress upon these extensions of the carriers' lines, thus furnished under the direction or authority of the state, a public character regardless of the number served at the beginning. The branch or spur comes into existence as a public utility, and as such is always available as localities change and communities grow. The supreme court of Wisconsin has left no doubt with respect to the public obligations imposed upon the carrier in relation to the spurs and branches to be provided under the statute in question, and we find no ground for the conclusion that this enactment was beyond the state power.

It is also contended by the plaintiff in error that the finding by the state court that the use in the present case is a public one is not supported by the facts. But this [223] criticism of the court's finding is in substance a repetition of the argument that is urged against the validity of the statute, and what has been said upon that point is applicable.

The judgment is affirmed.

Affirmed.

UNITED STATES, Plff. in Err.,
v.
WILLIS N. BIRDSALL. (No. 727.)

UNITED STATES, Plff. in Err.,
v.
THOMAS E. BRENTS. (No. 728.)

UNITED STATES, Plff. in Err.,
v.
EVERETT E. VAN WERT. (No. 729.)

(See S. C. Reporter's ed. 223-236.)

Appeal — by government in criminal case — construction of statute.

1. A decision of a Federal district court sustaining a demurrer to an indictment upon the ground that the acts charged did not

NOTE.—On review by government in criminal case—see note to United States v. Stevenson, 54 L. ed. U. S. 153.

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fall within the condemnation of the statute on which the indictment is founded is based upon the construction of such statute, so as to be reviewable in the Federal Supreme Court.

[For other cases, see Appeal and Error, I. e, in Digest Sup. Ct. 1908.]

Bribery — official act — departmental requirement.

2. The official action sought to be influenced by a bribe charged to have been given and accepted contrary to the Federal Criminal Code (35 Stat. at L. 1096, 1109, chap. 321, U. S. Comp. Stat. Supp. 1911, pp. 1600, 1623), §§ 39, 117, need not have been prescribed by statute; it is sufficient that it was governed by a lawful requirement of the executive department under whose authority the officer was acting; and such requirement need not have been prescribed by a written rule or regulation, but might also be found in an established usage which constituted the common law of the department, and fixed the duties of those engaged in its activities.

Indians — traffic in intoxicating liquors — departmental regulations — reports of subordinates.

3. Regulations and practices having the force of regulations, under which special officers for the suppression of the liquor traffic among the Indians are charged with the duty of rendering true reports to the Commissioner of Indian Affairs, and of making recommendations with respect to the advisability of showing executive or judicial clemency to those convicted of selling liquor to Indians, could be established by the Commissioner under U. S. Rev. Stat. § 463, U. S. Comp. Stat. 1901, p. 262, giving him, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, "the management of all Indian affairs and of all matters arising out of Indian relations."

[For other cases, see Indians, II., in Digest Sup. Ct. 1908.]

[Nos. 727, 728, and 729.]

Argued and submitted January 8 and 9, 1914. Reargued February 25, 1914. Decided April 6, 1914.

IN ERROR to the District Court of the United States for the Northern District of Iowa to review a judgment sustaining a demurrer to indictments charging respectively the giving and accepting of bribes. Reversed and remanded for further proceedings.

See same case below, 206 Fed. 818.

The facts are stated in the opinion.

Solicitor General Davis, and Assistant Attorney General Denison for the United States on original submission:

Passing the point that here was a criminal action at least in a conspiracy to defraud the United States (Curley v. United States, 64 C. C. A. 369, 130 Fed. 1), we think it plain on the face of §§ 39 and 117 of the Federal Penal Code that they do not limit the offense to the inducement of criminal breaches of official duty, but cover broadly all breaches of such duty.

Haas v. Henkel, 216 U. S. 462, 480, 54 L. ed. 569, 577, 30 Sup. Ct. Rep. 249, 17 Ann. Cas. 1112; Benson v. United States, 27 App. D. C. 344; Sharp v. United States, 71 C. C. A. 258, 138 Fed. 878; United States v. Van Leuven, 62 Fed. 62.

The duties of government employees may be determined by departmental usages and regulations, and are not limited to those specifically defined by statute.

United States v. Macdaniel, 7 Pet. 1, 14, 8 L. ed. 587, 592; Benson v. Henkel, 198 U. S. 1, 49 L. ed. 919, 25 Sup. Ct. Rep. 569; Crawford v. United States, 212 U. S. 183, 191, 53 L. ed. 465, 468, 29 Sup. Ct. Rep. 260, 15 Ann. Cas. 392; Tyner v. United States, 23 App. D. C. 356; Haas v. Henkel, 166 Fed. 621, affirmed in 216 U. S. 462, 54 L. ed. 569, 30 Sup. Ct. Rep. 249, 17 Ann. Cas. 1112.

Assistant Attorney General Wallace argued the cause and filed a brief for the United States on reargument:

The Commissioner of Indian Affairs could, by regulation and usage (having the force thereof), impose on his subordinates the duty to advise him whether they consider that the suppression of the liquor traffic would be aided or hindered by reduction or suspension of sentence in the case of individual violators.

United States v. Bailey, 9 Pet. 254, 255, 9 L. ed. 119, 120; Lewis Pub. Co. v. Wyman, 104 C. C. A. 453, 182 Fed. 16; Leonard v. Lennox, 104 C. C. A. 296, 181 Fed. 760; Re Neagle, 5 L.R.A. 78, 14 Sawy. 232, 39 Fed. 860.

It is not necessary that the deputy officer should make any final decision to come within reach of the bribery statute. A recommendation is equally within its terms.

Sharp v. United States, 71 C. C. A. 258, 138 Fed. 878.

Its purpose was to safeguard the honesty of official action throughout its entire flow, from the spring of initial investigation to the ultimate ocean of final disposition.

People v. Markham, 64 Cal. 158, 49 Am. Rep. 700, 30 Pac. 620; United States v. Bailey, 9 Pet. 254, 9 L. ed. 119.

The word "pending" means undecided or undetermined.

Sanford v. Sanford, 28 Conn. 20; Wentworth v. Farmington, 48 N. H. 210.

Courts have given the words "at any time" their natural, broad meaning.

Elkins v. Wolfe, 44 Ill. App. 380; Ray-

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mond v. Wathen, 142 Ind. 367, 41 N. E. 815; Re Miller, 145 Pa. 561, 22 Atl. 1044; Schroeder v. Gemeinder, 10 Nev. 361.

Seeking the intention in the light of the evil sought to be remedied, Congress must have had in mind that a prior corruption would work as great harm, as to a matter later to come before the official, as it would in the case of a matter already before him.

United States v. Bailey, 9 Pet. 254, 9 L. ed. 119.

The words "may be brought" deal with the future.

People v. Markham, 64 Cal. 158, 49 Am. Rep. 700, 30 Pac. 620; State v. Butler, 178 Mo. 272, 77 S. W. 560.

The words "by law" should be read as "pursuant to law," or "lawfully," or "in a lawful manner," rather than as under the mandate of an act of Congress expressly imposing specific duty in this regard on the bribe taker.

Lindsay & P. Co. v. Mullen, 176 U. S. 126, 136, 137, 44 L. ed. 400, 403, 406, 20 Sup. Ct. Rep. 325; Haas v. Henkel, 216 U. S. 462, 480, 481, 54 L. ed. 569, 577, 578, 30 Sup. Ct. Rep. 249, 17 Ann. Cas. 1112.

We do not think it should seriously be claimed that no act of an officer or person acting in an official capacity for the United States could be said to be an official act or duty unless specifically prescribed by an act of Congress. Were such the law a warehouse would be demanded to shelve the statutes. Common sense and the law alike declare otherwise.

United States v. Macdaniel, 7 Pet. 14, 15, 8 L. ed. 592; Benson v. Henkel, 198 U. S. 1, 12, 49 L. ed. 919, 922, 25 Sup. Ct. Rep. 569; Crawford v. United States, 212 U. S. 189, 191, 53 L. ed. 468, 29 Sup. Ct. Rep. 260, 15 Ann. Cas. 392.

Mr. Charles W. Mullan argued the cause, and, with Mr. H. B. Boies, filed a brief for defendant in error in No. 727:

To constitute the crime of bribery, or attempt to bribe, under the provisions of § 39, the person to whom such bribe is offered or paid must be an officer of the United States, or a person acting for or in behalf of the United States in an official function under or by authority of the department or office of the government, and must have power to act upon, or to decide, in his official capacity or in his official function, the matter, question, cause, or proceeding as to which he is sought to be influenced by such bribe. If the matter as to which he is sought to be influenced by the payment of a bribe is not one which is pending before him, or which may be by law brought before him in his official capacity or in his place of trust, or is one as to which he has no power to act or decide, then the payment of such bribe, or the offer of payment, is not an offense under § 39.

United States v. Gibson, 47 Fed. 833; Re Yee Gee, 83 Fed. 145; United States v. Boyer, 85 Fed. 425; United States v. George, 228 U. S. 14, 57 L. ed. 712, 33 Sup. Ct. Rep. 412; Vernon v. United States, 76 C. C. A. 547, 146 Fed. 121.

The power conferred upon the Secretary of the Interior to prescribe regulations for the government of his Department, under § 161 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 80), is administrative only, and is confined strictly to the transaction of business within his Department. No power is conferred by any act of Congress which authorizes the Secretary of the Interior to establish any rule or regulation which can have any force outside of the Department of the Interior, or which does not relate directly to the administration of the business of the Department.

United States v. George, 228 U. S. 14, 20, 57 L. ed. 712, 715, 33 Sup. Ct. Rep. 412.

A writ of error lies only in a case in which the validity or construction of the statute upon which the indictment is founded is involved in the decision of the lower court.

United States v. Keitel, 211 U. S. 371, 398, 399, 53 L. ed. 230, 244, 245, 29 Sup. Ct. Rep. 123; United States v. Stevenson, 215 U. S. 190–195, 54 L. ed. 153–155, 30 Sup. Ct. Rep. 35.

No counsel appeared for the other defendants in error.

Mr. Justice Hughes delivered the opinion of the court:

Separate indictments were found against the several defendants. There were two indictments against the defendant Birdsall (which were consolidated), charging him with having given to Brents and Van Wert, respectively, a bribe in violation of § 39 of the Criminal Code [35 Stat. at L. 1096, chap. 321, U. S. Comp. Stat. Supp. 1911, p. 1600]. The indictments against Brents and Van Wert were for accepting the bribes in violation of § 117. Demurrer to each indictment, upon the ground that it charged no offense, was sustained by the district court. 206 Fed. 818. The cases are brought here under the criminal appeals act. 34 Stat. at L. 1246, chap. 2564.

In view of the nature of the question presented, it is not necessary to consider the indictments separately. According to the allegations, Birdsall was attorney for certain persons who, on indictment for unlawfully selling [228] liquor to Indians, had

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pleaded guilty and had been sentenced at the April term, 1910. Application had then been made to the judge of the court for a reduction or suspension of the sentences, and it was also stated that an effort would be made to obtain a commutation by Executive action. Brents and Van Wert were special officers, duly appointed by the Commissioner of Indian Affairs, under the authority of the Secretary of the Interior, for the suppression of the liquor traffic among the Indians. It was averred that by the regulations and established requirements of the Department of the Interior they were charged with the duty of informing and advising the Commissioner of Indian Affairs, either directly or through other subordinates, concerning all matters connected with the conviction and punishment of persons violating the laws of the United States in reference to the liquor traffic affecting the Indians, and particularly "to inform the said Commissioner whether or not the effective suppression of the liquor traffic with and among Indians would be furthered or prejudiced by Executive or judicial clemency in any particular case."

After referring to the conviction and sentence of the persons named, and to the application then made to the judge for a reduction or suspension of sentence, each indictment continued as follows:

"That then and there the judge of the said court announced that he would not change or reduce or suspend the said sentences or any part thereof, unless a recommendation to that effect was made to him by the said Commissioner of Indian Affairs; and the United States attorney in the aforesaid district announced that he would not recommend a commutation or other Executive clemency unless a recommendation to that effect was made to him by the said Commissioner of Indian Affairs.

"That then and there, and during all the dates and times herein mentioned, it was and long had been the [229] settled usage and practice for the United States judges in determining upon sentences and upon the applications for changes, reductions, or suspensions thereof, to consult the United States attorney, and either directly or through him the administrative officer charged with the enforcement of the laws in question, including laws for the suppression of the liquor traffic with and among the Indians,—the said Commissioner of Indian Affairs; and likewise it had been and was the settled usage and practice of the President, in the exercise of his power of extending Executive clemency, to consult the Attorney General; and likewise it had been and was the settled usage and practice of the Attorney General, for the purpose of advising the President on the said subject, to consult with the United States attorney or other officer by whom the prosecution had been conducted. . . . .

"That then and there and that at all the times herein mentioned the Commissioner of Indian Affairs, in the performance of his official duty, as provided by the rules and regulations and established usages and practices and requirements of the said Department of the Interior, and as provided by law, was charged with the duties of assisting in the enforcement of the laws of the United States in reference to the liquor traffic affecting Indians, and particularly with the duty, when requested so to do, of advising and making recommendations to any judge before whom any prosecutions on the said subject may have been tried, and the United States attorney or other officer by whom the said prosecution had been conducted, concerning the effect upon the enforcement of the said law of any proposed leniency or clemency in connection with the punishment of persons found guilty of offenses thereunder."

The indictments against Birdsall charged him with having given money to Brents and Van Wert with intent to influence their official action so that they would advise the Commissioner of Indian Affairs, contrary to the truth, [230] that upon facts officially known to them leniency should be granted to the persons who had been convicted and sentenced, as stated, and that in the interest of the enforcement of the laws the Commissioner should so recommend to the judge, the United States attorney, the Secretary of the Interior, the Attorney General, or the President. The indictments against Brents and Van Wert charged that they had received the money from Birdsall with the intent that their official action should be thus influenced.

As the district court held that the acts charged did not fall within the condemnation of the statute, the court necessarily construed the statute, and the cases are properly here. United States v. Patten, 226 U. S. 525, 535, 57 L. ed. 333, 339, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141.

Section 117 of the Criminal Code (35 Stat. at L. p. 1109, chap. 321, U. S. Comp. Stat. Supp. 1911, p. 1623), with respect to the acceptance of bribes, provides that "whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the government thereof," accepts money, etc., "with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may

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by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby," shall be punished as stated.. Section 39 (id. p. 1096), as to bribe giving, uses similar language in defining the official relation of the recipient and the character of the action intended to be influenced; adding the words—"with intent to influence him to commit . . . any fraud . . . on the United States, or to induce him to do or omit to do any act in violation of his lawful duty."

Every action that is within the range of official duty comes within the purview of these sections. There was thus a legislative basis (United States v. George, 228 U. S. 14, 22, 57 L. ed. 712, 715, 33 Sup. Ct. Rep. 412) for the charge in the present cases, if the action sought to be influenced was official action. To constitute [231] it official action, it was not necessary that it should be prescribed by statute; it was sufficient that it was governed by a lawful requirement of the Department under whose authority the officer was acting (Rev. Stat. § 161, U. S. Comp. Stat. 1901, p. 80; Benson v. Henkel, 198 U. S. 1, 12, 49 L. ed. 919, 922, 25 Sup. Ct. Rep. 569; Haas v. Henkel, 216 U. S. 462, 480, 54 L. ed. 569, 577, 30 Sup. Ct. Rep. 249, 17 Ann. Cas. 1112). Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the Department and fixed the duties of those engaged in its activities. United States v. Macdaniel, 7 Pet. 1, 14, 8 L. ed. 587, 592. In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery. Haas v. Henkel, supra.

We must assume, in view of the decision below, that the indictment sufficiently charged that the action of Brents and Van Wert, which it was sought to influence, was action in the course of duty so far as the regulations and usages of the Department could establish that duty.

The question is whether the Department had authority to establish it. The district court held that it had no such power, and hence that the indictments charged no offense. The ruling was that there was "no act of Congress conferring upon the Interior Department, or the Bureau of Indian Affairs, any duty whatever in regard to recommending to the executive or judicial departments of the government whether or not Executive or judicial clemency shall be extended to, or withheld from, any person who may be charged with, or convicted of, selling intoxicating liquors to Indians, or of any other offense against the United States." 206 Fed. 818, 821.

The Commissioner of Indian Affairs, "under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe," is [232] charged with "the management of all Indian affairs and of all matters arising out of Indian relations" (Rev. Stat. § 463, U. S. Comp. Stat. 1901, p. 262). The object of the establishment of the office was to create an administrative agency with broad powers adequate to the execution of the policy of the government, as determined by the acts of Congress, with respect to the Indians under its guardianship. From an early day, Congress has prohibited the liquor traffic among the Indians, and it has been one of the important duties of the Indian Office to aid in the enforcement of this legislation. See act of June 30, 1834, chap. 161, § 20, 4 Stat. at L. 729, 732; Rev. Stat. §§ 2139-2141; act of July 23, 1892, chap. 234, 27 Stat. at L. 260; act of January 30, 1897, chap. 109, 29 Stat. at L. 506. It has furnished such aid by the detection of violations, by the collection of evidence, and by appropriate steps to secure the conviction and punishment of offenders. The regulations of the office, adopted under statutory authority (Rev. Stat. §§ 465, 2058, U. S. Comp. Stat. 1901, p. 264), have been explicit as to the duties of Indian agents in this respect.[1] In recent years, Congress has [233] made special appropriations "to enable the Commissioner of Indian Af-

[1] These regulations are as follows:

"574. Having therefore the power to break up to a great extent this demoralizing traffic" (the liquor traffic), "agents are expected to use the utmost vigilance in enforcing the penalties of the law against all persons who engage in it with the Indians under their charge, whether this is done on or off the reservation.

"575. When persons are detected in a violation of the law their cases should be placed in the hands of the district attorney for the district wherein the crime was committed, in order that they may be promptly arrested, tried, and punished; and agents will cooperate with that officer in his efforts to convict the guilty parties, furnishing him with the requisite evidence and all the facts that they may be able to obtain for the purpose indicated. Indians are competent witnesses in these cases.

"576. It is also the duty of agents to strictly carry out the provisions of §§ 2140 and 2141 of the Revised Statutes of the United States respecting the searching for concealed liquors within their agencies, and respecting the destruction of distilleries set up or continued in Indian country." Regulations of the Indian Office (1904).

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fairs, under the direction of the Secretary of the Interior, to take action to suppress the traffic of intoxicating liquors among Indians" (34 Stat. at L. 328, 1017, chaps. 3504, 2285; 35 Stat. at L. 72, 782, chaps. 153, 263; 36 Stat. at L. 271, 1059, chaps. 140, 210; 37 Stat. at L. 519, chap. 388), and an organization of special officers and deputies, serving in various states, has been created in the Department. Through these efforts numerous convictions have been obtained. The results have been reported to Congress annually by the Commissioner,[2] and the appropriations for the continuance of the service have been increased.[3]

[234] This being the character of the Department's work, it cannot be doubted that when persons who are convicted apply for Executive clemency the President is entitled to avail himself of the recommendations of the Secretary of the Interior and of the Commissioner. The information obtained by the Indian Office and its advice are always at his command. The President is entitled to know whether, in the judgment of the Secretary or the Commissioner, the granting of clemency will tend to promote or hinder the efforts of the Department. The action of these officers in thus advising the President plainly would be official action; but in so acting they would necessarily rely largely upon the reports and advice of subordinates in the department who were more directly acquainted with the existing conditions, the records of offenders, and the facts and circumstances of particular cases. For this reason, if for no other, it was within the competency of the office to establish regulations, and practices having the force of regulations, that all persons employed in its work should render to the Commissioner whenever requested true reports and give disinterested and honest advice upon the facts known to them with respect to the advisability of showing leniency to convicted violators of the law.

Nor is there any ground for the conclusion that the President is limited to obtaining direct reports to himself in such matters. By virtue of his relation to the Department he may require the reports to be made to the Attorney General, who, by the direction of the President, may be intrusted with the duty of securing the information and recommendations which the President should have in order properly to pass upon applications for clemency; and for these purposes the Department could require [235] the necessary reports from those engaged in its service.

Further, there can be no question that the authority of the Department in its undertaking to suppress the forbidden traffic extended to every matter in which its aid was appropriate. That was the clear import of the legislation broadly defining its powers and of the action of Congress in supporting its work. Whenever it could afford assistance in the course of proceedings to secure the punishment of offenders it was fully empowered to give it. If a judge in fixing the sentence to be imposed upon those found guilty, or in determining whether the sentence as imposed should be suspended or reduced, desired to be advised of the recommendation of the Commissioner of Indian Affairs, in view of his knowledge of the conditions attending the enforcement of the law, the Commissioner was not lacking in authority to comply with the request. It is not enough to say that there is no mandatory requirement im-

[2] H. Doc. vol. 27, 60th Cong. 1st Sess. pp. 26–31; H. Doc. vol. 43, 60th Cong. 2d Sess. pp. 34–40; H. Doc. vol. 44, 61st Cong. 2d Sess. pp. 12–15; H. Doc. vol. 32, 61st Cong. 3d Sess. pp. 12–13; H. Doc. vol. 41, 62d Cong. 2d Sess. pp. 32–33.

[3] The nature and extent of this authorized service of the Department are shown by the following extract from the Commissioner's report for the fiscal year ending June 30, 1912: "Until 1906 . . . enforcement of these statutes and subsequent enactments" (as to the liquor traffic) "was left to Indian agents and superintendents and their Indian police, assisted so far as might be by local peace officers and by representatives of the Department of Justice. In 1906 criminal dockets in Indian territory became so crowded and the possibility of early trial so remote that disregard of the statutes forbidding introduction of intoxicants assumed large importance. To meet the emergency, Congress, in the act of June 21, 1906, appropriated $25,000 to be used to suppress the traffic in intoxicating liquors among Indians, and in August, 1906, a special officer was commissioned and sent to Oklahoma that he and his subordinates might, through detective operations, supplement the efforts of superintendents in charge of reservations. In the fiscal year 1909, when the appropriation had grown to $40,000, this service began to operate throughout all states where Indians needed protection. In 1911 the service had grown until it had an appropriation of $70,000 and an organization including 1 chief special officer, 1 assistant chief, 2 constables, 12 special officers, and 143 local deputies stationed in 21 states. The increasing success of the service appears in the fact that in 1909, 561 cases which the service secured came to issue in court, resulting in 548 convictions, whereas in 1911, 1,202 cases came to issue, 1,168 defendants were convicted, and but 34 defendants were acquitted by juries. In 1911 fines imposed amounted to $80,463, or more than the appropriation for the service." H. Doc. No. 933, 62d Cong. 3d Sess. pp. 11, 12.

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posing the obligation to give the recommendation. In executing the powers of the Indian Office there is necessarily a wide range for administrative discretion, and in determining the scope of official action regard must be had to the authority conferred; and this, as we have seen, embraces every action which may properly constitute an aid in the enforcement of the law.

The Commissioner was entitled to give his recommendations to the judge or to the United States attorney upon request, and he had complete power under the direction of the Secretary of the Interior to establish rules and usages in the Department by which he could secure correct information and uncorrupted advice from every one of his subordinates. None of these officers could properly say that in reporting with respect to the effect of leniency in particular cases he was acting outside the sphere of official conduct, and the giving and acceptance of bribes to influence their reports and recommendations [236] was within the statutes under which these indictments were laid.

The judgment of the District Court in each case is reversed, and the cases are remanded for further proceedings in conformity with this opinion.

It is so ordered.

DIAMOND COAL & COKE COMPANY, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 236–249.)

Public lands — cancelation of patent — fraudulent entry of coal lands.

1. A homestead patent covering mineral lands, secured by submitting false proofs to the land officers of the nonmineral character of the lands applied for, although not void or open to collateral attack, is voidable and may be annulled in a suit by the government against the patentee or a purchaser with notice of the fraud.

[For other cases, see Public Lands, I. 1, in Digest Sup. Ct. 1908.]

Evidence — burden of proof — sufficiency — annulling homestead patent covering mineral lands.

2. The government is charged with the burden of proof in a suit to annul a homestead patent as wrongfully covering mineral lands, and must sustain the burden by that class of evidence which commands respect, and that amount of it which produces conviction.

[For other cases, see Evidence, II. 1, 2; XII. g, in Digest Sup. Ct. 1908.]

Public lands — annulling homestead patent for mineral lands.

3. To justify the annulment of a homestead patent as wrongfully covering mineral lands it must appear that the known conditions at the time of the proceedings which resulted in the patent were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable, and justify expenditures to that end.

[For other cases, see Public Lands, I. 1, in Digest Sup. Ct. 1908.]

Evidence — sufficiency — knowledge that homestead entries covered coal lands.

4. Arid sagebrush lands are sufficiently shown to have been known to be valuable for their coal at the time of the proceedings in the Land Department resulting in the issuance to a coal company of a patent for such lands upon soldiers' additional homestead entries purchased by it by evidence that such company made an earlier effort to acquire a part of such lands which was obviously fraudulent and unlawful independently of their character, that easily ten times their nominal value was voluntarily expended by the company in acquiring them, and that its own nearby mining operations, supplementing the evidence afforded by an outcrop to the east of such lands and by the geological formation, had disclosed the existence of an extensive bed of valuable coal dipping to the west.

[For other cases, see Evidence, XII. f, in Digest Sup. Ct. 1908.]

Public lands — what are coal lands.

5. Actual disclosure of coal within its boundaries is not essential to constitute a tract of public land coal lands which, under U. S. Rev. Stat. §§ 2302, 2318, 2319, 2347–2351, U. S. Comp. Stat. 1901, pp. 1410, 1423, 1424, 1440, 1441, are not subject to acquisition under the homestead law, but they are to be deemed such if the adjacent disclosures and other surrounding or external conditions are such as to induce practical coal men to invest in such lands as valuable for coal mining.

[For other cases, see Public Lands, 18, 20, 21, in Digest Sup. Ct. 1908.]

[No. 192.]

Argued January 28 and 29, 1914. Decided April 6, 1914.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which, reversing a decree of the Circuit Court for the District of Wyoming, directed an entry of a decree in favor of the United States in a suit to cancel homestead patents as wrongfully covering coal lands. Affirmed.

See same case below, 112 C. C. A. 272, 191 Fed. 786.

The facts are stated in the opinion.

NOTE.—On setting aside land patents for fraud—see note to Miller v. Kerr, 5 L. ed. U. S. 381.

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Messrs. Cornelius F. Kelley and Mr. L. O. Evans argued the cause, and, with Mr. B. M. Ausherman, filed a brief for appellant:

In a case of this character, to set aside and annul United States patents, the government occupies the same position as any private party in a similar action, and must establish its charge by the same quantum and character of proof as private parties to similar actions charging fraud.

Davis v. Wiebbold, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628; Atlantic Delaine Co. v. James, 94 U. S. 207, 24 L. ed. 112; Maxwell Land-Grant Case, 121 U. S. 381, 30 L. ed. 959, 7 Sup. Ct. Rep. 1015.

The construction given to statutes by those charged with the duty of executing them is always entitled to the most respectful consideration, and should not be overruled without cogent reasons.

United States v. Moore, 95 U. S. 760, 24 L. ed. 588; Barden v. Northern P. R. Co. 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030.

The established practice of the Land Office, which should be regarded as a rule of property, has been to deny entries of lands as coal lands or mineral lands unless the same were shown to contain within their limits developed and opened mines or deposits of coal of commercial value, or other minerals in quantity sufficient to justify the development and exploitation of the land, and to render it more valuable for mineral than for other purposes; and it has been the uniform practice to require evidence of the existence of coal or other mineral deposits upon the land itself. The fact that the land was surrounded by land containing either coal or other mineral, or that it was adjacent to mineral lodes or coal veins, or even that the land itself contained small quantities of mineral or surface croppings of coal undeveloped, has always been held insufficient; and where the character of the lands as mineral or coal lands was not established by such proof and evidence of mineral value, the land has always been held properly enterable under the homestead and other nonmineral acts.

Dughi v. Harkins, 2 Land Dec. 721; Roberts v. Jepson, 4 Land Dec. 60; Cleghorn v. Bird, 4 Land Dec. 478; Hooper v. Ferguson, 2 Land Dec. 712; Kings County v. Alexander, 5 Land Dec. 126; Re Williams, 11 Land Dec. 462; Frees v. Colorado, 22 Land Dec. 510; Arthur v. Earle, 21 Land. Dec. 92; Jones v. Driver, 15 Land Dec. 514; Re Elda Min. & Mill. Co. 29 Land Dec. 279; Tulare Oil & Min. Co. v. Southern P. R. Co. 29 Land Dec. 269; Harkrader v. Goldstein, 31 Land Dec. 87.

The views of the Land Office were not erroneous; on the contrary, they have been repeatedly approved by the decisions of this court and of the lower Federal courts and state courts which have had occasion to consider the questions involved.

Colorado Coal & I. Co. v. United States, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 13; Deffeback v. Hawke, 115 U. S. 392, 404, 29 L. ed. 423, 426, 6 Sup. Ct. Rep. 95; Davis v. Wiebbold, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628; United States v. Iron Silver Min. Co. 128 U. S. 673, 32 L. ed. 571, 9 Sup. Ct. Rep. 195; Reynolds v. Iron Silver Min. Co. 116 U. S. 688, 29 L. ed. 774, 6 Sup. Ct. Rep. 601, 15 Mor. Min. Rep. 591; United States v. Reed, 12 Sawy. 99, 28 Fed. 482; Nevada Sierra Oil Co. v. Home Oil Co. 98 Fed. 673, 20 Mor. Min. Rep. 283; Olive Land & Delevopment Co. v. Olmstead, 103 Fed. 568, 20 Mor. Min. Rep. 700; Migeon v. Montana C. R. Co. 23 C. C. A. 156, 44 U. S. App. 724, 77 Fed. 249, 18 Mor. Min. Rep. 446; United States v. Kostelak, 207 Fed. 447; Alford v. Barnum, 45 Cal. 482, 10 Mor. Min. Rep. 422; Blackburn v. United States, 5 Ariz. 162, 48 Pac. 904, 18 Mor. Min. Rep. 684; Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 64 Pac. 113.

The legislative classification of coal lands as mineral lands is not, as shown by the construction of this statute and the application thereof, a declaration that all coal is mineral, or that all coal lands are mineral lands, but was only intended to make the act applicable to coal lands such as are specified in the exclusion of known mines from the pre-emption act of 1841, and the rule as to the necessity of showing the existence of known mines under the pre-emption act is applicable to the present case.

Colorado Coal & I. Co. v. United States, 123 U. S. 325, 31 L. ed. 189, 8 Sup. Ct. Rep. 131; Mullan v. United States, 118 U. S. 271, 276, 277, 30 L. ed. 170, 172, 173, 6 Sup. Ct. Rep. 1041.

From the decisions of the courts and the Land Office, we believe that it can be said, without successful contravention, that the following propositions are firmly established:

First, the known character of the land at the time of the application or entry is determinative. The rule has always been that the inquiry would not be made as to such character at any time subsequent to the time of payment and final receipt or entry. The question must be determined by the conditions existing at the time the applicant does everything required on his part and becomes entitled to a conveyance, from which time he is regarded as the equitable owner of the land. Upon the pur-

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chase of homestead land under additional scrip, no residence is required. The scrip is tendered to and left with the Land Office at the time of application, so that in the case of such entries we submit that the time of the first application is the period to which the inquiry will be directed; and further, the time of application should be the determinative period, where the patent is sought to be set aside for fraud, for the reason that the motive which animated the entryman must be judged by the facts known to him and existing at the time his application was made. It is not material what developments subsequent to the application or entry show.

Second, in order to bring the land within the allegations of the bill, that is, to render it only enterable under the coal land law, it must have been shown that it contained known mines or deposits of coal, of a workable character, and of sufficient extent to make the lands more valuable on account of their existence for coal mining purposes than the lands would be for agricultural purposes.

Third, the mere presence of coal croppings or coal mines in the vicinity of the lands in question cannot determine the character which must be assigned to the land. On the contrary, it must be judged by the known physical features of the identical lands in question.

Fourth, if the lands were not shown to be coal lands in character, it is immaterial that they may have but slight value for grazing or other agricultural purposes.

Solicitor General Davis argued the cause, and, with Mr. Karl W. Kirchwey, filed a brief for appellee:

The policy of Congress to withhold lands valuable for minerals from acquisition under any law not expressly made applicable to such lands has been too often recognized by this court to admit of discussion here. This policy and the general statutes declaring it apply to coal as well as to all other minerals.

Mullan v. United States, 118 U. S. 271, 276, 30 L. ed. 170, 172, 6 Sup. Ct. Rep. 1041.

Upon a careful examination of this court's opinions, and of all of the relevant opinions delivered by the Land Department, it will be found that they do not present any obstacle to the acceptance now of the natural and primary meaning of the terms "mineral lands" and "lands valuable for minerals," or bar out any kind of evidence, direct or circumstantial, which is calculated to shed light upon the question whether given lands, at a given time, were or were not more valuable for coal than for other purposes. The true rule, as we regard it, especially in the case of coal lands, requires only such knowledge of mineral value as, in its nature, the subject-matter will allow, and permits proof of such knowledge by any evidence, real, direct, or inferential, which is logically relevant,—such, for instance, as practical men of experience are wont to rely upon in acquiring the land for mining purposes.

Deffeback v. Hawke, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; Colorado Coal & I. Co. v. United States, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; Davis v. Wiebbold, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628; Cowell v. Lammers, 10 Sawy. 257, 21 Fed. 200; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; United States v. Plowman, 216 U. S. 372, 59 L. ed. 523, 30 Sup. Ct. Rep. 299; United States v. Iron Silver Min. Co. 128 U. S. 673, 683, 32 L. ed. 571, 575, 9 Sup. Ct. Rep. 195; Iron Silver Min. Co. v. Reynolds, 124 U. S. 374, 384, 31 L. ed. 466, 471, 8 Sup. Ct. Rep. 598; Kings County v. Alexander, 5 Land Dec. 126; Re Instructions, 34 Land Dec. 200; Savage v. Boynton, 12 Land Dec. 612; Scott v. Sheldon, 15 Land Dec. 361; Rucker v. Knisley, 14 Land. Dec. 113; Hamilton v. Anderson, 19 Land. Dec. 168; Montana v. Buley, 23 Land Dec. 116; Hooper v. Ferguson, 2 Land Dec. 712; Dughi v. Harkins, 2 Land Dec. 721; Roberts v. Jepson, 4 Land Dec. 60; Cleghorn v. Bird, 4 Land Dec. 478; McWilliams v. Green River Coal Asso. 23 Land Dec. 127.

If these applicants actually believed the lands to be valuable for coal, and wilfully represented that the lands were essentially nonmineral and contained no coal, at the same time concealing from the officers of the government's Land Department such facts as that the lands lay opposite and immediately adjacent to a well-defined coal outcrop which dipped toward the lands in controversy, there would seem to be no question that they were guilty of a flagrant fraud, irrespective of what subsequent events might show as to the true character of the lands.

United States v. Trinidad Coal & Coking Co. 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct. Rep. 57; Hyde v. Shine, 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760; United States v. Keitel, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123.

Under these circumstances the burden of proof shifts from the government, which is no longer obliged to establish the mineral character of the lands.

Moffat v. United States, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10.

The appellant company is not an innocent purchaser.

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J. J. McCaskill Co. v. United States, 216 U. S. 504, 514, 54 L. ed. 590, 596, 30 Sup. Ct. Rep. 386; 5 Thomp. Corp. 2d ed. §§ 5474, 5479.

Mr. Justice Van Devanter delivered the opinion of the court:

This was a suit by the United States, against an incorporated company engaged in coal mining, to regain the title to about 2,840 acres of land in Uinta county, Wyoming, theretofore patented to Thomas Sneddon and Daniel F. Harrison, and by them conveyed to the coal company. The patents, thirty-four in number, were issued under the homestead law upon what are called soldiers' additional entries. The applications for the entries were made at various dates beginning with May 1, 1899, and each application was accompanied by an affidavit, by either Sneddon or Harrison, stating that he was [238] well acquainted with the land, had passed over it frequently, and could testify understandingly about it; that there was not, to his knowledge, any deposit of coal or other valuable mineral within its limits; that it was essentially nonmineral, and that the application was made with the object of securing it for agricultural purposes, and not of fraudulently obtaining title to mineral land. Mineral lands, including coal lands, are not subject to acquisition under the homestead law (Rev. Stat. §§ 2302, 2318, 2319, 2347-2351, U. S. Comp. Stat. 1901, pp. 1410, 1423, 1424, 1440, 1441), and these affidavits were made and submitted as proof that the character of the lands applied for was such that they properly could be acquired under that law. The land officers accepted the affidavits and the statements, therein as true, and allowed the entries and issued the patents.

The bill charged that the affidavits were false and that the entries and patents were procured in the execution of a fraudulent scheme to acquire known coal lands under soldiers' additional homestead entries; and the decisive issues in the case were, first, whether the lands were known to be valuable for coal when the applications for the entries were made, and, second, if they were, whether the coal company was a bona fide purchaser from the patentees. At the hearing the circuit court answered the first of these questions in the negative and gave a decree for the coal company; but upon an appeal to the circuit court of appeals that court answered the first question in the affirmative and the second in the negative, and reversed the action of the circuit court, with a direction that a decree for the government be entered. 112 C. C. A. 272, 191 Fed. 786. The present appeal was then taken by the coal company.

As the arguments of counsel have taken a wide range and in some respects have departed from the settled rules of decision applicable in cases like this, it will be appropriate to restate those rules before turning to the evidence. They are:

[239] 1. Questions of fact arising in the administration of the public-land laws, such as whether lands sought to be entered are mineral or nonmineral, are committed to the land officers for determination; and as their decision must rest largely or entirely upon proofs outside the official records, it is possible in *ex parte* proceedings, as was the case here, for applicants, by submitting false proofs, to impose upon those officers and secure entries and patents under one law, when if truthful proofs were submitted the lands could not be acquired under that law, but only under another imposing different restrictions upon their disposal. A patent secured by such fraudulent practices, although not void or open to collateral attack, is nevertheless voidable, and may be annulled in a suit by the government against the patentee or a purchaser with notice of the fraud. St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 640, 26 L. ed. 875, 876, 11 Mor. Min. Rep. 673; United States v. Minor, 114 U. S. 233, 240, 29 L. ed. 110, 112, 5 Sup. Ct. Rep. 836; Colorado Coal & I. Co. v. United States, 123 U. S. 307, 313, 31 L. ed. 182, 185, 8 Sup. Ct. Rep. 131; Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321, 323, 41 L. ed. 175, 176, 16 Sup. Ct. Rep. 1018.

2. The respect due to a patent, the presumption that all the preceding steps required by law were duly observed, and the obvious necessity for stability in titles resting upon these official instruments, require that in suits to annul them the government shall bear the burden of proof and shall sustain it by that class of evidence which commands respect, and that amount of it which produces conviction. Maxwell Land-Grant Case, 121 U. S. 325, 379-381; 30 L. ed. 949, 958, 959, 7 Sup. Ct. Rep. 1015; United States v. Iron Silver Min. Co. 128 U. S. 673, 676, 32 L. ed. 571, 572, 9 Sup. Ct. Rep. 195; United States v. Stinson, 197 U. S. 200, 204, 205, 49 L. ed. 724, 725, 25 Sup. Ct. Rep. 426; United States v. Clark, 200 U. S. 601, 608, 50 L. ed. 613, 616, 26 Sup. Ct. Rep. 340.

3. To justify the annulment of a homestead patent as wrongfully covered mineral land, it must appear that at the time of the proceedings which resulted in the patent the land was known to be valuable for minerals; that is to say, it must appear that the known conditions at the time [240] of

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those proceedings were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end. If at that time the land was not thus known to be valuable for mineral, subsequent discoveries will not affect the patent. The inquiry must be directed to the situation at that time, as were the applicant's proofs and the finding of the land officers. If the proofs were not false then, they cannot be condemned, nor the good faith of the applicant impugned, by reason of any subsequent change in the conditions. "We say 'land *known* at the time to be *valuable* for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the statute is applicable. . . . We also say lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the pre-emption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We therefore use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued." Deffeback v. Hawke, 115 U. S. 392, 404, 29 L. ed. 423, 426, 6 Sup. Ct. Rep. 95; Colorado Coal & I. Co. v. United States, 123 U. S. 307, 328, 31 L. ed. 182, 190, 8 Sup. Ct. Rep. 131; United States v. Iron Silver Min. Co. 128 U. S. 673, 683, 32 L. ed. 571, 575, 9 Sup. Ct. Rep. 195; Davis v. Wiebbold, 139 U. S. 507, 519, 35 L. ed. 238, 242, 11 Sup. Ct. Rep. 628; Dower v. Richards, 151 U. S. 658, 663, 38 L. ed. 305, 307, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; [241] Shaw v. Kellogg, 170 U. S. 312, 332, 42 L. ed. 1050, 1057, 18 Sup. Ct. Rep. 632; United States v. Plowman, 216 U. S. 372, 374, 54 L. ed. 523, 524, 30 Sup. Ct. Rep. 299.

As a further preliminary to considering the evidence, it should be observed that these lands, if purchased under the coal-land law, would have cost $20 an acre, and also that the coal company could not have purchased directly, or indirectly through others, more than 320 acres, unless it expended $5,000 in opening and improving a mine, in which event the maximum would have been 640 acres. Rev. Stat. §§ 2348, 2350, U. S. Comp. Stat. 1901, pp. 1440, 1441; United States v. Trinidad Coal & Coking Co. 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct. Rep. 57; United States v. Keitel, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123. As before said, the entries here in question embraced about 2,840 acres.

Coming to the evidence, we find it voluminous, unreasonably so. Part of it sheds no light upon the issues, and was taken in disregard of the last of the rules just stated. That which properly may be considered very clearly establishes the following facts:

The proceedings in the land office began in May, 1899 Most of the applications were filed during that year and passed to patent in 1901. The others were presented and acted upon in succeeding years. The patents were all secured by means of affidavits and proofs, as before indicated, declaring that the lands were essentially nonmineral, were not known to contain any deposit of coal, and were sought for agricultural purposes, and not as mineral land. For many years the district in which the lands were situate had been known to contain coal. They were surveyed in 1874, and the surveyor reported one of the sections as coal land, the others being contiguous to lands similarly reported. This was shown in the field notes and upon the official plats. The lands were in a valley, 3 or 4 miles in width, bounded on the east and west by foothills. A thick bed of coal was disclosed in the eastern face of the western hills, but its quality was not such as to make it of commercial value. Along [242] the western base of the eastern hills was the outcrop of another coal bed. This outcrop had been weathered down and in some places covered by the wash from above, but it could be traced upon the surface for several miles. It had been opened up at different places, and the openings disclosed a coal bed, from 6 to 14 feet in thickness, dipping to the west at an angle of from 15 to 25 degrees from the horizontal, as did the cretaceous rocks with which it was interstratified. This coal was of superior quality and recognized commercial value, and the rocks containing it were the coal-bearing strata of that region. The lands in controversy were west of the outcrop, in the direction of the dip. Some were near the outcrop, and the east line of the farthest section was about a mile and a half away. There was nothing upon their surface showing the presence of coal beneath, nor anything indicating that the bed outcropping on the

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east and dipping to the west did not pass through them. Unless valuable for coal, they were not worth to exceed a dollar and a quarter an acre. They were arid sagebrush lands, about 7,000 feet above sea level, and afforded very limited pasturage. Without irrigation they were not susceptible of cultivation, and the cost of securing water for that purpose was prohibitive.

Attracted by this outcrop, the coal company opened a mine thereon, in the vicinity of these lands, in 1894. In the beginning the output of the mine was small, but it reached 183,750 tons for 1897, 259,608 tons for 1898, and 441,277 tons for 1899.

An attempt was made by the coal company to acquire a part of the lands in controversy in 1898, by inducing some of its employees and others to make ordinary homestead entries of them under an agreement whereby the company was to bear the expense, compensate the entrymen for the exercise of their homestead rights, and receive the title when perfected. The arrangement was fraudulent [243] and in direct violation of the homestead law, independently of the character of the lands. 26 Stat. at L. 1097, chap. 561, § 5, U. S. Comp. Stat. 1901, p. 1388. Sneddon was in charge of the attempt. He was acquainted with the lands and all their surroundings and was well informed upon the subject of coal mining. With the aid of a surveyor he identified the subdivisions to be entered, and afterwards selected the men who were to make the entries and directed all that was done, indicating, in that connection, that the lands were coal lands and were to be taken for that reason, and also to prevent another coal concern from getting them. The entries were made in 160-acre tracts, and to give them apparent support cheap cabins were put upon the lands, at the company's expense, but the law was not even colorably complied with in other respects. The next year this plan was abandoned and that of using soldiers' additional rights was adopted. These rights were assignable, and in their exercise no residence, improvement, or cultivation was required. See Rev. Stat. § 2306, U. S. Comp. Stat. 1901, p. 1415; Webster v. Luther, 163 U. S. 331, 41 L. ed. 179, 16 Sup. Ct. Rep. 963. At the company's request the prior entries were relinquished and the entrymen were severally paid $500 for what they had done, the payment to one being $600. When the relinquishments were filed, Sneddon and Harrison immediately applied to enter the lands with soldiers' additional rights. A few of the relinquished subdivisions were not re-entered, and several tracts not covered by the prior entries were included in the new ones, but all of the latter were made with soldiers' additional rights purchased and supplied by the company, and were made for its benefit. The price paid by the company for these additional rights was from $6 to $13 an acre. After the entries were obtained the lands were conveyed to the company, and Sneddon was paid $1,000 for this service, although otherwise regularly employed by the company at the time.

In 1898, shortly before the dummy entries were made, [244] Sneddon had filed in the land office a sworn declaration of his intention to purchase, under the coal-land law (Rev. Stat. §§ 2347–2349, U. S. Comp. Stat. 1901, pp. 1440, 1441), one of the tracts in controversy, which he then described as containing "a valuable vein of coal." The tract was about a quarter of a mile from the outcrop. At the time of making the soldiers' additional entries he relinquished the coal filing and included the tract in two of them.

In 1899, about the time of the additional entries, James Lees purchased from the government, under the coal-land law, and sold to the company for $3,400, a quarter section upon which earlier exploration had disclosed good coal, 8 feet in thickness. This sale was in execution of a prior arrangement, and the price paid to Lees was $200 in excess of that paid to the government. The tract was within a half mile in each of three directions from lands here in controversy.

As indicative of the weight and importance which men having a practical knowledge of coal mining attached to the outcrop at the time, the government proved by an experienced mine foreman, who had been in charge of large mines, known as the Cumberland, adjacent to a portion of the lands in controversy, that those mines were opened in 1900 by reason of what was found on the outcrop; that there was no precedent drilling of the adjacent lands; and that in advising the opening of the mines he was guided by what an examination of the outcrop in 1889 disclosed. True, he said that he could not take "a solemn oath" or "be positive" that unexplored lands in the vicinity of the outcrop and in the direction of the dip contained valuable coal, but his testimony was plainly to the effect that the outcrop, the direction and inclination of the dip, and other conditions in 1899 and 1900, afforded reasonable ground for believing that a considerable territory lying west of the outcrop could be mined profitably.

[245] There was much expert testimony by geologists concerning the outcrop and other known geological data bearing upon the character of these lands. In the main the

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witnesses were agreed respecting the existence of these physical indicia, but differed as to the conclusions to be drawn from them; the expert for the government maintaining that they afforded convincing reasons for concluding that the lands were coal lands, and the experts for the coal company controverting that view. But the divergence was not so pronounced as it would seem, for it was partly due to a difference as to what, in legal contemplation, are coal lands.

The expert for the government proceeded upon the theory that when the known surroundings are such that practical coal men would invest in particular lands for coal mining, or advise others to do so, those lands are to be deemed coal lands, even though coal has not as yet actually been disclosed within their limits. And having in mind the outcropping coal bed, the direction and inclination of its dip, the character of the rocks with which it was interstratified, the quality and thickness of the coal at the outcrop, the proximity of the lands to the outcrop, and the topographical and structural features of the vicinity, he gave it as his opinion that the coal bed extended into and through the lands in question, and that practical coal men would regard the lands as valuable for coal, and invest in them as such. He accordingly pronounced them coal lands within his acceptation of that term. This conclusion had substantial support, not only in the facts already recited, but also in the fact that the company's maps, made three years before the suit was begun, showed that it was intended to project its mining operations westward from the outcrop a mile and a half, and had designated the intervening lands, which included some of those in controversy, as coal lands, and in the further fact that the company had returned lands extending westward [246] a similar distance, likewise including some now in controversy, as exempt from direct taxation by reason of a local statute substituting an output tax upon coal mines. Laws Wyo. 1903, chap. 81, p. 101. The return for the year in which the maps were made claimed an exemption of substantially six sections, in two tiers of three sections each, although the work of developing the mine (No. 4), as shown by the maps, was still within the east half of the middle section in the eastern tier.

The experts for the coal company proceeded largely, but not entirely, upon the theory that lands cannot be regarded as coal lands unless coal in quantity and of quality to render its extraction profitable is actually disclosed within their boundaries. One testified that even if a slope were driven from the outcrop to within 5 feet of the vertical boundary of one of the sections in question, and in good coal all the way (a fact proved, but not to be considered here, because in the nature of a discovery subsequent to the entries), it would not show that the section approached was coal land, there being no actual exposure of coal within its limits. And he added that it would be the same if the distance were 3 inches instead of 5 feet, but that "the moment you cross the line, then it commences to be coal land." Special emphasis was laid upon the uncertainties incident to coal mining in the cretaceous areas of the West by reason of the occurrence of faults, wants, thinning, and the like; and this, it was said, required that actual exposure of coal within the land, by an outcropping at the surface or an excavation, be accepted as the true and only test. But even such a test was largely discredited by statements that "a good outcrop at the surface may represent a want below, or a want at the surface may represent a coal below," and that in following a good discovery a fault or thinning, as well as a want, may be encountered at any moment. It was conceded, however, that the coal horizon—meaning the coal-bearing [247] strata shown at the outcrop, but not necessarily the coal—passed through the lands in controversy, and one expert, while declaring that he could not make an affidavit that they were coal lands in the sense of "strictly containing deposits of coal," candidly added: "But I would be prepared to make an affidavit that I believe them to contain coal." Another, although pronouncing the showing at the outcrop and elsewhere insufficient to render the lands valuable for coal mining, said: "I am not prepared, personally, to either affirm or deny that this land does or does not contain coal. I contend that it is beyond the capacity of any man to say that something exists or does not exist upon which he has no absolute testimony."

It is of some significance that Sneddon—who had long been in the company's service, had been the central figure in the acquisition of these lands, was familar with them and the purpose for which they were sought and acquired, was the company's superintendent when the evidence was taken before the master, and was present during a part, at least, of the time when it was being taken—was not called by the company as a witness, and that statements, declarations, and acts attributed to him and which made against the company were permitted to go undenied and unexplained.

We think the evidence, rightly considered, shows with the requisite certainty that at the time of the proceedings in the land

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office the lands were known to be valuable for coal. Otherwise they had only a nominal value, not to exceed $1.25 an acre, and yet easily ten times that amount was voluntarily expended by the company in acquiring them. It was hardly intending to make an aimless or grossly excessive expenditure. It was a practical concern, operated by practical men. It had located a mine upon the outcrop five years before, and in the meantime had proved the wisdom of the undertaking [248] by its mining operations. They had disclosed the existence of an extensive bed of valuable coal dipping to the west under the valley, and in that way had supplemented the evidence afforded by the outcrop and its surroundings. Without any doubt these considerations induced the company to believe, and rightly so, that the lands in controversy possessed a value for coal mining greatly in excess of their value for any other purpose. This explains the expenditure and the persistency of the company's efforts to acquire them; and the fact that the earlier effort was obviously fraudulent and unlawful, independently of the character of the lands, serves in no small degree to explain the kindred practices employed in the later effort. In short, the company, without care as to the means, sought and acquired the lands because it regarded them as valuable for coal. Its view and purpose were also reflected by its maps and tax returns. Of course, it was not a bona fide purchaser from Sneddon and Harrison, for they were mere agents representing it as an undisclosed principal.

An exposure to the eye of coal upon the particular lands was not essential to give them a then present value for coal mining. They were all adjacent to the outcrop and above the plane of the coal-bearing strata dipping under the valley. In alternate even-numbered sections they substantially paralleled the outcrop for 7 miles, and in two places were separated from it by only a few rods. Those to the north were opposite the company's developed mine (No. 4), and those to the south were opposite the tract acquired through Lees, upon which good coal was disclosed. The outcrop, the disclosures in the vicinity, and the geological formation pointed with convincing force to a workable bed of merchantable coal extending under the valley and penetrating these lands. These conditions were open to common obseravtion, and were such as would appeal to practical men, and be relied upon by [249] them in making investments for coal mining. They did so appeal to the Cumberland people, as well as this company, both large concerns represented by men of experience, understanding the uncertainties and hazards of the business as well as its rewards. No doubt it has its uncertainties and hazards, but the evidence shows that they are not so pronounced as indicated by the company's experts.

There is no fixed rule that lands become valuable for coal only through its actual discovery within their boundaries. On the contrary, they may, and often do, become so through adjacent disclosures and other surrounding or external conditions; and when that question arises in cases such as this, any evidence logically relevant to the issue is admissible, due regard being had to the time to which it must relate.

The case of Colorado Coal & I. Co. v. United States, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131, relied upon by the coal company, is essentially different from this in that there the court was dealing with a statute excepting from entry lands on which there were "mines" at the time, a matter particularly noticed in the opinion (p. 328), while here the exception is of "mineral lands" and "lands valuable for minerals." Rev. Stat. §§ 2302, 2318, U. S. Comp. Stat. 1901, pp. 1410, 1423.

It will be perceived that we are not here concerned with a mere outcropping of coal with nothing pointing persuasively to its quality, extent, or value; neither are we considering other minerals whose mode of deposition and situation in the earth are so irregular or otherwise unlike coal as to require that they be dealt with along other lines.

Decree affirmed.

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[250] EL PASO BRICK COMPANY, Appt.,
v.
JOHN H. McKNIGHT.

(See S. C. Reporter's ed. 250–260.)

Mines — rights acquired by entry — erroneous cancelation.

1. The legal effect under U. S. Rev. Stat. § 2325, U. S. Comp. Stat. 1901, p. 1429, of the allowance of an entry upon an application for a patent to a mining claim by the local land officer issuing the final receipt as a determination that the original locations were valid and that everything necessary to keep them in force, including the annual assessment work, had been done, is not destroyed by the cancelation by the Land Department of such entry and final receipt, based upon a mistake of law.

[For other cases, see Mines, I. d, 1, in Digest Sup. Ct. 1908.]

Mines — affidavit of posting — curing defect.

2. The execution before an officer residing outside of the mining district of the affidavit that notice of an application for a patent to a mining claim had been posted

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on the land, though not a compliance with U. S. Rev. Stat. § 2335, U. S. Comp. Stat. 1901, p. 1435, is not a fatal defect which invalidates the entire proceeding before the Land Department, but is a mere irregularity which may be cured by the subsequent filing of a properly verified affidavit.

Mines — acquiescence in erroneous cancelation of entry — effect on vested rights.

3. Rights to a patent to a mining claim with which the applicant had become vested by a full compliance with the requirements of U. S. Rev. Stat. § 2325, U. S. Comp. Stat. 1901, p. 1429, were not destroyed because such applicant yielded to an erroneous ruling of the Land Department canceling the entry and receiver's final receipt on the ground that the affidavit of posting was executed before an officer residing outside of the mining district, and instituted new proceedings in order to secure a patent as evidence of title.

[For other cases, see Mines, I. d, 1, in Digest Sup. Ct. 1908.]

[No. 185.]

Argued January 22 and 23, 1914. Decided April 6, 1914.

APPEAL from the Supreme Court of the Territory of New Mexico to review a decree which affirmed a decree of the District Court of Doña Ana County in that territory in favor of plaintiff in a suit to try the right of possession to conflicting mining locations. Reversed and remanded for further proceedings.

See same case below, 16 N. M. 721, 120 Pac. 694, Ann. Cas. 1912D, 1309.

Statement by Mr. Justice Lamar:

In proceedings brought by McKnight to try the right of possession to conflicting mining locations, it appeared that the defendant, the El Paso Brick Company, was in possession of the Aluminum, International, and Hortense claims, constituting what was known as the Aluminum group of placer mines. It held under locations made prior to January, 1903. In 1905 the company decided to apply for a patent to the land, which embraced about 411 acres. Accordingly, on August 2, 1905, it filed with the register of the land office at Las Cruces, Doña Ana county, New Mexico, an application for a patent, together with an affidavit (executed before an officer residing outside of the mining district) that notice of the application had been posted on the land. These papers were filed with the register, who gave the further notice required by statute. No protest or adverse claim was filed by any person. The Brick Company paid $1,027.50, being the purchase price fixed by Rev. Stat. § 2333, U. S. Comp. Stat. 1901, p. 1433, and on October 23, 1905, the land officers allowed an entry on which the receiver issued a final receipt—the material portions of which were as follows:

United States Land Office at Las Cruces, N. Mexico.

October 23, 1905.

Received from the El Paso Brick Company, El Paso, Texas, the sum of Ten hundred and twenty-seven and 50-100 dollars, the same being payment in full for the area embraced in that mining claim known as the "Aluminum [252] Placer Group" unsurveyed . . . embracing 410.90 acres in the Brickland mining district, in the county of Doña Ana and territory of New Mexico, as shown by the survey thereof.

$1,027.50. Henry D. Bowman, Receiver.

The entry and this final receipt prima facie entitled the company to a patent, which, however, was not issued because various parties filed protests with the land commissioner in which it was asserted that the Brick Company's locations were originally void, or if valid, had been forfeited. It was also contended that the company was not entitled to a patent because the affidavit showing the posting of the notice on the land had not been signed before an officer residing within the land district, as provided in Rev. Stat. § 2335, U. S. Comp. Stat. 1901, p. 1435, which declares that "all affidavits required to be made under this chapter [mining laws] may be verified before any officer authorized to administer oaths within the land district where the claims may be situated."

Notice of these protests was given to the Brick Company, which was allowed sixty days within which to show cause why the entry should not be canceled. "In response, numerous affidavits and exhibits designed to overcome the objections were filed on behalf of the company," among which was a "supplementary affidavit with reference to such posting and such claim, which was in compliance with the laws of the United States, and was verified before a proper officer."

On September 4, 1906, the commissioner ruled that the entry was fatally defective because the original affidavit as to posting had not been executed before an officer residing in the land district. From that ruling the Brick Company appealed.

There was a hearing before the Assistant Secretary of the Interior, who, on September 9, 1908, rendered a decision (37 Land Dec. 155) in which, after discussing the provisions [253] of Rev. Stat. §§ 2325, 2335, U. S. Comp. Stat. 1901, pp. 1429, 1435, and quot-

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ing from various rulings of the Land Department and courts, he held that the fact that the affidavit of posting had been signed before an officer residing outside of the district was a fatal defect, which invalidated the entire proceeding. Among other things, he said: "The defect is not a mere irregularity which may be cured by the subsequent filing of a properly verified affidavit. The statutory provisions involved are mandatory. Their observance is among the essentials to the jurisdiction of the local officers to entertain the patent proceedings. The requisite statutory proof as to posting, not having been theretofore filed, the register was without authority to direct the publication of the notice or otherwise proceed, and the notice, although in fact published and posted, being without the necessary legal basis, was a nullity and ineffectual for any purpose. The patent proceedings, therefore, fall and the entry will be canceled."

The record further recites that on November 24, 1908, the Brick Company waived its right to petition for a review of such decision and "thereupon such decision and the cancelation of said entry became final and said entry was canceled on the records of the land office." On the next day, November 25, 1908, the Brick Company filed at the local land office a second application for patent. McKnight thereupon filed an adverse claim in which he set up that the land described in the Brick Company's application embraced within its limits the Lulu and Agnes claims which had been located by him in April, 1905, and relocated in May, 1906, at which time he also located the Tip Top, Lynch, and Aurora claims. The patent proceedings in the local land office were stayed in order that McKnight might, as provided in Rev. Stat. § 2326, U. S. Comp. Stat. 1901, p. 1430, bring a suit in a court of competent jurisdiction to try the right of possession.

On January 2, 1909, McKnight brought such suit in the [254] district court of Doña Ana county, New Mexico. It was tried November 8, 1909, before a judge without a jury. At the hearing McKnight introduced the certificates of the location described in his complaint, and evidence tending to show that he had done the required assessment work on his five claims. In support of his contention that the Brick Company had forfeited its rights, by failing to do the annual assessment work, the record recites that he offered "certified copies of proof filed by the Brick Company in June, 1905, and December, 1906, for the purpose of showing, in connection with the testimony of the witness [the keeper of the county records] that there had been no satisfactory proof of labor filed for any year previous to 1906." These certified copies consisted of affidavits by the president of the Brick Company that it had done more than $5,000 worth of work on its locations during each of the years 1903, 1904, and 1906. There was no ruling by the court limiting the effect of the affidavits as evidence, but it appears that McKnight contended that, as the names of the persons actually doing the work were not stated in the affidavit, and as the first of the affidavits was made in April, 1905, the burden of showing that the work had actually been done for 1903 and 1904 was cast on the Brick Company by virtue of the provisions of § 2315 of the Compiled Laws of New Mexico.† The Brick Company, on [255] the other hand, appears to have contended that this territorial statute was not only void as being in conflict with the Federal statutes, but that the affidavits offered by plaintiff showed on their face that many times the amount of assessment work required had been done in 1903, 1904, and 1906, thus segregating the land from the public domain and rendering McKnight's subsequent locations nugatory.

At the conclusion of the evidence the court took the case under advisement, and on December 17, 1909, rendered a judgment for McKnight which was affirmed (16 N. M. 721, 120 Pac. 694, Ann. Cas. 1912D, 1309) by the supreme court of New Mexico. The case was then brought here on appeal.

Mr. Francis W. Clements argued the cause, and, with Messrs. W. A. Hawkins, John Franklin, Aldis B. Browne, Alexander Britton, and Evans Browne, filed a brief for appellant:

Defendant's entry was at most only voidable, and was not and could not have been held void.

†"Sec. 2315. The owner or owners of any unpatented mining claim in this territory, located under the laws of the United States and of this territory, shall, within sixty days from and after the time within which the assessment work required by law to be done upon such claim should have been done and performed, cause to be filed with the recorder of the county in which such mining claim is situated, an affidavit setting forth the time when such work was done, and the amount, character, and actual cost thereof, together with the name or names of the person or persons who performed such work; and such affidavit, when made and filed as herein provided, shall be prima facie evidence of the facts therein stated. The failure to make and file such affidavit as herein provided shall in any contest, suit, or proceedings touching the title to such claim, throw the burden of proof upon the owner or owners of such claim to show that such work has been done according to law."

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St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 646, 26 L. ed. 875, 878, 11 Mor. Min. Rep. 673; Knight v. United Land Asso. 142 U. S. 161, 211, 212, 35 L. ed. 974, 992, 12 Sup. Ct. Rep. 258; Southern Cross Gold Min. Co. v. Sexton, 147 Cal. 758, 82 Pac. 423.

There is no difference between an agricultural and a mineral entry as withdrawing lands covered thereby from the public domain.

Clements v. Warner, 24 How. 394, 397, 16 L. ed. 695, 696; Shepley v. Cowan, 91 U. S. 330, 337, 338, 23 L. ed. 424, 426, 427; Ard v. Brandon, 156 U. S. 537, 541–544, 39 L. ed. 524–526, 15 Sup. Ct. Rep. 406; Northern P. R. Co. v. Amacker, 175 U. S. 564, 567, 568, 44 L. ed. 274, 275, 20 Sup. Ct. Rep. 236; Tarpey v. Madsen, 178 U. S. 215, 220–222, 44 L. ed. 1042, 1044, 1045, 20 Sup. Ct. Rep. 849; Brandon v. Ard, 211 U. S. 11, 18, 19, 53 L. ed. 68, 71, 72, 29 Sup. Ct. Rep. 1; Weyerhaeuser v. Hoyt, 219 U. S. 380, 388, 389, 55 L. ed. 258, 261, 262, 31 Sup. Ct. Rep. 300.

A mineral entry withdraws lands embraced thereby from the public domain.

Lindley, Mines, 2d ed. §§ 637, 717; Barringer & A. Mines & Mining, 265; Snyder, Mines, § 493; Re American Hill Quartz Mines, Sickels, Min. Dec. 377, 383, s. c. Comrs. Dec. Sickles, Min. Dec. 384; Re Harrison, 2 Land Dec. 767; Smuggler Min Co. v. Trueworthy Lode Claim, 19 Land Dec. 356 v. Re David Foote Lode, 26 Land Dec. 196; Nielson v. Champagne Min. & Mill. Co. 29 Land Dec. 491; McCormack v. Night Hawk & N. Gold Min. Co. 29 Land Dec. 373; Re Marburg Lode Min. Claim, 30 Land Dec. 202; Benson Min. & Smelting Co. v. Alta Min. & Smelting Co. 145 U. S. 428, 431, 432, 434, 36 L. ed. 762, 764, 765, 12 Sup. Ct. Rep. 877, 17 Mor. Min. Rep. 488; Aurora Hill Consol. Min. Co. v. 85 Min. Co. 34 Fed. 515; Neilson v. Champaigne Min. & Mill. Co. 111 Fed. 655, 21 Mor. Min. Rep. 664; Teller v. United States, 51 C. C A. 230, 113 Fed. 273; Cranes Gulch Min. Co. v. Scherrer, 134 Cal. 350, 86 Am. St. Rep. 279, 66 Pac. 487, 21 Mor. Min. Rep. 549; Southern Cross Gold Min. Co. v. Sexton, 147 Cal. 758, 82 Pac. 423; Batterton v. Douglas Min. Co. 20 Idaho, 760, 38 L.R.A. (N.S.) 1121, 120 Pac. 827; Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735, 1 Mor. Min. Rep. 510; Germania Iron Co. v. James, 32 C. C. A. 348, 61 U. S. App. 1, 89 Fed. 811; James v. Germania Iron Co. 46 C. C. A. 476, 107 Fed. 597.

That an agricultural entry segregates land from the public domain is well settled.

Graham v. Hastings & D. R. Co. 1 Land Dec. 362; St. Paul, M. & M. R. Co. v. Forseth, 3 Land Dec. 446; St. Paul, M. & M. R. Co. v. Leech, 3 Land Dec. 506; Witherspoon v. Duncan, 4 Wall. 210, 219, 18 L. ed. 339, 343; Simmons v. Wagner, 101 U. S. 260, 261, 25 L. ed. 910, 911; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 363, 364, 33 L. ed. 363, 366, 367, 10 Sup. Ct. Rep. 112; Whitney v. Taylor, 158 U. S. 85, 90–93, 39 L. ed. 906–908, 15 Sup. Ct. Rep. 796; Parsons v. Venzke, 164 U. S. 89, 92, 41 L. ed. 360, 362, 17 Sup. Ct. Rep. 27.

Rights in mineral lands withdrawn from the public domain by entry or otherwise cannot be acquired.

Brown v. Gurney, 201 U. S. 184, 50 L. ed. 717, 26 Sup. Ct. Rep. 509; Murray v. Polglase, 17 Mont. 455, 43 Pac. 505, 23 Mont. 401, 59 Pac. 439; United States v. Steenerson, 1 C. C. A. 552, 4 U. S. App. 332, 50 Fed. 504; Adams v. Polglase, 32 Land Dec. 477; Noonan v. Caledonia Gold Min. Co. 121 U. S. 393, 30 L. ed. 1061, 7 Sup. Ct. Rep. 911; Kendall v. San Juan Silver Min. Co. 144 U. S. 658, 36 L. ed. 583, 12 Sup. Ct. Rep. 779, 17 Mor. Min. Rep. 475.

Only the facts found by the Land Department on defendant's first application for a patent are binding in this action.

St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875, 11 Mor. Min. Rep. 673; Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; Wisconsin C. R. Co. v. Forsythe, 159 U. S. 46, 61, 40 L. ed. 71, 76, 15 Sup. Ct. Rep. 1020.

Reviewing the legality of the cancelation of defendant's entry in October, 1905, is not a collateral attack upon the Land Department's action.

Rebecca Gold Min. Co. v. Bryant, 31 Colo. 119, 102 Am. St. Rep. 17, 71 Pac. 1110, 22 Mor. Min. Rep. 538; Southern Cross Gold Min. Co. v. Sexton, 147 Cal. 758, 82 Pac. 423.

The cancelation of defendant's entry in October, 1905, was erroneous as a matter of law.

Lonergan v. Shockley, 33 Land Dec. 238; Corning Tunnel Co. v. Pell, Sickels, Min. Dec. 307; Re Stock Oil Co. 40 Land Dec. 198; Cleaves v. Smith, 22 Land Dec. 486; Re Sharp, 35 Land Dec. 179; Re Leahy, 22 Land Dec. 114; Re Boomer, 18 Land Dec. 364; Brox v. Tobias, 17 Land Dec. 400; 2 Lindley, Mines, §§ 677, 680, 713; Wight v. Dubois, 21 Fed. 693; City Rock Lode v. King of West Lode, Copp, L. O. 218; Cooper v. Reynolds, 10 Wall. 308, 319, 19 L. ed. 931, 933.

Mr. Eugene S. Ives argued the cause and filed a brief for appellee:

The test of whether mineral territory has been segregated from the public domain,

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or, in other words, has ceased to be open to location, is found in the inquiry as to whether an interest in it has vested in anybody else.

Benson Min. & Smelting Co. v. Alta Min. & Smelting Co. 145 U. S. 430, 36 L. ed. 763, 12 Sup. Ct. Rep. 877, 17 Mor. Min. Rep. 488.

The distinction between mineral and nonmineral entries is recognized by the courts, and what decisions there are upon the question are to the effect that a mineral entry does not segregate the land from the public domain.

Brown v. Gurney, 201 U. S. 184, 50 L. ed. 717, 26 Sup. Ct. Rep. 509; Murray v. Polglase, 17 Mont. 455, 43 Pac. 505, 23 Mont. 401, 59 Pac. 439, 20 Mor. Min. Rep. 296; Adams v. Polglase, 32 Land Dec. 477.

The rule that invalid agricultural entries segregate the land until cancelation is not inconsistent with the principle that the fact of segregation depends fundamentally upon the fact of an interest in the property, existing in a third party.

Hodges v. Colcord, 193 U. S. 192, 48 L. ed. 677, 24 Sup. Ct. Rep. 433.

The Secretary of the Interior had jurisdiction over appellant's application for a patent. The Land Department was a tribunal with jurisdiction over the parties and the subject-matter, and its judgment cannot be collaterally attacked. The Land Department held that, as between the United States and the appellant, the appellant's application was void *ab initio* and a nullity. In this adjudication the appellant acquiesced, and he cannot attack it collaterally or at all.

United States v. Winona & St. P. R. Co. 15 C. C. A. 96, 32 U. S. App. 272, 67 Fed. 955; New Dunderberg Min. Co. v. Old, 25 C. C. A. 116, 49 U. S. App. 201, 79 Fed. 602; United States v. Northern P. R. Co. 37 C. C. A. 290, 95 Fed. 869; King v. McAndrews, 50 C. C. A. 29, 111 Fed. 864; Knight v. United Land Asso. 142 U. S. 211, 35 L. ed. 992, 12 Sup. Ct. Rep. 258.

The amended affidavit could not have a retroactive effect for any purpose, and the proceedings were at all times a nullity.

McCracken v. Flanagan, 127 N. Y. 493, 24 Am. St. Rep. 481, 28 N. E. 385.

The decision of the Secretary canceling the entry is binding and cannot be attacked in this proceeding.

St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875, 11 Mor. Min. Rep. 673; Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258.

The action of the Land Department cannot be reviewed in this action.

Aurora Hill Consol. Min. Co. v. 85 Min. Co. 34 Fed. 515.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

McKnight brought suit against the El Paso Brick Company to try the right of possession to conflicting mining locations. In his complaint he asserted his own title and attacked that of the defendant under locations older in date, but which he claimed had been forfeited by failure to do the annual assessment work for 1903 and 1904, thereby leaving the land open to the locations made by McKnight in 1905 and 1906. The Brick Company, while insisting that the plaintiff's own evidence proved that the assessment [256] work had in fact been fully performed, relied on the legal effect of the company's application for a patent to the land and the final receipt issued to it by the receiver of the local land office in October, 1905. To this the plaintiff replied that the entry, on which the receipt issued, had been canceled on the ground that the patent proceedings were absolutely void because the statutory affidavit of posting had not been filed.

1. Locators of mining claims have the exclusive right of possession of all the surface included within the exterior limits of their claims so long as they make the improvements or do the annual assessment work required by the Revised Statutes, § 2324, U. S. Comp. Stat. 1901, p. 1426. The law, however, provides (Rev. Stat. §§ 2325, 2333, U. S. Comp. Stat. 1901, pp. 1429, 1433) a means by which the locator can pay the purchase price fixed by statute and convert the defeasible possessory title into a fee simple. Sixty days' notice must be given in order that all persons having any adverse claim may be heard in opposition to the issue of a patent. That notice is threefold. It must be given by publication in the nearest newspaper, by posting in the Land Office, and by posting on the land itself; and it is provided in the statute that this latter fact may be proved by the affidavit of two persons before an officer residing within the land district (Rev. Stat. § 2335). All persons having adverse claims under the mining laws may be heard in objection to the issuance of a patent. But (§ 2325) "if no adverse claim shall have been filed . . . it shall be assumed that the applicant is entitled to a patent upon the payment . . . [of the price fixed by statute] and that no adverse claim exists; and thereafter no objection from third persons to the issuance of a patent shall be heard, except it be shown that the applicant has failed to

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comply with the terms of this chapter" [relating to mineral lands].

2. In the present case the Brick Company's application for a patent was filed, each of the several forms of notice [257] required by statute was given, no adversee claim was filed, the purchase price was paid to the government, and a final receipt was issued by the local land office. The entry by the local land officer issuing the final receipt was in the nature of a judgment *in rem* (Wight v. Dubois, 21 Fed. 693), and determined that the Brick Company's original locations were valid, and that everything necessary to keep them in force, including the annual assessment work, had been done. It also adjudicated that no adverse claim existed and that the Brick Company was entitled to a patent.

From that date, and until the entry was lawfully canceled, the Brick Company was in possession under an equitable title, and to be treated as "though the patent had been delivered to" it. Dahl v. Raunheim, 132 U. S. 262, 33 L. ed. 325, 10 Sup. Ct. Rep. 74, 16 Mor. Min. Rep. 214. And, when McKnight instituted possessory proceedings against the Brick Company, the latter was entitled to a judgment in its favor when it produced that final receipt as proof that it was entitled to a patent and to the corresponding right of an owner.

Nor should the result have been different when the record showed that the entry and final receipt, properly issued, had been improperly canceled. It is true that the order of the Department was a denial of the patent, but it was not a conclusive adjudication that the Brick Company was not entitled to a patent, nor could such an order deprive the Brick Company of rights vested in it by law. For while the General Land Office had power of supervision over the acts of the local officers, and could annul entries obtained by fraud or made without authority of law, yet, if the Department's cancelation was based upon a mistake of law, its ruling was subject to judicial review when properly drawn in question in judicial proceedings, inasmuch as the power of the land office is not unlimited, nor can it be arbitrarily exercised so as to deprive any person of land lawfully entered and paid for. Cornelius v. [258] Kessel, 128 U. S. 461, 32 L. ed. 483, 9 Sup. Ct. Rep. 122; Parsons v. Venzke, 164 U. S. 89, 41 L. ed. 360, 17 Sup. Ct Rep. 27.

3. So that the case involves a determination of the single question as to whether the patent was properly refused by the Land Department because of the objection that the Brick Company had failed to comply with the terms of the law relating to mineral land. Rev. Stat. § 2325, U. S. Comp. Stat. 1901, p. 1429. That can be determined by an inspection of the record, in which the order appears. It shows that the cancelation of the entry was not based on the Brick Company's failure to do the annual assessment work, or to give the proper notice, or to pay the statutory price, but solely for the reason that the affidavit of posting was executed before an officer who resided outside of the land district.

That decision (37 Land Dec. 155), though supported by some Departmental rulings of comparatively recent date, was in conflict with the established practice of the Land Department, and was expressly and by name overruled, on July 29, 1911, in Re Stock Oil Co. 40 Land Dec. 198, which reaffirmed prior decisions to the effect that irregularities in proof, including the execution of affidavits before other than the designated officers, might be supplied, even on appeal.

These and similar rulings, previously followed in the Department, are manifestly correct. They accord with the policy of the land laws, under which the United States does not act as an ordinary proprietor seeking to sell real estate at the highest possible price, but offers it on liberal terms to encourage the citizen and to develop the country. The government does not deal at arm's length with the settler or locator, and whenever it appears that there has been a compliance with the substantial requirements of the law, irregularities are waived or permission is given, even on appeal, to cure them by supplemental proofs. United States v. Marshall Silver Min. Co. 129 U. S. 587, 32 L. ed. 737, 9 Sup. Ct. Rep. 343, 16 Mor. Min. Rep. 205. In [259] the present case such proof by supplemental affidavits, properly executed, showed that the land had been properly posted. But that fact was not allowed to have any effect because of the mistaken view that, as the original affidavit of posting had been signed before an officer residing outside of the land district, the patent proceedings were absolutely void. This confused service by proper posting—which was judisdictional,—with defective proof of such service, which —like the defective return of an officer—could be corrected. Under the law, jurisdiction depended upon giving notice by publication in a newspaper, by posting in the land office, and by posting on the land itself,—the statute directing how the giving of such notice should be proved. But irregularities in complying with such directory provision could be cured, and when cured, as it was here, the patent should have been issued. The cancelation of the entry was based on a plain error of law,

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and though there was no appeal in fact, and no right of appeal to the courts, the ruling did not operate to deprive the Brick Company of its property in the mines. The fact that the Brick Company, perforce, yielded to the erroneous ruling, and instituted new proceedings in order to secure a patent, as evidence of its title, did not destroy the rights with which the company had become invested by full compliance with the requirements of Rev. Stat. § 2325, U. S. Comp. Stat, 1901, p. 1429. When, therefore, in the suit to try the right of possession, the plaintiff asked that proper effect be given to the final receipt and the entry on which it was based as a judgment *in rem*, it was not making, as is contended, a collateral attack on the order of the Land Department, but was merely relying on the valid entry, and asking the court to decline to give effect to the erroneous cancelation.

4. This conclusion makes it unnecessary to decide the question as to whether the territorial statute, imposing upon the locator the burden of proving that he has performed the annual assessment work, is void as being in [260] conflict with the Federal statutes, which require no such annual proof, raise no presumption of abandonment, and, as construed in Hammer v. Garfield Min. & Mill. Co. 130 U. S. 291, 32 L. ed. 964, 9 Sup. Ct. Rep. 548, 16 Mor. Min. Rep. 125, demand clear and convincing proof that work has not been done before a forfeiture can be declared. It also makes it unnecessary to determine whether the affidavit of work being offered for one purpose by McKnight could be used for another purpose by the Brick Company as substantive evidence in the case.

Many pages of the briefs are devoted to a discussion of these questions, but if any of them were decided in favor of the Brick Company it could not increase its rights. If the legal propositions involved could be decided in favor of McKnight, that could not overcome the fact that the issuance of the final receipt to the Brick Company on October 23, 1905, was an adjudication not only that the Brick company was entitled to a patent, but that McKnight then had no adverse claim to the land. Of course he acquired none in May, 1906, by locating on property that had previously been and then was segregated from the public domain.

The judgment of the Supreme Court of the Territory of New Mexico is reversed, and the case is remanded to the Supreme Court of the State of New Mexico for further proceedings not inconsistent with this opinion.

Reversed.

[261] AMERICAN IRON & STEEL MANUFACTURING COMPANY

v.

SEABOARD AIR LINE RAILWAY and S. Davies Warfield, R. Lancaster Williams, and E. C. Duncan, Receivers of the Seaboard Air Line Railway.

(See S. C. Reporter's ed. 261-268.)

Interest — sale on thirty days' credit.

1. A sale of supplies on thirty days' credit imports, in Virginia, an implied promise by the purchaser to pay interest after that date as an incident of the debt.

[For other cases, see Interest, I. a, in Digest Sup. Ct. 1908.]

Interest — during receivership.

2. Interest during the receivership should be allowed on a claim for supplies sold to a railway company in Virginia on thirty days' credit, which, under the local law, has priority over bonded indebtedness, where, before the credit period expired, the railway company, alleged to be insolvent, was, on its own application, placed in the hands of receivers whose appointment was continued under a bill for foreclosure by the mortgage trustee, and the property was subsequently returned to the railway company upon the success of a plan to readjust the bonded indebtedness, interest having been paid on the bonds and floating indebtedness during the receivership, and the court retaining jurisdiction for the purpose of passing upon claims of creditors aggrieved by the railway company's default in paying its obligations.

[For other cases, see Interest, I. c, in Digest Sup. Ct. 1908.]

[No. 233.]

Argued March 6, 1914. Decided April 6, 1914.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Fourth Circuit, presenting the question as to the right to recover interest on a claim against a railway company during the period of a receivership. Answered in the affirmative.

Statement by Mr. Justice Lamar:

Under the provisions of § 6 of the act of March 3, 1891 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549), the circuit court of appeals of the fourth circuit certified to this court a question on which it desired instruction, and in that connection made the following statement of facts:

"Upon a bill filed by a railway company alleging its insolvency and consequent inability to maintain itself as a going concern, except through the medium of a receivership, receivers were appointed. The bill alleged that a receivership would enable

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the property of the railway company to be preserved and maintained as a whole, [262] and the sums due and to become due to the bondholders and creditors to be secured and ultimately paid in full.

"The trustee in the first mortgage answered the bill, admitting its allegations, and afterwards filed a cross bill again admitting the allegations of the bill in regard to the insolvency of the company. The suit was not a creditors' suit. The trustee subsequently filed a bill in the same court to foreclose the mortgage, seeking a sale of the equity of redemption, and the two suits were consolidated. No prior encumbrancers were made parties to either suit. Prior to the receivership the claimant furnished supplies to the railway company, for which, shortly after the receivers were appointed, a lien was duly perfected under the statute of Virginia known as the labor and supply lien statute, Code of Va. § 2485. The supplies were sold on a credit of 'thirty days, 1 per cent discount allowed for payment in ten days.' Claimant filed its claim before the special master in the receivership proceedings, relying upon a statutory lien under the statute above mentioned. The special master reported against the allowance of interest on the claim, to which report in that particular claimant excepted.

"Subsequently, on the petition of the railway company, a decree was entered approving 'a plan of adjustment' of the finances of the company, and providing for turning back to the company its property, and for ending the receivership at a certain time. From time to time during the receivership and at the ratification of the plan of adjustment, and as a part thereof, all interest due at the time of the appointment of the receivers and accruing during the receivership on all the funded and many of the floating obligations of the railway company were paid in full. The amount so paid for interest aggregated some millions of dollars.

"The decree approving the plan of adjustment provided that the company should pay in due course of business all [263] its obligations, liabilities, and indebtedness, and reserved the right, in the event of default in that regard, to any claimant aggrieved by such default, to present his petition to the court to have his claim enforced 'to the same extent as though the receivership had continued.'

"After the receivership had been thus terminated, claimant filed its petition in the court, praying that its exceptions to the special master's report should be sustained, and for the enforcement of its claims, including interest thereon during the period of the receivership, and seeking to enforce it not upon the doctrine of an equitable lien, but as a statutory lien. The circuit court refused to allow interest for the period of the receivership, and from that ruling an appeal was taken.

Question.

Is interest recoverable on such a claim for the period of the receivership?

Mr. George Wayne Anderson argued the cause, and, with Mr. Henry R. Pollard, filed a brief for American Iron & Steel Manufacturing Company:

The debt is interest-bearing because "the supplies were sold on a credit of thirty days, 1 per cent discount allowed for payment in ten days." This was an express term of credit, and interest is always allowed at the expiration of an express or of an implied term of credit, for such is the implied contract of the parties.

Curtis v. Innerarity, 6 How. 146, 154, 12 L. ed. 380, 383; Spalding v. Mason, 161 U. S. 375, 396, 40 L. ed. 738, 746, 16 Sup. Ct. Rep. 592; Alantic Phosphate Co. v. Graffin, 114 U. S. 500, 29 L. ed. 224, 5 Sup. Ct. Rep. 967.

The nature of the promise implies the payment of interest. Moreover, the filing of a lien is equivalent to an account stated (Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co. 34 L.R.A. 625, 15 C. C. A. 289, 31 U. S. App. 704, 68 Fed. 115), and interest is allowed on a stated account (Young v. Godbe, 15 Wall. 562, 21 L. ed. 250).

Again, the debt was secured by a lien duly perfected under the statute of Virginia, which gives priority to the lienor over mortgages. Since the debt is an interest-bearing debt, it follows that the security and priority of the lien attach as well to the interest as to the principal.

Central T. Co. v. Condon, 14 C. C. A. 314, 31 U. S. App. 387, 67 Fed. 98; Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co. 34 L.R.A. 625, 15 C. C. A. 289, 31 U. S. App. 704, 68 Fed. 116; Jourolmon v. Ewing, 29 C. C. A. 41, 56 U. S. App. 149, 85 Fed. 105.

The steel company has a prior lien by statute which relates back to and dates from the time the supplies were furnished, and that was anterior to the appointment of receivers.

First Nat. Bank v. William R. Trigg Co. 106 Va. 327, 56 S. E. 158; Mott v. Wissler Min. Co. 68 C. C. A. 335, 135 Fed. 697; Re West Norfolk Lumber Co. 112 Fed. 760; Newgass v. Atlantic & D. R. Co. 56 Fed. 676; Newgass v. Atlantic & D. R. Co. 72 Fed. 712; Kahle v. Long Reach Oil Co. 51 W. Va. 313, 41 S. E. 233; Richmond v.

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Irons, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; Seventh Nat. Bank v. Shenandoah Iron Co. 35 Fed. 436; High, Receivers, 4th ed. §§ 138, 440; Wiswall v. Sampson, 14 How. 52, 14 L. ed. 322.

The lien is statutory and is to be liberally construed. The receivers took *cum onere*.

Seventh Nat. Bank v. Shenandoah Iron Co. 35 Fed. 436; Mott v. Wissler Min. Co. 68 C. C. A. 335, 135 Fed. 700; Davis v. Alvord, 94 U. S. 549, 24 L. ed. 285, 9 Mor. Min. Rep. 384; National Bank v. Mechanics' Nat. Bank, 94 U. S. 437, 441, 24 L. ed. 176, 179; Richmond v. Irons, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; Guardian Trust & D. Co. v. Fisher, 200 U. S. 57, 50 L. ed. 367, 26 Sup. Ct. Rep. 186.

The contract was for the payment of money with an express term of credit, and payment of interest being clearly implied by the nature of the promise, it became part of the debt, and is recoverable not as damages, but of right.

Curtis v. Innerarity, 6 How. 146, 154, 12 L. ed. 380, 383; Alantic Phosphate Co. v. Grafflin, 114 U. S. 500, 29 L. ed. 224, 5 Sup. Ct. Rep. 967; Spalding v. Mason, 161 U. S. 375, 396, 40 L. ed. 738, 746, 16 Sup. Ct. Rep. 592; Hastings v. Westchester F. Ins. Co. 73 N. Y. 152; Meech v. Smith, 7 Wend. 318; Redfield v. Bartels, 139 U. S. 694, 701, 703, 35 L. ed. 310, 313, 314, 11 Sup. Ct. Rep. 683; Redfield v. Ystalyfera Iron Co. 110 U. S. 174, 28 L. ed. 109, 3 Sup. Ct. Rep. 570; Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co. 34 L.R.A. 625, 15 C. C. A. 289, 31 U. S. App. 704, 68 Fed. 115; Cecil v. Hicks, 29 Gratt. 4, 26 Am. Rep. 391; Chapman v. Shepherd, 24 Gratt. 384; Roberts v. Cocke, 28 Gratt. 217; Kent v. Kent, 28 Gratt. 845; McVeigh v. Howard, 87 Va. 605, 13 S. E. 31; Tidball v. Shenandoah Nat. Bank, 100 Va. 741, 42 S. E. 867; Re West Norfolk Lumber Co. 112 Fed. 769; Ohio v. Frank, 103 U. S. 697, 26 L. ed. 531; New York, L. E. & W. R. Co. v. Estill, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444; Young v. Godbe, 15 Wall. 562, 21 L. ed. 250; Selleck v. French, 1 Am. Lead. Cas. (Hare & W.) 5th ed. 626, note; Henderson Cotton Mfg. Co. v. Lowell Mach. Shops, 86 Ky. 668, 7 S. W. 142.

The local law allows interest as of right in such a case, which the court has no discretion to refuse, and the question of interest is always one of local law.

4 Minor, Inst. p. 909; Cecil v. Hicks, 29 Gratt. 4, 26 Am. Rep. 391; Shipman v. Bailey, 20 W. Va. 140; Pickens v. McCoy, 24 W. Va. 344; Sioux City, O'N. & W. R. Co. v. Manhattan Trust Co. 172 U. S. 642, 43 L. ed. 1180, 19 Sup. Ct. Rep. 879; Missouri, K. & T. R. Co. v. McCann, 174 U. S. 586, 43 L. ed. 1096, 19 Sup. Ct. Rep. 755; Massachusetts Ben. Asso. v. Miles, 137 U. S. 689, 34 L. ed. 834, 11 Sup. Ct. Rep. 234; United States Mortg. Co. v. Sperry, 138 U. S. 313, 34 L. ed. 969, 11 Sup. Ct. Rep. 321; Ohio v. Frank, 103 U. S. 697, 26 L. ed. 531; Holden v. Freedman's Sav. & T. Co. 100 U. S. 72, 25 L. ed. 567.

A receivership does not put an end to the running of interest in a proper case, and the security of the lien attaches as well to the interest as to the principal.

Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co. 34 L.R.A. 625, 15 C. C. A. 289, 31 U. S. App. 704, 68 Fed. 116; Southern R. Co. v. Carnegie Steel Co. 176 U. S. 295, 296, 44 L. ed. 474, 475, 20 Sup. Ct. Rep. 347, 22 C. C. A. 289, 42 U. S. App. 145, 76 Fed. 492; Central Trust Co. v. Condon, 14 C. C. A. 314, 31 U. S. App. 387, 67 Fed. 98; Jourolmon v. Ewing, 29 C. C. A. 41, 56 U. S. App. 149, 85 Fed. 105; First Nat. Bank v. Ewing, 43 C. C. A. 150, 103 Fed. 190; Southern R. Co. v. American Brake Co. 22 C. C. A. 298, 42 U. S. App. 162, 76 Fed. 502; Southern R. Co. v. Adams, 22 C. C. A. 300, 42 U. S. App. 167, 76 Fed. 504; Southern R. Co. v. Tillett, 22 C. C. A. 303, 42 U. S. App. 173, 76 Fed. 507; Virginia Pass. & Power Co. v. Lane Bros. Co. 98 C. C. A. 295, 174 Fed. 513; Wetzel & T. R. Co. v. Tennis Bros. Co. 75 C. C. A. 266, 145 Fed. 458, 7 Ann. Cas. 426; Griffith v. Blackwater Boom & Lumber Co. 46 W. Va. 56, 33 S. E. 125, 55 W. Va. 604, 69 L.R.A. 124, 48 S. E. 442.

Under the decree approving the adjustment plan, the appellees must be held as having funds in hand liable to appellant's debt, and this entitles him to interest upon the principle of Malcomson v. Wappoo Mills, 99 Fed. 633; Williams v. American Bank, 4 Met. 317; and Thomas v. Western Car Co. 149 U. S. 95, 37 L. ed. 663, 13 Sup. Ct. Rep. 824.

Mr. L. L. Lewis argued the cause and filed a brief for Seaboard Air Line Railway et al.:

Interest was not a substantive part of appellant's debt.

The difficulty and confusion on the subject of interest has, undoubtedly, largely arisen from the failure to distinguish between those cases in which interest must be allowed as a part of the debt, pursuant to contract, and those in which, in the exercise of a judicial discretion, it may be allowed as damages. The distinction has been recognized by this court.

United States v. North Carolina, 136 U. S. 211, 34 L. ed. 336, 10 Sup. Ct. Rep. 920.

Whenever interest is allowed, except in cases where there has been a contract to

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pay interest, it is allowed for delay or default of the debtor.

United States v. Sherman, 98 U. S. 565, 25 L. ed. 235.

The fact of a specific credit having been given is not a circumstance, standing alone, from which a contract to pay interest is legally inferable.

Gordon v. Swan, 2 Campb. 429, 12 East, 419, 11 Revised Rep. 758 note.

While interest, when there is an agreement to pay it, is recoverable as matter of law, in other cases, *i. e.*, where it is given not as a part of the debt, but as damages, it is matter of discretion, to be determined upon the particular circumstances of the case.

Erskine v. Van Arsdale, 15 Wall. 75, 21 L. ed. 63; Redfield v. Ystalyfera Iron Co. 110 U. S. 174, 28 L. ed. 109, 3 Sup. Ct. Rep. 570; United States v. Sanborn, 135 U. S. 271, 34 L. ed. 112, 10 Sup. Ct. Rep. 812; Stewart v. Barnes, 153 U. S. 456, 462, 38 L. ed. 781, 784, 14 Sup. Ct. Rep. 849; Young v. Godbe, 15 Wall. 562, 21 L. ed. 250; Redfield v. Bartels, 139 U. S. 694, 35 L. ed. 310, 11 Sup. Ct. Rep. 683.

In those cases in which it has been said that interest is not given as damages at the discretion of the court or jury, but as a part of the debt, etc., the court was speaking of obligations or other written instruments for the payment of money at a given day, the point decided being that in such cases, the absence of an express contract, the law implies a promise to pay interest from the date appointed for the payment of the principal.

Chapman v. Shepherd, 24 Gratt. 377; Roberts v. Cocke, 28 Gratt. 207; Murphy v. Gaskins, 28 Gratt. 222; Cecil v. Deyerle, 28 Gratt. 775; Kent v. Kent, 28 Gratt. 840; Cecil v. Hicks, 29 Gratt. 1, 26 Am. Rep. 391; McVeigh v. Howard, 87 Va. 599, 13 S. E. 31; Tidball v. Shenandoah Nat. Bank, 100 Va. 741, 42 S. E. 867; Jones v. Williams, 2 Call (Va.) 102; Hatcher v. Lewis, 4 Rand. (Va.) 152; Buchanan v. Leeright, 1 Hen. & M. 211.

None of these cases go beyond the rule recognized by the court of King's Bench in Farquhar v. Morris, 7 T. R. 124 (decided in 1797), which was the case of a bond, conditioned for the payment of a lesser sum, dated on a day certain, without naming any day of payment or expressly reserving interest. It was held that the bond was payable on the day of its date, and that it impliedly carried interest from date. That case has never been supposed to conflict with Gordon v. Swan, supra, and other English cases in regard to book debts.

Can any reason be imagined why a claim for goods sold should, independently of statute, carry interest as matter of law any more than a judgment for money, a judgment or decree for money being a debt of record?

Shelton v. Welsh, 7 Leigh, 175.

In Virginia, interest in an action for goods sold and delivered, though sold on a specified credit, is matter of discretion, except where there is a controlling agreement of the parties, express or implied.

Mickie v. Lawrence, 5 Rand. (Va.) 571; Cooke v. Wise, 3 Hen. & M. 463; Newton v. Wilson, 3 Hen. & M. 470; Dow v. Adams, 5 Munf. 21.

A foreclosing junior mortgagee, seeking only the sale of the equity of redemption, as in the present case, has no right, under ordinary circumstances, to bring in a prior mortgagee or other prior encumbrancer, and if brought in, such prior encumbrancer may object and be relieved from the suit with costs. And, as in such a case no relief as against prior encumbrancers is sought, it goes without saying that their rights cannot be injuriously affected by the decree.

Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136; Woodworth v. Blair, 112 U. S. 8, 28 L. ed. 615, 5 Sup. Ct. Rep. 6.

From the action of the court refusing leave to a prior lienor to intervene in such a suit there is no appeal; and as the order refusing such leave is not final in its character, it leaves the party denied the privilege of intervening at full liberty to assert his rights, if any, in any appropriate form of proceeding.

Ex parte Cutting, 94 U. S. 14, 24 L. ed. 49; Credits Commutation Co. v. United States, 177 U. S. 311, 44 L. ed. 782, 20 Sup. Ct. Rep. 636; Re Metropolitan R. Receivership, 208 U. S. 90, 106, 52 L. ed. 403, 411, 28 Sup. Ct. Rep. 219.

Mr. Justice Lamar delivered the opinion of the court:

The statement of facts made by the circuit court of appeals of the fourth circuit shows that supplies were sold to a railway company on thirty days' credit. Before the credit period expired the road, alleged to be insolvent, was, on its own application, placed in the hands of receivers, their appointment being subsequently continued under a bill for foreclosure filed by mortgage trustees. The [264] railway company succeeded in making a readjustment of its bonded indebtedness and the property was returned to the owners. The court, however, retained jurisdiction for the purpose of passing upon the claims of creditors aggrieved by the company's default in paying its obligations. Among those presented was the American Iron & Steel Manufacturing Company's claim for supplies secured by a lien

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which by statute took priority over mortgages. The matter was referred to a master on pleading not before us. He made a report (not in the record) and on exceptions thereto the circuit court refused to allow interest. From that statement, in connection with the briefs and arguments of both counsel, we infer that the railway was directed to pay the principal of the claim. The case was then taken to the circuit court of appeals for the fourth circuit which certifies to this court the question, "is interest recoverable on such a claim for the period of receivership?"

Both parties agree that the matter is controlled by the law in Virginia, but no light is thrown on the subject by the statute of the state, which merely declares that legal interest shall continue to be at the rate of 6 per cent. Pollard's Code, § 2817. No Virginia case directly in point is cited in either of the briefs, and there is a complete disagreement between counsel as to the bearing of the state decisions on the question here involved.

On the part of the railway company it is contended that interest could not have been recovered on this claim even in an action at law. On the authority of Calton v. Bragg, 15 East, 223, 13 Revised Rep. 451, 14 Eng. Rul. Cas. 541; Newton v. Wilson, 3 Hen. & M. 470; Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 36 L. ed. 632, 12 Sup. Ct. Rep. 787, and other like cases, it is argued that the right to interest is a matter of agreement, and can be recovered as a part of the debt only where it has been reserved in the contract, or where a promise is implied from the character of the note or instrument evidencing the debt. The railway therefore [265] insists that as the intervener sold the supplies, without taking a note and without securing a promise to pay interest, there was no right to recover interest as an incident of the debt, although a jury, as a matter of discretion, might have allowed it by way of damages for unreasonable delay in making payment.

On the other hand, counsel for the Iron & Steel Company contend that as these supplies were sold on a credit of thirty days, a promise was implied to pay interest after that date as an incident of the debt itself. From Chapman v. Shepherd, 24 Gratt. 383; Craufurd v. Smith, 93 Va. 623 (2), 23 S. E. 235, 25 S. E. 657; Tidball v. Shenandoah Nat. Bank, 100 Va. 741, 42 S. E. 867; Butler Bros.-Huff Co. v. Virginian R. Co. 113 Va. 28 (7), 73 S. E. 441; Roberts v. Cocke, 28 Gratt. 207, and Cooper v. Coates, 21 Wall. 111, 22 L. ed. 482, we reach the conclusion that whatever may have been the English and early American rule, the tendency in Virginia, as elsewhere in this country, is to allow interest on contracts to pay money from the date that the debt becomes due. 2 Minor's Inst. 381. The sale here of supplies on thirty days' credit was not, as argued, a mere agreement for the benefit of the buyer that it should not be sued before the expiration of that time, but was the fixing of a definite date for payment of the purchase money. The acceptance of the supplies, sold on those terms, was equivalent to a promise to pay the money on that day. Atlantic Phosphate Co. v. Graffin, 114 U. S. 500, 29 L. ed. 224, 5 Sup. Ct. Rep. 967. As payment was not then made, the railway company was in default, and interest began to accrue as an incident of the debt, recoverable as such, and not merely as damages to be allowed in the discretion of court or jury. This appears to have been the view of the circuit court of appeals, since the interest-bearing quality of the debt seems to be assumed in the question—"Is interest recoverable on such a claim for the period of receivership?"

In the discussion as to the answer which should be [266] given that question, the railway company insists that, whether treated as part of the debt or allowed as damages, interest can only be charged against the railway because of delay due to its own fault, while here the failure to pay was due to the act of the law in taking its property into custody and operating the same by receivers in order to prevent the disruption of a great public utility. And it is true, as held in Tredegar Co. v. Seaboard Air Line R. Co. 105 C. C. A. 501, 183 Fed. 290, that as a general rule, after property of an insolvent is *in custodia legis* interest thereafter accruing is not allowed on debts payable out of the fund realized by a sale of the property. But that is not because the claims had lost their interest-bearing quality during that period, but is a necessary and enforced rule of distribution, due to the fact that in case of receiverships the assets are generally insufficient to pay debts in full. If all claims were of equal dignity and all bore the same rate of interest, from the date of the receivership to the date of final distribution, it would be immaterial whether the dividend was calculated on the basis of the principal alone or of principal and interest combined. But some of the debts might carry a high rate and some a low rate, and hence inequality would result in the payment of interest which accrued during the delay incident to collecting and distributing the funds. As this delay was the act of the law, no one should thereby gain an advantage or suffer a loss. For that and like reasons, in case funds are not sufficient to pay claims of equal dignity, the distribution is made only on the basis of the prin-

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cipal of the debt. But that rule did not prevent the running of interest during the receivership; and if, as a result of good fortune or good management, the estate proved sufficient to discharge the claims in full, interest as well as principal should be paid. Even in bankruptcy, and in the face of the argument that the debtor's liability on the debt and its incidents terminated at the date of adjudication, and as a fixed liability [267] was transferred to the fund, it has been held, in the rare instances where the assets ultimately proved sufficient for the purpose, that creditors were entitled to interest accruing after adjudication. 2 Bl. Com. 488; Cf. Johnson v. Norris, — L.R.A.(N.S.) —, 111 C. C. A. 291, 190 Fed. 460 (5).

The principle is not limited to cases of technical bankruptcy, where the assets ultimately prove sufficient to pay all debts in full, but principal as well as interest, accruing during a receivership, is paid on debts of the highest dignity, even though what remains is not sufficient to pay claims of a lower rank in full. Central Trust Co. v. Condon, 14 C. C. A. 314, 31 U. S. App. 387, 67 Fed. 84; Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co. 34 L.R.A. 625, 15 C. C. A. 289, 31 U. S. App. 704, 68 Fed. 116; First Nat. Bank v. Ewing, 43 C. C. A. 150, 103 Fed. 190.

The railway company relies on the statement in Thomas v. Western Car Co. 149 U. S. 96, 116, 37 L. ed. 663, 670, 13 Sup. Ct. Rep. 824, that "as a general rule after property of an insolvent passes into the hands of a receiver, interest is not allowed on claims against the fund." The court there refused to allow interest on car rentals, accruing during the receivership, under an old contract, because the funds were not sufficient to pay the bonds, saying (117): "We see no reason in departing from that [general] rule in a case like the present where the claim [for car rentals] would be paid out of the moneys that fall far short of paying the mortgage debt." But here, interest was paid on mortgage bonds and should therefore have been paid on a claim which by statute was given priority over the bonds. This was specially true where the property was in the hands of a receiver on the application of the debtor and of the mortgage trustees. For, manifestly, the law does not contemplate that either the debtor or the trustees can, by securing the appointment of receiver, stop the running of interest on claims of the highest dignity.

In the brief for the railway company attention is called to the fact that the road was not *in custodia legis* [268] under a creditors' suit, but in a proceeding to foreclose the equity of redemption. In view of that fact it is argued that the Iron & Steel Company should be remitted to its action at law against the company which is now in possession of the property. But this seems to involve matters not within the question certified by the circuit court of appeals. The property was returned to the railway company on condition that any creditor aggrieved by the failure to pay his claim might present his petition to the court and have it enforced "to the same extent as though the receivership had continued." As a fact interest was paid on the floating indebtedness, out of earnings made by the receivers appointed first under a bill which asked that the property be taken in charge by the court so that ultimately all creditors would be paid in full. We must assume that the court had the right to make these payments, and if so it had a like right in the case of the claim for railway supplies. No question is raised as to the power of the court to require payment of the principal of appellant's debt, and if the court could require a payment of the principal, it could also enforce the payment of the interest, which was but an incident of that debt. If the property had remained in the hands of the receiver, the lienor might have been permitted to intervene and share in the fund realized by the sale of property in the hands of receivers appointed, first, on the application of the railway, in the interest of all creditors, and continued by an order entered in the bill to foreclose the mortgage.

It is, however, not necessary to discuss that matter further than to say that on the facts stated, interest was recoverable on the American Iron & Steel Company's claim for the period of receivership. The question certified by the Circuit Court of Appeals is answered in the affirmative.

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[269] WIRT FRANKLIN, Plff. in Err.,

v.

C. S. LYNCH and O. A. Simmons.

(See S. C. Reporter's ed. 269–273.)

Indians — restrictions on alienation — sale before allotment.

1. The removal by the act of April 21, 1904 (33 Stat. at L. 204, chap. 1402), of all restrictions upon the alienation of lands of all allottees of the Five Civilized Tribes of Indians who are not of Indian blood, did not empower a white member of the Choctaw Tribe to sell before allotment.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indians — after- acquired title — effect on sale before allotment.

2. The after-acquired title of a white member of the Choctaw Nation cannot inure to the benefit of her grantee in a deed

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which, under the act of July 1, 1902 (32 Stat. at L. 641, chap. 1362), §§ 15, 16, was void when made because executed before allotment, notwithstanding the provision of Mansfield's Ark. Dig. § 642, that "if a person without title shall convey real estate and subsequently acquire title, the legal or equitable estate afterwards acquired shall immediately pass to the grantee as if the estate had been in the grantor at the time of the conveyance," since this statute was extended to the Indian territory by the act of February 19, 1903 (32 Stat. at L. 841, chap. 707), only so far as "not inconsistent with any law of Congress."

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

[No. 553.]

Submitted February 25, 1914. Decided April 6, 1914.

IN ERROR to the Supreme Court of the State of Oklahoma to review a decree which reversed a decree of the District Court of McClain County, in that state, in favor of plaintiff in a suit to remove a cloud on title. Affirmed.

See same case below, 37 Okla. 60, 130 Pac. 599.

The facts are stated in the opinion.

Mr. H. A. Ledbetter submitted the cause for plaintiff in error:

An intermarried citizen of the Choctaw or Chickasaw nation, after the act of Congress of April 21, 1904, although he had no vested right in the nation that would prevent Congress from legislating with reference to such citizens as it saw fit, still had a vested equitable right to his just and equal share against strangers and fellow members of his tribe. Such a right of such a citizen was one in expectancy or equity that he may assign, and unless Congress legislates this expectancy or equity away before selection is made, we can see no good and valid reason why the after-acquired legal title would not inure to the benefit of the assignee or grantee.

32 Cyc. 1066; 4 Cyc. 12; McDonald v. McDonald, 58 N. C. (5 Jones, Eq.) 211, 75 Am. Dec. 434; Doe ex dem. Mann v. Wilson, 23 How. 457, 16 L. ed. 584; Crews v. Burcham, 1 Black, 352, 17 L. ed. 91; Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; Webster v. Luther, 163 U. S. 331, 339, 41 L. ed. 179, 181, 16 Sup. Ct. Rep. 963; Barnes v. Poirier, 12 C. C. A. 9, 27 U. S. App. 500, 64 Fed. 14; Beley v. Naphtaly, 19 C. C. A. 392, 44 U. S. App. 232, 73 Fed. 120; McKennon v. Winn, 1 Okla. 327, 22 L.R.A. 501, 33 Pac. 582; Lamb v. Davenport, 18 Wall. 307, 21 L. ed. 759; Hussey v. Smith, 99 U. S. 20, 25 L. ed. 314; Shulthis v. McDougal, 95 C. C. A. 615, 170 Fed. 529; Southerland v. Whittington, 46 Ark. 285.

Where Congress legislates for the Indians in general, without mentioning the Five Civilized Tribes, they are excepted from its operation.

United States v. Joseph, 94 U. S. 614, 24 L. ed. 295.

Reading the act of Congress of April 21, 1904, with §§ 15 and 16 of the supplemental treaty of 1902, and § 19 of the act of 1906, necessitates the conclusion that the restrictions against the right of alienation had been removed.

Mullen v. United States, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494; Crews v. Burcham, 1 Black, 352, 17 L. ed. 91; Doe ex dem. Mann v. Wilson, 23 How. 457, 16 L. ed. 584; Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; Rutherford v. Greene, 2 Wheat. 197, 4 L. ed. 218; Wray v. Doe, 10 Smedes & M. 452; Land v. Keirn, 52 Miss. 341; Francis v. Francis, 203 U. S. 233, 51 L. ed. 165, 27 Sup. Ct. Rep. 129; McAffee v. Lynch, 26 Miss. 257; Bonifer v. Smith, 92 C. C. A. 604, 166 Fed. 846; Beam v. United States, 89 C. C. A. 240, 162 Fed. 260; Johnson v. Collins, 12 Ala. 322; Atwood v. Beck, 21 Ala. 590.

Mr. S. T. Bledsoe submitted the cause for defendants in error:

An Indian tribe or a member thereof is incapable of making a valid conveyance of tribal lands.

Johnson v. M'Intosh, 8 Wheat. 543, 5 L. ed. 681.

Conveyances by Indians, members of the Five Civilized Tribes, of their interest in unallotted tribal land, are void and incapable of passing any interest.

Case v. Hall, 2 Ind. Terr. 8, 46 S. W. 180; Rogers v. Hill, 3 Ind. Terr. 562, 64 S. W. 536; Turner v. Gilliland, 4 Ind. Terr 606, 76 S. W. 253; Denton v. Capital Town Site Co. 5 Ind. Terr. 396, 82 S. W. 852; Harris v. Hardridge, 7 Ind. Terr. 532, 104 S. W. 826; Kelly v. Harper, 7 Ind. Terr. 541, 104 S. W. 829; Sayer v. Brown, 7 Ind. Terr. 675, 104 S. W. 877; Hayes v. Barringer, 7 Ind. Terr. 697, 104 S. W. 937, 93 C. C. A. 507, 168 Fed. 221; McKee v. Henry, 119 C. C. A. 412, 201 Fed. 75; Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; Gritts v. Fisher, 224 U. S. 640, 56 L. ed. 928, 32 Sup. Ct. Rep. 850; Muskrat v. United States, 219 U. S. 346, 55 L. ed. 246, 31 Sup. Ct. Rep. 250; Woodbury v. United States, 95 C. C. A. 498, 170 Fed. 302; Ligon v. Johnston, 90 C. C. A. 486, 164 Fed. 670; Fleming v. McCurtain, 215 U. S. 56, 57, 54 L. ed. 88, 90, 30 Sup. Ct. Rep. 16; Bledsoe v. Wortman, 35 Okla. 261, 129 Pac. 841.

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The act of April 21, 1904, is not applicable to tribal lands.

Goat v. United States, 224 U. S. 458–468, 56 L. ed. 841–846, 32 Sup. Ct. Rep. 541; Deming Invest. Co. v. United States, 224 U. S. 471, 56 L. ed. 847, 32 Sup. Ct. Rep. 549; Mullen v. United States, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494; Heckman v. United States, 224 U. S. 413, 56 L. ed. 820, 32 Sup. Ct. Rep. 424.

If the conveyance from Emmer Sisney, under which the plaintiff claims, is void because made before the lands were alienable, or before the restrictions upon the right to alienate such land had been removed, the judgment of the supreme court of the state of Oklahoma should be affirmed.

Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578; Heckman v. United States, 224 U. S. 413, 56 L. ed. 820, 32 Sup. Ct. Rep. 424; Mullen v. United States, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494; Goat v. United States, 224 U. S. 458, 56 L. ed. 841, 32 Sup. Ct. Rep. 541; Deming Invest. Co. v. United States, 224 U. S. 471, 56 L. ed. 847, 32 Sup. Ct. Rep. 549; Simmons v. Whittington, 27 Okla. 356, 112 Pac. 1018; Hooks v. Kennard, 28 Okla. 457, 114 Pac. 744; Howard v. Farrar, 28 Okla. 490, 114 Pac. 695; Smith v. Martin, 28 Okla. 836, 115 Pac. 866; Bledsoe v. Wortman, 35 Okla. 261, 129 Pac. 841.

Nor can such a conveyance be made effective on the doctrine of relation.

Starr v. Long Jim, 227 U. S. 613, 57 L. ed. 670, 33 Sup. Ct. Rep. 358; Monson v. Simonson, 231 U. S. 341, ante, 260, 34 Sup. Ct. Rep. 71; Bledsoe v. Wortman, 35 Okla. 261, 129 Pac. 841.

Conveyances made in violation of legislation imposing restrictions upon alienation are void; the purpose of such legislation is not only to prevent alienation during the restricted period, but to prevent the encumbrance of the restricted land by deed or contract during the period when alienation is prohibited from being effective after the expiration or removal of restrictions.

Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578; Heckman v. United States, 224 U. S. 413, 56 L. ed. 820, 32 Sup. Ct. Rep. 424; Goodrum v. Buffalo, 89 C. C. A. 525, 162 Fed. 817; Hayes v. Barringer, 93 C. C. A. 507, 168 Fed. 221; Lewis v. Clements, 21 Okla. 167, 95 Pac. 769; Howard v. Farrar, 28 Okla. 490, 114 Pac. 695; Simmons v Whittington, 27 Okla. 356, 112 Pac. 1018; Harper v. Kelly, 29 Okla. 809, 120 Pac. 293; Turner v. Gilliland, 4 Ind. Terr. 606, 76 S. W. 253; Denton v. Capital Town Site Co. 5 Ind. Terr. 396, 82 S. W. 852; Sayer v. Brown, 7 Ind. Terr. 675, 104 S. W. 877; Harris v. Hardridge, 7 Ind. Terr. 532, 104 S. W. 826.

Mr. Justice Lamar delivered the opinion of the court:

Emmer Sisney, a white woman and widow of a Choctaw Indian, applied in 1899 to be admitted as a member of the tribe by intermarriage. Her application not having been granted, she employed Franklin & Apple, attorneys at law, to secure her enrolment. As compensation for their services she, on October 16, 1905, by warranty deed, conveyed to them her "entire interest in any and all lands, exclusive of homestead, which might finally be allotted to her by the Commissioners of the Five Civilized Tribes." This deed was duly recorded, together with an instrument by which she agreed to make conveyance when the land was actually allotted. Thereafter, on November 26, 1906, Emmer Sisney was enrolled as an intermarried citizen of the Choctaw Nation. She promptly made her selection, and on December 12, 1906, received a patent to land, all of which, except the homestead, she, on December 14, 1906, sold for value to Lynch & Simmons. Thereupon Franklin, who had acquired Apple's interest under the deed of 1905, brought this suit to have the deed to Lynch & Simmons canceled as a cloud on his title. The district court of Oklahoma entered a decree in his favor. That judgment was reversed by the supreme court, and the case is here on a writ of error to review that ruling.

Both parties claim title to land allotted in December, 1906, to a white member of the Choctaw Tribe. The plaintiff has the older warranty deed, but the defendants contend that as it was signed before allotment, the deed was void by virtue of the provisions in the Supplemental Agreement of July 1, 1902 (32 Stat. at L. 641, §§ 15 and 16, chap. 1362), [271] that

"lands allotted to members and freedmen [of the Choctaw and Chickasaw Tribes] shall not be affected . . . by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except . . . (§ 16) after issuance of patent."

To this the plaintiff replies that, as Emmer Sisney was a white woman, this prohibition against sale by her had been repealed by the act of April 21, 1904 (33 Stat. at L. 204, chap. 1402), which provides that

"all the restrictions upon the alienation of lands of all allottees of . . . the Five Civilized Tribes of Indians, who are not of

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Indian blood, . . . are . . . hereby removed."

That statute did not authorize white *members* of the tribe to sell future acquired property, but did permit non-Indian *allottees* to sell what had been actually assigned to them in severalty. Cf. 34 Stat. at L. § 19, p. 144, chap. 1876. The distinction between a member and an allottee is not verbal, but was made in recognition of a definite policy in reference to these lands. The Revised Statutes (§ 2118) declare that no conveyance from an Indian tribe shall be of any validity in law or in equity unless authorized by treaty. As the tribe could not sell, neither could the individual members, for they had neither an undivided interest in the tribal land nor vendible interest in any particular tract. Gritts v. Fisher, 224 U. S. 641, 56 L. ed. 931, 32 Sup. Ct. Rep. 580. But in pursuance of the legislation following the Report of the Dawes Commission (Choate v. Trapp, 224 U. S. 665, 56 L. ed. 941, 32 Sup. Ct. Rep. 565), provision was made for dividing and distributing the tribal land in severalty among the members of the tribe. But, recognizing the probability of improvident and hasty sales being made, Congress provided that the land could not be sold until after the patent had actually issued, and even then only one quarter could be sold in one year, three quarters in three years, and the balance in five years. The act of 1904, relied on by plaintiff, removed some of the restrictions, [272] and permitted those members of the tribe who were not of Indian blood to sell land after it had been actually allotted in severalty. But it did not permit even a non-Indian to sell a mere float or expectancy, since he would not likely receive the full value of what thereafter might be patented to him.

The plaintiff further contends that even if the deed was inoperative when made, yet, as Emmer Sisney was a white woman, she had the capacity of a white person of full age to convey an expectancy, so that when she acquired title in 1906 it inured to the benefit of Franklin and Apple, as the grantees under the deed of 1905. But the trouble with this contention is that Emmer Sisney cannot be treated as a white woman for the purpose of conveying an expectancy, and an Indian for the purpose of securing an allotment. When she applied to be enrolled as a citizen of the Choctaw Nation she, *ipso facto*, subjected herself to the restriction upon alienation of Indian land imposed upon all members of the tribe. All who dealt with her, as to land thereafter allotted to her, were charged with knowledge that the act of 1902 declared that such land should not be affected by any contract made before allotment. The deed of 1905 was therefore a nullity, and did not estop her or her assigns from showing that it had been made in direct violation of the statute. For, to permit an Indian's deed, void when made, to operate as a conveyance of title to lands subsequently allotted, would be to disregard the express language of the statute and defeat the protective purposes for which the law was passed. Starr v. Long Jim, 227 U. S. 624, 57 L. ed. 675, 33 Sup. Ct. Rep. 358. The result is not changed by the provision of § 642 of Mansfield's Digest that "if a person, without title, shall convey real estate, and subsequently acquire title, the legal or equitable estate afterwards acquired shall immediately pass to the grantee as if the estate had been in the grantor at the time of the conveyance." The chapter of Mansfield's Digest of [273] Arkansas Law containing this section was extended (32 Stat. at L. 841, chap. 707) to the Indian territory "so far as the same may be applicable and not inconsistent with any law of Congress." It has no effect here because it is inconsistent with the act of 1902, which declared that Indian land should not be affected by a deed made before patent. The deed to Franklin, having been made before allotment, was void, and the judgment is affirmed.

WILLIAM S. TEVIS, William H. McKittrick, the Pacific Surety Company, and the United Surety Company, Plffs. in Err.,

v.

JEPP RYAN, Thomas C. Ryan, and E. R. Ryan.

(See S. C. Reporter's ed. 273-291.)

Contracts — construction — stockholders' agreement.

1. A personal responsibility on the part of the minority stockholders, in case the project for rehabilitating the corporation then in financial straits should not succeed in two years, to see to it that the majority stockholders should be reinvested with the same proportionate interest in the corporate stock that they had previously held, was imported by an agreement between all the stockholders whereby, in consideration of a readjustment of the capital stock, involving the placing of a substantial part of such stock in the corporate treasury, to be sold by such minority stockholders for the benefit of the corporation at a price to be fixed

NOTE.—Generally, on admissibility of parol evidence to vary, add to, or alter a written contract—see notes to Durkin v. Cobleigh, 17 L.R.A. 273, and Union Mut. L. Ins. Co. v. Mowry, 24 L. ed. U. S. 674.

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by the directors, the said majority stockholders were to surrender both their stock control and their control of the directorate to such minority stockholders, who were to have two years in which to comply with all the requirements of the contract, and in case of default the interest of the said majority stockholders was to "reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement."

[For other cases, see Contracts, II. d, in Digest Sup. Ct. 1908.]

Evidence — parol to vary contract — admissibility under pleadings.

2. Parol evidence of previous promises by one of the defendants inconsistent with the terms of the written contract in suit are admissible where the pleadings upon which the parties went to trial relied not only upon the contract, but also upon alleged fraudulent conduct beginning with representations of the means and property of the defendants, on the strength of which the plaintiffs entered into the written agreement, followed by alleged fraudulent use of the control of the property turned over to the defendants in pursuance of the terms of such agreement.

[For other cases, see Evidence, VI. c; XIII. a, in Digest Sup. Ct. 1908.]

Appeal — admission of evidence — rulings correct when made.

3. Rulings that certain evidence was admissible, which were correct when made, because relevant to an issue of fraud raised by the pleadings, do not become erroneous when the allegations of fraud are afterwards abandoned, or are held by the trial court not to be sufficiently supported.

[For other cases, see Appeal and Error, VIII. m, 3, in Digest Sup. Ct. 1908.]

Evidence — relevancy — fraud.

4. Evidence that stockholders who had surrendered their control of the corporate stock and directorate to certain minority stockholders in order to rehabilitate the company, reserving the right to resume control if the project should fail, were not given timely information of important suits against the corporation, is relevant to the question of fraud alleged to consist in fraudulent representations by such minority stockholders, on the strength of which the contract for surrender of control was entered into, followed by alleged fraudulent use of such control.

[For other cases, see Evidence, XI. e, in Digest Sup. Ct. 1908.]

Imputed notice — joint contractors.

5. Notice to either one of two joint contractors is notice to both.

[For other cases, see Notice, II. b, in Digest Sup. Ct. 1908.]

Contracts — demand for performance.

6. An oral demand for reinvestment, made by majority stockholders who had surrendered their control of the corporate stock and directorate to the minority stockholders in order to rehabilitate the company, reserving the right to resume control in case the project should fail, is sufficient if it is specific enough fairly to warn such minority stockholders that they are called upon to perform their engagement under the reinvestment clause of the contract.

[For other cases, see Contracts, 677, 678, in Digest Sup. Ct. 1908.]

Appeal — question not raised below — evidence.

7. A party cannot complain of the admission in evidence of a paper introduced to show a demand, and admissible for that purpose (in the absence of objections based upon the time of its delivery), where his only objection at the trial was that the paper contained matters irrelevant to the demand, since his proper course was to request an instruction limiting the effect that should be given to the paper by the jury, or, if intending to insist that it came too late to constitute a proper demand, then to exclude the paper from consideration.

[For other cases, see Appeal and Error, VIII. j, 5, in Digest Sup. Ct. 1908.]

Error to territorial supreme court — following decision below.

8. The Federal Supreme Court will not lightly disturb on writ of error the decision of a territorial supreme court, turning largely upon the local practice.

[For other cases, see Appeal and Error, VIII. m, 1; Courts, VII. d, in Digest Sup. Ct. 1908.]

[No. 189.]

Argued January 23 and 26, 1914. Decided April 6, 1914.

IN ERROR to the Supreme Court of the Territory of Arizona to review a judgment which affirmed, upon condition of the remittitur of a part of the damages recovered, a judgment of the District Court of Maricopa County in that territory, in favor of plaintiffs in an action on a contract. Affirmed.

See same case below, 13 Ariz. 120, 108 Pac. 461, on rehearing, 13 Ariz. 282, 114 Pac. 557.

Statement by Mr. Justice **Pitney**:

This action was brought by defendants in error against Tevis and McKittrick, two of the plaintiffs in error, in a district court of one of the counties of the then territory of Arizona. The trial resulted in a verdict and judgment in favor of plaintiffs below for $132,000. On appeal, the supreme court of the territory held that because of error affecting the amount of the damages, $64,564.63 of the verdict ought to be remitted, and that upon the filing of a remittitur judgment should be entered in favor of plaintiffs below for the remaining sum of $67,435.37. 13 Ariz. 120, 108 Pac. 461. Both parties filed petitions for a rehearing, with the result that the court adhered to its former view. 13 Ariz. 282, 114 Pac. 557. Plaintiffs having filed the remittitur, judgment was entered in their favor for the last-mentioned sum, and the present writ of error was sued out.

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The controversy arises out of the following transactions. In the year 1902 plaintiffs and defendants were stockholders in an Arizona corporation known as the Turquoise Copper Mining & Smelting Company, which owned mining properties in Cochise county, Arizona. The stock consisted of 100,000 shares, of the par value of $10 each, of which the Ryans together owned four [275] sevenths and Tevis and McKittrick owned three sevenths. The Ryans were in control of the board of directors. About $160,000 had been expended towards the development of the mines, and this had been contributed by the respective parties in proportion to their holdings of stock, plaintiffs having contributed about $90,000, defendants about $70,000. One Bryant had secured a judgment and levied execution upon the property of the company, under which the mines had been sold on July 30, 1902, to one McPherson, subject to redemption on or before January 31, 1903. In this situation of affairs plaintiffs met the defendant McKittrick in Wilcox, Arizona, on November 29, 1902, and, after some negotiation, a written contract was drawn up and by them signed. Defendant Tevis was not present at this meeting, and the agreement was made contingent upon his signing, as he did a few days later. It reads as follows:

"This agreement, made and entered into this 29th day of November, 1902, by and between W. S. Tevis and W. H. McKittrick of Bakersfield, California, parties of the first part, and Jepp Ryan, T. C. Ryan, and E. B. Ryan, of Leavenworth, Kansas, parties of the second part,

"Witnesseth, That, whereas, the parties above mentioned represent all the stock in the Turquoise Copper Mining & Smelting Company, a corporation organized and existing under the laws of the territory of Arizona, and doing business in Cochise county, Arizona, and

"Whereas, the parties of the first part now own and control three sevenths of the capital stock of the said corporation, and the parties of the second part four sevenths of the capital stock thereof; and

"Whereas, the parties of the first part are desirous of securing the controlling interest of the said capital stock of the said corporation, and thereby obtain the full management of the affairs of the said corporation;

"Now, therefore, in consideration of, that the capital [276] stock of the said corporation shall be changed from its original capitalization to one million shares of the par value of one dollar each share, and that 240,000 of said shares of said capital stock shall be placed in the treasury of the said company, to be sold in whole or in part by the said parties of the first part, at such price or prices as the board of directors of said corporation may deem advisable, and the moneys received from such sale or sales shall be used as follows: First, to pay off and liquidate a certain judgment held by T. B. McPherson, of Omaha, Nebraska, or his assigns, against the said corporation, in the amount of about $25,532.47 dollars. Second, to use the next $20,000 received from the sale of said stock to develop the claims now owned and controlled by this company; the parties of the second part hereby agree to and with the parties of the first part, that the officers in the said corporation now representing the interest of the parties of the second part shall resign from said office or offices, and allow the parties of the first part to appoint or elect such officers in their place and stead as they may desire, said second parties agree to give the parties of the first part as their interest in the said company, a total of 280,500 shares of the capital stock thereof, and the parties of the second part shall receive as their portion 279,500 shares of capital stock of the said company. That the remaining 200,000 shares shall be divided between the parties hereto in the proportion of 101,000 shares to the first parties, and 99,000 shares to the parties of the second part; said 200,000 shares shall be issued to W. H. McKittrick, as trustee for the parties hereto. All of the parties hereto agree to use their best endeavors to sell as much of the said last-mentioned shares as possible, at not less than par value, and the proceeds of any of such sales of said block of stock shall be divided *pro rata* among the parties hereto, until they have been fully reimbursed for the money they now have expended upon this property, [277] amounting to about $160,000, when the remaining shares shall be divided equally among them, according to their respective interests, in the ratio aforesaid.

"It is further understood and agreed between the parties hereto that they shall not be allowed to sell any of their individual holdings of stock in this company until the block of 200,000 held in trust for all shall have been sold or apportioned, as above set forth. The parties of the second part shall not be liable for any expense connected with the operation of this company, excepting the expense of selling the stock held in trust for the parties hereto. The parties of the first part shall have a term of two years in which to comply with all the requirements of this contract. Should they fail or refuse to comply with all the agreements and stipulations herein mentioned within the period aforesaid, then this agreement shall become null and void

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and of no effect, otherwise to remain in full force and effect. Should this contract be annulled by any failure of the parties of the first part to do any and all things herein required of them, then the interest of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement.

"It is further understood and agreed by and between the parties hereto that W. S. Tevis, not being present upon the signing hereof, that ten days' time be allowed him in which to sign and ratify the same. Should he fail or refuse to do so within the period above mentioned, then this instrument shall be null and void in respect to all parties hereto. All erasures and changes and interlineations were made prior to the signing of this instrument.

"Witness our hands, the day and year first above mentioned."

In accordance with the agreement, a reorganization of the company was effected, the Ryans resigned as directors, control of the directorate passed to Tevis and McKittrick, [278] and the capital stock was changed so as to consist of 1,000,000 shares, of the par value of $1 each, which were allotted as prescribed by the contract, *viz.:*

To Tevis and McKittrick..	280,500	shares
To the Ryans	279,500	"
To McKittrick as trustee..	200,000	"
Treasury stock	240,000	"
Total	1,000,000	"

The mines of the company were redeemed from the sheriff's sale with $30,000 loaned for the purpose by Tevis upon the company's note. This note, with others given by the company for the interest upon it, was transferred by Tevis to the Western Company of California, a corporation controlled by him.

The reorganized Turquoise Company did not prosper. Defendants sold 32,000 shares of the treasury stock at 25c. per share, netting $8,000, and the remaining 208,000 shares at ¾c. per share, netting $1,560. This money was spent in operating the mines and in paying for a diamond drill, for patents, and for attorneys' fees. In May, 1905, the Western Company secured judgment against the company in a California court for the amount of the notes and interest, aggregating $44,078.05, and an action was brought on this judgment in Cochise county, Arizona, resulting on July 20, 1905, in a judgment for $44,549.43. On this same day McKittrick secured judgment against the company for $9,975 for services as general manager from May, 1903, to June, 1905. The following day (July 21, 1905) execution was levied against the mining properties to satisfy the judgments of McKittrick and the Western Company; and on July 11, 1906, the property was sold by the sheriff to that company. A few days later defendants, with others, organized the Tejon Mining Company under the laws of Arizona, and two years afterwards the Western Company conveyed the mining properties [279] formerly of the Turquoise Company to the Tejon Company.

The present action was commenced November 30, 1906, and, after repeated modifications of the pleadings, came on for trial upon a complaint which, besides setting up the above facts, averred that after two years from the 29th day of November, 1902, had elapsed, and after plaintiffs were informed that defendants had failed to sell the 240,000 shares of the Turquoise Company for sufficient funds to pay the money advanced by them to redeem the property of the company from the sheriff's sale, and before the action of the Western Company against the Turquoise Company was commenced in the California court, to wit, on February 15, 1905, plaintiffs informed defendants that they desired to be reinvested with their interest in the property of the Turquoise Company, and to be restored to their interest therein the same as before November 29, 1902, and informed defendants that they were then ready, able, and willing to pay defendants four sevenths of the sum of $25,262.60 paid to redeem the property from the sale of July 31, 1902; and that defendants ignored said request. There were allegations of fraudulent conduct, in support of which certain evidence was introduced, but these allegations seem to have been abandoned; at least the trial judge submitted the case to the jury solely upon the ground of a breach of the contract.

Mr. Edward H. Thomas argued the cause, and, with Messrs. Evans Browne, Alexander Britton, A. B. Browne, Ben Goodrich, and A. C. Baker, filed a brief for plaintiffs in error:

An agreement to pay dividends on preferred stock of a railroad out of the net earnings of the road does not mean the net earnings of the road as it was when the preferred stock was issued.

St. John v. Erie R. Co. 22 Wall. 136, 22 L. ed. 743.

Where a railroad company agreed to advance to trustees a certain sum of money to be used in running steamers, to be repaid out of a certain fund arising from the business, and to be secured by a pledge of stock, and no personal liability for said moneys was reserved as against any of the parties to the agreement, such parties are not liable for any portion of said moneys

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beyond the amount agreed to be contributed by them to such fund.

Ogdensburgh & L. C. R. Co. v. Nashau & L. R. Co. 112 U. S. 311, 28 L. ed. 740, 5 Sup. Ct. Rep. 161.

An agreement between the members of a "syndicate" formed to purchase the controlling interest in the stock of a mining corporation, that one of them should "control the management of the mine," is necessarily subject to such reasonable rules and regulations as the stockholders or directors may adopt for the government of the officers of the company.

Grant v. Parker, 115 U. S. 51, 29 L. ed. 346, 5 Sup. Ct. Rep. 1170.

An undertaking to hold a person harmless from liability on a subscription to stock in an incorporated company, and from loss or damage or liability as a stockholder in such a company, or from loss or damage by reason of connection with the company as a stockholder, cannot be held to mean that the person so indemnified will be held harmless if the stock depreciates in market value, or for any reason becomes worthless in his hands.

Morris v. Veach, 111 Ga. 438, 36 S. E. 753.

The promissory representations raise no estoppel.

Union Mut. L. Ins. Co. v. Mowry, 96 U. S. 544, 24 L. ed. 674; Wigmore, Ev. § 2425; 1 Greenl. Ev. 12th ed. § 275; Starkie, Ev. 9th Am. ed. 587; Union Stock-Yards & Transit Co. v. Western Land & Cattle Co. 7 C. C. A. 660, 18 U. S. App. 438, 59 Fed. 57; Arthur v. Baron De Hirsch Fund, 58 C. C. A. 67, 121 Fed. 795; Pitcairn v. Philip Hiss Co. 61 C. C. A. 657, 125 Fed. 113; Oelricks v. Ford, 23 How. 49, 63, 16 L. ed. 534, 538; Parish v. United States, 8 Wall. 489, 490, 19 L. ed. 472, 473; Bast v. First Nat. Bank, 101 U. S. 93, 96, 97, 25 L. ed. 794, 796, 797; Martin v. Cole, 104 U. S. 30, 38, 39, 26 L. ed. 647, 650, 651; Seitz v. Brewers' Refrigerating Mach. Co. 141 U. S. 510, 517, 518, 35 L. ed. 837, 840, 841, 12 Sup. Ct. Rep. 46; Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 318–361, 46 L. ed. 213, 218–235, 22 Sup. Ct. Rep. 133; Maryland v. Baltimore & O. R. Co. 22 Wall. 105, 113, 22 L. ed. 713, 715; Union Selling Co. v. Jones, 63 C. C. A. 224, 128 Fed. 675.

The contract is complete, and the parol representations are not consistent with its terms.

Stowell v. Greenwich Ins. Co. 163 N. Y. 298, 57 N. E. 480; House v. Walch, 144 N. Y. 418, 39 N. E. 327; Thompson v. Libby, 34 Minn. 374, 26 N. W. 1; Naumberg v. Young, 44 N. J. L. 331, 43 Am. Rep. 380.

A guaranty cannot be added to a written contract by parol.

De Witt v. Berry, 134 U. S. 306, 312, 33 L. ed. 896, 899, 10 Sup. Ct. Rep. 536; Seitz v. Brewers' Refrigerating Mach. Co. 141 U. S. 510, 517, 35 L. ed. 837, 840, 12 Sup. Ct. Rep. 46; Van Winkle v. Crowell, 116 U. S. 42, 48, 49, 36 L. ed. 880, 882, 883, 13 Sup. Ct. Rep. 18.

The admission of parol representations was prejudicial to defendants.

Renner v. Bank of Columbia, 9 Wheat. 581, 587, 588, 6 L. ed. 166–168; Deery v. Cray, 5 Wall. 795, 807, 808, 18 L. ed. 653, 657; Smith v. Shoemaker 17 Wall. 630, 639, 21 L. ed. 717, 719; Mexia v. Oliver, 148 U. S. 664, 673, 37 L. ed. 602, 605, 13 Sup. Ct. Rep. 754; United States v. Honolulu Plantation Co. 58 C. C. A. 279, 122 Fed. 583.

The remittitur does not cure the error.

Galveston, H. & S. A. R. Co. v. Wesch, 85 Tex. 593, 22 S. W. 957.

The court below erred in sustaining the trial court's ruling admitting in evidence the written demand of plaintiffs upon defendants.

Rulofson v. Billings, 140 Cal. 452, 74 Pac. 35; Weller v. Weller, 4 Hun, 197; Bristor v. Bristor, 82 Ind. 277; Lissak v. Crocker Estate Co. 119 Cal. 444, 51 Pac. 688; Re James, 124 Cal. 655, 57 Pac. 578, 1008; Dempsey v. Dobson, 174 Pa. 122, 3 L.R.A. 761, 52 Am. St. Rep. 816, 34 Atl. 459; Chicago v. McKechney, 205 Ill. 372, 68 N. E. 954; Rollins v. Duffy, 14 Ill. App. 69; Hightower v. Ansley, 126 Ga. 8, 54 S. E. 939, 7 Ann. Cas. 927; Allen v. Killinger (Murphy v. Killinger) 8 Wall. 480, 19 L. ed. 470.

Nelson v. First Nat. Bank, 16 C. C. A. 425, 32 U. S. App. 554, 69 Fed. 803, does not sustain the instruction on measure of damages.

The theory of damages applied by the court below is incorrect.

Galigher v. Jones, 129 U. S. 193, 201, 32 L. ed. 658, 661, 9 Sup. Ct. Rep. 335; Barnes v. Brown, 130 N. Y. 382, 29 N. E. 760; Dyer v. Rich, 1 Met. 180; Huse & L. Ice & Transp. Co. v. Heinze, 102 Mo. 245, 14 S. W. 756; Brinkerhoff-Farris Trust & Sav. Co. v. Home Lumber Co. 118 Mo. 461, 24 S. W. 129; Butler v. Wright, 103 App. Div. 463, 93 N. Y. Supp. 113; Moffitt v. Hereford, 132 Mo. 513, 34 S. W. 252; Sedgw. Damages, 8th ed. § 257; 2 Thomp. Corp. § 2724; Evans v. George, 80 Ill. 51.

The court below erred in holding that plaintiffs were entitled to recover the value of shares of stock of the Turquoise Company under the facts alleged in the complaint.

22 Cyc. 563–565; Sheehy v. Mandeville, 7

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Cranch, 208, 3 L. ed. 317; Alexander v. Harris, 4 Cranch, 299, 2 L. ed. 627; Sebree v. Dorr, 9 Wheat. 558, 6 L. ed. 160; Covington v. Comstock, 14 Pet. 43, 10 L. ed. 346; Ferguson v. Harwood, 7 Cranch, 409, 3 L. ed. 387; Southwick v. First Nat. Bank, 84 N. Y. 428.

The court below erred in refusing to sustain defendant's assignment of error that no sufficient demand for reinvestment was proved to have been made by plaintiffs upon defendants.

28 Am. & Eng. Enc. Law, 2d ed. 707, 708; Monnot v. Ibert, 33 Barb. 24; Hamilton v. Calhoun, 2 Watts, 139.

When the parties engage for the performance of distinct and several duties, mere words of plurality, such as "we bind ourselves," will not make the contract joint.

1 Addison, Contr. 8th ed. 30.

The amount of the excessiveness of the jury's verdict should be apparent to justify a remittitur by the prevailing party.

18 Enc. Pl. & Pr. 128; Re Holmes, 79 Ill. App. 59.

A verdict tainted by passion and prejudice cannot be cured by a remittitur of any supposed excess.

18 Enc. Pl. & Pr. 144; Stafford v. Pautucket Haircloth Co. 2 Cliff. 82, Fed. Cas. No. 13,275; Southern P. Co. v. Tomlinson, 4 Ariz. 126, 33 Pac. 710; Drumm v. Cessnum, 58 Kan. 331, 49 Pac. 78; Atchison v. Plunkett, 61 Kan. 297, 59 Pac. 646, 7 Am. Neg. Rep. 241.

An erroneous instruction on the measure of damages is not obviated by a remittitur of an amount assumed to represent the excessiveness of the jury's verdict.

Jacoby v. Johnson, 56 C. C. A. 637, 120 Fed. 487; Reed v. Keith, 99 Wis. 672, 75 N. W. 392; Lauth v. Chicago Union Traction Co. 244 Ill. 244, 91 N. E. 431; Hughes v. Chicago, R. I. & P. R. Co. 150 Iowa, 232, 129 N. W. 956.

Mr. Eugene S. Ives argued the cause and filed a brief for defendants in error:

Where two parties have made a contract which one of them has broken, the damages which the other ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either as arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of it.

Hadley v. Baxendale, 9 Exch. 353, 2 C. L. R. 517, 23 L. J. Exch. N. S. 179, 18 Jur. 358, 2 Week. Rep. 302, 5 Eng. Rul. Cas. 502; 1 Sutherland, Damages, 3d ed. §§ 50, 52, 77, pp. 149, 165, 168, 229, 234; Jones v. George, 61 Tex. 345, 48 Am. Rep. 280; Doushkess v. Burger Brewing Co. 20 App. Div. 375, 47 N. Y. Supp. 312; Hedden v. Schneblin, 126 Mo. App. 478, 104 S. W. 887; Bank of Commerce v. Bright, 23 C. C. A. 586, 39 U. S. App. 483, 77 Fed. 949; Gallup v. Miller, 25 Hun, 299; Graham v. McCoy, 17 Wash. 63, 48 Pac. 780, 49 Pac. 235.

The value of the property, less the indebtedness of the corporation, is the value of the total issue of the capital stock of the corporation.

McDonald v. Danahy, 196 Ill. 133, 63 N. E. 648; Nelson v. First Nat. Bank, 16 C. C. A. 425, 32 U. S. App. 554, 69 Fed. 798; Hewitt v. Steele, 118 Mo. 463, 24 S. W. 440; 2 Cook, Corp. § 581; Crichfield v. Julia, 77 C. C. A. 297, 147 Fed. 73; Huse & L. Ice & Transp. Co. v. Heinze, 102 Mo. 245, 14 S. W. 756.

If there be no evidence as to the value of the stock, it will be presumed that its actual value is its par value.

Harris's Appeal, 9 Sadler (Pa.) 21 W. N. C. 189, 12 Atl. 743; Brinkerhoff-Farris Trust & Sav. Co. v. Home Lumber Co. 118 Mo. 447, 24 S. W. 129.

An instruction limiting appellees' right of recovery to the value of the additional stock would have done them substantial injustice.

Clark, Contr. p. 486; 8 Am. & Eng. Enc. Law, 627, 633; Jones v. VanPatten, 3 Ind. 107; Paine v. Sherwood, 21 Minn. 225; Tuers v. Tuers, 100 N. Y. 201, 2 N. E. 922.

The actual damage which they sustained was the value of the interest which they lost.

Hampton Stave Co. v. Gardner, 83 C. C. A. 521, 154 Fed. 805; Griggs v. Day, 158 N. Y. 1, 52 N. E. 692; Baltimore & O. R. Co. v. Weedon, 24 C. C. A. 249, 47 U. S. App. 306, 78 Fed. 584, 2 Am. Neg. Cas. 688.

Defendants, having wrongfully withheld the management from the plaintiffs, were, after the demand in February, 1905, trustees by usurpation, and are responsible for damage to the property which occurred during such wrongful trusteeship.

4 Sutherland, Damages, 3d ed. § 1139, pp. 3325, 3326; 3 Sutherland, Damages, § 658, p. 1914.

The written demand in July, 1906, was sufficient to constitute a breach of contract.

Freeman v. Ingerson, 143 Mich. 7, 106 N. W. 278; Meherin v. San Francisco Produce Exch. 117 Cal. 215, 48 Pac. 1074.

Although the evidence is sufficient to sustain the finding of a demand upon Tevis, the demand upon McKittrick alone was sufficient.

Blood v. Goodrich, 9 Wend. 68, 24 Am.

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Dec. 121; Ball v. Larkin, 3 E. D. Smith, 555; 9 Am. & Eng. Enc. Law, 214, note 2.

When an instrument has been correctly construed according to its terms, it is harmless error to admit incompetent testimony to show its interpretation.

Taylor v. Hodges, 105 N. C. 344, 11 S. E. 156; Allan v. State S. S. Co. 29 N. Y. S. R. 288, 8 N. Y. Supp. 803.

Moreover, the attention of the court was never called to any possible misconsideration of this evidence, and no instruction was asked limiting the consideration which the jury might give it. If counsel feared that the jury might (as now claimed) consider this evidence in determining the question of value, they should have asked an instruction limiting or explaining the purpose of the evidence, or the purpose for which it might be considered. Not having done so, defendants may not now complain.

Roos v. Lewyn, 5 Tex. Civ. App. 593, 23 S. W. 450, 24 S. W. 538; Walker v. Brown, 66 Tex. 556, 1 S. W. 797; Shumard v. Johnson, 66 Tex. 70, 17 S. W. 398.

The proper and only method of objecting to and correcting redundant, immaterial, or irrelevant allegations in a pleading is a motion to strike out the unnecessary matter, and not a demurrer, nor an exclusion of evidence at the trial.

Pom. Code Remedies, 4th ed. § 446; Dent v. South Bound R. Co. 61 S. C. 329, 39 S. E. 527.

The amount of damages did not become fixed at the time of the demand.

Wilcox v. Plummer, 4 Pet. 172, 182, 7 L. ed. 821, 824; Reformed Protestant Dutch Church v. Brown, 54 Barb. 197; 1 Sutherland, Damages, § 110, 4th ed. p. 312.

The damages for the destruction of the value of the stock holdings of the Ryans were recoverable by the Ryans in an action brought in their own name.

Ritchie v. McMullen, 25 C. C. A. 50, 47 U. S. App. 470, 79 Fed. 533.

Mr. Justice Pitney delivered the opinion of the court:

The trial judge in submitting the case to the jury [280] adopted the following construction of the contract of November 29, 1902: That it provided for a general scheme to be carried out within the period of two years; that control of the Turquoise Company was to be given to defendants McKittrick and Tevis, and with a board of directors of their own choosing they were to carry on the business of the company, and within two years were to carry out the plan for the rehabilitation of the company according to the stipulations of the agreement; that they did not guarantee successful results, but were simply to use their best endeavors to carry out the plan; that if there was a failure on their part to do the things contemplated within the two years, this of itself did not raise any legal obligation on their part to the plaintiffs; but that if, at the end of the two years, the scheme contemplated by the contract had not been accomplished, then defendants agreed to reinvest plaintiffs with the interest they had at the time of entering into the contract, provided plaintiffs demanded that reinvestment. The jury were instructed that they should first determine whether, at the expiration of the two years specified in the contract, the situation was such that defendants were obligated to reinvest plaintiffs with the four-sevenths interest in the company that they formerly held. That if so, the next question was whether plaintiffs ever demanded that they should be so reinvested; for if there was no demand, there was no liability on the part of defendants; but that if plaintiffs did make such demand within a reasonable time after the expiration of the two years, it was the duty of defendants to comply with it; that certain evidence introduced to show a written demand made at a time in the summer of 1906 should be rejected because such demand, if made, came too late; but that if the jury should find [as, in fact, certain other evidence tended to show] that a demand was made on defendants by plaintiffs a few months following the expiration of the [281] two years, and in the early part of 1905, that was a reasonable time in which to make the demand. The further instruction was that if there was a breach of the agreement by defendants in failing to reinvest plaintiffs as they ought to have done, the next question was the amount of the damages; and as to this, that what defendants agreed to do was to put plaintiffs back as nearly as might be in the situation they were in when the contract was made; that at that time the property was about to be foreclosed, and subsequently money was raised to redeem it from the judgment, and the money thus used became a debt against the company, and this should be considered by the jury, because plaintiffs ought not to be put back in possession of their interest in the property free and clear of any such encumbrance as stood upon it when the contract was made. "So, if you should come to this question of damages at all, you should ascertain the damages in this way: You should ascertain the value of this mining property, —this property that was owned by the Turquoise Copper Mining & Smelting Company —at the time the demand of the Ryans to be reinvested was made, if any such demand was made at all,—ascertain first the value of that property. Then deduct from that

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value the amount of this claim of the Western Company which loaned this money, with interest, which at that time amounted to at least $39,000. Then take that balance, if there is any,—the value of the property, from which deduct the $39,000, and if there is any balance left,—that belongs to the plaintiffs and defendants in the proportion that they owned the property,—that is, the Ryans four sevenths and Tevis and McKittrick three sevenths. So the Ryans would be entitled to four sevenths of the balance after you deduct from the value of the property the amount of this Western Company's claim,—this $39,000. And of course it follows that if the value of the property was not so much as $39,000, they would not be entitled to anything."

[282] There were no requests for particular instructions, and no specific objection to the instructions as given.

In the supreme court of the territory the principal question raised was as to the correctness of the instruction respecting the measure of damages. In passing upon this, the appellate court interpreted the contract as binding defendants (in the event of the failure of the scheme, and a demand made for reinvestment) to turn over to plaintiffs, not a four-sevenths interest in the mining property, but a four-sevenths interest in the capital stock of the company. At the same time it was held that the trial court, in apparently adopting as a measure of damages the four-sevenths interest in the property of the corporation, did not actually construe the reinvesting clause to extend to the property or the mines of the corporation, but that the instruction was tantamount to an instruction that plaintiffs were entitled to the value of four sevenths of the capital stock, which was the equivalent of, and was to be ascertained by determining from the evidence the value of, four sevenths of the net assets of the corporation. And the appellate court held, as to this, that the result was right, and hence the judgment ought not to be reversed, though the instruction as given might be open to criticism as to its form, and even though the jury might have based their verdict upon an incorrect theory.

But it was held that the measure of damages as applied by the trial court was erroneous in failing to deduct from the valuation of the four sevenths a proper allowance for the 279,500 shares of stock of the Turquoise Company that had been retained by the Ryans under the terms of the contract, and were still owned by them.

The court overruled certain minor contentions on the one side and on the other, and, finding that the proximate damage resulting from the breach of the contract was the loss of the value of the stock that was agreed to be returned, and that the loss of the value of the 279,500 shares [283] retained (attributed, as it was, to subsequent mismanagement, of the company by Tevis and McKittrick) was only a remote and indirect consequence, and not such as was in contemplation at the time of the making of the contract as a probable result of such breach, held that there was error (and error only) in including in the allowance of damages the loss of the value of the retained shares. The court further found that the evidence and the verdict of the jury afforded a basis for computing the correct sum to be awarded, in that the jury by its verdict found in effect that the value of the entire capital stock of 1,000,000 shares of the Turquoise Company at the time of the breach of the contract was $231,000 (four sevenths of this sum being $132,000, the amount of the verdict). Taking four sevenths of the entire number of shares (or 571,428 shares) and deducting the 279,500 shares retained by the plaintiffs, there remained 291,928 shares, which, computed upon the basis afforded by the verdict of the jury, yielded $67,435.37 as the proper amount of the recovery. And under the provisions of ¶ 1588 of the Revised Statutes of 1901 and the practice approved in Kennon v. Gilmer, 131 U. S. 22, 29, 33 L. ed. 110, 113, 9 Sup. Ct. Rep. 696, plaintiffs were put to their election to either remit the excess beyond that amount or submit to a new trial, with the result mentioned in the prefatory statement.

It is now contended by plaintiffs in error that the interpretation of the contract adopted by the trial court, and followed by the appellate court, respecting the question of liability, is unwarranted by anything in the language of the instrument. It is said that Tevis and McKittrick did not agree, as the trial court held they did, that they personally would use their best endeavors to do the things that were in contemplation. It is said that the directors of the corporation were to fix the price of the treasury stock, and to use the money derived from its sale in the manner indicated; that Tevis and McKittrick were to be merely [284] the agents of the board of directors (if that board should so determine), without authority to fix the price of the stock, pay the judgment, or use the money to develop claims, or in any other way for the company's benefit; that if the directors should fail to give such authority, Tevis and McKittrick could do nothing; that they did not covenant or agree that the stock would sell for any particular price, much less that it would sell for $20,000 more than the amount of the judgment; that the terms of the agreement show merely the expectations of the parties,

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which, as the event befell, were not realized, and that the agreement and all its stipulations were conditional upon the sale of the stock for a sufficient price to meet the purposes indicated. The insistence is that the Ryans simply sold and transferred a controlling interest in the stock in consideration of a future authority to sell the treasury stock for a price in nowise fixed, and that there was no agreement that Tevis and McKittrick were to contribute or pay anything to the company; that, as between the corporation and the shareholders, the 240,000 shares of treasury stock were contributed outright to the corporation, which, by the terms of the agreement, had the right to sell it; and that Tevis and McKittrick did not undertake to bind the company to return or pay for this stock.

The gist of the argument seems to be that Tevis and McKittrick incurred no personal liability except possibly to see to it that the capital stock of the company was changed from its original capitalization (100,000 shares, of the par value of $10 each) to 1,000,000 shares, of the par value of $1 each, that 250,000 of the new shares were placed in the treasury of the company, and that the board of directors of the corporation fixed a price for the sale of these shares.

The agreement shows on its face that it was not prepared by a skilled person, and it requires construction. But we think it was binding upon defendants, at least to [285] the extent that the decision of the territorial supreme court gave effect to it.

The argument for plaintiffs in error attributes too little force to what is referred to as the "reinvestment clause," *viz.*: "The parties of the first part shall have a term of two years in which to comply with all the requirements of this contract. Should they fail or refuse to comply with all the agreements and stipulations herein mentioned within the period aforesaid, then this agreement shall become null and void and of no effect; otherwise to remain in full force and effect. Should this contract be annulled by any failure of the parties of the first part to do any and all things herein required of them, then the interest of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement." This imports, at least, that if the project for rehabilitating the company, in contemplation of which the Ryans devested themselves for the time of the majority interest and control of the company, should come to naught, they should be reinvested with the same proportion of the stock of the company that they had held before. But the company was not named as a party to the agreement, and, even if treated as a party by implication, could hardly be supposed to covenant for a transfer of the outstanding stock. Hence the covenant quoted could bind Tevis and McKittrick, only, who themselves were to be placed in control of the company, and of the very stock that would need to be retransferred in order to fulfil the stipulation. Consequently, it imports a personal responsibility on their part to see to it that the Ryans were "reinvested" in accordance with the terms of the covenant.

It is insisted that if certain declarations of McKittrick, said to have been made during the negotiations that immediately preceded the signing of the contract, be eliminated, there is nothing in the terms of the instrument, [286] or in the circumstances under which it was made, to warrant the interpretation adopted. In this view we do not concur, for reasons already indicated.

The declarations referred to are also said to have been erroneously admitted. They were made by McKittrick in the absence of Tevis at the interview of November 29, 1902. Jepp Ryan, one of the plaintiffs, being called as a witness and asked to state the conversation between McKittrick and himself, testified: "He went out and had an agreement made and brought it up into our room. 'Now,' he says, 'Boys, Mr. Tevis is a multimillionaire and rich and influential, and by putting him in control of this property, or giving us control of the property, we will try to handle it so each of us can get all our money back.' I says, 'Captain, suppose you don't handle it, where do we come in.' He says, 'If we don't sell the stock we will return to you the property the same as it is to-day.'" It appeared that this was after the contract was drawn up and before it was signed. A motion was made to strike it out "because the contract speaks for itself." This, the only objection, was overruled. Each of the other plaintiffs was permitted, over the like objection, to give evidence of a similar import.

If the action had been based alone upon the written instrument there would be force in the objection to the introduction of parol evidence of previous promises inconsistent with the terms of the writing. But the action was not so limited. The pleading upon which the parties went to trial (the third cause of action in the third amended and supplemental complaint) relied not upon the contract alone, but also upon alleged fraudulent conduct, beginning with representations of the abundant means and property of the defendants, on the strength of which, as was said, the plaintiffs entered into the written agreement, and followed by alleged fraudulent use of the control of the company that was turned over to Tevis and McKittrick [287] in pursuance of the

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terms of the agreement. The evidence of the oral declarations of McKittrick was admissible upon this question; and the fact that the allegations of fraud were afterwards abandoned, or were held by the trial court not to be sufficiently supported, does not render erroneous the previous rulings upon the admissibility of the evidence referred to.

For like reasons we find no error in the testimony to show that the Ryans were not notified, until long afterwards, that suit had been brought by the Western Company against the Turquoise Company in California, or that suit had been brought upon this judgment in Cochise county, Arizona. Assuming, for argument's sake, that defendants were under no duty to keep plaintiffs informed in regard to the status of the company, and that the contract did not require that they should do so, it nevertheless was a circumstance of more or less significance upon the question of fraud, that events of such consequence to the company were not communicated to parties who held legal and equitable rights such as the Ryans concededly held.

It is contended that the appellate court erred in holding that there was sufficient evidence to show a demand for reinvestment made by plaintiffs upon defendants. The complaint alleged two such demands, one on February 15, 1905, the other on August 26, 1906. Plaintiffs introduced testimony in regard to an oral demand claimed to have been made in May, 1905, and it was upon this alone that the trial court permitted the case to go to the jury. It is contended that this demand was insufficient because not made in proper form, nor made in a proper place, and made only upon McKittrick, and not upon Tevis also. Assuming, as both courts held, that a special demand was necessary, it seems to us that the oral demand referred to is not open to the objections made to it. McKittrick and Tevis were joint contractors, so that notice to either was [288] notice to both. And there is no doubt that it was sufficiently specific to fairly warn defendants that they were called upon to perform their engagement under the reinvestment clause.

Objection is made to the trial court's ruling, sustained by the appellate court, admitting in evidence a written demand served by plaintiffs upon defendants, marked Exhibit "K." This was a letter, undated, but apparently written after July 11, 1906, and stated to have been served upon defendants in September of that year. Its admission was not objected to on the ground that it did not evidence a proper demand (this, indeed, was admitted), nor on the ground that the demand came too late, but only because of other matters contained in the letter. The trial court having refused to exclude it as evidence, subsequently instructed the jury that as a demand it came too late to furnish a proper support for plaintiffs' cause of action. The contention now is that because of self-serving declarations contained in it, Exhibit K ought to have been excluded entirely from the consideration of the jury, and that it was likewise inadmissible because it contained veiled charges of fraud on the part of the defendants, and also offers of compromise made by the plaintiffs. But we have already pointed out that the action was in part based upon fraud, and we are not prepared to say that the fact that Exhibit K contained insinuations attributing fraud to defendants, coupled with the fact that defendants did not respond to it, would not in some degree tend to support this charge. It is sufficient, however, to say that the paper was introduced as evidence of a demand, and was admissible for that purpose (in the absence of objection based on the time of its delivery), since it contained a notice that plaintiffs insisted that defendants should comply, as well as might then be done, with the provisions of the agreement. The fact (if it were a fact) that it also contained matters irrelevant to the demand would not [289] render the document inadmissible. The proper course would have been for defendants to request an instruction limiting the effect that should be given to it by the jury; or, if intending to insist that it came too late to constitute a proper demand, then to exclude the paper from consideration. The present objection was not properly raised at the trial.

It is insisted that the court erred in holding that plaintiffs, under the averments of the complaint, were entitled to recover the value of a four-sevenths interest in the stock of the company. The basis of the objection is that such a recovery was inconsistent with the cause of action set forth in the complaint, which, it is said, sought a recovery of a four-sevenths interest in the property of the Turquoise Company, and not the value of four sevenths of its share stock. This is a mere question of pleading, and is sufficiently disposed of in the opinion of the appellate court below.

It is contended that there was error in sustaining the trial court's instruction that the measure of plaintiff's damages was four sevenths of the value of the mining company's property, minus the indebtedness to the Western company. As already shown, however, the appellate court did not sustain this interpretation of the contract, but in terms rejected it; at the same time holding that the trial court, in referring to the value of a four-sevenths interest in the property

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of the corporation as a test for the measure of damages, in effect reached a correct result through the employment of inaccurate phraseology, and that although the jury may have found their verdict upon an incorrect theory, the error was harmless and the judgment should not be reversed, because under the evidence, the rule adopted made no substantial difference in the result, saving as to the 279,500 shares, and as to this the error was easily cured by applying the proper correction, as above mentioned.

[290] Finally, the point is made that, assuming the alleged error of the trial court could be cured by a remittitur, the ruling of the supreme court and the remittitur as entered accounted only for the 279,500 shares that were retained by the Ryans under the contract; and it is insisted that the 200,000 shares of trust stock to which McKittrick held the legal title, with the 240,000 shares of treasury stock, the legal title to which was in the company, and over which defendants had no control except in their capacity as directors of the company, should have been deducted from the entire share capital of 1,000,000 shares, and the plaintiffs allowed only the value of four sevenths of the difference, less the 279,500 shares that they retained. Without spending further time in discussion, we will simply say that in our opinion the view suggested is inconsistent with the terms of the covenant, which were that in the contingency provided for "the interest of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement." This, we think, contemplated that they should be restored to the same proportionate interest that they held prior to the making of the agreement.

In affirming the judgment we are not to be understood as holding that the rulings of the court below were undubitably correct. In dealing with the instructions of the trial court respecting the mode of ascertaining the damages, and in permitting the filing of a remittitur, and affirming the judgment for the residue of the verdict, the supreme court of the territory acted under Revised Statutes of Arizona 1901, ¶ 1588, which provides, in substance, that there shall be no reversal on an appeal or writ of error for want of form provided sufficient matter or substance be contained in the record to enable the court to decide the cause upon its merits; and also provides for remitting excessive damages pending the appeal. The record in the present case came fairly within the purview of [291] this provision. And we are not disposed to lightly disturb the decision of a territorial supreme court turning so largely, as this does, upon the local practice. Phœnix R. Co. v. Landis, 231 U. S. 578, 579, ante, 377, 380, 34 Sup. Ct. Rep. 179; Work v. United Globe Mines, 231 U. S. 595, 599, ante, 389, 392, 34 Sup. Ct. Rep. 274; Montoya v. Gonzales, 232 U. S. 375, 376, ante, 645, 649, 34 Sup. Ct. Rep. 413.

We have dealt with all the questions that appear to have been raised in the supreme court of the territory. Others we need not notice. Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, 98, ante, 521, 523, 34 Sup. Ct. Rep. 229.

Judgment affirmed.

SAMUEL LEWIS, Petitioner,

v.

G. OLIVER FRICK, United States Immigration Inspector, etc.

(See S. C. Reporter's ed. 291-304.)

Aliens — deportation — effect of previous residence.

1. An alien who, after having been domiciled some six years in the United States, departs from this country, even for a brief period, and on re-entering brings into the country a woman for the purpose of prostitution or other immoral purpose, subjects himself to the operation of the clauses of the immigration act of February 20, 1907 (34 Stat. at L. 898, chap. 1134), as amended by the act of March 26, 1910 (36 Stat. at L. 263, chap. 128, U. S. Comp. Stat. Supp. 1911, p. 501), that relate to the exclusion and deportation of aliens, the same as if he had no previous residence or domicil in the United States.

[For other cases, see Aliens, VI., in Digest Sup. Ct. 1908.]

Courts — deportation of alien — judicial review of findings.

2. The findings of the Secretary of Commerce and Labor in proceedings for the deportation of an alien, that the latter imported and brought into the United States a woman for an immoral purpose, is binding on the courts if there was evidence to support it and the hearing was fairly conducted.

[For other cases, see Courts, 242-245, in Digest Sup. Ct. 1908.]

NOTE.—On conclusiveness of judgments generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street R. Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

On judgment in criminal action as *res judicata* in civil action—see notes to Micks v. Mason, 11 L.R.A.(N.S.) 653, and State v. Roach, 31 L.R.A.(N.S.) 670.

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Aliens — deportation — importing woman for immoral purpose.

3. An alien, though not previously convicted of importing an alien for the purpose of prostitution or other immoral purpose under the immigration act of February 20, 1907, § 3, as amended by the act of March 26, 1910, making such importation a felony, and providing for the deportation of an alien who shall be convicted of such offense, may be deported for bringing a woman into the United States for an immoral purpose under the other provisions of the immigration act, which, in enumerating in § 2 the classes of aliens which shall be excluded from admission to the United States, specifically includes "persons who procure or attempt to bring in prostitutes, or women or girls for the purpose of prostitution, or for any other immoral purpose," and in §§ 20, 21, provides for the deportation of any alien entering or found in the United States in violation of law.

[For other cases, see Aliens, VI., in Digest Sup. Ct. 1908.]

Judgment — res judicata — identical issues — effect of acquittal on administrative inquiry.

4. An acquittal under an indictment charging an alien with the importation of another alien for an immoral purpose, contrary to the immigration act of February 20, 1907, § 3, as amended by the act of March 26, 1910, is not *res judicata* in a proceeding before the Department of Commerce and Labor to deport such alien, under the provisions of §§ 2, 21, of the immigration act, because he had brought a woman into the United States for an immoral purpose.

[For other cases, see Judgment, III. j, in Digest Sup. Ct. 1908.]

Aliens — deportation — to what country.

5. Russia, not Canada, is the country to which should be deported, under the immigration act of February 20, 1907, §§ 20, 21, an alien who, some six years after coming to the United States from Russia, his native land, enters Canada and immediately re-enters the United States, bringing a woman for an immoral purpose, the three years' period prescribed by these sections for the return of the alien to "the country whence he came" manifestly limiting only the authority to deport, and not affecting the determination of the country to which the alien is to be deported, and the legislative intent, as indicated by § 35, being that aliens subject to deportation shall be taken to trans-Atlantic or trans-Pacific ports if they came thence, rather than to foreign territory on this continent, although it may have been crossed on the way to this country.

[For other cases, see Aliens, VI., in Digest Sup. Ct. 1908.]

[No. 208.]

Argued January 28, 1914. Decided April 6, 1914.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which reversed a decree of the Circuit Court for the Eastern District of Michigan for the discharge on habeas corpus of an alien in custody under a warrant for deportation. Affirmed.

See same case below, 115 C. C. A. 493, 195 Fed. 693.

The facts are stated in the opinion.

Mr. Guy W. Moore argued the cause, and, with Messrs. Frederic S. Florian, H. P. Wilson, and Philip T. VanZile, filed a brief for petitioner:

The authority of the courts to review the decisions of the Secretary of the Department of Commerce and Labor on habeas corpus is well established.

Re Panzara, 51 Fed. 275; Re Martorelli, 63 Fed. 437; Re Maiola, 67 Fed. 114; Re Ota, 96 Fed. 487; Illinois ex rel. McNichols v. Pease, 207 U. S. 100, 52 L. ed. 121, 28 Sup. Ct. Rep. 58; United States ex rel. Nicola v. Williams, 173 Fed. 626; Ex parte Watchorn, 160 Fed. 1014; Redfern v. Halpert, 108 C. C. A. 262, 186 Fed. 150.

The question as to whether or not an alien returning to the United States after a temporary absence is an alien immigrant is one of law.

27 Ops. Atty. Gen. 49; 22 Ops. Atty. Gen. 357.

Inferences of law from undisputed facts are to be finally drawn by the courts, and not by the Department.

Ex parte Saraceno, 182 Fed. 955; Re Nicola, 106 C. C. A. 464, 184 Fed. 322.

Lewis is not an alien, amenable to the immigration laws, and is not subject to inspection and deportation while residing lawfully and peaceably in the United States, for the reason that he was admitted into the country lawfully and regularly in 1904. It is not claimed that he was guilty of any fraud, misrepresentation, or deception, and manifestly he does not stand in the class of those aliens who have entered the country fraudulently in the first instance, and who therefore can acquire no rights which the government must recognize. Neither is he within that class of aliens excludable under our laws, who are "detained" or "duly held" at our borders.

Redfern v. Halpert, 108 C. C. A. 262, 186 Fed. 150; Rodgers v. United States, 81 C. C. A. 454, 152 Fed. 346; Sprung v. Morton, 182 Fed. 330; United States v. Sprung, 110 C. C. A. 37, 187 Fed. 903; United States v. Aultman Co. 79 C. C. A. 457, 148 Fed. 1022; United States v. Nakashima, 87 C. C. A. 646, 160 Fed. 842; Lem Moon Sing v. United States, 158 U. S. 538, 39 L. ed. 1082, 15

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Sup. Ct. Rep. 967; Lau Ow Bew v. United States, 144 U. S. 59, 61, 63, 36 L. ed. 344, 345, 346, 12 Sup. Ct. Rep. 517.

Errors of law by executive departments may be reviewed by the courts.

Botis v. Davies, 173 Fed. 1001; Gonzales v. Williams, 192 U. S. 1, 48 L. ed. 317, 24 Sup. Ct. Rep. 177; United States ex rel. Nicola v. Williams, 173 Fed. 626; Ex parte Koerner, 176 Fed. 478; Ex parte Watchorn, 160 Fed. 1014; United States ex rel. Huber v. Sibray, 178 Fed. 144; American School of Magnetic Healing v. McAnnulty, 187 U. S. 108, 47 L. ed. 96, 23 Sup. Ct. Rep. 33; Re Nicola, 106 C. C. A. 464, 184 Fed. 322; DeBruler v. Gallo, 106 C. C. A. 546, 184 Fed. 566.

It being conceded, as we assume it must be, that errors of law by the Department of Commerce and Labor may be reviewed by the courts, it cannot be urged that the decisions of the Secretary of the Department on all questions relating to aliens are conclusive and final. It is equally clear that any authority the Secretary may have must be found in the statute.

Botis v. Davies, 173 Fed. 996.

The statute makes no provision for the deportation of an alien because he is thought to have imported a woman for an immoral purpose, unless, as provided in § 3 of the act, the woman imported is an alien, and the party importing her has been convicted of so doing, which, under the law in such case, constitutes a felony.

Ex parte Saraceno, 182 Fed. 955.

Citizens cannot be refused admission into this country under the laws relating to aliens.

Re Nicola, supra.

Petitioner being lawfully in the country and a resident of the country, and never having been held at the border, could not be excluded under § 2, but must necessarily come within § 3, which provides for deportation only in case of conviction.

Wong You v. United States, 104 C. C. A. 535, 181 Fed. 313.

Where a warrant is not specific, or where sentence is illegal, the prisoner is entitled to his liberty.

United States ex rel. Huber v. Sibray, 178 Fed. 144.

The immigration laws clearly contemplate the deportation of aliens to the country whence they came when they illegally entered the United States, regardless of their nativity. The only exception is when an alien, intending to enter the United States, for the convenience of his voyage lands first in foreign territory contiguous to the United States.

United States ex rel. Ruiz v. Redfern, 186 Fed. 603.

Assistant Attorney General Wallace argued the cause and filed a brief for respondent:

The act of February 20, 1907 (34 Stat. at L. 898, chap. 1134), as amended by the act of March 26, 1910 (36 Stat. at L. 263, chap. 128, U. S. Comp. Stat. Supp. 1911, p. 501), applies to resident aliens like the petitioner.

Lapina v. Williams, 232 U. S. 78, ante, 515, 34 Sup. Ct. Rep. 196; United States ex rel. Ueberall v. Williams, 187 Fed. 470.

The act of 1907, as amended by the act of 1910, does not make a conviction a condition precedent to the deportation of an alien like the petitioner, who imported a woman into the United States for immoral purposes at the time of his own entry.

United States v. Wong You, 223 U. S. 67, 56 L. ed. 354, 32 Sup. Ct. Rep. 195; Ex parte Pouliot, 196 Fed. 437.

The acquittal of the petitioner under the indictment is not *res judicata* of the right to deport him.

Bugajewitz v. Adams, 228 U. S. 585, 57 L. ed. 978, 33 Sup. Ct. Rep. 607; Chantangeo v. Abaroa, 218 U. S. 476, 54 L. ed. 1116, 31 Sup. Ct. Rep. 34; Chin Kee v. United States, 196 Fed. 74; Coffey v. United States, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437, 11 Columbia, L. Rev. 170; Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; Johannessen v. United States, 225 U. S. 227, 56 L. ed. 1066, 32 Sup. Ct. Rep. 613; Lilienthal v. United States, 97 U. S. 237, 24 L. ed. 901; Micks v. Mason, 145 Mich. 212, 11 L.R.A.(N.S.) 653, 108 N. W. 707, 9 Ann. Cas. 291; State v. Roach, 83 Kan. 606, 31 L.R.A.(N.S.) 670, 112 Pac. 150, 1 Ann. Cas. 1182; Stone v. United States, 167 U. S. 178, 42 L. ed. 127, 17 Sup. Ct. Rep. 778; United States v. Donaldson-Shultz Co. 148 Fed. 581; United States v. Reisinger, 128 U. S. 398, 32 L. ed. 480, 9 Sup. Ct. Rep. 99; Williams v. United States, 108 C. C. A. 457, 186 Fed. 479; Wong Wing v. United States, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977; Zakonaite v. Wolf, 226 U. S. 272, 57 L. ed. 218, 33 Sup. Ct. Rep. 31.

The petitioner was properly ordered deported to Russia.

(1) The question is not open on habeas corpus.

Re Bonner, 151 U. S. 242, 38 L. ed. 149, 14 Sup. Ct. Rep. 323; De Bara v. United States, 40 C. C. A. 194, 99 Fed. 942; Ex parte Lange, 18 Wall. 163, 21 L. ed. 872; Lavin v. LeFevre, 60 C. C. A. 425, 125 Fed. 693; Lui Lum v. United States, 92 C. C. A. 90, 166 Fed. 106; Re Mills, 135 U. S. 263, 34 L. ed. 107, 10 Sup. Ct. Rep. 762; Re Swan, 150 U. S. 637, 37 L. ed. 1207, 14

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was "the country whence he came," within the meaning of the act.

The provisions that are especially pertinent are set forth in the margin.†

[295] The decision of the circuit court of appeals is attacked here on several grounds. The first is based upon the fact that the alien had an established domicil and residence in the United States dating from September 20, 1904, having obtained his admission into the country legally, and maintained a domicil here continuously from the date [296] of his entry until the time of his arrest; and it is insisted that the fact of his having crossed the river to Canada, even though it was done with the object of bringing a woman into this country for the purpose of prostitution, did not bring him within the reach of the immigration act, or subject him to the summary procedure therein prescribed.

This question is settled adversely to the contention of petitioner by our recent decision in Lapina v. Williams, 232 U. S. 78, ante, 515, 34 Sup. Ct. Rep. 196. That case arose under the act of February 20, 1907, while this arises under the same act as amended March 26, 1910. But the changes are not such as to affect the authority of that decision upon the present point.

In Lapina v. Williams it did appear that the alien had practised prostitution for many years before her temporary departure from the country, and that she not only returned with the intent to continue the practice, but did almost immediately engage in it, and continued it until her arrest under the provisions of the immigration act. But the real ground of decision was that Congress, in the act of 1903 [32 Stat. at L. 1213, chap. 1012], sufficiently expressed, and in the act of 1907 reiterated, the purpose of extending the prohibition against the admission of aliens of certain classes, and the mandate for their deportation, to all aliens within the descriptive terms of the excluding clause, irrespective of any qualification arising out of a previous residence or domicil in this country. This view was based (a) upon the legislative history of the act of 1903 (from which the material provisions of the 1907 act were taken), which was a re-enactment of previous laws, but with the deliberate omission of the word "immigrant" and of certain other qualifying phrases that had been construed by the courts as giving so limited meaning to the word "alien" as not to include aliens previously resident in this country, and who had temporarily departed with the intention of returning; (b) upon the clear language of the excluding clause of § 2 [297] of the act of 1907 (quoted in full, 232 U. S. 91); (c) upon the fact that none of the excluded classes (with the possible exception of contract laborers) would be any less undesirable if previously domiciled in the United States; and (d) upon the fact that the section contains its own specific provisos and limitations, which, upon familiar principles, tend to negative any other and implied exception.

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†"An Act To Regulate the Immigration of Aliens into the United States," approved February 20, 1907, chap. 1134, 34 Stat. at L. 898, as amended by act of March 26, 1910, chap. 128, 36 Stat. at L. 263, U. S. Comp. Stat. Supp. 1911, p. 501.

"Sec. 2. That the following classes of aliens shall be excluded from admission into the United States . . . persons who procure or attempt to bring in prostitutes, or women or girls for the purpose of prostitution, or for any other immoral purpose. . . .

"Sec. 3. That the importation into the United States of any alien for the purpose of prostitution or for any other immoral purpose is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien for the purpose of prostitution or for any other immoral purpose, . . . shall, in every such case, be deemed guilty of a felony, and on conviction thereof be imprisoned not more than ten years and pay a fine of not more than five thousand dollars. . . . Any alien who shall be convicted under any of the provisions of this section shall, at the expiration of his sentence, be taken into custody and returned to the country whence he came, or of which he is a subject or a citizen, in the manner provided in sections twenty and twenty-one of this act. . . .

"Sec. 20. That any alien who shall enter the United States in violation of law, . . . shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States. . . .

"Sec. 21. That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act or of any law of the United States, he shall cause such alien, within the period of three years after landing or entry therein, to be taken into custody and returned to the country whence he came, as provided by section twenty of this act. . . .

"Sec. 35. That the deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or if such embarkation was for foreign contiguous territory, to the foreign port at which said aliens embarked for such territory."

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We hold, therefore, that the fact that the petitioner, Lewis, had been domiciled for six years or more in this country, he remaining still an alien, did not change his status so as to exempt him from the operation of the immigration act; and that if he departed from the country, even for a brief space of time, and on re-entering brought into the country a woman for the purpose of prostitution or other immoral purpose, he subjected himself to the operation of the clauses of the act that relate to the exclusion and deportation of aliens, the same as if he had had no previous residence or domicil in this country. In short, the period of three years from entry, prescribed by §§ 20 and 21, runs not from the date when the alien first entered the country, but from the time of the prohibited entry; that is to say, in the present case, the entry made by the alien when bringing in the woman.

The next question is whether there was sufficient evidence to fairly sustain the finding of the Secretary of Commerce and Labor to the effect that petitioner did, on November 17, 1910, import and bring into the United States a woman for an immoral purpose. Upon this question, petitioner's contention was and is, that the woman is in fact his wife. He testified that he married her in Warsaw shortly before he came from Russia to this country, and that when he brought her across the river from Windsor he intended that he and she should live together in Detroit as husband and wife. The contention [298] of respondent was and is, that the story of the marriage was a pure fabrication, resorted to in the effort to conceal the fact that the woman was a prostitute and imported by petitioner for immoral purposes. There is much in the evidence to support this view. Petitioner admitted that his real name was not Lewis, but Prezysuskier, and his "other name" was Nossek; that he first used the name of Lewis after coming to this country; that his father's name was Chaskel Prezysuskier; that he knew his alleged wife as "Leah," and did not know her other name, if any; that he knew her father as "Isaac," but did not know whether he had any other name; that two friends were present at the ceremony, but he could not remember their names; that he lived with the woman in Warsaw for five or six months, and then separated from her because he heard stories of improper conduct on her part, and that he afterwards heard she had had children before the marriage. Being questioned concerning his life in New York he professed himself unable to give the names of several persons among those with whom he said he had come in contact, and who could presumably have been called either to corroborate or to contradict his testimony. He declared that he had not seen his alleged wife since coming to America until the occasion when he met her at Windsor. Being asked "How did you happen to meet her at that time?" he answered as follows: "I was home not working one day and Berman comes up and asks for me and I don't know how he got my address and I was surprised that a strange man should ask for my name but my cousin, Mrs. Newman, told him he should come back at night when I got home from work and he came back and said 'I have regards for you' and he said 'Are you Lewis' and I said 'Yes' and he asked me questions, if I was ever in Warsaw and I said 'Yes,' and he said, 'I have regards from your wife' and I pretended to say that I haven't got any, because I kept myself single, but still [299] when he mentioned the name I knew what it was and I said, 'Where is she, what does she want of me' and he said 'She is not here, she is in Canada, but I will let you know when she gets here.' On the 17th I went to work in the morning and at dinner time when I got back Mr. Berman was there waiting for me. I said, 'What is the matter' and he said, 'I received a telegram that my wife and your wife are coming here and I want you to come over with me to Windsor and meet them,' and I said, 'She will come over to the Immigration Office they should send for me over there and she could get out.' Well he said it was better for me to come over there, 'For you know how a woman is;' he said, 'She might make you trouble' and I didn't think about it, so I went there and met her and I went over to Windsor and stood there fifteen or twenty minutes and got a train to the station at Windsor and met her there but very cool and came over here to the Immigration Office."

The story is extraordinary. How it happened that the alleged wife, who had known him as Prezysuskier in Warsaw, was able through the good offices of an entire stranger to identify him as Lewis, in Detroit, more than six years later, was not explained. The alleged husband's readiness to accept her is equally suspicious. There were other circumstances tending to discredit the story of the marriage. And if that story fell, the inference of an unlawful purpose was irresistible. It should be mentioned that the exhibits introduced upon the examination on which the warrant of deportation was issued are not included in the record; but it does appear that among them was a statement made by the alien at police headquarters in Detroit on November 21, 1910. Were there doubt whether the testimony itself, without the documentary evidence, would support the action of the Secretary of Commerce and Labor, we should be inclined to say that a

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court ought not set aside that action without at least requiring the [300] production of the exhibits that were presented to the Secretary. But, without regard to them, enough appears to show that he was fully justified in concluding as a matter of fact that the whole story of the marriage in Warsaw was a fabrication, and that in truth Lewis went from Detroit to Windsor upon information from which he inferred that the woman was an alien and a prostitute, willing to accompany him to Detroit for an immoral purpose, and that he brought her to Detroit for that purpose.

This being so, and there being no contention that the hearing was not fairly conducted, the finding of the Secretary upon the question of fact is binding upon the courts. Low Wah Suey v. Backus, 225 U. S. 460, 468, 56 L. ed. 1165, 1167, 32 Sup. Ct. Rep. 734; Zakonaite v. Wolf, 226 U. S. 272, 275, 57 L. ed. 218, 220, 33 Sup. Ct. Rep. 31.

Respecting the construction of the act, we cannot assent to the view entertained by the circuit court. Section 2 declares that certain classes of aliens shall be excluded from admission into the United States, and among them "persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose." This section applies only where an alien brings in a woman or girl for the purpose indicated. It does not declare that the woman or girl need be an alien. Section 3 prohibits the importation of "any alien" for the purpose of prostitution or for any other immoral purpose. Of course, in order to constitute an offense against this section, the person brought in must be an alien. But the person need not be a woman or girl. This is clear from the changes made by Congress in § 3 when amending it in 1910. The section as it stood in the 1907 act (34 Stat. at L. 899, chap. 1134, U. S. Comp. Stat. Supp. 1909, p. 450) forbade and rendered felonious the importation or attempt to import "any alien woman or girl for the purpose of prostitution or for any other immoral purpose;" the phrase "alien woman or girl" being repeated in other [301] clauses of the section; and one of the principal changes made in 1910 (36 Stat. at L. 264, chap. 128, U. S. Comp. Stat. Supp. 1911, p. 502) was to eliminate the words "woman or girl," so that now the section prohibits the importation of "any alien" for the purposes referred to, and declares that whoever shall import or attempt to import "any alien for the purpose," etc., or shall hold or attempt to hold "any alien" for any such purpose, etc., or shall keep, etc., in pursuance of such illegal importation, "any alien," shall be deemed guilty of a felony. The purpose of the amendment is not to be mistaken. Moreover, the offense is made a felony irrespective of whether it is committed by an alien or by a citizen of this country, the only difference being that by one of the clauses any alien convicted under this section is, after the expiration of his sentence, to be returned to the country whence he came, or of which he is a subject or a citizen.

Again, § 20 provides "that any alien who shall enter the United States in violation of law" shall be deported "at any time within three years after the date of his entry into the United States." This certainly includes those who enter in violation of § 2; indeed, violators of § 3 may not have "entered" at all, within the meaning of the act.

Consequently, we deem that the circuit court erred in holding that the act does not provide for deporting an alien for the offense of procuring or attempting to bring in prostitutes, etc., in the absence of a conviction for the felony under § 3. Section 2, read in connection with §§ 20 and 21, is not thus conditioned. And, as just now pointed out, the offense aimed at in § 2 and that which is punishable under § 3 are not the same. In short, it cannot be said that out of a general class covered by § 2, Congress selected the particular class named in § 3, for the latter class is not entirely included within the former.

We agree with the circuit court of appeals that the [302] verdict and judgment acquitting petitioner under the indictment does not render the present controversy *res judicata*. The issue presented by the traverse of the indictment was not identical with the matter determined by the Secretary of Commerce and Labor. And, besides, the acquittal under the indictment was not equivalent to an affirmative finding of innocence, but merely to an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused. The distinction between a criminal prosecution and an administrative inquiry by an executive department or subordinate officers thereof has been often pointed out. Zakonaite v. Wolf, 226 U. S. 272, 275, 57 L. ed. 218, 220, 33 Sup. Ct. Rep. 31, and cases cited; Williams v. United States, 108 C. C. A. 457, 186 Fed. 479.

The final contention is that petitioner should have been deported to Canada, whence he came upon the occasion of his unlawful entry into this country, rather than to Russia, the land of his birth, from which he came six years earlier. By § 20, the alien is to be "deported to the country whence he came at any time within three years after the date of his entry into the United States;" by § 21, the Secretary of

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Commerce and Labor, upon being satisfied that an alien is subject to deportation, "shall cause such alien within the period of three years after landing or entry therein [within the United States] to be taken into custody and returned to the country whence he came, as provided by section twenty of this act;" by § 3, an alien convicted thereunder is, at the expiration of his sentence, to be "returned to the country whence he came, or of which he is a subject or citizen, in the manner provided in sections twenty and twenty-one of this act;" and by § 35, "The deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or if such embarkation [303] was for foreign contiguous territory, to the foreign port at which said aliens embarked for such territory."

Petitioner not having been convicted under § 3, his destination is to be determined rather in the light of §§ 20, 21, and 35. And first, we take it to be clear (notwithstanding the peculiar phraseology of § 20) that the three-year period limits only the authority to deport, and does not affect the determination of the country to which an alien is to be deported. Respecting this matter, the sections are somewhat lacking in clearness. But, at least, § 35 indicates a legislative intent that aliens subject to deportation shall be taken to trans-Atlantic or trans-Pacific ports, if they came thence, rather than to foreign territory on this continent, although it may have been crossed on the way to this country. This was recognized by Rule 38 of the Immigration Regulations, in force December 12, 1910.

It is to be noted that the classes of aliens who are subject to deportation are not wholly made up of those who enter in violation of the law; in some cases cause for deportation may arise after a lawful entry. And in many cases the unlawfulness of the entry may not be discovered until afterwards. The theory of the act, as expressed in § 2, is that the undesirables ought to be excluded at the seaport or at the frontier; but §§ 20, 21, and 35 recognize that this is not always practicable. Of course, if petitioner's attempt to bring a woman into the country for an immoral purpose had been discovered in time, he might have been physically excluded from entry at Detroit upon his return from Windsor. In that event he would naturally have remained upon Canadian soil. But since his offense was not discovered in time to permit of his physical exclusion, so that he becomes subject to the provisions for deportation, his destination ought not be to controlled by the factitious circumstance that he went into Canada to procure the prostitute. And, upon the whole, it seems to [304] us that the act reasonably admits of his being returned to the land of his nativity, that being in fact "the country whence he came" when he first entered the United States. See Lavin v. Le Fevre, 60 C. C. A. 425, 125 Fed. 693, 696; Ex parte Hamaguchi, 161 Fed. 185, 190; Ex parte Wong You, 176 Fed. 933, 940; United States v. Ruiz, 121 C. C. A. 551, 203 Fed. 441, 444. We need go no further, and may therefore leave undecided the question whether the act leaves any room for discretion on the part of the Secretary of Commerce and Labor.

We have assumed, without deciding, that that part of the deportation order which determines the destination of the alien is open to inquiry upon habeas corpus.

Judgment affirmed.

SINGER SEWING MACHINE COMPANY, Appt.,

v.

ROBERT C. BRICKELL, Attorney General of the State of Alabama; C. Brooks Smith, Auditor of the State of Alabama; J. Lee Long et al., Composing the State Taxation Commission of Alabama, et al.

(See S. C. Reporter's ed. 304-318.)

Commerce — state regulation — sales by peddlers or agents.

1. The license or occupation tax imposed in each county upon the business of selling or delivering sewing machines, under Ala. act of March 31, 1911, § 32, is not an unconstitutional interference with interstate commerce as applied to a foreign corporation which maintains a store or regular place of business in each county, from which all of the local agents in such county are supplied with sewing machines and appurtenances to be taken into the rural districts

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Note.—On peddlers and drummers, as related to interstate commerce—see notes to Stockard v. Morgan, 46 L. ed. U. S. 785; Re Spain, 14 L.R.A. 97; State v. Bayer, 19 L.R.A.(N.S.) 297; and Dozier v. State, 28 L.R.A.(N.S.) 265.

Generally, on statutes part valid and part invalid—see notes to Titusville Iron Works v. Keystone Oil Co. 1 L.R.A. 363, and Fayette County v. People's & D. Bank, 10 L.R.A. 196.

On discrimination by municipality between its own residents and other residents of the same state—see note to Sayre v. Phillips, 16 L.R.A. 49.

On discrimination against nonresidents by statute or municipal ordinance imposing license or occupation tax—see note to State v. Williams, 40 L.R.A.(N.S.) 279.

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for sale or rent, all transactions entering into such sale or renting being completed within a single county.

[For other cases, see Commerce, IV. d, 4, in Digest Sup. Ct. 1908.]

Statutes — construction favoring constitutionality — license tax.

2. The license or occupation tax imposed in each county by Ala. act of March 31, 1911, §§ 32, 33f, upon the business of selling or delivering sewing machines, may be construed, in order to avoid an unconstitutional meaning, as not intended to apply to that portion of the business conducted by a foreign corporation which involves transactions in interstate commerce, where its business as generally conducted is wholly intrastate and free from any element of interstate commerce, the single exception being the business conducted in a border county.

[For other cases, see Statutes, 145–147, in Digest Sup. Ct. 1908.]

Statutes — invalid in part — license tax.

3. The invalidity, if applied to the interstate business conducted by a foreign corporation in a border county, of the license or occupation tax imposed by Ala. act of March 31, 1911, §§ 32, 33f, upon the business of selling or delivering sewing machines, does not affect the validity of the tax as applied to the business conducted by such corporation in the other counties in the state in which there is no element of interstate commerce, the statute dealing separately with the business as conducted in each county in the state, and providing for separate taxes to be laid for each county.

[For other cases, see Statutes, I. d, 4, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — discrimination in license tax.

4. The exemption of merchants selling sewing machines at their regularly established places of business from the license or occupation tax imposed by Ala. act of March 31, 1911, §§ 32, 33f, upon the business of selling or delivering sewing machines, does not deny the equal protection of the laws guaranteed by U. S. Const., 14th Amend., as making an arbitrary discrimination.

[For other cases, see Constitutional Law, 360–368, in Digest Sup. Ct. 1908.]

Constitutional law — discrimination — license tax.

5. An arbitrary discrimination forbidden by the Alabama Bill of Rights, §§ 1, 37, is not made by the exemption of merchants selling sewing machines at their regularly established places of business from the license or occupation tax imposed by Ala. act of March 31, 1911, §§ 32, 33f, upon the business of selling or delivering sewing machines.

[For other cases, see Constitutional Law, 360–368, in Digest Sup. Ct. 1908.]

License — occupation tax — sales by traveling salesmen.

6. A corporation engaged both in selling sewing machines at its regularly established places of business and in selling such machines by traveling salesmen is, with respect to the itinerant sales, subject to the license or occupation tax which Ala. act of March 31, 1911, §§ 32, 33f, imposes annually upon the business of selling and delivering sewing machines, with an additional tax for each wagon or team used in delivering or displaying the same, although merchants selling sewing machines at their regularly established places of business are specifically exempted from such tax.

[For other cases, see License, II., in Digest Sup. Ct. 1908.]

[No. 458.]

Argued January 12, 1914. Decided April 6, 1914.

APPEAL from the District Court of the United States for the Southern District of Alabama to review a decree granting a part only of the relief sought by a bill to enjoin the enforcement of certain license or occupation taxes. Affirmed.

See same case below, on demurrer, 199 Fed. 654.

Statement by Mr. Justice Pitney:

Appellant, which is a New Jersey corporation carrying on a mercantile business in many places in the state of Alabama in the sale and renting of sewing machines, in part from regularly established places of business and in part by means of delivery wagons going from place to place in the respective counties in which its stores are located, filed its bill of complaint against appellees, who are the agents of the state, charged with the administration of the tax laws, and therein sought to restrain by [306] injunction the enforcement against it of the state tax prescribed by § 32 of an act for providing revenues, approved March 31, 1911 (Session Acts, p. 180), which reads as follows:

"Sec. 32. Sewing machines.—Each person, firm, or corporation selling or delivering sewing machines either in person or through agents, shall pay $50 annually, for each county in which they may sell or deliver said articles. And for each wagon and team used in delivering or displaying the same an additional sum in each county of $25 annually; but this section shall not apply to merchants selling the above enumerated articles at their regularly established places of business."

And also to enjoin the enforcement of county taxes, amounting to 50 per centum of the state tax prescribed by the above section, which might be imposed in the several counties for county purposes under § 33F of the same act.

The bill, as amended, besides showing di-

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verse citizenship of the parties, avers that complainant is qualified under the state laws to do business within the state as a foreign corporation, and has established, in thirty counties of the state, thirty-six regular places of business or stores, which are conducted by it; that complainant buys sewing machines and parts to supply breakage and defects therein and a variety of sewing machine accessories without the state, causes them to be shipped to its places of business within the state, and keeps them at these places for sale to the general public.

In each of the counties, except the county of Russell, the business is conducted as follows: A resident agent is employed for the purpose of making contracts for the sale and renting of machines in that county and that county only; machines are delivered to such agents and placed aboard wagons and taken by the agents into the [307] rural districts for the purpose of soliciting customers either to purchase or to rent machines; when a buyer is found the machine is delivered by the agent to the customer, who either pays cash for it or executes an instalment note in which the company retains title to the machine, or an instalment note secured by a mortgage upon the machine and other property; such sale on credit is made subject to the approval of the company, and if not approved, the instalment note is returned to the maker and the machine returned to the company. If the agent makes a contract for the sale of the machine for cash, this also is subject to the approval or disapproval of complainant. The final consummation of all sales is at one of complainant's established places of business. The same agents are engaged also in renting machines and collecting the rent arising therefrom, and the greater portion of their time is consumed in such renting, this constituting at least 70 per centum of the business done by complainant in the state. Rented machines are placed aboard wagons and taken by the agents into the rural districts. Each of these agents is attached to some one of the stores or places of business operated by complainant, and the machines handled by the agent are sent to him from the place of business to which he is attached, or taken from that place of business by him upon the wagon which he drives. Besides this, complainant sells and rents machines at its regularly established places of business, and delivers such machines to the buyers or renters by the use of wagons and teams; and in those counties where complainant has established places of business, machines sold or rented at those places are delivered by the same agents and with the same wagons that are used in carrying machines into the rural districts. It is averred that the machines are of the average weight of 135 pounds. That there are many other merchants in the state who sell sewing machines of a different manufacture [308] at their places of business, and the average weight of these also is about 135 pounds; that on account of their weight it is the custom and practice of complainant, and of the other merchants also, to make delivery by the use of wagons and teams whether the sales are made at their places of business or otherwise, and that it is impracticable to conduct the business without delivery by wagon.

With respect to the business conducted in Russell county, Alabama, it is averred that complainant operates a regularly established place of business in the city of Columbus, Georgia, where sewing machines and accessories are kept for sale, and in connection with this business agents are employed to deliver machines and accessories in Russell county, which adjoins the Georgia state line; and that complainant does not sell or deliver any sewing machines or accessories in Russell county except in the following manner; namely, its agents use wagons and teams in going about and displaying sample machines, and thereby obtain orders for machines and accessories, which orders are transmitted by the agents to the complainant at Columbus, Georgia, for acceptance or rejection, and if accepted, the machines or other articles so ordered are taken out of stock there, placed upon wagons, and thereby delivered to the purchasers in Russell county.

The bill is based upon the contention that § 32 of the tax law violates the Constitution of the United States in that it is a regulation of interstate commerce, and contravenes the "due process" and "equal protection" clauses of the 14th Amendment, and also that it violates the Constitution of Alabama; and, finally, that appellant is within the exception of the statute.

To the original bill (prior to the amendments) demurrers were filed, and were sustained as to the whole bill except paragraph 6, which set forth the mode of conducting complainant's business in Russell county. As to this the court held that the facts showed a case of interstate [309] commerce, and that the act had no application to it. 199 Fed. 654.

The amendments having been made, the amended bill was submitted upon the same demurrers, which were made to apply to the bill as amended. Again the court sustained the demurrers except as to paragraph 6, relating to Russell county, and as to this overruled them. Defendants then filed an

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answer admitting the allegations of paragraph 6, and the cause was submitted upon bill and answer, with the result that by final decree relief was accorded to complainant as to the license tax sought to be collected in Russell county, and in other respects relief was denied and the bill dismissed. Because of the constitutional questions, a direct appeal to this court was taken under Judicial Code, § 238 [36 Stat. at L. 1157, chap. 1157, U. S. Comp. Stat. Supp. 1911, p. 228].

Messrs. **John R. Tyson** and **Henry Axtell Prince** argued the cause, and, with Mr. W. A. Gunter, filed a brief for appellant:

The equal protection of the laws is denied when, all questions of police power being out of the way, a lawful business, or the use of property in a lawful way, is palpably and unjustly discriminated against in favor of other business or other use of the same property by the same or other owners.

A business may be taxed for revenue, or may be forbidden or regulated under the police power, and so with the use of property; but a business cannot be taxed on account of the manner of conducting it by one citizen while the same business conducted in a different and perhaps less efficient manner by other citizens is exempted. And so as to property. The use of wagons and teams for transporting sewing machines, for sale or display, cannot be taxed merely because they are used in such work, while untaxed when not so used, and when the same transportation and display may be effected without taxation in any other way.

Alabama Consol. Coal & I. Co. v. Herzberg, 177 Ala. 248, 59 So. 305; Montgomery v. Kelly, 142 Ala. 552, 70 L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67; Mefford v. Sheffield, 148 Ala. 539, 41 So. 970; Phœnix Carpet Co. v. State, 118 Ala. 143, 72 Am. St. Rep. 143, 22 So. 627.

Legislation cannot restrict or coerce industry as to its channels from pure whimsicality, or from any motive disconnected from the due exercise of the police power, and from taxation for revenue according to constitutional formulas.

Ibid.

A business or property cannot be taxed as a whole and then separately as to its constituents; as, a tax on wagons, and separately on the spokes of the wheels.

Montgomery v. Kelly, supra; Mefford v. Sheffield, supra; Mobile v. Richards, 98 Ala. 594, 12 So. 793; Gambill v. Endrich Bros. 143 Ala. 506, 30 So. 297.

No state statute can stand which, by its terms, will burden or regulate interstate commerce. And the courts cannot, by judicial limitation, preserve the statute in part by restricting its terms to a legitimate field of operation.

Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Crutcher v. Kentucky, 141 U. S. 47–62, 35 L. ed. 649–654, 11 Sup. Ct. Rep. 851; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114–118, 34 L. ed. 394–396, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Brimmer v. Rebman, 138 U. S. 78–81, 34 L. ed. 862, 863, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; Butts v. Merchants & M. Transp. Co. 230 U. S. 126, 57 L. ed. 1422, 33 Sup. Ct. Rep. 964.

Contracts are made, and the "business of selling" is done, at the place where the contract receives the final assent of the mind which concludes the negotiation, converting it into a contract or sale.

Holder v. Aultman, M. & Co. 169 U. S. 81–88, 42 L. ed. 669–671, 18 Sup. Ct. Rep. 269; 9 Cyc. 667.

Mr. **Robert C. Brickell**, Attorney General of Alabama, argued the cause and filed a brief for appellees:

The bill shows upon its face that the agents of the company travel around the state, and sell and deliver from wagons sewing machines which they carry with them. This is entirely distinct and separable from the agent going out and soliciting trade for the merchant, and the merchant making the sale, or the agent for him making the sale at a regularly established place of business; and it is essentially different from the delivery by the wagons and teams of sewing machines sold by the merchant from his regularly established place of business.

Cook v. Marshall County, 196 U. S. 261–274, 49 L. ed. 471–476, 25 Sup. Ct. Rep. 233; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Quartlebaum v. State, 79 Ala. 4; Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367.

An occupation tax on all dealers in sewing machines does not deprive dealers in

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those articles of their property without due process of law, or deny them the equal protection of the law, because a similar tax is not imposed on dealers in other articles.

Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct. Rep. 496.

On the facts alleged in ¶ 6 of the bill, as to the conduct of the business of complainant in Russell county, § 32 of the statute under consideration has no application, the sales made to buyers in Russell county being made at complainant's regularly established place of business in Columbus, Georgia, and the articles sold and delivered to buyers in Russell county, Alabama. Said facts show a case of interstate commerce.

Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829.

The unconstitutionality of said section, even if conceded, would not operate to bring the complainant within the class not intended by it.

Ballou v. State, 87 Ala. 144, 6 So. 393.

The Federal court cannot interfere with the enforcement of the statute simply because it may disapprove its terms or question the wisdom of its enactment, or because it cannot be sure as to the precise reasons inducing the state to enact it.

Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct. Rep. 496.

Unless it is clear that the legislature has transcended its authority, it is our duty to declare its acts constitutional.

Sadler v. Langham, 34 Ala. 311; Stein v. Leeper, 78 Ala. 517.

The case at bar is of the same character as the one involved in Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367.

Mr. Justice Pitney, after making the foregoing statement, delivered the opinion of the court:

With respect to the business conducted in Russell county, the decree of the district court is not now directly under review; but, at any rate, it was clearly correct under Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294. With respect to the other counties, the correctness of the decision, so far as the commerce clause is concerned, seems to us equally clear under Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367.

But it is argued that the courts cannot properly sustain a statute which in direct terms applies to all commerce, by restricting it to cases of actual interference with interstate dealings. To quote from the brief: "All such laws as will necessarily affect interstate commerce when it arises are void. We do not have to await actual results on actual commerce to pronounce them void. . . . And, of course, a statute of this character, which is void as a whole, from its unity of character, will as readily be so declared in a case in which only intrastate commerce may be actually involved as otherwise. The lower court was [313] thus clearly in error in limiting the invalidity of the statute to the dealing in Russell county."

This argument, we think, misses the point. The statute under consideration does not in direct terms or by necessary inference manifest an intent to regulate or burden interstate commerce. Full and fair effect can be given to its provisions, and an unconstitutional meaning can be avoided, by indulging the natural presumption that the legislature was intending to tax only that which it constitutionally might tax. So construed, it does not apply to interstate commerce at all. The statute provides for a license or occupation tax. Normally, as the averments of the bill sufficiently show, the occupation may be and is conducted wholly intrastate, and free from any element of interstate commerce. The fact that, as carried on in Russell county, a like occupation is conducted with interstate commerce as an essential ingredient, is wholly fortuitous.

Nor has the tax that "unity of character" upon which the argument necessarily depends. The cases cited in support of the insistence that the act must be adjudged totally void because, if applied in Russell county, it would burden interstate commerce, are readily distinguishable. In United States v. Reese, 92 U. S. 214, 221, 23 L. ed. 563, 565, there was a penal statute couched in general language broad enough to cover wrongful acts without as well as within the constitutional inhibition, and it was held that the court could not reject the unconstitutional part and retain the remainder, because it was not possible to separate the one from the other. In Trade-Mark Cases, 100 U. S. 82, 99, 25 L. ed. 550, 553, the court upon the same principle declined to sustain in part a trademark law, so framed as to be applicable by its terms to all commerce, by confining it to the interstate commerce that alone was subject to the control of Congress. In Leloup v. Mobile, 127 U. S. 640, 647, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380, the court held a general license tax imposed by the state [314] of Alabama upon the business of a telegraph company in part interstate and in part internal, to be unconstitutional, and held that since the tax af-

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fected the whole business without discrimination it could not be sustained with respect to that portion of the business that was internal and therefore taxable by the state. To the same effect are Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 119, 34 L. ed. 394, 397, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; Crutcher v. Kentucky, 141 U. S. 47, 62, 35 L. ed. 649, 654, 11 Sup. Ct. Rep. 851; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 27, 54 L. ed. 355, 366, 30 Sup. Ct. Rep. 190. In Williams v. Talladega, 226 U. S. 404, 419, 57 L. ed. 275, 281, 33 Sup. Ct. Rep. 116, there was a state license tax that operated without exemption or distinction upon the privilege of carrying on a business, a part of which was that of an essential governmental agency constituted under a law of the United States. It was held that the tax necessarily included within its operation this part of the business, and since this was unconstitutional, the whole tax was rendered void.

The statute now under consideration differs materially, in that it deals separately with the business as conducted in each county of the state, and provides for separate taxes to be laid for each county. And the facts as averred in the bill of complaint show that with respect to all of the counties in which appellant does business, excepting only the county of Russell, there is no element of interstate commerce. In each county there is a store or regular place of business, from which all of the local agents for the same county are supplied with sewing machines and appurtenances that are to be taken into the rural districts for sale or renting, and all transactions that enter into the sale or renting are completely carried out within a single county.

It would be going altogether too far to say that appellant, being properly taxable, and without the least interference with interstate commerce, in twenty-nine counties of the state, could obtain immunity from all such taxation [315] by establishing in one county a system of business that involved transactions in interstate commerce.

So far as the 14th Amendment is concerned, the argument is confined to the "equal protection" clause. It is said there is no sufficient ground for a distinction, with respect to taxing the occupation, between the business of selling sewing machines from a regularly established store and the business of selling them from a delivery wagon. But there is an evident difference, in the mode of doing business, between the local tradesman and the itinerant dealer, and we are unable to say that the distinction made between them for purposes of taxation is arbitrarily made. In such matters the states necessarily enjoy a wide range of discretion, and it would require a clear case to justify the courts in striking down a law that is uniformly applicable to all persons pursuing a given occupation, on the ground that persons engaged in other occupations more or less like it ought to be similarly taxed. This is not such a case. Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 559, 562, 46 L. ed. 679, 689, 690, 22 Sup. Ct. Rep. 431; Cook v. Marshall County, 196 U. S. 261, 274, 49 L. ed. 471, 476, 25 Sup. Ct. Rep. 233; Armour Packing Co. v. Lacy, 200 U. S. 226, 235, 50 L. ed. 451, 456, 26 Sup. Ct. Rep. 232; Southwestern Oil Co. v. Texas, 217 U. S. 114, 121, 54 L. ed. 688, 692, 30 Sup. Ct. Rep. 496.

In Quartlebaum v. State, 79 Ala. 1, a previous statute (subsec. 20 of § 14, act of December 12, 1884; Session Acts 1884–85, p. 17), which imposed an annual license fee of $25 upon "each sewing machine . . . company selling sewing machines . . . either themselves or by their agents, and all persons who engage in the business of selling sewing machines . . . but when merchants engaged in a general business keep sewing machines . . . they shall not be required to pay the tax herein provided," was sustained against the criticism that it discriminated between two classes of persons engaged in the business of selling sewing machines, namely, between persons who were "merchants engaged in a general business," and persons not so engaged; [316] the court saying as to the former: "If sewing machines be part of their stock in trade they are taxed for them as for other merchandise. Their business is in its nature stationary, and there is little or no risk in levying taxes upon their business, on the rule of percentage. That rule may be wholly unsuited and ineffectual for other pursuits and other lines of business. Much must be left to the discretion of the legislature, for exact equality of taxation can never be reached." And see Ballou v. State, 87 Ala. 144, 146, 6 So. 393.

The contention that the statute violates the state Constitution is grounded upon two sections of the Bill of Rights, *viz.*, § 1, "That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness;" and § 37, "That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation and oppression."

The bearing of these provisions upon the case in hand is not clear. The argument

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seems to be that since the tax law in question is not a police measure, but a revenue measure, the discriminations are arbitrary. To quote from the brief: "Selling sewing machines is the business, and it is taxed highly, and it may be in fact prohibitorily when it is done by the use of wagons and teams, and not at all when done at stores." There are other suggestions of a like import. They seem to be sufficiently answered by what has been already said respecting the "equal protection" clause of the 14th Amendment. The state has a wide range of discretion with respect to establishing classes for the purpose of imposing revenue taxes, and its laws upon the subject are not to be set aside as discriminatory unless it clearly appears that there is no rational basis for the classification.

[317] The cases cited from the state courts lend no support to appellant's argument. Mobile v. Craft, 94 Ala. 156, 10 So. 534; Tuscaloosa v. Holczstein, 134 Ala. 636, 32 So. 1007, and Gambill v. Endrich Bros. 143 Ala. 506, 39 So. 297, involved the construction of certain municipal charters and the powers of the respective municipalities thereunder, and have no direct bearing upon the present question. In Montgomery v. Kelly, 142 Ala. 552, 70 L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67, a municipal ordinance requiring each merchant who issued trading stamps in connection with his business to pay a license tax of $100, viewed in the light of another ordinance that fixed a license fee of $1,000 upon trading stamp companies, was held to be "a palpable attempt under the guise of a license tax to fix a penalty on the merchant for conducting his business in a certain way," and therefore unconstitutional. Mefford v. Sheffield, 148 Ala. 539, 41 So. 970, sustained a city ordinance that imposed a tax of $200 on wholesale dealers in illuminating oil, while fixing the license tax on dealers in goods, wares, or merchandise in general at $10. Alabama Consol. Coal & I. Co. v. Herzberg, 177 Ala. 248, 59 So. 305, declared unconstitutional § 33A of the revenue act of March 31, 1911, p. 181, which undertook to impose upon persons, firms, or corporations conducting a store at which their employees trade on checks, orders, or the like, an annual license fee varying according to the number of persons employed; the court saying: "The tax is not, therefore, imposed upon the business, or upon all engaged in a similar business, but is based solely upon the manner in which a party may conduct the business; and the foregoing section is repugnant to the state and Federal Constitu- -- under the authority of Montgomery v.

The other state decisions to which we are referred have been examined, and we are unable to find in them any basis for declaring § 32 of the act to be in contravention of the state Constitution.

[318] Finally, it is said that since it appears from the averments of the bill that all sales of sewing machines by appellant's agents in the field are executory only, and require the approval of appellant at its regularly established places of business, located in the various counties of the state, which are headquarters for all agents with their wagons and teams, it at the same time sufficiently appears that appellant is a merchant conducting a regular business at each of said stores, and therefore within the saving clause of § 32 of the act in question, which declares that "this section shall not apply to merchants selling the above enumerated articles at their regularly established places of business."

It is quite plain, however, from a reading of the entire section, that the business of selling sewing machines by traveling salesmen is intended to be taxed, and the business of selling them at established places of business is intended to be left untaxed, so far as this section is concerned, although the machines sold at these places be delivered by wagons. Complainant is engaged in doing business of both kinds; and with respect to the itinerant sales it is subject to the tax under the section referred to.

Decree affirmed.

E. A. O'SULLIVAN, Plff. in Err.,
v.
PAUL FELIX and William W. Stiles.

(See S. C. Reporter's ed. 318-325.)

Federal courts — rule of decision — state statute of limitations.

1. The application of a state statute of limitations is not precluded because the action depends upon or arises under the laws of the United States, in the absence of any limitation specifically prescribed by Congress.

[For other cases, see Courts, VII. c. 17; Limitation of Actions, I. d, in Digest Sup. Ct. 1908.]

Note.—As to state decisions and laws as rules of decision in Federal courts—see notes to Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Clark v. Graham, 5 L. ed. U. S. 334; Mitchell v. Burlington, 18 L. ed. U. S. 351; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; and Snare & T. Co. v. Friedman, 40 L.R.A. (N.S.) 380.

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Limitation of actions — action based on denial of civil rights — damages or penalties.

2. The one year's limitation prescribed by La. Civ. Code, art. 3536, for actions for damages, and not the five-year limitation prescribed by U. S. Rev. Stat. § 1047, U. S. Comp. Stat. 1901, p. 727, against penalties and forfeitures, must govern a civil action for an assault committed in attempting to prevent plaintiff from voting, contrary to title 24 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1259), securing equal rights to citizens, in view of the provisions of §§ 1979–1981, 5508, 5510 (U. S. Comp. Stat. 1901, pp. 1262–1263, 3712, 3713), of those statutes, which provide criminal proceedings and punishment for the public wrong, and actions in law or equity for the redress of any private injury, without prescribing any specific limitation for such actions.

[For other cases, see Limitation of Actions, I. d, in Digest Sup. Ct. 1908.]

[No. 249.]

Submitted March 9, 1914. Decided April 13, 1914.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Louisiana, dismissing an action for an assault committed in attempting to prevent plaintiff from voting. Affirmed.

See same case below, 114 C. C. A. 166, 194 Fed. 88.

The facts are stated in the opinion.

Messrs. **W. S. Parkerson** and **E. A. O'Sullivan** submitted the cause for plaintiff in error.

Messrs. **Charles S. Rice, R. B. Montgomery,** and **Alfred Billings** submitted the cause for defendants in error.

Mr. Justice **McKenna** delivered the opinion of the court:

Action for damages for personal assault upon plaintiff in error, herein called plaintiff, by defendants in error, referred to as defendants, in the sum of $60,000.

The petition alleges that defendants and others were indicted for violating § 5508 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3712). The indictment is set out in the petition, and charges, with the usual verbosity of such instruments, [320] that an election was held in the parish of Jefferson, state of Louisiana, on November 3, 1908, for presidential electors, members of Congress, and certain municipal officers, under and in accordance with the laws and Constitution of the United States; that certain named persons were, as defendants well knew, qualified to vote at such election, that such persons were at the polling places with the intention and for the purpose of voting, and, knowing this, the defendants feloniously conspired and confederated with each other and other persons to intimidate and prevent, and did prevent, by the use of deadly weapons, such persons from voting.

It is alleged that the indictment further charged in a second count, a violation of § 5509 (U. S. Comp. Stat. 1901, p. 3712), in that the defendants, with other named persons, conspiring to intimidate the voters named in the first count from voting at the election named, "did then and there, with force and arms, armed with dangerous weapons, to wit: pistols, guns, scissors, wilfully, maliciously, unlawfully, and feloniously and upon" the defendant commit an assault, and with the purpose and in the disposition described, "with a dangerous weapon, to wit: a pair of scissors, inflict a wound less than mayhem."

That the defendants herein were convicted on both counts and sentenced to fine and imprisonment, and upon appeal to the circuit court of appeals the conviction, sentence, and fine were affirmed.

That the defendants conspired to prevent and did prevent the voters named in the indictment from voting, and that in furtherance of the conspiracy plaintiff was maliciously and without cause or provocation "cut, bruised, beaten, his face and eye blackened, his beard cut, he knocked down senseless, and other indignities were heaped upon him" by the defendants, for which he has suffered damages in the sum of $60,000.

The plaintiff is sixty-five years of age, has practised [321] law and held positions of honor and trust in the state, having been district attorney, state senator, and city attorney for the city of New Orleans.

The petition recites the injuries plaintiff received in defending himself from the assault upon him, and that he "was forced to appear in public, in performing his duties, carrying on his person the signs of the degradation and humiliation placed upon him."

The items of damages are set out as follows: For the wounding less than mayhem, $25,000; for humiliation, degradation, and public ridicule and pain of mind, $25,000; punitive and exemplary damages, $10,000. Judgment was prayed for $60,000, the sum of these items.

Exception was filed to the petition on the ground that the damages having, as it is alleged, been inflicted November 3, 1908, more than two years and five months before the filing of the petition, the action is barred "by the prescription of one year

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from and after the day on which such damages were sustained, under the provisions of Articles 3536 and 3537 of the Civil Code of the state of Louisiana. Dismissal of the suit was prayed. The plea of prescription was sustained and the sole question pressed by counsel, and which we are called upon to decide, is the application of the state statute to the conceded cause of action. The court, in passing upon the application of the statute of limitations, said that plaintiff conceded that if the action was to be governed by the state statute it was prescribed, but he contended that it was an action for a penalty, and governed by the prescription of five years, established by § 1047 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 727). The court was of opinion that the action was for "remedial damages, and not for a penalty," and maintained the plea of prescription, citing Campbell v. Haverhill, 155 U. S. 610, 39 L. ed. 280, 15 Sup. Ct. Rep. 217; Brady v. Daly, 175 U. S. 148, 44 L. ed. 109, 20 Sup. Ct. Rep. 62, and dismissed the action with costs.

Judgment of the circuit court was affirmed by the [322] circuit court of appeals. The court decided that the action was one for damages, and not for a penalty, and the limitations of five years against penalties or forfeitures (§ 1047, Rev. Stat.) was not applicable. It followed, the court said, that the state statute, which prescribes the action in one year, must be applied, citing §§ 3536 and 3537 of the Civil Code of Louisiana. 114 C. C. A. 166, 194 Fed. 88.

The opinions of the lower courts exhibit the contentions in the case, and the short question presented is whether the action is for damages or for a penalty. If for a penalty, § 1047 of the Revised Statutes applies, which provides: "No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained . . . unless the same is commenced within five years from the time when the penalty or forfeiture accrued." If for damages, the provisions of the Louisiana Code are applicable. They are as follows: Article 3536. "The following actions are prescribed in one year:

"Those for injurious words, whether verbal or written, and those for damages caused by animals, or resulting from offenses or quasi offenses."

And the prescription runs from the day the damage is sustained. Section 3537.

That the action depends upon or arises under the laws of the United States does not preclude the application of the statute of limitations of the state is established beyond controversy by cases cited by the circuit court and by McClaine v. Rankin, 197 U. S. 158, 49 L. ed. 702, 25 Sup. Ct. Rep. 410, 3 Ann. Cas. 500.

It is therefore not necessary to pursue in detail the argument of plaintiff based on the postulate that "the Sovereign alone can limit the right of action," and that because injury was inflicted on him in the course of violating Federal laws the limitation of the state could not apply. Congress, of course, could have, by specific provision, prescribed a limitation, but no specific provision is adduced. [323] The limitation of five years is asserted on the ground that the action is for a penalty, and that it is such is deduced from the provisions of title 24 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1259), securing equal civil rights to all citizens.

These provisions secure to all citizens the same rights that white citizens enjoy, and make every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory, deprives another of the rights secured, liable "to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Section 1979 (U. S. Comp. Stat. 1901, p. 1262).

It is also provided that if a conspiracy be entered into between two or more persons to deprive another of the equal protection of the laws, or of equal privileges and immunities under the laws, and the persons conspiring to or cause to be done any act in furtherance of the object of the conspiracy whereby another is injured in his person or property, or deprived of having or exercising any right or privilege as a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. Section 1980 (U. S. Comp. Stat. 1901, p. 1262).

Anyone having knowledge of the wrongs conspired to be done, and who, having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, shall be liable to the party injured or his legal representatives in an action on the case. Any number of defendants may be joined in the action. If the death of any party be caused by such act or neglect, the legal representatives of the deceased shall have an action therefor and may recover not exceeding $5,000 for the benefit of the widow of the deceased, if there be one, and, if there be no widow, then for the benefit of the next of kin. But no action under the provisions of the section can be sustained [324] which is not commenced within one year after the cause of action accrued. Section 1981 (U. S. Comp. Stat. 1901, p. 1263).

Conspirators to injure, oppress, threaten

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or intimidate any citizen in the free exercise or enjoyment of his rights under the Constitution and laws of the United States, or because of his having so exercised the same, shall be fined not more than $5,000 and imprisoned not more than ten years; and shall, moreover, be ineligible to office under the United States. Section 5508 (U. S. Comp. Stat. 1901 p. 3712).

If, in violating any of the provisions of the two preceding sections, any felony or misdemeanor be committed, the offender shall be punished as provided in the state laws.

And every person who, under color of any law, etc., subjects or causes to be subjected any inhabitant of any state or territory to the deprivation of rights under the laws and Constitution of the United States shall be fined not more than $1,000, or be imprisoned not more than one year, or both. Section 5510 (U. S. Comp. Stat. 1901, p. 3713).

There are other criminal provisions not necessary to mention.

It will be observed, therefore, that the sections of the Revised Statutes which we have quoted provide criminal proceedings and punishment for the public wrong, and actions in law or equity for the redress of any private injury, with a limitation in one instance of the amount of recovery and of the time for commencing the action to one year.

The penal and remedial provisions are therefore distinct and cannot be confounded. The term "penalty" involves the idea of punishment for the infraction of the law, and is commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. United States v. Chouteau, 102 U. S. 603, 611, 26 L. ed. 246, 249; Huntington v. Attrill, 146 U. S. 666, 667, 36 L. ed. 1127, 1128, 13 Sup. Ct. Rep. 224. There is no justification for the contention of plaintiff, therefore, that the [325] remedy provided for a penalty and the limitation of time of bringing an action is five years under § 1047 (U. S. Comp. Stat. 1901, p. 727). It is very clear that the public wrong is punished by the fines and punishment prescribed, that the private injuries inflicted are to be redressed by civil suit, and the amount of recovery is determined by the extent of the injury received and the elements constituting it. This plaintiff indicates in his pleading, praying damages in the sum of $25,000 "for the wounding less than mayhem," $25,000 "for the humiliation, degradation, and public ridicule," and $10,000 "as punitive and exemplary damages."

Judgment affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Plff. in Err.,
v.
JACOB ANDERSON.

(See S. C. Reporter's ed. 325–330.)

Constitutional law — due process of law — penalizing refusal to pay claim.

1. Double liability and an attorney's fee may be exacted under the authority of Ark. Laws 1907, No. 61, p. 144, from a railway company refusing to pay for the killing of live stock by one of its trains within thirty days after the owner's demand, without denying the railway company the due process of law guaranteed by U. S. Const., 14th Amend., where the justice of the demand is fully established in the suit following the refusal to pay.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — penalizing railway company's refusal to pay claim.

2. Singling out railway companies and subjecting them to the payment of double damages and attorneys' fees in case of their refusal to pay for the killing of live stock by their trains within thirty days after the owner's demand, as is done by Ark. Laws 1907, No. 61, p. 144, when litigants in general are not subject to the same burdens, does not deprive the railway companies of the equal protection of the laws.

[For other cases, see Constitutional Law, IV. a, 3, b, in Digest Sup. Ct. 1908.]

[No. 319.]

Argued March 20, 1914. Decided April 13, 1914.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which affirmed a judgment of the Circuit Court of Little River County, in that state, penalizing a railway company's refusal to pay a claim for the killing of live stock by one of its trains. Affirmed.

See same case below, 104 Ark. 500, 149 S. W. 58.

The facts are stated in the opinion.

Mr. Samuel W. Moore argued the cause, and, with Messrs. Frank H. Moore and James B. McDonough, filed a brief for plaintiff in error:

The act of the state of Arkansas which is drawn in question in this case has been held unconstitutional by this court, and is therefore void for all purposes.

Kansas City Southern R. Co. v. Ander-

NOTE.—On constitutionality of statute imposing penalty or added liability for failure of railroad company to pay claim—see note to St. Louis, I. M. & S. R. Co. v. Wynne, 42 L.R.A.(N.S.) 102.

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son, 104 Ark. 500, 149 S. W. 58; Meyer v. Wells, F. & Co. 223 U. S. 298, 56 L. ed. 445, 32 Sup. Ct. Rep. 218; St. Louis, I. M. & S. R. Co. v. Wynne, 224 U. S. 354, 56 L. ed. 799, 42 L.R.A.(N.S.) 102, 32 Sup. Ct. Rep. 493; Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40.

The Arkansas act which is drawn in question in this case is in conflict with the 14th Amendment to the Constitution of the United States.

Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378; Bannon v. State, 49 Ark. 167, 4 S. W. 655; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Illinois C. R. Co. v. Crider, 91 Tenn. 489, 19 S. W. 618; Kirby's Digest of Statutes, §§ 6773–6782, 7907; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Missouri & N. A. R. Co. v. State, 92 Ark. 1, 31 L.R.A. (N.S.) 861, 135 Am. St. Rep. 164, 121 S. W. 930; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; St. Louis, I. M. & S. R. Co. v. Williams, 49 Ark. 492, 5 S. W. 883; St. Louis, I. M. & S. R. Co. v. Wynne, 90 Ark. 538, 119 S. W. 1127, 17 Ann. Cas. 631; Seaboard Air Line R. Co. v. Seegars, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 11 Ann. Cas. 1247; Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40.

This Arkansas act denies to defendant due process of law.

Chicago, M. & St. P. R. Co. v. Polt, 232 U. S. 165, ante, 554, 34 Sup. Ct. Rep. 301; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961.

No brief was filed for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

Error to review a judgment of the supreme court of the state, affirming a judgment by which defendant in error was awarded against plaintiff in error (herein called the railway company) double damages and attorney's fee for a mare killed by one of the railway company's trains.

The judgment was recovered under a statute of the state which the railway company attacked in the courts below and attacks here, on the ground that it violates the due process clause of the Constitution of the United States. The statute provides that when any stock is killed or injured by railroad trains running in the state, the officers of the train shall cause the station master or overseer at the nearest station house to give notice of the fact by posting and by advertisement, and, on failure to so advertise, the owner shall recover double damages for all stock killed and not advertised. "And said railroad shall pay the owner of such stock within thirty days after notice is served on such railroad by such owner. Failure to do so shall entitle said owner to double the amount of damages [328] awarded him by any jury trying such cause, and a reasonable attorney's fee." [Ark. Laws, 1907, p. 1447.]

If a suit be brought after the thirty days have expired, and the owner recover "a less amount of damages than he sues for, then such owner shall recover only the amount given him by said jury, and not be entitled to recover any attorney's fee."

For its contention that the act offends the Constitution of the United States the railway company relies on St. Louis, I. M. & S. R. Co. v. Wynne, 224 U. S. 354, 56 L. ed. 799, 42 L.R.A.(N.S.) 102, 32 Sup. Ct. Rep. 493.

In that case, however, there was a demand for $500 damages. The railway company refused to pay it. The owner sued for $400 and recovered a verdict for that amount, and the court, deeming the statute applicable, gave judgment for double that amount and an attorney's fee of $50. The supreme court sustained the judgment against the contention of the railway company that the statute so applied was repugnant to the due process clause of the Constitution of the United States. This court reversed the judgment, holding that so far as the statute was held to justify the imposition of double damages where there was demand for one sum and an action and judgment for less, it was void. The question was expressly reserved whether such would be the decision if the recovery corresponded to the demand; in other words, in the language of the opinion, "Where the prior demand is fully established in the suit following the refusal to pay." That question is involved in the present case, and we think it is determined by Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28, and Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40. In both cases statutes (South Carolina and Missi-

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sippi) were sustained. Each provided for a penalty for failure to settle claims after certain time after demand, the penalty being $50 in one [329] statute and in the other $25, in addition to the actual damages. In the Seegers Case it was said: "It must be remembered that the purpose of this legislation is not primarily to enforce the collection of debts, but to compel the performance of duties which the carrier assumes when it enters upon the discharge of its public functions." In the other case it was said, the railroad company "has not been penalized for failing to accede to an excessive or extravagant claim, but for failing to make reasonably prompt settlement of a claim which, upon due inquiry, has been pronounced just in every respect." In Chicago, M. & St. P. R. Co. v. Polt, 232 U. S. 165, ante, 554, 34 Sup. Ct. Rep. 301, a statute of South Dakota was passed upon which makes a railroad liable for double damages if, within sixty days after demand, it does not pay the damage actually sustained for property destroyed by fire communicated from its locomotive engine. The plaintiff in the case got a verdict for less than he demanded, but for more than the railroad offered. Judgment for double the amount of the verdict was entered and sustained by the supreme court of the state. It was reversed by this court, the ruling of the Wynne Case, supra, being applied. We said: "The case is not like those in which a moderate penalty is imposed for failure to satisfy a demand found to be just. Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. supra."

It is contended, however, that the statute having been declared unconstitutional as applied to one state of facts that properly raises the question, it is void for all purposes. The contention is based on the assumption that we decided the statute in the Wynne Case to be unconstitutional; but the ground of the decision was, as we have seen, that the statute was there applied to a case where the plaintiff in the action had recovered less than he demanded before suit. We declined to extend our opinion to a case where the amount of the judgment corresponded to the demand; [330] in other words, declined to pronounce the act entirely unconstitutional.

In Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. supra, when urged again to extend our ruling beyond the facts and declare the Mississippi statute entirely void, we declined to do so, considering it a matter for the state court to decide "how far parts of it might be sustained if others fail."

In the case at bar the supreme court of the state has limited the statute, and has, indeed, declared that it had not intended in the Wynne Case to place upon the "statute a construction that would make it applicable to a case based upon a state of facts where a demand had been made before suit for a sum greater than that recovered upon a trial." And, further: "The construction and application of this statute, as made by this court, is therefore not such as to render it invalid under the decisions made by the Supreme Court of the United States."

It is also contended by the railway company that the statute deprives it of the equal protection of the laws in that it singles out railroads and subjects them to the payment of double damages and attorneys' fees when litigants in general are not subject to the same burdens. The contention is not tenable. Seaboard Air Line R. Co. v. Seegers, supra.

We do not enter into a general discussion of the police power of the state. As we said in the Polt Case, "the states have a large latitude in the policy that they will pursue and enforce," and we do not think that the limit of their power has been transcended in the present case.

Judgment affirmed.

Mr. Justice Holmes and Mr. Justice Lamar dissent.

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[331] HAMMOND PACKING COMPANY, Plff. in Err.,
v.
STATE OF MONTANA.

(See S. C. Reporter's ed. 331-334.)

Constitutional law — equal protection of the laws — discrimination in license tax.

A license tax of 1 cent per pound sold for carrying on the business of selling oleomargarin does not deny the equal protection of the laws guaranteed by U. S. Const., 14th Amend., because it puts oleomargarin in a class by itself, and discriminates between it and butter, although the tax is pronounced or assumed by the state courts to be a revenue measure.

[For other cases, see Constitutional Law, 360-368, in Digest Sup. Ct. 1908.]

[No. 278.]

NOTE.—On constitutionality of discriminations in statutory regulations concerning food products—see note to Freadrich v. State, 34 L.R.A.(N.S.) 651.

As to the validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

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Submitted March 11, 1914. Decided April 13, 1914.

IN ERROR to the Supreme Court of the State of Montana to review a judgment which affirmed a judgment of the District Court for the County of Silver Bow, in that state, in favor of the state in an action to recover a license tax. Affirmed.

See same case below, 45 Mont. 343, 123 Pac. 407.

The facts are stated in the opinion.

Mr. M. S. Gunn submitted the cause for plaintiff in error:

It is undoubtedly true that the oleomargarin sold, after having been received, stored, and held for sale in Silver Bow county, was subject to the taxing power of the state.

American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403.

The oleomargarin sold, having been subject to the taxing power of the state, the motive of the legislative assembly in imposing this tax, and the reasonableness of the tax with respect to the amount of same, are not open to inquiry in this court.

McCray v. United States, 195 U. S. 53, 49 L. ed. 94, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561.

Again, the legislative assembly of Montana is authorized to classify for the purpose of taxation, and may lawfully impose a tax upon one class of property or one occupation to the exclusion of other property and other occupations.

Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct. Rep. 496.

It follows that the only inquiry is whether the placing of oleomargarin, butterin, and imitation of cheese in a separate class for the purpose of taxation is a legitimate exercise of the taxing power.

Oleomargarin is a wholesome article of food, a recognized article of commerce, and its manufacture and sale cannot be prohibited by a state.

Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768.

The state can, in the exercise of the police power, provide reasonable regulations with reference to the manufacture and sale of oleomargarin in order to prevent deception and fraud, and in the interest of the health of the people of the state.

Capital City Dairy Co. v. Ohio, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120.

As oleomargarin is a pure and wholesome article of food, used as a substitute for butter, the reason for the discrimination made cannot have reference to the nature of the article or the use to which it is applied. The only reason that can be assigned for this classification is that oleomargarin is sold in competition with butter. The reason for the discrimination made is to create a monopoly in favor of butter, and is not a valid reason.

Cooley, Taxn. 3d ed. p. 1133.

No classification for the purpose of taxation is reasonable or justifiable unless all articles used for the same purpose, and which are sold in competition, are placed in the same class. Such a classification as is made by this statute under consideration does violence to the equal protection clause of the 14th Amendment.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

If the legislative assembly of Montana can classify oleomargarin by itself and impose a license tax of 1 cent per pound for the sale of such article, it can increase the tax to such an amount as will prohibit the sale of the same. The validity of the statute is not to be determined by the amount of the tax imposed.

Gulf, C. & S. F. R. Co. v. Ellis, supra.

Mr. D. M. Kelly, Attorney General of Montana, submitted the cause for defendant in error. Mr. J. H. Alvord was on the brief:

The state may regulate or prohibit the sale of oleomargarin manufactured within its borders.

Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120.

This court has held that the distinction between the two substances, oleomargarin and butter, is so great as to justify a classification distinguishing between them.

McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561.

Beyond question Congress cannot add to or detract from the powers conferred upon it by the Constitution of the United States, neither can it confer upon a state the power vested by the Constitution exclusively in Congress; but removing "an impediment to the enforcement of the state law" is not granting an additional power to the state.

Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.

The police and licensing powers of the state are as great within the limits of the state as are the powers of Congress within the territory subject to the jurisdiction of

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the United States. If, then, this law of the state is void as being an invasion of the 14th Amendment of the Constitution of the United States, the act of Congress of February 9, 1902, must also be void for the same reason. Yet, the Supreme Court of the United States has twice sustained the constitutionality of this law of Congress.

McCray v. United States, supra; Cliff v. United States, 195 U. S. 159, 49 L. ed. 139, 25 Sup. Ct. Rep. 1. See also People v. Freeman, 242 Ill. 373, 90 N. E. 366, 17 Ann. Cas. 1098; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154.

The power of the state legislature, under the state Constitution, to impose a license for revenue or for regulation, cannot be successfully contested.

State ex rel. Toi v. French, 17 Mont. 54, 3 L.R.A. 415, 41 Pac. 1078; State v. Camp Sing, 18 Mont. 128, 32 L.R.A. 635, 56 Am. St. Rep. 551, 44 Pac. 516.

If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarin as an article of food, their appeal must be to the legislature or to the ballot box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government.

Powell v. Pennsylvania, 127 U. S. 678, 686, 32 L. ed. 253, 257, 8 Sup. Ct. Rep. 992, 1257.

The "equal protection of law," as expressed in the Constitution of the United States, simply requires that all persons subjected to such legislation shall be treated alike in like circumstances and conditions, both in the privilege conferred and the liabilities imposed.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283–293, 42 L. ed. 1037–1042, 18 Sup. Ct. Rep. 594.

It requires the same means and methods to be applied impartially to all the constituents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.

Kentucky R. Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57.

No doubt can be entertained of the right of a state legislature to tax trades, professions, or occupations in the absence of inhibition in the state Constitution in that regard.

Ficklen v. Taxing Dist. 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810.

The state may, if it chooses, exempt certain classes of property altogether; may impose different specific taxes upon different trades or professions; may vary the rates of excise upon various products; may tax real and personal estate in a different manner; may tax visible property only, and not securities; may allow or not allow deductions for indebtedness. All such regulations and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature or the people of the state in confirming their Constitution.

Connelly v. Union Sewer Pipe Co. 184 U. S. 562, 46 L. ed. 691, 22 Sup. Ct. Rep. 431; Armour Packing Co. v. Lacy, 200 U. S. 235, 50 L. ed. 456, 26 Sup. Ct. Rep. 232; McLean v. Arkansas, 211 U. S. 539, 547, 53 L. ed. 315, 319, 29 Sup. Ct. Rep. 206.

Mr. Justice Holmes delivered the opinion of the court:

This is an action to recover a license tax of 1 cent per pound sold for carrying on the business of selling oleomargarin. The answer, with some allegations not now material, admitted the facts and set up that § 4064 of the Political Code of Montana, as amended, by which the tax was imposed, violates the 14th Amendment. That is the only question raised here, so that other incidental or preliminary matters need not be mentioned. Judgment was entered for the state on the pleadings and the judgment was affirmed by the supreme court of the state.

The argument for the plaintiff in error is that, the tax being pronounced or assumed by the state courts to be a tax for revenue, it is unjustifiable to put oleomargarin in a class by itself and to discriminate, for instance, between it and butter. But we see no obstacle to doing so in the Constitution of the United States. Apart from interference with commerce among the states, a state may restrict the manufacture of oleomargarin in a way in which it does not hamper that of butter. Capital City Dairy Co. v. Ohio, 183 U. S. 238, 245, 246, 46 L. ed. 171, 175, 176, 22 Sup. Ct. Rep. 120. It even may forbid the manufacture altogether. Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257. It may express and carry out its [334] policy as well in a revenue as in a police law. Quong Wing v. Kirkendall, 223 U. S. 59, 62, 56 L. ed. 350, 351, 32 Sup. Ct. Rep. 192. The case really has been disposed of by previous decisions of this court. McCray v. United States, 195 U. S. 27, 62, 63, 49 L. ed. 78, 98, 99, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561.

Judgment affirmed.

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CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, Plff. in Err.,
v.
STATE OF IOWA.

(See S. C. Reporter's ed. 334–345.)

Commerce — local or interstate — continuity of transportation.

1. The reshipment by the consignee to other points within the state of coal consigned to it on interstate shipments to a distributing point within the state, although such reshipments are in the cars in which the coal was received, does not establish such continuity of transportation as to place such reshipments outside the pale of state regulation, where the consignee paid the freight to the point of reshipment to the initial carrier, which placed the cars on an interchange track, where they were held by the consignee until sales were made, when bills of lading were tendered to another railway company for the further transportation.

[For other cases, see Commerce, I. b, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — statutory construction.

2. The determination of a state court of last resort that a state railroad commission was authorized by the state laws to make the order under review is conclusive upon the Federal Supreme Court on writ of error to the state court.

[For other cases, see Appeal and Error, 2124–2151, in Digest Sup. Ct. 1908.]

Commerce — state regulation — requiring carrier to accept reshipments in cars of other carrier — termination of interstate transportation.

3. An order of a state railroad commission requiring a railway company to accept without unloading and reloading into its own cars reshipments of coal in carload lots when tendered in the cars of other railway companies by which the coal had been brought into the state does not interfere with interstate commerce where there is such a termination of the interstate transportation at the point of reshipment that the further transportation is a purely intrastate service.

[For other cases, see Commerce, III., in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — liberty of contract — requiring carrier to accept reshipments in cars of other carrier.

4. A railway carrier is not deprived of its liberty of contract, nor of its property without due process of law, contrary to U. S. Const., 14th Amend., by an order of a state railroad commission requiring it to accept without unloading and reloading into its own cars reshipments of coal in carload lots when tendered in the cars of other railway companies.

[For other cases, see Constitutional Law, 516–518, 591–604, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — requiring carrier to accept reshipments in cars of other carrier.

5. The equal protection of the laws guaranteed by U. S. Const., 14th Amend., is not denied to a railway carrier by an order of a state railroad commission requiring it to accept without unloading and reloading into its own cars reshipments of coal in carload lots when tendered in the cars of other railway companies.

[For other cases, see Constitutional Law, 266–291, in Digest Sup. Ct. 1908.]

[No. 176.]

Argued March 3, 1914. Decided April 13, 1914.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment which affirmed a judgment of the Polk County District Court, granting a mandatory injunction to require compliance with an order of a state railroad commission requiring a railway carrier to accept reshipments in the cars of other carriers. Affirmed.

See same case below, 152 Iowa, 317, 130 N. W. 802.

The facts are stated in the opinion.

Mr. O. W. Dynes argued the cause, and, with Messrs. C. S. Jefferson and Burton Hanson, filed a brief for plaintiff in error:

The board of railroad commissioners of the state of Iowa, and the courts of that state, could not construct contracts or impose contracts on the plaintiff in error which would restrict it in respect of whom it might rent cars from, and which would oblige it to rent and pay for cars when it could and desired to furnish its own cars instead.

Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 571, 48 L. ed. 569, 24 Sup. Ct. Rep. 339; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 680, 28 L. ed. 291, 296, 4 Sup. Ct. Rep. 185.

There being no connecting line involved as to the shipments in the case at bar, but only a single line haul over the rails of the plaintiff in error alone, the Iowa statutes do not apply, and in the absence of abrogating legislation, the common law extends to the plaintiff in error the right to decline to use cars of other carriers, and insist upon using its own cars.

Oregon Short Line & U. N. R. Co. v.

NOTE.—On shipments within a state as part of interstate or foreign transportation —see note to Missouri P. R. Co. v. Sherwood, T. & Co. 17 L.R.A. 643.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

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Northern P. R. Co. 4 Inters. Com. Rep. 249, 51 Fed. 465; Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 680, 28 L. ed. 291, 296, 4 Sup. Ct. Rep. 185.

The fact that the carload shipments in question had undergone previous transportation did not make the previous carriers connecting carriers with the plaintiff in error, for the previous contract of transportation had been consummated, the cargoes had reached their destination, and the consignee had paid the freight thereon, and claimed physical possession of them.

Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360.

If it be not admitted that the previous carriage had been terminated and that the previous carrier is not a connecting carrier, then it would follow that these carloads of coal, having been carried originally from Illinois to Davenport, Iowa, would have the character of interstate commerce, and, therefore, would not be subject to regulation by the state of Iowa.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229.

An order made by a state commission under assumed authority of the state, which directly burdens or regulates interstate commerce, will be enjoined.

McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722.

In ordering the Chicago, Milwaukee, & St. Paul Railway Company to take and use the cars of the interstate carrier which brought the coal from Illinois to Davenport, Iowa, the board of railroad commissioners of the state of Iowa exceeded its powers in that it placed a burden on interstate commerce by depriving the interstate carrier of its vehicles of interstate commerce as an incident of the attempt to regulate intrastate commerce.

Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 571, 48 L. ed. 565, 569, 24 Sup. Ct. Rep. 339; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 144, 53 L. ed. 441, 446, 29 Sup. Ct. Rep. 246; Southern R. Co. v. United States, 222 U. S. 20, 26, 56 L. ed. 72, 74, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 400, 57 L. ed. 1511, 1541, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

The order of the Iowa commission necessarily involves either taking from the interstate carrier its cars without compensation, or denying to plaintiff in error the privilege of supplying and using its own cars, with the consequence that its cars remain idle, and it is obliged to pay for the foreign cars. Either view of the significance of the order involves the taking of property without due process of law, contrary to the 14th Amendment to the Constitution of the United States.

Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 417, 41 L. ed. 489, 495, 17 Sup. Ct. Rep. 130; Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427.

Coal cars used in interstate commerce are instruments of such commerce, and regulating their use is regulating interstate commerce.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 474, 54 L. ed. 280, 289, 30 Sup. Ct. Rep. 155; Southern R. Co. v. United States, 222 U. S. 20, 26, 56 L. ed. 72, 74, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822; Northern P. R. Co. v. Washington, 222 U. S. 370, 377, 56 L. ed. 237, 239, 32 Sup. Ct. Rep. 160.

The Congress of the United States having extended governmental regulations to include the use and distribution of coal cars used in interstate commerce, state regulation of the same is thereby excluded.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 400, 57 L. ed. 1511, 1541, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; Northern P. R. Co. v. Washington, 222 U. S. 370, 378, 56 L. ed. 237, 239, 32 Sup. Ct. Rep. 160; Smith v. Alabama, 124 U. S. 465, 473, 31 L. ed. 508, 510, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; M'Culloch v. Maryland, 4 Wheat. 415, 426, 4 L. ed. 603, 606.

The order of the board of railroad commissioners of Iowa deprives plaintiff in error of the equal protection of the laws, in contravention of the Constitution of the United States.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 698, 43 L. ed. 858, 864, 19 Sup. Ct. Rep. 565.

Whatever transportation service or facility the law requires the carriers to supply they have the right to furnish. They can therefore use their own cars, and cannot be compelled to accept those tendered by the shipper on condition that a lower rate be charged.

Atchison, T. & S. F. R. Co. v. United States, 232 U. S. 199, ante, 568, 34 Sup. Ct. Rep. 291.

It is very doubtful whether this case falls within the law of Gulf, C. & S. F. R. Co.

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v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; Railroad Commission v. Texas & P. R. Co. 229 U. S. 336, 341, 57 L. ed. 1215, 1218, 33 Sup. Ct. Rep. 837; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 130, 57 L. ed. 442, 450, 33 Sup. Ct. Rep. 229; Southern P. Terminal Co. v. Interstate Commerce Commission, 219, U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653.

Mr. George Cosson, Attorney General of Iowa, argued the cause, and, with Mr. Henry E. Sampson, filed a brief for defendant in error:

This court accepts as conclusive the interpretation placed upon a state statute by its highest judicial tribunal.

Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 508, 46 L. ed. 298, 302, 22 Sup. Ct. Rep. 95.

A reasonable regulation of public service corporations or persons, and a reasonable limitation of the right to contract, if made under the police power, in the interest of the public health, the public safety, the public morals, or the public welfare, convenience, necessity, or prosperity, is valid.

Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, ante, 310, 34 Sup. Ct. Rep. 152; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. Rep. 66; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Assaria State Bank v. Dolley, 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. Rep. 189; Mobile, J. & K. C. R. Co. v. Mississippi, 210 U. S. 187, 52 L. ed. 1016, 28 Sup. Ct. Rep. 650; Chicago, R. I. & P. R. Co. v. Zernecke, 183 U. S. 582, 46 L. ed. 339, 22 Sup. Ct. Rep. 229.

On the other hand, an arbitrary, unreasonable taking of property, or limiting of the right to contract, is invalid, especially where the statute bears no relation to correcting some public evil, or promoting the health, safety, morals, welfare, or prosperity of a state or community.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 687, 43 L. ed. 860, 19 Sup. Ct. Rep. 565; Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; McNeil v. Southern R. Co. 202 U. S. 543, 561, 50 L. ed. 1142, 1148, 26 Sup. Ct. Rep. 722; Allgeyer v. Louisiana, 165 U. S. 579, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246.

This case comes squarely under the doctrine of Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115, and kindred cases, and is not controlled by the pronouncement in Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339.

The order of the railroad commissioners of Iowa does not deprive plaintiff in error of property without due process, and plaintiff is not denied due process by reason of limiting its right to contract.

Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 300, 45 L. ed. 200, 21 Sup. Ct. Rep. 115; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, ante, 310, 34 Sup. Ct. Rep. 152; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900.

Plaintiff in error can complain only of the injury which he himself may sustain, and may not strike down a statute as violative of the Federal Constitution because of its possible injury to someone else.

Standard Stock Food Co. v. Wright, 225 U. S. 540, 550, 56 L. ed. 1197, 1201, 32 Sup. Ct. Rep. 784.

The order of the commission in question does not offend against the 14th Amendment in that the railway company is denied the equal protection of the laws.

Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1,

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51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, ante, 310, 34 Sup. Ct. Rep. 152; Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815; Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151, 31 Sup. Ct. Rep. 132; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. ed. 137, 31 Sup. Ct. Rep. 171; German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. 229, 31 Sup. Ct. Rep. 246; District of Columbia v. Brooke, 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. Rep. 560; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 Sup. Ct. Rep. 578; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; McLean v. Arkansas, 211 U. S. 546, 53 L. ed. 319, 29 Sup. Ct. Rep. 206; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. Rep. 66; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct. Rep. 496; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638.

If the regulation is reasonable, and Congress has remained silent upon the specific matter, it is neither a burden to interstate commerce nor a conflict with the acts of Congress to regulate interstate commerce.

Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, ante, 310, 34 Sup. Ct. Rep. 152; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; Standard Stock Food Co. v. Wright, 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784; Reid v. Colorado, 187 U. S. 137, 147, 47 L. ed. 108, 114, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729. See also New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 55, 51 L. ed. 78, 88, 27 Sup. Ct. Rep. 1; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 238, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086.

Mr. Justice Hughes delivered the opinion of the court:

This suit was brought by the state of Iowa to obtain a mandatory injunction requiring the Chicago, Milwaukee, & St. Paul Railway Company to comply with an order of the State Railroad Commission promulgated December 22, 1909. The defendant answered, denying the validity of [340] the order, and also filed a cross petition to set it aside, alleging that it was repugnant to the Constitution of the United States, as an attempt to regulate interstate commerce and to deprive the company of its property without due process of law, and, further, that the Commission was without authority under the laws of the state to make the order. Judgment, sustaining the action of the Commission and directing compliance, was affirmed by the supreme court of the state. 152 Iowa, 317, 130 N. W. 802.

It appeared that the railway company, in 1909, had refused to accept shipments of coal in carload lots at Davenport, Iowa, for points in that state when tendered in cars of other railroad companies by which the coal had been brought to Davenport from points in Illinois. The railway company insisted that it was entitled to furnish its own cars. The Clark Coal & Coke Company, operating a branch at Davenport, complained of this rule to the Railroad Commission, stating that it was a departure from the practice which had obtained for several years with respect to such shipments, that the Clark Company paid all charges to Davenport, and on receiving orders from its customers tendered written billing for transportation from Davenport to the designated points, and that it was unreasonable for the railway company to require in such cases that the coal should be unloaded and reloaded in its own cars. A hearing was had before the Commission at which other shippers intervened, adopting the coal company's complaint. The facts were presented in an agreed statement, as follows:

"The Clark Coal & Coke Company of Davenport, Iowa, have been making shipments of coal from points in Illinois to Davenport by the Chicago, Rock Island, & Pacific Railway Company and the Chicago, Burlington, & Quincy Railroad Company; that said coal is then placed by the railroad bringing it into Iowa on an interchange track at Davenport; that all charges from point of origin [341] in Illinois to Davenport, Iowa, are paid by the Clark Coal & Coke Company to the railroad company bringing said coal; that thereupon complainant has notified the respondent railway company of the placement of said coal, and that it desired to ship said coal by the respondent railway company to different points on its

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own line, and tendered a written billing from Davenport to the point so designated; that thereupon respondent railway company has accepted said billing from Davenport to said point, and taken said cars from said interchange track to its own line, and transported the same in accordance with said written billing; that the respondent railway company has changed its method of doing business in the above respects by its printed order, and now refuses to accept said written billing and take said cars from said interchange track and transport them over its own line to the point designated by said billing, unless said coal is loaded in equipment belonging to respondent railway company. Respondent railway company, by its answer to the complaint, alleges that it 'will furnish cars for shipment of coal from Davenport to any point in Iowa, as provided by Iowa Distance Tariff, but will not accept shipments originating at Davenport, billed from Davenport, in the equipment of other carriers,' and its readiness and ability to furnish cars of its own for shipment is not controverted and will therefore be taken to be true. It will thus be observed that before the respondent railway company will take coal for transportation on its own line, in equipment other than its own, it requires that the same shall be unloaded and reloaded into its own cars."

Thereupon, the Commission rendered a decision in favor of the shipper and entered the following order, to which this controversy relates:

"In accordance with the conclusions heretofore expressed, it is therefore ordered by the Board of Railroad Commissioners of Iowa that upon arrival of loaded cars of [342] coal at the city of Davenport, upon any line of railroad, when said cars are placed upon the interchange track at Davenport, as ordered or requested by the owner or consignee of said cars, and the freight paid thereon, and the ordinary billing in use by the respondent railway is tendered to it for a billing of said cars so placed to a point on its own line within the state of Iowa, that the respondent railway company be and is hereby ordered and required to accept said billing, receive said car or cars so billed, and transport them on its own line to the point designated by the owner or consignee in said billing; and that it receive said car or cars in whatever equipment the same may be loaded, without requiring an unloading and reloading into its own equipment, and transport said car or cars over its own line to points within this state, so loaded, without unloading and reloading as above set forth, in the same manner that it receives cars from connecting lines, loaded in its own equipment. It is expressly understood, however, in this order, that no questions in relation to switching charges are determined."

The railway company contended, both before the Commission and in the state court, that the shipments in question were interstate; and it was alleged in its answer that the method of transportation resorted to was a device of shippers to secure, by adding the rate from the initial point in Illinois to Davenport to the rate established by the Iowa distance tariff from Davenport to other points in the state, a lower rate than that applicable to an interstate shipment from the point in Illinois to the point of final destination.

The Railroad Commission held that the transportation desired from Davenport was a purely intrastate service, saying: "Under the admitted facts, the city of Davenport became a distributing point for coal shipped by the consignor. The certainty in regard to the shipments of coal ended at Davenport. The point where the same was to be [343] shipped beyond Davenport, if at all, was determined after the arrival of the coal at Davenport. The coal was under the control of the consignee, and he could sell it in transit or at Davenport, or reconsign it to a point on respondent's railway, or any other railway, at his own discretion." Upon the trial of the present suit in the state court, the state introduced in evidence the proceedings, decision, and order of the Commission, and without further evidence both parties rested. The supreme court of the state took the same view of the facts that the Commission had taken, and accordingly held that the shipments were intrastate. The court said that the facts showed that the coal was originally consigned to the coal company in Davenport, that it was there held until sales were made, that the consignee had taken delivery, paying the freight to the initial carrier, and assuming full control. 152 Iowa, 317, 319, 130 N. W. 802.

The record discloses no ground for assailing this finding. It is undoubtedly true that the question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract. Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229; Railroad Commission v. Texas & P. R. Co. 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837. But the fact that commodities received on interstate shipments are reshipped by the consignees, in the cars in which they are received, to other points of destination, does not necessarily

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establish a continuity of movement, or prevent the reshipment to a point within the same state from having an independent and intrastate character. Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; Railroad Commission v. Worthington, 225 U. S. 101, 109, 56 L. ed. 1004, 1008, 32 Sup. Ct. Rep. 653; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 129, 130, 57 L. ed. 442, 449, 450, 33 Sup. Ct. Rep. 229. The question is with respect to the nature of the actual movement in the particular [344] case; and we are unable to say upon this record that the state court has improperly characterized the traffic in question here. In the light of its decision, the order of the Commission must be taken as referring solely to intrastate transportation originating at Davenport.

In this view, the validity of the Commission's order is challenged upon the ground that at common law the carrier was entitled to use its own equipment, and that the statute of the state of Iowa as to the receiving of cars from connecting carriers (Code, § 2116) is inapplicable for the reason that, with respect to the transportation in question, the plaintiff in error was the initial carrier. But the obvious answer is that what is required by the law of Iowa has been determined by the supreme court of that state. That court, examining the various provisions of the Iowa Code which have relation to the matter, has held that the order was within the authority of the Railroad Commission. 152 Iowa, 317, 320, 321, 130 N. W. 802.

Further, the plaintiff in error insists that the enforcement of the order would deprive it of its liberty to contract, and of its property, without due process of law, and would deny to it the equal protection of the laws, in violation of the 14th Amendment. We find these objections to be without merit. It was competent for the state, acting within its jurisdiction, and not in hostility to any Federal regulation of interstate commerce, to compel the carrier to accept cars which were already loaded and in suitable condition for transportation over its line. The requirement was a reasonable one. It cannot be said that the plaintiff in error had a constitutional right to burden trade by insisting that the commodities should be unloaded and reloaded in its own equipment. Upon this point the case of Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115, is decisive. There is no essential difference, so far as the power of the state is concerned, between such an order as we have here and one compelling the [345] carrier to make track connections, and to receive cars from connecting roads, in order that reasonably adequate facilities for traffic may be provided. See also Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 263, 46 L. ed. 1151, 1156, 22 Sup. Ct. Rep. 900; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 19, 27, 51 L. ed. 933, 941, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; Grand Trunk R. Co. v. Michigan Railroad Commission, 231 U. S. 457, 468, ante, 310, 317, 34 Sup. Ct. Rep. 152.

It is argued that it was unreasonable to subject the railway company to the expense incident to the use of the cars of another carrier when it was ready to furnish its own. The record affords no sufficient basis for this contention. What the expense referred to would be was not proved, and, in the absence of a suitable disclosure of the pertinent facts, no case was made which would justify the conclusion that, in its practical operation, the regulation would impose any unreasonable burden. On the other hand, the agreed statement makes it evident that prior to the change which gave rise to this controversy it was the practice of the company to accept such shipments.

Finally, it is said that the order of the Commission interferes with interstate commerce because the cars in question were the vehicles of that commerce, and were brought into the state as such. No question, however, is presented here as between the shippers and the owners of the cars, and no actual interference with interstate commerce is shown. Nor does it appear that any regulation under Federal authority has been violated.

The plaintiff in error has failed to establish any ground for invalidating the order of the Commission and the judgment must be affirmed.

Affirmed.

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[346] LAURA G. WHITE, Appt.,
v.
ISLAND TRANSPORTATION COMPANY.

(See S. C. Reporter's ed. 346–352.)

Admiralty jurisdiction — limiting liability.

1. A Federal district court has jurisdiction of proceedings for the limitation of a shipowner's liability for a personal injury to a passenger, instituted by a petition which alleged that the injury was occasioned without the owner's privity or knowledge, thus bringing the case within

NOTE.—On limitation of liability of shipowners—see note to Lawton v. Comer, 7 L.R.A. 59.

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U. S. Rev. Stat. § 4283, U. S. Comp. Stat. 1901, p. 2943, although the claimant affirms in her answer that such injury was caused by the owner's negligence, and not otherwise, where, instead of insisting that the allegations of the petition be proved, the claimant expressly waived proof of them, thereby consenting that they be taken as true.

[For other cases, see Admiralty, I. f, 10, in Digest Sup. Ct. 1908.]

Shipping — limiting liability of owner — single claim.

2. A single claim against a shipowner, founded upon a personal injury to a passenger, is sufficient to make applicable the provision of U. S. Rev. Stat. § 4283, U. S. Comp. Stat. 1901, p. 2943, that the liability of a shipowner for any damage occasioned without his privity or knowledge shall in no case exceed the value of the vessel, notwithstanding the plurality of claims apparently contemplated by the terms of §§ 4284, 4285 (U. S. Comp. Stat. 1901, pp. 2943, 2944), which require a *pro rata* distribution of the value of the vessel and freight when not sufficient to satisfy all claims, authorize proceedings to obtain the benefit of the statute, make the surrender of the vessel and freight for the benefit of the claimants a sufficient compliance with the statute on the part of the owner, and declare that upon such surrender all claims and proceedings against the owner shall cease.

[For other cases, see Shipping, V. c, 3, in Digest Sup. Ct. 1908.]

[No. 206.]

Submitted January 26, 1914. Decided April 13, 1914.

APPEAL from the District Court of the United States for the Western District of Washington to review a decree in favor of the shipowner in proceedings for the limitation of the shipowner's liability. Affirmed.

The facts are stated in the opinion.

Mr. **M. J. Gordon** submitted the cause for appellant. Messrs. P. C. Sullivan and E. B. Stevens were on the brief:

The claim which the appellant was asserting was one predicated on negligent construction by the owner, as contradistinguished from any negligence arising out of the conduct of the master and the crew.

Richardson v. Harmon, 222 U. S. 96, 56 L. ed. 110, 32 Sup. Ct. Rep. 27.

It will not be gainsaid that the law devolved upon the appellee, as a common carrier of passengers for hire, the duty of providing safely constructed and properly equipped boats engaged in such carriage so far as the exercise of the highest degree of care, prudence, and foresight might contribute toward making them safe.

Philadelphia & R. R. Co. v. Derby, 14 How. 485, 14 L. ed. 509, 10 Am. Neg. Cas. 602; The New World v. King, 16 How. 469, 14 L. ed. 1019, 10 Am. Neg. Cas. 614; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141, 10 Am. Neg. Cas. 593; Stokes v. Saltonstall, 13 Pet. 181, 10 L. ed. 115; New Jersey R. & Transp. Co. v. Pollard, 22 Wall. 341, 22 L. ed. 877, 7 Am. Neg. Cas. 325; Williams v. Spokane Falls & N. R. Co. 39 Wash. 77, 80 Pac. 1100; Firebaugh v. Seattle Electric Co. 40 Wash. 658, 2 L.R.A. (N.S.) 836, 111 Am. St. Rep. 990, 82 Pac. 995, 19 Am. Neg. Rep. 579.

Since the owner had the right to design and construct this vessel according to its own plan, it would seem to follow, as a necessary sequence, that an injury to a passenger which is the result of improper construction must be attributed to the fault of the owner, rather than to that of the master and crew.

Mr. **Alpheus Byers**, submitted the cause for appellee. Mr. Ovid A. Byers was on the brief:

The procedure taken by appellee was that provided by the 54th admiralty rule and outlined by this court in Providence & N. Y. S. S. Co. v. Hill Mfg. Co. 109 U. S. 578, 27 L. ed. 1038, 3 Sup. Ct. Rep. 617, and we think is correct in every particular.

Allegations that the owners themselves were in fault cannot affect the jurisdiction of the court to entertain a cause of limited liability, for that is one of the principal issues to be tried in such cause.

Butler v. Boston & S. S. S. Co. 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612.

The limitation of liability is pre-eminently a question of admiralty jurisdiction, and it has been held practically from the foundation of the government that admiralty jurisdiction can only be exercised under the laws of the United States.

Janney v. Columbian Ins. Co. 10 Wheat. 411, 6 L. ed. 354.

A motion to dismiss ought not to be granted, even if there be but one claim.

The Hoffmans, 171 Fed. 455; The Southside, 155 Fed. 364; Re Starin, 124 Fed. 101; The S. A. McCaulley, 99 Fed. 302; Quinlan v. Pew, 5 C. C. A. 438, 5 U. S. App. 382, 56 Fed. 111; Providence v. Boston & S. S. S. Co. 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612.

Mr. Justice **Van Devanter** delivered the opinion of the court:

While a passenger on the steamboat Fairhaven, plying upon Puget sound, Laura G. White sustained a severe personal injury in being caught or thrown by a rod, called a hog-chain, extending through the deck and connecting with the paddle-wheel. To recover for the injury she brought an action

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against the Island Transportation [348] Company, the owner of the vessel, in the superior court for King county, in the state of Washington, naming $21,350.87 as her damages. The owner then filed a libel or petition in the district court of the United States for that district to secure the benefit of the statute limiting the liability of vessel owners. Rev. Stat. §§ 4283–4285, U. S. Comp. Stat. 1901, pp. 2943, 2944; admiralty rules, 53–57, 210 U. S. 562, Digest Sup. Ct. 1908, vol. 6, p. 33 Appx., 29 Sup. Ct. Rep. XLV. The petition referred to the action in the state court, and alleged that the damage claimant was insisting that her injury was caused by "the carelessness and negligence of the employees" of the owner in handling the vessel, in not furnishing the passengers with safe and proper facilities, and in not informing them of dangerous conditions. It also alleged that the claimant was injured through her own negligence, without any fault in the construction, equipment, management, control, or care of the vessel, and especially without the privity or knowledge of the owner; that there was a valid and meritorious defense to the claim; and that the value of the vessel did not exceed $10,000. The petition, while insisting upon the right of the owner, under admiralty rule 56, to contest its liability and that of the vessel in that proceeding, prayed for an appraisement of the vessel and her pending freight, for an order for the payment of the amount of the appraisement into court, or the giving of a stipulation with sureties for such payment whenever required, for the issuance of a monition in the usual form and upon the usual condition, for an order restraining the prosecution of the action in the state court, for a decree limiting the owner's liability, if any, and for other appropriate relief. Although laying no special basis for it, the petition also, in a general way, indicated that the owner apprehended other claims and actions of a like character, and the prayer for the monition and relief was so framed as to include them. After other steps in the proceeding, which need not be noticed, the claimant answered, alleging, in substance, that her [349] claim was founded solely upon the owner's negligence in that the hog-chain was part of the construction of the vessel, and, with the knowledge and acquiescence of the owner, was negligently left unboxed, uncovered, and unguarded, so that it endangered the passengers when upon the deck, in the place regularly assigned to them, and that her injury was caused by such negligence, and not by any fault of her own. In addition, the answer contained this paragraph: "8th. The respondent further alleges that the facts are such that the petitioner is not entitled to take the benefit of the limited liability acts, and joins issue with the petitioner thereon, and asks that the court determine this question before it proceeds further in the said matter." The claimant also moved to dismiss the proceeding for want of jurisdiction, upon the ground that the pleadings showed that the injury was attributable to negligence of the owner, and that the petition disclosed but one claim and laid no basis for apprehending the existence of others. The motion to dismiss was overruled, and an exception reserved. The claimant elected to stand upon the motion, and refused to move further in the proceeding, whereupon proof of the allegations of the petition "being waived," a final decree was entered for the owner, adjudging that the claimant take nothing by the proceeding. This appeal followed, and a certificate was granted showing the grounds of the motion, the court's ruling, and the exception. See Judicial Code, § 238 [36 Stat. at L. 1157, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 228].

The objection that the court was without jurisdiction, because the pleadings showed that the damage was occasioned by the negligence of the owner, evidently resulted from a misapprehension of what was in the pleadings. So far were they from settling where the fault lay that they put the matter directly in issue, the petition alleging that the injury was occasioned without the owner's privity or knowledge, and the answer affirming that it was caused by the owner's negligence, and not otherwise. If the fact was [350] as alleged in the petition, the case was within the statute, for § 4283 (U. S. Comp. Stat. 1901, p. 2943) declares: "The liability of the owner of any vessel . . . for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending." And while the claimant was at liberty, under admiralty rule 56, to contest the owner's right to a limitation of liability, the decision of the question necessarily rested with the court. Its jurisdiction was not ousted merely because the claimant took issue with what was alleged in the petition. Butler v. Boston & S. S. S. Co. 130 U. S. 527, 552, 553, 32 L. ed. 1017, 1022, 1023, 9 Sup. Ct. Rep. 612. The questions of fact so presented were to be settled by a trial, and this was so whether the facts were jurisdictional or otherwise. But there was no trial. Instead of insisting that the allegations of the petition be proved, the claimant expressly waived proof of them, thereby consenting that they be

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taken as true. As they were plainly to the effect that the injury was without the privity or knowledge of the owner, there was no defect in the jurisdiction at that point.

The objection that the court could not entertain the proceeding because the petition disclosed only one claim arising out of the injury is grounded upon the terms of §§ 4284 and 4285 (U. S. Comp. Stat. 1901, pp. 2943, 2944), which require a *pro rata* distribution of the value of the vessel and freight when not sufficient to satisfy all claims, authorize proceedings to obtain the benefit of the statute, make the surrender of the vessel and freight for the benefit of claimants a sufficient compliance with the statute on the part of the owner, and declare that upon such surrender all claims and proceedings against the owner shall cease. It must be conceded that these sections, if taken alone, give color to the objection, for, with a single exception, their words apparently contemplate a plurality of claims. But to a right understanding [351] of these sections it is essential that they be read with § 4283 (U. S. Comp. Stat. 1901, p. 2943). It contains the fundamental provision on which the others turn. It broadly declares that "the liability . . . for *any* . . . damage . . . occasioned without the privity or knowledge of such owner . . . shall *in no case* exceed" the value of the vessel and freight. The succeeding sections are in the nature of an appendix, and relate to the proceedings by which the first is to be made effective. Therefore, they should be so construed as to bring them into correspondence with it. It was so held in Butler v. Boston & S. S. S. Co. 130 U. S. 550, 551, 1022, 9 Sup. Ct. Rep. 612, where it became necessary to consider another difference in terms between them and it. In that case this court said, quoting from a decision of the supreme court of Rhode Island: "These sections [4284 and 4285], if we look only to the letter, apply only to injuries and losses of property. The question is, therefore, whether we shall by construction bring the three sections into correspondence by confining the scope of § 4283 to injuries and losses of property, or by enlarging the scope of the two other sections so as to include injuries to the person. We think it is more reasonable to suppose that the designation of losses and injuries in §§ 4284 and 4285 (U. S. Comp. Stat. 1901, pp. 2943, 2944) is imperfect, a part being mentioned representatively for the whole, and consequently that those sections were intended to extend to injuries to the person as well as to injuries to property, than it is to suppose that § 4283 was intended to extend only to the latter class of injuries, and was inadvertently couched in words of broader meaning." In the lower Federal courts there has been some contrariety of opinion upon the point now being considered, but the prevailing view has been that due regard for the broad terms and dominant force of § 4283 requires that §§ 4284 and 4285 be construed as authorizing a proceeding for limitation of liability whether there be a plurality of claims or only one. Quinlan v. Pew, 5 C. C. A. 438, 5 U. S. App. 382, 56 Fed. 111, 120; The S. A. McCaulley, 99 [352] Fed. 302, 304; The Hoffmans, 171 Fed. 455, 457; Benedict Admiralty, 4th ed. § 533. In the recent case of Richardson v. Harmon, 222 U. S. 96, 56 L. ed. 110, 32 Sup. Ct. Rep. 27, where there was but a single claim, it was assumed by both court and counsel that a plurality of claims was not essential. We think that is the true view of the statute.

Decree affirmed.

ANTHONY FARRUGIA, Plff. in Err.,
v.
PHILADELPHIA & READING RAILWAY COMPANY.

(See S. C. Reporter's ed. 352-354.)

Error to district court — jurisdiction below.

A judgment of compulsory nonsuit in an action brought in a Federal district court under the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), which rests upon the ground that the evidence produced at the trial of the case does not disclose that plaintiff, at the time of the happening of the accident by which he received the injury complained of, was engaged in interstate commerce, does not present a question as to the power of that court as a Federal court to hear and determine the case, which is essential under the Judicial Code, § 238 (36 Stat. at L. 1157, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 228), to sustain a direct writ of error from the Federal Supreme Court, sued out on the ground that the jurisdiction below was in issue.

[For other cases, see Appeal and Error, 895-914, in Digest Sup. Ct. 1908.]

[No. 823.]

Argued March 2, 1914. Decided April 13, 1914.

IN ERROR to the District Court of the United States for the Eastern District

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NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

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of Pennsylvania to review a judgment of compulsory nonsuit in an action based upon the Federal employers' liability act. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Mr. George Demming argued the cause and filed a brief for plaintiff in error.

Mr. William Clarke Mason argued the cause, and, with Mr. Charles Heebner, filed a brief for defendant in error.

Mr. Justice Van Devanter delivered the opinion of the court:

This was an action against a railway company to recover for personal injuries. The right of action was predicated upon the Federal employers' liability act of April 22, 1908, 35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322, as amended April 5, 1910, 36 Stat. at L. 291, chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1324, and it was alleged that the injuries were sustained while the defendant was engaged, and while the plaintiff was employed by it, in interstate commerce. There was a plea of not guilty, and a trial resulted in a judgment of compulsory nonsuit. The case is here upon a direct writ of error based upon a certificate that the court's decision was given upon a jurisdictional ground; namely, that "the evidence produced at the trial of the case did not disclose that plaintiff, at the time of the happening of the accident by which he received the injuries complained of, was engaged in interstate commerce."

Although counsel have presented the case as if it were properly here, it is manifest that it is not. The clause in § 238 of the Judicial Code [36 Stat. at L. 1157, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 228], providing for a direct writ of error "in any case in which the jurisdiction of the court is in issue," refers, as we have repeatedly held, to cases in which the power of the court, as a Federal court, to hear and determine the cause, is in controversy. Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175, 178, 55 L. ed. 163, 164, 31 Sup. Ct. Rep. 185; United States v. Congress Constr. Co. 222 U. S. 199, 56 L. ed. 163, 32 Sup. Ct. Rep. 44; R. J. Darnell v. Illinois C. R. Co. 225 U. S. 243, 56 L. ed. 1072, 32 Sup. Ct. Rep. 760. No such issue is here disclosed. The power of the court, as a Federal court, to hear and determine the case, was not questioned. Nor did the court hold that it was without jurisdiction [354] in that sense. On the contrary, it proceeded to a hearing and decided that the plaintiff could not recover under the Federal act because one element of his asserted cause of action was without any evidence to sustain it. Had the action been brought in a state court, as it could have been, the same question would have arisen; and had the evidence been similarly insufficient, a like decision must have ensued. We say the action could have been brought in a state court, because § 6 of the Federal act declares: "The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States." And we say the result must have been the same in a state court upon similar evidence, because the right of recovery given by the act (§ 1) is restricted to injuries suffered while the employee is employed in interstate commerce.

It follows that there was no basis for the direct writ of error. If a review of the decision was desired it should have been sought in the Circuit Court of Appeals.

Writ of error dismissed.

TENNESSEE COAL, IRON, & RAILROAD COMPANY, Plff. in Err.,
v.
WILEY GEORGE.

(See S. C. Reporter's ed. 354–361.)

Statutes — full faith and credit — venue of transitory action.

The enforcement by the Georgia courts of the cause of action given by Ala. Code, § 3910, to a servant against the master, for injuries occasioned by defective machinery, does not deny full faith and credit to the provision of § 6115 of that Code, that "all actions under § 3910 must be brought in a court of competent jurisdiction within the state of Alabama, and not elsewhere."

[For other cases, see Statutes, II. a, in Digest Sup. Ct. 1913 Supp.]

[No. 299.]

Argued March 17, 1914. Decided April 13, 1914.

IN ERROR to the Court of Appeals of the State of Georgia to review a judgment which affirmed a judgment of the City Court of Atlanta, in that State, in favor of plaintiff in an action founded on a provision of the Alabama Code giving a right of action to a servant against the master for injuries occasioned by defective machinery. Affirmed.

See same case below, 11 Ga. App. 221, 75 S. E. 567.

The facts are stated in the opinion.

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Mr. Alexander W. Smith argued the cause and filed a brief for plaintiff in error:

The condition, or limitation, put upon a right of action created by statute, and not existing at common law, inheres in the right itself, and follows it into other jurisdictions.

Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 490, 56 L. ed. 516, 522, 32 Sup. Ct. Rep. 205; The Harrisburg, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140; Davis v. Mills, 194 U. S. 451, 454, 48 L. ed. 1067, 1070, 24 Sup. Ct. Rep. 692; Munos v. Southern P. Co. 2 C. C. A. 163, 2 U. S. App. 222, 51 Fed. 188; Stern v. LaCompagnie General Transatlantique, 110 Fed. 996; The Edna, 185 Fed. 206; United States use of Gibson Lumber Co. v. Boomer, 106 C. C. A. 164, 183 Fed. 726; Coyne v. Southern P. R. Co. 155 Fed. 683.

Such a condition, or limitation, need not be contained in the same statute. It operates the same way if it be specially attached to such a statutory right of action subsequently and in a different statute.

Davis v. Mills, 194 U. S. 451, 454, 48 L. ed. 1067, 1070, 24 Sup. Ct. Rep. 692.

The courts of the United States take judicial notice of the public laws of each state of the Union.

Mills v. Green, 159 U. S. 651, 657, 40 L. ed. 293, 295, 16 Sup. Ct. Rep. 132.

Where a limitation to local courts was affixed to a cause of action existing at the common law, and independently of the statute affixing it, the limitation was disregarded in Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397. A well defined distinction exists between cases based on common-law liability and those depending on statutory rules of liability.

Charleston & W. C. R. Co. v. Miller, 113 Ga. 15, 38 S. E. 338; Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 382, 28 L. ed. 787, 789, 5 Sup. Ct. Rep. 184; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 378, 379, 37 L. ed. 772, 777, 778, 13 Sup. Ct. Rep. 914; Missouri P. R. Co. v. Castle, 224 U. S. 541, 56 L. ed. 875, 32 Sup. Ct. Rep. 606; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 537, 52 L. ed. 297, 326, 28 Sup. Ct. Rep. 141; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 49, 56 L. ed. 327, 345, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Mobile & B. R. Co. v. Holborn, 84 Ala. 133, 4 So. 146, 13 Am. Neg. Cas. 125.

"Interstate venue," or venue as between different countries, is jurisdictional. "Municipal venue," or venue as between different places in the same jurisdiction, as a rule has to do with procedure merely.

Ellenwood v. Marietta Chair Co. 158 U. S. 105, 108, 39 L. ed. 913, 914, 15 Sup. Ct. Rep. 771; Companhia de Mocambique v. British South Africa Co. [1892] 2 Q. B. 358, 61 L. J. Q. B. N. S. 663, 66 L. T. N. S. 773, 40 Week. Rep. 650.

There is a profound distinction between the existence of jurisdiction in a given court and its proper exercise in a given case therein.

Smith v. McKay, 161 U. S. 355, 358, 40 L. ed. 731, 732, 16 Sup. Ct. Rep. 490; Louisville Trust Co. v. Knott, 191 U. S. 225, 233, 48 L. ed. 159, 162, 24 Sup. Ct. Rep. 119; United States v. Larkin, 208 U. S. 333, 338, 52 L. ed. 517, 519, 28 Sup. Ct. Rep. 417; Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175, 55 L. ed. 163, 31 Sup. Ct. Rep. 185; Van Fleet, Collateral Attack, chap. 4.

The contention here does not militate against the soundness of the general doctrine established in the following cases, that whenever a right of action has become fixed and a legal liability incurred, that right of action may be pursued and that liability enforced in any court of competent jurisdiction. This is so because in not one of these cases was the right of action restricted or limited by the law which created it, and that restriction disregarded.

Dennick v. Central R. Co. 103 U. S. 11, 18, 26 L. ed. 439, 441; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477.

The principle involved is closely analogous to that found in the decisions relative to the enforcement of "death statutes" enacted in one state and invoked in another. All restrictions and limitations therein found are enforced everywhere.

Slater v. Mexico Nat. R. Co. 194 U. S. 120, 126, 48 L. ed. 900, 902, 24 Sup. Ct. Rep. 581; Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34.

So also, it is analogous to the application of statutes of limitations of the *locus* in the forum.

Davis v. Mills, 194 U. S. 451, 457, 48 L. ed. 1067, 1071, 24 Sup. Ct. Rep. 692; Selma, R. & D. R. Co. v. Lacey, 49 Ga. 106.

So also, it is analogous to the question of statutory venue of suits under the act

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of Congress authorizing actions on contractor's bonds in government work.

Davidson Bros. Marble Co. v. United States, 213 U. S. 10, 16, 53 L. ed. 675, 677, 29 Sup. Ct. Rep. 324; United States use of Gibson Lumber Co. v. Boomer, 106 C. C. A. 164, 183 Fed. 726; United States v. Congress Constr. Co. 222 U. S. 199, 56 L. ed. 163, 32 Sup. Ct. Rep. 44.

Mr. **Reuben R. Arnold** argued the cause and filed a brief for defendant in error:

The decision of the United States Supreme Court in the case of Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397, which was a decision upon a similar statute of New Mexico, is controlling.

There are many cases where the *forum*, in enforcing the law of another state, has enforced the substantive rights created by such state through statute, and has ignored attempted conditions imposed by the *lex loci* which deal only with the remedy.

Chicago & N. W. R. Co. v. Whitton, 13 Wall. 270, 20 L. ed. 571; Husted v. Missouri P. R. Co. 143 Mo. App. 623, 128 S. W. 282; Philes v. Missouri P. R. Co. 141 Mo. App. 561, 125 S. W. 555.

In the following cases the right of action was sustained in transitory actions in one state under the laws of another state, and various provisions of the *lex loci* regulating the remedy, which were claimed to be a part of the right itself, were disregarded.

Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; Hollenbach v. Elmore & H. Contracting Co. 174 Fed. 845; Southern R. Co. v. Decker, 5 Ga. App. 21, 62 S. E. 678; Southern R. Co. v. Robertson, 7 Ga. App. 154, 66 S. E. 535; Holmes v. Barclay, 4 La. Ann. 63.

It is a universal rule that the *lex loci* relating to remedy, even though those laws may have been parcel of the same general enactment in which the rights were created, do not apply to the *forum*, and it is clear that the Federal Constitution and act of Congress upon the full faith and credit proposition are not in conflict with the general current of authority.

Minor, Confl. L. § 192, p. 476; Storey, Confl. L. §§ 539, 540, 556, 558; Stevens v. Brown, 20 W. Va. 450; Boston & M. R. Co. v. Hurd, 56 L.R.A. 196, note; Herrick v. Minneapolis & St. L. R. Co. 31 Minn. 11, 47 Am. Rep. 772, 16 N. W. 413.

It would be impossible to transplant all the remedies provided by the *lex loci* to the *lex fori* and make them parts and conditions of the rights granted. The jurisdiction and powers of the courts of the several states vary, and each state must apply its own machinery to rights granted in another state, as the machinery cannot be transferred. This applies to the forms of action, the process, the sufficiency of the pleadings, etc.

22 Am. & Eng. Enc. Law pp. 1383, 1384; 4 Sutherland, Damages, § 4280.

[358] Mr. Justice **Lamar** delivered the opinion of the court:

Wiley George, the defendant in error, was an engineer employed by the Tennessee Coal, Iron, & Railroad Company at its steel plant in Jefferson county, Alabama. While he was under a locomotive repairing the brakes, a defective throttle allowed steam to leak into the cylinder, causing the engine to move forward automatically, in consequence of which he was seriously injured. He brought suit by attachment, in the city court of Atlanta, Georgia, founding his action on § 3910 of the Alabama Code, which makes the master liable to the employee when the injury is "caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer."

The defendant filed a plea in abatement in which it was set out that § 6115 of that Code also provided that "all actions under § 3910 must be brought in a court of competent jurisdiction within the state of Alabama, and not elsewhere." The defendant thereupon prayed that the action be abated because "to continue said case of said statutory cause of action given by the statutes of Alabama, and restricted by said statutes to the courts of Alabama, would be a denial so far as the rights of this defendant are concerned of full faith and credit to said public acts of the state of Alabama in the state of Georgia, contrary to the provisions of art. 4, § 1 of the Constitution of the United States." A demurrer to the plea in abatement was sustained and the judgment for the plaintiff thereafter entered was affirmed by the court of appeals. The case was then brought to this court.

The record raises the single question as to whether the full faith and credit clause of the Constitution prohibited the courts of Georgia and enforcing a cause of action [359] given by the Alabama Code, to the servant against the master, for injuries occasioned by defective machinery, when another section of the same Code provided that suits to enforce such liability "must be brought in a court of competent jurisdiction within the state of Alabama, *and not elsewhere*."

There are many cases where right and remedy are so united that the right cannot be enforced except in the manner and before the tribunal designated by the act. For the

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rule is well settled that "where the provision for the liability is coupled with a provision for the special remedy, that remedy, that alone, must be employed." Pollard v. Bailey, 20 Wall. 527, 22 L. ed. 378; Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 490, 56 L. ed. 522, 32 Sup. Ct. Rep. 205; Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; Fourth Nat. Bank v. Francklyn, 120 U. S. 753, 30 L. ed. 828, 7 Sup. Ct. Rep. 757.

But that rule has no application to a case arising under the Alabama Code relating to suits for injuries caused by defective machinery. For, whether the statute be treated as prohibiting certain defenses, as removing common-law restrictions, or as imposing upon the master a new and larger liability, it is in either event evident that the place of bringing the suit is not part of the cause of action,—the right and the remedy are not so inseparably united as to make the right dependent upon its being enforced in a particular tribunal. The cause of action is transitory, and like any other transitory action can be enforced "in any court of competent jurisdiction within the state of Alabama . . ." But the owner of the defective machinery causing the injury may have removed from the state, and it would be a deprivation of a fixed right if the plaintiff could not sue the defendant in Alabama because he had left the state, nor sue him where the defendant or his property could be found because the statute did not permit a suit elsewhere than in Alabama. The injured plaintiff may likewise have moved from Alabama, and for that, or other, reason may have found it to his interest to [360] bring suit by attachment or *in personam* in a state other than where the injury was inflicted.

The courts of the sister state, trying the case, would be bound to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action, or which name conditions on which the right to sue depend. But venue is no part of the right; and a state cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction. That jurisdiction is to be determined by the law of the court's creation, and cannot be defeated by the extraterritorial operation of a statute of another state, even though it created the right of action.

The case here is controlled by the decision of this court in Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 70, 53 L. ed. 695, 702, 29 Sup. Ct. Rep. 397, where the New Mexico statute, giving a right of action for personal injuries, and providing that suits should be brought after certain form of notice in a particular district, was preceded by the recital that "it has become customary for persons claiming damages for personal injuries received in this territory to institute and maintain suits for the recovery thereof in other states and territories, to the increased cost and annoyance and manifest injury and oppression of the business interests of this territory and the derogation of the dignity of the courts thereof." Despite this statement of the public policy of the territory, the judgment obtained by the plaintiff in Texas was affirmed by this court in an opinion wherein it was said that where an action is brought in "another jurisdiction, based upon common-law principles, although having certain statutory restrictions, such as are found in this [territorial] act, as to the making of an affidavit, and limiting the time of prosecuting the suit, full faith and credit is given to the law when the recovery is permitted, subject to the restrictions upon the right of action imposed in the territory enacting [361] the statute. . . . When it is shown that the court in the other jurisdiction observed such conditions, and that a recovery was permitted after such conditions had been complied with, the jurisdiction thus invoked is not defeated because of the provision of the statute" requiring the suit to be brought in the district where the plaintiff resides or where the defendant, if a corporation, has its principal place of business.

It is claimed, however, that the decision in the Sowers Case is not in point because the plaintiff was there seeking to enforce a common-law liability, while here he is asserting a new and statutory cause of action. But that distinction marks no difference between the two cases because in New Mexico common-law liability is statutory liability,—the adopting statute (Comp. Laws, § 1823) providing that "the common law, as recognized in the United States of America, shall be the rule of practice and decision."

The decision in the Sowers Case, however, was not put upon the fact that the suit was based on a common-law liability. The court there announced the general rule that a transitory cause of action can be maintained in another state even though the statute creating the cause of action provides that the action must be brought in local domestic courts.

In the present case the Georgia court gave full faith and credit to the Alabama act and its judgment is affirmed.

Mr. Justice Holmes dissents.

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[362] CARONDELET CANAL & NAVIGATION COMPANY, Plff. in Err.,
v.
STATE OF LOUISIANA.

(See S. C. Reporter's ed. 362–388.)

Error to state court — final judgment.

1. A judgment of a state court ordering the delivery to the state by a canal company of the waterway in its entirety, and all appurtenant property and improvements, including the roadways upon the sides, which comprise practically all the property sued for, such judgment involving and disposing of the Federal right asserted by the canal company, possesses the requisite finality to sustain a writ of error from the Federal Supreme Court, although there is reserved for further adjudication a small piece of ground as to which there was a dispute as to whether it was appurtenant to the canal, and although an accounting of certain receipts and disbursements is ordered.

[For other cases, see Appeal and Error, I. d, 24, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — impairing contract obligations.

2. A decision of the highest state court that La. Acts 1858, No. 74, on which a canal company bases its contract right to compensation upon the reverting of its property to the state, gives the company no such right, is reviewable in the Federal Supreme Court as presenting the question of the impairment of contract obligations, although the state court does not refer to any subsequent legislation, where, by La. Acts 1906, No. 161, a board of control of the canal was created which, through the affirmative and repealing provisions of such statute, was to be the instrument and moving agency by which the state was to exercise its asserted right to control and take possession of the canal company's property without making compensation.

[For other cases, see Appeal and Error, 1376–1392, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — right to compensation upon reversion to state.

3. A contract right to the payment of compensation as a condition precedent to the reversion to the state of the property rights of a canal company acquired under La. Acts 1852, No. 309, 1857, No. 160, 1858, No. 74, was given by § 4 of the latter act, which provides that "the said company shall enjoy corporate succession during fifty years from this date, after which time it may revert to the state upon due compensation being made," the pronoun "it" referring to the company, and not to the railroad which the company was authorized by § 2 to construct, but which in fact was never built.

[For other cases, see Constitutional Law, IV. g, 2, c, in Digest Sup. Ct. 1908.]

[No. 78.]

Argued March 16 and 17, 1914. Decided April 20, 1914.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which, reversing a judgment of the Civil District Court of the Parish of Orleans, in that state, ordered the delivery to the state by a canal company of its canal and waterway, together with the appurtenant property and improvements. Reversed and remanded for further proceedings.

See same case below, 129 La. 279, 56 So. 137.

The facts are stated in the opinion.

Mr. Edgar H. Farrar argued the cause, and, with Messrs. Benjamin T. Waldo and W. C. Dufour, filed a brief for plaintiff in error:

This court will determine for itself what the contract claimed to be violated was.

Douglas v. Kentucky, 168 U. S. 502, 42 L. ed. 557, 18 Sup. Ct. Rep. 199; McGahey v. Virginia, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972; McCullough v. Virginia, 172 U. S. 110, 43 L. ed. 385, 19 Sup. Ct. Rep. 134; Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 467, 50 L. ed. 1110, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253.

This court will review the findings of fact by a state court where a conclusion of law as to a Federal right and the finding of fact are so intermingled as to make it necessary to analyze and dissect the facts for the purpose of passing on the Federal question.

Creswill v. Grand Lodge, K. P. 225 U. S.

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

As to what judgments of state courts are final for purposes of review in Federal Supreme Court—see note to Schlosser v. Hemphill, 49 L. ed. U. S. 1001.

On error to state courts in cases presenting questions of impairment of contract obligations—see note to Osborne v. Clark, 51 L. ed. U. S. 619.

Generally, as to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Henderson v. State Soldiers & S. Monument Comrs. 13 L.R.A. 169; and Fletcher v. Peck, 3 L. ed. U. S. 162.

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261, 56 L. ed. 1080, 32 Sup. Ct. Rep. 822; Wood v. Chesborough, 228 U. S. 678, 57 L. ed. 1021, 33 Sup. Ct. Rep. 706.

The necessary corollary is that when the claim is that claimant has been deprived of property without due process of law, this court will find for itself what the claimant's property rights were, and how he has been deprived of them.

A comparison of La. Acts 1857, No. 160, § 26, and La. Acts 1858, No. 74, § 4, demonstrates that they are irreconcilably repugnant, and that the provisions of the earlier section are repealed by the later provisions.

Henrietta Min. & Mill. Co. v. Gardner, 173 U. S. 123, 43 L. ed. 637, 19 Sup. Ct. Rep. 327; United States v. Tynen, 11 Wall. 92, 20 L. ed. 154.

Even if the tenure by which the company held the waterway sued for was a lease, the state, as lessor, could not take the property at the end of the lease and keep the improvements made by the lessee, without making compensation therefor.

Ross v. Zuntz, 36 La. Ann. 888.

The grant of the territorial council to the Orleans Navigation Company was valid, and it would have been valid even if made by the state.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622.

To hold that the defendant cannot at this stage of the case, prosecute its writ of error to this court, would wholly defeat the appellate jurisdiction of this court under the Constitution and laws of the United States.

Forgay v. Conrad, 6 How. 201, 12 L. ed. 404; Thomson v. Dean (Dean v. Nelson) 7 Wall. 342, 346, 19 L. ed. 94, 95; French v. Shoemaker, 12 Wall. 86, 98, 20 L. ed. 270. 271; Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; Grant v. Phœnix Mut. L. Ins. Co. 106 U. S. 429, 27 L. ed. 237, 1 Sup. Ct. Rep. 414; Winthrop Iron Co. v. Meeker, 109 U. S. 180, 27 L. ed. 898, 3 Sup. Ct. Rep. 111; St. Louis, I. M. & S. R. Co. v. Southern Exp. Co. 108 U. S. 24, 28, 27 L. ed. 638, 639, 2 Sup. Ct. Rep. 6; Missouri, K. & T. R. Co. v. Dinsmore, 108 U. S. 30, 27 L. ed. 640, 2 Sup. Ct. Rep. 9; Keystone Manganese & Iron Co. v. Martin, 132 U. S. 91, 33 L. ed. 275, 10 Sup. Ct. Rep. 32; Bank of Lewisburg v. Sheffey, 140 U. S. 452, 35 L. ed. 496, 11 Sup. Ct. Rep. 755.

The fact that the state court did not pass on the Federal rights specially set up of record does not eliminate those questions from the case. This court will decide the Federal questions if the necessary effect of the judgment of the state court is to deny the Federal right so set up, and which, if recognized and enforced, would require a different judgment.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

A judgment of a state court, even if it be authorized by a statute, whereby private property is taken for the state, or under its direction, for the public use, without compensation, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Fayerweather v. Ritch, 195 U. S. 276, 49 L. ed. 193, 25 Sup. Ct. Rep. 58; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 202, 50 L. ed. 152, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493.

The same principle applies to a statute of a state.

Mr. **Ruffin G. Pleasant**, Attorney General of Louisiana, argued the cause, and, with Mr. Daniel Wendling, filed a brief for defendant in error:

There is a want of jurisdiction because of nonfinality of judgment.

Haseltine v. Central Nat. Bank, 183 U. S. 131, 46 L. ed. 117, 22 Sup. Ct. Rep. 49; Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 57 L. ed. 138, 33 Sup. Ct. Rep. 78; Missouri & K. I. R. Co. v. Olathe, 222 U. S. 185, 56 L. ed. 155, 32 Sup. Ct. Rep. 46; Norfolk & S. Turnp. Co. v. Virginia, 225 U. S. 264, 56 L. ed. 1082, 32 Sup. Ct. Rep. 828; Schlosser v. Hemphill, 198 U. S. 175, 49 L. ed. 1002, 25 Sup. Ct. Rep. 654.

No Federal question is involved.

Beaupre v. Noyes, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; Cross Lake Shooting & Fishing Club v. Louisiana, 224 U. S. 632, 56 L. ed. 924, 32 Sup. Ct. Rep. 577; Central Land Co. v. Laidley, 159 U. S. 110, 40 L. ed. 94, 16 Sup. Ct. Rep. 80; Chappell v. Bradshaw, 128 U. S. 132, 32 L. ed. 369, 9 Sup. Ct. Rep. 40; Clark v. Pennsylvania, 128 U. S. 397, 32 L. ed. 487, 9 Sup. Ct. Rep. 113; Commercial Bank v. Buckingham, 5 How. 317, 12 L. ed. 169; Des Moines v. Des Moines City R. Co. 214 U. S. 179, 53 L. ed. 958, 29 Sup. Ct. Rep. 553; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 599, 57 L. ed. 983, 33 Sup. Ct. Rep. 609; De Saussure v. Gaillard, 127 U. S. 222, 32 L. ed. 127, 8 Sup. Ct. Rep. 1053; Deming v. Carlisle Packing Co. 226 U. S. 102, 57 L. ed. 140, 33 Sup. Ct. Rep. 80; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353;

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Kennebec & P. R. Co. v. Portland & K. R. Co. 14 Wall. 23, 20 L. ed. 850; Knox v. Exchange Bank, 12 Wall. 379, 20 L. ed. 414; Lehigh Water Co. v. Easton, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 30, 31 L. ed. 612, 8 Sup. Ct. Rep. 741; Preston v. Chicago, 226 U. S. 447, 57 L. ed. 293, 33 Sup. Ct. Rep. 177; Ross v. Oregon, 227 U. S. 150, 57 L. ed. 458, 33 Sup. Ct. Rep. 220; Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep 21, 22; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 149, 45 L. ed. 792, 21 Sup. Ct. Rep. 575; Turner v. Wilkes County, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464; Wood v. Chesborough, 228 U. S. 672, 57 L. ed. 1018, 33 Sup. Ct. Rep. 706; Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 41, 45 L. ed. 415, 21 Sup. Ct. Rep. 256.

The judgment may be sustained without reference to the alleged Federal question, or giving effect to subsequent legislation.

Arkansas Southern R. Co. v. German Nat. Bank, 207 U. S. 270, 52 L. ed. 201, 28 Sup. Ct. Rep. 78; Beaupre v. Noyes, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 326, 57 L. ed. 857, 33 Sup. Ct. Rep. 510; Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co. 172 U. S. 471, 43 L. ed. 519, 19 Sup. Ct. Rep. 265; Chesapeake & O. R. Co. v. McDonald, 214 U. S. 193, 53 L. ed. 964, 29 Sup. Ct. Rep. 546; Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; Delaware City, S. & P. S. B. Nav. Co. v. Reybold, 142 U. S. 636, 35 L. ed. 1141, 12 Sup. Ct. Rep. 290; De Saussure v. Gaillard, 127 U. S. 222, 32 L. ed. 127, 8 Sup. Ct. Rep. 1053; Fowler v. Lamson, 164 U. S. 252, 41 L. ed. 424, 17 Sup. Ct. Rep. 112; Fisher v. New Orleans, 218 U. S. 439, 54 L. ed. 1099, 31 Sup. Ct. Rep. 57; Hammond v. Johnston, 142 U. S. 73, 35 L. ed. 941, 12 Sup. Ct. Rep. 141; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; Jenkins v. Loewenthal, 110 U. S. 222, 28 L. ed. 129, 3 Sup. Ct. Rep. 638; Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; Miller v. Cornwall R. Co. 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; Mobile, J. & K. C. R. Co. v. Mississippi, 210 U. S. 187, 52 L. ed. 1016, 28 Sup. Ct. Rep. 650; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; California Powder Works v. Davis, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; Preston v. Chicago, 226 U. S. 447, 57 L. ed. 293, 33 Sup. Ct. Rep. 177; Rutland R. Co. v. Central Vermont R. Co. 159 U. S. 630, 40 L. ed. 284, 16 Sup. Ct. Rep. 113; Snell v. Chicago, 152 U. S. 191, 38 L. ed. 408, 14 Sup. Ct. Rep. 489; Simmerman v. Nebraska, 116 U. S. 54, 29 L. ed. 535, 6 Sup. Ct. Rep. 333; Tyler v. Cass County, 142 U. S. 288, 35 L. ed. 1016, 12 Sup. Ct. Rep. 225; Wood v. Chesborough, 228 U. S. 672, 57 L. ed. 1018, 33 Sup. Ct. Rep. 706; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 35 L. ed. 193, 11 Sup. Ct. Rep. 528.

The validity of Federal grants was not involved or passed on.

Chever v. Horner, 142 U. S. 122, 35 L. ed. 959, 12 Sup. Ct. Rep. 184; De Lamar's Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715; Florida C. & P. R. Co. v. Bell, 176 U. S. 328, 44 L. ed. 490, 20 Sup. Ct. Rep. 399; Gill v. Oliver, 11 How. 529, 13 L. ed. 799; Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; California ex rel. Hastings v. Jackson, 112 U. S. 233, 28 L. ed. 712, 5 Sup. Ct. Rep. 113; McStay v. Friedman, 92 U. S. 723, 23 L. ed. 767; Murray v. Bluebird Min. Co. 45 Fed. 386; Miller v. Swann (Miller v. Anderson) 150 U. S. 132, 37 L. ed. 1028, 14 Sup. Ct. Rep. 52; Maney v. Porter, 4 How. 55, 11 L. ed. 873; Romie v. Casanova, 91 U. S. 379, 23 L. ed. 374; Theurkauf v. Ireland, 27 Fed. 769; Mace v. Merrill, 110 U. S. 581, 30 L. ed. 503, 7 Sup. Ct. Rep. 330.

If the canal company has not had due process of law in the state court, then it is difficult to know what that term means.

Bergemann v. Backer, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727; Central Land Co. v. Laidley, 159 U. S. 110, 40 L. ed. 94, 16 Sup. Ct. Rep. 80; Head v. Amoskeag Mfg. Co. 113 U. S. 26, 28 L. ed. 895, 5 Sup. Ct. Rep. 441; Londoner v. Denver, 210 U. S. 379, 52 L. ed. 1109, 28 Sup. Ct. Rep. 708; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; Standard Oil Co. v. Missouri, 224 U. S. 270, 56 L. ed. 760, 32 Sup. Ct. Rep. 406, Ann. Cas. 1913D, 936; Twining v. New Jersey, 211 U. S. 110, 53 L. ed. 110, 29 Sup. Ct. Rep. 14; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; West v. Louisiana, 194 U. S. 261, 48 L. ed. 968, 24 Sup. Ct. Rep. 650.

The supreme court of Louisiana has correctly construed these statutes.

Barney v. Keokuk, 94 U. S. 338, 24 L. ed.

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228; 2 Baudry, Lacantinerie, Du Contrat de Louage, p. 1, No. 1395; Blair. v. Chicago, 201 U. S. 471, 50 L. ed. 830, 26 Sup. Ct. Rep. 427; Carondelet Canal & Nav. Co. v. Lugger 1st Chevere Tedesco, 37 La. Ann. 102; Carondelet Canal & Nav. Co. v. New Orleans, 38 La. Ann. 309; Carondelet Canal & Nav. Co. v. New Orleans, 44 La. Ann. 396, 10 So. 871; Cleveland v. Cleveland Electric R. Co. 204 U. S. 116, 51 L. ed. 399, 27 Sup. Ct. Rep. 202; New Orleans v. Carondelet Canal & Nav. Co. 36 La. Ann. 397; Dubuque & P. R. Co. v. Litchfield, 23 How. 66, 16 L. ed. 500; Elmendorf v. Taylor, 10 Wheat. 152, 6 L. ed. 289; Enfield v. Jordan, 119 U. S. 680, 30 L. ed. 523, 7 Sup. Ct. Rep. 358; Illinois C. R. Co. v. Chicago, 176 U. S. 659, 44 L. ed. 627, 20 Sup. Ct. Rep. 509; Maxwell Land-Grant Case, 121 U. S. 325, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015; Missouri, K. & T. R. Co. v. McCann, 174 U. S. 586, 43 L. ed. 1096, 19 Sup. Ct. Rep. 755; New Orleans Canal & Nav. Co. v. New Orleans, 12 La. Ann. 365; Orleans Nav. Co. v. New Orleans, 2 Mart. (La.) 10, 214, 1 Mart. (La.) 269; Rowan v. Runnels, 5 How. 139, 12 L. ed. 87; Ridings v. Johnson, 128 U. S. 212, 32 L. ed. 401, 9 Sup. Ct. Rep. 72; Shively v. Bowlby, 152 U. S. 57, 38 L. ed. 352, 14 Sup. Ct. Rep. 548; Speers v. Flack, 34 Mo. 101, 84 Am. Dec. 74; State v. Orleans Nav. Co. 11 Mart. (La.) 107, 7 La. Ann. 679; Stein v. Bienville Water Supply Co. 141 U. S. 80, 35 L. ed. 627, 11 Sup. Ct. Rep. 892; Tallman v. Coffin, 4 N. Y. 134; Williams v. Eggleston, 170 U. S. 311, 42 L. ed. 1049, 18 Sup. Ct. Rep. 617.

Mr. Justice McKenna delivered the opinion of the court:

The state of Louisiana brought this suit in the civil district court of the parish of Orleans, state of Louisiana, against the Carondelet Canal & Navigation Company of New Orleans (herein called the canal company) for the recovery from the company, through its liquidators, of the Carondelet canal, Bayou St. John, and Old Basin, a waterway used by vessels for the transportation of freight and merchandise, and for its improvements and appurtenant properties.

The suit was dismissed by the civil district court as premature. On appeal to the supreme court of the state, that court reversed the judgment dismissing the suit, and ordered that a judgment be entered against the canal company, in liquidation, ordering the delivery to the state of the canal and waterway in their entirety, as they stood on March 10, 1908, together with all the property and improvements appurtenant thereto, including the roadway or roadways upon the side or sides of the canal.

The claims of the state to a triangular strip of ground hereafter mentioned, or to the proceeds thereof, or to any other property, movable or immovable, not appurtenant to the waterway and roadways, were reserved for further adjudication in the proceedings. And an accounting was ordered of the receipts and disbursements in the management of the property since March 10, 1908, and the case was remanded to the district court for further proceedings on all questions reserved as above stated, and "that the right of the plaintiff to obtain judgment for such [371] amount as may be found due upon defendant's accounting, and to take such further proceedings and obtain such further orders as may be required for the execution of this judgment, be reserved." 129 La. 279, 56 So. 137.

We refer to the opinion of the supreme court for the history of the canal, which, while interesting, is quite long. There is no question of the source and origin of the rights of the canal company; no question of the right of the state to take possession of the canal and its appurtenant properties upon complying with the contract alleged to exist between the state and the company. There is a question as to the extent of the rights of the company under the contract, and for what property the state must make compensation, and the factors in the solution of the question require quite an extended discussion.

We are met, however, at the outset, by a motion to dismiss, on the ground that the judgment is not final.

The judgment disposes of and orders the delivery of practically all of the property sued for: (1) The waterway in its entirety; (2) all the property and improvements appurtenant to it, including the roadway or roadways upon the sides of it. It reserves property not appurtenant and an accounting of certain disbursements. The reservation concerns only a small piece of ground upon which there was a dispute as to whether it was appurtenant to the canal,—a question the court apparently could not determine, as it was a question of fact. All else will be taken from the canal company and delivered to the state. That is, all was decreed that it was the purpose of the suit to have decreed, and which not only constituted its success, but which involved and disposed of the Federal right asserted by the canal company. The judgment, therefore, has a substantial finality. Is it not as well in form?

Cases are cited which, the state contends, require a negative answer to the question. They are distinguishable from that at bar.

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[372] In Haseltine v. Central Nat. Bank, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49, the action was against a national bank to recover under § 5198 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3493), for usurious interest alleged to have been charged. There was judgment in favor of the plantiff in the action. It was reversed by the supreme court of the state on the ground that he had neither paid nor tendered the principal sum, and the case was remanded for further proceedings. The case, therefore, was remanded for a new trial in its entirety. It was ruled that the face of the judgment is the test of its finality, and that this court, cannot be called on to inquire whether, when a cause is sent back, the defeated party might or might not make a better case.

This rule was again expressed in Schlosser v. Hemphill, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654, in a case where a right to amend the pleadings existed and a new case could have been made.

In Missouri & K. Interurban R. Co. v. Olathe, 222 U. S. 185, 56 L. ed. 155, 32 Sup. Ct. Rep. 46, a demurrer was sustained to the plaintiff's pleadings in the trial court and the supreme court, but the latter court did not direct a dismissal of the suit, but left it stand in the court below. We held that the judgment sought to be reviewed was not one which finally determined the cause, and that we were without jurisdiction.

In Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 57 L. ed. 138, 33 Sup. Ct. Rep. 78, we repeated the test of finality to be the face of the judgment, and expressed the reason to be that this court cannot be called upon to review an action of the state court piecemeal. The language was appropriate to the condition presented by the case, for the pleading in the case was left open for amendment.

In the case at bar there is distinct and explicit finality, and the further proceedings are directed to apply only to the "questions reserved." And it is to be assumed this was purposely done to give finality to the questions not reserved, so that the decree could be immediately executed [373] upon the property involved requiring it to be delivered into the possession and administration of the state. This disposition, we can easily conceive, the court considered necessary to the rights which the state was adjudged to have, and the remedy commensurate with them. The decree, therefore, had a definiteness which did not exist in the cited cases, the Federal rights asserted by the canal company were injuriously disposed of. The ground of dismissal of the writ of error based on the judgment is not, therefore, sustained.

There are other grounds urged, to wit, that no Federal question is shown, and that, besides, the decision of the court below was rested on a non-Federal ground sufficient to sustain it. A consideration of this involves the issues in the case and their determination.

The suit involves, as we have said, the right to the canal and its appurtenant properties, and the controversy between the parties turns upon the construction of two acts of the legislature of the state, passed, respectively, in 1857 and 1858. Those acts will be referred to hereafter with some particularity. By virtue of those acts the canal company derived its rights and its corporate existence. The petition of the state presents the following propositions: (1) The act of 1857 gave the canal company a corporate existence of twenty-five years from October 17, 1857, with power in the state to take possession of the canal and appurtenant properties. If the state should not exercise such right at such time, then the company was to have existence for a second term of twenty-five years, at which time the canal and its appurtenant properties were to be surrendered to the state without compensation to be paid to the company. (2) By the act of 1858 the charter existence of the company was extended to fifty years, and at the expiration of such period the property was to be surrendered to the state without the necessity of compensation being made [374] therefor. (3) In 1906, in order that the state should be in a position to assume control and take possession of the property, the legislature passed an act creating a board of control of the canal, to be appointed by the governor. This board was appointed and the property demanded. (4) The company refused to comply with the demand on the ground that the state had not complied with certain alleged contract obligations which the canal company claimed under § 4 of the act of 1858, and which gave it greater rights to the property than did the act of 1857, and until such obligations were performed the company would refuse to deliver the property. (5) If such was the effect of the act of 1858, the act was void as being in violation of the constitution of the state; especially of articles 108 and 109, which prohibited the granting of aid by the state to companies and corporations formed for the purpose of making works of public improvement. And further, if the company have the right to demand compensation, it has no right to claim against the state the property and improvements connected with or which belong to the Carondelet canal, the Bayou St. John,

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and the Old Basin on Toulouse street, the state being sole owner of that part of the property. (6) The New Orleans Terminal Company, in a suit to expropriate a triangular piece of ground upon which stood the office building of the company, was condemned to pay $3,000, which sum was deposited in bank by agreement to await the determination of whether the state or the company should be entitled thereto. (7) The company has collected tolls through its liquidators since the expiration of its charter.

The state prayed an accounting of the revenues of the property after the expiration of the charter of the company, and that all the property and improvements connected with and appurtenant thereto, including the $3,000, the proceeds of the triangular piece of ground [375] referred to above, be delivered to the board of control created by the act of 1906, to be administered through the board.

Exceptions were filed to the petition of the state, and having been overruled an answer was filed. We need give only its basic allegations. They present, after denying the allegations of the petition of the state, the following propositions: (1) The state had no interest in the canal except under the contract between the canal company and the state, constituted of the acts of 1857 and 1858. (2) In 1857 the legislature, after anticipating the inability of a company called the New Orleans Canal & Navigation Company to carry out the terms of the purchase of the property under an act passed in 1852, passed the act of 1857, and that under those acts the canal company became possessed of the property. By § 4 of the act of 1858 (hereafter set out) it was provided that the company should have corporate existence during fifty years from the date of the act, after which time it might revert to the state upon due compensation being made according to award by three commissioners. (3) If the act of 1906 can be construed to authorize the board of control to take possession of the property without compensating the company therefor, it violates the contract clause of the Constitution of the United States. (4) The state never claimed any right or property in or to the canal and the improvements respectively made thereon by the Orleans Navigation Company and its successors, and whatever rights the state has are derived solely from the contracts between it and the canal company, as defined in the acts of 1857 and 1858. The state never spent a dollar on the canal, the basin, or the bayou, but the canal company has spent thereon a sum exceeding $750,000.

The state, as we have said, made a motion to dismiss on two grounds, one of which we have decided; the other is [376] that no Federal question is presented by the record, the canal company failing to distinguish, it is contended, between a subsequent act of the legislature impairing the contract, and the decision of the court construing it. The question, then, is whether the act of 1906, appointing the board of control and investing it with powers, was an act which impaired the obligation of the contract; and in the solution of the question we must assume that the act of 1858 constituted a contract between the state and the canal company. The negative of the question is urged by the attorney general in an argument of strength in which he contends the court did not consider or give any effect to the act of 1906, but considered only the act of 1858, and decided that the canal company did not acquire the rights under it which the company contends for. In other words, decided that the act of 1858 gave no rights which the state did not already have, and which it was entitled to possess upon the expiration of the charter of the canal company. There is, as we have said, strength in the contention; but, of course, the fact that the supreme court did not refer to the act of 1906 does not put it aside from consideration. If it was the assertion of legislative power against the contract of the company, and a legislative provision against the obligation of the contract, and was an essential, although unmentioned, element of the decision under review, it is a basis in the Federal question set up. Nor need bad motives be imputed to the legislature. It is not the motive which caused the enactment of the law which is of account, but the effect of the enactment, impairing the rights resting in the contract. And this, we think, was the effect of the act of 1906. It was treated as an important factor in the state's petition in both the charging part and the prayer. The board of control had something else to do besides to wait. It was an agency of invasion, and it was by its especial command that the attorney general made demand upon the company.† [377] And in this the board exer-

†"Messrs. A. J. Davidson, J. H. Elliott, and Hans Widmer, liquidators of the Carondelet Canal & Navigation Company, of New Orleans, Louisiana:

"Dear Sirs:—

"In view of the fact that the time during which the Carondelet Canal & Navigation Company of New Orleans has had the right to enjoy the possession and control of the Carondelet canal and Bayou St. John, together with the Old Basin, with all of the revenue derived therefrom, has expired, and that it becomes the duty of the state of Louisiana, through the board of control for

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cised the power given it; and to remove the impediments to the exercise of the power, "all laws and parts of laws in conflict with" the act of 1906, which conferred the power, were repealed. The repeal of a law which constitutes a contract is an impairment [378] of its obligation. "It may be laid down as a general principle that whenever a law is in its own nature a contract, and absolute rights have vested under it, a repeal of it cannot devest those rights, or annihilate or impair the title so acquired." 2 Story, Const. § 1391. The provision of the Constitution against the impairment of the obligation of contracts was intended "to prohibit every mode or device having such purpose. The prohibition is universal. It attempted no enumeration of the modes by which contracts might be impaired. It would have been unwise to have made such enumeration, since it might have been defective." Id. § 1386. The precaution was necessary. The prohibition is directed against the exertions of sovereignty which the citizens, unless protected by the organic law, would be impotent to resist, whether boldly declared in an explicit law or disguised in an ambiguous form. This case is an illustration. Here is a property sought to be taken from the canal company, and there can be no doubt that the board of control, through the affirmative and repealing provisions of the act of 1906, was to be the instrument and moving agency. The motion to dismiss must, therefore, be denied, and we are brought to the merits of the controversy—Did the acts of 1857 and 1858 constitute a contract?

In the consideration of that question we do not think it is necessary to discuss with any particularity the contributions, respectively, of the state and the canal company and its predecessors to the construction of the canal and its appurtenant properties. The case exhibits from the first conception and commencement of the enterprise by Governor Carondelet through its successive development and extension the interest the state had in its accomplishment and the difficulties which had to be overcome, two corporations going down to insolvency in the undertaking, the state being compelled to resume the [379] powers it had conferred, and make provision for granting them to more efficient instruments. In these circumstances we find the impelling causes of the act of 1857.

A word or two of the act of 1852 becomes pertinent. It provided that in case of a judgment of forfeiture against the Orleans Navigation Company a liquidating commissioner should be appointed who should take possession of the entire property of the company, real and personal, movable and immovable, and, after advertisement, sell the same in block at public auction. The conditions of sale were that the purchasers should "organize themselves into a corporation under the laws of the state for the period of twenty-five years for the purpose of carrying out and effecting all the improvements detailed and described in the reports and plans known as Harrison's reports and plans, including the construction of a new basin at the junction of Canal Carondelet and Bayou St. John, of the depths and dimensions set forth in said reports," and to actually complete them within the term of three years from the date of the charter of the corporation. It was provided that at the end of the term of twenty-five years the state should have the option of granting a renewal of the right of receiving the tolls for a second term of twenty-five years, or of purchasing for itself "the property and the improvements of the company" at the appraised value thereof, and provided further that if the said term

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the Bayou St. John and Carondelet canal and Old Basin, to take possession of the said Carondelet canal, Bayou St. John, and Old Basin, together with all the property and improvements connected therewith, or in any wise thereto belonging or appertaining, in order that the same may be controlled, managed, and administered by said board, for the use and benefit of the state, and in view of the further fact that, at a meeting of said board of control, held on the 1st day of October, 1908, a resolution was adopted requesting me, as attorney general of the state, to take such action as, in my judgment, would be proper to 'have the state put into possession of the Bayou St. John, Carondelet canal, and Old Basin, and all its properties and rights,' I now hereby make formal demand upon you to deliver into the possession and control of the said board of control of the Bayou St. John and Carondelet canal and Old Basin the said Bayou St. John and Carondelet canal and Old Basin, together with all the properties and improvements connected therewith or in any wise thereto belonging or appertaining. In default of your complying with this formal demand within a reasonable delay, I now notify you that I will institute suit for the purpose of recovering for the state, to be controlled, managed, and operated by the board of control aforesaid, the said Carondelet canal and Bayou St. John and Old Basin, together with all the properties and improvements connected therewith or thereto belonging or appertaining.

"Be pleased to let me hear from you at your earliest convenience, and oblige,

"Yours truly,

(Signed) "Walter Guion.

"Attorney General."

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of twenty-five years be granted, the whole property should revert to the state at the end of the second term, without any payment of compensation made to the company. Work and improvements were to be commenced within six months and completed within six years, otherwise the right, title, and interest acquired, together with the improvements that might be made, should vest in and belong to the state. The purchasers organized themselve into a corporation called the New Orleans Canal & Navigation Company.

[380] Then came the act of 1857. It organized the present canal company, making the capital stock of the company $500,000. The company was authorized to take possession of the canal for the purpose of completing the works of improvement undertaken and commenced by the New Orleans Canal & Navigation Company under the provisions of the act of 1852. The canal company was given authority to depart from the plan "of the improvement of said canal and bayou," designated as "Harrison's plan," so far as the plan proposes a basin at the junction of the said canal with the bayou, if the board of directors should determine that such works were not demanded by the interests, safety, or convenience of commerce.

It was provided that in case of the New Orleans Canal & Navigation Company's failure to perform the obligations undertaken by it, suit should be instituted to forfeit its charter, franchises, and privileges and property, including the interest in the Canal Carondelet and Bayou St. John and the works done and effected therein, which, after appraisement, should be sold and payment made therefor in the stock of the new corporation, the canal company. With expressions of detail, it was provided that the new company might take and have all and singular the rights, privileges, franchises, immunities, powers, and authority which had been at any time granted to and possessed and exercised by the Orleans Navigation Company under §§ 9-13 of the act of 1805, and those possessed and exercised under the acts of 1850 and 1852 by the New Orleans Canal & Navigation Company. The new company was to assume all of the debts and obligations imposed on the old one by the act of 1852, except in so far as the provisions of said act were modified or changed in and by the act of 1857.

The canal company was required to complete the works required by the act of 1852 within three years from and after the 17th of October, 1857, subject to the [381] modification provided, and in the case of failure the franchise, rights, privileges, and immunities granted should cease and be forfeited to and become the property of the state.

The canal company was given an existence of twenty-five years from and after the 17th of October, 1857, "provided that the state of Louisiana shall have the right to take possession of said Canal Carondelet and Bayou St. John, and all the property connected therewith, at the expiration of the term above mentioned, should the legislature determine so to do, paying to this corporation the value of said property, to be appraised by five competent persons, as experts, two to be appointed by this corporation and two by the governor, and the four thus appointed shall appoint a fifth; said experts shall be required to take an oath to discharge their duty faithfully. In the event that the state shall not determine to take possession of said property, as herein provided, then this corporation shall be in existence for twenty-five years from and after the expiration of the term in this section mentioned aforesaid, and at the end of such second term of twenty-five years, the said property shall become absolutely the property of the state of Louisiana, and no compensation required to be made to this corporation."

The act of 1858 comes next to be considered. It gives the right to construct layouts, basins, and half moons, for steam and any other water craft on the Bayou St. John, the basin and canal, and to extend them, provided public roads be constructed around them and be kept subject to the ordinance of the city of New Orleans.

The company was given (§ 2) the right to construct a railroad, with single or double track, on either side of the basin, canal, and Bayou St. John from the head of the basin, on Toulouse street, to the lake end, and transport freight and passengers for hire, and employ steam locomotives [382] within such limits of the city as the common council may prescribe.

After five years from the passage of the act, the city was prohibited from draining in the bayou except upon payment of indemnity. And the city is given the right to build bridges over the canal and bayou.

Section 4 is as follows: "That the said company shall enjoy corporate succession during fifty years from this date; after which time *it* [italics ours] may revert to the state, upon due compensation being made according to award, by three commissioners, one appointed by the governor of the state, one by the company, and the third by any court of record of New Orleans."

By subsequent section the company is given the right to tow vessels; exclusive power to carry out their works in conformity with such plan or plans as it may at any time adopt and deem best calculated

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to forward the interests of commerce; to impose fines for violation of its rules; to issue bonds and to secure them by hypothecating and mortgaging "all its property, privileges, and immunities whatever," the amount of bonds not to exceed $250,000; and the company shall be exempt from taxation.

The controversy centers in § 4 and turns upon the antecedent to the pronoun "it" in the sentence "after which time *it* may revert to the state."

The natural and grammatical use of a relative pronoun is to put it in close relation with its antecedent, its purpose being to connect the antecedent with a descriptive phrase. In the provision under discussion "it" stands in the place of something that is to revert to the state, and following, therefore, the natural and grammatical use of "it," its antecedent would be the noun "company" (said company). The supreme court of the state, however, considered that there was ambiguity in the relation of "it" and rejected "company" as the antecedent, and observed [383] that it could not relate to any of the things provided for in succeeding sections nor to the "layouts, basins, and half moons" mentioned in § 1, and decided that the antecedent was the railroad authorized to be constructed by the canal company by § 2. The court, after elaborate argument, expressed the view that the company could not revert to the state, and, as it had no property in the canal and its appurtenances, the only thing which could revert to the state was the railroad. "Whether this be the true solution of the problem or not," the court said, "we are unable to find anything else in the act of 1858 than the railroad to which the relative 'it,' as used in § 4, can in any way be made to relate." And it was further said that there being nothing else to which "it" could relate other than the railroad, and that, "having never been built, can afford no basis for . . . [its] demand for compensation and for a continuance of its possession of public property."

We are unable to concur in the learned court's conclusion. We have already pointed out that the first companies organized went down successively in bankruptcy. Neither the rights given them nor the purpose for which they were given averted financial disaster. The same rights and property, in the main contingent upon the same conditions, were conferred upon the canal company, the record shows, by the act of 1857, but they offered no prospect of success, and the company was about to abandon its charter, when the act of 1858 was passed. It was effective, and its effectiveness must have been due to the additive rights which it conferred and the security which it gave them. We have stated its provision and those of the acts which preceded it. Let us repeat them, for in them we shall find the answer to the question whether any property existed in the canal company which could revert to the state, under § 4 of the act of 1858, except the railroad. For the answer we need not go farther back than 1852. [384] In the act of that year the rights and property of the Orleans Navigation Company were conveyed through its liquidators after proper legal proceedings to certain individuals who were to organize themselves into a corporation for the term of twenty-five years, which was to undertake the construction of the work, with an option on the part of the state to grant a renewal of rights for another term of twenty-five years, "or of purchasing for itself *the property and improvements of the company at the appraised value thereof.*" In case of the grant of a second term, at its end "*the whole property*" was to revert to the state "without any payment or compensation made to said company."

These provisions are a recognition of a property interest in the canal which would be acquired by the corporation that was to be organized. This is put beyond doubt by a subsequent provision. If the corporation did not complete the work in the time the act designated, it was provided that "*all right, title, and interest acquired by the purchaser, under the provisions of this act, together with any improvements that may be made, shall vest in and belong to the state.*"

The corporation was organized, as we have said, and became the New Orleans Canal & Navigation Company. The latter company failing to perform its undertaking, the Carondelet Canal & Navigation Company, plaintiff in error, was, under the act of 1857, organized, and possession of the property was given to it for the purpose and with the rights, powers, and privileges as provided in the act of 1857. There was a provision in that act, as we have seen, as in the act of 1852, for successive corporate terms of twenty-five years. At the end of the first term the state should "have the right to take possession of said Canal Carondelet and Bayou St. John, and all the property and improvements connected therewith, . . . should the legislature determine so to do, upon paying the value [385] thereof," to be appraised in the manner provided. If the state did not elect to purchase the property as provided, the second term of twenty-five years began, at the end of which it was provided that the "said property may still become absolutely the

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property of the state of Louisiana, and no compensation required to be made" to the canal company.

These provisions were idle—barren of everything but mischief and misleading effect—if the contention now made is tenable that the canal company, and necessarily as well its predecessors in the work, could acquire no property because the Bayou St. John was navigable water and the improvements had become appurtenant to it. Under the comprehensiveness of the contention there were no "property and improvements" to appraise or purchase, although the act declared there were both; there was no property to revert to the state, although the act provided for it, and took the precaution of excluding the requirement of paying for it. These circumstantial provisions cannot be misunderstood. They were not a precaution against the assertion of unfounded rights; they were the recognition of rights to be purchased and paid for in one contingency, to revert to the state without "compensation made" in the other contingency.

There was something more, then, than a prospective railroad for "it" to relate to, and we might consider the contention of the state disposed of without the necessity of further discussion. The supreme court recognized that as "the act of 1858 contains no repealing clause, and the act of 1857 is *in pari materia*, the search for the vagrant antecedent [it was so considered by the court] might be prosecuted in the last-mentioned statute." The court, however, did not locate the antecedent there because of the view that the railroad was the only property that the canal company had which could revert to the state. But, we have seen, there was property provided [386] for in the act of 1857 substantial enough to have value to be appraised and purchased; substantial enough, therefore, to revert to the state. Not, it may be, property to be considered the antecedent looked for, but significantly determining it to be something else than the railroad, which was but a subordinate instrument in the scheme, and which might or might not be built.

The rights and property conveyed and provided for by the act of 1857 were then of substance and value, and yet the enterprise halted. We need not conjecture the cause. It is manifest that the failures of the past warned against the conditions of the act of 1857. A large sum of money was necessary. It was conceived it might be as much as $500,000, and to encourage its investment the act of 1858 was passed. This being its purpose, whatever changes it made in the act of 1857 it must be construed as having been adopted to effect such purpose. A prominent fact in it was that it contemplated a greater expenditure than the capital of the company, and authorized an issue of bonds of not exceeding $250,000. It is true that it was provided that the sum should be employed upon the improvement of the navigation of the canal and the building of the railroad; but, notwithstanding, the authorization of the bonds indicates the conception of the amount necessary for the undertaking.

The act of 1858 made other changes to which we have referred, and it may be assumed that all of them were of some value to the state or to the company or to both. The supreme court assigned a special value to the power given to the company to adopt its own plans instead of being confined to the Harrison report and plans. The record, however, affords no basis of estimating the importance of this choice; besides, by the act of 1857, the company had been authorized to depart from Harrison's plans in certain particulars, and what would have remained of them after exercises of the right we have no means of [387] knowing. But it was certainly not intended by the discretion conferred to give the company power to construct the works in a cheap and inefficient manner, and it is not intimated that the discretion was not wisely conferred or not wisely exercised.

We must look, therefore, for some other motive for the act of 1858, and we think, as said by Mr. Justice Provosty in his dissenting opinion, that it "will be sought for in vain, unless it is to be found in the purpose of prolonging the unconditional life of the company and the doing away with the clause for the reversion of its property without compensation." This conclusion is fortified by the structure of the act and the relation of its parts. We have seen that the natural and grammatical antecedent of "it" in § 4 is "said company," and that it was the intentional antecedent is clear from the French version of the statute, the practice of the state at that time being to publish statutes in French and English.

The use of "*elle*" in the French version is of strong significance. There is no neuter gender in the French language, every noun is masculine or feminine, and the pronoun which stands for it must agree with it in gender as in English; but in French there is more certain indication of the antecedent. The neuter *it* relative to a noun

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is *il* or *elle*, and therefore the use of *elle* in French version points unmistakably to an antecedent of the same gender—to "*cette compagnie*," and not to "*un chemin de fer*." Thus, wholly aside from which text is controlling, the context of both versions removes all doubt as to the meaning of the laws.

It is true, in a sense, that the company could not revert, for as a legal entity it would expire; but what it represented and possessed could revert, — the result of its investments and energies, the property it had acquired under legislative sanction and the property it had created under like sanction. The company stood for its attributes and property. [388] It may be that it did not own the canal, or the bayou, or the old basin. Indeed, ownership of their soil was disclaimed at the bar. But, we repeat, there was valuable property which the statute contemplated could revert and could be compensated for. Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622.

The attorney general separates in his argument the canal, the bayou, and the old basin from the other properties, and urges that at least as to them the state is entitled to take possession. And he seems to concede that the act of 1858 contemplated payment to the canal company not only for the railroad, but also for the "layouts, basins, and half-moons,"—giving "it" an antecedent of greater scope than did the supreme court. To the contention, however, that a distinction may be made between the properties, it must be answered that neither the act of 1857 nor that of 1858 makes such a distinction. The language of the act of 1858 is comprehensive and provides that all which is represented by "it" "may revert to the state upon due compensation being made according to award." And the same answer must be made to the contention that the company only has a lease of the properties, and that its relation to the state being that of lessee, it, therefore, "has no defense to the state's demand for possession of the property." Whatever the relation created, payment of compensation was a condition precedent of the reversion to the state. It certainly was not intended to remit the canal company to a claim against the state. How would it be enforced against the resistance of the state, the sovereignty or the state giving immunity from suit?

Judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

[389] GERMAN ALLIANCE INSURANCE COMPANY, Appt.,

v.

IKE LEWIS, as Superintendent of Insurance of the State of Kansas.

(See S. C. Reporter's ed. 389-434.)

Constitutional law — police power — regulating prices — business affected with public interest.

1. A business may be so far affected with a public interest as to permit legislative regulation of its rates and charges, although no public trust is imposed upon the property, and although the public may not have a legal right to demand and receive service.

[For other cases, see Constitutional Law, 608-615, 881-889, in Digest Sup. Ct. 1908.]

Constitutional law — police power — regulating fire insurance rates.

2. The business of fire insurance is so far affected with a public interest as to justify legislative regulation of its rates.

[For other cases, see Constitutional Law, 608-615, 881-889, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification — regulating fire insurance rates.

3. Exempting farmers' mutual insurance companies organized and doing business under the laws of the state, and insuring only farm property, from the legislative scheme for regulation of fire insurance rates, as is done by Kan. Laws 1909, chap. 152, does not render such legislation invalid as to other insurance companies, as denying the equal protection of the laws.

[For other cases, see Constitutional Law, 343-346, in Digest Sup. Ct. 1908.]

[No. 120.]

NOTE.—As to what kinds of business are affected with a public interest subjecting them to regulation and control in respect to rates or prices—see note to Ratcliff v. Wichita Union Stockyards Co. 6 L.R.A. (N.S.) 834.

On power of legislature to regulate life insurance—see note to People v. Hartford L. Ins. Co. 37 L.R.A.(N.S.) 778.

Generally, as to legislative power to fix tolls, rates, or prices—see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177.

For a discussion of police power, generally—see notes to State v. Marshall, 1 L.R.A. 51; Re Gannon, 5 L.R.A. 359; State v. Schlemmer, 10 L.R.A. 135; Ulman v. Baltimore, 11 L.R.A. 224; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; and Barbier v. Connolly, 28 L. ed. U. S. 923.

As to validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

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Argued December 10, 1913. Decided April 20, 1914.

APPEAL from the Circuit Court of the United States for the District of Kansas to review a decree which sustained a demurrer to, and dismissed, the bill in a suit to restrain the enforcement of a state statute regulating fire insurance rates. Affirmed.

See same case below, on demurrer, 189 Fed. 769.

Statement by Mr. Justice McKenna:

Bill in equity to restrain the enforcement of the provisions of an act of the state of Kansas entitled, "An Act Relating to Fire Insurance, and to Provide for the Regulation and Control of Rates of Premium Thereon, and to Prevent Discriminations Therein." Chap. 152 of the Session Laws of 1909.

The grounds of the bill are that the act offends the Constitution of the state and of the United States.

A summary of the requirements of the act is as follows:

Sec. 1. Every fire insurance company shall file with the superintendent of insurance general basis schedules showing the rates on all risks insurable by such company in the state, and all the conditions which affect the rates or the value of the insurance to the assured.

Sec. 2. No change shall be made in the schedules except after ten days' notice to the superintendent, which notice shall state the changes proposed and the time when they [391] shall go into effect. The superintendent may allow changes upon less notice.

Sec. 3. When the superintendent shall determine any rate is excessive or unreasonably high, or not adequate to the safety or soundness of the company, he is authorized to direct the company to publish and file a higher or lower rate, which shall be commensurate with the character of the risk; but in every case the rate shall be reasonable.

Sec. 4. No company shall engage or participate in insurance on property located in the state until the schedules of rates be filed, nor write insurance at a different rate than the rate named in the schedules, or refund or remit in any manner or by any device any portion of the rates; or extend to any insured or other person any privileges, inducements, or concessions except as specified in the schedules.

Sec. 5. Any company making insurance where no rate has been filed shall, within thirty days after entering into such contract, file with the superintendent a schedule of such property, showing the rate and such information as he may require. The schedule shall conform to the general basis of schedules, and shall constitute the permanent rate of the company.

Sec. 6. The schedules shall be open to the inspection of the public, and each local agent shall have and exhibit to the public copies thereof relative to all risks upon which he is authorized to write insurance.

Sec. 7. No company shall, directly or indirectly, by any special rate or by any device, charge or receive from any person a different rate of compensation for insurance than it charges or receives from any other person for like insurance or risks of a like kind and hazard under similar circumstances and conditions in the state. Any company violating this provision shall be deemed guilty of unjust discrimination, which is declared unlawful.

Sec. 8. The superintendent may, if he finds that any [392] company, or any officer, agent, or representative thereof, has violated any of the provisions of the act, revoke the license of such offending company, officer, or agent, but such revocation shall not affect liability for the violation of any other section of the act; and provided that any action, decision, or determination of the superintendent under the provisions of the act shall be subject to review by the courts of the state as provided in the act.

Sec. 9. The superintendent shall give notice of any order or regulation made by him under the act, and any company, or any person, city, or municipality which shall be interested, shall have the right within thirty days to bring an action against the superintendent in any district court of the state to have the order or regulation vacated. Issues shall be formed and the controversy tried and determined as in other cases of a civil nature, and the court may set aside one or more or any part of any of the regulations or orders which the court shall find to be unreasonable, unjust, excessive, or inadequate to compensate the company writing insurance thereon for the risk assumed by it, without disturbing others. The order of the superintendent shall not be suspended or enjoined, but the court may permit the complaining company to write insurance at the rates which obtained prior to such order upon the condition that the difference in the rates shall be deposited with the superintendent to be paid to the company or to the holders of policies as, on final determination of the suit, the court may deem just and reasonable. During the pendency of the suit no penalties or forfeitures shall attach or accrue on account of the failure of the complainant to comply with the order sought to be vacated or modified until the

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final determination of the suit. Proceedings in error may be instituted in the supreme court of the state as in other civil cases, and that court shall examine the record, including the evidence, and render such judgment as shall be just and equitable. No action [393] shall be brought in the United States courts until the remedies provided by the act shall have been exhausted. If any company organized under the laws of the state, or authorized to transact business in a state, shall violate the section, the superintendent may cancel the authority of the company to transact business in the state.

Sec. 10. Infractions of the act are declared to be misdemeanors and punishable by a fine not exceeding $100 for each offense, provided that if the conviction be for an unlawful discrimination, the punishment may be by a fine or by imprisonment in the county jail not exceeding ninety days, or by both fine and imprisonment.

Sec. 11. No person shall be excused from testifying at the trial of any other person on the ground that the testimony may incriminate him, but he shall not be prosecuted on account of any transaction about which he may testify, except for perjury committed in so testifying; "provided, that nothing in this act shall affect farmers' mutual insurance companies, organized and doing business under the laws of this state, and insuring only farm property."

The bill alleged that it was brought by the German Alliance Insurance Company in behalf of itself and all other companies and corporations conducting a similar business and similarly situated, and that Charles W. Barnes was the duly elected superintendent of fire insurance of the state of Kansas. It alleged the jurisdictional amount, and that the controversy was one arising under the Constitution of the United States and of the state of Kansas. It alleged, further, the following facts, which we state in narrative form, omitting those which relate to the Constitution of the state, no assignment of error being based upon them. The appellant, to which we shall refer as complainant, was incorporated under the laws of New York as a fire insurance company in 1879, and immediately entered upon such business, and it has for long periods of [394] time conducted the business of fire insurance in Kansas and other states of the United States.

The business of fire insurance as conducted by it consists of making indemnity contracts against direct loss or damage by fire for a consideration paid, known as a premium; that the rate or premium is the amount charged for each $100 of indemnity. The property which is the subject of insurance is ordinarily known and designated as the risk. Complainant issues indemnity contracts or fire insurance policies covering all kinds and descriptions of improvements upon real estate and the contents thereof, and all kinds and descriptions of personal property, and also farm houses, barns, and granaries and their contents. The rate of premium varies with the kind of property covered, its physical characteristics and situation, its exposure, the presence or absence of fire protection, and many other causes.

The establishment of the basis rate for the premium to be charged is a matter of technical and mathematical deduction from the experience of all fire insurance companies, covering a long period of years, and, territorially, the whole civilized world. To make such deduction it is necessary not only to be in possession of the compiled statistics of fire insurance business, but also to be skilled in the mathematical "theory of probabilities" and in the "law of large numbers" so as to be able to apply with technical accuracy such laws and such data, and that no one not specially trained as an insurance statistician is competent to make such deductions.

A theoretically correct basis rate having thus been arrived at is subject to variation according to the risk, whether in town or country, and, if in the former, according to the class of town or city in which it is situated. The classification of towns and cities depends upon water supply, fire protection, and general physical conditions. In addition to ascertaining the individual risk, if a building [395] the size, material of which, and the manner in which it is constructed, the character of the occupancy, and the character of the occupancy and construction of adjacent buildings, also the character of the contents of the buildings, and the manner in which they are stored, and the precautions used to detect and prevent fires, are necessary to be ascertained.

Complainant and others engaged in the insurance business employ a large number of men skilled as inspectors to report upon individual risks, and it is impossible to fix and adjust a reasonable rate of premium for each and every individual risk without the information so obtained and having the same applied by experts. And such training and information are necessary to determine whether a basic rate or actual rate, as applied to any particular risk, is or is not reasonable, and the respondent is not possessed of the requisite information or special training necessary to qualify for such determination, and any conclusion to which he might come would be a mere guess or arbitrary determination; and the provisions of the act can only be properly administered

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in any event by the employment by the state of a corps of inspectors and experts specially trained in the business of fixing rates of fire insurance.

The complainant has complied with all of the laws of the state, and has received the regular license or authorization of the state, to transact the business of fire insurance therein.

It conducts its business by means of resident agents, of which it has seventy-two directly employed; it has a large and valuable established business to secure which it has expended a large sum of money, and to be compelled to give up its business would result in irreparable damage and injury to it. A large number of the fire insurance policies issued by complainant are written upon farm buildings and their contents, and in writing such business [396] it comes into direct competition with various farmers' mutual insurance companies organized and doing business under the laws of the state, and insuring only farm property.

The business of fire insurance is purely and exclusively a private business, and may be transacted by private persons in their individual capacity, or by unincorporated or incorporated companies; that the amount of indemnity and the premium is a matter of private negotiation and agreement, and the act of the legislature of the state of Kansas attempts to regulate the business in so far as the fixing of the rate of premium is concerned, and in the attempted regulation distinguishes between fire insurance companies and individuals and partnerships, and thereby denies to complainant and other companies the equal protection of the law, contrary to the 14th Amendment to the Constitution of the United States, and is therefore unconstitutional and void.

Under the laws of Kansas, mutual fire insurance companies may be organized, that such companies having a guaranteed fund of $25,000 may do business on a cash basis and accept premiums in cash, and that such premium measures the total liability of the insured under the policy, either to the company or to its creditors; that by the 11th section of the act under review, it is provided "that nothing in this act shall affect farmers' mutual insurance companies, organized and doing business under the laws of this state, and insuring only farm property." The complainant and many other companies insure farm property and come into direct competition with farmers' mutual companies of the character specified, and the act of the legislature in excepting the latter companies deprives complainant of the equal protection of the laws, and is therefore repugnant to the 14th Amendment of the Constitution of the United States and is unconstitutional and void.

[397] The business of fire insurance is private, with which the state has no right to interfere, and the right to fix by private contract the rate of premium is a property right of value; the business is not a monopoly, either legally or actually; it may not be legally conducted by the national government or by the state of Kansas or other states under their respective Constitutions, and is not a business included within the functions of government. Neither complainant nor others engaged in fire insurance receive or enjoy from the state of Kansas or any government, state or national, any privilege or immunity not in like manner and to like extent received and enjoyed by all other persons, partnerships, and companies, incorporated or unincorporated, respectively, engaged in the conduct of other lines of private business and enterprises. Complainant, therefore, is deprived of one of the incidents of liberty and of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

The act distinguishes between fire insurance companies and other insurance companies, individuals and persons, and distinguishes between insurance and other lines of business and thereby offends the equality clause of the Constitution of the United States.

Complainant, under protest, filed the general basis schedules of its rates as required by the act, which were arrived at by the process hereinbefore set out. On the 19th of August, 1909, respondent made a reduction of 12 per cent from the rates as filed and from the rates filed by other companies, with the proviso that it should not apply to residence property, churches, schoolhouses, farm property, or special hazards. The order was to become effective September 1, 1909. And it was further ordered that on and after that date the exception of churches and dwelling houses should be eliminated. Complainant notified the superintendent by letter that it would, under [398] protest, and reserving the rights which it had under the law, comply with the provisions of the order.

The risks included in the order, and not excepted therefrom, comprise all ordinary mercantile risks in the state, and that the reduction of 12 per cent will result in a rate which is much less than the cost of carrying the risks.

Respondent is threatening to make further reductions, and it is proposed to revoke the license of any fire insurance company which may violate the provisions of the act, even though the rates fixed by him may be so

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low as to be confiscatory, and to inflict upon the officers of the company, including complainant, the penalties prescribed for such violation, and such companies and complainant, unless defendant be restrained by injunction, will be obliged to comply with the requirements of the act to their irreparable damage and injury.

Complainant finally alleges that it is not its purpose to attack the orders of respondent on the ground that they were not made in strict compliance with the provisions of the act, but to have the act in its entirety declared to be unconstitutional and void for the reasons alleged, and to have respondent restrained and orders made by him under the provisions of the act enjoined. And such an injunction is prayed.

Respondent filed a demurrer stating that he demurred to so much of the bill as charges the act of the state of Kansas to be repugnant to the Constitution of Kansas and the Constitution of the United States. The demurrer was sustained. Subsequently, upon the bill being amended, a general demurrer was filed, which was also sustained by the court, and the bill dismissed. Prior, however, to this action, it having been suggested that the term of office of Charles W. Barnes as superintendent of insurance had expired, and that Ike Lewis had succeeded to that office and to all of its duties and powers, he was made defendant in the place and stead of Charles W. Barnes.

Messrs. **Thomas Bates** and **John G. Johnson** argued the cause, and, with Mr. Seymour Edgerton, filed a brief for appellant:

The business of fire insurance is a private business, and the public has no legal right to demand its service.

American Surety Co. v. Shallenberger, 183 Fed. 636; Hunt v. Simonds, 19 Mo. 583; Orr v. Home Mut. Ins. Co. 12 La. Ann. 255, 68 Am. Dec. 770; Queen Ins. Co. v. State, 86 Tex. 250, 22 L.R.A. 483, 24 S. W. 397.

The state has not the power to fix the rates charged to the public either by corporations or individuals engaged in a private business, and the test as to whether a use is public or not is whether a public trust is imposed upon the property, and whether the public has a legal right to the use which cannot be denied.

Allen v. Jay, 60 Me. 124, 11 Am. Rep. 185; American Live Stock Commission Co. v. Chicago Live Stock Exch. 143 Ill. 210, 18 L.R.A. 190, 36 Am. St. Rep. 385, 32 N. E. 274; Arnsperger v. Crawford, 101 Md. 247, 70 L.R.A. 497, 61 Atl. 413; Avery v. Vermont Electric Co. 75 Vt. 235, 59 L.R.A. 817, 98 Am. St. Rep. 818, 54 Atl. 179; Brown v. Gerald, 100 Me. 351, 70 L.R.A. 472, 109 Am. St. Rep. 526, 61 Atl. 785; Burlington Twp. v. Beasley, 94 U. S. 310, 24 L. ed. 161; Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. Rep. 881; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Collister v. Hayman, 183 N. Y. 250, 1 L.R.A.(N.S.) 1188, 111 Am. St. Rep. 740, 70 N. E. 20, 5 Ann. Cas. 344; Dutton v. Strong, 1 Black, 23, 17 L. ed. 29; Ex parte Quarg, 149 Cal. 79, 5 L.R.A.(N.S.) 183, 117 Am. St. Rep. 115, 84 Pac. 766, 9 Ann. Cas. 747; Fallsburg Power & Mfg. Co. v. Alexander, 101 Va. 98, 61 L.R.A. 129, 99 Am. St. Rep. 855, 43 S. E. 194; Farmers' Market Co. v. Philadelphia & R. Terminal R. Co. 142 Pa. 580, 21 Atl. 902, 989; Gaylord v. Sanitary Dist. 204 Ill. 576, 63 L.R.A. 582, 98 Am. St. Rep. 235, 68 N. E. 522; Howard Mills Co. v. Schwartz Lumber & Coal Co. 77 Kan. 599, 18 L.R.A.(N.S.) 356, 95 Pac. 559; Horney v. Nixon, 213 Pa. 20, 1 L.R.A.(N.S.) 1184, 110 Am. St. Rep. 520, 61 Atl. 1088, 5 Ann. Cas. 349, 19 Am. Neg. Rep. 496; Hurley v. Eddingfield, 156 Ind. 416, 53 L.R.A. 135, 83 Am. St. Rep. 198, 59 N. E. 1058; Jacobs v. Clearview Water Supply Co. 220 Pa. 388, 21 L.R.A.(N.S.) 410, 69 Atl. 870; Louisville & N. R. Co. v. West Coast Naval Stores Co. 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. Rep. 745; Ladd v. Southern Cotton Press & Mfg. Co. 53 Tex. 172; Pearce v. Spalding, 12 Mo. App. 141; People v. Steele, 231 Ill. 340, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236; Purcell v. Daly, 19 Abb. N. C. 301; Queen Ins. Co. v. State, 86 Tex. 250, 22 L.R.A. 483, 24 S. W. 397; Ryan v. Louisville & N. Terminal Co. 102 Tenn. 111, 45 L.R.A. 303, 50 S. W. 744; Shasta Power Co. v. Walker, 149 Fed. 568; Sholl v. German Coal Co. 118 Ill. 427, 59 Am. Rep. 379, 10 N. E. 199; New York & C. Grain & Stock Exch. v. Board of Trade, 127 Ill. 153, 2 L.R.A. 411, 19 N. E. 855; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91; Tyler v. Beacher, 44 Vt. 648, 8 Am. Rep. 398; Ulmer v. Lime Rock R. Co. 98 Me. 579, 66 L.R.A. 387, 57 Atl. 1001; Weems S. B. Co. v. People's S. B. Co. 214 U. S. 345, 53 L. ed. 1024, 29 Sup. Ct. Rep. 661, 16 Ann. Cas. 1222.

The regulation of rates and charges in a private business is not within the police power of the state.

Adair v. United States, 208 U. S. 175, 52 L. ed. 442, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 66 L.R.A. 185, 76 Pac. 848, 1 Ann. Cas. 936; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Dobbins

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v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Ex parte Dickey, 144 Cal. 234, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Hurtado v. California, 110 U. S. 535, 28 L. ed. 238, 4 Sup. Ct. Rep. 111, 292; Ex parte Berger, 193 Mo. 16, 3 L.R.A.(N.S.) 530, 112 Am. St. Rep. 472, 90 S. W. 759, 5 Ann. Cas. 383; Kreibohm v. Yancey, 164 Mo. 67, 55 S. W. 260; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; People v. Steele, 231 Ill. 340, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 361, 83 N. E. 236; People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91; Street v. Varney Electrical Supply Co. 160 Ind. 338, 61 L.R.A. 154, 98 Am. St. Rep. 325, 66 N. E. 895; West Branch Lumbermen's Exch. v. McCormick, 1 Pa. Dist. R. 542.

The Kansas rate law of 1909 cannot be sustained as a condition precedent to the right of a foreign corporation to do business in the state.

Ætna F. Ins. Co. v. Jones, 78 S. C. 445, 13 L.R.A.(N.S.) 1147, 125 Am. St. Rep. 818, 59 S. E. 148; American Surety Co. v. Shallenberger, 183 Fed. 636; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. Rep. 66; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619, 6 Ann. Cas. 317; Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; National Council v. State Council, 203 U. S. 151, 51 L. ed. 132, 27 Sup. Ct. Rep. 46; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190.

The law cannot be sustained on the ground that it is within the power of the legislature of a state to impose such conditions as it likes upon corporations which derive their right to exist from the state.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; People v. Budd, 117 N. Y. 1, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91.

The business of fire insurance is not a monopoly.

Herriman v. Menzies, 115 Cal. 16, 56 Am. St. Rep. 81, 46 Pac. 730, 44 Pac. 660; United States v. American Tobacco Co. 164 Fed. 700.

The business of fire insurance is not a proper function of government, nor does it receive special privileges from the state.

Ætna L. Ins. Co. v. Coulter, 115 Ky. 787, 74 S. W. 1050; State ex rel. Monnett v. Guilbert, 56 Ohio St. 575, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551; Opinion of Justices, 155 Mass. 598, 15 L.R.A. 809, 30 N. E. 1142; Opinion of Justices (Re Municipal Fuel Plants) 182 Mass. 605, 60 L.R.A. 592, 66 N. E. 25.

A general public interest is not equivalent to a public use.

Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; Re New York, 135 N. Y. 253, 31 Am. St. Rep. 825, 31 N. E. 1043; Re Niagara Falls & W. R. Co. 108 N. Y. 375, 15 N. E. 429.

The power to regulate rates and charges is simply the power to take private property for public use.

Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773; Cole v. La Grange, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416; Dodge v. Mission Twp. 54 L.R.A. 242, 46 C. C. A. 661, 107 Fed. 827; 2 Kent, Com. 333; Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; Opinion of Justices, 155 Mass. 598, 15 L.R.A. 809, 30 N. E. 1142.

That the decision in Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77, was based upon the monopolistic feature of the business conducted by the plaintiffs in error, is clearly shown by the opinion of Chief Justice Waite, and is most strongly emphasized by a consideration of Allmutt v. Inglis, 12 East, 527, 11 Revised Rep. 482, the leading authority cited by the court.

The following cases, American Live Stock Commission Co. v. Chicago Live Stock Exch. 143 Ill. 210, 18 L.R.A. 190, 36 Am. St. Rep. 385, 32 N. E. 274; Ladd v. Southern Cotton Press & Mfg. Co. 53 Tex. 172; Ex parte Dickey, 144 Cal. 234, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428; Queen Ins. Co. v. State, 86 Tex. 250, 22 L.R.A. 483, 24 S. W. 397; State ex rel. Star Pub. Co. v. Associated Press,

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159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91; Horney v. Nixon, 213 Pa. 20, 1 L.R.A.(N.S.) 1184, 110 Am. St. Rep. 520, 61 Atl. 1088, 5 Ann. Cas. 349, 19 Am. Neg. Rep. 496; Louisville & N. R. Co. v. West Coast Naval Stores Co. 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. Rep. 745, and in fact all those cases cited under the second paragraph of this brief, clearly show the distinction between the Munn Case and the case at bar, and further show the distinction between a quasi public corporation and a private corporation, or between a corporation or individual whose business is impressed with a public use and an individual or corporation whose business is purely private.

In decisions of this court rendered subsequent to that of Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77, and in which the decision and opinion in that case are commented upon, this court has made clear what was there meant by the somewhat indefinite phrases, "a use in which the public has an interest," "a public use of property," and "property affected with a public interest."

Burlington Twp. v. Beasley, 94 U. S. 310, 24 L. ed. 161; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 5 Sup. Ct. Rep. 1028; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468.

Mr. John S. Dawson, Attorney General of Kansas, argued the cause, and, with Messrs. S. N. Hawks, F. S. Jackson, and Charles Blood Smith, filed a brief for appellee:

The act complained of is within the police power of the state.

Noble State Bank v. Haskell, 219 U. S. 112, 575, 55 L. ed. 117, 341, 32 L.R.A. (N.S.) 1062, 1065, 31 Sup. Ct. Rep. 186, 299, Ann. Cas. 1912A, 487, 489; German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. 229, 31 Sup. Ct. Rep. 246; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 411, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66; Jacobson v. Massachusetts, 197 U. S. 11, 27, 31, 49 L. ed. 643, 650, 651, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 297, 43 L. ed. 702, 706, 19 Sup. Ct. Rep. 465; Citizens' Ins. Co. v. Clay, 197 Fed. 435; German Alliance Ins. Co. v. Barnes, 189 Fed. 769.

The act is not repugnant to § 1 of the 14th Amendment, as the state has full power of classification.

Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 726; Columbus Southern R. Co. v. Wright, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396; Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 99, 43 L. ed. 910, 19 Sup. Ct. Rep. 609; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419.

The act is not repugnant to either the due process clause of the 14th Amendment or the equal protection clause.

Orient Ins. Co. v. Daggs, 172 U. S. 561, 43 L. ed. 554, 19 Sup. Ct. Rep. 281; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 208, 209, 32 L. ed. 107, 108, 109, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Holden v. Hardy, 169 U. S. 366, 389, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Paul v. Virginia, 8 Wall. 168, 179, 19 L. ed. 357, 359; Ducat v. Chicago, 10 Wall. 410, 415, 19 L. ed. 972, 973; Liverpool & L. Life & F. Ins. Co. v. Massachusetts (Liverpool & L. Life & F. Ins. Co. v. Oliver) 10 Wall. 566, 573, 19 L. ed. 1029, 1031; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; Fritts v. Palmer, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93; Barbier v. Connolly, 113 U. S. 32, 28 L. ed. 925, 5 Sup. Ct. Rep. 357; Soon Hing v.

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Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Kentucky R. Tax Cases, 115 U. S. 322, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Home Ins. Co. v. New York, 134 U. S. 606, 33 L. ed. 1031, 10 Sup. Ct. Rep. 593; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Orient Ins. Co. v. Daggs, 172 U. S. 562, 43 L. ed. 554, 19 Sup. Ct. Rep. 281; New York & N. E. R. Co. v. Bristol, 151 U. S. 571, 38 L. ed. 274, 14 Sup. Ct. Rep. 437.

The validity of the act can be sustained under the police power of the state, as well as under the power of the state to regulate corporations created by it, or permitted by it to do business within its borders.

British America Assur. Co. v. Bradford, 60 Kan. 85, 55 Pac. 335; Atchison, T. & S. F. R. Co. v. Matthews, 58 Kan. 447, 49 Pac. 602, 3 Am. Neg. Rep. 27; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 155, 41 L. ed. 668, 17 Sup. Ct. Rep. 255; Atkinson v. Woodmansee, 68 Kan. 74, 64 L.R.A. 325, 74 Pac. 640; Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 322, 46 L. ed. 931, 22 Sup. Ct. Rep. 662; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; New York L. Ins. Co. v. Cravens, 178 U. S. 394, 44 L. ed. 1118, 20 Sup. Ct. Rep. 962; John Hancock Mut. L. Ins. Co. v. Warren, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. Rep. 535; Com. v. Vrooman, 164 Pa. 306, 25 L.R.A. 250, 44 Am. St. Rep. 603, 30 Atl. 217; Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148; State v. Missouri P. R. Co. 33 Kan. 176, 5 Pac. 772; Leavenworth v. Leavenworth City & Ft. L. Water Co. 62 Kan. 643, 64 Pac. 66; Wayland v. Middlesex County Comrs. 4 Gray, 500; Lake Koen Nav. Reservoir & Irrig. Co. v. Klein, 63 Kan. 484, 65 Pac. 684; West v. Topeka Sav. Bank, 66 Kan. 524, 63 L.R.A. 137, 97 Am. St. Rep. 385, 72 Pac. 252.

The classification made by the legislature is not unreasonable.

4 Enc. U. S. Sup. Ct. Rep. 357; Heath & M. Mfg. Co. v. Worst, 207 U. S. 354, 52 L. ed. 243, 28 Sup. Ct. Rep. 114; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 256, 52 L. ed. 197, 28 Sup. Ct. Rep. 89; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638.

Is insurance affected by public interest?

State v. Vigilant Ins. Co. 30 Kan. 585, 2 Pac. 840; State v. Phipps, 50 Kan. 619, 18 L.R.A. 657, 4 Inters. Com. Rep. 299, 34 Am. St. Rep. 152, 31 Pac. 1097; Blaker v. Hood, 53 Kan. 509, 24 L.R.A. 854, 36 Pac. 1115; Freund, Pol. Power, §§ 400, 401; Ætna L. Ins. Co. v. Hardison, 199 Mass. 181, 85 N. E. 407, 199 Mass. 190, 127 Am. St. Rep. 478, 85 N. E. 410; Selected Essays in Anglo-American Legal History, vol. 3, p. 108; Zartman, Yale Readings in Insurance, pp. 9–10; 1 Arnould, Marine Ins. p. 102; 7 Enc. U. S. Sup. Ct. Rep. 78; 4 Enc. U. S. Sup. Ct. Rep. 77; Northwestern Nat. L. Ins. Co. v. Riggs, 203 U. S. 243, 51 L. ed. 168, 27 Sup. Ct. Rep. 126, 7 Ann. Cas. 1104; Phœnix Assur. Co. v. Fire Department, 117 Ala. 631, 42 L.R.A. 468, 23 So. 843; Exempt Firemen's Benev. Fund v. Roome, 93 N. Y. 313, 45 Am. Rep. 217; Firemen's Benev. Asso. v. Lounsbury, 21 Ill. 511, 74 Am. Dec. 115; Fire Department v. Helfenstein, 16 Wis. 136; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

The legislature may fix rates.

Note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; Hale, De Portibus Maris, 1 Hargraves Law Tracts, 78; Mobile v. Yuille, 3 Ala. 137, 36 Am. Dec. 441; Laurel Fork & S. H. R. Co. v. West Virginia Transp. Co. 25 W. Va. 324; Allnutt v. Inglis, 12 East, 527, 11 Revised Rep. 482; People v. Budd, 117 N. Y. 1, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Re Annon, 50 Hun, 415, 2 N. Y. Supp. 275, affirmed in 26 N. Y. S. R. 554; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 38 L. ed. 173, 4 Sup. Ct. Rep. 48; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857, affirming 2 N. D. 482, 52 N. W. 408.

The right to regulate prices, as well as the right to demand service, are each evidence of a public business, but neither is necessary to make a vocation subject to public control.

Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468, 117 N. Y. 1, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670; Freund, Pol. Power, §§ 304, 378; People v. Formosa, 61 Hun, 272, 16 N. Y. Supp. 753, 131 N. Y. 478, 27 Am. St. Rep. 612, 30 N. E. 492; Boswell v. Security Mut. L. Ins. Co. 193 N. Y. 465, 19 L.R.A. (N.S.) 946, 86 N. E. 532; Winchester & L. Turnp. Road Co. v. Croxton, 98 Ky. 739, 33 L.R.A. 182, 34 S. W. 518; West Branch Lumber-

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men's Exch. v. Fisher, 150 Pa. 475, 24 Atl. 735; Craig v. Kline, 65 Pa. 399, 3 Am. Rep. 636; Henry v. Roberts, 50 Fed. 902; Genesee-Fork Improv. Co. v. Ives, 144 Pa. 114, 13 L.R.A. 427, 22 Atl. 887; Mobile v. Yuille, 3 Ala. 137, 36 Am. Dec. 441; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; McCarter v. Firemen's Ins. Co. 74 N. J. Eq. 372, 29 L.R.A.(N.S.) 1194, 135 Am. St. Rep. 708, 73 Atl. 80, 414, 18 Ann. Cas. 1048; Civil Rights Cases, 109 U. S. 62, 27 L. ed. 856, 3 Sup. Ct. Rep. 18.

Associations having all the power to fix fire insurance rates have been authorized by the legislatures of numerous states of the Union, and have been generally upheld and recognized by the courts as valid.

New York Fire Underwriters v. Higgins, 130 App. Div. 78, 114 N. Y. Supp. 506; Fireman's Fund Ins. Co. v. Hellner, 159 Ala. 447, 49 So. 297, 17 Ann. Cas. 793; Continental Ins. Co. v. Parkes, 142 Ala. 650, 39 So. 204; Orient Ins. Co. v. Daggs, 172 U. S. 565, 43 L. ed. 555, 19 Sup. Ct. Rep. 281; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; Barbier v. Connolly, 113 U. S. 27, 28, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357.

That there is a relation between the number of fires, or "fire losses," and insurance rates, does not admit of doubt. If an owner can insure his property more cheaply than he can protect it, he will continue to insure and neglect improvement or protection.

Zartman, Yale Lectures on Fire Insurance, 1909, p. 213.

After stating the case as above, Mr. Justice McKenna delivered the opinion of the court:

The specific error complained of is the refusal of the district court to hold that the act of the state of Kansas is unconstitutional and void as offending the due process clause of the 14th Amendment of the Constitution of the United States. To support this charge of error, [405] complainant asserts that the business of fire insurance is a private business, and, therefore, there is no constitutional power in a state to fix the rates and charges for services rendered by it. An exercise of such right, it is contended, is a taking of private property for a public use. The contention is made in various ways, and, excluding possible countervailing contentions, it is urged that the act under review cannot be justified as an exercise of the police power or of the power of the state to admit foreign corporations within its borders upon such terms as it may prescribe, or of any other power possessed by the state; that no state has the power to impose unconstitutional burdens either upon private citizens or private corporations engaged in a private business.

The basic contention is that the business of insurance is a natural right, receiving no privilege from the state, is voluntarily entered into, cannot be compelled, nor can any of its exercises be compelled; that it concerns personal contracts of indemnity against certain contingencies merely. Whether such contracts shall be made at all, it is contended, is a matter of private negotiation and agreement, and necessarily there must be freedom in fixing their terms. And "where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist." Many elements, it is urged, determine the extending or rejection of insurance; the hazards are relative and depend upon many circumstances upon which there may be different judgments, and there are personal considerations as well,—"moral hazards," as they are called.

It is not clear to what extent some of these circumstances are urged as affecting the power of regulation in the state. It would seem to be urged that each risk is individual, and no rule of rates can be formed or applied. The bill asserts the contrary. It in effect admits that there can be standards and classification of risks, determined by the [406] law of averages. Indeed, it is a matter of common knowledge that rates are fixed and accommodated to those standards and classifications in prearranged schedules, and, granted the rates may be varied in particular instances, they are sufficiently definite and applicable as a general and practically constant rule. They are the product, it is true, of skill and experience, but such skill and experience a regulating body may have as well as the creating body. Indeed, an allegation in the original bill that the superintendent of insurance could not have the requisite technical and mathematical training to determine whether a basic rate or an actual rate as applied to any particular risk was or was not reasonable, and that his conclusion, therefore, "would be a mere guess or arbitrary determination," was omitted by an amendment. It would indeed be a strained contention that the government could not avail itself, in the exercise of power it might deem wise to exert, of the skill and knowledge possessed by the world. We may put aside, therefore, all merely adventitious considerations and come to the bare and essential one, whether a contract of fire insurance is private, and as such has constitutional im-

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munity from regulation. Or, to state it differently and to express an antithetical proposition, is the business of insurance so far affected with a public interest as to justify legislative regulation of its rates? And we mean a broad and definite public interest. In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation. We can best explain by examples. The transportation of property—business of common carriers—is obviously of public concern, and its regulation is an accepted governmental power. The transmission of intelligence is of cognate character. There are other [407] utilities which are denominated public, such as the furnishing of water and light, including in the latter gas and electricity. We do not hesitate at their regulation nor of the fixing of the prices which may be charged for their service. The basis of the ready concession of the power of regulation is the public interest. This is not denied, but its application to insurance is so far denied as not to extend to the fixing of rates. It is said, the state has no power to fix the rates charged to the public by either corporations or individuals engaged in a private business, and the "test of whether the use is public or not is whether a public trust is imposed upon the property, and whether the public has a legal right to the use which cannot be denied;" or, as we have said, quoting counsel, "Where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist." Cases are cited which, it must be admitted, support the contention. The distinction is artificial. It is, indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant explicitly so contends, urging that the test it applies excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use, which, necessarily, it is contended, can only apply to property, not to personal contracts. The distinction, we think, has no basis in principle (Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487), nor has the other contention that the service which cannot be demanded cannot be regulated.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77, is an instructive example of legislative power exerted in the public interest. The Constitution of Illinois declared all elevators or storehouses, where grain or other property was stored for a compensation, to be public warehouses, and a law was subsequently enacted fixing rates of storage. In other words, that which had been private property had from its [408] uses become, it was declared, of public concern, and the compensation to be charged for its use prescribed. The law was sustained against the contention that it deprived the owners of the warehouses of their property without due process of law. We can only cite the case and state its principle, not review it at any length. The principle was expressed to be, quoting Lord Chief Justice Hale, "that when private property is 'affected with a public interest, it ceases to be *juris privati*' only" and it becomes "clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large;" and, so using it, the owner "grants to the public an interest in that use, and must submit to be controlled by the public for the common good." And it was said that the application of the principle could not be denied because no precedent could be found for a statute precisely like the one reviewed. It presented a case, the court further said, "for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress." The principle was expressed as to property, and the instance of its application was to property, but it is manifestly broader than that instance. It is the business that is the fundamental thing; property is but its instrument, the means of rendering the service which has become of public interest.

That the case had broader application than the use of property is manifest from the grounds expressed in the dissenting opinion. The basis of the opinion was that the business regulated was private and had "no special privilege connected with it, nor did the law ever extend to it any greater protection than it extended to all other private business." The argument encountered opposing examples, among others, the regulation of the rate of interest on money. The regulation was accounted for on the ground that the act of Parliament permitting the charging [409] of some interest was a relaxation of a prohibition of the common law against charging any interest; but this explanation overlooked the fact that both the common law and the act of Parliament were exercises of government regulation of a strictly private business in the interest of public policy,— a policy which still endures and still dictates regulating laws. Against that conservatism of the mind which puts

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to question every new act of regulating legislation, and regards the legislation invalid or dangerous until it has become familiar, government—state and national—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guaranties impaired.

Munn v. Illinois was approved in many state decisions, but it was brought to the review of this court in Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468, and its doctrine, after elaborate consideration, reaffirmed, and against the same arguments which are now urged against the Kansas statute. Nowhere have these arguments been, or could be, advanced with greater strength and felicity of expression than in the dissenting opinion of Mr. Justice Brewer. Every consideration was adduced, based on the private character of the business regulated, and, for that reason, its constitutional immunity from regulation, with all the power of argument and illustration of which that great judge was a master. The considerations urged did not prevail. Against them the court opposed the everexisting police power in government and its necessary exercise for the public good, and declared its entire accommodation to the limitations of the Constitution. The court was not deterred by the charge (repeated in the case at bar) that its decision had the sweeping and dangerous comprehension of subjecting to [410] legislative regulation all of the businesses and affairs of life and the prices of all commodities. Whether we may apprehend such result by extending the principle of the cases to fire insurance we shall presently consider.

In Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; Munn v. Illinois and Budd v. New York were affirmed. A law of the state of North Dakota was sustained which made all buildings, elevators, and warehouses used for the handling of grain for a profit public warehouses, and fixed a storage rate. The case is important. It extended the principle of the other two cases and denuded it of the limiting element which was supposed to beset it,—that to justify regulation of a business the business must have a monopolistic character. That distinction was pressed and answered. It was argued, the court said. "that the statutes of Illinois and New York [passed on in the Munn and Budd Cases] are intended to operate in great trade centers, where, on account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combinations to raise and control elevating and storage charges are afforded, while the wide extent of the state of North Dakota and the small population of its country towns and villages are said to present no such opportunities." And it was also urged that the method of carrying on business in North Dakota and the Eastern cities was different, that the elevators in the latter were essentially means of transporting grain from the lakes to the railroads, and those who owned them could, if uncontrolled by law, extort such charges as they pleased, and stress was laid upon the expression in the other cases which represented the business as a practical monopoly. A contrast was made between those conditions and those which existed in an agricultural state where land was cheap and limitless in quantity. It was replied that this difference in conditions was "for those who make, not for those who interpret, the laws." And considering [411] the expressions in the other cases which, it was said, went rather to the expediency of the laws than to their validity, yet, it was further said, the expressions had their value because the "obvious aim of the reasoning that prevailed was to show that the subject-matter of these enactments fell within the legitimate sphere of legislative power, and that so far as the laws and Constitution of the United States were concerned, the legislation in question deprived no person of his property without due process of law."

The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern, and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in the Budd Case (117 N. Y. 27, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670), that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected, cannot be supported. "The underlying principle is that business of certain kinds hold such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation." Is the business of insurance within the principle? It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past, and

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cannot be applied though modern economic conditions may make necessary or beneficial its application. In other words, to say that government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than government possesses to-day. We proceed, then, to consider whether the business of insurance is within the principle.

A contract for fire insurance is one for indemnity against loss, and is personal. The admission, however, does not [412] take us far in the solution of the question presented. Its personal character certainly does not of itself preclude regulation, for there are many examples of government regulation of personal contracts, and in the statutes of every state in the Union superintendence and control over the business of insurance are exercised, varying in details and extent. We need not particularize in detail. We need only say that there was quite early (in Massachusetts, 1837, New York, 1853) state provision for what is known as the unearned premium fund or reserve; then came the limitation of dividends, the publishing of accounts, valued policies, standards of policies, prescribing investment, requiring deposits in money or bonds, confining the business to corporations, preventing discrimination in rates, limitation of risks, and other regulations equally restrictive. In other words, the state has stepped in and imposed conditions upon the companies, restraining the absolute liberty which businesses strictly private are permitted to exercise.

Those regulations exhibit it to be the conception of the lawmaking bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation. A conception so general cannot be without cause. The universal sense of a people cannot be accidental; its persistence saves it from the charge of unconsidered impulse, and its estimate of insurance certainly has substantial basis. Accidental fires are inevitable and the extent of loss very great. The effect of insurance—indeed, it has been said to be its fundamental object—is to distribute the loss over as wide an area as possible. In other words, the loss is spread over the country, the disaster to an individual is shared by many, the disaster to a community shared by other communities; great catastrophes are thereby lessened, and, it may be, repaired. In assimilation of insurance to a tax, the companies have been said to be [413] the mere machinery by which the inevitable losses by fire are distributed so as to fall as lightly as possible on the public at large, the body of the insured, not the companies, paying the tax. Their efficiency, therefore, and solvency, are of great concern. The other objects, direct and indirect, of insurance, we need not mention. Indeed, it may be enough to say, without stating other effects of insurance, that a large part of the country's wealth, subject to uncertainty of loss through fire, is protected by insurance. This demonstrates the interest of the public in it, and we need not dispute with the economists that this is the result of the "substitution of certain for uncertain loss," or the diffusion of positive loss over a large group of persons, as we have already said to be certainly one of its effects. We can see, therefore, how it has come to be considered a matter of public concern to regulate it, and, governmental insurance has its advocates and even examples. Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the individuals. We may say in passing that when the effect goes beyond that, there are many examples of regulation. Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151, 31 Sup. Ct. Rep. 132; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487.

Complainant feels the necessity of accounting for the regulatory state legislation and refers it to the exertion of the police power; but, while expressing the power in the broad language of the cases, seeks to restrict its application. Counsel states that this power may be exerted to "pass laws whose purpose is the health, safety, morals, and the general welfare of the people." The admission is very comprehensive. What makes for the general welfare is [414] necessarily in the first instance a matter of legislative judgment, and a judicial review of such judgment is limited. "The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short,

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the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 540, 569, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259.

The restrictions upon the legislative power which complainant urges we have discussed, or rather, the considerations which take, it is contended, the business of insurance outside of the sphere of the power. To the contention that the business is private we have opposed the conception of the public interest. We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby, and charged with great responsibility. How necessary their solvency is, is manifest. On the other hand, to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activity and enterprise. It is, therefore, essentially different from ordinary commercial [415] transactions, and, as we have seen, according to the sense of the world from the earliest times,—certainly the sense of the modern world,—is of the greatest public concern. It is therefore within the principle we have announced.

But it is said that the reasoning of the opinion has the broad reach of subjecting to regulation every act of human endeavor and the price of every article of human use. We might, without much concern, leave our discussion to take care of itself against such misunderstanding or deductions. The principle we apply is definite and old, and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become "clothed with a public interest," and therefore subject "to be controlled by the public for the common good."

If there may be controversy as to the business having such character, there can be no controversy as to what follows from such character if it be established. It is idle, therefore, to debate whether the liberty of contract guaranteed by the Constitution of the United States is more intimately involved in price regulation than in the other forms of regulation as to the validity of which there is no dispute. The order of their enactment certainly cannot be considered an element in their legality. It would be very rudimentary to say that measures of government are determined by circumstances, by the presence or imminence of conditions, and of the legislative judgment of the means or the policy of removing or preventing them. The power to regulate interstate commerce existed for a century before the interstate commerce act was passed, and the Commission constituted by it was not given authority to fix rates until some years afterwards. Of the agencies which those measures were enacted to [416] regulate at the time of the creation of the power, there was no prophecy or conception. Nor was regulation immediate upon their existence. It was exerted only when the size, number, and influence of those agencies had so increased and developed as to seem to make it imperative. Other illustrations readily occur which repel the intimation that the inactivity of a power, however prolonged, militates against its legality when it is exercised. United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527. It is oftener the existence of necessity rather than the prescience of it which dictates legislation. And so with the regulations of the business of insurance. They have proceeded step by step, differing in different jurisdictions. If we are brought to a comparison of them in relation to the power of government, how can it be said that fixing the price of insurance is beyond that power and the other instances of regulation are not? How can it be said that the right to engage in the business is a natural one when it can be denied to individuals and permitted to corporations? How can it be said to have the privilege of a private business when its dividends are restricted, its investments controlled, the form and extent of its contracts prescribed, discriminations in its rates denied, and a limitation on its risks imposed? Are not such regulations restraints upon the exercise of the personal right— asserted to be fundamental—of dealing with property freely, or engaging in what contracts one may choose, and with whom and upon what terms one may choose?

We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promul-

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gated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose, and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that "it is illusory [417] to speak of a liberty of contract." It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling if not compelling it, that we may discover the inducement of the Kansas statute; and the problem presented is whether the legislature could regard it of as much moment to the public that they who seek insurance should no more be constrained by arbitrary terms than they who seek transportation by railroads, steam, or street, or by coaches whose itinerary may be only a few city blocks, or who seek the use of grain elevators, or to be secured in a night's accommodation at a wayside inn, or in the weight of a 5 cent loaf of bread. We do not say this to belittle such rights or to exaggerate the effect of insurance, but to exhibit the principle which exists in all and brings all under the same governmental power.

We have summarized the provisions of the Kansas statute, and it will be observed from them that they attempt to systematize the control of insurance. The statute seeks to secure rates which shall be reasonable both to the insurer and the insured, and as a means to this end it prescribes equality of charges, forbids initial discrimination or subsequently by the refund of a portion of the rates, or the extension to the insured of any privilege; to this end it requires publicity in the basic schedules and of all of the conditions which affect the rates or the value of the insurance to the insured, and also adherence to the rates as published. Whether the requirements are necessary to the purpose, or—to confine ourselves to that which is under review—whether rate regulation is necessary to the purpose, is a matter for legislative judgment, not judicial. Our function is only to determine the existence of power.

The bill attacks the statute of Kansas as discriminating against complainant because the statute excludes from its provisions farmers' mutual insurance companies, organized [418] and doing business under the laws of the state and insuring only farm property. The charge is not discussed in the elaborate brief of counsel, nor does it seem to have been pressed in the lower court; it is, however, covered by the assignments of error.

The provision of the statute is, "That nothing in this act shall affect farmers' mutual insurance companies, organized and doing business under the laws of this state, and insuring only farm property." The distinction is therefore between co-operative insurance companies insuring a special kind of property and all other insurance companies. It is only with that distinction that we are now concerned. There are special provisions in the statutes of Kansas for the organization of co-operative companies, and if the statute under review discriminates between them the German Alliance Company cannot avail itself of the discrimination. A citation of cases is not necessary, nor for the general principle that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise. Ozan Lumber Co. v. Union County Nat. Bank, 202 U. S. 623, 50 L. ed. 1176, 26 Sup. Ct. Rep. 768. There are certainly differences between stock companies, such as complainant is, and the mutual companies described in the bill, and a recognition of the differences we cannot say is outside of the constitutional power of the legislature. Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281.

Decree affirmed.

Mr. Justice Lurton was not present when this case was argued, and took no part in its decision.

Mr. Justice Lamar, dissenting:

I dissent from the decision and the reasoning upon which it is based. The case does not deal with a statute affecting [419] the safety or morals of the public. It presents no question of monopoly in a prime necessity of life, but relates solely to the power of the state to fix the price of a strictly personal contract. The court holds that fire insurance, though personal, is affected with a public interest, and therefore that the business may not only be regulated, but that the premium or price to be paid to the insurer for entering into that personal contract can be fixed by law.

The fixing of the price for the use of private property is as much a taking as though the fee itself had been condemned for a lump sum; that taking, whether by fixing rates for the use or by paying a lump sum for the fee, has always heretofore been thought to be permissible only when it was for a public use. But the court in this case holds that there is no distinction between the power to take for public use and the power to regulate the exercise of private rights for the public

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good. That is the fundamental proposition on which the case must stand, and the decision must therefore be considered in the light of that ruling and of the results which must necessarily flow from the future application of that principle. For if the power to regulate, in the interest of the public, comprehends what is intended in the power to take property for public use, it must inevitably follow that the price to be paid for any service or the use of any property can be regulated by the general assembly. This is so because the power of regulation is all-pervading, as witness the statute of frauds, the recording acts, weight and measure laws, pure food laws, hours of service laws, and innumerable other enactments of that class. And if this power be as extensive as is now, for the first time, decided, then the citizen holds his property and his individual right of contract and of labor under legislative favor rather than under constitutional guaranty. The principle is applied here to the case of insurance; but the nature of that business [420] and the intangible character of its contracts are such as to indicate the farreaching effect of the principle announced, and warrants a statement of some of the grounds of dissent.

Insurance is not production; nor manufacture; nor transportation; nor merchandise. And this court in New York L. Ins. Co. v. Deer Lodge County at the present term [231 U. S. 495, ante, 332, 34 Sup. Ct. Rep. 167] reaffirmed its previous rulings that "insurance is not commerce," "not an instrumentality of commerce," "not a transaction of commerce," "but simply contracts of indemnity against loss by fire." Such a contract is personal, and in the state whose statute is under consideration, insurance companies are classed among those "strictly private." Leavenworth County v. Miller, 7 Kan. 520, 12 Am. Rep. 425. The fact that insurance is a strictly private and a personal contract of indemnity puts it on the extreme outside limit, and removes it as far as any business can be from those that are in their nature public. So that if the price of a private and personal contract of indemnity can be regulated,—if the price of a chose in action can be fixed,—then the price of everything within the circle of business transactions can be regulated. Considering, therefore, the nature of the subject treated and the reasoning on which the court's opinion is based, it is evident that the decision is not a mere entering wedge, but reaches the end from the beginning, and announces a principle which points inevitably to the conclusion that the price of every article sold and the price of every service offered can be regulated by statute.

And such laws are not without English precedent. For while no statute ever before attempted to fix the price of a contract of indemnity,† yet under a Parliament that sat as a perpetual constitutional convention, with power [421] to pass bills of attainder to take property for private purposes, and to take it without due process of law, many statutes approaching that now under review were adopted and enforced. Acts were passed by Parliament fixing the price of many commodities that were convenient or useful. These laws did not stop at fixing the price of property, but, like the present act, they fixed the price of private contracts, and by statute prescribed the rate of wages, and made it unlawful for the employee to receive or for the employer to give more than the wage fixed by law. It is needless to say that these laws were felt to be an infringement upon the rights of men; that they were bitterly resisted by buyer and seller, by employer and employee, and were a source of perpetual irritation often leading to violence. But the fact that the English Parliament had the arbitrary power to pass such statutes made them valid in law, though they were in violation of the inherent rights of individual. In time, the great injustice in this was so far recognized that these laws, fixing the price of strictly private contracts, seem to have been repealed, and Lord Ellenborough, while enforcing, as proper, a rate for public wharves, was able to say, in Allnutt v. Inglis, 12 East, 535, "that the general principle is favored that every man may fix whatever price he pleases for his own property or for the use of it." But what was a favor in England, that might at any time be withdrawn, was in this country made a constitutional right that could not be withdrawn. For although the practice of fixing prices may have prevailed in some of the colonies "up to the time of independence," yet, as Judge Cooley says, since independence "it has been commonly supposed that a general power in the state to regulate prices was inconsistent with constitutional liberty." Cooley, Const. Lim. 7th ed. 807; Stickney, State Control of Trade, p. 3, and the abstract of English price-fixing statutes, pp. 9 *et seq.* That common supposition is rightly founded on the fact [422] that the Constitution recognizes the liberty to contract and right of private property. They include not only the right to make contracts with which to acquire property, but the right to fix the price of its use while it is held, and the further

†The statute fixing the premium rates on surety bonds was held to be void in American Surety Co. v. Shallenberger, 183 Fed. 636.

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right to fix the price if it is to be sold. To deprive any person of either is to take property, since there can be no liberty of contract and true private ownership if the price of its use or its sale is fixed by law. That right is an attribute of ownership. State Freight Tax Case, 15 Wall. 278, top, 21 L. ed. 162.

But it may be said that, though insurance is a contract of indemnity, and personal, its personal character has not been thought to preclude the many regulatory measures adopted and sustained during the past hundred years.

This is most freely conceded. But it is equally true that the failure for more than one hundred years to attempt to fix the rates of insurance is indubitable evidence of the general public and legislative conception that the business of insurance did not belong to the class whose rates could be fixed. That settled usage is not an accident. For rate-making is no new thing, and neither is insurance. Its use in protecting the owner of property against loss; its value as collateral in securing loans; its method of averages and distributing the risk between many persons widely separated, and all contributing small premiums in return for the promise of a large indemnity, has been known for centuries. All these considerations were recently pressed upon the court in an effort to secure a ruling that insurance was commerce. In refusing to accede to the sufficiency of the argument, the court, in the Deer Lodge Case, pointed out that the size of the business of insurance did not change the inherent nature of the business itself, saying that "the number of transactions do not give the business any other character than magnitude."

The character of insurance, therefore, as a private and personal contract of indemnity, has not been changed by [423] its magnitude or by the fact that more policies and for greater amounts are now written than in the centuries during which no effort has ever before been made to fix their rates. It is, however, undoubtedly true that during all of that period *regulatory statutes* were, from time to time, adopted to protect the public against conditions and practices which were subject to regulation. The public had no means of knowing whether these corporations were solvent or not, and statutes were passed to require a publication of the financial condition. The policies were long and complicated, with exceptions and qualifications and provisos. They were often unread by the policy holder and sometimes not understood when read. Statutes were accordingly passed providing for a standard form of policy in order to protect the assured against his inexperience, to prevent hard bargains, and to avoid vexatious litigation; and as similar evils appear they may be dealt with by regulatory or prohibitory legislation just as statutes were passed, and can still be passed to punish combinations, pooling arrangements, and all those practices which amount to unfair competition.

But these and those referred to in McCarter v. Firemen's Ins. Co. 74 N. J. Eq. 372, 29 L.R.A.(N.S.) 1194, 135 Am. St. Rep. 708, 73 Atl. 80, 414, 18 Ann. Cas. 1048, furnish instances of the exercise of this power to regulate which can be exerted against any person, trade, or business, no matter great or small. This power to regulate is so much oftener exerted against the large business, because the evils are then more apparent, that the size of the business and the number of persons interested is sometimes referred to as indicating that the business is affected with a public interest. But there is no such limitation. For the power to regulate is the essential power of government which can be exerted against the whole body of the public or the smallest business. And if, as seems to be implied, the fact that a business may be regulated is to be the test of the power to fix rates, it would follow, since all can be [424] regulated, the price charged by all can be regulated. Or if great size is the test, if the number of customers is the test, if the scope of the business throughout the nation is the test, if the contributions of the many to the value of the business is the test,—or if it takes a combination of all to meet the condition,—then every business with great capital and many customers distributed throughout the country, and making a large business possible, must be treated as affected with a public interest, and the price of the goods on its shelves can be fixed by law. Then could the price of newspapers, magazines, and the like be fixed, because certainly nothing is more affected with a public interest, nothing is so dependent on the public, nothing reaches so many persons, and so profoundly affects public thought and public business. Such a business is, indeed, affected with a public interest,—justifying regulation (Lewis Pub. Co. v. Morgan, 229 U. S. 288, 57 L. ed. 1190, 33 Sup. Ct. Rep. 867), but not the fixing of the price of the paper or periodical or the rates of advertising. For great and pervasive as is the power to regulate, it cannot override the constitutional principle that private property cannot be taken for private purposes. Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130. That limitation on the

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power of government over the individual and his property cannot be avoided by calling an unlawful taking a reasonable regulation. Indeed, the protection of property is an incident of the more fundamental and important right of liberty guaranteed by the Constitution, and which entitled the citizen freely to engage in any honest calling, and to make contracts as buyer or seller, as employer or employee, in order to support himself and family.

It said, however, that the validity of rates statutes has often been recognized, notably in the Munn Case (94 U. S. 126, 24 L. ed. 84), where a statute was sustained which regulated the price to be charged for storing grain in elevators.

The Munn Case is a landmark in the law. It is accepted [425] as an authoritative and accurate statement of the principle on which the right to fix rates is based. But the statute there under review did not undertake to fix the price of a personal contract, but to fix the price for the use of property, once private, but then public. The reasoning of the court clearly shows that in order to regulate rates, two things must concur—(1) the business must be affected with a public interest; and (2) the property employed in such business must be devoted to a public use. The basic principle of the decision was the oft-quoted saying of Lord Hale that "when private property is 'affected with a public interest, it ceases to be *juris privati* only.'" The decision in the Munn Case was but an application of that terse statement, and was applied in a case where the elevators had been devoted to a public use. This will distinctly appear from the statement by the court of the question involved and decided. For after reviewing and applying Lord Hale's pithy saying, and reviewing the other authorities, the court said (italics ours):

"Enough has already been said to show that when private *property is devoted to a public use* it is subject to public regulation. It remains only to ascertain whether the *warehouses* of these plaintiffs in error and the business which is carried on *there* come within the operation of this principle."

Not only does the Munn Case show that the right to fix prices depends on the concurrence of public interest and the employment of property devoted to a public use, but, with the exception of the Louisiana Bread Case, Guillotte v. New Orleans, 12 La. Ann. 432, it is believed that every American rate statute since the requirement that property should not be taken without due process of law related to a business which was public in its character and employed visible and tangible property which had been devoted to a public use.

The list of rate-regulated occupations is not too long to be here given. It includes canals, waterways, and [426] booms; bridges and ferries; wharves, docks, elevators, and stockyards; telegraph, telephone, electric, gas, and oil lines; turnpikes, railroads, and the various forms of common carriers, including express and cabs. To this should be added the case of the innkeeper (as to which no American case has been found where the constitutional question as to the right to fix his rates has been considered), the confessedly close case of the irrigation ditches for distributing water (San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571), and the toll mill acts. This, of course, does not include the case of condemnation for governmental purposes or for roads and ways where no question of rates is involved. There may be other instances not found, but it is believed that the foregoing numeration exhausts the list of what has heretofore been treated as a public business justifying the exercise of the price-fixing power against persons or corporations.

It is to be noted that in each instance the power to regulate rates is exercised against a business which in every case used tangible property devoted to a public use. Some of them had a monopoly (Spring Valley Waterworks v. Schottler, 110 U. S. 354, 28 L. ed. 176, 4 Sup. Ct. Rep. 48). Some of them had franchises. Most of them used public ways or employed property which they had acquired by virtue of the power of eminent domain. They were therefore subject to the correlative obligation to have the use, of what had been thus taken by law, fixed by law. And as further pointing out the characteristics of the public use justifying the fixing of prices, it will be noted that, with the exception of toll mills (which, however, do employ property devoted to a public use), they all have direct relation to the business or facilities of transportation or distribution,—to transportation by carriers of passengers, goods, or intelligence by vehicle or wire; to distribution of water, gas, or electricity through ditch, pipe, or wire; to wharfage, storage, or accommodation of property before the journey begins, when it ends, or along the way.

[427] When thus enumerated, they appear to be grouped around the common carrier as the typical public business, and all employing in some way property devoted to a public use.

It will be seen, too, that the size of the business is unimportant, for the fares of a cabman, employing a broken-down horse and a dilapidated vehicle, can be fixed by law as well as the rates of a railroad with mil-

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lions of capital and thousands of cars transporting persons and property across the continent.

The fact that rate statutes, enacted and sustained since the adoption of constitutional government in this country, all had some reference to transportation or distribution, is a practical illustration of the accepted meaning of "public use" when that phrase was first employed in American Constitutions, and when turnpikes and carriers, wharfingers and ferrymen, had rates, tolls, and fares fixed by law. No change was made in the meaning of the words or in the principle involved when it opened to take in new forms and facilities of transportation, whether by vehicle, pipe, or wire, and new forms of storage, whether on the wharf or in the grain elevator.

But it is said that business is the fundamental thing, with the property but an instrument, and that there is no basis for the distinction between a public interest and a public use. But there is a distinction between a public interest—justifying regulation—and a public use—justifying price fixing. "Public interest and public use are not synonymous." Re Niagara Falls & W. R. Co. 108 N. Y. 385, 15 N. E. 429. And since the case here involves the validity of a Kansas statute, it is well to note that the supreme court of that state in Howard Mills Co. v. Schwartz Lumber & Coal Co. 77 Kan. 599, 18 L.R.A.(N.S.) 356, 95 Pac. 559, recognizes that there is a difference, and adjudges accordingly. It there cited numerous decisions from other states, and in defining a public use made the following quotation from the opinion of the supreme court of Maine:

[428] "'Property is devoted to a public use when, and only when, . . . all the public has a right to demand and share in' [it] . . . In a broad sense it is the right in the public to an actual use, and not to an incidental benefit."

The effect of the difference between public use and public interest appears from the application; for the supreme court of Kansas, on the authority of this and numerous other cases, held that a steam flour mill was not such a public use as would authorize its owners to exercise the power of eminent domain, though it was a useful and important business instrumentality which contributed to the growth and development of the locality where the [mills] are situated. This may also be said, however, of every legitimate business. To a limited extent every honest industry adds to the general sum of prosperity and promotes the public welfare.

Nothing more can be said of insurance—nor can the power to take the private property of insurers by fixing rates be enlarged by a legislative declaration that the business is affected with a broad and definite public interest. For since the contract of insurance is private and personal, it is almost a contradiction in terms to say that the private contract is public, or that a business which consists in making such private contracts is public in the constitutional sense. The fundamental idea of a public business, as well declared by the supreme court of Kansas (77 Kan. 608), is that "all of the public have a right to demand and share in it." That means that each member of the public, on demand and upon equal terms, without written contract, without haggling as to terms, may demand the public service, and secure the use of the facility devoted to public use. If the company can make distinctions and serve one and refuse to serve another, the business *ex vi termini* is not public. The common carrier has no right to refuse to haul a passenger even if he has been [429] convicted of arson. But if an insurance company is indeed public, it is bound to insure the property of the man who is suspected of having set fire to his own house, or whose statements of value it is unwilling to take. This is manifestly inconsistent with the contract of insurance, which requires the utmost good faith, not only in making truthful answers to questions asked, but in not concealing anything material to the risk. If the company has the discretion to insure or the right to refuse to insure, then, by the very definition of the terms, it is not a public business. If, on the other hand, the company is obliged to insure bad risks or the property of men of bad character, of doubtful veracity, or known to be careless in their handling of property, the law would be an arbitrary exertion of power in compelling men to enter into contract with persons with whom they did not choose to deal where confidence is the very foundation of a contract of indemnity. Indeed, it seems to be conceded that a person owning property is not entitled to demand insurance as a matter of right. If not, the business is not public, and not within the provision of the Constitution which only authorizes the taking of property for public purposes—whether the taking be of the fee, for a lump sum assessed in condemnation proceedings, or whether the use be taken by rate regulation, which is but another method of exercising the same power.

The suggestion that the public interest is found in the characteristics of the business of insurance justifies a brief examination of those characteristics and a statement of the results that logically must follow from such a test. For if the power is to develop out

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of the characteristics, it must necessarily follow that other occupations, having similar characteristics, must be subject to the same rate regulating power.

The elements which are said to show that insurance is affected with a public interest do not arise out of the size of any one company, but out of the volume of the aggregate [430] business of all the companies doing business within the state and beyond its borders. If that test be applied, and if the sum of the units is to determine whether or not a business is affected with a public interest (which is said to be the equivalent of a public use), then if the principle of the decision be applied to the business of farming, all can see to what end it leads. In view of the amount of property employed and the aggregate number of persons engaged in agriculture, and the public's absolute dependence upon that pursuit, it would follow that, farming being affected with a broad and definite public interest, the price of wheat and corn; cotton and wools; beef, pork, mutton, and poultry; fruit and vegetables,—could be fixed. Or if we take the aggregate of those who labor, and consider the public's absolute dependence upon labor, it would inevitably follow that it, too, was affected with a broad and definite public interest, and that wages in the United States of America in this 20th century could be fixed by law, just as in England between the 14th and 18th centuries. And inasmuch as the prices of agricultural products are dependent on the price of land and labor, and as the price of labor is closely related to the cost of rent and food and clothes and the comforts of life, there would be the power to take the further step and regulate the cost of everything which enters into the cost of living. Of course, it goes without saying that if the rates for fire insurance can be fixed, then the rates for life and marine insurance can be fixed. By a parity of reasoning, the rates of accident, guaranty, and fidelity insurance could also be regulated. There seems no escape from the conclusion that the asserted power to fix the price to be paid by one private person to another private person or private corporation for a private contract of indemnity, or for his product, or his labor, or for his private contracts of any sort, will become the center of a circle of price-making legislation that, in its application, will destroy the right of [431] private property, and break down the barriers which the Constitution has thrown around the citizen to protect him in his right of property,—which includes his right of contract to make property,—his right to fix the price at which his property shall be used by another. By virtue of the liberty which is guaranteed by the Constitution, he also has the right to name the wage for his labor and to fix the terms of contracts of indemnity,—whether they be contracts of indorsement or suretyship, or contracts of indemnity against loss by fire, flood, or accident.

In view of what Judge Cooley calls the general supposition that "the right to fix prices was inconsistent with constitutional liberty," it is not surprising that little is to be found in the books relating to a statute like this. It is, however, somewhat curious that among the few expressions to be found on the subject is the intimation by Lord Ellenborough in Allnutt v. Inglis, 12 East, 535, that insurance rates were not on the same basis as a public business using property devoted to a public use. For in answering the argument that if the rates of a public wharf could be fixed, insurance rates could also be fixed, he clearly intimates that this could not be done, since the wharf was a monopoly, and "the business of insurance and of counting-houses may be carried on elsewhere."

In the following cases the statutes fixing prices have been held to be void: Ex parte Dickey, 144 Cal. 234, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428, fixing the price to be charged by an employment bureau; Ex parte Quarg, 149 Cal. 79, 5 L.R.A.(N.S.) 183, 117 Am. St. Rep. 115, 84 Pac. 766, 9 Ann. Cas. 747; People v. Steele, 231 Ill. 340, 14 L.R.A. (N.S.) 361. 121 Am. St. Rep. 321, 83 N. E. 236, prohibiting the sale of theater tickets at a price higher than that charged by the theater; State v. Fire Creek Coal & Coke Co. 33 W. Va. 188, 6 L.R.A. 359, 25 Am. St. Rep. 891, 10 S. E. 288, limiting the profits on sales to employees. See also State v. McCool, 83 Kan. 430, bot., 111 Pac. 477, where, in sustaining a statute regulating the weight of bread, the court called attention to the fact that the statute did not attempt to fix the price. To these could be added a multitude of decisions showing that the power [432] to regulate is limited by the constitutional prohibition against the taking of private property. Guillotte v. New Orleans, 12 La. Ann. 432, is the only American case found which sustains the right to fix prices for other than a commodity or service furnished by a public utility company of the kind already pointed out. In that case the court said that the city could fix the price of bread, and that if the baker did not desire to do business within the limits of such city, he could go elsewhere. That reasoning would support any statute, for every citizen at least has the right to go out of business. But it has been repeatedly held by this court that such

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an answer cannot sustain an invalid statute, the Constitution being intended to secure the citizen against being driven out of business by an unconstitutional statute or regulation.

There is, in the opinion, an allusion to usury laws as instances of fixing rates for other than public service corporations. We do not understand that the opinion is founded on that proposition, for even the usury laws do not fix a flat rate, but only a maximum rate, and do not require lenders to make loans to all borrowers, similarly situated, at the same rate of interest. Moreover, interest laws were in their inception not a restriction upon the right of contract, but an enlargement, permitting what theretofore had been regarded both as an ecclesiastical and civil offense. This fact may have been coupled with the idea that as the sovereign had the prerogative to coin money and make legal tender for all claims, he could fix the price that should be charged for the use of that money.

At any rate, interest laws had been long recognized before the Constitution, and have been prevalent ever since. They therefore fall within the rule that contemporary practice, if subsequently continued and universally acquiesced in, amounts to an interpretation of the Constitution. But the same character of long-continued acquiescence [433] and settled usage that sustains a usury law also sustains the right of the contracting parties to agree upon the charge for insurance. For centuries before the Constitution, and continuously ever since, they have themselves fixed this charge, and this makes most strongly in favor of their right to continue to agree upon the price of a private contract of indemnity against loss by fire.

The act now under review not only takes property without due process of law, but it unequally and arbitrarily selects those from which such property shall be taken by price fixing. Although including all other fire insurance companies, it excepts certain mutual insurance companies. *Persons* engaged in doing an insurance business are not within its terms. In Kansas, the right to do a fire insurance business is not limited to corporations, but may be conducted by persons, individuals, partners, companies, and associations, whether incorporated or not. Gen. Stat. (Kan.) (1909) §§ 4086, 4091, 4122. And if it could be true that the legislature could fix the price of insurance, it would seem to be doubly necessary that all doing an insurance business should be treated alike. There is no difference in principle and none by statute in the character of the contract, whether it is made by one man, or the Lloyds, or a corporation. There is no difference in the character of the contract made by a stock company and a mutual company. In each instance the contract is one of indemnity against loss for a fixed premium. If the policy holder is a stockholder in an ordinary corporation, he may get back some of his premium by way of dividends; if he is a member of a mutual company, he pays his premium and gets back his share of the earnings. But to say that the state may fix the price to be charged for insurance by a stock company, and that it will not fix the price to be charged by mutual companies or by the Lloyds, who do an enormous business of exactly the same nature, on exactly [434] the same sort of property, and on exactly the same terms, is to make a discrimination which amounts to a denial of the equal protection of the law.

The CHIEF JUSTICE and Mr. Justice Van Devanter concur in this dissent.

LAURA WHEELER and Charles P. Howland, Executors of the Will of Charles C. Tiffany, Plffs. in Err.,

v.

WILLIAM SOHMER, Comptroller of the State of New York.

(See S. C. Reporter's ed. 434-447.)

Constitutional law — due process of law — inheritance tax — debts due nonresident testator — notes given by nonresident.

Consistent with due process of law is the imposition under the authority of N. Y. Laws 1905, chap. 368, § 1, amending Laws

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NOTE.—Due process of law in succession tax.

A succession tax need not operate with absolute uniformity in order to satisfy constitutional guaranties against the denial of due process of law.

Thus, an inheritance tax law may exempt from its provisions property devised to religious, educational, or charitable corporations, and not extend such exemption to nonresident corporations, without violating the due process provision of the 14th Amendment to the Constitution of the United States. Re Speed, 216 Ill. 23, 108 Am. St. Rep. 189, 74 N. E. 809, affirmed in 203 U. S. 553, 51 L. ed. 314, 27 Sup. Ct. Rep. 171, 8 Ann. Cas. 157.

And an inheritance tax law which discriminated between life tenants with remainder to lineal descendants, and life tenants with remainder to collateral heirs or strangers, by imposing the tax on the first, and excluding the second from its operation, is not unconstitutional as depriving the class affected of their property without due

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1896, chap. 908, § 220, of a transfer tax upon promissory notes left by a nonresident testator in a safe deposit box in New York, although such notes were made either by a resident of Chicago, secured by mortgages of Chicago land to Illinois trustees, or by a Virginia corporation.

[For other cases, see Constitutional Law, 532-535, 554-556; Taxes, I. c, 6, in Digest Sup. Ct. 1908.]

[No. 45.]

Argued November 5 and 6, 1913. Decided April 20, 1914.

IN ERROR to the Surrogates' Court of New York County, in the State of New York, to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which had affirmed a judgment of the Appellate Division of the Supreme Court, First Department, affirming the surrogate's order imposing a transfer tax. Affirmed.

See same case below, in Appellate Division, 143 App. Div. 327, 128 N. Y. Supp. 106; in Court of Appeals 202 N. Y. 550, 95 N. E. 1140.

The facts are stated in the opinion.

Mr. Charles P. Howland argued the cause and filed a brief for plaintiffs in error:

Jurisdiction of a state for purposes of transfer or inheritance taxation is limited to "property within the state," in the sense in which that phrase has been recognized.

Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499.

Promissory notes are only evidences of debt, and not the debts themselves. Their situs, therefore, is not the situs of the debts; the situs of the debts is at the residence of one or the other of the parties to the relation.

Buck v. Beach, 206 U. S. 392, 51 L. ed.

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process of law. Billings v. People, 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 798, affirmed in 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272.

So, in Gelsthorpe v. Furnell, 20 Mont. 299, 39 L.R.A. 170, 51 Pac. 267, it was held that a succession tax did not take property without due process of law, when it was imposed upon all property which passed by will or intestate laws except when the estate was less than a specified sum.

The death of the testator before the enactment of the succession tax law is not an insuperable obstacle to its application. Thus, in Cahen v. Brewster, 203 U. S. 543, 51 L. ed. 310, 27 Sup. Ct. Rep. 174, 8 Ann. Cas. 215, affirming 115 La. 377, 8 L.R.A. (N.S.) 1181, 39 So. 37, 5 Ann. Cas. 871, it was held that a Louisiana inheritance tax law imposing a tax on all successions not finally closed and administered upon, and on all successions thereafter opened, did not deprive universal legatees under the will of a person who had died before the enactment of the law, of their property without due process of law, though, under the Louisiana Civil Code, the ownership of the property passed to such legatees upon the death of the testator.

The interest of those who will take under a will or deed upon failure of a donee of a power of appointment therein to exercise it is not so far vested that the imposition of a succession tax upon the passing to them of the estate, in case of such failure, can be considered as a taking of property without due process of law. Minot v. Treasurer & Receiver General (Minot v. Stevens) 207 Mass. 588, 33 L.R.A.(N.S.) 236, 93 N. E. 973.

In Re Vanderbilt, 50 App. Div. 246, 63 N. Y. Supp. 1079, affirmed without opinion in 163 N. Y. 597, 57 N. E. 1127, and in Re Potter, 51 App. Div. 212, 64 N. Y. Supp. 1013, an inheritance tax law taxing the exercise of the power of appointment derived from the disposition of property, made before the passage of the act, as though the property belonged absolutely to the donee of the power, was held not to take property without due process of law.

None of the provisions of U. S. Const., 14th Amend., are infringed by the provision of the New York transfer tax law for taxation of the exercise of the power of appointment derived from the disposition of property, made either before or after the passage of that act, as though the property belonged absolutely to the donee of the power, and had been bequeathed or devised by him by will, although construed by the highest court of the state to apply to the exercise by a son among his children of a power of appointment given him in the will of his father, who, under the law as it stood at the time of his death, had a legal right to transfer by will his property to such appointees, without any limitation then imposed upon the exercise of that right. Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213.

A tax on gifts, legacies, and collateral inheritances, which operates alike on all property and persons similarly situated, and which is made by a judicial officer, after notice and opportunity to be heard, does not conflict with the provisions of the 14th Amendment of the Constitution of the United States. Wallace v. Myers, 4 L.R.A. 171, 38 Fed. 184.

And a statute which vested the interest of the state in a succession tax at the time of the decedent's death did not take property without due process of law, where it provided for an appraisement after notice to all persons known to be interested, and afforded them an opportunity to be heard before the tax could be collected. Trippet v. State, 149 Cal. 521, 8 L.R.A.(N.S.) 1210, 86 Pac. 1084.

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1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; Pelham v. Way, 15 Wall. 196, 21 L. ed. 55.

The distinction between a debt and the evidence establishing it has long been recognized.

Wyman v. Halstead (Wyman v. United States) 109 U. S. 654, 27 L. ed. 1068, 3 Sup. Ct. Rep. 417; Atty. Gen. v. Bouwens, 4 Mees. & W. 171, 1 Hayw. & H. 319, 7 L. J. Exch. N. S. 297; Hunter v. Board of Supervisors, 33 Iowa, 376, 11 Am. Rep. 132; Hanson, Death Duties, 4th ed. p. 239.

A note is the representative of a debt as a warehouse receipt is the representative of personal property, but such a receipt cannot be taxed at the value of the goods, on the theory that "in some way it represents them."

Selliger v. Kentucky, 213 U. S. 200, 53 L. ed. 761, 29 Sup. Ct. Rep. 449.

Undoubtedly the field of inheritance taxation is broader than that of annual taxation. Tangible chattels may be taxed at the domicil of the owner where they come under the universal succession, or in the jurisdiction of their own situs.

Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277.

In the case of choses in action, the state of the owner's domicil levies one tax (Re Swift, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096), while the state of the debtor's domicil levies a tax "not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor,"—in other words, because it grants a practical privilege by providing means for the collection of the debt.

What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay.

Blackstone v. Miller, supra; Re Houday-

So, in State v. Hamlin, 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 569, 30 Atl. 70, it was held that an inheritance tax law which provided for an appraisal of the estate subject to the tax upon application to the probate court by anyone interested in the estate, and gave that court jurisdiction to hear and determine all questions that might arise, subject to appeal as in other cases, satisfied the requirement of due process of law.

And in Union Trust Co. v. Wayne Probate Judge, 125 Mich. 487, 84 N. W. 1101, a succession tax law was held not to be unconstitutional as taking property without due process of law, because it did not provide for personal notice and opportunity to resist the assessment, upon the ground that it was not taking the property of the legatee, but was only imposing a condition upon the acquisition of property.

And in Gelsthorpe v. Furnell, 20 Mont. 299, 39 L.R.A. 170, 51 Pac. 267, an inheritance tax statute was held not to take property without due process of law, where it made provision for notice to the persons interested, and an opportunity was given to be heard in relation to the value of the property and the amount of the tax.

In Hostetter v. State, 26 Ohio C. C. 702, reversed on other grounds in 72 Ohio St. 448, 74 N. E. 650, an inheritance tax statute was held not to take property without due process of law, though it gave the probate court power to order an appraisement of the property of a deceased for the purpose of fixing the tax to which the same was liable, without giving notice to the executors or next of kin, where other sections thereof provided for a review of all matters before such court and for an appeal, and where, by general law, certain courts had jurisdiction to enjoin the illegal levy of tax assessments, and to entertain actions to recover them back when collected.

On the other hand, in Ferry v. Campbell, 110 Iowa, 290, 50 L.R.A. 92, 81 N. W. 604, a collateral inheritance tax law which failed to provide for any notice to the persons interested was held to be unconstitutional as taking property without due process of law.

Property is not taken without due process of law, contrary to U. S. Const., 14th Amend., by the imposition of the tax authorized by N. Y. Laws 1896, chap. 908, when property is transferred by deed intended to take effect upon the death of the grantor. Keeney v. New York, 222 U. S. 525, 56 L. ed. 299, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105.

A safe deposit company is not arbitrarily charged, without due process of law, with a duty to supervise the delivery and to determine the ownership of property over which it has no control, by the provisions of the Illinois inheritance tax law of July 1, 1909, under which the contents of safe deposit boxes cannot be removed after the death of the renter, whether standing solely in his name or in the joint name of the decedent and others, or in the name of a partnership of which he was a member, except after ten days' notice to the attorney general and state treasurer, and even then, not without retaining possession of enough of the assets to pay the tax, where in law and by contract the safe deposit company stood in such relation to the property as to make it liable for allowing unauthorized persons to take possession. National Safe Deposit Co. v. Stead, 232 U. S. 58, ante, 504, 34 Sup. Ct. Rep. 209.

Prohibiting a safe deposit company from permitting the removal of the contents of a safe deposit box after the death of the renter, whether standing solely in his name or in the joint name of the deceased and others, or in the name of a partnership of which he was a member, without retaining assets sufficient to pay the state inheritance tax, as is done by Ill. act of July 1, 1909, does not deprive the company of its property without due process of law, nor arbitrarily burden it with a liability. Ibid.

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er, 150 N. Y. 37, 34 L.R.A. 235, 55 Am. St. Rep. 642, 44 N. E. 718.

In this case the state of New York had no control over the persons of the debtors. That control was in the states of Illinois and Virginia, respectively (Buck v. Beach, 206 U. S. 392, 407, 51 L. ed. 1106, 1114; 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 715, 43 L. ed. 1144, 1146, 19 Sup. Ct. Rep. 797); and as neither the universal succession nor the control over the means of enforcement was granted or could be regulated by the state of New York, that state had no power to tax.

The situs of bonds appears to determine the situs of the debts they symbolize, but bonds have always been sharply distinguished from promissory notes in that regard.

Re Bronson, 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707; Re Fearing, 200 N. Y. 340, 93 N. E. 956; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; Buck v. Beach, 206 U. S. 392, 403, 51 L. ed. 1106, 1112, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; Selliger v. Kentucky, 213 U. S. 200, 204, 53 L. ed. 761, 763, 29 Sup. Ct. Rep. 449.

A promissory note may be the subject of larceny.

People ex rel. Westbrook v. Ogdensburgh, 48 N. Y. 390.

This consideration, however, is not near enough to the question involved to change the law in regard to the taxation of property, and make that property within the state, which we think is clearly outside it.

Buck v. Beach, 206 U. S. 407, 51 L. ed. 1114, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732.

Indeed, at common law a promissory note was not within the law of larceny, for larceny could not be committed of an instrument which had no value of its own, and was only the evidence of a chose in action.

Reg. v. Watts, 6 Cox, C. C. 304.

Larceny is no criterion, for certificates of stock, warehouse receipts, and policies of insurance are unquestionably the subjects of larceny, yet none of them is the property whose situs determines the power of annual or of inheritance taxation.

Re James, 144 N. Y. 6, 38 N. E. 961; Selliger v. Kentucky, 213 U. S. 200, 53 L. ed. 761, 29 Sup. Ct. Rep. 449; Re Horn, 39 Misc. 133, 78 N. Y. Supp. 979.

Taxation rests upon protection as a correlative, and when no protection is either practically or theoretically possible, taxation should not be laid; this is the broad basis for the rules limiting taxation.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Re Bronson, 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707; Cooley, Taxn. 3d ed. p. 3.

In this case Connecticut may tax, and indeed does so because, as the state of the testator's domicil, it protects the universal succession. The states of Illinois and Virginia may tax, because they protect the debts by affording recourse to their respective courts.

Re Daly, 100 App. Div. 373, 91 N. Y. Supp. 858, affirmed in 182 N. Y. 524, 74 N. E. 1116; Re Clinch, 180 N. Y. 300, 73 N. E. 35.

But New York has protected nothing. If such taxation is allowed, triple taxation on many kinds of choses in action is possible; in the case of a bill of exchange issued in multiplicate, the domiciliary states of the owner and of the primary obligor would be able to tax, and also each state within which one of the multiplicate bills happened to be found at the owner's death.

Mr. William Law Stout argued the cause and filed a brief for defendant in error:

Promissory notes, kept by a nonresident decedent in the state of New York, are properly assessed and taxed as personal property under the declaratory statutes of the state of New York.

Re Jones, 172 N. Y. 575, 60 L.R.A. 476, 65 N. E. 570; Re Whiting, 150 N. Y. 27, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715; Re Bronson, 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707; Re Romaine, 127 N. Y. 80, 12 L.R.A. 401, 27 N. E. 759; Re Morgan, 150 N. Y. 36, 44 N. E. 1126.

The maxim, *Mobilia personam sequuntur*, is not an inflexible rule, but, upon the contrary, may be modified or disregarded by the declaratory laws of the state in defining promissory notes as tangible personal property when held or located within its domain.

Savings & Loan Soc. v. Multnomah County, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; Eidman v. Martinez, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; Blackstone v. Miller, 188 U. S. 189–206, 47 L. ed. 439–445, 23 Sup. Ct. Rep. 277; Re Whiting, 150 N. Y. 27, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715; Re Bronson, 150 N. Y. 1, 34 L.R.A. 238, 55 Am.

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St. Rep. 632, 44 N. E. 707; Re Houdayer, 150 N. Y. 37, 34 L.R.A. 235, 55 Am. St. Rep. 642, 44 N. E. 718; Re Blackstone, 171 N. Y. 682, 64 N. E. 1118; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18–22, 35 L. ed. 613–616, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. ed. 189; People ex rel. Hoyt v. Tax & A. Comrs. 23 N. Y. 224.

The power of taxation of a sovereign state is over persons, property, and business within its domain. It is within the sovereign power of each state to designate and classify all objects of property within its domain which shall be subject to taxation. It is not necessary that both owner and thing assessed be within the jurisdiction of the state.

State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; State R. Tax Cases, 92 U. S. 575, 23 L. ed. 663; Dewey v. Des Moines, 173 U. S. 193–204, 43 L. ed. 665–668, 19 Sup. Ct. Rep. 379; Bristol v. Washington County, 177 U. S. 133–141, 44 L. ed. 701–705, 20 Sup. Ct. Rep. 585; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385–396, 47 L. ed. 513–518, 23 Sup. Ct. Rep. 463; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. ed. 189.

It is within the power of a state to create a situs for property, tangible or intangible, in so far as it is able to obtain jurisdiction and dominion over the object of transfer as a basis for the imposition of a transfer or inheritance tax.

There is no provision in the Federal Constitution forbidding a state to give to the promissory note the attribute of tangible personal property, or forbidding the state to impose either a direct tax thereon when actually located in the state, or to impose a transfer tax upon the transfer effected by the death of the owner, whether resident or nonresident.

State Assessors v. Comptoir National d'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109.

If justification for legislation be found, a statute will not be dissected to show how little or how much benefit has accrued or may accrue to the taxpayer.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493.

The power of taxation is exercised upon the assumption of an equivalent rendered in the protection of property and person of the taxpayer.

Ibid.

The fundamental differences between a negotiable and a non-negotiable promissory note, and between these notes and ordinary choses in action, have justified the recognition of a promissory note as tangible personal property when held or located within the state of New York.

Norton, Bills & Notes, 3d ed. 7; Friedlander v. Texas & P. R. Co. 130 U. S. 416, 32 L. ed. 991, 9 Sup. Ct. Rep. 570; Russell v. Whipple, 2 Cow. 536; Goodwin v. Robarts, L. R. 10 Exch. 337; Southern P. Co. v. Kentucky, 222 U. S. 63, 56 L. ed. 96, 32 Sup. Ct. Rep. 13.

The state of New York, in its sovereign power over all property within its domain, may declare by appropriate legislation that promissory notes held and located within its domain shall be recognized as tangible personal property; such legislation does not offend any of the rights of the plaintiffs in error under the Constitution of the United States.

People ex rel. Hoyt v. Tax & A. Comrs. 23 N. Y. 224; Re Clinch, 180 N. Y. 303, 73 N. E. 35.

Promissory notes by usage and custom, apart from declaratory statutes, are recognized generally as tangible personal property, and establish by their physical presence a situs for all purposes of taxation in the state where located.

New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; State Assessors v. Comptoir National d'Escompte, 191 U. S. 388–402, 48 L. ed. 232–238, 24 Sup. Ct. Rep. 109; Selliger v. Kentucky, 213 U. S. 200, 53 L. ed. 761, 29 Sup. Ct. Rep. 449; Re Whiting, 2 App. Div. 590, 38 N. Y. Supp. 131, reversed in 150 N. Y. 27, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715; People ex rel. Burke v. Wells, 184 N. Y. 275, 12 L.R.A.(N.S.) 905, 121 Am. St. Rep. 840, 77 N. E. 19, affirmed in 208 U. S. 14, 52 L. ed. 370, 28 Sup. Ct. Rep. 193; People ex rel. Westbrook v. Ogdensburgh, 48 N. Y. 390; People ex rel. Jefferson v. Smith, 88 N. Y. 576.

By the decisions of the New York courts, irrespective of its declaratory statutes, promissory notes are considered personal property where they are kept.

People ex rel. Burke v. Wells, 184 N. Y. 275, 12 L.R.A.(N.S.) 905, 121 Am. St. Rep. 840, 77 N. E. 19, affirmed in 208 U. S. 14, 52 L. ed. 370, 28 Sup. Ct. Rep. 193; People ex rel. Jefferson v. Smith, 88 N. Y. 576; Re Fearing, 200 N. Y. 340, 93 N. E. 956.

There are fundamental differences be-

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tween a property tax and an inheritance or succession tax. The conditions deemed essential to establish a situs in the taxing state as a basis for a property tax are not essential to justify the imposition of a transfer, succession, or inheritance tax.

Cahen v. Brewster, 203 U. S. 552, 51 L. ed. 314, 27 Sup. Ct. Rep. 174, 8 Ann. Cas. 215; Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; Wallace v. Meyer, 4 L.R.A. 171, 38 Fed. 184; Hertz v. Woodman, 218 U. S. 205–219, 54 L. ed. 1001–1007, 30 Sup. Ct. Rep. 621.

The court of appeals of the state of New York has construed the statute imposing this tax as a tax upon the right to particular successions, and not upon the property.

Re Swift, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096; Re Merriam, 141 N. Y. 479, 36 N. E. 505; Re Hoffman, 143 N. Y. 329, 38 N. E. 311; Re Cullum, 145 N. Y. 593, 40 N. E. 163; Re Sherman, 153 N. Y. 1, 46 N. E. 1032; Re Dows, 167 N. Y. 227, 52 L.R.A. 433, 88 Am. St. Rep. 508, 60 N. E. 439; Re Vanderbilt, 172 N. Y. 69, 64 N. E. 782.

This interpretation of the tax as a tax upon the right of testamentary successions has been uniformly recognized by the Supreme Court of the United States.

Mager v. Grima, 8 How. 490, 12 L. ed. 1168; Wallace v. Myers, 4 L.R.A. 171, 38 Fed. 184; United States v. Perkins, 163 U. S. 625, 628–630, 41 L. ed. 287–289, 16 Sup. Ct. Rep. 1073; Knowlton v. Moore, 178 U. S. 41, 55, 57, 59, 44 L. ed. 969, 975–977, 20 Sup. Ct. Rep. 747; Blackstone v. Miller, 188 U. S. 189–203, 47 L. ed. 439–444, 23 Sup. Ct. Rep. 277; Plummer v. Coler, 178 U. S. 115–122, 44 L. ed. 998–1003, 20 Sup. Ct. Rep. 829; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Chanler v. Kelsey, 205 U. S. 466, 51 L. ed. 882, 27 Sup. Ct. Rep. 550; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 47 L.R.A.(N.S.) 84, 30 Sup. Ct. Rep. 676; United States v. Fox, 94 U. S. 315, 24 L. ed. 192; Billings v. Illinois, 188 U. S. 97–104, 47 L. ed. 400–403, 23 Sup. Ct. Rep. 272.

The enactment of rules, regulations, and principles governing the transmission of property by will, intestacy, or other conveyances testamentary in character and effect, is within the exclusive province of the state. The Supreme Court of the United States will look to the statutes of the state for the rules governing the descent and testamentary transfer, alienation, and succession of property. This court will not only adopt but is bound by the decisions of the highest courts of the states as to the effect and interpretation of wills and instruments of title.

Orr v. Gilman, 183 U. S. 278–290, 46 L. ed. 196–202, 22 Sup. Ct. Rep. 213; De Vaughn v. Hutchinson, 165 U. S. 566–570, 41 L. ed. 827–829, 17 Sup. Ct. Rep. 461; Clarke v. Clarke, 178 U. S. 186–190, 44 L. ed. 1028–1030, 20 Sup. Ct. Rep. 876; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Yazoo & M. Valley R. Co. v. Adams, 181 U. S. 580–583, 45 L. ed. 1011, 1012, 21 Sup. Ct. Rep. 729; Eastern Bldg. & L. Asso. v. Ebaugh, 185 U. S. 114–122, 46 L. ed. 830–833, 22 Sup. Ct. Rep. 566; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 47 L.R.A.(N.S.) 84, 30 Sup. Ct. Rep. 676; Leffingwell v. Warren, 2 Black, 599–603, 17 L. ed. 261, 262; Randall v. Brigham, 7 Wall. 523–541, 19 L. ed. 285–293; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162–167, 36 L. ed. 925, 927, 928, 13 Sup. Ct. Rep. 54; Moffitt v. Kelly, 218 U. S. 400, 405, 54 L. ed. 1086, 1087, 30 L.R.A.(N.S.) 1179, 31 Sup. Ct. Rep. 79.

This court will also be bound by the decision of the highest court of the state that there is nothing in the statute or its enforcement in conflict with the Constitution of the state, and that the proceedings taken therein for its ascertainment did not deprive the plaintiffs in error of their property without due process of law within the meaning of the state Constitution.

New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1–47, 50 L. ed. 65–79, 25 Sup. Ct. Rep. 705, 4 Ann. Cas. 381; Orr v. Gilman, 183 U. S. 278–283, 46 L. ed. 196–200, 22 Sup. Ct. Rep. 213; Carpenter v. Pennsylvania, 17 How. 456, 15 L. ed. 127; Wallace v. Myers, 4 L.R.A. 171, 38 Fed. 184; Yazoo & M. Valley R. Co. v. Adams, 181 U. S. 580–583, 45 L. ed. 1011, 1012, 21 Sup. Ct. Rep. 729.

Buck v. Beach went no further than to hold that, under the facts presented by the record, the promissory notes were held but temporarily in the state of Indiana, and that therefore a situs as a basis for a property tax had not been established.

Selliger v. Kentucky, 213 U. S. 200, 53 L. ed. 761, 29 Sup. Ct. Rep. 449.

The interpretation and construction placed by the highest court of the state upon its statutes is conclusive upon this court.

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Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; Hibben v. Smith 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; Blackstone v. Miller, 188 U. S. 189–207, 47 L. ed. 439–445, 23 Sup. Ct. Rep. 277; Watson v. Maryland, 218 U. S. 173–175, 54 L. ed. 987–989, 30 Sup. Ct. Rep. 644; Kentucky Union Co. v. Kentucky, 219 U. S. 140–151, 55 L. ed. 137–153, 31 Sup. Ct. Rep. 171; Tilt v. Kelsey, 207 U. S. 43–56, 52 L. ed. 95–101, 28 Sup. Ct. Rep. 1; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Moffitt v. Kelly, 218 U. S. 400, 54 L. ed. 1086, 30 L.R.A.(N.S.) 1179, 31 Sup. Ct. Rep. 79; Eastern Bldg. & L. Asso. v. Ebaugh, 185 U. S. 114–122, 46 L. ed. 830–833, 22 Sup. Ct. Rep. 566; Chanler v. Kelsey, 205 U. S. 477, 51 L. ed. 888, 27 Sup. Ct. Rep. 550; Cahen v. Brewster, 203 U. S. 551, 51 L. ed. 313, 27 Sup. Ct. Rep. 174, 8 Ann. Cas. 215.

In respect to the succession to property by death, the states are sovereign, and may give to their courts authority to determine finally, as against all the world, all questions which arise therein, subject to applicable constitutional limitations.

McElroy, Transfer Tax Law, 2; Tilt v. Kelsey, 207 U. S. 43, 52 L. ed. 95, 28 Sup. Ct. Rep. 1; Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66–76, 46 L. ed. 86–91, 22 Sup. Ct. Rep. 26; Bristol v. Washington County, 177 U. S. 133–141, 44 L. ed. 701–705, 20 Sup. Ct. Rep. 585.

The objection that the statutory construction law, now general construction law, might, under its terms, without further test, comprehend various instruments of title without legal justification, cannot be made by transferees of promissory notes.

Re Keeney, 194 N. Y. 281, 87 N. E. 428, affirmed in 222 U. S. 525, 56 L. ed. 299, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105.

The 14th Amendment does not affect or control the states in the exercise of their sovereign authority to regulate inheritances, and to determine the persons or objects upon which an inheritance tax shall be imposed.

Campbell v. California, 200 U. S. 94, 50 L. ed. 387, 26 Sup. Ct. Rep. 182; Heath & M. Mfg. Co. v. Worst, 207 U. S. 338–354, 52 L. ed. 236–243, 28 Sup. Ct. Rep. 114.

Mr. Justice Holmes delivered the judgment of the court:

This proceeding began with a petition by an executor, acting under ancillary letters, for the appointment of an appraiser to determine the amount, if any, of the transfer tax due from the estate of the deceased testator, Charles C. Tiffany. Tiffany was not a resident of New York at the time of his death, but left in a safe deposit box in New York four promissory notes made by Pottinger, a resident of Chicago, secured by mortgages of Chicago land to Illinois trustees, and promissory notes of the Southern Railway Company, a Virginia corporation. The appraiser held these notes taxable under the New York Laws of 1905, chap. 368, § 1, amending § 220 of an earlier law, and imposing a tax "when the transfer is by will or intestate law, of property within the state, and the decedent was a nonresident of the state at the time of his death." The surrogate [438] confirmed the appraiser's report, and his order was affirmed by the appellate division and the court of appeals. 143 App. Div. 327, 128 N. Y. Supp. 106; 202 N. Y. 550, 95 N. E. 1140. The executors contend that the tax deprives them of their property without due process of law.

In support of this position it was argued that if bonds were subject to taxation simply because of their presence within the jurisdiction, it was due to the survival of primitive notions that identified the obligation with the parchment or paper upon which they were written; that bills and notes had a different history, and that there was no ground for extending the conceptions of the infancy of the race to them. It was pointed out that the power to tax simple contracts depends upon power over the person of one of the parties, and does not attach to documentary evidence of such contracts that may happen to be within the jurisdiction. Cases were cited in which this court has pronounced bills and notes to be only evidences of the simple contracts that they express (Pelham v. Way, 15 Wall. 196, 21 L. ed. 55; Wyman v. Halstead [Wyman v. United States] 109 U. S. 654, 656, 27 L. ed. 1068, 1069, 3 Sup. Ct. Rep. 417); and the precise issue was thought to be disposed of by Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732. We shall discuss this case, but for the moment it is enough to say that for the purposes of argument we assume that bills and notes stand as mere evidences at common law.

But we are bound by the construction given to the New York statutes by the New York courts, and the question is whether a statute that we must read as purporting to give to bills and notes within the state the same standing as bonds for purposes of taxation goes beyond the constitutional power of the state. Again, for the purposes of argument we may assume that there are limits to this kind of power; that the presence of a deed would not warrant a tax

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measured by the value of the real estate that it had conveyed, or even that a memorandum of a contract required by the statute of frauds would not support [439] a tax on the value of the contract because it happened to be found in the testator's New York strong box. But it is plain that bills and notes, whatever they may be called, come very near to identification with the contract that they embody. An indorsement of the paper carries the contract to the indorser. An indorsement in blank passes the debt from hand to hand so that whoever has the paper has the debt. It is true that in some cases there may be a recovery without producing and surrendering the paper, but so may there be upon a bond in modern times. It is not primitive tradition alone that gives their peculiarities to bonds, but a tradition laid hold of, modified and adapted to the convenience and understanding of business men. The same convenience and understanding apply to bills and notes, as no one would doubt in the case of bank notes, which technically do not differ from others. It would be an extraordinary deduction from the 14th Amendment to deny the power of a state to adopt the usages and views of business men in a statute on the ground that it was depriving them of their property without due process of law. The necessity of caution in cutting down the power of taxation on the strength of the 14th Amendment often has been adverted to. Louisville & N. R. Co. v. Barber Asphalt Paving Co. 197 U. S. 430, 434, 49 L. ed. 819, 821, 25 Sup. Ct. Rep. 466. Unless we are bound by authority, we think the statute, so far as we now are concerned with it, plainly within the power of the state to pass.

As to authority, it has been asserted or implied, again and again, that the states had the power to deal with negotiable paper on the footing of situs. "It is well settled that bank bills and municipal bonds are in such a concrete, tangible form that they are subject to taxation where found, irrespective of the domicil of the owner; . . . Notes and mortgages are of the same nature . . . we see no reason why a state may not declare that, if found within its limits, they shall be subject to taxation." New [440] Orleans v. Stempel, 175 U. S. 309, 322, 323, 44 L. ed. 174, 181, 20 Sup. Ct. Rep. 110; Bristol v. Washington County, 177 U. S. 133, 141, 44 L. ed. 701, 705, 20 Sup. Ct. Rep. 585; State Assessors v. Comptoir National d'Escompte, 191 U. S. 388, 403, 404, 48 L. ed. 232, 238, 239, 24 Sup. Ct. Rep. 109; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 400, 402, 51 L. ed. 853, 855, 856, 27 Sup. Ct. Rep. 499. This is the established law unless it has been overthrown by the decision in Buck v. Beach, supra.

No such effect should be attributed to that case. The Ohio notes in Buck's hands that were held not to be taxable in Indiana were moved backward and forward between Ohio and Indiana with the intent to avoid taxation in either state. 206 U. S. 402. They really were in Ohio hands for business purposes (id. 395), and sending them to Indiana was spoken of by Mr. Justice Peckham as improper and unjustifiable. Id. 402. Their absence from Ohio evidently was regarded as a temporary absence from home. Id. 404. And the conclusion is carefully limited to a refusal to hold the presence of the notes "under the circumstances already stated" to amount to the presence of property within the state. A distinction was taken between the presence sufficient for a succession tax like that in this case, and that required for a property tax such as then was before the court, and the only point decided was that the notes had no such presence in Indiana as to warrant a property tax. See New York ex rel. New York C. & H. R. R. Co. v. Miller, 202 U. S. 584, 597, 50 L. ed. 1155, 1160, 26 Sup. Ct. Rep. 714. If Buck v. Beach is not to be distinguished on one of the foregoing grounds, as some of us think that it can be, we are of opinion that it must yield to the current of authorities to which we have referred.

In the case at bar it must be taken that the safe deposit box in which the notes were found was their permanent resting place, and therefore that the power of the state so repeatedly asserted in our decisions could come into play.

Judgment affirmed.

[441] Mr. Justice McKenna, concurring:

I concur in the result, but cannot concur in the reasoning of the opinion, or rather, its controlling proposition, unmodified. I might pass it by in silence if it did not have larger consequence than the decision of the pending case. The opinion is rested on the proposition, said to be based on authority, that the states have power to deal "with negotiable paper on the footing of situs;" that is, to regard such paper so far concrete and tangible as to be of itself a subject of taxation, irrespective of the domicil of its owner, or, I add, the locality of the debt which it represents. For the proposition announced, Mr. Justice Brewer, in New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110, is quoted from. Other cases are cited and it is said to be established law unless it has been overthrown by the decision in Buck v. Beach,

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206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732. I refrain from meeting the judgment of my brethren by simply opposing assertion, and I feel constrained to review the cases, including Buck v. Beach. I will do so in the order of their decision.

Commencing with the Stempel Case I may immediately say of it that its facts did not call for the broad and general declaration it is adduced to sustain. The statute passed on did not attempt to tax negotiable paper simply because of its presence in the state. It regarded the origin and use of such paper, and declared its (the statute's) purpose to be that no nonresident, by himself or through an agent, should transact business in the state "without paying to the state a corresponding tax with that exacted of its own citizens;" and, to execute the purpose, declared: "All bills receivable, obligations or credits arising from the business done in the state, are hereby declared assessable within this state, and at the business domicil of said nonresident, his agent or representative."

The property assessed was inherited by Stempel's wards, they and she being residents of the state of New York. It [442] was assessed to the estate of the grandfather of the wards, and was $15,000, "money in possession, on deposit, or in hand," and $8,000, "money loaned or advanced, or for goods sold; and all credits of every description." The contention was that "the situs of the loans and credits was in New York, the place of residence of the guardian and wards, and, therefore, being loans and credits without the state of Louisiana, they were not subject to taxation therein."

The question presented by the contention, this court said, was whether, under the statute as interpreted by the supreme court of the state, the properties were subject to taxation, and, if so subject, whether any rights secured by the Federal Constitution were thereby infringed. The tax was sustained, but it will be observed that negotiable paper was not assessed at all or dealt with as an entity separate from what it represented. The notes which represented the credits taxed were, it is true, in New Orleans, but in possession of the agent of Stempel. Not they, but the rights of which they were the evidence, were taxed. The broad declaration, therefore, that negotiable paper had such tangibility as to be of itself a taxable entity was not called for. The true value of the case and its application to the case at bar can be estimated when we consider the other cases.

In Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585, notes secured by mortgages in the state (Minnesota) were taxed. The question was of their situs. The state court put its decision on the ground that the notes were in the state for collection or renewal with a view of reloaning the money and keeping it invested as a permanent business. And this court in its decision said that "credits secured by mortgages, the result of the business of investing and reinvesting moneys in the state, were subject to tax as having a situs there." The ruling was affirmed. We said, by Mr. Chief Justice Fuller: "Persons are not permitted [443] to avail themselves for their own benefit of the laws of a state in the conduct of business within its limits, and then to escape their due contribution to the public needs through action of this sort, whether taken for convenience or by design."

In State Assessors v. Comptoir National d'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109, credits in the form of checks were taxed under the same statute considered in the Stempel Case. They were held in the state for investment and reinvestment, and this was the basis of the decision. The checks, it was said, became a credit for money loaned, localized in Louisiana, protected by it, and within the scope of its taxing laws as construed by the supreme court. And we further said, after reviewing the Stempel Case and the Bristol Case: "From these cases it may be taken as the settled law of this court that there is no inhibition in the Federal Constitution against the right of the state to tax property in the shape of credits where the same are evidenced by notes or obligations held within the state, in the hands of an agent of the owner for the purpose of collection or renewal with a view to new loans and carrying on such transactions as a permanent business." (p. 403.)

In Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499, the assessment was also under the act passed on in the Stempel Case. I will not pause to detail the facts. It is enough to say that the credits taxed were loans (evidenced by notes) by the insurance company to its policy holders in Louisiana. The tax was not *eo nomine* on the notes, but was expressed to be on "credits, money loaned, bills receivable," etc., and its amount was ascertained by computing the sum of the face value of all the notes held by the company at the time of the assessment.

The purpose of the taxing law was said to be to lay the burden of taxation equally upon those who do business within the state. And, after comment, it was said: "Thus it is clear that the measure of taxation

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[444] designed by the law is the fair average of the capital employed in the business." In other words, the investments in the state were taxed, and the legality of the tax was determined by their situs, not by the locality of the notes which represented them, *the notes being in New York, at the home of the insurance company.*

It was the situs of the debt which determined the legality of the taxation in all of the cases, and united them under the principle expressed in Metropolitan L. Ins. Co. v. New Orleans, that the law regards the place of the origin of negotiable paper as its true home, to which it will return to be paid, and its temporary absence can be left out of account. They do not support the broad proposition that to negotiable paper can be ascribed such tangibility and entity as so to make it a taxable object of itself in a jurisdiction other than that of the obligation it represents. This broad generality is necessary to sustain the tax in the present case if it can be regarded a direct tax on property, for Illinois, not New York, is the situs of the debts of which the notes taxed are the evidence, and of the mortgages which secure them.

That broad proposition was asserted in Buck v. Beach and rejected. The notes involved had their origin in Ohio and represented investments in that state. Their owner died, and one of the two trustees of his will resided in Indiana. The notes were kept in the custody of the latter except that at the time of assessment of taxes in that state they were sent to Ohio, and after the lapse of a few days returned to him. They were taxed in Indiana. The tax was sustained by the state supreme court, but declared invalid by this court.

The proposition presented for decision was stated thus by Mr. Justice Peckham for the court: "The sole question, then, for this court, is whether the mere presence of the notes in Indiana [the taxing state] constituted the debts of which the notes were the written evidence, property [445] within the jurisdiction of that state, so that such debts could be therein taxed." The prior cases were considered, and it was said: "There are no cases in this court where an assessment such as the one before us has been involved. *We have not had a case where neither the party assessed nor the debtor was a resident of or present in the state where the tax was imposed, and where no business was done therein by the owner of the notes or his agent relating in any way to the capital evidenced by the notes assessed for taxation.* We cannot assent to the doctrine that the mere presence of evidences of debt, such as these notes, under the circumstances already stated, amounts to the presence of property within the state." And it was pointed out that the prior cases, which were specifically reviewed, gave no support to the rejected doctrine. It was not overlooked that certain specialty debts, state and municipal bonds and circulating notes of banking institutions, have sometimes been treated as property where they were found, though removed from the domicil of the owner, and State Tax on Foreign-held Bonds, 15 Wall. 300, 324, 21 L. ed. 188, was cited. Promissory notes were held not to be within the rule.

It is, however, asserted that the circumstances of the case showed that the notes were fugitives from taxation, alternately from Indiana and Ohio, and that their stay in Indiana was in evasion of their obligations to Ohio, and was "a transit, although prolonged." But the bad motive of the possessor of the notes was not made a ground of decision. If the court felt a retributive impulse to deny the notes sanctuary in Indiana, it was suppressed. The court declared that the motive for sending the notes to Indiana was of no consequence, and that the attempt to escape proper taxation in Ohio did not confer jurisdiction on Indiana to tax them (page 402).

But we are not required to overrule Buck v. Beach, nor make it yield in any particular in order to sustain the [446] tax in the case at bar. It, in effect, reserved from its principle inheritance or succession taxing acts by rejecting as not in point cases which involved them. We said: "The foundation upon which such acts rest is different from that which exists where the assessment is levied upon property. The succession or inheritance tax is not a tax upon property, as has been frequently held by this court (Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277), and therefore the decisions arising under such inheritance tax cases are not in point."

The tax under review is of that kind. In other words, it is not a tax on property, but a tax upon the transfer of the property by the will of the testator of plaintiffs in error, as provided by the laws of the state. The will was probated in Connecticut, where the deceased was a resident, but ancillary letters of administration were issued to plaintiffs in error by the surrogates' court, county of New York, state of New York, and the taxed notes were part of the property disposed of by his will. It appears, therefore, that the property is in the control of the courts of New York. In other words, the laws of New York are invoked, accomplish its transfer, and subject it to the dispositions of the will, and make ef-

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fectual the purposes of the testator. Blackstone v. Miller, supra.

I am dealing with the power of taxation under our decisions. If there be injustice in its exercise by measuring the tax by the value of the credits represented by the notes, it is an injustice which this court cannot redress.

I am authorized to say that Mr. Justice Pitney concurs in this opinion.

Mr. Justice Lamar (dissenting):

I concur in Mr. Justice McKenna's analysis of Buck v. Beach and the other cases, but am of the opinion that the principle there decided applies as well to inheritance and [447] transfer taxes on notes as to direct taxes; and that therefore the judgment in the present case should be reversed.

I am authorized to say that the Chief Justice and Mr. Justice Van Devanter concur in this dissent.

RAFAEL MARTINEZ NADAL, Plff. in Err.,
v.
DAVID W. MAY.

(See S. C. Reporter's ed. 447–454.)

Federal courts — following decisions of Porto Rico courts — date when statute takes effect.

Decisions of the supreme court of Porto Rico that the Civil Code of March 1, 1902, went into effect on July 1, 1902, would be followed by the Federal Supreme Court as having become a rule of property, even if the latter court did not think, as it does, that probably the certificate of the Secretary of Porto Rico to that effect expressed the legislative will.

[No. 130.]

Submitted December 12, 1913. Restored for reargument January 26, 1914. Reargued April 6 and 7, 1914. Decided April 20, 1914.

IN ERROR to the District Court of the United States for Porto Rico to review a judgment in favor of defendant in a suit to establish title to real property. Affirmed.

The facts are stated in the opinion.

Messrs. N. B. K. Pettingill and F. L. Cornwell for plaintiff in error.

Messrs. Felix Frankfurter and Wolcott H. Pitkin, Jr., Attorney General of Porto Rico, for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit by the plaintiff in error to establish his title to one-half interest in a plantation called "Carmen," as devisee of his aunt, Altagracia Nadal. It is alleged that the plantation was bought with the separate money of Altagracia Nadal by her husband, after marriage; that she became the owner of one undivided half, subject to [451] the administration of her husband until the termination of the conjugal partnership, and that this half passed to her devisee at her death. The complaint admits that after the purchase the husband purported to convey the whole plantation to a third person, but alleges that the wife did not consent to the conveyance, and that therefore her rights remained.

It appears that on May 1, 1901, Altagracia Nadal brought a suit against her husband for an account of her paraphernal property, alleging, among other things, that he had recorded in his favor the estate Carmen, acquired by a deed of October 25, 1900, and praying judgment that it was her private property because bought with her separate funds, and for a cautionary notice to be entered in the registry. On November, 10, 1901, a settlement was made by which it was stated that the husband had received $10,000 as the product of the wife's paraphernal property, had paid her $5,000 and given a mortgage for the other $5,000, and in view thereof, she "renounces all the rights and interests which she might have against her husband because of the facts stated in the said complaint." The instrument was presented to the court with a prayer that the court would hold that the parties had desisted from continuing the action and that the cautionary notice be canceled, which was granted on November 21. There had been conveyances of Carmen, without consideration, it was testified; there was a reconveyance to the husband, and on June 2, 1902, he conveyed it, without his wife's consent, to Elisa Sanjurjo, who, on August 29 of the same year, conveyed it to the people of Porto Rico, for valuable consideration, there being then no cautionary notice on record. On April 10, 1906, the wife assigned to the plaintiff the mortgage received by her on the above settlement, and on April 27, 1906, made the will under which the plaintiff claims.

By this will the testatrix left to the plaintiff a mortgage [452] described, with all its rights and actions (*así como todos sus derechos y acciones*) and also the mortgage assigned on April 10, in case the assignment should not have been effective in favor of her said nephew Rafael Martinez y Nadal, *todos los derechos y acciones que puedan*

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caberme en los bienes míos que estén á nombre de mi esposo Isidro Fernandez Sanjurjo, en virtud de la transacción celebrada con mi dicho esposo.

The plaintiff's claim is founded on these last words. The official translation accepted by the court reads that she leaves the mortgage "in case the assignment shall not have become effective, all the rights and actions which may pertain to me in my properties which are in the name of my husband Isidro Fernandez Sanjurjo, by virtue of the settlement made with my said husband." The plaintiff contends that the word "and" should be read in before "all the rights and actions" on the notion that an *y* has dropped out or should be implied. He argues that the estate Carmen was not embraced in the settlement, because community property in which the wife had and retained a community interest, and that the last words devise it—*en virtud de* signifying more nearly in spite of the settlement than by virtue of it.

On the other hand, it is argued that the settlement renounced all claim by the wife to Carmen, if any she had; that the last words of the will have an import similar to that of those used in connection with the previous mortgage; that *en virtud de* means by virtue of, that if the wife had a claim it was outside the settlement, and those words would not describe it, even if, at the date of the will, the estate had still stood in the husband's name, where notoriously, and as she well knew, it had not stood for years. The government also claims as a bona fide purchaser without notice. It is obvious, we think, from this summary, that these arguments against the plaintiff's claim are hard to meet, and they were not met. But it is [453] not necessary absolutely to decide on their validity as the case is disposed of by a preliminary point.

Both sides agree that the wife's assent to a conveyance by her husband was made necessary for the first time by § 1328 of the Civil Code of March 1, 1902. Unless that Code went into effect at its date, it did not apply to the conveyance of June 2. The plaintiff argues with much force that it was in effect then, and that the decisions to the contrary are all based on a mistaken certificate of the Secretary of Porto Rico; but we are of opinion that the considerations on the other side must prevail. On the last day of its session the legislature passed four codes making material changes in the existing law,—the Political Code, the Penal Code, the Code of Criminal Procedure, and the Civil Code, which, although in form separate acts, were published in one volume and constituted a large part of a system. Two of these Codes fixed July 1, 1902, as the time for their taking effect. It was the duty of the Secretary to promulgate the laws (act of Congress of April 12, 1900, chap. 191, § 19, 31 Stat. at L. 77, 81), and he was directed by an act of the same date as that of the Codes to revise and arrange the provisions of the Codes for publication along with the Joint Codes Committee of the legislature; the arrangement to be completed as soon as practicable after April 1, and publication being expected on or before August 1. A resolution of the day before shows that they had to be enacted before enrolment with manuscript corrections. Rev. Stat. & Codes of Porto Rico, 1902, p. 299. The Secretary certified that they were in effect on and after July 1, 1902. But the injustice of making the Civil Code operative before its contents could be known and before the revision contemplated by the law was so manifest that on February 24, 1903, an act was passed purporting to validate all conveyances of real estate and in general all acts that required certification by a notary executed after March 1, 1902, and on or before January 1, 1903, [454] if they would have been valid by the laws in force on February 28, 1902. This court assumed that the Civil Code went into effect on July 1, in Ortega v. Lara, 202 U. S. 339, 343, 50 L. ed. 1055, 1056, 26 Sup. Ct. Rep. 707, and the supreme court of Porto Rico has decided the same point twice. Morales v. Registrar of Property, 16 P. R. R. 109, 114; Busó v. Busó, 18 P. R. R. 864, 837, 868. It is impossible to know how many or how important transactions may have taken place on the faith of these repeated solemn assurances, and apart from the general unwillingness of this court to overrule the local tribunals upon matters of purely local concern (Sante Fé C. R. Co. v. Friday, 232 U. S. 694, 700, ante, 802, 803, 34 Sup. Ct. Rep. 468), it is not too much to say that the decisions have become a rule of property, even if we did not think, as we do, that probably the Secretary's certificate expressed the legislative will.

Judgment affirmed.

SAN JOAQUIN & KINGS RIVER CANAL & IRRIGATION COMPANY, Incorporated, Appt.,

v.

COUNTY OF STANISLAUS, in the State of California, et al.

(See S. C. Reporter's ed. 454–461.)

Estoppel — by silence — judicial relief against rate regulation.

1. The failure of an irrigation company to offer any evidence as to its water rights

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at the hearing before the boards of supervisors by whom its rates were fixed does not prevent it from asserting as a ground for judicial relief that the value of such water rights was not taken into account,—especially where the supervisors contend that the company is entitled to no compensation for such rights.

[For other cases, see Estoppel, III. b, 5, in Digest Sup. Ct. 1908.]

Waters — municipal regulation of irrigation rates — valuation — water rights.

2. The right of an irrigation company as against riparian proprietors, acquired either by purchase or prescription, to withdraw the water that it distributes through its canals, must be included in the valuation of its property in determining whether the water rates fixed by county boards of supervisors will yield the 6 per cent return upon the value of its property to which the company is entitled, under Cal. act of March 12, 1885, empowering such boards to fix the rates, notwithstanding the declaration in Cal. Const. 1879, that water appropriated for sale is appropriated to a public use.

[For other cases, see Waters, III. b, in Digest Sup. Ct. 1908.]

[No. 303.]

Argued March 18, 1914. Decided April 27, 1914.

APPEAL from the Circuit Court of the United States for the Northern District of California to review a decree dismissing a bill to restrain the enforcement of municipal regulation of irrigation rates. Reversed.

See same case below, 191 Fed. 875.

The facts are stated in the opinion.

Mr. Edward F. Treadwell argued the cause, and, with Messrs. Frank H. Short, Garret W. McEnerney, Aldis B. Browne, and Alexander Britton, filed a brief for appellant:

The contention of counsel for appellees and the decision of the trial court are based on certain decisions of Judge Ross, circuit judge of the southern district of California, as to the meaning of the California constitutional provisions, which have been disapproved by the supreme court of California, and (previous to the decision in the case at bar) by the United States circuit court of appeals of the ninth circuit, and, in fact, by Judge Morrow, as a judge of the latter court, and by the railroad commission of California.

People v. Stephens, 62 Cal. 209; McCrary v. Beaudry, 67 Cal. 120, 7 Pac. 264; Fresno Canal & Irrig. Co. v. Rowell, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53; Fresno Canal & Irrig. Co. v. Dunbar, 80 Cal. 530, 22 Pac. 275; San Diego Flume Co. v. Chase, 87 Cal. 561, 25 Pac. 756, 20 Pac. 825; Clyne v. Benicia Water Co. 100 Cal. 310, 34 Pac. 714; Balfour v. Fresno Canal & Irrig. Co. 109 Cal. 221, 41 Pac. 876; People ex rel. Ricks Water Co. v. Elk River Mill & Lumber Co. 107 Cal. 221, 48 Am. St. Rep. 125, 40 Pac. 531; Merrill v. South Side Irrig. Co. 112 Cal. 426, 44 Pac. 720; Fairbanks v. Rollins, 6 Cal. Unrep. 99, 54 Pac. 79; San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; Fresno Canal & Irrig. Co. v. Park, 129 Cal. 437, 62 Pac. 87; Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. 137; Stanislaus Water Co. v. Bachman, 152 Cal. 716, 15 L.R.A.(N.S.) 359, 93 Pac. 858; Leavitt v. Lassen Irrig. Co. 157 Cal. 82, 29 L.R.A. (N.S.) 213, 106 Pac. 404; Lassen Irrig. Co. v. Long, 157 Cal. 94, 106 Pac. 409; Thayer v. California Development Co. 164 Cal. 117, 128 Pac. 21; Wilterding v. Green, 4 Idaho, 773, 45 Pac. 134; San Diego Land & Town Co. v. National City, 74 Fed. 79, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; Lanning v. Osborne, 76 Fed. 319; Osborne v. San Diego Land & Town Co. 178 U. S. 22, 44 L. ed. 961, 20 Sup. Ct. Rep. 860; San Diego Flume Co. v. Souther, 32 C. C. A. 548, 61 U. S. App. 134, 90 Fed. 164, 44 C. C. A. 143, 104 Fed. 707, 112 Fed. 228; Boise City Irrig. & Land Co. v. Clark, 65 C. C. A. 399, 131 Fed. 415; Imperial Water Co. v. Holabird, 116 C. C. A. 526, 197 Fed. 4; Palmer v. Southern California Mountain Water Co. (decided Jan. 21, 1913, Cal. R. Com.)

A water right, whether acquired by appropriation, purchase, prescription, or condemnation, is property, and the canal company appropriating it is the proprietor thereof.

Black's Pomeroy, Water Rights, §§ 58–61; People ex rel. Ricks Water Co. v. Elk River Mill & Lumber Co. 107 Cal. 221, 48 Am. St. Rep. 125, 40 Pac. 531; State v. St. Paul & D. R. Co. 81 Minn. 422, 84 N. W. 302. Strickler v. Colorado Springs, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313; Gould, Water Rights, § 324; Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570; Buffalo v. Delaware, L. & W. R. Co. 39 N. Y. Supp. 4; Hallock v. Suitor, 37 Or. 9, 60 Pac. 384; Wyatt v. Larimer & W. Irrig. Co. 1 Colo.

NOTE.—On state regulation generally of tolls, rates, and prices—see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177.

On treatment of franchises, water rights, and miscellaneous intangibles in public service property valuations—see note to Home Teleph. Co. v. Carthage, 48 L.R.A. (N.S.) 1063.

On reasonableness of governmental regulation of water rates—see note to Knoxville v. Knoxville Water Co. 53 L. ed. U. S. 371.

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App. 480, 29 Pac. 906; Rigney v. Tacoma Light & Water Co. 9 Wash. 570, 26 L.R.A. 425, 38 Pac. 147; New Whatcom v. Fairhaven Land Co. 24 Wash. 493, 54 L.R.A. 190, 64 Pac. 735; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; St. Helena Water Co. v. Forbes, 62 Cal. 182, 45 Am. Rep. 659; Gould v. Stafford, 91 Cal. 146, 27 Pac. 543; Winnipiseogee Lake Cotton & Woolen Mfg. Co. v. Gilford, 64 N. H. 337, 10 Atl. 849; Amoskeag Mfg. Co. v. Concord, 66 N. H. 562, 32 L.R.A. 621, 34 Atl. 241; Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984; Paine Lumber Co. v. United States, 55 Fed. 854; Sulliman Timber Co. v. Mobile, 110 Fed. 186; Union Depot Street R. & Transfer Co. v. Brunswick, 31 Minn. 297, 47 Am. Rep. 789, 17 N. W. 626; Bradshaw v. Duluth Imperial Mill Co. 52 Minn. 59, 53 N. W. 1068; Meyers v. St. Louis, 8 Mo. App. 266; Emporia v. Soden, 25 Kan. 588, 37 Am. Rep. 265; Water Supply & Storage Co. v. Tenney, 24 Colo. 344, 51 Pac. 505; Mud Creek Irrig. Agri. & Mfg. Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078; North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co. 16 Utah, 246, 40 L.R.A. 851, 67 Am. St. Rep. 607, 52 Pac. 168; Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113; Nevada Ditch Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472; Albuquerque Land & Irrig. Co. v. Gutierrez, 10 N. M. 177, 61 Pac. 357; Thayer v. California Development Co. 164 Cal. 117, 128 Pac. 21; Palmer v. Southern California Mountain Water Co. (decided Jan. 21, 1913, Cal. R. Com.); Wilterding v. Green, 4 Idaho, 773, 45 Pac. 134; San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; Spring Valley Waterworks v. San Francisco, 124 Fed. 574.

The right to collect rates or compensation for the use of water is a franchise, which vested in the company upon its incorporation. Disconnected with any water which the company owned and which it could sell, this franchise was only of nominal value; but when the company acquired the absolute right to divert the water, the franchise became a valuable property right.

San Joaquin & K. River Canal & Irrig. Co. v. Merced County, 2 Cal. App. 593, 84 Pac. 285; People v. O'Brien, 111 N. Y. 41, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Montgomery County v. Schuylkill Bridge Co. 110 Pa. 54, 20 Atl. 407; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; Smyth v. Ames, 169 U. S. 466, 544, 42 L. ed. 819, 848, 18 Sup. Ct. Rep. 418; Spring Valley Waterworks v. San Francisco, 124 Fed. 594; Consolidated Gas Co. v. Mayer, 146 Fed. 150; Consolidated Gas Co. v. New York, 157 Fed. 849; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Kennebec Water Dist. v. Waterville, 97 Me. 220, 60 L.R.A. 856, 54 Atl. 6.

The right to divert this water increased the value of the tangible property of the company to the extent of the value of the right to divert the same. The water carried in the canal is as much tangible property as the earthwork and structures.

Fudickar v. East Riverside Irrig. Dist. 109 Cal. 29, 41 Pac. 1024; Lower Kings River Water Ditch Co. v. Kings River & F. Canal Co. 60 Cal. 408; Williams v. Harter, 121 Cal. 47, 53 Pac. 405; Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119; 2 Kinney, Irrig. & Water Rights, § 773.

The water rights owned by complainant have added to the value of its property as a "going concern" to the extent of the value of such water rights.

National Waterworks Co. v. Kansas City, 62 Fed. 853; Gloucester Water Supply Co. v. Gloucester, 179 Mass. 365, 60 N. E. 977; Norwich Gas & Electric Co. v. Norwich, 76 Conn. 565, 57 Atl. 746; Kennebec Water Dist. v. Waterville, 97 Me. 220, 60 L.R.A. 856, 54 Atl. 19; C. H. Venner Co. v. Urbana Waterworks, 174 Fed. 348; Omaha v. Omaha Water Co. 218 U. S. 180, 54 L. ed. 991, 48 L.R.A.(N.S.) 1084, 30 Sup. Ct. Rep. 615.

Riparian rights are well established in California, and must be extinguished by the canal company.

Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Miller & Lux v. Madera Canal & Irrig. Co. 155 Cal. 59, 22 L.R.A.(N.S.) 391, 99 Pac. 502; Miller v. Bay Cities Water Co. 157 Cal. 256, 27 L.R.A.(N.S.) 772, 107 Pac. 115.

Riparian rights are extinguished by condemnation.

Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Miller & Lux v. Madera Canal & Irrig. Co. 155 Cal. 64, 22 L.R.A.(N.S.) 391, 99 Pac. 502; Stevinson v. San Joaquin & K. River Canal & Irrig. Co. 162 Cal. 141, 121 Pac. 398, 164 Cal. 221, 128 Pac. 924.

Return on water rights is permitted in other cases.

Spring Valley Waterworks v. San Francisco, 124 Fed. 575, 192 Fed. 137; San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; Spring Valley Waterworks v. San Mateo Waterworks, 64 Cal. 123, 28 Pac. 447; Katz v. Walkinshaw, 141 Cal. 123, 64 L.R.A. 236, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766.

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Messrs. Garret W. McEnerney, Frank H. Short, and Edward F. Treadwell filed a separate brief for appellant:

Appellees' contention that the company is only entitled to a return on its investment, and not upon the present value of its property, is contrary to their position in the former case between the same parties, and is contrary to the uniform decisions of this court since that time.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Minnesota Rate Case (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729; San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; Smyth v. Ames, 169 U. S. 544, 42 L. ed. 848, 18 Sup. Ct. Rep. 418; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Ashland v. Ashland W. Co. 4 Wis. R. C. R. 273; Tighe v. Clinton Tel. Co. 3 Wis. R. C. R. 117.

The contention of appellees that the waters acquired by the canal company by appropriation, prescription, or contract were "public waters" is entirely unfounded under the laws of the state of California.

Palmer v. Southern California Mountain Water Co. (decided Jan. 21, 1913, Cal. R. Com.)

A canal company acquires its water right by extinguishment, *in toto* or *pro tanto*, of the rights of the riparian owners; and whether it acquires them by prescription, by grant, or by condemnation, it does not succeed to the riparian right, but extinguishes the right of the riparian owner to object to the diversion, and in the case of a public service company the tacit consent of the riparian owner to the diversion is, for all practical purposes, equivalent to a grant.

Duckworth v. Watsonville Water & Light Co. 150 Cal. 525, 89 Pac. 338; Fresno Street R. Co. v. Southern P. R. Co. 135 Cal. 202, 67 Pac. 773; Southern California R. Co. v. Slauson, 138 Cal. 342, 94 Am. St. Rep. 58, 71 Pac. 352; Katz v. Walkinshaw, 141 Cal. 136, 64 L.R.A. 236, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766; Crescent Canal Co. v. Montgomery, 143 Cal. 248, 65 L.R.A. 940, 76 Pac. 1032; Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113; Newport v. Temescal Water Co. 149 Cal. 531, 6 L.R.A.(N.S.) 1098, 87 Pac. 372; Miller & Lux v. Madera Canal & Irrig. Co. 155 Cal. 59, 22 L.R.A.(N.S.) 391, 99 Pac. 502; Barton v. Riverside Water Co. 155 Cal. 509, 23 L.R.A.(N.S.) 331, 101 Pac. 790; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Miller & Lux v. Enterprise Canal & Land Co. 142 Cal. 208, 100 Am. St. Rep. 115, 75 Pac. 770; Miller & Lux v. Enterprise Canal & Land Co. — Cal. —, decided Dec. 20, 1913.

The dedication of property to a public use does not vest title to the property in the public.

Pacific Teleph. & Teleg. Co. v. Eshleman, 166 Cal. 640, 137 Pac. 1119.

The argument that, if the water rights of the canal company were condemned, the damages would go to the irrigators, and not to the canal company, and that therefore the canal company does not own them, is without foundation in law or fact.

Leavitt v. Lassen Irrig Co. 157 Cal. 82, 29 L.R.A.(N.S.) 213, 106 Pac. 404.

The claim that the complainant cannot claim a due return upon its property for the alleged reason that the claim was not made before the supervisors at the time of the passage of the ordinance fixing the rates is unfounded.

Spring Valley Waterworks v. San Francisco, 82 Cal. 286, 6 L.R.A. 756, 16 Am. St. Rep. 116, 22 Pac. 910, 1046; San Diego Land & Town Co. v. National City, 74 Fed. 79; San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633.

Mr. James P. Langhorne argued the cause, and, with Messrs. L. J. Maddux, Parker S. Maddux, Denver S. Church, M. F. McCormick, and H. S. Shaffer, filed a brief for appellees:

Assuming, for the argument, that complainant was the owner of the alleged water right at the time the rates were fixed by the county supervisors, nevertheless it has no standing in the Federal court to complain of the noninclusion of the value of such water right, because, when the rates complained of were being fixed by the county supervisors upon appellant's own initiative and petition, it wholly failed to claim before the rate boards that it owned any water right, or to submit to them any evidence of the value of any such water right.

Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; Knoxville v. Knoxville Water Co. 212 U. S. 1, 8, 53 L. ed. 371, 378, 29 Sup. Ct. Rep. 148.

The word "appropriation," as used in the state Constitution, has been construed by the supreme court of the state of California as not referring to the act of taking or the method of acquiring water, but as meaning "devoted to."

Merrill v. South Side Irrig. Co. 112 Cal. 433, 44 Pac. 720.

The appropriation of water is made and

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is complete if the water be actually taken from the stream with the intent to appropriate it for a beneficial use, and if it shall be applied to such use.

McDonald v. Bear River & A. Water & Min. Co. 13 Cal. 220, 1 Mor. Min. Rep. 626; Watterson v. Saldunbehere, 101 Cal. 112, 35 Pac. 432.

An appropriator of water obtains a good title to its use by prescription as against the riparian owner of five years' open, continuous, and adverse use of it.

Duckworth v. Watsonville Water & Light Co. 150 Cal. 530, 89 Pac. 338.

Complainant water company, having dedicated its water rights to the use of the public, has forever dedicated them to a public use, and is not entitled to have them valued as part of its plant, or otherwise, in a proceeding to fix the rates to be charged the public.

San Diego Land & Town Co. v. National City, 74 Fed. 79; Leavitt v. Lassen Irrig. Co. 157 Cal. 82, 29 L.R.A.(N.S.) 213, 106 Pac. 404; Lassen Irrig. Co. v. Leavitt, 157 Cal. 94, 106 Pac. 409; San Diego Water Co. v. San Diego, 118 Cal. 567, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; Boise City Irrig. & Land Co. v. Clark, 65 C. C. A. 399, 131 Fed. 415.

The supreme court of the state of California has decided in the cases of Leavitt v Lassen, 157 Cal. 82, 29 L.R.A.(N.S.) 213, 106 Pac. 404, and Lassen Irrig. Co. v. Long, 157 Cal. 94, 106 Pac. 409, that a water company which has appropriated (dedicated) its waters to public use can have thereafter, as between itself and the public, no private right of the water, can give no preferential rights to the water, and is but the purveyor of the water, and the instrumentality for its distribution to the public.

Complainant is not entitled to have its alleged water rights valued as its franchise. Complainant introduced no proof as to franchises or their value. Complainant's franchises cost it nothing.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

Complainant has a monopoly of furnishing water in the territory under the flow of its canals, and hence is not entitled to any valuation of "going concern" or "good will."

Ibid; Contra Costa Water Co. v. Oakland, 159 Cal. 323, 113 Pac. 668.

The master having found that complainant has not come into court with clean hands, and his findings being fully supported by the evidence, defendants are entitled to a dismissal of the bill of complaint on that ground, aside from the ground that complainant has wholly failed to establish its case that the rates are unreasonably low.

Clarke v. White, 12 Pet. 178, 9 L. ed. 1046; Galloway v. Finley, 12 Pet. 297, 9 L. ed. 1092; Wheeler v. Sage, 1 Wall. 518, 17 L. ed. 646; Kitchen v. Rayburn, 19 Wall. 254, 22 L. ed. 64; Manhattan Medicine Co. v. Wood, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; Roberts v. Northern P. R. Co. 158 U. S. 13, 39 L. ed. 877, 15 Sup. Ct. Rep. 756; New York v. Pine, 185 U. S. 103, 46 L. ed. 825, 22 Sup. Ct. Rep. 592; Creath v. Sims, 5 How. 192, 12 L. ed. 111.

If a water company makes a contract with a consumer to furnish water at less than the rate established by public authority, it should, in a proceeding attacking the rate as unreasonably low, be held by the court to have actually received the public rate, and not the lesser special contract rate.

Willcox v. Consolidated Gas Co. supra; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Boise City Irrig. & Land Co. v. Clark, 65 C. C. A. 399, 131 Fed. 415; San Diego Land & Town Co. v. National City, 74 Fed. 79; Contra Costa Water Co. v. Oakland, 159 Cal. 323, 113 Pac. 668.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill to restrain the enforcement of orders passed by the boards of supervisors of the three defendant counties, Stanislaus, Fresno, and Merced, establishing water rates to be charged by the plaintiff, the appellant; the ground of the bill being that the orders deprive the plaintiff of its property without due process of law. By a statute of March 12, 1885, the boards are authorized to fix these rates for their several counties, but so that the returns to the parties furnishing the water shall be not less than 6 per cent upon the value of the "canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation and furnishing of such water." The rates when fixed are binding for one year and until established anew or abrogated. The bill concerns rates fixed in 1907, and the question before the court has been narrowed to a single issue. If the plaintiff is entitled to 6 per cent upon its tangible property alone it is agreed that the orders must stand. But if the plaintiff has water rights that are to be taken into account, the rates fixed will fall short of giving it what it is entitled to and must be set aside. The circuit court dismissed the bill (191 Fed. 875), and on this appeal figures are immaterial, the only question being whether the principle adopted is right.

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[459] It was suggested, to be sure, at the argument, that it does not appear that the plaintiff offered any evidence as to water rights at the hearing before the supervisors, and therefore that it ought not to be allowed to complain now that nothing was allowed for them. But this evidently is an afterthought. In general, a party may wait until a law is passed or regulation is made, and then insist upon his constitutional rights. Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 227, 229, 53 L. ed. 150, 159, 160, 29 Sup. Ct. Rep. 67. This we understand to be the view of the California courts as to these very boards. Spring Valley Waterworks v. San Francisco, 82 Cal. 286, 315, 6 L.R.A. 756, 16 Am. St. Rep. 116, 22 Pac. 910, 1046; San Diego Water Co. v. San Diego, 118 Cal. 558, 564, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633. Moreover, as the defendants contend that the plaintiff is entitled to no compensation for water rights, to offer evidence would have been an idle form.

It is not disputed that the plaintiff has a right as against riparian proprietors to withdraw the water that it distributes through its canals. Whether the right was paid for, as the plaintiff says, or not, it has been confirmed by prescription and is now beyond attack. It is not disputed, either, that if the plaintiff were the owner of riparian lands to which its water was distributed, it would have a property in the water that could not be taken without compensation. But it is said that as the plaintiff appropriates this water to distribution and sale, it thereby dedicates it to public use under California law, and so loses its private right in the same. It appears to us that when the cases cited for this proposition are pressed to the conclusion reached in the present case, they are misapplied. No doubt it is true that such an appropriation and use of the water entitles those within reach of it to demand the use of a reasonable share on payment. It well may be true that if the waters were taken for a superior use by eminent domain those whose lands were irrigated would be compensated for the loss. But even if the rate paid is not to be determined as upon a purchase of water from the plaintiff, [460] still, at the lowest, the plaintiff has the sole right to furnish this water, the owner of the irrigated lands cannot get it except through the plaintiff's help, and it would be unjust not to take that fact into account in fixing the rates. We are not called upon to decide what the rate shall be, or even the principle by which it shall be measured. But it is proper to add a few words.

The declaration in the Constitution of 1879 that water appropriated for sale is appropriated to a public use must be taken according to its subject-matter. The use is not by the public at large, like that of the ocean for sailing, but by certain individuals for their private benefit respectively. Thayer v. California Development Co. 164 Cal. 117, 128, 128 Pac. 21; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 161, 41 L. ed. 369, 389, 17 Sup. Ct. Rep. 56. The declaration, therefore, does not necessarily mean more than that the few within reach of the supply may demand it for a reasonable price. The roadbed of a railroad is devoted to a public use in a stricter sense, yet the title of the railroad remains, and the use, though it may be demanded, must be paid for. In this case it is said that a part of the water was appropriated before the Constitution went into effect, and that a suit now is pending to condemn more as against a riparian proprietor, for which, of course, the plaintiff must pay. It seems unreasonable to suppose that the Constitution meant that if a party, instead of using the water on his own land, as he may, sees fit to distribute it to others, he loses the rights that he has bought or lawfully acquired. Recurring to the fact that in every instance only a few specified individuals get the right to a supply, and that it clearly appears from the latest statement of the supreme court of California (Palmer v. Railroad Commission, January 20, 1914 [— Cal. —, 138 Pac. 997]) that the water when appropriated is private property, it is unreasonable to suppose that the constitutional declaration meant to compel a gift from the former owner to the users, and that in [461] dealing with water "appropriated for sale" it meant that there should be nothing to sell. See San Diego Water Co. v. San Diego, 118 Cal. 556, 567, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; Fresno Canal & Irrig. Co. v. Park, 129 Cal. 437, 443, et seq. 62 Pac. 87; Stanislaus Water Co. v. Bachman, 152 Cal. 716, 15 L.R.A.(N.S.) 359, 93 Pac. 858; Leavitt v. Lassen Irrig. Co. 157 Cal. 82, 29 L.R.A. (N.S.) 213, 106 Pac. 404.

Decree reversed.

Mr. Justice Pitney did not sit in this case.

THADDEUS DAVIDS COMPANY, Petitioner,

v.

CORTLANDT I. DAVIDS and Walter I. Davids, Trading as Davids Manufacturing Company.

(See S. C. Reporter's ed. 461–472.)

Trademarks — registration — surnames — ten years' exclusive use.

1. Marks which, like ordinary surnames,

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are not the subject of exclusive appropriation as a common-law trademark, could be registered as trademarks under the 4th proviso of the act of February 20, 1905 (33 Stat. at L. 724, chap. 592, U. S. Comp. Stat. Supp. 1911, p. 1459), § 5, that nothing therein should prevent the registration of any mark used in interstate or foreign commerce, or in commerce with the Indian tribes, which was in actual and exclusive use for ten years next preceding the passage of the act, since this proviso, although not having the effect of limiting the exceptions in that section with respect to marks of a scandalous sort and those embracing public insignia, must be deemed to modify the general prohibition contained in the 2d proviso in that section against the registration of marks consisting of names of persons, firms, or corporations, of terms descriptive of character or quality, or geographical names or terms.

[For other cases, see Trademark, VI., in Digest Sup. Ct. 1908.]

Trademarks — registration — protection.

2. One who, by virtue of ten years' actual and exclusive use, is entitled under the 4th proviso of the act of February 20, 1905, § 5, to register as a trademark a mark which was not the subject of exclusive appropriation as a common-law trademark, becomes, on due registration, the "owner" of the "trademark," and is entitled to the protection in its use as such which, by §§ 16 and 19, is afforded to an "owner."

[For other cases, see Trademark, VI., in Digest Sup. Ct. 1908.]

Trademarks — infringement of registered mark — surname — colorable imitation.

3. The protection against colorable imitation given to the owner of a registered trademark by the act of February 20, 1905, § 16, extends to all trademarks within the act, including those which, like surnames, are registerable under the 4th proviso of § 5 by virtue of the ten-year clause, although not the subject of exclusive appropriation as a common-law trademark, provided they are not used contrary to § 21, "in unlawful business," or "upon any article injurious in itself," or "with the design of deceiving the public," and have not been "abandoned."

[For other cases, see Trademark, IV., in Digest Sup. Ct. 1908.]

Trademarks — registration of marks not technical trademarks — infringement.

4. The reproduction, copy, or imitation which, under the act of February 20, 1905, § 16, constitutes an infringement of a registered trademark, must be such as is calculated to mislead the public with respect to the origin or ownership of the goods, and thus to invade the right of the registrant to the use of the name or term as a designation of his merchandise, where the mark, consisting of names or terms having a double significance, and being susceptible of legitimate uses with respect to their primary sense, could only have been registered under the 4th proviso of § 5, as having been in actual and exclusive use for ten years.

[For other cases, see Trademark, IV. a, in Digest Sup. Ct. 1908.]

Trademark — registration of surname — infringement.

5. A mark consisting of a surname which, though not the subject of exclusive appropriation as a common-law trademark, has been registered as a trademark by virtue of the ten years' clause in the 4th proviso of the act of February 20, 1905, § 5, is not reproduced, copied, or imitated, contrary to § 16, where a person bearing the same name uses it in his own business, although dealing in similar goods, if the name is not used in a manner tending to mislead, and it is clearly made to appear that the goods are his own, and not those of the registrant.

[For other cases, see Trademark, IV. a, in Digest Sup. Ct. 1908.]

Trademark — registration of surname — infringement.

6. The trademark "Davids" being a surname registered under the ten years' clause in the 4th proviso of the act of February 20, 1905, § 5, and placed by the registrant prominently at the top of its labels on ink manufactured by it, is colorably imitated, contrary to § 16 of that act, by persons bearing the same surname, who put "C. I. Davids" in the same position on their ink labels, and at the bottom of such labels put "Davids Mfg. Co."

[For other cases, see Trademark, IV., in Digest Sup. Ct. 1908.]

Injunction — against colorable infringement of registered trademark — extent of relief.

7. The owner of a registered trademark in the surname "Davids," as applied to inks, who places such mark prominently at the top of his labels, is entitled to an injunction to restrain persons bearing the same surname from violating the prohibitions of the act of February 20, 1905, § 16, against colorable imitation by the use of the words "Davids Mfg. Co.," and by the use of the word "Davids" at the top of their labels in connection with the business of making and selling inks.

[For other cases, see Injunction, I. m; II. b, in Digest Sup. Ct. 1908.]

[No. 184.]

Argued January 22, 1914. Decided April 27, 1914.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which, on a second appeal, reversed a decree of the

NOTE.—On injunctive relief against infringement of trademark—see notes to McLean v. Fleming, 24 L. ed. U. S. 828; Lawrence Mfg. Co. v. Tennessee Mfg. Co. 34 L. ed. U. S. 997; Coats v. Merrick Thread Co. 37 L. ed. U. S. 847; and Dr. S. A. Richmond Nervine Co. v. Richmond, 40 L. ed. U. S. 155.

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Circuit Court for the Southern District of New York, enjoining the infringement of a registered trademark. Decree of the Circuit Court of Appeals reversed and that of the Circuit Court affirmed.

See same case below, 114 C. C. A. 355, 192 Fed. 915.

The facts are stated in the opinion.

Mr. W. P. Preble argued the cause and filed a brief for petitioner.

Mr. Emerson R. Newell argued the cause and filed a brief for respondent.

Mr. Justice Hughes delivered the opinion of the court:

Thaddeus Davids Company, manufacturer of inks, etc., brought this suit for the infringement of its registered trademark "DAVIDS." It was alleged that the complainant was the owner of the trademark; that it had been used in interstate commerce by the complainant and its predecessors in business for upwards of eighty years; that on January 22, 1907, it had been registered by the complainant [464] as a trademark, applicable to inks and stamp pads, under the act of February 20, 1905 (chap. 592, 33 Stat. at L. 724, U. S. Comp. Stat. Supp. 1911, p. 1459); that the complainant was entitled to such registration under § 5 of the act by reason of actual and exclusive use for more than ten years prior to the passage of the act; and that the defendants, Cortlandt I. Davids and Walter I. Davids, trading as Davids Manufacturing Company, were putting inks upon the market with infringing labels. The bill also charged unfair competition. Upon demurrer, the validity of the trademark was upheld by the circuit court of appeals (102 C. C. A. 249, 178 Fed. 801), and on final hearing, upon pleadings and proofs, complainant had a decree. 190 Fed. 285. This decree was reversed by the circuit court of appeals, which held that there was no infringement of the registered trademark, and that the suit, if regarded as one for unfair competition, was not within the jurisdiction of the court, the parties being citizens of the same state. 114 C. C. A. 355, 192 Fed. 915. Certiorari was granted.

As the mark consisted of an ordinary surname, it was not the subject of exclusive appropriation as a common-law trademark (Brown Chemical Co. v. Meyer, 139 U. S. 540, 542, 35 L. ed. 247, 248, 11 Sup. Ct. Rep. 625; Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 134, 135, 49 L. ed. 972, 984, 25 Sup. Ct. Rep. 609); and the complainant derived its right from the fourth proviso of § 5. This section, at the time of the registration, was as follows: [1]

"Sec. 5. That no mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trademark on account of the nature of such mark unless such mark—

"(a) Consists of or comprises immoral or scandalous matter;

"(b) Consists of or comprises the flag or coat of arms or [465] other insignia of the United States, or any simulation thereof, or of any state or municipality, or of any foreign nation: Provided, That trademarks which are identical with a registered or known trademark owned and in use by another, and appropriated to merchandise of the same descriptive properties, or which so nearly resemble a registered or known trademark owned and in use by another, and appropriated to merchandise of the same descriptive properties, as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers, shall not be registered: Provided, That no mark which consists merely in the name of an individual, firm, corporation, or association, not written, printed, impressed, or woven in some particular or distinctive manner or in association with a portrait of the individual, or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the terms of this act: Provided further, That no portrait of a living individual may be registered as a trademark, except by the consent of such individual, evidenced by an instrument in writing: And provided further, That nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations or among the several states, or with Indian tribes, which was in actual and exclusive use as a trademark of the applicant or his predecessors from whom he derived title for ten years next preceding the passage of this act."

The fourth proviso, or ten-year clause, has manifest reference to marks which are not technical trademarks; otherwise, it would have no effect. The owner of a trademark valid at common-law and used in commerce with foreign nations, or among the several states, or with Indian tribes, may

[1] Section 5 has been amended by the acts of March 2, 1907, chap. 2573, 34 Stat. at L. 1251, February 18, 1911, chap. 113, 36 Stat. at L. 918, U. S. Comp. Stat. Supp. 1911, p. 1462; January 8, 1913, chap. 7, 37 Stat. at L. 649.

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obtain its registration under the act [466] without showing the user of ten years required by this clause. Secs. 1, 2. Congress evidently had in mind the fact that marks, although not susceptible of exclusive appropriation at common law, frequently acquired a special significance in connection with particular commodities; and the language of the fourth proviso was carefully chosen in order to bring within the statute those marks which, while not being technical trademarks, had been in "actual and exclusive use" as trademarks for ten years next preceding the passage of the act.[2] See [467] Re Cahn, 27 App. D. C. 173, 177; Worster Brewing Corp. v. Rueter, 30 App. D. C. 428, 430, 431; Re Wright, 33 App. D. C. 510.

It is suggested, however, that the privilege accorded by this proviso is limited to marks which lie outside the positive prohibitions contained in the earlier clauses of § 5. Thus, it is said that the exceptions with respect to marks of a scandalous sort, and as to those embracing public insignia, are plainly intended to apply to all marks of the described character, whether or not they had been used for the preceding ten years (Re Cahn, supra); and it is urged that if this be so, the prohibitions of the provisos which precede the ten-year clause must likewise be deemed to restrict its scope. The emphasis in the present case is placed upon the second proviso in § 5. This, in substance, prohibits the registration of marks consisting merely of individual, firm, or corporate names, not written or printed in a distinctive manner, or of designations descriptive of the character or quality of the goods with which they are used, or of geographical names or terms; and it thus contains, as the court of appeals said, "a fairly complete list" of the marks used by dealers in selling their goods, which are not valid trademarks at common law. If the ten-year proviso be construed as not to apply to any marks within this comprehensive description, the clause would have little or nothing to act upon, and we can conceive of no reason for its insertion.

We think that the intent of Congress is clear. In the opening clause of § 5, it is provided that no mark by which the goods of the owner may be distinguished from other goods of the same class shall be refused registration as a trademark, on account of its nature, unless it consists of, or comprises: (a) immoral or scandalous matter; or (b) certain public insignia. The marks within these excepted classes are withdrawn from the purview of the act. Then, [468] in dealing with the marks which remain, limitations upon registrability are defined by the first, second, and third provisos; and the restrictions thus imposed are in turn qualified by the fourth proviso or ten-year clause. It follows that the fourth proviso in no way detracts from the force of the exceptions contained in clauses (a) and (b) which were plainly intended to be established without qualification; but the generality of the succeeding prohibitions is qualified. It may well be that this qualification, by reason of its terms, does not affect the first proviso, which relates to cases of conflicting trademarks, as the ten-year clause explicitly requires that the use shall have been "exclusive." But there can be no doubt that this clause does modify the general limitations contained in the second proviso with respect to the use of marks consisting of names of persons, firms, or corporations, of terms descriptive of character and quality, or of geographical names or terms. Marks of this sort, notwithstand-

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[2] In the bill as it passed the House of Representatives, the fourth proviso in § 5 read as follows: "And provided further, that nothing herein shall prevent the registration of any *trademark* used by the applicant or his predecessors, or by those from whom title to the *trademark* is derived, in commerce with foreign nations or among the several states or with Indian tribes, which was in actual *and lawful* use as a trademark of the applicant, or his predecessors from whom he derived title, over ten years next preceding February twentieth, nineteen hundred and five." The bill was amended in the Senate so as to substitute the word "mark" for the word "trademark," where it is italicised above, and also by striking out the words "and lawful." The conference committee recommended that the House recede from its disagreement to these amendments and that the words "and exclusive" should be substituted for the words "and lawful." The managers on the part of the House made the following statement in explanation:

"On amendments Nos. 2 and 3: The word 'mark' is substituted in each instance for the word 'trademark' in the bill as passed the House, for the reason that the use of the word 'trademark' in this connection would not have accomplished the purposes of the proviso of the section in question.

"On amendment No. 4: The words 'and lawful' were stricken out by the Senate amendment, and by the conference report it is recommended that the words 'and exclusive' be substitued therefor. The purpose of this amendment is to prohibit the registration of any marks which are not technical trademarks unless the applicant has used such mark exclusively for the period of ten years. The words 'next preceding' are inserted in place of the words 'prior to' the passage of the act, so as to require the exclusive use of the mark for the ten years immediately preceding the passage of this act." Cor Rec. vol. 39, pp. 1399, 2412.

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ing the general prohibition, were made registrable when the applicant or his predecessors had used them, actually and exclusively, as trademarks for the described period.

In this view, the complainant was entitled to register its mark. We need not stop to discuss the contention that the complainant's use had not been exclusive, or that the mark had not been used in interstate commerce, or the further defense that the complainant should be denied relief because it had deceived the public. It is enough to say that these contentions were without adequate support in the evidence and were properly overruled by the circuit court.

Having the right to register its mark, the complainant was entitled to its protection as a valid trademark under the statute. As defined in § 29, "the term 'trademark' includes any mark which is entitled to registration under the terms of this act." The defendants, [469] however, insisted below, and urge here, that although the mark was registrable, it was not susceptible of ownership, and hence that the complainant could not maintain a suit for injunction, profits, and damages, as provided in the statute, for the reason that the remedies it affords are available only to "owners" (§§ 16, 19). That is to say, that registration was expressly permitted, but that protection to the registrant was denied. This interpretation, of course, would render the ten-year proviso meaningless by stripping it of practical effect. It was not the intention of Congress thus to provide for a barren notice of an ineffectual claim, but to confer definite rights. The applicant who, by virtue of actual and exclusive use, is entitled to register his mark under this clause, becomes on due registration the "owner" of a "trademark" within the meaning of the act, and he is entitled to be protected in its use as such.

The further argument is made that, assuming that the complainant has a valid registered trademark, still the protection is limited to its use when standing alone (as the complainant has used it on its labels), and that there can be no infringement unless it is used in this precise manner. The statutory right cannot be so narrowly limited. Not only exact reproduction, but a "colorable imitation" is within the statute; otherwise, the trademark would be of little avail, as by shrewd simulation it could be appropriated with impunity. The act provides (§ 16): "Any person who shall, without the consent of the owner thereof, reproduce, counterfeit, copy, or colorably imitate any such trademark . . . and shall use, or shall have used, such reproduction, counterfeit, copy, or colorable imitation in commerce among the several states . . . shall be liable. . . ." This provision applies to all trademarks that are within the act, including those which come under the ten-year clause, provided they are not used "in unlawful business," or "upon any article injurious in itself," or [470] "with the design of deceiving the public," and have not been "abandoned" (§ 21).

But, while this is true, the inquiry as to the extent of the right thus secured by the statute, in the case of marks which are admitted to registration under the ten-year clause, is not completely answered. It is apparent that, with respect to names or terms coming within this class, there may be proper uses by others than the registrant, even in connection with trade in similar goods. It would seem to be clear, for example, that the registration for which the statute provides was not designed to confer a monopoly of the use of surnames, or of geographical names, as such. It is not to be supposed that Congress intended to prevent one from using his own name in trade, or from making appropriate reference to the town or city in which his place of business is located; and we do not find it necessary to consider the question of the validity of such an attempt if one were made. Congress has admitted to registration the names or terms belonging to the class under consideration simply because of their prior use as trademarks, although they had not been such in law. Their exclusive use as trademarks for the stated period was deemed, in the judgment of Congress, a sufficient assurance that they had acquired a secondary meaning as the designation of the origin or ownership of the merchandise to which they were affixed. And it was manifestly in this limited character only that they received statutory recognition, and, on registration, became entitled to protection under the act.

In the case, therefore, of marks consisting of names or terms having a double significance, and being susceptible of legitimate uses with respect to their primary sense, the reproduction, copy, or imitation which constitutes infringement must be such as is calculated to mislead the public with respect to the origin or ownership of the goods, and thus to invade the right of the registrant to the use [471] of the name or term as a designation of his merchandise. This we conceive to be the meaning of the statute. It follows that where the mark consists of a surname, a person having the same name and using it in his own business, although dealing in similar goods, would not be an infringer, provided that the name was not used in a manner tending to mislead, and it was clearly made to appear that the goods were his own, and

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not those of the registrant. This is not to say that, in this view, the case becomes one simply of unfair competition, as that category has been defined in the law; for, whatever analogy may exist with respect to the scope of protection in this class of cases, still the right to be protected against an unwarranted use of the registered mark has been made a statutory right, and the courts of the United States have been vested with jurisdiction of suits for infringement, regardless of diversity of citizenship. Moreover, in view of this statutory right, it could not be considered necessary that the complainant, in order to establish infringement, should show wrongful intent in fact on the part of the defendant, or facts justifying the inference of such an intent. Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 549, 34 L. ed. 997, 1004, 11 Sup. Ct. Rep. 396; Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 674, 45 L. ed. 365, 379, 21 Sup. Ct. Rep. 270. Having duly registered under the act, the complainant would be entitled to protection against any infringing use; but, in determining the extent of the right which the statute secures, and what may be said to constitute an infringing use, regard must be had, as has been said, to the nature of the mark, and its secondary, as distinguished from its primary, significance.

The distinction between permissible and prohibited uses may be a difficult one to draw in particular cases, but it must be drawn in order to give effect to the act of Congress. That the distinction may readily be observed in practice is apparent. In this case, for instance, if the defendants [472] had so chosen, they could have adopted a distinct mark of their own, which would have served to designate their inks and completely to distinguish them from those of the complainant. It was not necessary that, in exercising the right to use their own name in trade, they should imitate the mark which the complainant used, and was entitled to use under the statute, as a designation of its wares; or that they should use the name in question upon their labels without unmistakably differentiating their goods from those which the complainant manufactured and sold.

We agree with the circuit court that infringement was shown. The complainant put its mark "DAVIDS'" prominently at the top of its labels. The defendants, in the same position on its labels, put "C. I. DAVIDS.'" At the bottom of their labels the defendants placed "DAVIDS MFG. CO." The use of the name in this manner was a mere simulation of the complainant's mark which it had duly registered; it constituted a "colorable imitation" within the meaning of the act. The decree of the circuit court accordingly restrained the defendants from the use of the words "Davids Manufacturing Company," and from the use of the word "Davids" at the top of their labels in connection with the business of making and selling inks. We think that the complainant was entitled to this measure of protection.

The decree of the Circuit Court of Appeals must therefore be reversed and that of the Circuit Court affirmed.

It is so ordered.

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[473] ILLINOIS CENTRAL RAILROAD COMPANY v. JOSEPH BEHRENS, Administrator, etc.

(See S. C. Reporter's ed. 473–478.)

Master and servant — employers' liability act — employee must be engaged in interstate commerce.

1. Congress intended, by the provisions of the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), making every common carrier by railroad while engaged in interstate commerce liable in damages to any person "suffering injury while he is employed by such carrier in such commerce," to confine its action to injuries occurring when the particular service in which the employee was engaged was a part of interstate commerce.

[For other cases, see Master and Servant, II. a, in Digest Sup. Ct. 1913 Supp.]

Master and servant — employers' liability act — when servant is employed in interstate commerce.

2. A fireman employed by an interstate railway carrier on a switching engine, who was killed while aiding in the work of moving several cars all loaded with intrastate freight, between two points in the same city, was not employed in interstate commerce within the meaning of the Federal employers' liability act of April 22, 1908, making every common carrier by railroad, while engaged in interstate commerce, liable to an employee "suffering injury while he is employed by such carrier in such commerce," although upon completion of that task the switching crew was to have gathered up and taken to other points several other cars as a step or link in both interstate and intrastate transportation.

[For other cases, see Master and Servant, II. a, in Digest Sup. Ct. 1913 Supp.]

[No. 241.]

NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see note to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38.

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Argued March 6, 1914. Decided April 27, 1914.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Fifth Circuit, presenting the question whether a railway employee was engaged in interstate commerce within the meaning of the employers' liability act. Answered in the negative.

The facts are stated in the opinion.

Mr. Blewett Lee argued the cause, and, with Messrs. Hunter C. Leake and Gustave Lemle, filed a brief for the Illinois Central Railroad Company:

Congress was engaged in regulating the relations between common carriers and their servants in the matter of liability for personal injuries, and the scope of congressional power was limited to the sphere of interstate commerce. Unless the employee was engaged in such commerce, he does not fall within the provisions of the act, or of the power of Congress to make a regulation in his favor. If the liberal interpretation should be adopted that any employee who is employed in interstate commerce part of the time is to be regarded as employed in such commerce all the time, the result might be to make the employers' act of 1908 unconstitutional for the same reasons which invalidated the employers' liability act of June 11, 1906, and which overthrew it in the Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

Since the engine and cars and their contents all had their origin and destination in the state of Louisiana, the transaction was wholly one of intrastate commerce.

United States v. New York C. & H. R. R. Co. 205 Fed. 428.

Since the facts make it perfectly plain that Behrens was engaged in intrastate commerce at the time he was killed (indeed, it would be difficult to conceive of a clearer case), aside from the constitutional question involved, the reason why the court should attempt to separate and distinguish between interstate and intrastate commerce is that Congress has made liability turn upon that distinction. The particular defect in the statute, that it does not apply when the employee is engaged in intrastate commerce, is fundamental so far as the present act is concerned. A man is not "employed" in interstate commerce except when he is engaged in interstate commerce.

Adair v. United States, 208 U. S. 161, 177, 52 L. ed. 436, 442, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Colasurdo v. Central R. Co. 180 Fed. 832; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 498, 52 L. ed. 297, 309, 28 Sup. Ct. Rep. 141; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 150, 57 L. ed. 1125, 1127, 33 Sup. Ct. Rep. 648, 3 N. C. C. A. 779; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651; Van Brimmer v. Texas & P. R. Co. 190 Fed. 394; Bennett v. Lehigh Valley R. Co. 197 Fed. 578; Myers v. Norfolk & W. R. Co. 162 N. C. 343, 48 L.R.A.(N.S.) 987, 78 S. E. 280; Wright v. Chicago, R. I. & P. R. Co. 94 Neb. 317, 143 N. W. 220; Gray v. Chicago & N. W. R. Co. 153 Wis. 637, 142 N. W. 505; Louisville & N. R. Co. v. Strange, 156 Ky. 439, 161 S. W. 239.

Messrs. Alfred L. Becker, Maurice C. Spratt, and Lester F. Gilbert filed a brief as *amici curiæ:*

This court held in Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822, that the power to regulate commerce among the states is not exceeded by that provision of the safety appliance act which prohibits the use upon the railroad of any interstate carrier of any car not equipped with the safety appliances required by the act. On an appeal involving solely the constitutionality of the act,—not its construction,—the railway company contended that Congress had no power to legislate with respect to the equipment of cars used in intrastate commerce on the line of an interstate carrier. The Supreme Court held, however, that the effective regulation of interstate commerce with respect to safety appliances required as an incident the regulation of the equipment of all cars in use on the interstate railroad. The court pointed out that an accident to an intrastate train due to lack of safety appliances would have a tendency to affect interstate traffic, and sustained the constitutionality of the act upon such ground. The principle applied was, that where a power conferred upon Congress cannot be effectively exercised without an incidental regulation of matters which would otherwise fall within the reserved powers of the states, such incidental regulation is constitutional.

On the other hand, this court held in the Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, that the power to regulate commerce was exceeded by an act which attempted to establish the lia-

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bility of interstate carriers to all of their employees, whether or not engaged in interstate commerce at the time of the accident giving rise to the cause of action. The Supreme Court held that the power to establish the liability of an interstate carrier to its employees, while both were engaged in interstate commerce, had been conferred upon Congress, but that the effective exercise of such power did not require as an incident thereto the regulation of the liability of an interstate carrier towards its employees while not engaged in interstate commerce.

The opposite results reached in the two cases must be ascribed to a basic difference between the essential characters of the two acts. The safety appliance act is a regulation of the conduct of the carrier's business. An employers' liability act is merely an establishment of the rules of law governing the liabilities of employers to their employees.

The safety appliance act, like the act requiring carriers to report to the Interstate Commerce Commission the earnings of not only their interstate but also their intrastate business (Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 56 L. ed. 729, 32 Sup. Ct. Rep. 436), is constitutional, because any effective regulation of these matters cannot be split up into two parts, one exclusively administered by the Federal authorities and one exclusively administered by the state authorities. The possibilities of conflicting regulations as to the patterns of couplers, height of drawbars, and the forms of air brakes to be used, demand uniform regulation of all the operations of any carrier whose railroad as a whole is an interstate railroad, or one engaged in interstate commerce. But the effective regulation of liability does not require that all operations of an interstate railroad, whether or not such operations be of an interstate character, shall be conducted subject to one rule of liability. That it does not was implicitly held in the (first) Employers' Liability Cases, supra.

An intention to assume the regulation of intrastate commerce as an incident to the regulation of interstate commerce is not to be inferred in the absence of language clearly expressing such intention.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

Though a servant be in the general employ of one master, if his services are temporarily loaned to another, no matter for how brief a time, no matter how exceptional the occurrence, the rules of liability may be fundamentally different.

Standard Oil Co. v. Anderson, 212 U. S. 215, 53 L. ed. 480, 29 Sup. Ct. Rep. 252.

In determining the meaning of the present employers' liability act, we are not to assume that it was passed in order to promote the safety and despatch of interstate commerce; for at most that was only a remote consideration. That the act might have such a consequence was perhaps of importance in determining whether any act establishing rules of liability could be sustained under the power to regulate commerce. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup Ct. Rep. 169, 1 N. C. C. A. 875. But, without doubt, the chief purpose of the act was to remedy what the people have come to consider a social injustice worked by the common-law rules of negligence in master and servant cases. And one of the chief motives in the mind of Congress was to obviate all questions of constitutionality,—to keep within undebatable territory of constitutional power.

It is the function of this court to interpret and apply the law already enacted, but not, under the guise of construction, to provide a more comprehensive scheme of regulation than Congress has decided upon.

Minnesota Rate Cases, supra.

Mr. Armand Romain argued the cause and filed a brief for Joseph Behrens:

The statute is remedial in its character, and it should be so construed as to prevent the mischief and advance the remedy.

St. Louis, I. M. & S. R. Co. v. Conley, 110 C. C. A. 97, 187 Fed. 951; Michigan C. R. Co. v. Vreeland, 227 U. S. 65, 57 L. ed. 419, 33 Sup. Ct. Rep. 192; Johnson v. Southern P. Co. 196 U. S. 21, 49 L. ed. 371, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Gibson v. Jenney, 15 Mass. 205; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 10, 51 L. ed. 685, 27 Sup. Ct. Rep. 407; United States v. St. Louis Southwestern R. Co. 189 Fed. 964; Missouri, K. & T. R. Co. v. United States, 231 U. S. 119, ante 147, 34 Sup. Ct. Rep. 26; 1 White, Personal Injuries on Railroads, p. 817.

From the very nature of the occupation, it is impossible for the company to separate one line of work from the other.

Hanley v. Kansas City Southern R. Co. 187 U. S. 620, 47 L. ed. 335, 23 Sup. Ct. Rep. 214.

At the time of his injury, Behrens and the railroad company were both engaged in the furtherance of an interstate service.

Southern R. Co. v. United States, 222 U. S. 27, 56 L. ed. 74, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822; United States v. Southern

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R. Co. 164 Fed. 347; United States v. Louisville & N. R. Co. 162 Fed. 185; United States v. Great Northern R. Co. 145 Fed. 438; United States v. St. Louis, I. M. & S. R. Co. 154 Fed. 516; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 51, 56 L. ed. 346, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, 3 N. C. C. A. 779; Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 1, 116 C. C. A. 156, 196 Fed. 336; Zikos v. Oregon R. & Nav. Co. 179 Fed. 893; Central R. Co. v. Colasurdo, 113 C. C. A. 379, 192 Fed. 901; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Johnson v. Southern P. Co. 196 U. S. 21, 49 L. ed. 371, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412.

Mr. Justice Van Devanter delivered the opinion of the court:

In an action in the circuit court for the eastern district of Louisiana, under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), against a railroad [476] company, by a personal representative to recover for the death of his intestate, the plaintiff prevailed, and the defendant took the case by writ of error to the circuit court of appeals. That court, desiring instruction upon a question of law arising in the case, certified the question here under § 239 of the Judicial Code [36 Stat. at L. 1157, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 228]. The facts shown in the certificate are these: The intestate was in the service of the railroad company as a member of a crew attached to a switch engine operated exclusively within the city of New Orleans. He was the fireman, and came to his death, while at his post of duty, through a head-on collision. The general work of the crew consisted in moving cars from one point to another within the city over the company's tracks and other connecting tracks. Sometimes the cars were loaded, at other times empty, and at still other times some were loaded and others empty. When loaded the freight in them was at times destined from within to without the state or *vice versa;* at other times was moving only between points within the state, and at still other times was of both classes. When the cars were empty the purpose was usually to take them where they were to be loaded or away from where they had been unloaded. And oftentimes, following the movement of cars, loaded or empty, to a given point, other cars were gathered up and taken or started elsewhere. In short, the crew handled interstate and intrastate traffic indiscriminately, frequently moving both at once and at times turning directly from one to the other. At the time of the collision the crew was moving several cars loaded with freight which was wholly intrastate, and upon completing that movement was to have gathered up and taken to other points several other cars as a step or link in their transportation to various destinations within and without the state. The question of law upon which the circuit court of appeals desires instruction is whether, upon these facts, it can be said that the intestate, at the time of his fatal injury, was employed in [477] interstate commerce within the meaning of the employers' liability act.

Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce. Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 618, 55 L. ed. 878, 882, 31 Sup. Ct. Rep. 621; Southern R. Co. v. United States, 222 U. S. 20, 26, 56 L. ed. 72, 74, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 213, 56 L. ed. 729, 737, 32 Sup. Ct. Rep. 436; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 432, 57 L. ed. 1511, 1555, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729. The decision in Employer's Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, is not to the contrary, for the act of June 11, 1906 (34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1911, p. 1316), there pronounced invalid, attempted to regulate the liability of every carrier in interstate commerce, whether by railroad or otherwise, for any injury to any employee, even though his employment had no connection whatever with interstate commerce.

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Passing from the question of power to that of its exercise, we find that the controlling provision in the act of April 22, 1908, reads as follows: "That every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, . . . for such injury or death resulting [478] in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." Giving to the words "suffering injury while he is employed by such carrier in such commerce" their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce. The act was so construed in Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, 3 N. C. C. A. 779. It was there said (p. 150): "There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce." Again (p. 152): "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?" And a like view is shown in other cases. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875: Seaboard Air Line R. Co. v. Moore, 228 U. S. 433, 57 L. ed. 907, 33 Sup. Ct. Rep. 580; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 158, 57 L. ed. 1129, 1133, 33 Sup. Ct. Rep. 651; North Carolina R. Co. v. Zachary, 232 U. S. 248, 256, ante, 591, 594, 34 Sup. Ct. Rep. 305; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, ante, 838, 34 Sup. Ct. Rep. 581.

Here, at the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury.

The question is accordingly answered in the negative.

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[479] BAER BROTHERS MERCANTILE COMPANY, Plff. in Err.,
v.
DENVER & RIO GRANDE RAILROAD COMPANY.

(See S. C. Reporter's ed. 479-491.)

Interstate Commerce Commission — reparation order — omission to fix future rates.

1. There is no such necessary connection between the subjects of reparation for unreasonable interstate freight rates charged and collected, and the fixing of new and just rates for the future, as will render void a reparation order of the Interstate Commerce Commission because of the error, if any, in omitting any concurrent provision fixing future rates.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission.]

Interstate Commerce Commission — authority over local rates — through shipment — common arrangement.

2. The Interstate Commerce Commission had jurisdiction to pass upon the reasonableness of the Denver & Rio Grande Railroad Company's freight rate from Pueblo to Leadville, both in the state of Colorado, on beer received at St. Louis by the Missouri Pacific Railroad Company to be delivered in Leadville, although no through rate or through route had been established, and although the freight was received by the first-named carrier at Pueblo as an independent shipment originating at that point, and was forwarded as an intrastate shipment on a local waybill, where all this was in accordance with a long-continued course of dealing between the two carriers under which they divided the freight according to their local rates, with the knowledge that it had been paid as compensation for the single haul.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Judgment — conclusiveness — voluntary nonsuit.

3. A voluntary dismissal of an action brought by a shipper against a carrier to recover damages for collecting unreason-

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NOTE.—On conclusiveness of judgments, generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street R. Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

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able freight rates is not a bar to a subsequent suit between the same parties to enforce a reparation order of the Interstate Commerce Commission, based upon a finding that such rates were excessive.

[For other cases, see Judgment, III. f, 2, in Digest Sup. Ct. 1908.]

[No. 140.]

Argued December 16 and 17, 1913. Decided April 27, 1914.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which reversed a judgment of the Circuit Court for the District of Colorado, enforcing a reparation order of the Interstate Commerce Commission. Judgment of Circuit Court of Appeals reversed and that of the Circuit Court affirmed.

See same case below, 109 C. C. A. 337, 187 Fed. 486.

Statement by Mr. Justice Lamar:

Between July, 1902, and March, 1907, the Baer Brothers Mercantile Company was engaged in the liquor business at Leadville, Colorado. During those years it purchased beer from a brewing company in St. Louis, Missouri, which delivered the same in carload lots to the Missouri Pacific, which acknowledged the receipt of the beer "in good order to be delivered to the Baer Brothers Company at Leadville, Colorado, *via* the Denver & Rio Grande." No through bill of lading was issued, and as the two companies had not established a through route, each shipment was waybilled to Pueblo, Colorado, 923 miles distant, on the Missouri Pacific's local rate of 45 cents per cwt. The car was then delivered to the Denver & Rio Grande with an expense bill which described the shipment and disclosed the charges paid by or due to the Missouri Pacific. The Denver & Rio Grande then forwarded the beer to Leadville, Colorado, 160 miles from Pueblo, at its local rate of 45 cents per cwt., naming the Missouri Pacific as consignor and the Baer Company as consignee. Whether collected in advance at St. Louis or at destination in Leadville, the freight was always divided between the two companies according to their local rates, the Denver & Rio Grande in every instance receiving 45 cents per cwt. on every shipment.

The Baer Company insisted that the rate was unreasonable in fact and unjustly discriminatory, and in 1906 brought suit, in the United States circuit court for the district of Colorado, against both carriers, to recover from them $6,300, the amount of the unreasonable rate alleged to have been paid on beer. That suit was voluntarily dismissed by plaintiff upon the publication of the decision in the Abilene Case, 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075. [481] The Baer Company then instituted proceedings before the Commerce Commission in which it prayed that the 90 cent rate should be declared unreasonable and unjust; that the Commission would establish a new and just rate on beer between St. Louis and Leadville, and that the two companies be required to pay plaintiff $7,299 as reparation for excess freight paid on beer shipped over the two lines between July, 1902, and March, 1907.

At the hearing it was admitted that the Missouri Pacific's charge of 45 cents for the haul of 923 miles from St. Louis to Pueblo was reasonable. In view of this admission the subsequent proceedings before the Commission involved an investigation as to the reasonableness of the Denver & Rio Grande's charge of 45 cents for hauling beer a distance of 160 miles, from Pueblo, Colorado, to Leadville, Colorado. The carrier insisted that in each instance the beer had been received by it as an independent shipment at Pueblo, Colorado, where a new waybill was issued and the car forwarded as an intrastate shipment to Leadville on an intrastate rate. It claimed that the Commission had no jurisdiction to inquire as to the reasonableness of such intrastate rate. It further contended that the rate of 45 cents was just and fair.

It appeared that although no through route had been established by the two roads, the regular filed tariff of the Missouri Pacific named 45 cents as the rate on beer between St. Louis and Pueblo. The Denver & Rio Grande had filed no tariff under the commerce act, but, in compliance with the request of the Commission, addressed to all railroads, it had furnished a copy of tariffs showing its intrastate rates generally, and that the local rate on beer from Pueblo to Leadville was 45 cents per cwt.

At the conclusion of the hearing, the Commission held (13 Inters. Com. Rep. 329) that, even though no through route or through rate had been established, the Denver & Rio Grande, in hauling this beer, was engaged in interstate [482] commerce; that the mountainous character of the country through which the road was built and the steep grades made the cost of operation higher than for a similar distance on the Missouri Pacific, but ruled that, while this was true, the rate of 45 cents from Pueblo to Leadville was excessive to the extent of 15 cents per cwt. The report concluded as follows:

"The prayer of the complaint is, among other things, that the Commission fix 'a just rate for the through transportation of

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beer in carload lots from said city of St. Louis to said city of Leadville.' There is no suggestion either in the complaint or in the prayer looking to the establishment of a joint rate, and that subject was not referred to either upon the trial or in the argument. This being so, we ought not to establish a joint through rate, and we do not think that we should undertake by our order to fix in this proceeding the locals which will make up the charge for the through movement in the future. There has been no practical difficulty in making these shipments over this route in the past. If the Denver & Rio Grande does not reduce its charges in accordance with this report, or if suitable through facilities are denied, the complainant can file its petition asking the establishment of a joint through route and rate."

Thereupon the following reparation order was entered April 6, 1908:

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

"It is ordered that the defendant, the Denver & Rio Grande Railroad Company, be and it is hereby notified and required to pay unto the complainant, the Baer Brothers Mercantile Company, of Leadville, Colorado, on [483] or before the 1st day of June, 1908, the sum of $3,438.27, with interest thereon at the rate of 6 per cent per annum from May 6, 1907, as reparation for excessive and unreasonable charges for the transportation of 2,292,178 pounds of beer from Pueblo, Colorado, to Leadville, Colorado as part of a through transportation from St. Louis, Missouri, to said Leadville, as more fully and at large appears in the report of the Commission in this case."

The Denver & Rio Grande refused to pay the amount of reparation awarded, and thereupon the Baer Company brought suit against it in the United States circuit court for the district of Colorado, attaching to the complaint a copy of the award of the Commission.

By demurrer and plea the defendant attacked the jurisdiction of the Commerce Commission to pass upon the reasonableness of its rate between Pueblo and Leadville. It further contended that the Commission could not make an order of reparation unless at the same time, and as a part of such order, it fixed a through rate to be charged in the future. These objections were overruled, and thereupon the plaintiff introduced the report and order of the Commission, proved the weight of the beer shipped, the rate of freight paid, and that the freight on beer for the longer distance between St. Louis and Salt Lake City, *via* the Missouri Pacific and the Denver & Rio Grande, was 70 cents per cwt.

The defendant then offered evidence to show that Leadville was not on the through line, and was reached by a road 4½ miles long, the operation of which was unusually expensive because of the very steep grade throughout its entire length.

Defendant also introduced testimony for the purpose of showing that the beer, though forwarded by the Missouri Pacific to be delivered in Leadville, was actually received at Pueblo by the Denver & Rio Grande as an independent shipment, as though originating at Pueblo, [484] and was then forwarded as an intrastate shipment on a local waybill. The court overruled the various contentions of the defendant, and directed a verdict for the plaintiff for $3,761.45, being amount of the reparation order, with interest. The court also allowed attorney fees to the plaintiff. The case was then taken by the Denver & Rio Grande to the circuit court of appeals which held (109 C. C. A. 337, 187 Fed. 486) that it was not necessary to decide whether the Interstate Commerce Commission had jurisdiction to pass upon the reasonableness of the rate of 45 cents from Pueblo, Colorado, to Leadville, Colorado, saying that "an order of reparation without such an establishment of a reasonable maximum rate is beyond the power of the Commission and void; and as no such rate was prescribed and no order forbidding the future use of an excessive rate was made in the case in hand, the Commission's order of reparation in this case was beyond its power and void. This conclusion disposes of the case in hand and renders it impossible for a judgment to be obtained against the railroad company upon the reparation order of the Commission upon which the action is based. It is therefore unnecessary to consider the other questions in the case and the judgment below is reversed." A mandate issued in which it was "ordered that this case be and the same is hereby remanded to the said circuit court with direction for further proceedings in accordance with the views expressed in the opinion of this court."

The Baer Brothers Company then brought the case here by writ of error.

Mr. **William B. Harrison** argued the cause and filed a brief for plaintiff in error:

The duty imposed upon the Commission by § 15 of the act to regulate commerce, as amended in 1906, to prescribe the rate regulation or practice for the future, and

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to forbid a departure therefrom, refers exclusively to complaints made under that section for that purpose, and has no application to complaints seeking reparation under § 16 of said amended act.

Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co. 10 Inters. Com. Rep. 83; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; Albert Steinfeld & Co. v. Illinois C. R. Co. 20 Inters. Com. Rep. 12.

A duty imposed by law upon a tribunal becomes specific only when, in the opinion of that tribunal, a case or state of circumstances exists proper for its discharge. In the case at bar the Commission was of the opinion that a proper occasion had not arisen for the immediate exercise of the duty to prescribe the rate for the future. Beyond controversy, this conclusion was within the scope of its delegated authority, and this court has said that it cannot, under the guise of exerting judicial power, usurp the functions of the Commission upon its conception as to whether the power has been wisely exercised.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108; Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700; Procter & G. Co. v. United States, 225 U. S. 282, 56 L. ed. 1091, 32 Sup. Ct. Rep. 761.

The Abilene decision (Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075) only required that the Commission should first declare the rate to be unreasonable, and have the opportunity to exert its administrative functions; when this was done, the foundation for reparation, as provided in the interstate commerce act, was established. In other words, the court decided that in certain cases the Commission primarily had exclusive jurisdiction, but it did not decide or say how that jurisdiction should be exercised.

Southern R. Co. v. Tift, 206 U. S. 428, 51 L. ed. 1124, 27 Sup. Ct. Rep. 709, 11 Ann. Cas. 846; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164.

The constitutional guaranty of the right to trial by jury in an action for damages was intended for the benefit of the plaintiff as well as the defendant. Ordinarily the question as to this right of the plaintiff arises on motion for a compulsory nonsuit. the wrongful granting of which is unlawful because the plaintiff is thereby denied the right of trial by jury.

Doe ex dem. Elmore v. Grymes, 1 Pet. 469, 7 L. ed. 224; D'Wolf v. Rabaud, 1 Pet. 498, 7 L. ed. 236; Crane v. Morris, 6 Pet. 598, 8 L. ed. 514; Castle v. Bullard, 23 How. 172, 16 L. ed. 424; Mercantile Mut. Ins. Co. v. Folsom, 18 Wall. 237, 21 L. ed. 827; Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 26 L. ed. 539; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478.

It was not competent, under the act and under the complaint before the Commission, for that body to establish the local rate of the defendant to be applied to the through transportation in future.

Merchants Traffic Asso. v. New York, N. H. & H. R. R. Co. 13 Inters. Com. Rep. 225.

The Interstate Commerce Commission is an inferior tribunal whose jurisdiction depends upon facts which it is required to ascertain and settle. The decision of such a tribunal upon the facts essential to the existence of its jurisdiction is conclusive against collateral attack.

Pettus v. McClannahan, 52 Ala. 55; Re Grove Street, 61 Cal. 438; Evansville, I. & C. Straight Line R. Co. v. Evansville, 15 Ind. 395; Mullikin v. Bloomington, 72 Ind. 161; Delphi v. Startzman, 104 Ind. 343, 3 N. E. 937; Dowdy v. Wamble, 110 Mo. 280, 19 S. W. 489; State ex rel. Brown v. Wilson, 216 Mo. 215, 115 S. W. 567; Comstock v. Crawford, 3 Wall. 396, 18 L. ed. 34; Interstate Commerce Commission v. Lehigh Valley R. Co. 3 Inters. Com. Rep. 796, 49 Fed. 177.

When the jurisdiction of an inferior court has once attached, its subsequent proceedings are presumed to be as regular as those of a court of general jurisdiction. The jurisdiction existing, the subsequent action of the court is the exercise of its judicial authority, and can only be questioned in a direct proceeding.

Comstock v. Crawford, 3 Wall. 396, 18 L. ed. 34; Smith v. Engle, 44 Iowa, 265, Mankin v. State, 2 Swan, 206; Couchman v. Bush, 26 Ky. L. Rep. 1277, 83 S. W. 1039; Porter v. Rountree, 111 Ga. 369, 36 S. E. 761; Cromwell v. Sac County, 94 U S. 352, 24 L. ed. 197; United States v. Reyburn, 6 Pet. 352, 8 L. ed. 424; Pearse v Hill, 163 Mass. 493, 40 N. W. 765; Harshman v. County Ct. (United States ex rel. Harshman v. County Ct.) 122 U. S. 317, 318, 30 L. ed. 1154, 1155, 7 Sup. Ct. Rep. 1171; Freeman, Judgm. §§ 16–249, 531; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108.

Prior to the amendment of 1906, § 14

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of the act required the Commission to include in its report the findings of fact upon which its conclusions both of law and fact were based; and § 16 authorized the court to enforce only lawful orders of the Commission, and, if a jury was waived, to try the issues in the case. Under this state of the law, and when it was supposed to be optional with the shipper whether he would seek redress from the Commission or the courts, it was held that only lawful orders could be enforced, and that the suit for enforcement of the order must be tried *de novo* as to the law as well as the facts.

Western New York & P. R. Co. v. Penn Ref. Co. 70 C. C. A. 23, 137 Fed. 343; Interstate Commerce Commission v. Lehigh Valley R. Co. 3 Inters. Com. Rep. 796, 49 Fed. 177.

The right of trial by jury secured by the Federal Constitution is a trial according to the course of the common law, and is confined to matters of fact only.

Re Martin, 2 Paine, 348, Fed. Cas. No. 9,154.

The general equity jurisdiction of the Federal courts to grant injunctions in cases involving interstate commerce exists independent of this provision of the Hepburn act.

Re Lennon, 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. Rep. 658.

The Commission and the courts have both condemned the practice by carriers of withholding their defenses until after the hearing before the Commission, and producing them subsequently at the hearing before the court.

Independent Refiners' Asso. v. Pennsylvania R. Co. 6 Inters. Com. Rep. 52; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 196, 40 L. ed. 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700.

Both the Supreme Court and the Commission have held that, under the act as it existed prior to the amendments of 1906, the suit to enforce an order of reparation was a continuation of the proceedings before the Commission; and that, when the Court is of opinion that the Commission has erred in its interpretation of the law, the case should be remanded to the Commission for reconsideration under proper instructions.

Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co. 10 Inters. Com. Rep. 83; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters Com. Rep. 405, 16 Sup. Ct. Rep. 666; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

The practice would be much simplified, and the burden placed where it belongs, and where we believe it is placed by the Hepburn act, if the order of reparation were regarded as a final adjudication by a court of competent jurisdiction, and not subject to review in the suit to enforce the order in respect to any question except the question of damages. If the carrier is dissatisfied with the Commission's interpretation of the law, it should bring suit against the Commission and the shipper to enjoin and set aside the order of reparation.

The case should not now be remanded to the Commission because on subsequent complaint by plaintiff the rate in question was established.

Baer Bros. Mercantile Co. v. Missouri P. R. Co. 17 Inters. Com. Rep. 225; Denver & R. G. R. Co. v. Interstate Commerce Commission, 195 Fed. 968.

The transportation in question was interstate commerce and subject to the commerce act and to the jurisdiction of the Commission.

The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; Board of Trade v. Alabama Midland R. Co. 4 Inters. Com. Rep. 6, 6 I. C. C. Rep. 348; Phelps v. Texas & P. R. Co. 6 Inters. Com. Rep. 48; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; United States ex rel. Interstate Commerce Commission v. Seaboard R. Co. 82 Fed. 563; Augusta Southern R. Co. v. Wrightsville & T. R. Co. 74 Fed. 522; United States v. Pennsylvania R. Co. 153 Fed. 625; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 54 L. ed. 946, 30 Sup. Ct. Rep. 651; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700.

There can be no question that the shipments of beer involved in this case were made on through bills of lading, or the equivalent of through bills of lading.

5 Cyc. 707; Merchants' & M. Bank v. Hewitt, 3 Iowa, 93, 66 Am. Dec. 49.

Mr. E. N. Clark argued the cause, and, with Messrs. Joel F. Vaile and J. G. McMurry, filed a brief for defendant in error:

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It is immaterial in this case whether the rate had been established or not.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 428, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Langdon v. Pennsylvania R. Co. 186 Fed. 240.

It cannot be conceded that this court can or ought to take judicial knowledge or give any force to a case not brought to this court in the record presented.

Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 511, 56 L. ed. 288, 290, 32 Sup. Ct. Rep. 114.

This court is without power to overlook the failure of the Commission to establish the maximum rate, and can do nothing to make this order of the Commission a valid one. Upon a suit to enforce an order of the Commission, the court is without power to revise or supplement the order, or to overlook the deficiencies in the order.

Southern P. Co. v. Colorado Fuel & Iron Co. 42 C. C. A. 12, 101 Fed. 779; Southern P. Co. v. Interstate Commerce Commission, 200 U. S. 536, 551, 50 L. ed. 585, 592, 26 Sup. Ct. Rep. 330; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 494, 54 L. ed. 292, 297, 30 Sup. Ct. Rep. 164; Interstate Commerce Commission v. Lake Shore & M. S. R. Co. 134 Fed. 942; Philadelphia & R. R. Co. v. Interstate Commerce Commission, 174 Fed. 687.

The shipments in question, so far as they moved over the railroad of defendant, were not within the interstate commerce act.

Gibbons v. Ogden, 9 Wheat. 1, 190, 6 L. ed. 23, 68; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

The Commission had no power to deal with defendant's local rate from Pueblo to Leadville.

The Commission could not have made an order directly purporting to fix the divisions. Congress did not intend to confer upon the Commission power to do by indirection what it could not do directly.

Chicago, R. I. & P. R. Co. v. Interstate Commerce Commission, 171 Fed. 688.

Mr. Justice Lamar, after making the foregoing statement of facts, delivered the opinion of the court:

In proceedings before the Commerce Commission the plaintiff secured an order requiring the defendant to pay it $3,438.27 as reparation for unreasonable freight rates charged and collected, the fixing of a new and just rate being left for future decision. The carrier failed to make the payment required, and the plaintiff thereupon brought suit and recovered judgment for the sum awarded, together with interest and attorneys' fees. This judgment was reversed by the circuit court of appeals, which held that the order was void on its face, and could not be the basis of a recovery for the reason that, while reparation had been awarded on the ground that the old rate was unreasonable, the Commission had not fixed a new and just rate for the future.

1. That the two subjects of reparation and rates may be dealt with in one order is undoubtedly true. Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 446, 51 L. ed. 561, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Robinson v. Baltimore & O. R. Co. 222 U. S. 509, 56 L. ed. 289, 32 Sup. Ct. Rep. 114. But awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its quasi judicial capacity to measure past injuries sustained by a private shipper; the other, in its quasi legislative capacity, to prevent future injury to the public. But testimony showing the unreasonableness of a past rate may also furnish information on which to fix a reasonable future rate, and both subjects can be, and often are, disposed of by the same order. This, [487] however, is not necessarily so. Indeed, under the original commerce act, the two matters could not possibly be combined in a single order for the reason that, while at that time the Commission could order the carrier to desist from unreasonable practices and award damages, it could not fix rates. This brought about an anomalous state of affairs. For if the shipper obtained his order of reparation because of unreasonable charges which the railroad company was ordered to discontinue, a slightly different, but still unreasonable, rate might be put in for the future, which the shipper had to pay and again institute proceedings for reparation. 24 Stat. at L. 384, § 15, chap 104, U. S. Comp. Stat. 1901, p. 3165.

2. This situation was dealt with by the Hepburn act, which, in addition to the existing power to make reparation, conferred upon the Commission the new power to make rates for the future. But the two matters were treated as different subjects and were dealt with in separate sections. Section 4 conferred the power of making rates. Section 5 gave the Commission power to make reparation orders. 34 Stat. at L. 589, 590, §§ 4, 5, chap. 3591, U. S. Comp. Stat. Supp. 1911, pp. 1297, 1301. Not only were the two functions separately treated,

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but an analysis of the act shows that there is no such necessary connection between them as to make the quasi judicial order for reparation depend for its validity upon being joined with a quasi legislative order fixing rates. Persons entitled to one may have no interest in the other. Persons interested in both may be entitled to reparation, and not to a new rate; or to a new rate, and not to reparation. For example, § 13 permits "any mercantile, agricultural, or manufacturing society or any body politic or municipal organization to make complaints against the carrier." On the application of such bodies, old rates might be declared unjust and new rates established; but, of course, no reparation would be given, for the reason that such [488] complainants were not shippers, and therefore not entitled to an award of pecuniary damages. Cf. Louisville & N. R. Co. v. Interstate Commerce Commission, 227 U. S. 89, 57 L. ed. 431, 33 Sup. Ct. Rep. 185. Then, too, there are cases in which a rate, reasonable when made, becomes unreasonable as the result of a gradual change in conditions, so that no reparation is ordered even though a new rate be established for the future. Anadarko Cotton Oil Co. v. Atchison, T. & S. F. R. Co. 20 Inters. Com. Rep. 43. Conversely, there may be cases where what was an unreasonable rate in the past is found to be reasonable at the date of the hearing. In such a case reparation would be awarded for past unreasonable charges collected, but no new rate would be established for the future.

3. It may, however, be said that even in such a case, the order, while condemning the rate for the past, should contain a provision validating it for the future. But while this consideration might show that it was erroneous not to name the new rate, it would not follow that the order awarding reparation was void. The Hepburn act treats the two subjects as related, but independent. The grounds of complaint may be joint or separate, and the very fact that they may sometimes be separate shows that the presence of both is not jurisdictional, and that the absence of a provision for one need not operate to invalidate an order as to the other.

This conclusion is strengthened by considering the hardships that would result from nullifying a reparation order for error in omitting a provision for the future rate. It would punish the shipper for the failure of the Commission. It would deprive him of his award of damages for his private injury, because of the Commission's omission to make a rate for the benefit of the public. The shipper might or might not intend to remain in business. He might or he might not be interested in future rates. He might have been able to prove unreasonableness as to the past without being able to furnish evidence as to what [489] would be reasonable for the future. Or, the Commission might be in position to say with certainty that the rates had been unreasonable, and award reparation accordingly, but it might require a protracted and lengthy hearing to establish what would be just for the future. To make the shipper wait on such a finding, and deprive him of his present right to reparation, until the determination of an independent question, would work a hardship not contemplated by the act and not required by any of its provisions.

The present case illustrates some of these features. The plaintiff's petition asked for reparation and that the Commission would establish just rates. On the hearing it appeared that there was no through route or joint rate, and that the established local charge of one of the carriers was just, while that of the other had not been established or included in a filed tariff and was also unjust. The evidence was sufficient to sustain a finding of damages against such carrier, but it did not show how the through rate should be divided between the two companies, one of which hauled 923 miles and the other 160 miles. The carriers did not ask for an extension of the time within which the reparation should be paid. The fact that they were given an opportunity to agree on a through rate and how it should be divided ought not to deprive plaintiff of its rights to damages for the past, under a reparation order which could not, by any possibility, be changed by any subsequent finding as to rates for the future.

The report and order gave the plaintiff no preference over other shippers, since they showed that 15 cents of the rate charged by the Denver & Rio Grande was unreasonable. If such a finding of unreasonableness was not sufficiently general to inure to the benefit of all other shippers, they could, on application, have secured such a modification as to enable them to maintain a suit for the recovery of damages for unjust charges and collections in the past. [490] So far as the future operation of the order was concerned, all shippers were left in the same position, where, from the necessity of the case, the old rate had to be paid until the time had elapsed within which a new and just through rate could be put into effect. But, however desirable it may have been to deal with the entire matter at one time, the joinder of the two subjects was not jurisdictional. There was no such necessary connection between the two as to make the order of reparation void because of the

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absence of a concurrent provision establishing a rate for the future.

This conclusion makes it necessary to consider what judgment should have been entered by the circuit court of appeals (Baker v. Warner, 231 U. S. 588, ante, 384, 34 Sup. Ct. Rep. 175). That necessitates an examination of the other assignments of error relied on by the railroad company.

4. The Denver & Rio Grande claimed in the record in the court of appeals that the order was void on its face for the reason that the Commission was without jurisdiction to pass upon the reasonableness of the rate from Pueblo, Colorado, to Leadville, Colorado. But while there was no through rate and no through route, there was in fact a through shipment from St. Louis, Missouri, to Leadville, Colorado. Its interstate character could not be destroyed by ignoring the points of origin and destination, separating the rate into its component parts, and by charging local rates and issuing local waybills, attempting to convert an interstate shipment into intrastate transportation.

For where goods shipped "from a point in one state to a point in another are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce." Cincinnati, N. O. & T. P. R. Co. v. Interstate [491] Commerce Commission, 162 U. S. 193, 40 L. ed. 938, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700. This common arrangement does not depend upon the establishment of a through route or the issue and recognition of a through bill of lading, but may be otherwise manifested. Ibid.

That there was a common arrangement between the two carriers here was shown by the long-continued course in dealing, and the division of the freight, with the knowledge that it had been paid as compensation for the single haul. If there had been a failure on the part of one of the carriers to file the tariffs, that did not defeat the jurisdiction of the Commission to award reparation against that same carrier, when it was shown that its unreasonable charge of 45 cents per cwt. formed a part of the total rate of 90 cents per cwt. actually paid by the Baer Company.

5. The dismissal of the suit brought in 1906, for the recovery of damages for collecting unreasonable freight rates, was not a bar to this proceeding for the reason that a voluntary dismissal of an action at law is in the nature of a nonsuit, and does not operate as a judgment on the merits. Haldeman v. United States, 91 U. S. 584, 23 L. ed. 433; Jacobs v. Marks, 182 U. S. 583, 591, 45 L. ed. 1241, 1246, 21 Sup. Ct. Rep. 865.

There were other assignments of error in the circuit court of appeals, but as they are not discussed in the brief for the railroad company, they may be treated as abandoned here.

The judgment of the Circuit Court of appeals is reversed and that of the Circuit Court affirmed.

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[492] SEABOARD AIR LINE RAILWAY, Plff. in Err.,
v.
JAMES T. HORTON.

(See S. C. Reporter's ed. 492-508.)

Appeal — return day in writ of error — citation.

1. Making the writ of error to a state court and the citation thereon returnable "within thirty days from the date hereof," without inserting a day certain as the return day, is a substantial compliance with the provision of United States Supreme Court rule 8, clause 5, that (with certain exceptions in favor of the more distant states and territories) "all appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time."

[For other cases, see Appeal and Error, IV. e, 6; IV. j, 3, in Digest Sup. Ct. 1908.]

Error to state court — decision of Federal question — suit based on Federal statute.

2. A writ of error will lie from the Fed-

Note.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to Wedding v. Meyler, 66 L.R.A. 833.

On the constitutionality, application, and effect of the Federal employers' liability act—see note to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38.

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eral Supreme Court to review a decision of the highest state court, which sustained the action of the trial court in overruling certain contentions made by the plaintiff in error asserting a construction of the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1324), which, if acceded to, would presumably have produced a verdict in favor of plaintiff in error, and consequent immunity from the action.

[For other cases, see Appeal and Error, 1436-1445, in Digest Sup. Ct. 1908.]

Commerce — employers' liability — conflicting state and Federal legislation.

3. Since Congress, by the act of April 22, 1908, took possession of the field of the employers' liability in interstate transportation by rail, all state laws upon the subject are superseded.

[For other cases, see Commerce, I. c, in Digest Sup. Ct. 1908.]

Commerce — employers' liability — conflicting legislation — safe place or appliances.

4. The limitation of the responsibility of a railway carrier under the employers' liability act of April 22, 1908, § 1, for injuries to its employees resulting from defects or insufficiency in places of work or appliances to those caused by such defects and insufficiencies as are "due to its negligence," governs an action brought under that statute regardless of the measure of responsibility prescribed by the local statutes.

[For other cases, see Commerce, I. c, in Digest Sup. Ct. 1908.]

Master and servant — employers' liability — assumption of risk — contributory negligence — violation of statutes.

5. Federal statutes only were intended by the phrase "any statute enacted for the safety of employees" in the employers' liability act of April 22, 1908, §§ 3, 4, abolishing the defenses of contributory negligence and assumption of risk in any case where the violation by the carrier of any statute enacted for the safety of employees contributed to the injury or death of an employee.

Master and servant — employers' liability — assumption of risk.

6. The elimination of the defense of assumption of risk by the employers' liability act of April 22, 1908, § 4, in any case where the violation by the carrier of any statute enacted for the safety of the employees contributed to the injury or death of the employee, plainly evidences the legislative intent that in all other cases such assumption of risk shall have its former effect as a complete bar to the action.

Commerce — employers' liability — conflicting legislation — assumption of risk.

7. The common-law rule with respect to the employee's assumption of risk of injury from a defective appliance governs an action brought under the employers' liability act of April 22, 1908, where such appliance is not covered by any Federal statute enacted for the safety of employees, to the exclusion of any state statutes which, like N. C. Revisal 1905, § 2646, abolished the assumption of risk as a bar to an action by a railway employee for an injury attributable to defective appliances furnished by the employer, since otherwise the subject-matter would be controlled by the laws of the several states, and not by the Federal statute, which, in § 4, abolishes the defense of the assumption of risk only when the violation by the carrier of a Federal statute enacted for the safety of employees contributed to the death or injury of an employee.

[For other cases, see Commerce, I. c, in Digest Sup. Ct. 1908.]

[No. 691.]

Argued February 27, 1914. Decided April 27, 1914.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which affirmed a judgment of the Superior Court of Wake County, in that state, in favor of plaintiff in an action brought under the Federal employers' liability act. Reversed and remanded for further proceedings.

See same case below, 162 N. C. 424, 78 S. E. 494.

The facts are stated in the opinion.

Messrs. **Benjamin Micou and Murray Allen** argued the cause, and, with Messrs. Hilary A. Herbert and Richard P. Whiteley, filed a brief for plaintiff in error:

This court has jurisdiction.

St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 292, 52 L. ed. 1066, 28 Sup. Ct. Rep. 616; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 483, 56 L. ed. 1174, 32 Sup. Ct. Rep. 790.

In this case is clearly involved the right of the plaintiff in error to be shielded from responsibility under the Federal employers' liability act, because, when properly applied to the facts as presented by the plaintiff in error, no liability on its part from the statute would result.

St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703.

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It was error to confuse assumption of risk and contributory negligence.

Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230.

If the plaintiff in error pleaded defenses in any way contradictory, such practice is specifically approved by the decisions of the supreme court of North Carolina.

Upton v. South Carolina & G. Extension R. Co. 128 N. C. 173, 38 S. E. 736.

Whenever the evidence suggests that the servant knew of the extraordinary risk which caused the accident, the jury should be instructed regarding the legal consequences of such knowledge, as justifying the inference both of an assumption of risk and of contributory negligence.

Labatt, Mast. & S. § 1221.

It is manifest that, where the facts disclosed warrant both the inference that the servant had assumed the risk, or was guilty of contributory negligence in continuing to work, and the inference that he was lacking in proper care with respect to the act which was the immediate cause of the injury, the proper course for the trial judge to follow is to differentiate the defenses clearly, and to explain by suitable language that they are cumulative in their operation.

Labatt, Mast. & S. § 1222.

For a certain time a master may remain liable for a failure to use reasonable care in furnishing a safe place in which to work, notwithstanding the servant's appreciation of the danger, if he induces the servant to keep on by a promise that the source of trouble shall be removed.

Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612; Southwestern Brewery & Ice Co. v. Schmidt, 226 U. S. 162, 57 L. ed. 170, 33 Sup. Ct. Rep. 68. See also Labatt, Mast. & S. §§ 419, 1342; Coin v. John H. Talge Lounge Co. 222 Mo. 489, 25 L.R.A.(N.S.) 1179, 121 S. W. 1, 17 Ann. Cas. 888; Chicago & O. Coal & Car Co. v. Norman, 49 Ohio St. 598, 32 N. E. 857; Illinois Steel Co. v. Mann, 40 L.R.A. 793, note; Dresser, Employers' Liability, § 115.

There is a recognized exception to the rule that, by complaint and promise to repair, the servant is relieved of assumption of risk for a reasonable time if he continues to use the defective instrumentality in reliance upon the promise of the master. If the danger is so imminent that a man of ordinary prudence would not continue the work, notwithstanding the promise to repair, the servant continues to assume the risk.

Foster v. Chicago, R. I. & P. R. Co. 4 Ann. Cas. 153, note; Utah Consol. Min. Co. v. Paxton, 80 C. C. A. 68, 150 Fed. 114; Musser-Sauntry Land, Logging & Mfg. Co. v. Brown, 61 C. C. A. 207, 126 Fed. 141.

The Federal employers' liability act is in conflict with the state law.

Coley v. North Carolina R. Co. 128 N. C. 534, 57 L.R.A. 817, 39 S. E. 43.

Congress having occupied the field, the Federal act supersedes all state law.

Southern R. Co. v. Reid, 222 U. S. 442, 56 L. ed. 262, 32 Sup. Ct. Rep. 140; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 575, 576, 57 L. ed. 363, 33 Sup. Ct. Rep. 135; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 157, 158, 57 L. ed. 1133, 33 Sup. Ct. Rep. 651.

Upon the subject of assumption of risk the common-law right is preserved by the employers' liability act, unless there has been a violation by the employer of a statute enacted for the safety of the employee.

Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. Rep. 561; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 275, 36 L. ed. 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 49, 50, 56 L. ed. 345, 346, 32 Sup. Ct. Rep. 169; Barker v. Kansas City, M. & O. R. Co. 88 Kan. 767, 43 L.R.A.(N.S.) 1121, 129 Pac. 1151; Freeman v. Powell, — Tex. Civ. App. —, 144 S. W. 1033; Neil v. Idaho & W. N. R. Co. 22 Idaho, 74, 125 Pac. 331; Bowers v. Southern R. Co. 10 Ga. App. 367, 73 S. E. 677; Hall v. Vandalia R. Co. 169 Ill. App. 12.

The legislative history of an act of Congress is a proper aid to its construction.

11 Enc. U. S. Sup. Ct. Rep. 143.

Statutes which abolish by express provision assumption of risk as a defense do not affect the defense of contributory negligence.

Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561; Denver & R. G. R. Co. v. Arrighi, 63 C. C. A. 649, 129 Fed. 347.

The positive language used by Congress in the Federal safety appliance act, § 8, illustrates the proper method of abolishing assumption of risk by legislative enactment. See also the language of the recent employers' liability act of Ohio, set forth in Erie R. Co. v. White, 109 C. C. A. 322, 187 Fed. 556.

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Johnson v. Southern P. Co. 54 C. C. A. 508, 117 Fed. 462, 12 Am. Neg. Rep. 398.

Assumption of risk as a defense to an action based upon this act is to be measured by the common law and its interpretation by the Supreme Court of the United States.

Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. Rep. 261; Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612.

At common law and under the decisions of the Supreme Court of the United States a servant assumes the risk of defects arising from the master's negligence if he continues in the service with knowledge of such defects.

Butler v. Frazee, 211 U. S. 459, 53 L. ed. 281, 29 Sup. Ct. Rep. 136; Texas & P. R. Co. v. Harvey, 228 U. S. 319, 57 L. ed. 852, 33 Sup. Ct. Rep. 518; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 67, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707, 1 Am. Neg. Rep. 745; Worden v. Gore-Meenan Co. 83 Conn. 642, 78 Atl. 422; Smalls v. Southern R. Co. 115 Ga. 137, 41 S. E. 492; Katalla Co. v. Rones, 108 C. C. A. 132, 186 Fed. 30; Sharon Fire Brick Co. v. Miller, 104 C. C. A. 340, 181 Fed. 830; Detroit Crude-Oil Co. v. Grable, 36 C. C. A. 94, 94 Fed. 73; Texas & P. R. Co. v. Archibald, 170 U. S. 671, 672, 42 L. ed. 1191, 18 Sup. Ct. Rep. 777, 4 Am. Neg. Rep. 746; Chicago, B. & Q. R. Co. v. Shalstrom, 45 L.R.A. (N.S.) 387, 115 C. C. A. 515, 195 Fed. 729; St. Louis Cordage Co. v. Miller, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 508, 15 Am. Neg. Rep. 476; Kyner v. Portland Gold Min. Co. 106 C. C. A. 245, 184 Fed. 43; Labatt, Mast. & S. § 1186.

The requested instructions on the issue of assumption of risk should have been given.

Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148.

The theory that the mere fact of the servant's having continued to work with knowledge of an abnormal risk charges him, as a matter of law, with an assumption of risk, manifestly involves the corollary that, viewed as an evidential element, the servant's failure to express dissatisfaction with his environment is merely corroborative and confirmatory in its effect.

Labatt, Mast. & S. § 1202.

The fact that the dangerous condition arose after the plaintiff entered the employment is considered to be immaterial, where it is shown that he continued to work after the change with a full appreciation of the increased risk.

Labatt, Mast. & S. § 1195.

It has never been questioned, and there are numerous cases expressly or impliedly deciding, that the doctrine of assumption of risk is a bar to the action whenever the abnormal danger was known actually or constructively to the servant at the time when he entered the employment.

Ibid.; Leary v. Boston & A. R. Co. 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115; Ragon v. Toledo, A. A. & N. M. R. Co. 97 Mich. 265, 37 Am. St. Rep. 336, 56 N. W. 612.

Assumption of risk is not modified nor controlled by the fact that contributory negligence is no defense.

Jackson v. Chicago, R. I. & P. R. Co. 102 C. C. A. 159, 178 Fed. 435; Labatt, Mast. & S. pp. 749, 768, 772.

Messrs. William C. Douglass and Clyde A. Douglass argued the cause and filed a brief for defendant in error:

The plaintiff in error did not specifically claim, nor was it denied, any right, privilege, or immunity under the employers' liability act.

Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429.

Assumption of risk is a common-law defense, and not a creation of the Federal power.

Burnett v. Atlantic Coast Line R. Co. 163 N. C. 186, 79 S. E. 414; Pennsylvania R. Co. v. Hughes, 191 U. S. 478, 48 L. ed. 269, 24 Sup. Ct. Rep. 132.

The servant cannot assume the risk of the negligence of the master.

Union P. R. Co. v. O'Brien, 161 U. S. 452, 40 L. ed. 767, 16 Sup. Ct. Rep. 618; Hicks v. Naomi Falls Mfg. Co. 138 N. C. 319, 50 S. E. 703; Marks v. Harriet Cotton Mills, 138 N. C. 402, 50 S. E. 769, 3 Ann. Cas. 812; Pressly v. Dover Yarn Mills, 138 N. C. 417, 51 S. E. 69; Gottlieb v. New York, L. E. & W. R. Co. 100 N. Y. 467, 3 N. E. 344; Mason v. Richmond & D. R. Co. 111 N. C. 482, 18 L.R.A. 845, 32 Am. St. Rep. 814, 16 S. E. 698; Hudson v. Charleston, C. & C. R. Co. 104 N. C. 491, 10 S. E. 669; Schlacker v. Ashland Iron Min. Co. 89 Mich. 262, 50 N. W. 839; Greene v. Minneapolis & St. L. R. Co. 31 Minn. 248, 47 Am. Rep. 785, 17 N. W. 378; Sims v. Lindsay, 122 N. C. 678, 30 S. E. 19; Sibbert v. Scotland Cotton Mills, 145 N. C. 314, 59 S. E. 79; Leggett v. Atlantic Coast Line R. Co. 162 N. C. 111, 67 S. E. 249; Bissell v. Greenleaf-Johnson Lumber Co. 152 N. C. 124, 67 S. E. 259; Tanner v. Frank Hitch Lumber Co. 140 N. C. 477, 53 S. E. 287; Worley v. Laurel River Logging Co. 157 N. C. 490, 73 S. E. 107; Southern P.

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Co. v. Yeargin, 48 C. C. A. 497, 109 Fed. 441; Wright v. Yazoo & M. V. R. Co. 197 Fed. 96; Deninger v. American Locomotive Co. 107 C. C. A. 126, 185 Fed. 32.

This case was properly submitted to the jury upon the doctrine of the ideal prudent man.

Kane v. Northern C. R. Co. 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16; Snow v. Housatonic R. Co. 8 Allen, 441, 85 Am. Dec. 720, 15 Am. Neg. Cas. 447; Gardner v. Michigan C. R. Co. 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; 1 White, Personal Injuries on Railroads, §§ 370, 377; Lake Shore & M. S. R. Co. v. McCormick, 74 Ind. 440; Cregg v. Chicago & W. M. R. Co. 91 Mich. 624, 52 N. W. 62; Consolidated Coal Co. v. Haenni, 146 Ill. 614, 35 N. E. 162; Bridges v. St. Louis, I. M. & S. R. Co. 6 Mo. App. 389; Parker v. South Carolina & G. R. Co. 48 S. C. 364, 26 S. E. 669, 1 Am. Neg. Rep. 681; Vosburgh v. Lake Shore & M. S. R. Co. 94 N. Y. 374, 46 Am. Rep. 148; 1 Shearm. & Redf. Neg. § 194; Gottlieb v. New York, L. E. & W. R. Co. 100 N. Y. 467, 3 N. E. 344; Mason v. Richmond & D. R. Co. 111 N. C. 491, 18 L.R.A. 845, 32 Am. St. Rep. 814, 16 S. E. 698; Hermanek v. Chicago & N. W. R. Co. 108 C. C. A. 254, 186 Fed. 142; Barber Asphalt Paving Co. v. Austin, 108 C. C. A. 365, 186 Fed. 443; Hudson v. Charleston, C. & C. R. Co. 104 N. C. 491, 10 S. E. 669.

The party who procures or acquiesces in the rulings under which a trial is conducted thereby waives the right to object to them.

New York Elev. R. Co. v. Fifth Nat. Bank, 135 U. S. 432, 34 L. ed. 231, 10 Sup. Ct. Rep. 743.

"Plaintiff cannot complain of an error in a ruling which was made at his request, and to the prejudice of the defendant."

Avendano Bros. v. Gay, 8 Wall. 376, 19 L. ed. 422.

The laws of North Carolina have abolished assumption of risk as a defense, and Congress, in the act under consideration, having left open this part of the field, the state law governs, and assumption of risk can in no case be pleaded in an action brought under the act in the state courts of North Carolina.

Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Smith v. Alabama, 124 U. S. 468, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 2 Inters. Com. Rep. 238, 32 L. ed. 352, 9 Sup. Ct. Rep. 28; Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868, 30 Sup. Ct. Rep. 594.

The refusal to grant special requests to charge is not error, when their substance is embraced in the instructions actually given.

Northern P. R. Co. v. Urlin, 158 U. S. 271, 39 L. ed. 977, 15 Sup. Ct. Rep. 840; Rio Grande Western R. Co. v. Leak, 163 U. S. 280, 41 L. ed. 160, 16 Sup. Ct. Rep. 1020; Laber v. Cooper, 7 Wall. 565, 19 L. ed. 151; Iron Silver Min. Co. v. Cheesman, 116 U. S. 529, 29 L. ed. 712, 6 Sup. Ct. Rep. 481; Hartford Life Annuity Ins. Co. v. Unsell, 144 U. S. 439, 36 L. ed. 496, 12 Sup. Ct. Rep. 671; Ayers v. Watson, 113 U. S. 594, 28 L. ed. 1093, 5 Sup. Ct. Rep. 641.

Mr. Justice **Pitney** delivered the opinion of the court:

Horton sued the Seaboard Air Line Railway in the superior court of Wake county, North Carolina, to recover damages for personal injuries sustained by him while in defendant's employ as a locomotive engineer. The action was brought under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), as amended April 5, 1910 (36 Stat. at L. 291, chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1324). In the complaint it was sufficiently averred that defendant was a corporation operating a line of railway as a common carrier in interstate commerce, and that plaintiff, at the time he was injured, was employed by defendant in such commerce. These facts were not in issue at the trial.

As to the circumstances of the occurrence of the injury, plaintiff's evidence tended to show that on July 27, 1910, defendant's locomotive engine No. 752 was placed in his charge; that it was equipped with a Buckner water gauge, a device attached to the boiler head for the purpose of showing the level of the water in the boiler, and consisting of a brass frame or case inclosing a thin glass tube which communicated with the boiler above and below in such manner that the tube received water and steam direct from the boiler and under the full boiler pressure. In order to shield the engineer from injury in case of the bursting of the tube, a piece of ordinary glass, 2 or 3 inches wide, 8 or 9 inches long, and about half an inch thick, known as a guard glass, should have been provided, this being a part of the regular equipment of the Buckner water gauge. There were slots for receiving the guard glass and holding it in position in front of the water tube. At each end of the tube, valves were provided for the purpose of disconnecting [496] it from the boiler. As an alternative but probably less convenient method of determining the level of the water in the boiler, ordinary gauge cocks were provided.

Plaintiff was an experienced locomotive

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engineer, and, according to his own testimony, was fully aware of the function of the guard glass and of its importance to his safety. He testified that when he took the engine out on his first trip on July 27th, he observed that the guard glass was missing; that on his return upon the following day he reported this to defendant's roundhouse foreman, to whom reports of such defects were properly made, and asked him for a guard glass; that the foreman stated there were none in stock at that place, and it would be necessary to send to a distance to get one; that he would do this, and that plaintiff should meanwhile run the engine without one; and that, having ineffectually endeavored to get a guard glass from another source, plaintiff proceeded to drive the engine with the use of the unguarded water gauge until August 4th, when the glass exploded and flying fragments struck him in the face, causing the injuries upon which his claim for damages was based.

Defendant's evidence tended to show that when the engine was placed in plaintiff's charge on July 27th the water glass was in good condition, with a guard glass in place; that the gauge cocks were likewise in good working order; that it was the duty of a locomotive engineer to inspect his engine and know that it was in proper order before taking it out, and if not in proper order to make a written report to the roundhouse foreman, specifying the defects; that if anything should happen to the water glass it was the engineer's duty to close the valves so as to exclude the steam pressure from it, and run the engine with the gauge cocks, and that these were sufficient for the purpose; and that plaintiff made repeated reports in writing between July 27 and the time of his injury, mentioning other things needed about his engine, but making no mention of the [497] water gauge or the guard glass. The fireman testified specifically that when plaintiff took charge of the engine on the morning of the 27th the water glass had the shield or guard in front of it, but that it was smoky, so that one could not see through it; that he, the fireman, in the presence of plaintiff, removed the guard glass in order to clean it; and that in plaintiff's presence it became broken. The roundhouse foreman specifically denied plaintiff's testimony about the complaint and the promise of reparation.

Under instructions presently to be noticed, the case was submitted to the jury upon three issues, to which responses were made as follows:

(1) Was plaintiff injured by defendant's negligence? Answer, Yes.

(2) If so, did plaintiff assume the risk of injury? Answer, No.

(3) Did plaintiff by his own negligence contribute to his injury? Answer, Yes.

The jury also assessed substantial damages, for which judgment was rendered by the trial court, and upon appeal the supreme court affirmed the judgment (162 N. C. 424, — L.R.A.(N.S.) — 78 S. E. 494). The case comes here, under § 237, Judicial Code [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227], upon questions arising out of instructions given and refused to be given to the jury as to the nature of the duty of the employer and the rules respecting assumption of risk and contributory negligence under the Federal employers' liability act.

There is a motion to dismiss, upon the ground that no return day is specified in the writ of error or citation. Carroll v. Dorsey (1857) 20 How. 204, 207, 15 L. ed. 803, 804, and Sea v. Connecticut Mut. L. Ins. Co. (1880) 154 U. S. 659, and 25 L. ed. 882, 14 Sup. Ct. Rep. 1191, are relied upon. These decisions were based upon § 22 of the judiciary act of September 24, 1789, 1 Stat. at L. 84, chap. 20, which was held to require a certain return day to be specified in the writ of error. Accordingly, general rule 33, [498] promulgated December terms, 1867 (6 Wall. vi.), afterwards found as clause 5 of rule 8 of the revised rules promulgated January 7, 1884 (108 U. S. 577, 20 L. ed. 902, 3 Sup. Ct. Rep. vii.), required that the writ of error and citation should be returnable on the first day of the term in cases where final judgment was rendered more than thirty days before that day, and on the third Monday of the term in cases where judgment was rendered less than thirty days before the first day. Blatchf. U. S. Ct. Rules 77. But under the authority conferred by § 917, Rev. Stat. (U. S. Comp. Stat. 1901, p. 684), the court, on January 26, 1891, amended clause 5 of rule 8 so as to read: "All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation; whether the return day fall in vacation or in term time, and be served before the return day" (137 U. S. 710, 34 L. ed. 1122, 11 Sup. Ct. Rep. iii.). And in the present rule as promulgated December 22, 1911 (222 U. S. p. 14, Appx. 56 L. ed. 1297, 32 Sup. Ct. Rep. vii.), the same language is retained, with an exception extending the time to sixty days in writs of error and appeals from the western states, and Alaska, Hawaii, and Porto Rico, and to 120 days as to the Philippine Islands. An extension of the time in favor of the more distant states and territories was first introduced as clause 3 of original rule 63, promulgated at December term, 1853 (16 How. ix. 14 L. ed.

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818), and has been continued, with amendments, until the present time (21 How. viii.; 2 Wall. viii.; 108 U. S. 578, 20 L. ed. 903, 3 Sup. Ct. Rep. viii.). It has, however, no bearing upon the form of the writ or citation, aside from the limit of time that may be allowed between date and return.

The present writ of error and citation were dated the 4th day of August, 1913, and in terms were returnable "within thirty days from the date hereof." This form has been usually employed, with the approval of the court, since the amendment of the rule made in 1891, as mentioned. It is a substantial compliance with the present [499] rule, and tends to avoid errors that otherwise might be made in inserting a day certain as a return day.

This motion must therefore be denied.

A second motion to dismiss, based upon grounds still more technical, and which need not be particularly stated, will likewise be denied.

There is a further motion to dismiss for want of jurisdiction, upon the ground that no right, privilege, or immunity under the employers' liability act was especially set up or claimed in the state court of last resort and by that court denied. But since that court sustained the trial court in overruling certain contentions made by plaintiff in error asserting a construction of the act, which, if acceded to, would presumably have produced a verdict in its favor, and consequent immunity from the action, this motion must be denied, upon the authority of St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858.

Coming now to the merits, we need consider only certain assignments of error that are based upon exceptions to the action of the trial judge in giving and refusing to give instructions relating to the issues of defendant's negligence, the assumption of risk, and contributory negligence.

At the outset we observe that the judge evidently misapprehended the effect of the Federal act upon state legislation. Thus, the jury was told that plaintiff had brought the action under the Federal statute; "And where Congress enacts a law within the limits of its power, that law should be enforced uniformly throughout the entire United States. If it is in conflict with the state law, the state law is superseded. But where there is no conflict expressed by statute of the United States, then the rule of the state prevails." This, of course, in the absence of a specific statement of the applicable rule of the state law, might be treated as academic. But the theory [500] was carried into the specific instructions, to the extent that upon the questions of the employer's duty and the assumption of risk by the employee, the charge was modeled rather upon the North Carolina statute than upon the act of Congress. By § 2646, N. C. Revisal of 1905, "Any servant or employee of any railroad company operating in this state who shall suffer injury to his person, or the personal representative of any such servant or employee who shall have suffered death in the course of his services or employment with such company by the negligence, carelessness, or incompetence of any other servant, employee, or agent of the company, or by any defect in the machinery, ways, or appliances of the company, shall be entitled to maintain an action against such company. Any contract or agreement, expressed or implied, made by any employee of such company to waive the benefit of this section, shall be null and void."

Upon the issue of defendant's negligence, the trial court charged the jury as follows: "It is the duty of the defendant to provide a reasonably safe place for the plaintiff to work, and to furnish him with reasonably safe appliances with which to do his work." And in various other forms the notion was expressed that the duty of defendant was absolute with respect to the safety of the place of work and of the appliances for the work. Thus: "If you find from the evidence that it [the locomotive engine] was turned over to him without the guard, and if you further find from the evidence that the guard was a proper safety provision for the use of that gauge, and that it was unsafe without it, then the defendant did not furnish him a safe place and a safe appliance to do his work, and if it remained in that condition it was continuing negligence on the part of the defendant, and if he was injured in consequence thereof, if you so find by the greater weight of the evidence, you should answer the first issue, 'Yes.'"

[501] In these instructions the trial judge evidently adopted the same measure of responsibility respecting the character and safe condition of the place of work, and the appliances for the doing of the work, that is prescribed by the local statute. But it is settled that since Congress, by the act of 1908, took possession of the field of the employer's liability to employees in interstate transportation by rail, all state laws upon the subject are superseded. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 55, 56 L. ed. 327, 348, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

The act is quoted in full in that case at p. 6. By its 1st section a right of action

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is conferred (under conditions specified) for injury or death of the employee "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

This clause has two branches; the one covering the negligence of any of the officers, agents, or employees of the carrier, which has the effect of abolishing in this class of cases the common-law rule that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff; and the other relating to defects and insufficiencies in the cars, engines, appliances, etc. But, plainly, with respect to the latter as well as the former ground of liability, it was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence. The common-law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employees is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work [502] may be safe for the workmen. Hough v. Texas & P. R. Co. 100 U. S. 213, 217, 25 L. ed. 612, 615; Washington & G. R. Co. v. McDade, 135 U. S. 554, 570, 34 L. ed. 235, 241, 10 Sup. Ct. Rep. 1044; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 67, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230. To hold that under the statute the railroad company is liable for the injury or death of an employee resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words "due to its negligence." The plain effect of these words is to condition the liability upon negligence; and had there been doubt before as to the common-law rule, certainly the act now limits the responsibility of the company as indicated. The instructions above quoted imposed upon the employer an absolute responsibility for the safe condition of the appliances of the work, instead of limiting the responsibility to the exercise of reasonable care. In effect, the jury was instructed that the absence of the guard glass was conclusive evidence of defendant's negligence. In this there was error.

The questions more particularly discussed, however, and upon which the decision seems to have turned in the supreme court of North Carolina, pertain to the issues of assumption of risk and contributory negligence. By § 3 of the act of 1908 it is declared that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." And by § 4, "Such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for [503] the safety of employees contributed to the injury or death of such employee."

By the phrase "any statute enacted for the safety of employees," Congress evidently intended Federal statutes, such as the safety appliance acts (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174; 32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1911, p. 1314; 36 Stat. at L. 298, chap. 160, U. S. Comp. Stat. Supp. 1911, p. 1327; id. 913, chap. 103, U. S. Comp. Stat. Supp. 1911, p. 1333), and the hours of service act (34 Stat. at L. 1415, chap. 2939, U. S. Comp. Stat. Supp. 1911, p. 1321). For it is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employees in interstate commerce, Congress intended to permit the legislatures of the several states to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer.

It seems to us that § 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action. And, taking §§ 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk; for, while it is declared that neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employee, there is, with respect to cases not in this category, a limitation upon the effect that is to be given to contributory negligence, while no corre-

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sponding limitation is imposed upon the defense of assumption of risk—perhaps none was deemed feasible.

The distinction, although simple, is sometimes overlooked. Contributory negligence involves the notion of some fault or breach of duty on the part of the employee; and since it is ordinarily his duty to take some precaution [504] for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employees in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman, —danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court. Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 68, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 596, 55 L. ed. 596, 600, 31 Sup. Ct. Rep. 561; Texas & P. R. Co. v. Harvey, 228 U. S. 319, 321, 57 L. ed. 852, 855, 33 Sup. Ct. Rep. 518; Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, 102, ante, 521, 524, 34 Sup. Ct. Rep. 229; and cases cited.

When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee [505] assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employee, relying upon the promise, does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise. Hough v. Texas & P. R. Co. 100 U. S. 213, 224, 25 L. ed. 612, 617; Southwestern Brewery & Ice Co. v. Schmidt, 226 U. S. 162, 168, 57 L. ed. 170, 173, 33 Sup. Ct. Rep. 68. This branch of the law of master and servant seems to be traceable to Holmes v. Clarke, 6 Hurlst. & N. 349, 30 L. J. Exch. N. S. 135, 7 Jur. N. S. 397, 3 L. T. N. S. 675, 9 Week. Rep. 419; Clarke v. Holmes, 7 Hurlst. & N. 937, 9 L. T. N. S. 178, 10 Week. Rep. 405.

In the light of these principles, the rulings of the trial court in the case at bar must be considered.

Defendant specifically requested an instruction that plaintiff's right to recover damages was to be determined by the provisions of the Federal act, and that "if you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass, and the condition of the glass was open and obvious and was fully known to plaintiff, and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue 'Yes.'" The court gave this instruction as applicable to the issue of contributory negligence, and instead of the words, "then the court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue 'Yes,'" used the words, "then the court charges you that the plaintiff was guilty of contributory negligence, and you will answer the third issue 'Yes.'" To the refusal to give the instruction as requested, and the modification of it, defendant excepted.

[506] The trial court evidently deemed, as did the state supreme court, that the topic of assumption of risk, with reference to the circumstances of the case, was sufficiently and properly covered by an instruction actually given as follows: after stating in general terms that "a man assumes the risk when he takes employment, incident to the class of work which he is to perform," but that "he does not assume the risk incident to the negligence of his employer in providing machinery and appliances with which he has to work," the court proceeded as follows:

"On the other hand, the employer has

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the right to assume that his employee will go about his work in a reasonably safe way, and give due regard to the machinery and appliances which are in his hands and under his control, and if you should find from the evidence by its greater weight (because the burden in this instance is on the defendant), that the plaintiff knew of the absence of the guard or shield to the water guage and failed to give notice to the defendant or to the agent whose duty it was to furnish the water gauge and appliance, and he continued to use it without giving that notice, *it being furnished to him in a safe condition*, then he assumed the risk incident to his work in the engine with the glass water gauge in that condition, although he might have handled his engine in every other respect with perfect care." [Italics ours.]

It will be observed that by this instruction the application of the rule of assumption of risk was conditioned upon the jury finding that the water gauge, when furnished to plaintiff, was in a safe condition. Here again the court appears to have followed the local statute, rather than the act of Congress; for § 2646, N. C. Revisal of 1905, already quoted, has been held by the state supreme court to abolish assumption of risk as a bar to an action by a railroad employee for an injury attributable to defective appliances furnished by the employer. Coley v. North Carolina R. [507] Co. 128 N. C. 534, 57 L.R.A. 817, 39 S. E. 43. The trial court, while recognizing that the act of Congress applied so far as its terms extended, and that by its terms the employee is not to be held to have assumed the risk in any case where the violation by the carrier of a statute enacted for the safety of employees contributed to the injury, at the same time held that, since no statute had been enacted covering such an appliance as the glass water gauge, the rights of plaintiff were such as he would have under the state law. An instruction to the jury to this effect preceded the instructions we have just quoted.

It is true that such an appliance as the water gauge and guard glass in question is not covered by the provisions of the safety appliance act, or any other law passed by Congress for the safety of employees, in force at the time this action arose. But the necessary result of this is not to leave the employer responsible for the consequences of any defect in such an appliance, excluding the common-law rule as to assumption of risk, but to leave the matter in this respect open to the ordinary application of the common-law rule. The adoption of the opposite view would in effect leave the several state laws, and not the act of Congress, to control the subject-matter.

By the instruction as given, the application of the rule of assumed risk was confined to the single hypothesis that the jury should find the guard glass was in position when the engine was delivered to plaintiff on the morning of July 27th. This, as already pointed out, was one of the questions in dispute; plaintiff having testified that the guard glass was missing at that time, while his fireman testified (and in this was corroborated by circumstantial evidence) that it was in place at that time, and was subsequently broken. But by the common law, with respect to the assumption by the employee of the risk of injuries attributable to defects due to the employer's negligence, when known and appreciated by the employee, [508] and not made the subject of objection or complaint by him, it is quite immaterial whether the defect existed when the appliance was first placed in his charge, or subsequently arose. Hence, if the guard glass was missing when plaintiff first took the engine, as he testified, and he, knowing of its absence and the consequent risk to himself, continued to use the water gauge without giving notice of the defect to the defendant or its representative, he assumed the risk.

Defendant was entitled to have the requested instruction given respecting assumption of risk, and as the charge actually given did not cover the same ground, there was error.

Its harmful effect is conspicuously evident when we note that the jury, while finding that plaintiff did not assume the risk, at the same time found that he did by his own negligence contribute to his injury. Presumably, if instructed in the manner requested by defendant, the jury would have found that the risk was assumed, and this would have entitled defendant to a judgment in its favor, instead of a mere mitigation of the damages, which was the consequence of a finding of contributory negligence.

The judgment of the Supreme Court of North Carolina must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

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[509] UNITED STATES, Appt.,
v.
NELSON P. VULTE.

(See S. C. Reporter's ed. 509-515.)

Army — pay — service beyond seas.

The words "shall be as now provided by

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law," in the provision of the act of May 11, 1908 (35 Stat. at L. 110, chap. 163, U. S. Comp. Stat. Supp. 1911, p. 341), for increased pay for Army service beyond the limits of the states comprising the Union, and the territories of the United States contiguous thereto, refer to the proviso in the act of June 30, 1902 (32 Stat. at L. 512, chap. 1328, U. S. Comp. Stat. Supp. 1911, p. 339), that thereafter the pay proper of all commissioned officers and enlisted men serving beyond such limits should be increased 10 per cent and 20 per cent respectively; and a commissioned officer serving in Porto Rico from June, 1908, until November, 1909, is therefore entitled to such 10 per cent increase, notwithstanding the specific exception of Porto Rico and Hawaii in the acts of June 12, 1906 (34 Stat. at L. 247, chap. 3078), and March 2, 1907 (34 Stat. at L. 1164, chap. 2511), when making appropriations for such increase of pay, since these exceptions may not prevail over the substantive provision of the earlier act which is explicit and of enduring effect, and is, besides, comprehensive of all foreign stations.

[For other cases, see Army and Navy, VI. b, in Digest Sup. Ct. 1908.]

[No. 256.]

Argued March 10, 1914. Ordered for reargument April 6, 1914. Reargued April 21 and 22, 1914. Decided May 4, 1914.

APPEAL from the Court of Claims to review an award to a commissioned Army officer of additional pay for service beyond the seas. Affirmed.

See same case below, 47 Ct. Cl. 324.

The facts are stated in the opinion.

Assistant Attorney General Thompson argued the cause and filed a brief for appellant:

Congress had the power to repeal general salary or compensation acts through special appropriation acts. When such a repeal is claimed, the question is determined by the intention of Congress.

United States v. Fisher, 109 U. S. 143, 27 L. ed. 885, 3 Sup. Ct. Rep. 154; United States v. Mitchell, 109 U. S. 146, 27 L. ed. 887, 3 Sup. Ct. Rep. 151; Mathews v. United States, 123 U. S. 184, 31 L. ed. 127, 8 Sup. Ct. Rep. 80; Wallace v. United States, 133 U. S. 180, 33 L. ed. 571, 10 Sup. Ct. Rep. 251; McKinistry v. United States, 34 Fed. 211.

The army appropriation act of April 23, 1904, was intended to redefine the definition of "foreign stations" given in the act of June 30, 1902, so as to exclude Porto Rico and Hawaii; it repealed the act of June 30, 1902, to that extent.

The denial of additional compensation for service in Porto Rico and Hawaii was not only reasonable, but also logically inevitable, for the whole theory of the allowance of additional compensation for such service is that such service would be more onerous than service in the United States.

Carden v. United States, 45 Ct. Cl. 171; Irwin v. United States, 38 Ct. Cl. 87.

The act of June 12, 1906, having been construed by the Comptroller, and the act of May 11, 1908, having been prepared with reference to the act of 1906, so far as the definition of foreign stations was concerned, must necessarily refer back to the territorial definition of foreign stations as set forth in the act of 1906, and as construed by the Comptroller.

Sessions v. Romadka, 145 U. S. 41, 42, 36 L. ed. 614, 615, 12 Sup. Ct. Rep. 799; Claflin v. Commonwealth Ins. Co. 110 U. S. 81, 28 L. ed. 76, 3 Sup. Ct. Rep. 507; The Abbotsford, 98 U. S. 440, 25 L. ed. 168; Plummer v. United States, 224 U. S. 137, 140, 56 L. ed. 697, 700, 32 Sup. Ct. Rep. 467.

Since the passage of the act of 1906, the accounting officers of the Treasury have uniformly disallowed increased pay for service in Porto Rico and Hawaii. Such contemporaneous, uniform, and continuous construction is, we submit, entitled to great weight, and should not be overruled without cogent reasons.

Brown v. United States, 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648; Schell v. Fauché, 138 U. S. 562, 34 L. ed. 1040, 11 Sup. Ct. Rep. 376; Hewitt v. Shultz, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309; United States v. Healey, 160 U. S. 136, 40 L. ed. 369, 16 Sup. Ct. Rep. 247; United States v. Sweet, 189 U. S. 471, 47 L. ed. 907, 23 Sup. Ct. Rep. 638.

Mr. George A. King argued the cause, and, with Mr. William B. King, filed a brief for appellee:

The act of 1906 is a mere appropriation. The literal construction of its terms is that Congress was limiting the expenditure of the particular sum appropriated in the clause. If the terms of the act can be satisfied by this construction, this is conclusive in its favor. A literal construction must always be adopted where it involves no absurdity or contradiction.

Dewey v. United States, 178 U. S. 510, 521, 44 L. ed. 1170, 1174, 20 Sup. Ct. Rep. 981.

A repeal *pro tanto* of the act of 1902 cannot be inferred by indirection merely from language of appropriation. Repeals by implication are never favored; and one statute will not be construed so as to repeal another if, by any reasonable construction, the two may stand together.

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United States v. Langston, 118 U. S. 389, 30 L. ed. 164, 6 Sup. Ct. Rep. 1185.

A restriction upon the expenditure of a particular appropriation will not be extended into a change of substantive law.

Minis v. United States, 15 Pet. 423, 445, 10 L. ed. 791, 799; Collins v. United States, 15 Ct. Cl. 32; Converse v. United States, 26 Ct. Cl. 8; Geddes v. United States, 38 Ct. Cl. 428; Pennington v. United States, 231 U. S. 631, 58 L. ed. 410, 34 Sup. Ct. Rep. 269; Scott's Case, 7 Ops. Atty. Gen. 431; 27 Ops. Atty. Gen. 108, 294, 295.

A provision should not be permitted to masquerade through Congress in one character, only to assume a totally different phase after being enacted into law.

Wisconsin C. R. Co. v. United States, 27 Ct. Cl. 467, affirmed in 164 U. S. 190, 41 L. ed. 399, 17 Sup. Ct. Rep. 45.

Mr. Justice McKenna delivered the opinion of the court:

The appellee, Nelson P. Vulte, filed a petition in the court of claims claiming to be entitled to $299.78, being 10 per cent of his regular pay for service beyond the seas. Judgment was entered in his favor for that amount, and the United States prosecuted this appeal.

The court found the following facts: Vulte was appointed second lieutenant in the Marine Corps June 30, 1893, and was promoted to first lieutenant March 3, 1904. Under orders assigning him for duty in Porto Rico with station at San Juan, he sailed from New York for Porto Rico June 27, 1908, and served there until November 3, 1909, when he was detached and ordered back to the United States. He was four days on the return voyage.

If it is held that he is entitled to 10 per cent for services in Porto Rico from the date of sailing from New York until the date of his detachment from duty at San Juan, there would accrue to him the sum of $296.72, and [512] an additional sum of $3.06 if entitled to pay *en route* from Porto Rico to New York.

Vulte's pay was originally fixed by § 1612 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1096) as follows: "The officers of the Marine Corps shall be entitled to receive the same pay and allowances, and the enlisted men shall be entitled to receive the same pay and bounty for re-enlisting, as are or may be provided by or in pursuance of law for the officers and enlisted men of like grades in the Infantry of the Army."

On June 30, 1902 (32 Stat. at L. 512, chap. 1328, U. S. Comp. Stat. Supp. 1911, p. 339), as part of the appropriation act for the Army, Congress modified existing law respecting the pay proper of officers of this grade by the following language: "For additional ten per centum increase on pay of commissioned officers serving at foreign stations, four hundred and fifty-one thousand, four hundred and fifty-six dollars: Provided, That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the states comprising the Union and the territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said states to the date of return thereto."

As observed by Mr. Justice Booth, delivering the opinion of the court of claims: "Thus far the rights of plaintiff [Vulte] respecting pay are obvious; the complications arise by subsequent legislation."

On June 12, 1906, Congress provided—"for additional ten per centum increase on pay of commissioned officers serving beyond the limits of the states comprising the Union and the territories of the United States contiguous thereto (except Porto Rico and Hawaii), as provided by act of June thirtieth, nineteen hundred and two, the time of such service to be counted from the date of departure [513] from said states to the date of return thereto. . . ." (34 Stat. at L. 247, chap. 3078.)

This provision of the act of June 12, 1906, was repeated in the appropriation act of 1907. 34 Stat. at L. 1164, chap. 2511.

The act of May 11, 1908, provided as follows: "That increase of pay for service beyond the limits of the states comprising the Union and the territories of the United States contiguous thereto shall be as now provided by law.

. . . . . .

"For additional ten per centum increase on pay of officers on foreign service, two hundred and eighty-five thousand dollars.

. . . . . .

"That nothing herein contained shall be construed so as to reduce the pay or allowances now authorized by law for any officer or enlisted man of the Army; and all laws or parts of laws inconsistent with the provisions of this act are hereby repealed." 35 Stat. at L. 110, 114, chap. 163, U. S. Comp. Stat. Supp. 1911, pp. 341, 354.

The short point in the case is to what the words "shall be as now provided by law" in the act of May 11, 1908, refer,—whether to the acts of 1906 and 1907, or more limitedly, we may say, to the exceptions of Porto Rico and Hawaii in those acts, or to the proviso in the act of June 30, 1902, supra. In other words, whether the exceptions of

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those years of those special places shall prevail over the substantive provision of the act of June 30, 1902, supra, which is explicit, of enduring effect, and is besides comprehensive of all foreign stations, its language being: "That hereafter the pay proper of all commissioned officers . . . serving beyond the limits of the states . . . shall be increased ten per centum. . . ."

The government contends for the exceptions as constituting new law, not as a temporary condition under an [514] old one. The claimant contends for the proviso of the act of 1902, and counsel, in quite elaborate arguments, have supported their respective contentions. We shall not follow the details of their arguments. The question presented, we think, is in brief compass. Congress manifestly did not think that by the first instance of the exception, that in the act of 1906, it had done more than temporarily suspend as to Porto Rico and Hawaii the act of June 30, 1902. The exception was repeated in 1907. If the first exception was not intended to affect permanently the act of 1902, why should such intention be ascribed to the second exception—or to both, neither having words of prospective extension, and, without such words, naturally having only temporary operation? It would be extreme to say that by making them Congress considered that it had established a policy which could be confidently referred to as having the status and effect of permanent law.

The exceptions, it is to be remembered, were in appropriation acts, and no words were used to indicate any other purpose than the disbursement of a sum of money for the particular fiscal years. This court has had occasion to deal with such instances of legislation and their intended effect on existing law. In United States v. Langston, 118 U. S. 389, 394, 30 L. ed. 164, 165, 6 Sup. Ct. Rep. 1185, it was decided that a statute which fixed the annual salary of a public officer at a designated sum without limitation as to time is not abrogated or suspended by subsequent enactments which merely appropriate a less amount for that officer for particular years, and which contained no words that expressly or by clear implication modified or repealed the previous law. See also Minis v. United States, 15 Pet. 423, 445, 10 L. ed. 791, 799, where it is said: "It would be somewhat unusual to find engrafted upon an act making special and temporary appropriation any provision which was to have a general and permanent application to all future appropriations. [515] Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation." This follows naturally from the nature of appropriation bills, and the presumption hence arising is fortified by the rules of the Senate and House of Representatives.

The ruling in the Langston and Minis Cases is not opposed by the cases cited by the government. In all of them there was something more than the mere omission to appropriate a sufficient sum. There were expressions indicating a broader purpose. In two of them, United States v. Fisher, 109 U. S. 143, 27 L. ed. 885, 3 Sup. Ct. Rep. 154, and United States v. Mitchell, 109 U. S. 146, 27 L. ed. 887, 3 Sup. Ct. Rep. 157, it was intimated that the law was only suspended for the particular years. In another, Wallace v. United States, 133 U. S. 180, 33 L. ed. 571, 10 Sup. Ct. Rep. 251, it was held that the appropriation constituted the law which prescribed the compensation of the office. And in all of them the Langston Case was referred to and not disturbed or modified.

Judgment affirmed.

UNITED STATES, Plff. in Err.,
v.
HAROLD A. FOSTER, Frank E. Winchell, William S. Edwards, and Harry H. Platt.

(See S. C. Reporter's ed. 515–527.)

Appeal — by government in criminal case — jurisdiction.

1. A decision of a Federal district court sustaining a demurrer to an indictment charging a conspiracy to defraud the United States by unlawfully increasing the gross postoffice receipts on which the postmaster's salary is to be based, and a conspiracy to make a false return for the purpose of fraudulently increasing such compensation, is based upon the construction of the statutes on which the indictment is founded, and is therefore within the appellate jurisdiction of the Supreme Court, where the district court distinctly ruled that such indictment was sufficient in its technical or formal details, and, although giving special prominence to certain regulations of the Postmaster General, considered the effect of the Federal statutes independently of such regulations upon the sufficiency and legality of the postmaster's return, a construction of the statutes being

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Note.—On appeal by government in criminal case—see note to United States v. Stevenson, 54 L. ed. U. S. 153.

On interference by courts with rulings of Postoffice Department—see notes to United States ex rel. Reinach v. Cortelyou, 12 L.R.A.(N.S.) 166, and National L. Ins. Co. v. National L. Ins. Co. 52 L. ed. U. S. 808.

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necessary to determine the validity of the regulations.

[For other cases, see Appeal and Error, I. e., in Digest Sup. Ct. 1908.]

Conspiracy — to defraud United States — irregularly increasing postmaster's salary.

2. A conspiracy to increase the gross receipts of a postoffice upon which the postmaster's salary is to be fixed, by the unlawful sale and purchase at that office of large quantities of stamps to be used in mailing matter outside the delivery of such office, is one to defraud the United States,—especially where the postmaster at whose office the stamps are to be used receives a fixed salary.

[For other cases, see Conspiracy, II., in Digest Sup. Ct. 1908.]

Postoffice — postmaster's salary — gross receipts — unlawful sales.

3. The gross receipts of a postoffice upon which, under the act of March 3, 1883 (22 Stat. at L. 600, chap. 142, U. S. Comp. Stat. 1901, p. 2619), the compensation of the postmaster is to be fixed, do not include receipts arising out of violations of the Federal Criminal Code, § 208 (35 Stat. at L. 1128, chap. 321, U. S. Comp. Stat. Supp. 1911, p. 1650), making it a crime for a postmaster to dispose of stamps outside the delivery of his office, or to induce, or attempt to induce, for the purpose of increasing his compensation, the purchase of stamps, stamped envelops, or postal cards other than as provided by law or the regulations of the Postoffice Department.

[For other cases, see Postoffice, II., in Digest Sup. Ct. 1908.]

Executive departments — regulations of Postmaster General — return of postoffice receipts.

4. The authority of the Postmaster General under U. S. Rev. Stat. § 161, U. S. Comp. Stat. 1901, p. 80, to make regulations not inconsistent with law for the government of his Department, and the conduct of its officers and clerks, includes the power to prescribe that, in determining the gross receipts of a postoffice, upon which, under the act of March, 3, 1883, the salary of the postmaster is to be fixed, stamps sold in large or unusual quantities, to be used in mailing matter at other postoffices, will not be included, and to require the postmaster to ascertain and report the intention of the purchaser of stamps or stamped paper in large or unusual quantities, such regulations being purely administrative of the law, which manifestly intends that the gross receipts from lawful sales only are to be the measure of the postmaster's salary, excluding receipts arising out of violations of the Federal Criminal Code, § 208, making criminal unlawfully induced sales outside of the delivery of the office, and sales otherwise than as provided by law or the regulations of the Postoffice Department.

[For other cases, see Executive Departments, II. e, in Digest Sup. Ct. 1908.]

Postoffice — offenses — false return by postmaster.

5. A postmaster who includes in his return to the Department as a part of the gross receipts of the postoffice upon which his salary, under the act of March 3, 1883, is to be fixed, the receipts from the sale of stamps in large or unusual quantities, to be used in mailing matter at any other postoffice, is punishable under the Federal Criminal Code, § 206, making it a crime for a postmaster to make a false return for the purpose of fraudulently increasing his compensation, since, even if the regulations of the Postmaster General adopted under the supposed authority of U. S. Rev. Stat. § 161, U. S. Comp. Stat. 1901, p. 80, that, in determining such gross receipts, unusual sales shall not be included, are invalid, § 208 of such Code regards as criminal unlawfully induced sales, sales made outside the delivery of the office, and sales otherwise than as provided by law or the regulations of the Postoffice Department.

[For other cases, see Postoffice, II., in Digest Sup. Ct. 1908.]

[No. 838.]

Argued April 13 and 14, 1914. Decided May 4, 1914.

IN ERROR to the District Court of the United States for the District of Massachusetts to review a judgment sustaining a demurrer to an indictment charging a conspiracy to defraud the United States, and to violate certain provisions of the postal laws. Reversed.

See same case below, 211 Fed. 206.

The facts are stated in the opinion.

Assistant Attorney General Wallace argued the cause and filed a brief for plaintiff in error:

This court has jurisdiction.

United States v. Patten, 226 U. S. 525, 535, 57 L. ed. 333, 338, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141; United States v. Sutton, 215 U. S. 294, 54 L. ed. 201, 30 Sup. Ct. Rep. 116; United States v. Keitel, 211 U. S. 397, 53 L. ed. 244, 29 Sup. Ct. Rep. 123.

The term "gross receipts" means receipts accruing from sales made pursuant to law and the regulations of the Postoffice Department.

Lewis Pub. Co. v. Wyman, 104 C. C. A. 453, 182 Fed. 13; McKee v. United States, 164 U. S. 287, 293, 41 L. ed. 437, 439, 17 Sup. Ct. Rep. 92; State v. Illinois C. R. Co. 246 Ill. 188, 92 N. E. 814; German Alliance Ins. Co. v. Van Cleave, 191 Ill. 410, 61 N. E. 94; People ex rel. Continental Ins. Co. v. Miller, 177 N. Y. 515, 70 N. E. 10; State ex rel. Breckenridge v. Fleming, 70 Neb. 523, 97 N. W. 1063; State v. Northwestern Teleph. Exch. Co. 107 Minn. 390, 120 N. W. 534.

Departmental construction should not be disregarded or overturned except for cogent

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reasons, and unless it is clear that such construction is erroneous.

United States v. Johnston, 124 U. S. 236, 253, 31 L. ed. 389, 396, 8 Sup. Ct. Rep. 446.

The regulations of the Postmaster General here drawn in question are valid and not in excess of law.

Lewis Pub. Co. v. Wyman, 104 C. C. A. 453, 182 Fed. 13; Campbell v. United States, 107 U. S. 407, 27 L. ed. 592, 2 Sup. Ct. Rep. 759; Haas v. Henkel, 216 U. S. 462, 54 L. ed. 569, 30 Sup. Ct. Rep. 249, 17 Ann. Cas. 1112; United States v. Antikamnia Chemical Co. 231 U. S. 654, ante, 419, 34 Sup. Ct. Rep. 222.

The indictment may be sustained without reference to the regulation of the Postmaster General.

United States v. Keitel, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123; United States v. Newton, 48 Fed. 218.

Mr. **Philip Rubenstein** argued the cause, and, with Mr. Timothy Howard, filed a brief for defendants in error:

The whole case resolved itself into the question of the power to enact the regulation. If this be a construction by the lower court of § 161 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 80), it does not constitute a construction of the statute upon which the indictment is founded.

United States v. Keitel, 211 U. S. 370, 378, 53 L. ed. 230, 29 Sup. Ct. Rep. 123; United States v. Patten, 226 U. S. 525, 535, 57 L. ed. 333, 538, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141.

The Postmaster General, by his regulation, proposes to base the salary of the postmaster upon gross receipts, less unusual sales: in other words, upon something less than gross receipts. He has no right thus to change the method which Congress has clearly provided for fixing salaries.

United States v. George, 228 U. S. 14, 57 L. ed. 712, 33 Sup. Ct. Rep. 412; United States v. Eaton, 144 U. S. 687, 36 L. ed. 594, 12 Sup. Ct. Rep. 764; Morrill v. Jones, 106 U. S. 466, 27 L. ed. 267, 1 Sup. Ct. Rep. 423; Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163.

This court has definitely laid down the law that neither executive officers nor the appointing power can, during the service of an officer, either increase or diminish a salary fixed by statute.

Glavey v. United States, 182 U. S. 595, 601, 45 L. ed. 1247, 1250, 21 Sup. Ct. Rep. 891; United States v. Wilson, 144 U. S. 24, 36 L. ed. 332, 12 Sup. Ct. Rep. 539.

Many cases in that connection were decided in the court of claims.

Rush v. United States, 35 Ct. Cl. 223; Andrews v. United States, 47 Ct. Cl. 51; Adams v. United States, 20 Ct. Cl. 115; Geddes v. United States, 38 Ct. Cl. 428; Whiting v. United States, 35 Ct. Cl. 291; Sherlock v. United States, 43 Ct. Cl. 161; Jacobs v. United States, 41 Ct. Cl. 452.

Other cases in which the validity of departmental regulations were considered are:

Re Page, 128 Fed. 317; Borden v. United States, 132 Fed. 205; United States v. Symonds, 120 U. S. 46, 30 L. ed. 557, 7 Sup. Ct. Rep. 411; Patterson v. United States, 104 C. C. A. 434, 181 Fed. 970; Bruhl Bros. v. Wilson, 123 Fed. 957; Hoover v. Salling, 49 C. C. A. 26, 110 Fed. 43; Bruce v. United States, 120 C. C. A. 370, 202 Fed. 100.

If the regulation is invalid, the conspiracy to do acts prohibited therein is not a conspiracy to defraud.

United States v. Biggs, 211 U. S. 507, 519, 521, 53 L. ed. 305, 309, 310, 29 Sup. Ct. Rep. 181; Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163.

Mr. Justice **McKenna** delivered the opinion of the court:

Indictment in two counts for conspiracy to defraud the United States, and to violate certain provisions of the postal laws. The object of the conspiracy and the manner of its execution are in substance, as charged in the indictment in the first count, as follows: Harold A. Foster was postmaster of the United States postoffice at North Brookfield, Massachusetts, a second-class office. The salary of the office was fixed by the Postmaster General, pursuant to law and the regulations established by him, at $2,000 a year, the salary being based and ascertained upon the gross receipts of the office for the twelve months next preceding the 31st of March, 1911. The law required the salary to be adjusted annually, and the next adjustment was required to be made by the Postmaster General in accordance with the gross receipts of the office as shown by the quarterly returns of the postmaster to the Auditor of the Postoffice Department for the four quarters next preceding the 31st of March, 1912, the readjustment to take effect on the ensuing 1st of July, 1912. The Postmaster General was required by law and the established regulations in readjusting such salary not to include in the gross receipts of the office the moneys received by the postmaster for the sale of stamps to any person or persons in large quantities, to be used in other [519] postoffices than the North

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Brookfield office for mailing purposes, or in that office if such matter in the ordinary course would not be deposited for mailing in the latter office.

Frank E. Winchell, of North Brookfield, was the president and general manager of the Oxford Linen Mills, a corporation having its usual place of business at North Brookfield, and William S. Edwards and Harry H. Platt, both of New York, were officers of the Sterling Debenture Company, a corporation having its place of business in New York, and they and Foster, well knowing the premises, conspired to defraud the United States of its money and property by Winchell purchasing from the United States in behalf of the Oxford Linen Mills, with the knowledge, consent, and connivance of Foster, quantities of United States postage stamps to be sent to the Sterling Debenture corporation at New York, and Edwards and Platt as its officers were to cause it to use them in the prepayment of postage upon matter to be deposited in the postoffice in New York or in some other office, with the view and intent, by means of the purchase of stamps as stated, of irregularly and improperly increasing the gross receipts of the North Brookfield postoffice for the twelve months beginning on the 1st of April, 1911, and ending on the 31st of March, 1912, and thereby enabling Foster, as such postmaster to make returns to the Auditor of the Postoffice Department as a basis for the adjustment of Foster's salary for the fiscal year beginning July 1, 1912, which returns should include the sale of stamps so made to Winchell in addition to the sale of stamps made by Foster to other persons in the regular business of the North Brookfield office, with the intent and view of violating the regulations of the Postoffice Department, and for the purpose of fraudulently increasing Foster's salary, and with the further intent that such sales should, in violation of the Postoffice regulations, be included and [520] deemed a part of the gross receipts of the North Brookfield office for the period above mentioned, and be made in part the basis of the readjustment of Foster's salary. All the acts done by Foster, Winchell, Edwards, and Platt were done knowingly, wilfully, and fraudulently for such purpose; that is, for the purpose of increasing the salary of Foster by a sum of money in excess of that which he would be lawfully entitled to receive, and to cause such excessive sum to be paid to him, and thereby cheat and defraud the United States thereof.

In pursuance of the unlawful conspiracy, and to effect its object, on the 1st of July, 1911, Foster, as such postmaster, made a false return to the Postoffice Department of the gross receipts of the North Brookfield office for the quarter ending June 30, 1911.

In further pursuance of the conspiracy, and to effect its object, Winchell, on June 2, 1911, at North Brookfield, sent by registered mail to the Sterling Debenture corporation at New York a certain package, and also in pursuance of the conspiracy, and to effect its object, Winchell bought from Foster postage stamps to the value of $200.

In a second count the indictment charges that the defendants unlawfully conspired to commit an offense against the United States, specified to be an offense denounced by § 206 of the act of March 4, 1909, entitled, "An Act to Codify, Revise, and Amend the Penal Laws of the United States" [35 Stat. at L. 1128, chap. 321, U. S. Comp. Stat. Supp. 1911, p. 1649], in that Foster, as such postmaster, should, in violation of the section, knowingly and fraudulently increase Foster's salary and compensation by knowingly and fraudulently failing to report, in the report of the gross receipts of his office required by law and the regulations of the Postoffice Department, large and irregular sales of stamps to be made by Foster to Winchell as president and general manager of the Oxford Linen Mills, not to be used by that corporation, or by Winchell, or by any other person for [521] the mailing of matter at the North Brookfield office, but to be used for mailing matter at New York or in some other office other than the North Brookfield office, with the intent and for the purpose of increasing the compensation of Foster as such postmaster. That in pursuance of such conspiracy Winchell, on June 2, 1911, purchased stamps of the value of $200.

In pursuance of the conspiracy and to effect its object, Foster, on the 1st of July, 1911, made a false return to the Auditor of the Postoffice Department of the gross receipts of his office. An overt act by Winchell is charged.

The defendants were duly arraigned and pleaded not guilty, but subsequently withdrew their pleas of not guilty and filed demurrers to the indictment.

The grounds of demurrer were the same as to both counts, and were: (1) The facts alleged did not constitute a crime; (2) nor an offense at common law; (3) nor a violation of the statutes or penal laws of the United States; (4) nor a violation of any valid regulation of the Postmaster General; (5) each and every one of his regulations is invalid.

The demurrers to the first count were sustained on the ground expressed by the court in its opinion, that the act of March 3, 1883 (22 Stat. at L. 600, chap. 142, U. S. Comp. Stat. 1901, p. 2619), provides that

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the salaries of postmasters of the second class shall be determined by the gross receipts of the office, and that the Postmaster General had no power to qualify the requirement of the law by providing that unusual sales of stamps should not be included in estimating the gross receipts.

In passing upon the demurrers to the second count the court said that the count charged the defendants with a conspiracy to commit "the offense denounced by § 206 of the Criminal Code," that section providing, *inter alia*, that whoever, being a postmaster, shall, for the purpose of fraudulently increasing his compensation, make a false return, statement, or account to any officer of the [522] United States, shall be punished. The crime denounced, the court said, included "two essential elements: (1) that a return shall be made, which was known to be false; and (2) that such false return shall have been made 'for the purpose of fraudulently increasing compensation.'" And the court observed that there could be no criminality unless a false return was made for the purpose stated, and that it appearing from the indictment that the alleged return made by Foster was to secure for him only what he was legally entitled to receive, he committed no crime under § 206, "and the alleged conspiracy to do so was not a conspiracy to commit the offense denounced thereby."

It will be observed, therefore, that the court held that the indictment charged neither a conspiracy to defraud the United States nor to make a false return, because the object of each conspiracy was to obtain only what Foster was legally entitled to; namely, an increase of salary based upon the gross receipts of his office, and that it was immaterial how they were increased or for what purpose increased.

The case was brought here under the criminal appeals act, its provision being that this court has jurisdiction on writ of error taken by the United States in criminal cases "from a decision sustaining a demurrer to any indictment where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded." It is, however, contended by defendants in error that this court has no jurisdiction because, it is further contended, the district court gave the same meaning to the statutes upon which the indictment was based as the government asserted was the correct one, and only decided that the regulation of the Postmaster General was beyond his power to enact under Revised Statutes, § 161 (U. S. Comp. Stat. 1901, p. 80), upon which section alone he claimed the power. Nor, it is further contended, were the words "gross receipts" interpreted. [523] "The only question was," counsel says, "whether there was power in an administrative officer to make the regulation limiting its scope." It is further urged that if those words were interpreted, the indictment was not founded upon the act of 1883, where they occur.

A lack of jurisdiction is also urged to review the ruling upon the second count, it being based on § 206 of the Criminal Code, the construction or interpretation of which was never in dispute. "Whether it applied or not," it is said, "had to be determined by the validity of the regulation."

We think the contentions are untenable. The court distinctly ruled that the indictment was in technical or formal details sufficient, and the contention of the parties not only submitted for decision the validity of the regulations of the Postmaster General, but also the sufficiency and legality of the returns made by Foster under the provisions of the statutes. The court, it is true, gave especial prominence to the regulations, but the effect of the statutes independently of the regulations was necessarily considered. In other words, the court must have considered and decided that a conspiracy to establish a basis for a false return for the purpose of increasing Foster's salary was not prohibited by law; and, besides, a construction of the statutes was necessary to determine the validity of the regulation.

The case being one of statutory construction, a consideration of the statutes becomes necessary.

It is provided by the act of March 3, 1883, that the "compensation of postmasters of the first, second and third classes shall be annual salaries, assigned in even hundreds, of dollars, and payable in quarterly payments, to be ascertained and fixed by the Postmaster General from their respective quarterly returns to the Auditor of the Treasury for the Postoffice Department . . . to be forwarded to the First Assistant [524] Postmaster General, for four quarters immediately preceding the adjustment," according to the gross receipts, the amount of which not only determines the classes, but the compensation of the offices within classes.

By § 4 of the act, the Postmaster General is required to readjust the salaries of the first, second, and third class at the beginning of each fiscal year. The same section fixed the salary of the postmaster at the Washington Postoffice, and provided that "in no case shall the salary of any postmaster exceed the sum of six thousand dollars, except in the city of New York, where the salary of the postmaster shall re-

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main as now fixed by law, at eight thousand dollars."

Section 37 of the Criminal Code makes it an offense to conspire to defraud the United States in any manner or for any purpose.

Section 206 of the same Code makes it a crime for a postmaster to make a false return, for the purpose of fraudulently increasing his compensation, or to induce or attempt to induce, for such purpose, any person to deposit mail matter in or forward in any manner for mailing at the office where such postmaster is employed, knowing such matter to be properly mailable at some other office.

Section 208 makes it a crime for a postmaster to dispose of stamps outside of the delivery of his office, or to induce or attempt to induce, for the purpose of increasing his compensation, the purchase of stamps, stamped envelops or postal cards otherwise than as provided by law or the regulations of the Postoffice Department.

By § 161 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 80), it is provided that "the head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, [and] the distribution and performance of its business. . . ."

In pursuance of the authority so given, the Postmaster General made the following regulation:

[525] "2. In determining the 'gross receipts' upon which the salary of a postmaster shall be based, stamps, stamped envelops, and postal cards, sold in large or unusual quantities to any person to be used in mailing matter at other postoffices will not be included, whether the sale be made with or without solicitation by the postmaster. When postage stamps or stamped paper are sold in large or unusual quantities, it shall be the duty of the postmaster to inquire into and ascertain whether or not the purchaser intends to use such postage stamps or stamped paper for mailing matter in his office, or other offices; and the fact shall be clearly indicated in his monthly stock report on Form 3240 to the Third Assistant Postmaster General. Upon evidence of neglect of the postmaster to ascertain and report such facts, he will be required to refund the amount of the excess salary and allowances be may have received on account of such sales."

It is manifest from the quoted provisions that their purpose is to fix the salary of postmasters by the normal receipts of their respective offices, and thereby keep the officers in relation, and to secure such end quarterly returns are required to be made by each postmaster, and each is prohibited under criminal penalty from selling or disposing of stamps, stamped envelops or postal cards outside of the delivery of his office, or selling or disposing of stamps, etc., otherwise than as provided by law or the regulations of the Postoffice Department. In other words, the false returns and designated disposition of stamps are made crimes, and made crimes to secure the purpose of the law to keep the legal measure of the salaries unimpaired and the relation of the offices intact. It may, indeed, be that in one sense the United States would suffer no loss by the derangement of their relation; in another sense the United States would be defrauded. One of the postmasters would fraudulently obtain a greater salary than he was entitled to. But distinctly would the United [526] States be defrauded under the facts charged in the indictment, the postmaster at New York having a fixed salary of eight thousand dollars. See in this connection Haas v. Henkel, 216 U. S. 462, 479, 54 L. ed. 569, 577, 30 Sup. Ct. Rep. 249, 17 Ann. Cas. 1112.

The sole theory of the act of 1883 is that every postmaster shall receive a salary dependent upon and regulated by the amount of business done at his office (United States v. Wilson, 144 U. S. 24, 28, 36 L. ed. 332, 333, 12 Sup. Ct. Rep. 539) under normal and natural sales of stamps, not unlawfully induced sales. This being the law, what does the indictment charge?

(1) The salary of the postmaster was to be adjusted in accordance with the returns of the gross receipts. (2) By the law and regulation of the Postmaster General the postmaster was not to include in the gross receipts moneys received from the sale of stamps in large or unusual quantities which were (a) to be used upon matter in some other postoffice, or (b) used upon matter deposited at North Brookfield if, in the ordinary and usual course of business, such matter would be deposited at some other office. (3) The defendants conspired with Winchell, who purchased from Foster with Foster's connivance large quantities of stamps to be used by the Sterling Debenture corporation for mailing matter at New York or some other office than North Brookfield, and by such purchase to irregularly and improperly increase the gross receipts of the North Brookfield office, and thereby enable Foster to make returns as a basis for the readjustment of his salary in violation of the regulations of the Postoffice Department, and for the purpose of increasing his salary, and thereby cheat and defraud the United States.

The second count charges a violation of § 206 of the Criminal Code, by conspiring

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in the manner we have already set out, and which need not be repeated.

It is clear from these provisions that it is the gross receipts from lawful sales which are to be the measure of the salary of the postmaster, and that unlawfully induced [527] sales (§ 208), sales made "outside of the delivery of the office" (id.), and sales "otherwise than as provided by law or the regulations of the Postoffice Department" (id.), are unlawful sales and regarded as criminal.

It would, indeed, be strange if unlawful and criminal sales were intended to constitute a part of the gross receipts upon which the postmaster's salary should be adjusted, and it would seem clear that to prevent such result the Postmaster General could legally exercise by the regulation under review the power given him by § 161, Rev. Stat. (U. S. Comp. Stat. 1901, p. 80). The regulation is purely administrative of the law. (1.) It notifies the postmaster that, in the gross receipts of his office, stamps in large or unusual quantities sold to be used in mailing matter at other postoffices will not be included. This but executes the purpose of the law; adds nothing to it. United States v. Antikamnia Chemical Co. 231 U. S. 654, ante, 419, 34 Sup. Ct. Rep. 222; Lewis Pub. Co. v. Wyman, 104 C. C. A. 453, 182 Fed. 13. (2.) It requires the postmaster to ascertain and report the intention of the purchaser of stamps or stamped paper in large or unusual quantities. This is properly supplemental to the first requirement, and a reasonable supervision of the office, and a means of discovering unlawful and fraudulent sales. (3.) It provides that for a neglect to so ascertain and so report the postmaster will be required to refund the amount of the excess salary he may have received on account of such sales. This provision is of doubtful validity, but it is not of material consequence to the questions now involved.

But if the regulation be regarded as invalid, the indictment yet states an offense. It counts not only upon the regulation, but upon the law; and the facts it alleges show a violation of the law.

Judgment reversed.

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[528] GEORGE E. BOWLING and Miami Investment Company, Appts.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 528-536.)

Indians — congressional control — citizenship.

1. The guardianship of the Federal government over an Indian does not cease when an allotment is made and the allottee becomes a citizen of the United States.

[For other cases, see Indians, I., in Digest Sup. Ct. 1908.]

United States — right to sue — Indian allotments — restrictions on alienation.

2. The United States has the capacity to sue for the purpose of setting aside a conveyance of lands allotted to Indians under its care when restrictions upon alienation have been transgressed.

[For other cases, see United States, 137-147, in Digest Sup. Ct. 1908.]

Indians — restrictions on alienation — judgment enforcing contract of sale.

3. A conveyance by heirs of Indian allottees, if forbidden by the restrictions on alienation imposed by the act of March 2, 1889 (25 Stat. at L. 1013, chap. 422), could not be saved by a judgment sustaining the validity of the contract of sale in a suit by such heirs against the purchaser.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indians — restrictions on alienation — sales by heirs of allottee.

4. The land, whether in the hands of the Indian allottee or his heirs, must be deemed to be bound by the restriction in the act of March 2, 1889, that "the land so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of patent," in view of the further provisions of that act that "said lands so allotted and patented shall be exempt from levy, sale, taxation, or forfeiture for a like period of years," that the patent shall expressly set forth that "the land therein described and conveyed" shall not be alienated during this period, and that contracts "to sell or convey such land," entered into before the expiration of said term of years, shall be absolutely void.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

[No. 177.]

Submitted April 17, 1914. Decided May 4, 1914.

ON APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the Eastern District of Oklahoma, setting aside a conveyance by the heirs of an Indian allottee. Affirmed.

See same case below, 111 C. C. A. 561, 191 Fed. 19.

The facts are stated in the opinion.

Mr. James H. Harkless submitted the cause for appellants. Messrs. Halbert H. McCluer and Roland Hughes were on the brief:

Title having been once vested in the

Note.—On Federal control of Indians, generally—see note to Worcester v. Georgia, 8 L. ed. U. S. 484.

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Indians could be by no subsequent act or acts taken away without their consent.

Jones v. Meehan, 175 U. S. 13, 44 L. ed. 49, 20 Sup. Ct. Rep. 1.

On the admission of Oklahoma as a state on November 16, 1907, all Indians in the new state were made citizens thereof and of the United States.

Cooley, Const. Law, p. 270; Boyd v. Nebraska, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375.

When the United States grants the privileges of citizenship to an Indian, gives to him the benefit of, and requires him to be subject to, the laws, both civil and criminal, of the state, which places him outside the reach of police regulations on the part of Congress, the emancipation from Federal control thus created cannot be set aside at the instance of the government without the consent of the individual Indian and the state.

Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506.

The patent actually issued in this case was in exact conformity with the requirements of the law; but whether it was or not, the question would have to be determined by the law itself, as the issuance of the patent was a ministerial act, and anything inserted therein, not authorized by law, would be void.

Clark v. Lord, 20 Kan. 390.

The title acquired by the patent was a fee simple, but there was a restriction on the power to convey the same.

Libby v. Clark, 118 U. S. 250, 30 L. ed. 133, 6 Sup. Ct. Rep. 1045.

The restrictions against alienation mentioned in the patent were not such as run with the land, but were purely personal to the allottee, and died with him.

9 Am. & Eng. Enc. Law, 2d ed. 127, title, Deeds, note 4; Clark v. Lord, 20 Kan. 390; Miami County v. Brackenridge, 12 Kan. 114; Farrington v. Wilson, 29 Wis. 383; 4 Ops. Atty. Gen. 529; Frederick v. Gray, 12 Kan. 518; McMahon v. Welsh, 11 Kan. 280; Oliver v. Forbes, 17 Kan. 130; Kansas Indians (Bluejacket v. Johnson County) 5 Wall. 737, 18 L. ed. 667; Armstrong v. Athens County, 10 Ohio, 235, affirmed in 16 Pet. 281, 10 L. ed. 965; Hancock v. Mutual Trust Co. 24 Okla. 391, 103 Pac. 566; Krause v. Means, 12 Kan. 335.

The restriction on sale should not be carried beyond the very letter of the law. The free disposition of property is always favored; so much so that a restriction on alienation cannot be created in deeds by individuals, but such restrictions are declared void.

13 Am. & Eng. Enc. Law, 794; Mandlebaum v. McDonell, 29 Mich. 84, 18 Am. Rep. 61; Anderson v. Cary, 36 Ohio St. 506, 38 Am. Rep. 602; Oxley v. Lane, 35 N. Y. 340.

This suit cannot be maintained in the name of the United States unless it shall appear that it is brought by it as a guardian of the allottee, or his heirs, or by reason of some interest that the government may have in the land itself, either as owner, or as trustee for the allottee, or his heirs, or that it was obligated so to do; and if it is found that the guardianship of the government over the Indians had ceased before the bill was filed, and that it has no interest as owner in the land in controversy, and does not hold the same in any manner as a trustee for the allottee or his heirs, and was not obligated to bring the suit, the demurrer should be sustained and the bill dismissed.

United States v. San Jacinto Tin Co. 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850.

When the allotment of the land had been made, and when the allottee became a citizen of the United States, the guardianship of the government over him ceased, and he became vested with all the rights, privileges, and immunities of other citizens, including the right to institute and maintain a suit or desist from doing so, as he might desire; to employ counsel to represent him in any litigation involving his rights, and to have the absolute control of the litigation; guardianship and citizenship are inconsistent, one with the other.

United States v. Boss, 160 Fed. 132; Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; Ex parte Savage, 158 Fed. 205; Re Celestine, 114 Fed. 551; Civil Rights Cases, 109 U. S. 25, 27 L. ed. 844, 3 Sup. Ct. Rep. 18; United States v. Dooley, 151 Fed. 697; United States v. Auger, 153 Fed. 671.

The United States cannot maintain this suit as a trustee.

McKay v. Kalyton, 204 U. S. 458, 51 L. ed. 566, 27 Sup. Ct. Rep. 346.

The facts disclosed in the bill and answer constitute an equitable estoppel against the government; and show that it is inequitable and against good conscience to maintain this action.

Indiana v. Milk, 11 Biss. 197, 11 Fed. 389; Com. v. Andre, 3 Pick. 224; Com. v. Pejepscut, 10 Mass. 155; State v. Bailey, 19 Ind. 452; Cahn v. Barnes, 7 Sawy. 48, 5 Fed. 326; Gibbons v. United States, 5 Ct. Cl. 416; Vermont v. Society for Propagation of Gospel, 2 Paine, 545, Fed. Cas. No. 16,920; United States v. Stinson, 60 C. C. A. 615, 125 Fed. 907; United States v. Willamette Valley & C. M. Wagon-Road Co. 54 Fed. 811; Pengra v. Munz, 29 Fed. 830; State ex rel. Douglas v. School Dist.

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85 Minn. 230, 88 N. W. 751; The Siren, 7 Wall. 155, 19 L. ed. 131.

Assistant Attorney General Knaebel and Mr. S. W. Williams submitted the cause for appellee:

If Congress had intended that the restriction should die with the original allottee, it would naturally have provided in terms that the land should remain inalienable during his lifetime, not exceeding twenty-five years from the date of the grant, as was done in the case of the Choctaw and Chickasaw homesteads. See Mullen v. United States, 224 U. S. 448, 453, 56 L. ed. 834, 839, 32 Sup. Ct. Rep. 494.

The decision of the court below accords with the authorities.

United States v. Aaron, 183 Fed. 347, 123 C. C. A. 265, 204 Fed. 943; Goodrum v. Buffalo, 89 C. C. A. 525, 162 Fed. 817; Re Lands of Five Civilized Tribes, 199 Fed. 813.

The maintenance of limitations prescribed by Congress as part of its plan for distribution of Indian lands is distinctly an interest of the United States, and one upon which it may sue in its own courts to enforce.

Heckman v. United States, 224 U. S. 413, 56 L. ed. 820, 32 Sup. Ct. Rep. 424.

The decree of the United States court for the Indian territory is null and void.

Goodrum v. Buffalo, supra.

[532] Mr. Justice Hughes delivered the opinion of the court:

Pursuant to the act of March 2, 1889, chap. 422 (25 Stat. at L. 1013), a tract of land in the Indian territory was allotted to Pe-te-lon-o-zah, or William Wea, a member of the confederated Wea, Peoria, Kaskaskia, and Piankeshaw tribes of Indians. The patent conveying the land to Wea and his heirs was issued on April 8, 1890, and imposed a restraint upon alienation for a period of twenty-five years from its date. Upon the death of Wea, his heirs entered into a contract to sell the land, and in a suit brought by them in the United States court for the northern district of the Indian Territory, for the purpose of enforcing the contract, judgment was entered sustaining its validity. The property was thereupon conveyed by the heirs and passed by various mesne conveyances to the appellants.

The United States, by virtue of its interest in the enforcement of the restriction against alienation, instituted this suit to cancel these conveyances and also to set aside the above-mentioned judgment. The case was heard upon bill and answer, and a decree was rendered in favor of the United States, which was affirmed by the circuit court of appeals. 111 C. C. A. 561, 191 Fed. 19.

The relations of the government to these Indians, and the legislation with respect to the lands occupied by them, may be briefly stated. In 1832, the Piankeshaw and Wea tribes of Indians ceded to the United States their interest in lands within the states of Missouri and Illinois, and lands were set apart for them in what is now the state of Kansas (7 Stat. at L. 410), adjoining the lands assigned to the Peorias and Kaskaskias (7 Stat. at L. 403). In 1854, the Piankeshaws and Weas were united into a single tribe with the Peorias and Kaskaskias, and the consolidated tribes ceded to the United States all their interest in the tracts theretofore assigned to them, reserving, in addition to [533] certain sections which were to be held as common property, a specified quantity of land for each individual, the patents for which were to be issued "subject to such restrictions respecting leases and alienation as the President or Congress" might prescribe (10 Stat. at L. 1082; see Kansas Indians [Blue Jacket v. Johnson County] 5 Wall. 737, 757, 758, 18 L. ed. 667, 673, 674). By the treaty of February 23, 1867 (15 Stat. at L. 513, 518, 519), provision was made for the sale of the common tract in Kansas, and for the purchase with the proceeds of lands in the northeast portion of what is at present the state of Oklahoma; and to enable the Indians to dispose of their allotments in Kansas, the Secretary of the Interior was authorized to remove the restrictions upon sale. In 1873 (17 Stat. at L. 631), members of the tribe of Miamis, so electing, were united with these confederated tribes under the name of the United Peorias and Miamis. The territory which they occupied was expressly excepted from the operation of the general allotment act of February 8, 1887, chap. 119, § 8 (24 Stat. at L. 388, 391); but the provisions of that statute, with certain exceptions, were extended to these Indians by the act of March 2, 1889 (25 Stat. at L. 1013, chap. 422).

By the latter act, the Secretary of the Interior was authorized to make an allotment of land to each member, subject to the following restriction:

"The land so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of patent therefor, and said lands so allotted and patented shall be exempt from levy, sale, taxation, or forfeiture for a like period of years. As soon as all the allotments or selections shall have been made as herein provided, the Secretary of the Interior shall cause a patent to issue to each and every person so entitled, for his or her allotment, and such

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patent shall recite in the body thereof that the land therein described and conveyed shall not be alienated for twenty-five years from the date of said patent, and [534] shall also recite that such land so allotted and patented is not subject to levy, sale, taxation, or forfeiture for a like period of years, and that any contract or agreement to sell or convey such land or allotments so patented, entered into before the expiration of said term of years, shall be absolutely null and void."

It was under this provision that the land here in question was patented to William Wea, the allottee.

The confederated Peoria Indians who received allotments were made citizens of the United States by the act of May 2, 1890, chap. 182, § 43 (26 Stat. at L. 81, 99); and in 1897, it was provided that adult allottees, who had received allotments of 200 acres or more, might sell 100 acres under such regulations as the Secretary of the Interior might prescribe. Act of June 7, 1897, chap. 3 (30 Stat. at L. 62, 72). Subsequent provisions permitted sales by heirs of allottees, but only upon the approval of the Secretary of the Interior. Acts of May 31, 1900, chap. 598, § 7 (31 Stat. at L. 221, 248); May 27, 1902, chap. 888, § 7 (32 Stat. at L. 245, 275).

It is contended by the appellants that when the allotment was made, and the allottee became a citizen of the United States, the guardianship of the government ceased. But this contention is plainly untenable. Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578. And it is no longer open to question that the United States has capacity to sue for the purpose of setting aside conveyances of lands allotted to Indians under its care, where restrictions upon alienation have been transgressed. Since the decision below, the precise question has been determined by this court in Heckman v. United States, 224 U. S. 413, 56 L. ed. 820, 32 Sup. Ct. Rep. 424, and it was there held that the authority to enforce restrictions of this character is the necessary complement of the power to impose them. It necessarily follows that, as a transfer of the allotted lands contrary to the inhibition of Congress would be a violation of the governmental rights of the [535] United States arising from its obligation to a dependent people, no stipulations, contracts, or judgments rendered in suits to which the government is a stranger can affect its interest. The authority of the United States to enforce the restraint lawfully created cannot be impaired by any action without its consent. Heckman v. United States, supra p. 445. If, therefore, the conveyance by the allottee's heirs in the present case, would otherwise have been subject to cancelation, it was not saved by reason of the judgment entered in their suit against the purchaser.

The question, then, is whether the restriction imposed by the act of 1889 was a merely personal one, operative only upon the allottee, or ran with the land, binding his heirs as well. This must be answered by ascertaining the intent of Congress as expressed in the statute. The restriction was not limited to "the lifetime of the allottee," as in Mullen v. United States, 224 U. S. 448, 453, 56 L. ed. 834, 839, 32 Sup. Ct. Rep. 494, nor was the prohibition directed against conveyances made by the allottee personally. Congress explicitly provided that "the land so allotted" should not be subject to alienation for twenty-five years from the date of patent. "Said lands so allotted and patented" were to be exempt "from levy, sale, taxation, or forfeiture for a like period of years." The patent was expressly to set forth that "the land therein described and conveyed" should not be alienated during this period, and all contracts "to sell or convey such land" which should be entered into "before the expiration of said term of years" were to be absolutely void. These reiterated statements of the restriction clearly define its scope and effect. It bound the land for the time stated, whether in the hands of the allottee or of his heirs. Moreover, the subsequent legislation, relating to the same subject-matter, which expressly provided for conveyances by heirs of allottees, subject to the approval of the Secretary of the Interior, leaves no room [536] for doubt as to the intention of Congress. United States v. Freeman, 3 How. 556, 564, 11 L. ed. 724, 727; Cope v. Cope, 137 U. S. 682, 688, 34 L. ed. 832, 834, 11 Sup. Ct. Rep. 222; Marchie Tiger v. Western Invest. Co. 221 U. S. 309, 55 L. ed. 747, 31 Sup. Ct. Rep. 578.

The conveyance by Wea's heirs came directly within the statutory prohibition, and the later conveyances under which the appellants claim must fall with it.

Affirmed.

HOLDEN LAND & LIVE STOCK COMPANY, William D. McLeod, Administrator with the Will Annexed of Howard M. Holden, Deceased, et al., Plffs. in Err.,

v.

INTERSTATE TRADING COMPANY, National Bank of Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank.

(See S. C. Reporter's ed. 536-545.)

Error to state court — Federal question — decision on non-Federal ground.

A decision of the highest state court

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granting the prayer of a bill that certain conveyances absolute on their face be declared to be mortgages, and that redemption therefrom be permitted, which is placed distinctly upon the ground that the relief sought should be granted only upon the equitable condition that the grantor should be charged with the principal of the debt and legal interest, is not reviewable in the Federal Supreme Court, although the bill also avers that usury had been exacted by the creditor (a national bank), and prays that in the accounting the entire interest, under U. S. Rev. Stat. §§ 5197, 5198, U. S. Comp. Stat. 1901, p. 3493, shall be adjudged to be forfeited.

[For other cases, see Appeal and Error, 1465-1528, in Digest Sup. Ct. 1908.]

[No. 354.]

Argued February 26 and 27, 1914. Decided May 4, 1914.

IN ERROR to the Supreme Court of the State of Kansas to review a decree which affirmed, with a slight modification, a decree of the District Court of Shawnee County, in that state, adjudging certain conveyances, absolute on their face, to be mortgages, and permitting a redemption therefrom. Dismissed for want of jurisdiction.

See same case below, 87 Kan. 221, — L.R.A.(N.S.) —, 123 Pac. 733.

The facts are stated in the opinion.

Mr. Edward P. Garnett argued the cause, and, with Mr. Charles Blood Smith, filed a brief for plaintiffs in error:

This court has jurisdiction when a state court undertakes to interpret the provisions of the national banking act.

Haseltine v. Central Nat. Bank, 183 U. S. 134, 46 L. ed. 119, 22 Sup. Ct. Rep. 50; Schuyler Nat. Bank v. Gadsden, 191 U. S. 451, 48 L. ed. 258, 24 Sup. Ct. Rep. 129; Brown v. Marion Nat. Bank, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390; Daingerfield Nat. Bank v. Ragland, 181 U. S. 45, 45 L. ed. 738, 21 Sup. Ct. Rep. 536; Barnet v. Muncie Nat. Bank, 98 U. S. 555, 25 L. ed. 212; Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196; First Nat. Bank v. Watt, 184 U. S. 151, 155, 46 L. ed. 475, 477, 22 Sup. Ct. Rep. 457; Citizens' Nat. Bank v. Donnell, 195 U. S. 369, 49 L. ed. 238, 25 Sup. Ct. Rep. 49.

Here, the Federal question presented for decision by the state court was absolutely necessary to a determination of the case. The case could not have been decided without passing upon this Federal question, upon the face of the decision itself. Still there is no question but what this court would have the right to examine the whole record in this case to determine whether or not the Federal question was passed upon.

Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 594, 56 L. ed. 567, 32 Sup. Ct. Rep. 316.

The decision below is not only contrary to the plain provisions of the national banking act, but to every decision of this court construing the act.

Brown v. Marion Nat. Bank, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390; First Nat. Bank v. Watt, 184 U. S. 155, 46 L. ed. 477, 22 Sup. Ct. Rep. 457.

It goes without saying that a state court cannot ignore the plain provisions of a Federal statute, and proceed to decide a case upon what it might consider general principles of law repugnant to such provisions.

West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518; Gaar, S. & Co. v. Shannon, 223 U. S. 471, 56 L. ed. 512, 32 Sup. Ct. Rep. 236; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858.

Messrs. Edward P. Garnett, Oliver H. Dean, and Charles Blood Smith also filed a brief for plaintiffs in error.

Mr. Leonard S. Ferry argued the cause, and, with Messrs. Thomas F. Doran, John S. Dean, and Elijah Robinson, filed a brief for defendants in error:

Where the finding of the lower court was broad enough to sustain the decree without reference to the Federal question, this court has no jurisdiction. It does not matter in such a case whether the Federal question was decided or not, nor whether it was decided correctly.

Jenkins v. Loewenthal, 110 U. S. 222, 28 L. ed. 129, 3 Sup. Ct. Rep. 638; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; Delaware City, S. & P. S. B. Nav. Co. v. Reybold, 142 U. S. 643, 35 L. ed. 1144, 12

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

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Sup. Ct. Rep. 290; Rutland R. Co. v. Central Vermont R. Co. 159 U. S. 641, 40 L. ed. 289, 16 Sup. Ct. Rep. 113; Beaupre v. Noyes, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; Mutual Reserve Fund Life Asso. v. Hamlin, 139 U. S. 297, 35 L. ed. 167, 11 Sup. Ct. Rep. 614; McManus v. O'Sullivan, 91 U. S. 578, 23 L. ed. 390; Bolling v. Lersner, 91 U. S. 594, 23 L. ed. 366; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131.

Mr. Justice Hughes delivered the opinion of the court:

This suit was brought by the Holden Land & Live Stock Company and Howard M. Holden in the district [538] court of Shawnee county, Kansas, to have certain conveyances which were absolute on their face, and the accompanying contracts, decreed to be mortgages, and for an accounting in order to ascertain the amount of the indebtedness thereby secured. It was also alleged that usury had been exacted by the creditor (the National Bank of Commerce of Kansas City, Missouri), and upon this ground it was prayed that in taking the account the debtor should be charged only with the principal, and that the entire interest should be adjudged to be forfeited under §§ 5197 and 5198 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3493).

The principal facts and the nature of the litigation are succinctly stated by the supreme court of Kansas, as follows (87 Kan. 221-223, — L.R.A.(N.S.) —, 123 Pac. 733):

"On June 6, 1901, the Holden Land & Live Stock Company executed to the Mutual Benefit Life Insurance Company a mortgage for $90,000, due in five years, upon a tract of land in Shawnee county, containing about 5,603 acres of which it was the record owner. On July 1, 1901, the Holden company executed a note to Howard M. Holden for $82,000 secured by a second mortgage on the same tract. This note and second mortgage, with other security, Holden at once transferred to the National Bank of Commerce of Kansas City, Missouri, to secure his note to that bank for $80,000, bearing the same date, due in one year, and drawing 8 per cent interest, which was subsequently renewed. Holden had personally purchased a tract of land in Missouri, borrowing a part of the amount necessary for the purpose from the bank. To secure the bank the deed was made to one W. H. Winants. Afterwards it was agreed that he should hold the title as further security for Holden's note to the bank. In May, 1904, Holden caused to be executed to the Inter-State Trading Company deeds covering the tracts in Kansas and Missouri, less parts of the former that had been sold, most of the proceeds having been applied to [539] cutting down the encumbrances. On February 13, 1908, Holden and the Holden company brought an action against the bank and the Interstate Trading Company, alleging in substance that the deeds had been given by way of security for the indebtedness owing to the bank, and asking, if this should be found to have been paid in full, a decree quieting title; otherwise, a decree declaring title to be held under the deeds as security for whatever balance should be found due. The defendants maintained that the deeds were intended as absolute conveyances, and operated as such. The court found, in accordance with the report of the referee before whom the case was tried, that the defendants were precluded, by their course of dealing with the plaintiffs, from claiming the absolute title to the land; that the plaintiffs should be allowed to redeem it by paying the defendants what they had in it, amounting at the time the action was begun to $81,091.93, this including the first mortgage, which the bank had purchased; judgment was rendered that if the plaintiffs should pay this amount (which had been reduced to $65,233.67 by sales of land made during the litigation) within six months, their title should be quieted; that if they failed to make the payment within that time they should be barred of all interest in the land. The defendants appeal on the ground that the court should have denied the plaintiffs any relief whatever. The plaintiffs appeal upon two principal grounds: (1) that in the accounting they should not have been charged with interest on the note given to the bank, because by the exaction of usury all interest thereon had been forfeited; and (2) that the first mortgage should not have been enforced against them otherwise than by a foreclosure and sheriff's sale."

The supreme court of the state decided in favor of the plaintiffs in error upon the second question. Approving the findings made in the trial court, it was concluded that [540] the relations between the parties were in effect those of mortgagor and mortgagee, and that the appropriate remedy was a foreclosure and sale. Accordingly, the judgment was modified so as to provide that the lien upon the Kansas land should be enforced in this manner.

The court affirmed the judgment in other respects; and because, in fixing the amount to be paid in order to redeem the lands in

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question, the court did not require the forfeiture of all interest, this writ of error is prosecuted.

The question at once arises whether, in view of the character of the suit and the basis of the ruling, the judgment is subject to review in this court. The action, it will be observed, was not one brought by the bank to enforce the payment of the indebtedness, thus involving the application of the statutory measure of the bank's legal right. Nor was the debtor availing himself of the exclusive remedy afforded by the statute in cases where usurious interest has actually been paid to a national bank (Barnet v. Muncie Nat. Bank, 98 U. S. 555, 25 L. ed. 212; Stephens v. Monongahela, Nat. Bank, 111 U. S. 197, 28 L. ed. 399, 4 Sup. Ct. Rep. 336). While the plaintiffs insisted that interest should be forfeited, still they were suitors in equity, seeking to be permitted to redeem the lands which had been conveyed; and the decision was placed distinctly upon the ground that the relief sought should be granted only upon the equitable condition that the plaintiff should be charged with the principal of the debt and legal interest. Upon this point the supreme court of Kansas said (87 Kan. 221, 233, 234):

"Usury was charged and collected upon the Holden note. By the national banking act the exaction of usury destroys the interest-bearing quality of a debt. The referee decided that the plaintiffs were estopped from claiming the benefit of that provision. Nothing was said about usury until the present action was begun. Whether or not an actual estoppel has arisen, it was proper under the circumstances, in view of the equitable relief sought, [541] that the plaintiffs should be charged with the principal and legal interest.

"'When the borrower appears in any capacity in a court of equity, asking affirmative relief against a usurious contract to pay money, such relief will, in the absence of statute providing otherwise, be granted him only upon condition of his doing equity; that is, tendering the money actually due. . . . The rule . . . applies when the relief sought is the reformation or cancelation of a deed or mortgage, or other instrument evidencing or securing a usurious debt, or an injunction against threatened damaging action by the creditor, or in fact, whatever be the character of the relief sought. . . . In case the usurious interest has been reserved, or paid in advance, the amount equitably due is the principal debt less the usurious excess of interest paid. In the absence of statute providing otherwise, if the contract for the usurious interest is still executory, the sum equitably due is the principal debt with legal interest thereon.' 39 Cyc. 1010-1012."

The judgment thus rests upon an independent or non-Federal ground which was adequate to sustain it. The court applied a familiar equitable principle in defining the basis upon which extraordinary aid would be given. "A court of equity is not positively bound to interfere in such cases by an active exertion of its powers; but it has a discretion on the subject, and may prescribe the terms of its interference." Story, Eq. Jur. § 301; Fanning v. Dunham, 5 Johns. Ch. 122, 142, 143, 9 Am. Dec. 283; Tiffany v. Boatman's Sav. Inst. 18 Wall. 375, 385, 21 L. ed. 868, 879. It is manifest that the plaintiffs were not proceeding by virtue of any Federal right in seeking to have the conveyances which had been executed in the form of absolute transfers of title declared to be mortgages; and it was competent for the court whose intervention was desired for this purpose, to demand that its conscience be satisfied by the doing of equity on the part of those who asked it.

[542] The decision involves simply the exercise of the equitable jurisdiction in accordance with the jurisprudence of the state, and the ruling which prescribed the conditions of relief is not reviewable here.

The writ of error must be dismissed.

Dismissed.

Mr. Justice Day, dissenting:

I am unable to agree that this court does not have jurisdiction of this writ of error. In my judgment, if the principle here invoked is applied to a case like the one under consideration, it will result that the state court may determine, without power of review in this court, the ultimate effect and scope of rights secured by a Federal statute.

It appears from the opinion of the supreme court of Kansas, quoted in the opinion in this case, that a national bank, organized under and subject to the limitations of the Federal statutes in that respect, received usury upon a debt which was secured by a conveyance of title which was upon its face a deed. The plaintiff in error stated in its petition the facts which showed the usurious arrangement with the bank and the charging upon the debt of interest in violation of the statute, and thus distinctly relied upon a Federal statute controlling the right of national banks to take usurious interest. It asked to have the conveyance decreed a mortgage in fact and security for the debt, and that only the amount legally collectable thereon should be held to be due. These allegations brought the case

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within the provisions of §§ 5197 and 5198 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3493), fixing certain consequences for taking usurious interest by national banks. The state court found that the deed had at all times been intended by the parties to be and was security for the debt, but decreed that it should extend to the balance of the debt, with legal interest.

[543] By means of this petition a right of Federal origin was specially set up, which, if denied, gave the right to come to this court under a Federal statute which has been in substantially the same form, so far as this writ of error is concerned, since the passage of the judiciary act in 1789 [1 Stat. at L. 73, chap. 20]. This is not controverted in the opinion in this case, but the position is taken that the decision rests upon an independent ground not involving a denial of Federal right, and therefore is not reviewable here.

I am not unmindful of the rule frequently recognized in the decisions of this court, that if the judgment of the state court rests upon an independent, separate ground of local or general law, broad enough or sufficient in itself to base the decision upon and to control the rights of the parties, this court has no jurisdiction to review the action of the state court. So far as I understand the decisions where such independent ground has been sustained, resulting in a lack of jurisdiction in this court to review a decision of a state court, the judgment has proceeded upon the principle that, irrespective of the Federal right asserted, an independent ground of judgment, not involving the Federal question, has controlled the decision. For example, in a number of cases in this court it has been held that, conceding the Federal right asserted to have been one which might have been maintained, nevertheless, if, upon the general doctrine of laches that right no longer exists, the refusal to enforce it because of laches rests the decision upon a principle of general law, applicable to all rights, Federal or otherwise, and is not of itself a denial of a Federal right. So this court has more than once held that a decision placing the rights of the parties upon the doctrine of *res judicata*, where the decision did not necessarily involve the denial of a right of a Federal character, places the decision upon a non-Federal ground and is not reviewable here. These are examples of independent grounds of general law, which the state court has the right [544] to apply to all asserted rights, and their maintenance does not amount to a denial of special claims of Federal right.

"But," said this court in Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 580, 50 L. ed. 596, 604, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175, "it is equally well settled that the failure of the state court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law." Without citing all the cases, the rule substantially as just stated has been frequently recognized. Murdock v. Memphis, 20 Wall. 590, 636, 22 L. ed. 429, 444; Anderson v. Carkins, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905; Wabash R. Co. v. Pearce, 192 U. S. 179, 48 L. ed. 397, 24 Sup. Ct. Rep. 231; Terre Haute & I. R. Co. v. Indiana, 194 U. S. 579, 48 L. ed. 1124, 24 Sup. Ct. Rep. 767; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407.

Applying these principles here, it seems to me that where a party specially asserts, as it did in this case, the application of the Federal statute, which, in unequivocal terms, provides (§ 5198 [U. S. Comp. Stat. 1901, p. 3493]) that the 'taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done [which the record discloses was so taken in this case], shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon," and the supreme court of the state, holding that, notwithstanding the Federal statute, it has the discretion to condition its relief, allowing redemption only upon the payment of principal and legal interest, it has in effect denied the right asserted under the Federal statute, and the correctness of the decision is reviewable here. This statute has no conditions attached to it, and is upon its face applicable [545] wherever a situation arises which comes within its terms. In effect, the state court said this is true; usury has been charged upon this contract, and, because of the statute, the security is not enforceable beyond the face of the debt; but as the giver of the security has been obliged to apply to the equity powers of a state court for the carrying out of the contract, a condition may be attached to the relief to which the party is otherwise entitled, and the state court charged the plaintiff in error with the debt, with legal interest, notwithstanding the Federal statute which declares the interest forfeited upon such facts as are here presented. When the court

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so decided, in my judgment, it necessarily denied a Federal right, and, whether right or wrong, the denial of that right laid the basis for ultimate decision by this court as to the nature and extent of the rights secured by the Federal statute.

In my opinion this court should review the judgment and determine for itself whether the rule invoked in the state court has this effect upon a Federal statute, which unconditionally forfeits the entire interest where usurious interest has been knowingly reserved or taken.

I therefore dissent from the opinion of the court holding that there is no jurisdiction of the case.

Mr. Justice McKenna and Mr. Justice Van Devanter concur in this dissent.

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[546] A. WEBSTER RICHARDS, Plff. in Err.,
v.
WASHINGTON TERMINAL COMPANY.

(See S. C. Reporter's ed. 546–558.)

Eminent domain — taking — public or private nuisance.

1. Congress is prohibited, by the inhibition of U. S. Const., 5th Amend., against the taking of private property for public use without just compensation, from conferring immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use, although it may legalize what otherwise would be a public nuisance.

[For other cases, see Eminent Domain, V., in Digest Sup. Ct. 1908.]

Eminent domain — consequential injuries — damages incident to prudent operation of railroad.

2. The safeguard against the taking of private property for public use without compensation afforded by U. S. Const., 5th Amend., does not require that an owner of noncontiguous property, no part of which was actually appropriated, but which lies in the neighborhood of a railway tunnel and tracks constructed and maintained under the authority of the acts of February 12, 1901 (31 Stat. at L. 774, chap. 354), and February 28, 1903 (32 Stat. at L. 909, chap. 856), upon property acquired by purchase or condemnation proceedings, be compensated for the damage through smoke, cinders, gases, dust, dirt, and vibration incident to the prudent operation of the railroad.

[For other cases, see Eminent Domain, 110-119, in Digest Sup. Ct. 1908.]

Eminent domain — taking — injury to property — gas and smoke.

3. An owner of property in the neighborhood of, but not abutting upon, the railway tracks and tunnel constructed and maintained under the authority of the acts of February 12, 1901, and February 28, 1903, is entitled, under U. S. Const., 5th Amend., forbidding the taking of private property for public use without compensation, to be compensated for the damage attributable to gases and smoke emitted from locomotives while in the tunnel, and by means of a fanning system forced out of such tunnel at its mouth near his property in such manner as naturally to render such property less habitable than otherwise it would be, and to depreciate it in value.

[For other cases, see Eminent Domain, 110-119, in Digest Sup. Ct. 1908.]

[No. 52.]

Argued November 7, 1913. Decided May 4, 1914.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District in favor of defendant in an action by a noncontiguous property owner to recover for the damage to his property resulting from the operation of a railroad. Reversed and remanded, with directions to reverse the judgment of the Supreme Court of the District, and remand the cause to that court for a new trial.

See same case below, 37 App. D. C. 289.

The facts are stated in the opinion.

Mr. Hugh H. Obear argued the cause, and, with Messrs. Charles A. Douglas, Thomas Ruffin, Edward F. Colladay, Paul Sleman, and Harry F. Lerch, filed a brief for plaintiff in error:

There can be no question that defendant's acts constitute a private nuisance.

Aldred's Case, 9 Coke, 57; Crump v. Lambert, L. R. 3 Eq. 409, 15 Week. Rep. 417; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; Camfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864.

The inquiry is:

NOTE.—On right of property owner to compensation for interference with light or air by railroad structure on the company's own property—see note to Davis v. New England R. Co. 20 L.R.A.(N.S.) 1061.

On the right, under constitutional provision against damaging private property without compensation, to compensation for consequential damages to property no part of which is taken, for smoke, noise, dust, etc., incident to ordinary operation of railroad—see note to Tidewater R. Co. v. Shartzer, 17 L.R.A.(N.S.) 1054.

On consequential injuries, generally—see notes to D. M. Osborne & Co. v. Missouri P. R. Co. 37 L. ed. U. S. 156, and A. Backus, Jr. & Sons v. Fort Street Union Depot Co. 42 L. ed. U. S. 853.

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(1) Can Congress authorize or legalize a private nuisance such as is presented here? and

(2) Has it done so in this case?

It seems to us that these questions are settled by Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719.

There is sufficient evidence to show that there was a taking of the property within the meaning of the Constitution. The soot, smoke, gas, and cinders, driven in great volumes from the mouth of the tunnel, nearly a mile, along, over, and upon the property of the plaintiff, was a physical invasion.

Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557.

Mr. John W. Yerkes argued the cause, and, with Messrs. John J. Hamilton and George E. Hamilton, filed a brief for defendant in error:

If Congress had desired to make provision for payment of compensation to landowners whose property was not actually taken or occupied, but who suffered injury and damage by reason of the construction and operation of the railroad, the act would have contained fit and appropriate language to make certain this right. This has been done by Congress in other cases.

United States v. Alexander, 148 U. S. 186, 37 L. ed. 415, 13 Sup. Ct. Rep. 529; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; High Bridge Lumber Co. v. United States, 16 C. C. A. 460, 37 U. S. App. 234, 69 Fed. 320.

Many cases may be cited where, under distinct provisions of state Constitutions and legislation, these incidental and consequential damages may be recovered.

Pennsylvania R. Co. v. Miller, 132 U. S. 75, 33 L. ed. 267, 10 Sup. Ct. Rep. 34; Chicago v. Taylor, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820; Gainesville, H. & W. R. Co. v. Hall, 78 Tex. 169, 9 L.R.A. 298, 22 Am. St. Rep. 42, 14 S. W. 259.

There has been no such taking of the property of plaintiff in error for public use as requires compensation to be made to him by defendant in error.

Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; Gibson v. United States, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; Bedford v. United States, 192 U. S. 217, 48 L. ed. 414, 24 Sup. Ct. Rep. 238; United States v. Grizzard, 219 U. S. 180, 183, 55 L. ed. 165, 166, 31 L.R.A.(N.S.) 1135, 31 Sup. Ct. Rep. 162.

State decisions hold that unless there is specific legislation or a constitutional provision providing for recovery of damages for consequential or incidental injuries in a case like this, no such recovery can be allowed.

Beseman v. Pennsylvania R. Co. 50 N. J. L. 235, 13 Atl. 164, affirmed on appeal by the Court of Error and Appeals without opinion in 52 N. J. L. 221, 20 Atl. 169; Church of Jesus Christ, L. D. S. v. Oregon Short Line R. Co. 36 Utah, 238, 23 L.R.A. (N.S.) 860, 140 Am. St. Rep. 819, 103 Pac. 243; Hatch v. Vermont C. R. Co. 25 Vt. 49; Taylor v. Baltimore & O. R. Co. 33 W. Va. 39, 10 S. E. 29; Spencer v. Point Pleasant & O. River R. Co. 23 W. Va. 427; Dunsmore v. Central Iowa R. Co. 72 Iowa, 182, 33 N. W. 456; Boothby v. Androscoggin & K. R. Co. 51 Me. 318; Kansas, N. & D. R. Co. v. Cuykendall, 42 Kan. 234, 16 Am. St. Rep. 479, 21 Pac. 1051; Briesen v Long Island R. Co. 31 Hun, 112; Friedman v. New York & H. R. Co. 89 App. Div. 38, 85 N. Y. Supp. 404; Atchison, T. & S. F. R. Co. v. Armstrong, 71 Kan. 366, 1 L.R.A.(N.S.) 113, 114 Am. St. Rep. 474, 80 Pac. 978.

Mr. Justice Pitney delivered the opinion of the court:

Plaintiff in error, who was plaintiff below, commenced this action in the supreme court of the District of Columbia to recover for the damage to his property resulting from the maintenance of an alleged nuisance by defendant by means of the operation of a railroad and tunnel upon its own lands near to, but not adjoining, those of plaintiff. Defendant having pleaded not guilty, the issue came on for trial by jury, and at the conclusion of plaintiff's evidence a verdict was directed in favor of defendant. The court of appeals affirmed the judgment (37 App. D. C. 289), and a writ of error brings the controversy under the review of this court.

An agreed abridgment of the evidence upon which the ruling of the trial justice was based is embodied in the bill of exceptions. From this it appears that plaintiff is and has been since the year 1901 the owner of lot 34 in square 693 in the city of Washington, having a frontage of 20 ft. upon the westerly side of New Jersey avenue, southeast, and an average depth of 81 ft., with improvements thereon consisting of a three-story and basement brick dwelling house containing ten rooms, known as No. 415 New Jersey avenue. The rear windows upon all the floors of the house open in the direction of the railroad tracks that lead from defendant's tunnel. The south portal of this tunnel opens within square 693, and near its [549] northeasterly corner, and the tunnel extends thence

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in a northeasterly direction, passing under the Capitol and Library grounds and First street N. E., to the Union Station at Massachusetts avenue. There are two sets of railroad tracks in the tunnel and leading from it, and as these emerge from the south portal they extend in a general southwesterly direction up an incline or grade across the central portion or square 693 onto an elevated structure which carries the tracks over and beyond South Capitol street. The tunnel and these tracks are used for the passage of trains running both northwardly and southwardly, about thirty each day, all of them being passenger trains with the exception of an occasional shifting engine. The trains frequently pass in and out of the tunnel without stopping, but trains also very often stop at or near a switch tower that is situate near the center of square 693. From the nearest portion of plaintiff's house to the center of the south portal, the distance in a straight line is about 114 ft., there being three intervening dwelling houses, two of which have been purchased and are now owned by defendant. From the rear end of plaintiff's lot to the middle of the tracks southwestwardly from the portal the distance in a straight line is about 90 ft. Plaintiff's property has been damaged by the volumes of dense black or gray smoke, and also by dust and dirt, cinders and gases, emitted from the trains while passing over the tracks and in or out of the tunnel, or standing upon the tracks near the signal tower. There is a fanning system installed in the tunnel which causes the gases and smoke emitted from engines while in the tunnel to be forced out of the south portal, and these gases and smoke contaminate the air, and also add to the inconvenience suffered by plaintiff in the occupation of his property. His house was pleasant and comfortable for purposes of occupation before the construction of the tunnel and tracks, but since then it has not only depreciated in value, but the tenant [550] removed therefrom, and plaintiff was obliged to occupy the house himself by reason of his inability to rent it. The property has depreciated from a value of about $5,500 to about $4,000, and the rental value from $30 per month to $20 per month. The furniture and other belongings in the house have been depreciated from a value of $1,200 to $600, all of which depreciation is due to the presence of smoke, cinders, and gases emitted from passing trains and from the mouth of the tunnel, which smoke, cinders, and gases enter the dwelling house and settle upon the furniture and other personal property contained in it, contaminating the air and rendering the house objectionable as a habitation. The house has also been damaged by vibrations caused by the movement of trains on the track or in the tunnel, resulting in cracking the walls and wall paper, breaking glass in the windows, and disturbing the peace and slumber of the occupants.

The defendant, the Washington Terminal Company, is the owner of the tunnel and of the tracks therein, but its ownership of tracks ceases at the south portal. The tracks extending therefrom in a southwesterly direction are owned and used by other railroad companies, but the movement of the trains is controlled by defendant.

The tunnel and the tracks leading from it across square 693 were located and constructed and are now maintained under the authority of acts of Congress of February 12, 1901, and February 28, 1903 (31 Stat. at L. 774, chap. 354; 32 Stat. at L. 909, chap. 856), in accordance with plans and specifications approved by those acts. No claim is made by plaintiff that the tunnel, the tracks in square 693, and the trains operated therein and thereon, were constructed, operated, or maintained in a negligent manner; and it is conceded that the tunnel and tracks were built upon property acquired by purchase or condemnation proceedings, and were constructed under authority of the acts of Congress [551] and of permits issued by the Commissioners of the District of Columbia.

Such being the essential facts to be deduced from the evidence, we have reached the conclusion, for reasons presently to be stated, that with respect to most of the elements of damage to which the plaintiff's property has been subjected, the courts below correctly held them to be *damnum absque injuria;* but that with respect to such damage as is attributable to the gases and smoke emitted from locomotive engines while in the tunnel, and forced out of it by means of the fanning system through a portal located so near to plaintiff's property that these gases and smoke materially contribute to injure the furniture and to render the house less habitable than otherwise it would be, there is a right of recovery.

The acts of Congress referred to, followed by the construction of the tunnel and railroad tracks substantially in the mode prescribed, had the effect of legalizing the construction and operation of the railroad, so that its operation, while properly conducted and regulated, cannot be deemed to be a public nuisance. Yet it is sufficiently obvious that the acts done by defendant, if done without legislative sanction, would form the subject of an action by plaintiff to recover damages as for a private nuisance.

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At the same time, there is no exclusive and permanent appropriation of any portion of plaintiff's land, which, indeed, does not even abut upon defendant's property. The acts of Congress do not in terms provide for the payment of compensation to property owners damnified through the construction and operation of the tunnel and railroad lines in question, except to those whose lands, or a portion thereof, were necessarily appropriated. For damages, whether direct or consequential, to noncontiguous parcels such as that of plaintiff, there is no express provision. But § 9 of the act of 1903 (32 Stat. at L. 916, chap. 856) authorizes the Terminal Company to acquire, by purchase or condemnation, [552] "the lands and property necessary for all and every the purposes contemplated" by the several acts of Congress under which the tunnel and railroad were constructed and are operated. This grant of the power of condemnation is very broad, but it has not been acted upon by the company in the case of the present plaintiff. And since he is not wholly excluded from the use and enjoyment of his property, there has been no "taking" of the land in the ordinary sense.

The courts of England, in a series of decisions, have dealt with the general subject now under consideration. Rex v. Pease, 4 Barn. & Ad. 30, 40, 1 Nev. & M. 690, 2 L. J. Mag. Cas. N. S. 26, 22 Eng. Rul. Cas. 71; Vaughan v. Taff Vale R. Co. 5 Hurlst. & N. 679, 29 L. J. Exch. N. S. 247, 6 Jur. N. S. 899, 2 L. T. N. S. 394, 8 Week. Rep. 549, 1 Eng. Rul. Cas. 296; Jones v. Festiniog R. Co. L. R. 3 Q. B. 733, 9 Best & S. 835, 37 L. J. Q. B. N. S. 214, 18 L. T. N. S. 902, 17 Week. Rep. 28; Hammersmith & C. R. Co. v. Brand, L. R. 4 H. L. 171, 38 L. J. Q. B. N. S. 265, 21 L. T. N. S. 238, 18 Week. Rep. 12, 1 Eng. Rul. Cas. 623, 7 Eng. Rul. Cas. 380; Metropolitan Asylum Dist. v. Hill, L. R. 6 App. Cas. 193, 201, 203, 50 L. J. Q. B. N. S. 353, 44 L. T. N. S. 653, 29 Week. Rep. 617, 45 J. P. 664, 16 Eng. Rul. Cas. 556; London, B. & S. C. R. Co. v. Truman, L. R. 11 App. Cas. 45, 55 L. J. Ch. N. S. 354, 54 L. T. N. S. 250, 34 Week. Rep. 657, 50 J. P. 388, 22 Eng. Rul. Cas. 80. The rule to be deduced from these cases is that while no action will lie for an invasion of private rights necessarily resulting from the establishment and operation of railways and other public works under the express sanction of an act of Parliament, yet that such acts are to be strictly construed so as not to impair private rights unless the legislative purpose to do so appears by express words or necessary implication. In short, Parliament, being omnipotent, may authorize the taking of private property for public use without compensation to the owner; but the courts decline to place an unjust construction upon its acts, and will not interpret them as interfering with rights of private property unless the language be so clear as to admit of no other meaning.

But the legislation we are dealing with must be construed in the light of the provision of the 5th Amendment—"Nor shall private property be taken for public use without just compensation"—and is not to be given [553] an effect inconsistent with its letter or spirit. The doctrine of the English cases has been generally accepted by the courts of this country, sometimes with scant regard for distinctions growing out of the constitutional restrictions upon legislative action under our system. Thus, it has been said that "a railroad authorized by law and lawfully operated cannot be deemed a private nuisance;" that "what the legislature has authorized to be done cannot be deemed unlawful," etc. These and similar expressions have at times been indiscriminately employed with respect to public and to private nuisances. We deem the true rule, under the 5th Amendment, as under state constitutions containing a similar prohibition, to be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use. Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316, 329, 56 Am. Rep. 1, 7 Atl. 432; Costigan v. Pennsylvania R. Co. 54 N. J. L. 233, 23 Atl. 810; Cogswell v. New York, N. H. & H. R. Co. 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537; Garvey v. Long Island R. Co. 159 N. Y. 323, 70 Am. St. Rep. 550, 54 N. E. 57; Bohan v. Port Jervis Gaslight Co. 122 N. Y. 18, 29, 9 L.R.A. 711, 25 N. E. 246; Sadlier v. New York, 40 Misc. 78, 81 N. Y. Supp. 308.

But the question remains, in cases of the class now before us, What is to be deemed a private nuisance such as amounts to a taking of property? And by a great and preponderant weight of judicial authority in those states whose constitutions contain a prohibition of the taking of private property for public use without compensation, substantially in the form employed in the 5th Amendment, it has become established that railroads constructed and operated for the public use, although with private capital and for private gain, are not subject to actions in behalf of neighboring property owners for the ordinary damages attributable to the operation of the railroad, in the absence of negligence. Such roads are treated as [554] public highways, and

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the proprietors as public servants, with the exemption normally enjoyed by such servants from liability to private suit, so far as concerns the incidental damages accruing to owners of nonadjacent land through the proper and skilful management and operation of the railways. Any diminution of the value of property not directly invaded nor peculiarly affected, but sharing in the common burden of incidental damages arising from the legalized nuisance, is held not to be a "taking" within the constitutional provision. The immunity is limited to such damages as naturally and unavoidably result from the proper conduct of the road and are shared generally by property owners whose lands lie within range of the inconveniences necessarily incident to proximity to a railroad. It includes the noises and vibrations incident to the running of trains, the necessary emission of smoke and sparks from the locomotives, and similar annoyances inseparable from the normal and non-negligent operation of a railroad. Northern Transp. Co. v. Chicago, 99 U. S. 635, 641, 25 L. ed. 336, 338; Beseman v. Pennsylvania R. Co. 50 N. J. L. 235, 240, 13 Atl. 164, affirmed in 52 N. J. L. 221, 20 Atl. 169.

That the constitutional inhibition against the taking of private property for public use without compensation does not confer a right to compensation upon a landowner, no part of whose property has been actually appropriated, and who has sustained only those consequential damages that are necessarily incident to proximity to the railroad, has been so generally recognized that in some of the states (Arkansas, California, Colorado, Georgia, Illinois, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, South Dakota, Texas, West Virginia, and Wyoming are, we believe, among the number) constitutions have been established providing in substance that private property shall not be taken *or damaged* for public use without compensation.

The immunity from liability for incidental injuries is [555] attended with a considerable degree of hardship to the private landowner, and has not been adopted without some judicial protest. But, as pointed out by Chief Justice Beasley in the Beseman Case, 50 N. J. L. at p. 238, if railroad companies were liable to suit for such damages upon the theory that with respect to them the company is a tort feasor, the practical result would be to bring the operation of railroads to a standstill. And, on the whole, the doctrine has become so well established that it amounts to a rule of property, and should be modified, if at all, only by the lawmaking power.

But the doctrine, being founded upon necessity, is limited accordingly. This court, in a leading case that we deem controlling upon the questions now at issue, had occasion to recognize this, and at the same time to apply the distinction between public and private nuisances with respect to the private right of action. In Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, the court, while recognizing (p. 331) that the legislative authority for operating a railway carried with it an immunity from private actions based upon those incidental inconveniences that are unavoidably attendant upon the operation of a railroad, nevertheless sustained the right of action in a case where a building for housing and repairing locomotive engines was unnecessarily established in close proximity to a place of public worship, and so used that the noises of the shop and the rumbling of the locomotive engines passing in and out, the blowing off of steam, the ringing of bells, the sound of whistles, and the smoke from the chimneys, created a constant disturbance of the religious exercises. The court (speaking by Mr. Justice Field) held that the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights [556] of others; and that whatever the extent of the authority conferred, it was accompanied with the implied qualification that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. In the language of the opinion: "Grants of privileges or powers to corporate bodies like those in question confer no license to use them in disregard of the private rights of others, and with immunity for their invasion." The reasoning proceeded upon the ground (p. 332) that no authority conferred by Congress would justify an invasion of private property to an extent amounting to an entire deprivation of its use and enjoyment, without compensation to the owner; "nor could such authority be invoked to justify acts creating physical discomfort and annoyance to others in the use and enjoyment of their property, to a less extent than entire deprivation, if different places from those occupied could be used by the corporation for its purposes, without causing such discomfort and annoyance;" and hence that the legislative authorization conferred exemption only from suit or prosecution for the public nuisance, and did not affect "any claim of a

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private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."

The present case, in the single particular already alluded to,—that is to say, with respect to so much of the damage as is attributable to the gases and smoke emitted from locomotive engines while in the tunnel, and forced out of it by the fanning system therein installed, and issuing from the portal located near to plaintiff's property in such manner as to materially contribute to render his property less habitable than otherwise it would be, and to depreciate it in value; and this without, so far as appears, any real necessity existing for such damage,—is, in our opinion, within the reason and authority of the decision just cited. This case differs from that of the Baptist Church, [557] in that there the railroad company was free to select some other location for the repair shop and engine house; while here the evidence shows that the location of the tunnel and its south portal was established pursuant to law, and not voluntarily chosen by defendant. This circumstance, however, does not, as we think, afford sufficient ground for a distinction affecting the result. The case shows that Congress has authorized, and in effect commanded, defendant to construct its tunnel with a portal located in the midst of an inhabited portion of the city. The authority, no doubt, includes the use of steam locomotive engines in the tunnel, with the inevitable concomitants of foul gases and smoke emitted from the engines. No question is made but that it includes the installation and operation of a fanning system for ridding the tunnel of this source of discomfort to those operating the trains and traveling upon them. All this being granted, the special and peculiar damage to the plaintiff as a property owner in close proximity to the portal is the necessary consequence, unless at least it be feasible to install ventilating shafts or other devices for preventing the outpouring of gases and smoke from the entire length of the tunnel at a single point upon the surface, as at present. Construing the acts of Congress in the light of the 5th Amendment, they do not authorize the imposition of so direct and peculiar and substantial a burden upon plaintiff's property without compensation to him. If the damage is not preventable by the employment at reasonable expense of devices such as have been suggested, then plaintiff's property is "necessary for the purposes contemplated," and may be acquired by purchase or condemnation (32 Stat. at L. 916, chap. 856, § 9), and pending its acquisition defendant is responsible. If the damage is readily preventable, the statute furnishes no excuse, and defendant's responsibility follows on general principles.

No doubt there will be some practical difficulty in distinguishing [558] between that part of the damage which is attributable to the gases and smoke emitted from the locomotive engines while operated upon the railroad tracks adjacent to plaintiff's land, and with respect to which we hold there is no right of action, and damage that arises from the gases and smoke that issue from the tunnel, and with respect to which there appears to be a right of action. How this difficulty is to be solved in order to determine the damages that should be assessed in this action, or the compensation that should be awarded in case condemnation proceedings are resorted to, is a question not presented by this record, and upon which, therefore, no opinion is expressed.

Judgment reversed and cause remanded to the Court of Appeals, with directions to reverse the judgment of the Supreme Court of the District and remand the cause to that court with directions for a new trial, and for further proceedings in accordance with the views above expressed.

Mr. Justice Lurton dissents.

F. F. GREEN, Appt.,
v.
MENOMINEE TRIBE OF INDIANS IN WISCONSIN and the United States.

(See S. C. Reporter's ed. 558-571.)

United States — suits against — claim against Indians.

1. No right to sue the United States was given by the act of May 29, 1908 (35 Stat. at L. 444, chap. 216), § 2, conferring jurisdiction on the court of claims to hear, determine, and render final judgment, notwithstanding lapse of time or statute of limitations, for any balances found due upon the claims of certain designated Indian traders against the Menominee tribe of Indians in Wisconsin, and against certain members of said tribe at the Green Bay Agency for supplies furnished certain members of the tribe for the purpose of carrying on logging operations, but such statute created no new right, simply affording a means of establishing by a proceeding in the court of claims the existence, if any, of a claim against the tribe and its individual members.

[For other cases, see United States, IV. b, in Digest Sup. Ct. 1908.]

NOTE.—On immunity of United States from suit—see note to Beers v. Arkansas, 15 L. ed. U. S. 991.

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Claims — jurisdiction — contracts with Indians.

2. Claims against individual Indians as citizens of the United States, resulting from their purely individual and personal contracts, not related to, or connected with, tribal membership, or the dependency resulting from status as an Indian, as distinguished from citizenship, were not made justiciable in the court of claims by the act of May 29, 1908, § 2, conferring upon that court jurisdiction to hear, determine, and render final judgment, notwithstanding lapse of time or statute of limitations, for any balances found due, without interest, with the right of appeal, as in other cases, upon the claims of certain specified Indian traders against the Ménominee tribe of Indians in Wisconsin, and against certain members of said tribe at the Green Bay Agency for supplies furnished to such members for the purpose of carrying on logging operations, but such act, except so far as concerned the statute of limitations, created no new right, simply affording a means of establishing by a proceeding in the court of claims the existence, if any, of a claim against the tribe, and the individual members of the tribe as such.

[For other cases, see Claims, 105-127, in Digest Sup. Ct. 1908.]

Indians — contracts with — formal requisites.

3. The contractual agreement of an Indian tribe or its individual members to pay for supplies to be furnished to certain members of the tribe for logging operations out of the proceeds to be received by the Indian agent from the sale of the logs to be cut and sold is governed by the provisions of U. S. Rev. Stat. § 2103, making null and void all agreements made by any person with any Indian tribe or individual Indians for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, instalments, or other moneys, claims, demands, or things, under laws or treaties with the United States, or official acts of any officer thereof, or in any way connected with or due from the United States, unless such agreements are in writing, and are formally executed and approved.

[Matters as to Indians, see Indians, in Digest Sup. Ct. 1908.]

Indians — contracts with — formal requisites.

4. The requirement of U. S. Rev. Stat. § 2103, that contracts with Indians shall be void unless in writing and formally executed and approved, is none the less applicable to an asserted agreement by a tribe or its individual members to pay for supplies to be furnished such members for logging operations out of the proceeds to be received by the Indian agent from the sale of the logs to be cut and sold because the other contracting party was a licensed Indian trader, authorized to deal with the tribe and its members, or because such contract was made in the presence of, and with the assent of, an agent of the Interior Department.

[Matters as to Indians, see Indians, in Digest Sup. Ct. 1908.]

Indians — implied contracts — liability.

5. An Indian tribe and its members should not, on the theory of an implied contract, be held liable to pay for supplies furnished to certain members of the tribe for logging operations under an express agreement, void under U. S. Rev. Stat. § 2103, because not in writing, that the supplies should be paid for out of the proceeds to be received by the Indian agent from the sale of the logs to be cut and sold, where such agent failed to apply the proceeds in his hands to the payment of the supplies so furnished.

[Matters as to Indians, see Indians, in Digest Sup. Ct. 1908.]

[No. 285.]

Argued March 13 and 16, 1914. Decided May 11, 1914.

APPEAL from the Court of Claims to review the dismissal of a petition seeking to enforce a claim against an Indian tribe and its members. Affirmed.

See same case below, 47 Ct. Cl. 281.

The facts are stated in the opinion.

Mr. L. T. Michener argued the cause, and, with Messrs. P. G. Michener and C. F. Dillett, filed a brief for appellant:

The United States is treated by the act of May 29, 1908, as well as by the broad field of our general legislation, as the trustee in possession, or the vested trustee, of the Indian funds. Therefore, it was clearly right and proper, and it was necessary, to sue both the United States and the tribe. The case may be likened to a suit in equity to direct the disposition of a trust fund, the holder of the fund being a necessary, or, at least, a proper, party defendant.

1 Dan. Ch. Pr. 246-249; La Abra Silver Min. Co. v. United States, 175 U. S. 423, 441, 443, 463-466, 44 L. ed. 223, 230, 231, 237-239, 20 Sup. Ct. Rep. 168.

There was here an agreement entered into and most of the paymen's made. Those payments operated as a ratification.

Neal's Case, 14 Ct. Cl. 285.

If there be no agreement made within the forms of law, the action lies upon an implied contract for a *quantum valebant* for supplies, goods, wares, merchandise, tools, and live stock furnished certain members of the said tribe after the 1st day of January in the year 1880, for the purpose of carrying on logging operations upon the Me-

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nominee Indian Reservation. The Indians received and used the property of appellant, and he is entitled to be reimbursed the value thereof, whether there was a formal and precise agreement in writing or not.

Clark v. United States, 95 U. S. 539, 24 L. ed. 518; Roberts v. United States, 92 U. S. 41, 48, 23 L. ed. 646, 648; Braden's Case, 16 Ct. Cl. 410.

The provisions of the jurisdictional act operate as an assumption of liability if the value of the claims is established by the evidence and they are unpaid.

Navarre's Case, 33 Ct. Cl. 248, affirmed in 173 U. S. 77, 43 L. ed. 620, 19 Sup. Ct. Rep. 326.

If Congress, having knowledge of the facts, had intended that the validity of the agreement should be contested, or that it should be treated as a nullity, the claims would not have been referred to the court below to have such a defense set up and the claims defeated. Congress could have done all that itself by not making the reference.

Dahlgren's Case, 16 Ct. Cl. 49; Braden's Case, 16 Ct. Cl. 411.

Special and general statutory provisions may subsist together, the former qualifying and supplying exceptions to the latter.

Townsend v. Little, 109 U. S. 504, 512, 27 L. ed. 1012, 1015, 3 Sup. Ct. Rep. 357; United States v. Nix, 189 U. S. 199, 205, 47 L. ed. 775, 777, 23 Sup. Ct. Rep. 495.

Assistant Attorney General **Thompson** argued the cause and filed a brief for appellees:

The jurisdictional act makes no admission of liability, or any ground of liability on the part of the government, but merely provides a forum for the adjudication of the claim according to applicable legal principles.

United States v. Mille Lac Band, 229 U. S. 498, 57 L. ed. 1299, 38 Sup. Ct. Rep. 811; Cooley, Const. Law, 1st ed. p. 319, 3d ed. p. 358.

Mr. Chief Justice **White** delivered the opinion of the court:

By this appeal a review is sought of a judgment of the court below holding that an amended petition filed by the appellant stated no cause of action, and dismissing the same. 47 Ct. Cl. 281. Our attention, therefore, must be directed to the petition; but as a means of at once clarifying the issues, we refer to the act of Congress authorising the suit, and briefly state the averments of an original petition which was likewise dismissed because stating no cause of action.

By an act of Congress of May 29, 1908 (35 Stat. at L. 444, chap. 216, § 2), jurisdiction was conferred upon the court of claims "to hear, determine, and render final judgment, nothwithstanding lapse of time or statute of limitation, for any balances found due, without interest, with the right of appeal, as in other cases," upon the claims of eight named persons who were described in the act as "traders," against the "Menominee tribe of Indians in Wisconsin, and against certain members of said tribe at the Green Bay Agency, for supplies, goods, wares, merchandise, tools, and live stock furnished certain members of the said tribe after the first day of January, in the year eighteen hundred and eighty, for the purpose of carrying on logging operations upon the Menominee Indian Reservation, in Wisconsin." The statute further provided: "Said court shall, in rendering judgment, ascertain and determine the amount, if any, due upon each of said claims, and if the court find that there is a liability upon any of said claims, it shall then determine if such liability be that of the said Menominee tribe of Indians as a tribe, or that of individual members of said tribe, and it shall [563] render judgment for the amount, if any, found due from said tribe to any of said claimants, and it shall render judgment, for the amounts, if any, found due from any of the individual members of said tribe to any of said claimants." The statute then provided the means by which the judgments, if any were rendered, whether against the tribe or against individual Indians, should be paid.

Green, the appellant, one of the traders named in the act, sought to recover from the Menominee tribe and 158 named members thereof an amount alleged to be the price of certain equipment and supplies alleged to have been furnished by him. The liability of the individual Indians was based upon averments that they had received during the years 1886 to 1889 the amount of the equipment and supplies sued for, and that they had contracted to pay for the same, the supplies having been furnished them to enable them to carry on logging operations on the Menominee Reservation in Wisconsin. The liability of the tribe was based on averments that it had expressly guaranteed that the individual Indians, members of the tribe, would pay for the supplies furnished them for the purposes and under the circumstances alleged. The defendants jointly demurred on two grounds: first, that the act conferring authority to bring suit was repugnant to the Constitution, and second, because the petition stated no cause of action. Holding that Congress had the undoubted power to pass the jurisdictional act, the court overruled the first ground. It also overruled the second ground as to the individual members of the tribe who were made

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defendants, but it sustained the exception of no cause of action as to the tribe, the court holding that "under the averments of the petition the Menominee Tribe of Indians is but a naked guarantor for the debt of another, and such promise, not being in writing, is void under the statute of frauds." The suit, as to the tribe, was therefore dismissed.

[564] By leave, an amended petition was filed stating a new cause of action and joining the United States as defendant. This petition, after alleging that the petitioner was a citizen of the United States and a resident of Wisconsin, and after counting upon the jurisdictional act, made in substance the following averments: That in 1881 the Menominee Indians on the reservation were in a destitute condition, and, to save them and their families from starvation, the United States granted them permission to cut and sell the dead and down timber on the reservation, "10 per cent of the proceeds to go to the benefit of the said tribe and those performing labor in that respect." That when it developed that the Indians, because of their extreme poverty and want of credit, could not procure the equipment and supplies which were essential to enable them to make use of the permission, the Commissioner of Indian Affairs sent a special agent, John A. Wright, to the Reservation, to make some arrangement whereby such condition could be remedied. That a council of the tribe was thereupon held, attended by all the chiefs and head men and practically all the members of the tribe, and it was agreed by and between the then Indian trader, M. Wescott, "as one party to the agreement, and the Menominee Indian Tribe as the other party thereto, that the said M. Wescott, the duly licensed Indian trader, at Keshena, Wisconsin, should furnish necessary equipment and supplies to those members of the tribe who desired to engage in logging operations to enable them to carry on such work, and support their respective families while so engaged, such equipment and supplies not to exceed the sum of $2.50 for each thousand feet of logs so cut and sold; that all logs cut and hauled by the Menominee Tribe in the logging operations were to be sold through the Indian agent, to the highest and best bidder; and that the prices for such supplies as were to be furnished by the petitioner should be such prices as were being paid in cash for similar [565] supplies in that part of the state, with transportation added; that said Menominee Tribe promised and agreed that such equipment and supplies so furnished should be paid for out of the first proceeds from the sale of the logs so to be cut and sold. That said agreement was made with the consent and approval of the Indian agent residing at Keshena, Wisconsin, and in charge of said Menominee Indian Reservation, and also by the said special agent, John A. Wright. That said agreement had the unanimous approval of all members of the tribe present at said council. That said agreement was made orally by the said M. Wescott, personally, and by the chiefs and head men on behalf of said tribe. . . ." It was alleged that the agreement thus made was carried out by the tribe and by Wescott, who made advances for the purposes of the operations in cutting the dead and down timber, and continued to do so until the year 1886, when Wescott ceased to be the Indian trader and was succeeded by Green, the petitioner, and one Stacy, whose rights the petitioner Green had acquired. The petition then charged that, as the condition of destitution and inability to obtain equipment and supplies which had led to the making of the agreement with Wescott yet prevailed after petitioner and Stacy became the Indian traders, on the 1st of January, 1887, it was agreed between petitioner and Stacy and the tribe that the previous agreement should be continued in full force and effect with petitioner and Stacy, the petition expressly averring that "said last-mentioned agreement was made with your petitioner and W. H. Stacy, personally, and on behalf of the Menominee Tribe, by the chiefs and head men thereof, which said chiefs and head men still continued to have and were recognized as having authority to make contracts in behalf of, and binding on, said tribe. That said last-mentioned agreement was approved by the Indian agent at Keshena, Wisconsin, and was acquiesced in by all members of said tribe, and treated by all [566] parties interested as valid and binding on the contracting parties."

It was averred that up to 1889 supplies were furnished in accordance with the agreement with the approval of the Indian agent and the United States, and with a few exceptions were paid for by the methods pointed out by the contract; that during the year 1889, however, supplies amounting to $13,087.46 were furnished to 158 members of the tribe, the name of each member and the amount supplied him being stated, for which payment had not been made either by the Indians, the tribe, or the United States.

It was further averred that such unpaid-for supplies were furnished "in accordance with and relying on said agreement," and that petitioner and Stacy "did not and would not extend credit to the individual members of said tribe, but extended such credit solely to the tribe, relying upon said agreement." It was further alleged that the

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proceeds from the sales of the dead and down timber cut and hauled by the Indians were received by the Indian agent, and if the amounts which came into his hands in accordance with the contract and which were subject by its terms to be applied to the payment of the supplies advanced under the terms of the agreement had been so applied, all the supplies would have been paid for; but that they remain unpaid for because "such proceeds were not so applied." After averring that the logging operations and the credits extended by the petitioner and Stacy were for the benefit of the tribe, the petition charged that "there is a large fund in the possession of the United States to the credit and for the benefit of said Menominee Tribe of Indians, derived through their logging operations, and now amounting to more than a million and a half dollars, which fund has been accumulated through the credit extended and assistance rendered by licensed traders to the Menominee Indians in logging operations," [567] but there was no averment that such sum or any part thereof was derived from payments made to the United States by the Indian agent of any portion of the sum derived from the 10 per cent provided for in the contract, and which it was contemplated would be used by the Indian agent for the purpose of paying the trader for the supplies furnished by him. There was also no averment that the money to the extent of the amount of the supplies which was received by the Indian agent out of the funds of the Indians, and which was not by him applied to pay for the supplies, was ever turned over to the Indians, or that they became in any way the beneficiaries thereof.

The petition concluded with the following averment and prayer:

"Your petitioner avers that there is due him from the Menominee Tribe of Indians, or from the individual members thereof, as may be found and adjudicated by the court, the sum of Thirteen Thousand and Eighty seven Dollars, Forty-six Cents ($13,087.46).

"Wherefore the petitioner prays judgment for Thirteen Thousand and Eighty-seven Dollars, Forty-six Cents ($13,087.46)."

By a general demurrer the defendants, besides questioning the right to file the amended petition, on the ground that it constituted an entire departure, and insisting in any event that if there was a right to file it, its averments did not state a cause of action, denied the right to implead the United States as a defendant, and challenged the constitutionality of the jurisdictional act. The court, without specifically directing its attention to the other grounds, came to consider whether the amended petition stated a cause of action, and deciding that it did not, dismissed the cause, and, as we at the outset said, the rightfulness of its action in so doing is the matter we are called upon to decide.

The contentions pressed upon the one side to sustain the correctness of the conclusion of the court below, and [568] on the other, to demonstrate the existence of reversible error, all but involve an examination of the reasoning which led the court to its conclusion, and we think the most direct way to dispose of the case will be to state under separate headings the propositions to which the court gave its sanction, and the reasons relied upon to establish that error was committed.

1. The court held that the jurisdictional act, except so far as concerned the statute of limitations, created no new right in favor of the petitioner, but simply afforded a means of establishing by a proceeding in the court of claims the existence, if any, of a claim against the tribe and the individual members of the tribe as such. From this premise the conclusion was deduced that the act gave no right to sue the United States, and conferred no jurisdiction upon the court below over claims against an Indian as a mere individual, aside from his membership of the tribe, or dissociated from his dependent condition as an Indian, subject, because of such condition, to the exercise by the United States of governmental supervision and control. The court consequently decided that it was not concerned with any supposed liability of the individual defendants as citizens of the United States, resulting from their purely individual and personal contracts, and which, therefore, were not related to or connected with tribal membership or the dependency resulting from status as an Indian, as distinguished from citizenship. We think the conclusions thus reached by the court are so clearly the necessary result of the text of the act that we content ourselves with referring to that text as a demonstration of their soundness.

2. Concluding that the relevant provisions of § 2103 of the Revised Statutes (which are in the margin†) were applicable [569] and

†Sec. 2103. No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person, in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to,

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controlling, as the contract alleged was not in writing and did not in other respects conform to the statute, it was held that no right to recover was stated in the petition. Again, we think that the conclusion of the court on this subject is so clearly within the text of the statute that it suffices to direct attention to such text without going further. But if it be conceded for argument's sake that there is ambiguity involved in determining from the text whether the statute is applicable, we are of the opinion that the case as made is so within the spirit of the statute, and so exemplifies the wrong which it was intended to prevent and the evils which it was intended to remedy as to dispel any doubt otherwise engendered. Nothing, we think, could more cogently demonstrate this statement than does the development in the court below concerning the claim in controversy: the uncertainty as to the alleged debtor, manifested by the claim against the individual members of the tribe as principals and against the tribe as a mere surety, shifting, as the exigencies of the case required, to a claim against the tribe as principal, and secondarily against the members as mere [570] accessories, culminating in a prayer for relief which, in and of itself, points to the uncertainty with which the transactions referred to were environed. And this is additionally fortified by observing that on the face of the petition it appears that an adequate amount of the labor and property of the tribe or of its individual members passed into the hands of the person designated under the alleged contract, and who, by its terms, was charged with the duty of paying it over for the equipment and supplies furnished. A situation which makes it clear that the controversy is not whether there is a liability express or implied for supplies and equipment received and not paid for, but upon whom the loss must fall resulting from the failure of the person designated under the asserted contract, and who received the money, to discharge his duty by paying it over to the furnisher of the supplies, who was a party to the alleged contract, and in whose interest and for whose benefit presumably the provision as to the retention and paying over of the money was made.

But it is said that the statute ought not to be held applicable because the petitioner was a licensed Indian trader, authorized to deal with the tribe and its members. But manifestly the right to deal did not confer power to deal by making unlawful contracts. And this consideration also answers the proposition so much insisted upon that because the asserted contract was made in the presence of and with the assent of an agent of the Interior Department, therefore the provisions of § 2103 should not be held applicable. We say the prior reasoning is controlling, since it cannot be held that the presence of the agent of the Interior Department authorized the doing of that which was expressly prohibited by law. In other words, that an unlawful contract became lawful because of the presence, at its making, of a public officer whose obvious duty it was to see to it that the law was not violated. Indeed, when the prohibitions of § 2103 are considered and the [571] presence of the representative of the Interior Department at the time the alleged agreement was entered into is borne in mind, if inferences are to be indulged in it is not to be inferred that that which was prohibited by law was done, but rather the assumption should be that instead of leaving the trader who was to furnish the equipment and supplies for utilizing, by the Indians, the dead and down timber, to depend for his payment upon the mere force of the contract agreements of the tribe or its individual members, having regard to the interest of the trader and his protection, and with his consent, it was arranged that the proceeds to arise from marketing the dead and down timber should go into the hands of the Indian agent, so that, before paying the Indians for their labor, the sum due for the supplies should be paid by the agent to the trader, thus in a sense impounding in the hands of the person selected by him the proceeds for the trader's benefit. And this view answers the contention made that, even in the absence of an express contract, there should have been a judgment against the tribe and its members upon the theory of an implied obligation to pay, arising from the fact of the receipt by the tribe or its members of supplies or equipment for which they had not paid. True, in a narrow sense it may be said that the case involves the right of

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annuities, instalments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall be executed before a judge of a court of record, and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

. . . . . .

All contract or agreements made in violation of this section shall be null and void, . . .

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the petitioner to be paid for the supplies furnished, but, from the point of view of the Indians in a broad sense the case as made involves deciding whether the petitioner should bear the loss of the failure of the agent to pay over to him out of the moneys retained for that purpose, the sum of the advances of supplies; that is to say, whether the Indians, after having placed in the hands of the designated person the sum of the supplies, are under the obligation to pay again,—that is, to pay twice.

Affirmed.

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[572] SOUTHERN RAILWAY COMPANY, Plff. in Err.,
v.
W. O. GADD.

(See S. C. Reporter's ed. 572–581.)

Error to circuit court of appeals — scope of review — questions of general law — manifest error.

1. A judgment of a Federal circuit court of appeals in an action based upon the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1324), will be affirmed by the Supreme Court where all the questions presented for decision are of general law, not involving the interpretation of a statute, and it does not clearly appear that error was committed in the decision of such questions.

[For other cases, see Appeal and Error, VIII. e; VIII. m, 1, in Digest Sup. Ct. 1908.]

Error to circuit court of appeals — scope of review — frivolous Federal question.

2. A question of interpretation of the Federal employers' liability act of April 22, 1908, as amended by the act of April 5, 1910, is not presented for review in the Federal Supreme Court on writ of error to a circuit court of appeals by the refusal of the request of the defendant, in a suit based on that statute, to take the case from the jury by a peremptory instruction, where, in view of the state of the proof, such request was absolutely without merit.

[For other cases, see Appeal and Error, VIII. e, in Digest Sup. Ct. 1908.]

Appeal — scope of review — questions not involved in record — instructions.

3. The question of the operation of the Federal employers' liability act of April 22, 1908, as amended by the act of April 5, 1910, on the doctrine of assumption of risk, cannot be said to arise on a record which shows that the trial court's statement in reply to an exception to the general charge based on the court's silence as to assumption of risk, that he understood the doctrine to have been abolished by that statute, was so qualified as to convey clearly that, as the matters to which the excepted charge related purely concerned the common-law principles of fellow servant and contributory negligence, they were controlled by the provisions of the statute, and there was nothing in the excepted portion of the general charge which in any possible way was relevant to the doctrine of assumption of risk,—especially as this question was not presented by any request to charge, nor raised on the motion for new trial, nor referred to in the assignments of error either in the circuit court of appeals or in the Supreme Court.

[For other cases, see Appeal and Error, VIII. j, 7, in Digest Sup. Ct. 1908.]

Error to circuit court of appeals — damages for delay.

4. Five per cent damages for delay will be awarded under United States Supreme Court rule 23 upon the affirmance of a judgment of a circuit court of appeals in a suit based on the Federal employers' liability act of April 22, 1908, as amended by the act of April 5, 1910, where the contentions that the interpretation of the statute was involved are wholly lacking in merit, the only questions presented for decision being those of general law, as to which it does not clearly appear that any error was committed.

[For other cases, see Appeal and Error, IX. h, in Digest Sup. Ct. 1908.]

[No. 645.]

Argued April 15, 1914. Decided May 11, 1914.

IN ERROR to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Western District of Tennessee in favor of plaintiff in an action brought under the Federal employers' liability act. Affirmed with interest and damages for delay.

See same case below, 207 Fed. 277.

The facts are stated in the opinion.

Mr. Caruthers Ewing argued the cause and filed a brief for plaintiff in error.

Messrs. Caruthers Ewing and L. E. Jeffries filed a brief in reply for plaintiff in error.

Mr. John L. Stout argued the cause and filed a brief for defendant in error.

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

On the constitutionality, application, and effect of the Federal employers' liability act—see note to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38.

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Mr. Chief Justice White delivered the opinion of the court:

The defendant in error on this record sued the railway company, the plaintiff in error, to recover damages for personal injuries alleged to have been suffered through its negligence. The cause of action was expressly based [576] upon the employers' liability act,† it being averred that at the time of the injury the plaintiff, as an employee of the defendant, was assisting in the actual movement of interstate commerce transportation in which the defendant company was then engaged. The case is here on error prosecuted by the railway company to a judgment of the court below affirming a judgment of the trial court upon a verdict. 207 Fed. 277.

In Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79, it was held that as the pleadings in that case based the right to recover upon an act of Congress, the safety appliance law, there was power in this court to review the judgment of a circuit court of appeals,—an authority which carried with it the duty to consider and pass upon all questions for decision in the case, even although they might not concern the interpretation of the act of Congress upon which the suit was based. But while thus ruling, it was nevertheless declared that, as questions of common-law negligence not involving the interpretation of the statute fell within the classes of questions which, under the distribution of judicial power made by the act of 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488] (re-expressed in the Judicial Code) were determinable by the circuit court of appeals in last resort, where such questions were brought here from a circuit court of appeals because they arose in a suit under the statute, and which for that reason alone could come here, whilst considering we would not reverse as to such questions unless it clearly appeared that error had been committed. Besides establishing this rule, it was further said that, in disposing of such questions, we would not feel it our duty to re-state the case and re-expound the principles applicable to its decision below, but would, as a general rule, leave those subjects where the circuit court of appeals had left them, and [577] would hence content ourselves with merely expressing our ultimate conviction of the case as formed after an adequate examination of the record. The principles announced in the King Case were subsequently expressly reiterated and applied in Seaboard Air Line R. Co. v. Moore, 228 U. S. 433, 57 L. ed. 907, 33 Sup. Ct. Rep. 580, and Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 57 L. ed. 1204, 33 Sup. Ct. Rep. 840, 3 N. C. C. A. 826. And in both of these latter cases it was recognized that the ruling in the King Case was equally applicable to cases brought here from the circuit court of appeals on the ground that the relief sought was based on the employers' liability act where the cause of action arose since the adoption of the Judicial Code.

Coming to the case made by this record, although, as we have said, it is manifest that the cause of action was based upon the employers' liability act, we are of the opinion that it presents for decision no question concerning the interpretation of that act, since all the questions which require to be decided merely involve considerations of general law depending in no sense upon the particular significance of the employers' liability act. Under these conditions it is apparent that the case is absolutely controlled by the King Case, and we therefore content ourselves with saying that, as after an adequate examination of the record we find no ground whatever affording a clear conviction that error was committed, affirmance must follow.

This disposes of the entire case; but as it is insisted that two propositions which it is asserted involve the meaning of the employers' liability act arose upon the record and require to be decided, we come not to decide the propositions, but to point out the absolute want of merit in the contention that they arose on the record for decision. The first contention is based upon the refusal of a request made by the defendant to take the case from the jury by a peremptory instruction. Granting that, in its ultimate analysis, the request involved an appreciation of the [578] employers' liability act, nevertheless we are of opinion that the absolute want of merit in the proposition, in view of the state of the proof, caused the request, intrinsically considered, to be so unsubstantial and frivolous as not to furnish any support for the contention that its refusal raised a question concerning the interpretation of the statute.

The second contention rests upon the assumption that the court below affirmed a supposed action of the trial court in erroneously instructing the jury that the effect of the employers' liability act was to abolish the doctrine of assumption of risk. The proposition is thus stated in the opening sentences of the argument of the plaintiff in error: "The trial judge held that said employers' liability act abolished the defense of assumed risk, so that the construc-

†The employers' liability act of April 22, 1908, 35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322, as amended April 5, 1910, 36 Stat. at L. 291, chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1324.

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tion of the act is here involved." A brief statement of the condition of the record on the subject is necessary to demonstrate the entire want of foundation for the proposition. The plaintiff was a locomotive fireman, and the controversy in the case was whether the personal injury which he suffered was occasioned by the reckless and negligent conduct of the engineer in moving the engine under the circumstances disclosed by the proof. In its general charge, the court had instructed the jury that the plaintiff was entitled to recover if they believed the testimony of the plaintiff, which disclosed an unusual and reckless movement of the engine by the engineer after he had directed the fireman to descend from the engine to ascertain whether there was a defect in its mechanism. Coming, then, to consider special charges asked by the respective parties, the court gave a charge requested by the plaintiff, as follows: "If you believe from the evidence that the plaintiff was directed by the engineer Hunter to get off the engine and examine the engine for defects, then, while said plaintiff was obeying the direction of Hunter, it was Hunter's duty to look out for plaintiff, and not move [579] the engine until he knew that plaintiff was in a position of safety." Upon the giving of this charge the defendant excepted as follows: "I want to take exception to that last statement on the ground that the fact that he moved up that engine if he was in a place of safety is not stated to be any cause of action in this case, and not involved in the pleadings, and he was not injured by virtue of it." And the counsel added: "We further except to the statement that the court made to the jury (evidently referring to the general charge) that if they believed the facts as stated by the plaintiff, which left out of question the doctrine of assumed risk." In response to which the court said: "I understand that the doctrine of assumed risk is abolished by the employers' liability act, in so far as relates to cases wherein the servant is injured because of the negligence of any of the officers, agents, or employees, etc., of the carrier, and contributory negligence is modified so as that it no longer bars the right of action, but goes in reduction of the amount of recovery. But you reserve your exception." From this statement it is evident that no charge whatever was given by the court concerning the assumption of risk, and hence that no exception was or could have been taken to any such charge, and that the exception which was reserved concerned the special charge as to the conduct of the engineer and the portion of the general charge concerning liability if the testimony of the plaintiff as to the negligence of the engineer was believed, the exception as to the latter having been placed on the ground that the court had been silent as to assumption of risk. And it is equally clear that this view is not affected by taking into account the reply of the court to the comment of counsel. We say this because, while the reply echoed the counsel's mistaken use of the words "assumed risk," by the qualification which is affixed to these words, it clearly conveyed that as the matters to which the excepted charge related purely concerned the common-law [580] principles of fellow servant and contributory negligence, they were controlled by the provisions of the statute. And this becomes certain when it is borne in mind that there was nothing in that portion of the general charge which was excepted to which, in any possible view, was relevant to the doctrine of assumption of risk. If there were room for the slightest doubt on the subject it is dispelled by the following considerations: (a) because the record contains no intimation of any request for instruction concerning assumption of risk made by the defendant; (b) because although the elaborate application for a new trial stated many alleged grounds, not the slightest reference was made to any supposed error committed with reference to the mistaken construction of the statute concerning assumption of risk which is now relied upon; (c) because while, in the assignments of error made for the purpose of review by the circuit court of appeals, the special charge in connection with which the colloquy between court and counsel took place was referred to, and error assigned concerning it for specified reasons, no reference was made to the alleged mistake which is now relied upon concerning the wrongful interpretation of the statute as to assumption of risk. It may indeed be inferred that in the argument in some form alleged error on such subject was called to the attention of the circuit court of appeals, since that court, in its opinion, considered and disposed of the subject by directing attention to the qualifying words used in the remarks of the trial judge, and to the fact that, as assumption of risk was not at all involved in the testimony to which the charge related, no prejudicial error could have arisen. Certain is it, however, that in the assignments of error made for the purposes of review by this court, no complaint whatever was made of the alleged mistake concerning the operation of the statute upon the doctrine of assumed risk.

Before coming to order the judgment of affirmance [581] which is the necessary result of what we have said, we briefly state the considerations which lead us to the con-

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clusion that our duty is, in directing such judgment, to award interest by way of damages for delay under the terms of the second paragraph of rule 23. It is manifest on the face of the record that the case was carefully and fully considered in both of the courts below. In view of the ruling in the King Case and of what we have said concerning the contentions advanced to support the assertion that the interpretation of the statute was here involved, we think the conclusion that the writ of error was prosecuted only for delay is plainly justified, and that a penalty by way of damages should be imposed. The judgment below is therefore affirmed with 5 per cent upon the amount of the judgment in addition to the interest allowed by law.

Affirmed with interest and 5 per cent damages.

O. ITOW and E. Fushimi, Plffs. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 581-586.)

Error to Alaska district court — capital cases.

1. The general right under the prior law to a direct review in the Federal Supreme Court of judgments of the district court of Alaska in capital cases was taken away by the provision of the Judicial Code, § 134 (36 Stat. at L. 1134, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 195), which makes the judgments of the circuit court of appeals of the ninth circuit final in all cases, including criminal cases "other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States, as provided in § 247," by which such right to direct review is confined to prize causes and those which involve certain designated Federal questions.

[For other cases, see Appeal and Error, 962-966, in Digest Sup. Ct. 1908.]

Error to Alaska district court — Federal question — when raised.

2. The jurisdiction of the Federal Supreme Court under the Judicial Code, § 247, to review judgments of the district courts of Alaska because of the presence of a constitutional question exists only when such question was actually raised in the trial court.

[For other cases, see Appeal and Error, 974-979, in Digest Sup. Ct. 1908.]

[No. 714.]

Argued and submitted April 8, 1914. Decided May 11, 1914.

IN ERROR to the District Court of the United States, Division No. 1, Territory of Alaska, to review a conviction under an indictment for murder. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Mr. J. H. Cobb submitted the cause for plaintiffs in error.

Assistant Attorney General Adkins argued the cause, and, with Mr. Karl W. Kirchwey, filed a brief for defendant in error.

Solicitor General Davis also filed a brief for defendant in error.

Mr. Chief Justice White delivered the opinion of the court:

By an indictment found in the court below on the 13th of December, 1912, the plaintiffs in error, Itow and Fushimi, were charged with having murdered one Frank Dunn, on the 14th day of July, 1912, and to a verdict of murder and sentence of death against Itow, and of manslaughter and sentence of twenty years' imprisonment against Fushimi, this direct writ of error is prosecuted.

The government moves to dismiss for want of jurisdiction, and at the threshold that motion requires to be disposed of. The crime charged was committed after the enactment of the Judicial Code, and there is no question as to the applicability of its relevant provisions. By § 134 of [583] that Code [36 Stat. at L. 1134, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 195] governing the right to review cases in the district of Alaska or any division thereof, power is conferred on the circuit court of appeals of the ninth circuit to review, and its judgments in such cases are made final, all cases, including all criminal cases "other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States, as provided in section two hundred and forty-seven." It is obvious that this section changed the general rule of the prior law by taking capital cases out of the class which could come, because they were capital cases, directly to this court, and by bringing such cases within the final reviewing power of the circuit court of appeals of the ninth circuit.

Section 247, which, as pointed out in § 134, defines the cases which are excepted from the general rule provided by § 134, gives authority to this court to directly review the action of the district courts of Alaska "in prize cases; and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question, or

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in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

These provisions being but a re-expression of the language by which the subject of direct review by this court was governed, as provided in the 5th section of the judiciary act of 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488], the settled meaning which was affixed by the decisions of this court to the provisions as found in the act of 1891 necessarily determines the significance of the provisions of the section under consideration.

In Ansbro v. United States, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187, where it became necessary in a criminal case to determine whether there was a right to come directly to this court from a circuit court of the United States in virtue of the [584] provisions of the 5th section of the act of 1891, the court, speaking through Mr. Chief Justice Fuller, said:

"The jurisdiction of this court must be maintained, then, if at all, on the ground that this is a case 'that involves the construction or application of the Constitution of the United States,' or 'in which the constitutionality of any law of the United States is drawn in question.' But we cannot find that any constitutional question was raised at the trial. Motions to quash, to instruct the jury to find for the defendant, for new trial, and in arrest of judgment, were made, but in neither of them, so far as appears, nor by any exception to rulings on the admission or exclusion of evidence, nor to instructions given, or the refusal of instructions asked, was any suggestion made that defendant was being denied any constitutional right, or that the law under which he was indicted was unconstitutional. The first time that anything appears upon that subject is in the assignment of errors, filed February 13, 1895.

"A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised, on the ground of error in the disposal of such a claim by its decision. . . . An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below, and rulings asked thereon, so as to give jurisdiction to this court under the 5th section of the act of March 3, 1891 [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549]."

And the doctrine thus announced has been followed and applied in many cases. Cornell v. Green, 163 U. S. 75, 79, 80, 41 L. ed. 76-78, 16 Sup. Ct. Rep. 969; Muse v. Arlington Hotel Co. 168 U. S. 430, 435, 42 L. ed. 531, 532, 18 Sup. Ct. Rep. 109; [585] Cincinnati, H. & D. R. Co. v. Thiebaud, 177 U. S. 615, 619, 44 L. ed. 911, 912, 20 Sup. Ct. Rep. 822; Paraiso v. United States, 207 U. S. 368, 52 L. ed. 249, 28 Sup. Ct. Rep. 127.

The assignments of error relate to these subjects: 1. Error asserted to have been committed by the court in refusing to allow a continuance pending the arrival of certain witnesses, thereby, it is asserted, "denying the defendant the right to have their counsel make an opening statement to the jury." 2. Error committed by the court in permitting the jury, with the consent of the accused, to separate after they were selected and impaneled and sworn. 3. Error by the court in refusing to discharge the jury because of an alleged publication made in a local newspaper during the trial, although the refusal of the court was based upon its opinion, formed after a statement by the jurors, that they had not seen the publication referred to. 4. Error committed by the court in admitting in evidence against Fushimi a statement made by him concerning the crime.

But in the light of the settled rule which we have stated it is apparent on the face of the record that the assignments are wholly inadequate to give us the power to directly review, since there is nothing whatever directly or indirectly even intimating that the reliance on the Constitution was stated at the trial below in any form.

It may be fairly presumed under these circumstances that the direct writ of error from this court was sued out overlooking the fact that, by operation of the Judicial Code, the general right to direct review in capital cases was taken away, or that the writ was prosecuted upon the assumption that the right to a direct review existed in any case where it was possible in this court to argue as to the existence of a constitutional right, wholly irrespective of whether the constitutional question relied upon was raised and considered in the lower court. But the latter conception overlooks the conclusively settled rule to which we have referred that the power to directly review [586] because of a constitutional question obtains only where such question was involved in the trial court; that is, was there actually raised. The destructive effect on the distribution of judicial power made by the act of 1891 which would result from holding that jurisdiction to directly review obtained in any case because of a constitutional question, irrespective of the making of such question in the trial court,

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merely because of the possibility, after completion of the trial below, of suggesting for the first time such question as the foundation for resorting to direct review, is apparent and finds apt illustration in this case. Thus, although the accused made no objection, constitutional or otherwise, to the permission given by the court to the jury to separate, and indeed expressly assented to such separation, yet, as one of the grounds for direct review by this court it is insisted that, as the Constitution guaranteed a jury trial according to the course of the common law, and permission to separate could not be granted under that law, therefore the accused was deprived of a constitutional right.

It is to be observed that confining the right to direct review because of a constitutional question to cases where such question was raised in the trial court, that is, was there involved, does not deprive this court of the ultimate power to pass upon constitutional questions where it is necessary to do so, since if such a question not raised in the trial court, germinates or emerges in a circuit court of appeals, the right of that court to certify affords an opportunity of obtaining a review of the question by this court, and, in the absence of a certification of the question, the authority of this court to grant a writ of certiorari would enable the same result to be accomplished if, in the judgment of this court, the constitutional question was of sufficient importance to justify the calling into play of that power.

Dismissed for want of jurisdiction.

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[587] AMBROSIO APAPAS, Cornelio Lubo, Francisco Lubo, et al., Plffs. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 587–592.)

Error to district court — jurisdiction below — certificate.

1. A question of the jurisdiction below is inadequate to sustain a direct writ of error from the Federal Supreme Court to a district court, where such writ of error brings up the whole case, and not the question of jurisdiction, as provided in the Judicial Code, § 238, governing such review, and there is no certificate as to the jurisdiction, as required by that section.

[For other cases, see Appeal and Error, 879–887, 919–937, in Digest Sup. Ct. 1908.]

Error to district court — frivolousness of Federal question.

2. The contention that the ancestors of certain Indians, charged with a murder committed on an Indian reservation within a state, became, by virtue of the treaty of Guadalupe Hidalgo with Mexico of February 2, 1848 (9 Stat. at L. 922), citizens of the United States and of the state, and were therefore not amenable to prosecution for such murder in the Federal courts, is so absolutely lacking in merit as in no real sense to involve the construction of the treaty within the meaning of the Judicial Code, § 238, governing writs of error from the Federal Supreme Court to the district courts.

[For other cases, see Appeal and Error, 938–989, in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — crime on Indian reservation.

3. Murder committed by Indians on a United States Indian reservation within a state is a crime against the authority of the United States, expressly punishable by the Penal Code, § 328 (35 Stat. at L. 1151, chap. 321, U. S. Comp. Stat. Supp. 1911, p. 1685), and within the cognizance of the Federal courts, without reference to the citizenship of the accused.

[For other cases, see Courts, 1468–1471, in Digest Sup. Ct. 1908.]

Error to district court — Federal question — raising below.

4. The admission over objection of testimony as to a statement or admission of the accused does not involve a question as to his constitutional right to protection against compulsory self-crimination which, under the Judicial Code, § 238, will sustain a writ of error from the Federal Supreme Court to a district court to review the conviction, where no reference was made to the Federal Constitution at the time the objection was taken, and there is nothing to indicate that the attention of the court was directed to the fact that there was any controversy or dispute involving such Constitution.

[For other cases, see Appeal and Error, 974–984, in Digest Sup. Ct. 1908.]

[No. 746.]

Argued April 8, 1914. Decided May 11, 1914.

IN ERROR to the District Court of the United States for the Southern District of California to review a conviction of murder committed by Indians on a United States Indian Reservation. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Mr. Miguel Estudillo argued the cause, and, with Mr. Theodore Martin, filed a brief for plaintiffs in error.

NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

On jurisdiction to punish crimes committed by or against Indians—see note to State v. Campbell, 21 L.R.A. 169.

On Federal control of Indians—see note to Worcester v. Georgia, 8 L. ed. U. S. 484.

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Assistant Attorney General Adkins argued the cause and filed a brief for defendant in error.

Solicitor General Davis also filed a brief for defendant in error.

[588] Mr. Chief Justice White delivered the opinion of the court:

Ten persons described as Indians were, in July, 1912, indicted for the murder of William H. Stanley, a white person, "at, upon, and within the limits of a United States Indian Reservation known as the Cahuilla Indian Reservation in the county of Riverside, within the southern division of the southern district of California, and within the jurisdiction" of the court below, in violation of §§ 273, 275, and 328 of the Penal Code of 1909. [35 Stat. at L. 1143, 1151, chap. 321, U. S. Comp. Stat. Supp. 1911, pp. 1671, 1672, 1685.] As the result of a trial, four of the accused were acquitted, and the six who are plaintiffs in error here were convicted of murder in the second degree, and sentenced to ten years' imprisonment each, and prosecute this direct writ of error to reverse such conviction and sentence. There are one hundred assignments of error, but before we come to consider them we must dispose of a motion made by the government to dismiss on the ground that we are without jurisdiction because the case is susceptible only of review by the circuit court of appeals of the ninth circuit.

Undoubtedly, under the general provisions of § 128 of the Judicial Code [36 Stat. at L. 1133, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 193], power to review is lodged in the circuit court of appeals of the ninth circuit, and our authority, if any to consider the case, depends, therefore, upon whether it comes within the class of cases authorized to be brought directly here from a trial court under the provisions of § 238. By such section, in addition to the power conferred to bring directly to this court a question of jurisdiction of a trial court as a Federal court, under the conditions and subject to the limitations stated, the right to directly review in a case of this kind is conferred only "in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its [589] authority, is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

The settled significance of these provisions we have just pointed out in the case of Itow v. United States, just decided [233 U. S. 581, ante, 1102, 34 Sup. Ct. Rep. 699], and under the principle there applied it follows that we must determine the right to direct review by ascertaining whether any of the issues enumerated in the provisions of § 238 were below involved in the cause. Coming to apply this test, only three out of the matters assigned as error have any conceivable relation to the conditions defined by the statute as essential to give the right to a direct review. They are: (1) a challenge of the jurisdiction of the court below; (2) a contention as to the effect of the treaty of Guadalupe Hidalgo [9 Stat. at L. 922]; (3) an assertion that a constitutional question was involved in the action of the trial court in admitting over objection, testimony as to a statement or admission of Ambrosio Apapas, one of the accused.

As to the first, while it was raised below, it is obviously inadequate to sustain the right to direct review, since, under the writ of error, the whole case is brought here, and not the question of jurisdiction alone, as provided in § 238, and because there is no certificate as to the jurisdiction, as required by the section. Maynard v. Hecht, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353; Chappell v. United States, 160 U. S. 499, 507, 40 L. ed. 510, 512, 16 Sup. Ct. Rep. 397; Courtney v. Pradt, 196 U. S. 89, 91, 92, 49 L. ed. 398, 399, 25 Sup. Ct. Rep. 208.

While the second contention based upon the treaty of Guadalupe Hidalgo was raised in the lower court, it in no sense involved the validity or construction of the treaty, and therefore affords no support for the right to directly review. In substance the proposition concerning the treaty is this: that as the ancestors of the accused prior to the termination of the war with Mexico were citizens of Mexico, and became by the treaty citizens of the United States and of the state of California, they were therefore [590] not amenable to prosecution in the courts of the United States for the crime of murder committed within the state of California, however much they may have been susceptible of being prosecuted for such crime in an appropriate state court. But assuming, for argument's sake, the premise based on the treaty to be sound, and disregarding, for brevity's sake, the fact that the accused were tribal Indians, leading a tribal life, and living on a tribal reservation under the control of the United States, the deduction based on the premise is so absolutely devoid of merit as not in any real sense

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to involve the construction of the treaty. We so say because the prosecution was for murder committed by Indians on a United States Indian reservation, and therefore was for a crime against the authority of the United States, expressly punishable by statute (§ 328, Penal Code), and within the cognizance of the courts of the United States, without reference to the citizenship of the accused, as settled by a long line of authority. United States v. Kagama, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; United States v. Celestine, 215 U. S. 278, 54 L. ed. 195, 30 Sup. Ct. Rep. 93; Donnelly v. United States, 228 U. S. 270, 57 L. ed. 831, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913E, 710; United States v. Sandoval, 231 U. S. 39, ante, 111, 34 Sup. Ct. Rep. 1. Indeed, in answering the argument of the government on the motion to dismiss, if not in express terms, at least virtually, it is conceded that the two propositions we have disposed of thus are inadequate to sustain the resort to a direct writ of error. But it is urged that the third contention plainly is sufficient for that purpose, that contention, as we have said, being based upon an exception taken to the action of the trial court in receiving testimony concerning an alleged statement or admission made by one of the accused, Apapas. But we search the record in vain to find the slightest reference made to the Constitution of the United States at the time the objection referred to was taken, or anything whatever to indicate in any manner that the attention of the court below was directed to the fact that there [591] was any controversy or dispute involving the Constitution of the United States.

Under this condition, as pointed out in the case of Itow v. United States, supra, there is no ground whatever for saying that a constitutional right was involved within the exceptions created by § 238 so as to justify disregarding the regular course of judicial procedure by coming directly to this court. The theory upon which it is insisted in argument that the right to direct review results because of the action of the trial court as to the admission of the statement is based upon the premise that because the Constitution guaranteed against compulsory self-incrimination, therefore any objection made to the admission of the statement or confession by the accused necessarily and inherently involved a constitutional right, and amounted to a statement of the same, although no express mention was made of the Constitution, and nothing appears to indicate that any contention whatever existed as to the significance and operation of the Constitution. But this proposition, if carried to its legitimate conclusion, would embrace every conceivable controversy as to every possible right, since, under a constitutional system of government, all rights, in their last analysis, are referable to the safeguards of the Constitution. But we need not further demonstrate the unsoundness of the contention, since it is directly in conflict with the settled rule which we have just re-stated in the Itow Case. And although to go further is superfluous, to prevent misconception or unfounded inferences as to what we decide, we say that must not be understood as holding that, even although it be assumed, for the sake of argument, that the constitutional guaranty against compulsory self-incrimination would apply to an objection made to the offer in evidence of an admission by an accused person, it would follow that such guaranty would be involved in an objection to the admission in evidence of a confession in [592] the sense of § 238, even if, in making the objection, the guaranty of the Constitution was expressly referred to, unless there was some real controversy concerning the meaning of the constitutional guaranty. We make this reservation because it is quite apparent that such an objection, in the absence of some difference as to the significance of the Constitution, might well involve but the exercise of discretion as to the order or method of proof, and the calling into play of judgment to determine whether or not the proof as offered brought the question which was to be decided within the undisputed scope of the constitutional safeguard. In other words, we do not hold that any and every objection to the admission of a statement or confession of an accused can be made to involve the construction of the Constitution merely by referring to that instrument when in substance and effect there is no controversy concerning the Constitution, but only a contention as to the methods of procedure. Conceptions which are well illustrated by the record before us, where the entire argument concerning the Constitution is based on the following objection taken to the admission of the statement of the accused: Counsel for accused, "One minute. We object that there is no proper foundation laid for a confession, as there is no evidence to show that there was any (no) inducement or immunity offered, or what the circumstances were under which the statement was made."

Dismissed for want of jurisdiction.

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[593] CORNELL STEAMBOAT COMPANY, Plff. in Err.,
v.
PHŒNIX CONSTRUCTION COMPANY.
(No. 933.)

CORNELL STEAMBOAT COMPANY, Plff. in Err.,
v.
PHŒNIX CONSTRUCTION COMPANY.
(No. 934.)

CORNELL STEAMBOAT COMPANY, Plff. in Err.,
v.
PHŒNIX CONSTRUCTION COMPANY.
(No. 935.)

(See S. C. Reporter's ed. 593–600.)

Error to state court — Federal question — decision on non-Federal ground.

1. A judgment of a state court that a steamboat company must answer for the damage to certain boring plants in the Hudson river, the result of collisions with its boats, which is based upon two grounds, *viz.*, that there was sufficient Federal authority for the erection and maintenance of such boring plants, and that, even if such plants were unlawful obstructions, the collisions were caused by the exclusive negligence of the steamboat company, is not excluded from the appellate jurisdiction of the Federal Supreme Court on the theory that such judgment rests upon a non-Federal ground adequate to sustain it, since the determination of the issue of negligence necessarily involved a consideration of the nature of the obstructions, and the ascertainment whether, in and of themselves, they so interfered with or impeded the right to carry on interstate commerce by using the river as to make the mere presence of the obstructions the efficient and proximate cause of the collisions.

[For other cases, see Appeal and Error, 1465–1528, in Digest Sup. Ct. 1908.]

Error to state court — affirmance on motion.

2. The judgment of a state court will be affirmed on motion by the Federal Supreme Court where the proposition upon which the contention as to jurisdiction to review such judgment must rest is entirely without foundation.

[For other cases, see Appeal and Error, VII. g, in Digest Sup. Ct. 1908.]

Collision — with unlawful obstruction — negligence.

3. The lack of sufficient Federal authority for the erection of certain boring plants in the Hudson river does not exempt a steamboat company from liability for the damages inflicted upon such structures in collisions with the boats of the steamboat company, caused solely by that company's negligence, and not contributed to in any way by the owner of the boring plants.

[Matters as to collision, see Collision, in Digest Sup. Ct. 1908.]

[Nos. 933, 934, and 935.]

Submitted April 27, 1914. Decided May 11, 1914.

THREE WRITS OF ERROR to the Supreme Court of the State of New York in and for the County of New York to review judgments entered pursuant to the mandate of the Court of Appeals, which affirmed judgments of the Appellate Division of the Supreme Court, First Department, which had in turn affirmed judgments of the Supreme Court in favor of plaintiff in an action to recover damages arising out of a collision. Affirmed on motion.

See same case below, in court of appeals, 210 N. Y. 113, 103 N. E. 891; in appellate division, 146 App. Div. 951, 131 N. Y. Supp. 1138.

The facts are stated in the opinion.

Mr. **J. Parker Kirlin** submitted the cause for plaintiff in error:

Where the issue raised by the question of Federal statute is controlling in the decision of the suit, as in this case, the Supreme Court will take jurisdiction of the case on a writ of error.

Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429.

Even if the court below attempted to base its decision upon the defendant's negligence, it could not properly make negli-

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On the necessity of color of merit in Federal question to sustain writ of error to state court—see note to Offield v. New York, N. H. & H. R. Co. 51 L. ed. U. S. 231.

As to rules for avoiding collisions, generally—see notes to St. John v. Paine, 13 L. ed. U. S. 537; Williamson v. Barrett, 14 L. ed. U. S. 68; The Abbotsford v. Johnson, 25 L. ed. U. S. 108; The E. A. Packer v. New Jersey Lighterage Co. 35 L. ed. U. S. 453; The Imperial & The S. G. Reed, 3 L.R.A. 234; and The Umbria, 41 L. ed. U. S. 1053.

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gence the sole ground for a recovery under a correct construction of the statute.

Montgomery v. Portland, 190 U. S. 89, 47 L. ed. 965, 23 Sup. Ct. Rep. 735; Cummings v. Chicago, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472; Hart v. Albany, 9 Wend. 571, 24 Am. Dec. 165; Moore v. Pilot Comrs. 32 How. Pr. 184; Blanchard v. Western U. Teleg. Co. 60 N. Y. 517; Moore v. Jackson, 2 Abb. N. C. 211; Gold v. Carter, 9 Humph. 369, 49 Am. Dec. 712; Garey v. Ellis, 1 Cush. 306; Rathbun v. Payne, 19 Wend. 399; Foley v. McKeever, 56 App. Div. 517, 67 N. Y. Supp. 559; Haskell v. New Bedford, 108 Mass. 208.

There is no question but that these obstructions to navigation in the Hudson river, erected by the Construction Company, were nuisances if they were not properly authorized.

North Shore Boom & Driving Co. v. Nicomen Boom Co. 212 U. S. 406, 53 L. ed. 574, 29 Sup. Ct. Rep. 355; People v. Vanderbilt, 26 N. Y. 287, 28 N. Y. 396, 84 Am. Dec. 351; People v. Horton, 64 N. Y. 610; Woodman v. Kilbourn Mfg. Co. 1 Abb. (U S.) 158, Fed. Cas. No. 17,978; Hart v. Albany, 9 Wend. 571, 24 Am. Dec. 165.

There can be no doubt that where a person claims a right under a Federal statute to carry on his business in a certain way, and this right is denied him by any court, the question whether or not he has been deprived of his right or immunity is one which this court is authorized to pass on.

Belden v. Chase, 150 U. S. 674, 37 L. ed. 1218, 14 Sup. Ct. Rep. 264; Baltimore & O. R. Co. v. Maryland, 21 Wall. 456, 22 L. ed. 678; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488.

Where it appears that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction, the case is one arising under the laws or Constitution of the United States.

Cooke v. Avery, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340; Nevada Sierra Oil Co. v. Miller, 97 Fed. 690; Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 576, 23 Sup. Ct. Rep. 365.

The motion to affirm is premature, and should not be granted before the cases have been reviewed upon the writs of error.

Steele v. Culver, 211 U. S. 26, 53 L. ed. 74, 29 Sup. Ct. Rep. 9; Micas v. Williams, 104 U. S. 556, 26 L. ed. 842; Jenkins v. Banning, 23 How. 455, 16 L. ed. 580; Wehner v. Bauer, 160 Fed. 240.

Mr. E. Crosby Kindleberger submitted the cause for defendant in error:

Where a state court decides a case upon an independent ground not within the Federal objections taken, and the non-Federal ground is sufficient to maintain the judgment, the writ of error will be dismissed.

Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; California Powder Works v. Davis, 151 U. S. 389, 393, 38 L. ed. 206, 208, 14 Sup. Ct. Rep. 350; Leathe v. Thomas, 207 U. S. 93, 98, 52 L. ed. 118, 120, 28 Sup. Ct. Rep. 30; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 116, 53 L. ed. 431, 433, 29 Sup. Ct. Rep. 227; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 57 L. ed. 982, 33 Sup. Ct. Rep. 609; Adams v. Russell, 229 U. S. 353, 358, 359, 57 L. ed. 1224, 1226, 1227, 33 Sup. Ct. Rep. 846.

The Federal question must be the turning point of the case, and its decision necessary for the judgment sought to be reviewed.

De Saussure v. Gaillard, 127 U. S. 216, 234, 32 L. ed. 125, 132, 8 Sup. Ct. Rep. 1053; California Powder Works v. Davis, 151 U. S. 389, 393, 38 L. ed. 206, 207, 14 Sup. Ct. Rep. 350; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 487, 56 L. ed. 1171, 1176, 32 Sup. Ct. Rep. 790; First Nat. Bank v. Estherville, 215 U. S. 341, 346, 54 L. ed. 223, 227, 30 Sup. Ct. Rep. 152.

The Federal question necessary to give this court jurisdiction must be substantial and real, and not devoid of merit or frivolous.

Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 311, 47 L. ed. 190, 192, 23 Sup. Ct. Rep. 123; Gring v. Ives, 222 U. S. 365, 56 L. ed. 235, 32 Sup. Ct. Rep. 167; Deming v. Carlisle Packing Co. 226 U. S. 102, 105, 57 L. ed. 140, 142, 33 Sup. Ct. Rep. 80; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 57 L. ed. 982, 33 Sup. Ct. Rep. 609.

Even conceding that the plaintiff's vessels and borings were improperly in the channel, the want of care in navigating defendant's tows required judgments for the plaintiff.

Grand Trunk R. Co. v. Ives, 144 U. S. 408, 429, 36 L. ed. 485, 493, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; Herr v. St. Louis & S. F. R. Co. 98 C. C. A. 550, 174 Fed. 938; The Plymouth, 108 C. C. A. 217, 186 Fed. 108; Chunn v. City & Suburban R. Co. 207 U. S. 302, 309, 52 L. ed. 219, 222, 28 Sup. Ct. Rep. 63; Austin v. New Jersey S. B. Co. 43 N. Y. 75, 3 Am. Rep. 663; Silliman v. Lewis, 49 N.

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Y. 379; Gring v. Ives, 222 U. S. 365, 56 L. ed. 235, 32 Sup. Ct. Rep. 167; The Edmund L. Levy, 108 Fed. 435, affirmed in 75 C. C. A. 468, 144 Fed. 666.

Mr. Chief Justice White delivered the opinion of the court:

The cases are before us on a motion to dismiss or affirm, and the facts essential to its consideration are these:

The Phœnix Construction Company, defendant in error, brought three actions to recover damages alleged to have resulted from the negligence of the Cornell Steamboat Company, plaintiff in error, in permitting its tugs and canal boats on three separate occasions in the year 1908 to collide with certain scows and other property of the Construction Company on the Hudson river. The cases were tried by a referee, resulting in judgments against the [596] Steamboat Company, which were affirmed by the appellate division of the supreme court (146 App. Div. 951, 131 N. Y. Supp. 1138), and by the court of appeals (210 N. Y. 113, 103 N. E. 891). These writs of error were then prosecuted to the court below, to which the records were remitted by the court of appeals, upon the theory that Federal questions were involved and wrongly decided.

The Construction Company was a contractor for the Board of Water Supply of the City of New York, and in the year 1908 was engaged in making test borings in the bed of the Hudson river for the purpose of determining where it was best to tunnel under the river in the construction of the Catskill aqueduct. At the times of the collisions complained of boring operations were carried on simultaneously at four points on a line across the river near Storm King mountain, and it was with plants established at certain of these borings, consisting of pipes, drills, platforms, scows, and other property, that canal boats in tow of the Steamboat Company collided. The referee found in each case that the location of the borings was known to the masters of the tugs, who had many time passed between them with tows; that upon the nights of the accidents, lights which could be seen for more than a mile were displayed on the borings; that the collisions were the direct result of the negligence of the servants of the Steamboat Company in charge of its tugs, and that the Construction Company was in nowise negligent. In addition, considering the defense made by the Steamboat Company that it was not liable because the structures of the Construction Company were unlawful obstructions in the channel, erected and maintained without a lawful permit from the Secretary of War, and without authority of Congress, as required by §§ 9 and 10 of the act of March 3, 1899 (chap. 425, 30 Stat. at L. 1151; U. S. Comp. Stat. 1901, pp. 3540, 3541), the findings of the referee were in substance these: In 1906, upon the application of the [597] Board of Water Supply of New York City, a permit was issued by the Secretary of War, authorizing borings to be made in the bed of the Hudson river at certain points near New Hamburg, and that subsequently such permit was modified by communications signed by members of the corps of engineers of the United States Army located in New York city, and having charge of the district in which the work was being executed, so as to permit the borings to be carried on at points near Storm King. Under these facts the referee stated that, in his opinion, it was extremely doubtful whether the Construction Company was lawfully authorized to establish its boring plants in the river, but held that even although the permits did not constitute lawful authority and the boring plants were unlawful obstructions in the river, the Steamboat Company was not, because of that circumstance, relieved of its duty to exercise ordinary care, and his decision in each case was based solely upon the fact that the collisions were caused by the exclusive negligence of the steamboat Company. In affirming the judgments the appellate division filed no opinion, although it appears that two of the justices concurred "solely on the ground that authority was given by the Secretary of War to make the borings and anchor the barges in the river," from which it is to be inferred that a majority of the court were of opinion that the judgments were amply sustained by the reasoning of the referee. The court of appeals, however, while stating that, as the actions were for common-law negligence, the ground of negligence stated by the referee was adequate to sustain the judgments, also considered the contention based upon the statute, and additionally placed the affirmance upon the conclusion that the facts found by the referee, which were concluded by the unanimous affirmance by the appellate division, were sufficient to establish authority given by the Secretary of War for the operations carried on by the Construction Company, and that the [598] contention of the Steamboat Company that action by Congress was essential to authorize the Construction Company to do the work was without foundation.

The assignments of error here insisted upon as involving a Federal question are directed to the conclusions of the court of appeals last stated.

Clearly, the judgment of the court of appeals which is under review rests upon two propositions: (1) The sufficiency of the au-

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thority from a Federal point of view under which the Phœnix Construction Company was carrying on its work in the bed of the river, and in the execution of which work it had anchored in the river its barges and other appliances incidental to the boring operations in which it was engaged. (2) The absence of all negligence on the part of the Construction Company, resulting from the place where its appliances were anchored in the stream, or from any other cause, and the happening of the accident solely because of negligence on the part of the Steamboat Company. It is elementary that where the judgment of a state court which is under review by this court rests upon two or more grounds, one or more of which are Federal and others of which are not Federal, because resting solely upon state grounds independent of Federal rights, and which state grounds are therefore completely adequate to sustain the judgment under consideration, no jurisdiction obtains to review. This doctrine, it is insisted, is here applicable for the following reason: Because, conceding that the first proposition, that is, the rightfulness of the acts of the company in placing its appliances in the stream, involves Federal questions which are reviewable, the second proposition upon which the court based its decision, that is, the happening of the accident solely as the result of the negligent conduct of the Steamboat Company, is an independent state ground, broad enough to sustain the judgment without the necessity of considering the Federal question involved in the first proposition.

[599] But the mistake lies in the contention that the finding that there was no negligence on the part of the Construction Company and that the negligence of the Steamboat Company was the sole cause of the damage suffered involved purely questions of state cognizance, involving no Federal considerations whatever. We say this is the error because the determination of the issue of negligence upon the hypothesis that there was no Federal authority given to place the obstructions in the river necessarily involves a consideration of the nature of the obstructions and the ascertainment of whether, in and of themselves, they so interfered with or impeded the right to navigate the river, that is, to carry on interstate commerce by using the river, as to cause the mere presence of the obstructions to constitute negligence *per se;* that is, to render the conclusion necessary that their mere presence was the efficient and proximate cause of the accident complained of. Because the elements involved in the decision of this Federal question are intermingled with the elements necessary to be considered to determine whether there was negligence irrespective of the Federal right affords no reason for not considering and disposing of the issue which the case presents from the Federal aspect, or to treat it as nonexisting. It is indeed true that the fact of negligence, in and of itself, abstractly considered, may be a state question, concerning which we would accept, and, indeed, it may be conceded, would be bound by, the conclusion of the state court. But when negligence involves and concerns a subject of Federal jurisdiction which it is our duty to decide, to the extent necessary to enable us to discharge that duty, we must consider and review the subject independent of the action of the state court. Southern P. Co. v. Schuyler, 227 U. S. 601, 612, 57 L. ed. 662, 669, 40 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277.

The motion to dismiss being thus adversely disposed of, it remains to consider the motion to affirm, which we think should be granted because of the entire want of [600] foundation, that is, in substance, the frivolousness, of the proposition upon which the contention as to jurisdiction to review must rest, and we have reached this conclusion for the following reasons: (a) because, under the circumstances disclosed by the record, we are of the opinion that it is manifest that whether the ingredients of negligence be considered from the Federal point of view or from the point of view of the general law, it clearly results that the injury which the Construction Company suffered was purely and exclusively, as held by all the courts below, the result of the negligence of the Steamboat Company, unaffected in a legal sense by the act of the Construction Company in placing its works in the stream at the places and under the circumstances shown. (b) Because, reaching this conclusion, we are of the opinion that the question of the sufficiency or insufficiency of the Federal authority by which the appliances of the Construction Company were placed in the river becomes wholly negligible and need not be considered, because, even assuming the want of authority, such absence of authority conferred upon the Steamboat Company no right to negligently injure the property of the Construction Company. In other words, we are of the opinion that, conceding that the appliances and boats of the Construction Company were in the river at the points stated without authority, that fact did not endow the Steamboat Company with a license to become a wrongdoer free from responsibility, and did not exempt it, therefore, from liability for the consequences of a wrong inflicted solely by its own negligence, not contributed to in any way by the Construction Company.

Affirmed.

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[601] DENVER & RIO GRANDE RAILROAD COMPANY, Appt.,

v.

ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO.

(See S. C. Reporter's ed. 601–604.)

Appeal — from territorial supreme court — following decision below — best and secondary evidence.

1. The admission of the oral testimony of the chief engineer of a railway company to prove the adoption by the board of directors of the line of the proposed railway will not require the reversal of a decree of the territorial supreme court, affirming the decree, where, notwithstanding N. M. Comp. Laws 1897, § 3832, which requires the directors to keep a complete record of all proceedings in a special book, no record of such adoption was made.

[For other cases, see Appeal and Error, VIII. m; Courts, VII. d; Evidence, III. b; in Digest Sup. Ct. 1908.]

Appeal — from territorial supreme court — following decision below — statutory construction.

2. A decision of the territorial supreme court that a railway company is entitled to protection against interference with its right of way from the time when the final location of its line is complete, notwithstanding delay in filing a map of such location, if such map is filed within the reasonable time allowed by N. M. Comp. Laws 1897, § 3874, will not be reversed by the Federal Supreme Court, although, under § 3850, a petition for condemnation must set forth that the company has surveyed the line of its proposed road and made a map thereof, and that it has located its road according to such survey.

[For other cases, see Appeal and Error, VIII. m; Courts, VII. d, in Digest Sup. Ct. 1908.]

Laches — excuses for delay.

3. The delay of a railway company in building its line is not a defense to a suit by it against another railway company which, with full knowledge, has threatened and intended to take and occupy, and has crossed and recrossed the former company's location at many points and different grades, making it impracticable for it to proceed,—especially where, in the location and acquisition of its line, the former company acted with due diligence and in good faith, and had expended large sums in the location and securing the right of way before bringing suit.

[For other cases, see Limitation of Actions, I. b, 3, in Digest Sup. Ct. 1908.]

Equity — jurisdiction — remedy at law — irreparable damage.

4. A railway company which has located the best line between its terminals is entitled to resort to a court of equity for relief against the acts of another railway company which, with full knowledge, has threatened and intended to take and occupy, and has crossed and recrossed such location at many points and different grades, making it impracticable for the former railway company to proceed with the construction of its line.

[For other cases, see Equity, I. c; I. d, 1, in Digest Sup. Ct. 1908.]

[No. 188.]

Argued April 22, 1914. Decided May 11, 1914.

APPEAL from the Supreme Court of the Territory of New Mexico to review a decree which affirmed on a second appeal a decree of the District Court for the County of Bernalillo, in that territory, enjoining the entrance upon and interference with a railway company's right of way. Affirmed.

See same case below, on first appeal, 13 N. M. 345, 84 Pac. 1018; on second appeal, 16 N. M. 281, 117 Pac. 730.

The facts are stated in the opinion.

Mr. E. N. Clark argued the cause, and, with Messrs. Joel F. Vaile and R. G. Lucas, filed a brief for appellant:

Oral evidence of the adoption of the line by the directors of the railway company should have been stricken out. It should have been discarded by the court, and appellee's claim with it.

Mandel v. Swan Land & Cattle Co. 154 Ill. 177, 27 L.R.A. 313, 45 Am. St. Rep. 124, 40 N. E. 462; Corcoran v. Sonora Min. & Mill. Co. 8 Idaho, 651, 71 Pac. 127; Methodist Chapel Corp. v. Herrick, 25 Me. 354; Haven v. New Hampshire Asylum, 13 N. H. 532, 38 Am. Dec. 512; Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 565; Dennis v. Joslin Mfg. Co. 19 R. I. 666, 36 Atl. 129; Mengis v. Fifth Ave. R. Co. 81 Hun, 480, 30 N. Y. Supp. 999; Central Electric Co. v. Sprague Electric Co. 57 C. C. A. 197, 120 Fed. 925; Ramsdell v. National Rivet & Novelty Co. 104 Fed. 16; Beeler v. Highland University Co. 8 Kan. App. 89, 54 Pac. 295; Guadalupe & S. A. R. Stock Asso. v. West, 76 Tex. 461, 13 S. W. 307; Nixon v. Goodwin, 3 Cal. App. 358, 85 Pac. 169; Tobin v. Roaring Creek & C. R. Co. 86 Fed. 1020; Swisher v. Fidelity & D. Co. 164 Ill. App. 243; Soldiers' Orphans' Home v. Shaffer, 63 Ill. 243; Miller v. Johnston, 71 Ark. 174, 72 S. W. 371; Stevens v. Eden Meeting-House Soc. 12 Vt. 688; Hurd v. Hotchkiss, 72 Conn. 472,

NOTE.—As to review by the United States Supreme Court of territorial decisions—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

As to laches as a defense—see notes to Middletown v. Newport Hospital, 1 L.R.A. 191; Calhoun v. Delhi & M. R. Co. 8 L.R.A. 248; Coffey v. Emigh, 10 L.R.A. 125; Pratt v. Carroll, 3 L. ed. U. S. 627; Hammond v. Hopkins, 36 L. ed. U. S. 135; and Felix v. Patrick, 36 L. ed. U. S. 720.

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45 Atl. 11; Bowick v. Miller, 21 Or. 25, 26 Pac. 861; Coffin v. Collins, 17 Me. 440; Skowhegan Bank v. Cutler, 49 Me. 315; Supreme Lodge, K. P. v. Robbins, 70 Ark, 364, 67 S. W. 758; Pittsburgh & C. R. Co. v. Clarke, 29 Pa. 146; 4 Thomp. Corp. § 5175; 6 Thomp. Corp. § 7735; Hill v. Cleveland, 4 Ohio Dec. Reprint, 562; 3 Enc. Ev. 650.

There was no appropriation of the land till appellee's location map was filed, which was not done until after this suit was started.

2 Lewis, Em. Dom. 3d. ed. § 503, p. 904; Sioux City & I. F. Town Lot & Land Co. v. Griffey, 143 U. S. 32, 39, 36 L. ed. 64, 65, 12 Sup. Ct. Rep. 362; Tarpey v. Madsen, 178 U. S. 215, 228, 229, 44 L. ed. 1042, 1048, 20 Sup. Ct. Rep. 849; White River R. Co. v. Batesville & W. Teleph. Co. 81 Ark. 195, 98 S. W. 721; Biles v. Tacoma, O. & G. H. R. Co. 5 Wash. 509, 32 Pac. 211; Southern Indiana R. Co. v. Indianapolis & L. R. Co. 168 Ind. 360, 13 L.R.A.(N.S.) 197, 81 N. E. 65.

Whatever rights appellee may have had originally, it has lost by its laches and inability to construct its line.

Milwaukee Light, Heat & Traction Co. v. Milwaukee Northern R. Co. 132 Wis. 313, 112 N. W. 663; 2 Lewis, Em. Dom. 3d ed. § 503, p. 908; Columbia Valley R. Co. v. Portland & S. R. Co. 89 C. C. A. 361, 162 Fed. 603; Goldsboro Lumber Co. v. Hines Bros. Lumber Co. 126 N. C. 254, 35 S. E. 458; Fox v. Pierce, 50 Mich. 500, 15 N. W. 880; New York & A. R. Co. v. New York, W. S. & B. R. Co. 11 Abb. N. C. 386; St. Louis, I. M. & S. R. Co. v. Peach Orchard & G. R. Co. 42 Ark. 249; Colorado Eastern R. Co. v. Union P. R. Co. 41 Fed. 293; West Virginia Short Line R. Co. v. Belington & N. R. Co. 56 W. Va. 360, 49 S. E. 460; New Haven Water Co. v. Wallingford, 72 Conn. 293, 44 Atl. 235.

The facts of this controversy do not present a case of irreparable injury cognizable in a court of equity. Appellee had an adequate remedy at law.

Schurmeier v. St. Paul & P. R. Co. 8 Minn. 113, Gil. 88, 83 Am. Dec. 770; Chesapeake & O. Canal Co. v. Young, 3 Md. 480; 1 High, Inj. 4th ed. §§ 28, 30, 699; Drake v. Hudson River R. Co. 7 Barb. 508; Johnston v. Corson Gold Min. Co. 15 L.R.A. (N.S.) 1078, 84 C. C. A. 593, 157 Fed. 145; Mobile & G. R. Co. v. Alabama Midland R. Co. 87 Ala. 520, 6 So. 407; East St. Louis Connecting R. Co. v. East St. Louis Union R. Co. 108 Ill. 265; Dry Dock, E. B. & B. R. Co. v. New York & H. R. Co. 54 Barb. 389; Highland Ave. & Belt R. Co. v. Birmingham Union R. Co. 93 Ala. 508, 9 So. 568; Raleigh & W. R. Co. v. Glendon & Gulf Min. & Mfg. Co. 112 N. C. 661, 17 S. E. 77; Rainey v. Baltimore & O. R. Co. 15 Fed. 770.

If the court did not see fit to leave appellee to its action at law, good conscience at least required that it should promote the ends of justice by assessing appellee's damages, and awarding the same in lieu of the decree entered.

New York v. Pine, 185 U. S. 93, 46 L. ed. 820, 22 Sup. Ct. Rep. 592; St. Paul, M. & M. R. Co. v. Western U. Teleg. Co. 55 C. C. A. 263, 118 Fed. 497; Oregon R. & Nav. Co. v. McDonald, 58 Or. 228, 32 L.R.A.(N.S.) 117, 112 Pac. 413; Knoth v. Manhattan R. Co. 187 N. Y. 243, 79 N. E. 1015; Paterson v. East Jersey Water Co. 74 N. J. Eq. 49, 70 Atl. 472; Mitchell v. White Plains, 91 Hun, 189, 36 N. Y. Supp. 204; 2 Lewis, Em. Dom. 3d ed. pp. 1614, 1615; Campbell v. Point Pleasant & O. River R. Co. 23 W. Va. 448; Wellington & P. R. Co. v. Cashie & C. R. & Lumber Co. 116 N. C. 924, 20 S. E. 964; Kansas & A. Valley R. Co. v. Le Flore, 1 C. C. A. 192, 4 U. S. App. 93, 49 Fed. 119; Kansas & A. Valley R. Co. v. Payne, 1 C. C. A. 183, 4 U. S. App. 77, 49 Fed. 114; Coe v. New Jersey Midland R. Co. 28 N. J. Eq. 27; Fouche v. Rome Street R. Co. 84 Ga. 233, 10 S. E. 726; Menge v. Morris & E. R. Co. 73 N. J. Eq. 177, 67 Atl. 1028; Lane v. Michigan Traction Co. 135 Mich. 70, 97 N. W. 354; Northern P. R. Co. v. St. Paul, M. & M. R. Co. 2 McCrary, 260, 4 Fed. 688; D. M. Osborne & Co. v. Missouri P. R. Co. 147 U. S. 248, 37 L. ed. 155, 13 Sup. Ct. Rep. 299; Ivey v. Georgia Southern & F. R. Co. 84 Ga. 536, 11 S. E. 128.

Considerations of the relative convenience and inconvenience resulting from its decree, the contrast of the benefits and hardships entailed thereby, the balance of convenience, operate with persuasive and compelling force on the conscience of the court. Those considerations suggest the impropriety of the decree appealed from.

Western R. Co. v. Alabama Grand Trunk R. Co. 96 Ala. 272, 17 L.R.A. 474, 11 So. 483.

Appellant's business ought not to be arrested when it could be avoided consistently with all reasonable protection to appellee.

Lewis v. John L. Roper Lumber Co. 99 N. C. 11, 5 S. E. 19.

Appellee had an adequate remedy under the condemnation statutes of New Mexico, and that remedy was exclusive.

Morris & E. R. Co. v. Blair, 9 N. J. Eq. 635; 2 Elliott, Railroads, 2d ed. § 927; New York & A. R. Co. v. New York, W. S. & B. R. Co. 11 Abb. N. C. 386; 1 High, Inj. 4th ed. § 29.

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There was no ground of equitable interference to avoid a mulitiplicity of suits.

Bispham, Eq. 6th ed. §§ 415–417; 1 High, Inj. 3d ed. §§ 62–698; 1 Pom. Eq. Jur. 2d ed. §§ 254–272; Eureka & K. River R. Co. v. California & N. R. Co. 48 C. C. A. 517, 109 Fed. 509; Columbia Valley R. Co. v. Portland & S. R. Co. 89 C. C. A. 361, 162 Fed. 603; Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co. 116 Iowa, 681, 88 N. W. 1082.

Appellee had an adequate remedy at law by ejectment.

Columbia Valley R. Co. v. Portland & S. R. Co. 162 Fed. 609, affirmed in 89 C. C. A. 361, 162 Fed. 603; Kanawha, G. J. & E. R. Co. v. Glen Jean, L. L. & D. W. R. Co. 45 W. Va. 125, 30 S. E. 86; Highland Ave. & Belt R. Co. v. Birmingham Union R. Co. 93 Ala. 505, 9 So. 568; Morris & E. R. Co. v. Blair, 9 N. J. Eq. 635; Thompson v. Central Ohio R. Co. 6 Wall. 134, 18 L. ed. 765; Smyth v. New Orleans Canal & Bkg. Co. 141 U. S. 656, 35 L. ed. 891, 12 Sup. Ct. Rep. 113; Hipp v. Babin, 19 How. 271, 15 L. ed. 633; North Shore R. Co. v. Pennsylvania Co. 193 Pa. 641, 44 Atl. 1083; Washington & I. R. Co. v. Coeur D'Alene R. & Nav. Co. 2 Idaho, 580, 21 Pac. 562; Toledo, St. L. & N. O. R. Co. v. St. Louis & O. River R. Co. 208 Ill. 623, 70 N. E. 715; Detroit & B. Pl. Road Co. v. Oakland R. Co. 131 Mich. 663, 92 N. W. 346; Chesapeake & O. Canal Co. v. Young, 3 Md. 480; 1 High, Inj. 4th ed. § 699; Anniston & C. R. Co. v. Jacksonville, G. & A. R. Co. 82 Ala. 297, 2 So. 710; Tennessee & C. R. Co. v. East Alabama R. Co. 75 Ala. 516, 51 Am. Rep. 475; Mobile & G. R. Co. v. Alabama Midland R. Co. 87 Ala. 520, 6 So. 407; Johnston v. Corson Gold Min. Co. 15 L.R.A.(N.S.) 1078, 84 C. C. A. 593, 157 Fed. 145; Booher v. Browning, 169 Pa. 18, 32 Atl. 85; 1 Pom. Eq. Jur. 2d ed. § 252, pp. 330, 331; High, Inj. 3d ed. §§ 8, 698, 701, 715, pp. 8, 9, 537, 541, 550; Chesapeake & O. R. Co. v. Deepwater R. Co. 57 W. Va. 641, 50 S. E. 890; People v. Adirondack R. Co. 160 N. Y. 247, 54 N. E. 689; St. Louis, K. C. & C. R. Co. v. Dewees, 23 Fed. 691; Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 53 L. ed. 796, 29 Sup. Ct. Rep. 426; Yellow Pine Export Co. v. Sutherland-Innis Co. 141 Ala. 664, 37 So. 922; Hayward v. Andrews, 106 U. S. 672, 675, 676, 27 L. ed. 271, 272, 1 Sup. Ct. Rep. 544.

Mr. T. B. Catron argued the cause, and, with Mr. B. W. Ritter, filed a brief for appellee:

Where a statute provides that transactions of a board of directors should be made a matter of record in their minutes, still, if omitted, they can be proven by evidence *aliunde*.

Bank of United States v. Dandridge, 12 Wheat. 69, 6 L. ed. 554; Dill. Mun. Corp. 4th ed. § 300; Bridgford v. Tuscumbia, 4 Woods, 611, 16 Fed. 912; Mahoney Min. Co. v. Anglo-Californian Bank, 104 U. S. 192, 26 L. ed. 707; Allis v. Jones, 45 Fed. 149; Eureka Clothes Wringing Mach. Co. v. Bailey Washing & Wringing Mach. Co. 11 Wall. 488, 20 L. ed. 209; Whart. Ev. § 663; Morawetz, Corp. §§ 28, 31, 633–635; Gordon v. San Diego, 108 Cal. 264, 41 Pac. 302; Zalesky v. Iowa State Ins. Co. 102 Iowa, 514, 70 N. W. 187, 71 N. W. 433; Beach, Priv. Corp. § 295; Troy v. Atchison & N. R. Co. 11 Kan. 519; Pickett v. Abney, 84 Tex. 647, 19 S. W. 859; Hutchinson v. Pratt, 11 Vt. 402; United States v. Fillebrown, 7 Pet. 28, 8 L. ed. 596; Kelly v. Board of Public Works, 75 Va. 270; Higgins v. Reed, 74 Am. Dec. 309, note; Athearn v. Independent Dist. 33 Iowa, 105; Burgess v. Pue, 2 Gill, 254; Bigelow v. Perth Amboy, 25 N. J. L. 301; Robson v. C. E. Fenniman Co. 83 N. J. L. 453, 85 Atl. 356; Hughes Mfg. & Lumber Co. v. Wilcox, 13 Cal. App. 22, 108 Pac. 871; Re Assignment of Bank of West Superior, 109 Wis. 672, 85 N. W. 501; Caudell v. Athens Sav. Bank, 140 Ga. 713, 79 S. E. 776; Flakne v. Minnesota Farmers' Mut. Ins. Co. 105 Minn. 479, 117 N. W. 785; Whitlock v. Alexander, 160 N. C. 465, 76 S. E. 538; Brown v. Webster, 115 Iowa, 511, 88 N. W. 1070.

The requirements of the statute of New Mexico that the proceedings of a corporation should be made of record is directory, and not mandatory.

Bladen v. Philadelphia, 60 Pa. 466; Re Norwegian Street, 81 Pa. 349; Woolridge v. McKenna, 8 Fed. 662; Hurford v. Omaha, 4 Neb. 350; Eustis v. Kidder, 26 Me. 100; Hayes v. Hanson, 12 N. H. 290; Beach v. Stouffer, 84 Mo. App. 398; Davis Mill Co. v. Bennett, 39 Mo. App. 460; United States v. Fillebrown, 7 Pet. 28, 8 L. ed. 596; Bank of United States v. Dandridge, 12 Wheat. 69, 81, 6 L. ed. 554, 558; Ratcliff v. Teters, 27 Ohio St. 80; Mandel v. Swan Land & Cattle Co. 154 Ill. 177, 27 L.R.A. 313, 45 Am. St. Rep. 124, 40 N. E. 462.

Appellee appropriated the line when the final location was made, and the same was ratified by the directors.

Wheeling Bridge & Terminal R. Co. v. Camden Consol. Oil Co. 35 W. Va. 209, 13 S. E. 369.

Appellee was not guilty of any laches, and did not lose any right it had by reason of laches or inability to construct its line.

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Pittsburgh, S. & W. R. Co. v. Fiske, 60 C. C. A. 621, 123 Fed. 760.

Appellee had the right to the possession of its located and adopted line, and as much actual possession thereof as was possible after location, survey, and adoption thereof, when this action commenced.

31 Cyc. 924, 927; Wainman v. Hampton, 110 N. Y. 433, 18 N. E. 234; Heinze v. Butte & B. Consol. Min. Co. 61 C. C. A. 63, 126 Fed. 1; Sullivan v. Sullivan, 66 N. Y. 37; Fleming v. Maddox, 30 Iowa, 241; 1 Rorer, Railroads, 315; Troy & B. R. Co. v. Potter, 42 Vt. 272, 1 Am. Rep. 325.

In a case where there is a practical destruction of the rights of one person by another, and a threatened continuance of the acts which, if continued, would cause irreparable injury, injunction will lie.

1 High, Inj. § 697; Thorn v. Sweeney, 12 Nev. 251, 7 Mor. Min. Rep. 564; Western U. Teleg. Co. v. Judkins, 75 Ala. 428; McGregor v. Silver King Min. Co. 14 Utah, 47, 60 Am. St. Rep. 883, 45 Pac. 1091; Myers v. Hawkins, 67 Ark. 413, 56 S. W. 640; Collins v. Sutton, 94 Va. 127, 26 S. E. 415; Moore v. Halliday, 43 Or. 243, 99 Am. St. Rep. 724, 72 Pac. 801; Clark v. Jeffersonville, M. & I. R. Co. 44 Ind. 248; Poughkeepsie Gas Co. v. Citizens' Gas Co. 89 N. Y. 493; 22 Cyc. 428–b.

Where the threatened injury would be irreparable, an injunction would lie at the instance of complainant out of possession.

22 Cyc. 827, 828; Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828; Hicks v. Michael, 15 Cal. 107; Gaines v. Leslie, 1 Ind. Terr. 546, 37 S. W. 947; Hillman v. Hurley, 82 Ky. 626; Chesapeake & O. Canal Co. v. Young, 3 Md. 480; Heman v. Wade, 74 Mo. App. 339; New Jersey Zinc & Iron Co. v. Trotter, 38 N. J. Eq. 3; Shubrick v. Guerard, 2 Desauss, Eq. 616; Leroy v. Wright, 4 Sawy. 530, Fed. Cas. No. 8,273; 22 Cyc. 825; Florida, A. & G. C. R. Co. v. Pensacola & G. R. Co. 10 Fla. 145; Northern C. R. Co. v. Harrisburg & M. Electric R. Co. 177 Pa. 142, 34 L.R.A. 572, 35 Atl. 624.

The trespass committed by appellant cannot deprive appellee of its rights, or equity of jurisdiction.

Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 449, 35 L. ed. 1063, 1075, 12 Sup. Ct. Rep. 239.

Equity cannot lose jurisdiction on the ground that the value of property which will be destroyed can be ascertained, or that another right-of-way may be found, the cost of which may be determined. Appellee had the right to the particular property selected, which has been decided by the court to be the best location which could be obtained for appellee's purposes. It had a special value and equity will protect it.

Walker v. Emerson, 89 Cal. 456, 26 Pac. 968; Lemmon v. Guthrie Center, 113 Iowa, 36, 86 Am. St. Rep. 361, 84 N. W. 986; Camp v. Dixon, 112 Ga. 872, 52 L.R.A. 755, 38 S. E. 71; Eidemiller v. Wyandotte, 2 Dill. 376, Fed. Cas. No. 4,313; Kilbourn v. Sunderland, 130 U. S. 514, 32 L. ed. 1008, 9 Sup. Ct. Rep. 594; Lake Shore & M. S. R. Co. v. Cincinnati, W. & M. R. Co. 116 Ind. 578, 19 N. E. 440.

[602] Mr. Justice Holmes delivered the opinion of the court:

This is a bill brought by the appellee, a corporation of New Mexico, to restrain the appellant from entering upon and interfering in various ways with its right of way. After a trial the plaintiff (appellee) got a decree, conditioned, as to the portions of the line then occupied by the defendant in the actual operation of its railway, upon the plaintiff's constructing at least 21 miles of railroad, etc., and limited as a whole to five years from the date of the decree. This was affirmed by the supreme court of the territory. 16 N. M. 281, 117 Pac. 730. See 13 N. M. 345, 84 Pac. 1018. There are fifty-eight assignments of error, but the propositions argued fall into narrower compass. They are, that the plaintiff never adopted the line it claims; that there was no appropriation of the land until the plaintiff's location map was filed, after the beginning of this suit; that the plaintiff has lost whatever rights it had by laches and inability to construct its line; that there is no irreparable injury or other ground for equitable relief; and that the plaintiff had adequate remedies under the condemnation statutes and by ejectment. So far as they need discussion we will take these up in turn.

It is found that the plaintiff adopted the line in question; but it is argued that this finding is shown to be wrong as matter of law by reason of specific facts set forth in findings of the supreme court made, after the delivery of its opinion, in addition to those adopted from the court below. These are that certain small portions of the line between the northern boundary of the state and the town of Farmington are not covered by any order of adoption on the part of the directors shown by the records, and that finding that those portions were adopted is based on the oral testimony of the plaintiff's chief engineer. (We do not stop to notice a slight contradiction [603] in form between different parts of the findings, as the meaning is perfectly clear.) The argument is that adoption by the directors is necessary, which is admitted, and that, as the

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Compiled Laws of 1897, § 3832, require the directors to keep a complete record of all proceedings in a special book, such record is the only admissible evidence of the fact. But this is a matter of local practice and the construction of a local statute, as to which we should be slow to disturb the decision of the local court. Nadal v. May, April 20 [233 U. S. 447, ante, 1040, 34 Sup. Ct. Rep. 611]. The statute does not in terms purport to make the validity of the directors' action dependent upon being recorded. No doubt the record, when made, would be the best evidence, but it being found that no record was made, the admission of secondary evidence is no ground for reversing the decree. Bank of United States v. Dandridge, 12 Wheat. 64, 69, 6 L. ed. 552, 554. In the opinion of the court this question is avoided, but the finding subsequently added, coupled with the finding that the line was adopted, imports the ruling of law that we have supposed.

The next objection is that the maps of the disputed portion of the road were not filed, as required by § 3874, until the day after this suit was begun, and attention is called to § 3850, which requires a petition for condemnation to set forth that the company has surveyed the line of its proposed road and made a map thereof, and that it has located its road according to such survey. But by § 3874, the company is not required to record its map until "within a reasonable time its road shall be finally located;" which it is found to have done, and again, we see no sufficient reason for reversing the decision of the local court that a company is entitled to protection as soon as its final location is complete. Wheeling, Bridge & Terminal R. Co. v. Camden Consol. Oil Co. 35 W. Va. 205, 209, 13 S. E. 369.

Next it is said that the plaintiff has been guilty of laches. But it is found that the defendant, with full knowledge, [604] threatened and intended to take and occupy and has crossed and recrossed the plaintiff's location at many points and different grades, with circumstances not necessary to be detailed, and thus has made it impracticable for the plaintiff to proceed. It is found also that in the location and acquisition of its line the plaintiff proceeded with due diligence and in good faith, and that it had expended more than $100,000 in the location and securing rights of way before the beginning of this suit. The defendant has gone ahead since the suit was begun, but, of course, has acquired no new rights by doing so. The objections to equitable jurisdiction do not need separate discussion. The line is found to be the best line between the points, and the plaintiff is entitled to it. It neither is to be forced into a compulsory sale, nor to be remitted to legal or statutory remedies that rightly are thought to be inadequate by the local court.

Decree affirmed.

SAMUEL GOMPERS, John Mitchell, and Frank Morrison, Plffs. in Err., Appts., and Petitioners,

v.

UNITED STATES.

(See S. C. Reporter's ed. 604–613.)

Appeal — mode of review — appeal or error.

1. A judgment of fine or imprisonment in proceedings for an alleged criminal contempt of an injunction is not reviewable by appeal.

[For other cases, see Appeal and Error, II. b, in Digest Sup. Ct. 1908.]

Error to District of Columbia court of appeals — criminal contempt.

2. A writ of error will not lie from the Federal Supreme Court to the District of Columbia court of appeals to review a judgment rendered on an appeal from the supreme court of the District in proceedings to punish the alleged criminal contempt of an injunction.

[For other cases, see Appeal and Error, 1075–1081, in Digest Sup. Ct. 1908.]

Limitation of actions — when statute begins to run — criminal contempt.

3. The running of the three years' limitation prescribed by U. S. Rev. Stat. § 1044, U. S. Comp. Stat. 1901, p. 725, for criminal prosecutions against proceedings to punish criminal contempts of a decree enjoining the continuance of a boycott, was not postponed until such boycott was abandoned, but such statute began to run as respects each specific act charged as a substantive offense in disobedience of the injunction upon the date of the commission of such act.

[For other cases, see Limitation of Actions, II., in Digest Sup. Ct. 1908.]

Limitation of actions — criminal contempt.

4. Criminal contempts are none the less crimes within the meaning of U. S. Rev. Stat. § 1044, U. S. Comp. Stat. 1901, p. 725, prescribing a three years' limitation for

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NOTE.—On distinction between appeal and writ of error—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

On the appellate jurisdiction of the Federal Supreme Court over the District of Columbia courts—see note to United States ex rel. Taylor v. Taft, 51 L. ed. U. S. 269.

As to whether proceeding for contempt for violation of injunction is civil or criminal—see notes to Vilter Mfg. Co. v. Humphrey, 13 L.R.A.(N.S.) 591; Gompers v. Buck's Stove & Range Co. 34 L.R.A.(N.S.) 874; and Rothschild & Co. v. Steger & Sons Piano Mfg. Co. 42 L.R.A.(N.S.) 793.

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criminal prosecutions, because the constitutional right of trial by jury in criminal cases does not extend to such contempts.

[For other cases, see Limitation of Actions, III. 1, in Digest Sup. Ct. 1908.]

Limitation of actions — criminal contempt.

5. Proceedings to punish acts not committed in the presence of the court as criminal contempts of an injunction previously granted are none the less governed by the three years' limitation of U. S. Rev. Stat. § 1044, U. S. Comp. Stat. 1901, p. 725, which provides that "no person shall be prosecuted, tried, or punished for any offense not capital . . . unless the indictment is found or the information is instituted within three years next after such offense shall have been committed," because such contempt proceedings may not be instituted by an indictment or information.

[For other cases, see Limitation of Actions, III. 1, in Digest Sup. Ct. 1908.]

Limitation of actions — criminal contempt.

6. The Federal Supreme Court would prescribe by analogy a three years' limitation for proceedings to punish past acts not committed in the presence of the court as criminal contempts of an injunction previously granted if the case were not covered by the provisions of U. S. Rev. Stat. § 1044, U. S. Comp. Stat. 1901, p. 725, that "no person shall be prosecuted, tried, or punished for any offense not capital . . . unless the indictment is found or the information is instituted within three years next after such offense shall have been committed."

[For other cases, see Limitation of Actions, III. 1, in Digest Sup. Ct. 1908.]

[Nos. 640 and 574.]

Argued January 7 and 8, 1914. Reargued April 20 and 21, 1914. Decided May 11, 1914.

IN ERROR to, APPEAL from, and ON PETITION for Certiorari to the Court of Appeals of the District of Columbia to review a judgment which, reversing a judgment of the Supreme Court of that District, directed the entry of a judgment of fine or imprisonment in proceedings for the punishment of criminal contempts. Appeal and writ of error dismissed. Judgment reversed on writ of certiorari.

See same case below, 40 App. D. C. 293.

The facts are stated in the opinion.

Messrs. Alton B. Parker and Jackson H. Ralston argued the cause, and, with Mr. William E. Richardson, filed a brief for Gompers et al.:

From its beginnings, contempt of court has been a criminal offense, for many years triable only by jury.

3 Transactions of the Royal Historical Society (N. S.) 1886; Rex v. Almon, 24 Law Quarterly Rev. 184, 266.

English and American courts unite at this day in regarding it as a crime, although usually tried by the court in a summary manner.

Re Pollard, 5 Moore, P. C. C. N. S. 111, L. R. 2 P. C. 106; Oswald, Contempt, 3d ed. p. 6; 7 Laws of England (Halsbury) titles "Contempt" 280, "Crim. Law & Proc." 998; Ex parte Kearney, 7 Wheat. 38, 43, 5 L. ed. 391, 392; Williamson's Case, 26 Pa. 18, 67 Am. Dec. 374; Re Shull, 221 Mo. 623, 133 Am. St. Rep. 496, 121 S. W. 10; New Orleans v. New York Mail S. S. Co. 20 Wall. 387, 22 L. ed. 354; Castner v. Pocahontas Collieries Co. 117 Fed. 184; Re Ellerbe, 4 McCrary, 449, 13 Fed. 530; S. Anargyros v. Anargyros & Co. 191 Fed. 208; United States v. Jacobi, 1 Flipp. 108, Fed. Cas. No. 15,460; Re Mullee, 7 Blatchf. 23, Fed. Cas. No. 9,911; Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co. 63 C. C. A. 607, 129 Fed. 105; Lester v. People, 150 Ill. 424, 41 Am. St. Rep. 375, 23 N. E. 387, 37 N. E. 1004; Flathers v. State, 7 Okla. Crim. Rep. 668, 125 Pac. 902.

Courts have granted or refused, as the case may have been, writs of error, because the offense was criminal.

Pierce v. United States, 37 App. D. C. 582.

Contempt of court may be pardoned as a crime.

3 Ops. Atty. Gen. 622; 4 Ops. Atty. Gen. 458; 5 Ops. Atty. Gen. 579; 19 Ops. Atty. Gen. 476; Sharp v. State, 102 Tenn. 9, 43 L.R.A. 788, 73 Am. St. Rep. 851, 49 S. W. 752; State ex rel. Van Orden v. Sauvinet, 24 La. Ann. 119, 13 Am. Rep. 115; Ex parte Hickey, 4 Smedes & M. 751.

The want of a trial by jury does not, because of the constitutional requirement, affect the character of contempt of court as a crime.

United States v. Jacobi, 1 Flipp. 108, Fed. Cas. No. 15,460; Callan v. Wilson, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; 6 Am. & Eng. Enc. Law, 2d ed. p. 974; Robertson v. Baldwin, 165 U. S. 276, 41 L. ed. 715, 17 Sup. Ct. Rep. 326.

No court at all of which we are aware, except it may have been the Court of Star Chamber in its worst days, has ever decided that, in indirect contempts, the accused was not entitled to be informed of the nature of the accusation against him (and this under oath), and to confront witnesses.

Even if not criminal, contempt is an offense, and has in this case been prosecuted by an information.

Ex parte Thomas, 10 Mo. App. 24; 2 Hawk. P. C.; Stewart v. State, 140 Ind. 7, 39 N. E. 508; Snyder v. State, 151 Ind. 563, 52 N. E. 152; Re Wood, 82 Mich. 75, 45 N. W. 1113; Herdman v. State, 54 Neb. 626, 74 N. W. 1097, 11 Am. Crim. Rep. 298; Hutton

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v. Superior Ct. 147 Cal. 156, 81 Pac. 409; Re Blush, 5 Kan. App. 879, 48 Pac. 147; Otis v. Superior Ct. 148 Cal. 129, 82 Pac. 853; Post v. State, 7 Ohio C. D. 257; Hurley v. Com. 188 Mass. 443, 74 N. E. 677, 3 Ann. Cas. 757; Maloney v. Traverse, 87 Iowa, 306, 54 N. W. 155; People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528, 1 Am. Crim. Rep. 107; Worland v. State, 82 Ind. 49; State v. Henthorn, 46 Kan. 613, 26 Pac. 937; Cartwright's Case, 114 Mass. 230.

In the supreme court of the District of Columbia, as well as in other inferior courts of the United States, contempt is purely and absolutely statutory.

Ex parte Robinson, 19 Wall. 505, 22 L. ed. 205; Peck's Trial, p. 294; Ex parte Bollman, 4 Cranch, 93, 2 L. ed. 560.

Courts have repeatedly decided the direct proposition that the criminal statute of limitations could be invoked to bar prosecutions for the offense of contempt of court.

Beattie v. People, 33 Ill. App. 651; People ex rel. Blumle v. Neill, 74 Ill. 68; Gordon v. Com. 141 Ky. 461, 133 S. W. 206.

Messrs. Alton B. Parker, Jackson H. Ralston, Frederick L. Siddons, and William E. Richardson filed a brief in support of the petition for certiorari.

Messrs. J. J. Darlington and Daniel Davenport argued the cause, and, with Mr. James M. Beck, filed a brief for defendant in error and appellee:

The boycott which defendants conspired together to continue, in violation of the injunction, was, by the acts charged and of which they stand convicted, continued until the Buck Stove & Range Company, deprived of the protection the courts were vainly endeavoring to extend to it, was forced to submit, and thereby induce the respondents to terminate the boycott, on July 19, 1910. The statute of limitations did not begin to run until that date.

United States v. Kissel, 218 U. S. 601, 607, 54 L. ed. 1168, 1178, 31 Sup. Ct. Rep. 124.

It will not do to say that there are large classes of criminal cases tried without a jury, because so tried at common law, and that the Constitutions, Federal and state, inaugurate no new system, but simply preserve jury trials as at common law, for the reason, if there were no others, that there are no common-law crimes within the jurisdiction of the courts of the United States, nor any crimes triable in them except such as are expressly created by statute.

United States v. Britton, 108 U. S. 206, 27 L. ed. 700, 2 Sup. Ct. Rep. 531; United States v. Hudson, 7 Cranch, 32, 3 L. ed. 259; United States v. Coolidge, 1 Wheat. 415, 4 L. ed. 124; Manchester v. Massachusetts, 139 U. S. 262, 263, 35 L. ed. 166, 11 Sup. Ct. Rep. 559; United States v. Eaton, 144 U. S. 687, 36 L. ed. 594, 12 Sup. Ct. Rep. 764.

Contempt of court is not an offense so created.

Anderson v. Dunn, 6 Wheat. 227, 228, 5 L. ed. 247, 248; Ex parte Terry, 128 U. S. 303, 32 L. ed. 408, 9 Sup. Ct. Rep. 77; Interstate Commerce Commission v. Brimson, 155 U. S. 5, 39 L. ed. 49, 15 Sup. Ct. Rep. 19; Re Cooper, 32 Vt. 253; Watson v. Williams, 36 Miss. 331; Cartwright's Case, 114 Mass. 230; Eilenbecker v. District Ct. 134 U. S. 37, 38, 33 L. ed. 803, 804, 10 Sup. Ct. Rep. 424; Re Chadwick, 109 Mich. 597, 67 N. W. 1071.

If crimes, then neither the probate court, the circuit court, the court of appeals, this court, nor any tribunal except a criminal court, can entertain a proceeding for contempt. See Middlebrook v. State, 43 Conn. 267, 21 Am. Rep. 650.

Further, not only must the question of guilt be tried by a jury, but the accused must be confronted by the witnesses, contrary to what has hitherto been recognized universally.

1 Newland, Ch. Pr. 329; Fletcher, Eq. Pl. & Pr. § 553; State v. Matthews, 37 N. H. 455; Albany City Bank v. Schermerhorn, 9 Paige, 379, 38 Am. Dec. 551; 4 Enc. Pl. & Pr. 797; Re Savin, 131 U. S. 278, 33 L. ed. 153, 9 Sup. Ct. Rep. 699; United States v. Anonymous, 21 Fed. 761; Una v. Dodd, 38 N. J. Eq. 460; Re Chiles (Texas v. White) 22 Wall. 157, 22 L. ed. 819; Merchants' Stock & Grain Co. v. Board of Trade, 120 C. C. A. 582, 201 Fed. 20.

The fact that certain of the Attorneys General of the United States have held the President possessed of power to pardon in cases of contempt is, we think, rather strangely offered as a reason why, notwithstanding the foregoing, they should be held to be crimes. A tendency upon the part of the executive, as of the legislative, and even, it has been claimed, of the judicial departments of the government, to be jealous of their respective jurisdictions and powers, is perhaps to be expected; but the weight of authority upon this question of the power to pardon, if material for present purposes, we conceive to be strongly in the negative, both numerically and with respect to the force of reasoning employed.

2 Ops. Atty. Gen. 330; Re Nevitt, 54 C. C. A. 622, 117 Fed. 455; Taylor v. Goodrich, 25 Tex. Civ. App. 124, 40 S. W. 515; Re Chadwick, 109 Mich. 597, 67 N. W. 1071; State v. Morrill, 16 Ark. 384.

An information is a definite, legal, common-law term, and means only the act of an officer representing the sovereign power.

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Bacon, Abr. title "Information" "A"; 1 Chitty, Crim. Law, 843; 1 Bishop, New Crim. Proc. § 143; State v. Whitlock, 41 Ark. 403; People v. Sponsler, 1 Dak. 289, 46 N. W. 459; Goddard v. State, 12 Conn. 448; State v. Ashley, 1 Ark. 279; Ex parte Thomas, 10 Mo. App. 24; Lasley v. District of Columbia, 14 App. D. C. 407; State v. Hewlett, 124 Ala. 471, 27 So. 18; State v. Kelm, 79 Mo. 515; State v. Shortell, 93 Mo. 123, 5 S. W. 691; State v. Kyle, 166 Mo. 287, 56 L.R.A. 115, 65 S. W. 763; Haggerty v. People, 6 Lans. 332.

Neither limitations nor laches bars a charge of contempt.

Jones v. Mould, 151 Iowa, 599, 132 N. W. 45; State ex rel. Warfield v. Becht, 23 Minn. 411; Matheson v. Hanna-Schoellkopf Co. 122 Fed. 836; Dale v. Roosevelt, 1 Paige, 35; Re Hay Foundry & Iron Works, 22 App. Div. 87, 47 N. Y. Supp. 802; Brockway v. Wilbur, 5 Johns. 356; People ex rel. Platt v. State Canvassers, 74 Hun, 179, 26 N. Y. Supp. 345; State ex rel. Duensing v. Roby, 142 Ind. 168, 33 L.R.A. 213, 51 Am. St. Rep. 174, 41 N. E. 145; Middlebrook v. State, 43 Conn. 267, 21 Am. Rep. 650.

Messrs. J. J. Darlington, Daniel Davenport, Clarence R. Wilson, and James M. Beck also joined in the petition for certiorari.

Mr. Justice Holmes delivered the opinion of the court:

These are proceedings for alleged criminal contempts in the matter that was before this court in Gompers v. Buck's [606] Stove & Range Co. 221 U. S. 418, 55 L. ed. 797, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492. In that case the proceedings instituted by the Buck's Stove & Range Company to punish the petitioners were ordered to be dismissed, but without prejudice to the power of the supreme court of the District to punish contempt, if any, committed against it. The decision was rendered on May 15, 1911, and the next day the supreme court of the District appointed a committee to inquire whether there was reasonable cause to believe the plaintiffs in error guilty, in wilfully violating an injunction issued by that court on December 18, 1907, and, if yea, to present and prosecute charges to that effect. The inquiry was directed solely with a view to punishment for past acts, not to secure obedience for the future; and to avoid repetition it will be understood that all that we have to say concerns proceedings of this sort only, and further, only proceedings for such contempt not committed in the presence of the court.

The committee, on June 26, 1911, reported and charged that the parties severally were guilty of specified acts in violation of the injunction, being the same acts of which they had been found guilty by the supreme court in the former case. Rules to show cause were issued on the same day. The defendants pleaded the statute of limitations, Rev. Stat. § 1044, U. S. Comp. Stat. 1901, p. 725, as to most of the charges, and not guilty. There was a trial, the statute of limitations was held inapplicable, and the defendants were found guilty and sentenced to imprisonment for terms of different lengths, subject to exceptions which by agreement were embodied in a single bill. The court of appeals reduced the sentences to imprisonment for thirty days in the case of Gompers and fines of $500 for each of the other two. 40 App. D. C. 293. The defendants brought a writ of error and an appeal to this court, and also petitioned for a writ of certiorari. Of course, an appeal does not lie, nor does a writ of error, but the writ of certiorari is granted. [607] The judges of the supreme court also petitioned for a writ of certiorari, but as the case will be disposed of on the first-mentioned petition, the other will be denied.

The injunction, subsequently held too broad, not only forbade the defendants to combine to obstruct the business of the Buck's Stove & Range Company, or to declare or threaten any boycott against it (such a boycott already having been declared), but also to publish any statement calling attention of any body to any such boycott, or any statement of like effect, tending to any injury of the company's business. This decree, although made on December 18, did not become operative until December 23, 1907. Before going to the court of appeals the injunction in substantially the same form was made permanent on March 23, 1908. It may be assumed for the purposes of our decision that the evidence not only warranted but required a finding that the defendants were guilty of some, at least, of the violations of this decree that were charged against them, and so we come at once to consider the statute of limitations, which is their only real defense. A preliminary objection was urged, to be sure, that the question of the validity of that defense was not reserved, but there is nothing in it. The bar was pleaded, there was a motion to dismiss on that ground for want of a replication, there was a decision that the statute did not apply to contempts, and the counsel for the plaintiffs in error stated at the trial that there was one general exception presented on their behalf with regard to that. We cannot doubt that it was perfectly understood, or that the record shows that the plaintiffs in error preserved all their rights.

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The statute provides that "no person shall be prosecuted, tried, or punished for any offense not capital, except . . . , unless the indictment is found or the information is instituted within three years next after such offense shall have been committed." Rev. Stat. § 1044, act of April 13, 1876, chap. 56, 19 Stat. at L. 32, U. S. Comp. Stat. 1901, p. 725. The plaintiffs in [608] error treat these proceedings as having begun on May 16, 1911, when the supreme court directed an inquiry. They certainly did not begin before that date; so that, if the statute applies, contempts prior to May 16, 1908, would be barred. It is argued with force that the inquiry was directed only to breaches of the preliminary injunction, which expired by its own terms upon the making of the final decree on March 23, 1908, and that therefore everything legitimately before the court happened more than three years before. But as the report mentioned the final decree, and charged a few acts later than March 23, though mostly rather unimportant, and as the order to show cause referred to a violation of the injunctions, in the plural, it perhaps would savor of a technicality that we should be loath to apply on either side, if we did not deal with all that is charged.

The charges against Gompers are: (1) hurrying the publication of the January number of the American Federationist, and distributing many copies after the injunction was known and before it went into effect, in which number the Buck's Stove & Range Company was included in the "We don't patronize" list; (2) circulating other copies in January, 1908; (3) on and after December 23, 1907, circulating another document to the like effect with comments, some of which were lawful criticism, but others of which suggested that the injunction left the members of labor oganizations free to continue their boycott; (4) publishing in February, 1908, a copy of the decree with the suggestion that those who violated the injunction outside of the District could not be punished unless they came within it; (5) in January and February, 1908, publishing in conjunction with the other defendants a paper appealing for financial aid, commenting on the injunction as invading the liberty of the press and free speech, and reprinting the beforementioned comments and suggestions; (6) in March, 1908, again suggesting that no law compelled the purchase [609] of a Buck stove; (7) in April, 1908, after the final decree, reiterating the same suggestion in the American Federationist; (8) in April, 1908, repeating similar suggestions by transparent innuendo in a public address; (9) again repeating them in another address, on or about May 1; (10) and again in the July issue of the American Federationist; (11) publishing in the September Federationist an editorial characterizing the injunction as an invasion of constitutional freedom (which hardly seems to exceed lawful comment unless on the ground that the case was not finished, although mistaken in its law); (12) in a report published after September 9, 1908, saying that if the Executive Council of the Federation of Labor obeyed the injunction they could not report the state of the case to the Denver Convention, and that they did not see how they could refuse to give an account of their doings; (13) on September 29, 1908, saying in a public address that the injunction forbade him to discuss the case, but that he must (seemingly not going beyond that declaration); (14) on October 26, 1908, recurring in a single phrase in an address to his old suggestion that no law compelled his hearers to buy a Buck stove; (15) in November, 1908, in an address which he caused to be published in the Federationist in January, 1909, again referring to the injunction, mentioning his past advice and suggestions, and that he had been called on to show cause why he should not be adjudged guilty of contempt (in the former proceeding), and asking how he could have done otherwise; and finally (16) in a report made in November, 1909, referring to the judge as so far having transcended his authority that even judges of the court of appeals have felt called upon to criticize his action, and saying that in such circumstances it is the duty of the citizens to refuse obedience and to take whatever consequences may ensue. The charges against Mitchell and Morrison are mainly for having taken part in some of the abovementioned publications, but need not [610] be stated particularly, as all the acts of any substance in Mitchell's case and all in that of Morrison were more than three years old when these proceedings began.

The boycott against the company was not called off until July 19 to 29, 1910, and it is argued that, even if the statute applies, the conspiracy was continuing until that date (United States v. Kissel, 218 U. S. 601, 607, 54 L. ed. 1168, 1178, 31 Sup. Ct. Rep. 124), and therefore that the statute did not begin to run until then. But this is not an indictment for conspiracy, it is a charge of specific acts in disobedience of an injunction. The acts are not charged as evidence, but as substantive offenses; each of them, so far as it was a contempt, was punishable as such, and was charged as such, and therefore each must be judged by itself; and so we come to what, as we already have intimated, is the real question in the case.

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It is urged in the first place that contempts cannot be crimes, because, although punishable by imprisonment, and therefore, if crimes, infamous, they are not within the protection of the Constitution and the Amendments giving a right to trial by jury, etc., to persons charged with such crimes. But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic, living institutions transplanted from English soil. They significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. Robertson v. Baldwin, 165 U. S. 275, 281, 282, 41 L. ed. 715, 717, 718, 17 Sup. Ct. Rep. 326. It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are [611] they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, 3 Transactions of the Royal Historical Society, N. S. p. 147 (1885), and that, at least in England, it seems that they still may be and preferably are tried in that way. See 7 Laws of England (Halsbury), 280, subdiv. Contempt of Court (604); Re Clements, 46 L. J. Ch. N. S. 375, 383, 36 L. T. N. S. 332; Re Macleod, 6 Jur. 461; Schreiber v. Lateward, 2 Dick. 592; Wellesley's Case, 2 Russ. & M. 639, 667; Re Pollard, L. R. 2 P. C. 106, 120, 5 Moore, P. C. C. N. S. 111; Ex parte Kearney, 7 Wheat. 38, 43, 5 L. ed. 391, 392; Bessette v. W. B. Conkey Co. 194 U. S. 324, 328, 331, 332, 48 L. ed. 997, 1002-1004, 24 Sup. Ct. Rep. 665; Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 441, 55 L. ed. 797, 805, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492.

We come, then, to the construction of the statute. It has been assumed that the concluding words, "unless the indictment is found or the information is instituted within three years" limit the offenses given the benefit of the act to those usually prosecuted in that way, and the counsel for the petitioners were at some pains to argue that the charges of the committee amounted to an information,—a matter that opens vistas of antiquarian speculation. But this question is not one to be answered by refinements and curious inquiries. In our opinion the proper interpretation of the statute begins with the substantive, not with the adjective, part. The substantive portion of the section is that no person shall be tried for any offense not capital except within a certain time. Those words are of universal scope. What follows is a natural way of expressing that the proceedings must be begun within three years; indictment and information being the usual modes by which they are begun, and very likely no other having occurred to those who drew the law. But it seems to us plain that the dominant words of the act are, "no person shall be prosecuted, tried, or punished for any offense not capital," unless.

No reason has been suggested to us for not giving to the [612] statute its natural scope. The English courts seem to think it wise, even when there is much seeming reason for the exercise of a summary power, to leave the punishment of this class of contempts to the regular and formal criminal process. Re Macleod, 6 Jur. 461. Maintenance of their authority does not often make it really necessary for courts to exert their own power to punish, as is shown by the English practice in more violent days than these, and there is no more reason for prolonging the period of liability when they see fit to do so than in the case where the same offense is proceeded against in the common way. Indeed, the punishment of these offenses peculiarly needs to be speedy if it is to occur. The argument loses little of its force if it should be determined hereafter, a matter on which we express no opinion, that in the present state of the law an indictment would not lie for a contempt of a court of the United States.

Even if the statute does not cover the case by its express words, as we think it does, still, in dealing with the punishment of crime a rule should be laid down, if not by Congress, by this court. The power to punish for contempt must have some limit in time, and in defining that limit we should have regard to what has been the policy of the law from the foundation of the government. By analogy, if not by enactment, the limit is three years. The case cannot be concluded otherwise so well as in the language of Chief Justice Marshall in a case where the statute was held applicable to an action of debt for a penalty. Adams v. Woods, 2 Cranch, 336, 340-342, 2 L. ed. 297-299: "It is contended that the prosecutions limited by this law are those only which are carried on in the form of an indictment or information, and not those where the penalty is demanded by an action of debt. But if the words of the act be examined, they will be found to apply not to any particular mode of proceeding, but generally to any prosecution, trial, or punishment for the

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offense. It is not declared [613] that no indictment shall be found . . . But it is declared that 'No person shall be prosecuted, tried, or punished' . . . In expounding this law, it deserves some consideration, that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture." The result is that the judgments, based as they are mainly upon offenses that could not be taken into consideration, must be reversed.

Judgments reversed.

Mr. Justice Van Devanter and Mr. Justice Pitney dissent.

SCOTT LOGAN, Plff. in Err.,
v.
W. R. DAVIS.

(See S. C. Reporter's ed. 613–630.)

Error to state court — Federal question — railway land grants — adjustment act.

1. A judgment of the highest state court denying plaintiff in error's claim as a purchaser in good faith within the meaning of the railway land grant adjustment act of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), § 4, under which a confirmatory patent had been issued to him, and holding that he was not entitled to the benefit of the provisions of that section, is reviewable, under the Judicial Code (36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227), § 237, in the Federal Supreme Court.

[For other cases, see Appeal and Error, 1825–1871, in Digest Sup. Ct. 1908.]

Courts — conclusiveness of decision of Land Department — question of fact.

2. The decision of the Secretary of the Interior, based upon the evidence submitted in a contest before the Land Department, that one of the parties was a purchaser in good faith, within the meaning of the railway land grant adjustment act of March 3, 1887, § 4, is conclusive upon the courts unless founded upon errors of law and misconstruction of the statute, where no other basis is laid in the pleadings or agreed statement of facts for rejecting or disturbing such decision.

[For other cases, see Courts, I. e, 6, in Digest Sup. Ct. 1908.]

Public lands — railway land grant — adjustment.

3. The land grant made by the act of May 12, 1864 (13 Stat. at L. 72, chap. 84), to the state of Iowa in aid of railway construction, not having been adjusted by the Land Department, was within the operation of the adjustment act of March 3, 1887, § 1, empowering the Secretary of the Interior immediately to adjust, in accordance with the decisions of the Federal Supreme Court, the several land grants made by Congress in aid of railway construction, "and heretofore unadjusted," notwithstanding the declaration of Iowa Laws 1882, chap. 107, that the state thereby resumed all lands which had not been earned by the railway company, and of Iowa Laws 1884, chap. 71, that all lands resumed and intended to be resumed by the earlier act "are hereby relinquished and conveyed to the United States."

[For other cases, see Public Lands, I. c, 2, in Digest Sup. Ct. 1908.]

Public lands — railway land grants — bona fide purchasers — construction of statute by Land Department.

4. Subsequent as well as prior purchasers, if acting in good faith, must be regarded as within the protection afforded by the adjustment act of March 3, 1887, § 4, to bona fide purchasers from any railway company to which or for whose use and benefit land had been erroneously certified or patented, since to construe the statute otherwise would be to disturb a long-settled practical interpretation by the Land Department.

[For other cases, see Public Lands, I. c, 2 1; Statutes, II. e, 2, in Digest Sup. Ct. 1908.]

Public lands — railway land grants — bona fide purchasers.

5. Constructive notice of a defect in the railway company's title does not deprive one who has honestly purchased in actual ignorance of such defect, and in reliance upon the action of the government in the apparent transfer of title by certification or patent, of the protection afforded by the adjustment act of March 3, 1887, § 4, to bona fide purchasers from any railway company to which or for whose use and benefit

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NOTE.—On the general subject of writs of error from United States Supreme Court to State courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On error to state courts in cases involving land titles—see note to O'Conor v. Texas, 50 L. ed. U. S. 1120.

As to land grants to railroads, generally—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

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lands had been erroneously certified or patented.

[For other cases, see Public Lands, 331-340, 972-977, in Digest Sup. Ct. 1908.]

[No. 247.]

Submitted March 9, 1914. Decided May 11, 1914.

IN ERROR to the Supreme Court of the State of Iowa to review a decree which affirmed a decree of the District Court of O'Brien County, in that state, in favor of defendant in a suit over the title to real property. Reversed.

See same case below, 147 Iowa, 441, 124 N. W. 808.

Statement by Mr. Justice Van Devanter:

This case arises out of conflicting claims to 80 acres of land in O'Brien county, Iowa, under the act of March 3, 1887 (24 Stat. at L. 556, chap. 376, (U. S. Comp. Stat. 1901, p. 1595), as amended February 12, 1896 (29 Stat. at L. 6, chap. 18, U. S. Comp. Stat. 1901, p. 1596), providing for the adjustment of railroad land grants, etc. The land is within the place limits of the grant made May 12, 1864 (13 Stat. at L. 72, chap. 84), to the state of Iowa to aid in the construction of a railroad from Sioux City, in that state, to the southern boundary of Minnesota. The grant was *in præsenti* and embraced every alternate section, designated by odd numbers, for ten sections in width on each side of the road, with the usual exceptions and provision for indemnity. The company which was to construct the road and receive the benefit of the grant was to be designated by the state legislature. Upon the presentation of a certificate by the governor of the state that any section of 10 consecutive miles of the road was completed, the Secretary of the Interior was to issue to the state patents for 100 sections of land "for the benefit of" the company constructing the road, and this was to be repeated as each additional 10 miles was constructed until the entire road was completed and all the lands patented. If the road was not completed within ten years from the company's acceptance of the grant, [615] the lands "granted and not patented" were to revert to the state, to enable it to secure the completion of the work; and if the road was not completed within five years after the expiration of the ten years, then the "lands undisposed of" were to revert to the United States. The Sioux City & St. Paul Railroad Company was designated by the state legislature as the beneficiary of the grant in 1866, the company accepted it in the same year, and a map definitely locating the line of the road was filed with the Secretary of the Interior and approved in 1867. As so located, the road was about 80 miles in length. In 1872 the company constructed it from the southern boundary of Minnesota to LeMars, Iowa, a distance of 56.25 miles, but the remaining part was never constructed, a trackage right to Sioux City over another road being acquired by the company. In 1872 and 1873 the governor certified that five sections of 10 miles each, constituting 50 miles of continuous road from the southern boundary of Minnesota, had been completed and put into operation conformably to the granting act, and the Secretary of the Interior thereupon caused a large amount of lands within the primary and indemnity limits of the grant to be patented to the state "for the use and benefit of" the company, the tract in controversy being among those so patented. Most of the lands patented to the state were soon conveyed by it to the company, but some were not, this tract being among the latter. The company, however, was claiming it in virtue of the grant and the patent to the state. Litigation was had between this company and another, by reason of their overlapping land grants, to determine which was entitled to this tract and others within the overlap, and by the final decree in 1886 this tract was awarded to this company. Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co. 117 U. S. 406, 29 L. ed. 928, 6 Sup. Ct. Rep. 790. In truth, more land was patented to the state for the benefit of the company, and more land was conveyed by the state to the company, than the latter was entitled to [616] receive for the five 10-mile sections of completed road, not counting the additional 6.25 miles, and in 1882 the state legislature passed an act declaring that the state thereby resumed all lands "which have not been earned" by the company, but the act did not more definitely point out the lands intended to be resumed. Iowa Laws 1882, chap. 107. And in 1884 the state legislature passed an act declaring (§ 1) that all lands resumed and intended to be resumed by the act of 1882 "are hereby relinquished and conveyed to the United States," and also (§ 2): "The governor of the state of Iowa is hereby authorized and directed to certify to the Secretary of the Interior all lands which have heretofore been patented to the state, to aid in the construction of said railroad, and which have not been patented by the state to the Sioux City & St. Paul Railroad Company, and the list of land so certified by the governor shall be presumed to be the lands relinquished and conveyed by § 1 of this act. Provided, that nothing in this section contained shall be construed to ap-

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ply to lands situated in the counties of Dickinson and O'Brien." Iowa Laws 1884, chap. 71. The tract in controversy, being in O'Brien county, came within the excepting words of the proviso.

This tract was part of an odd-numbered section of land immediately adjoining the third 10-mile section of constructed road, the completion of which was duly certified by the governor, and was unreserved, unappropriated, and vacant at the date of the granting act and at the time the line of road was definitely located. Thus it was not only a part of the lands granted, but was earned by actual construction. And, strictly speaking, it was rightly patented to the state for the benefit of the company, the excess in the lands patented being caused by the inclusion in the patents of other lands differently situated and not earned by the completion of the five 10-mile sections of road.

September 11, 1888, while the tract was still free from [617] any homestead, preemption, or kindred claim, and while the patent therefor, issued to the state in 1873, for the benefit of the company, was still outstanding, Ellen M. Childs purchased the tract from the company, paying $88 in cash and agreeing to pay ten deferred instalments, with interest thereon, making the full price $1,270.64, which was the fair value of the land. At the time of her purchase the tract was in the actual and undisputed possession of the company through a tenant named Fitzgerald, who then became her tenant, and through him she continued in the undisturbed possession until October 8, 1889, when she sold to Logan, the plaintiff in error, who paid her $228 in cash and took the land subject to the payment of the ten deferred instalments. Fitzgerald then became the tenant of Logan and remained in possession in that capacity until the spring of 1890, when Davis, the defendant in error, with a gang of men and teams, went upon the land, took possession of it, and began cultivating the larger part of it. In what he did Davis acted without the consent of Logan, and with knowledge of Mrs. Childs's purchase from the company in 1888, of her sale to Logan in 1889, and of Fitzgerald's possession as tenant of Mrs. Childs and then of Logan. Although subsequently maintaining the possession obtained in the spring of 1890, Davis did not reside upon the tract or erect any buildings upon it.

In October, 1889, the United States brought a suit—the bill was filed October 4 and the subpœna was served October 8—against the company under the adjustment act of March 3, 1887, supra, to regain the title to nearly 22,000 acres of land in Dickinson and O'Brien counties, including this tract, theretofore patented to the state for the benefit of the company, the theory upon which such relief was sought being that the company had received a larger quantity of other lands than it was entitled to receive under the granting act, and therefore [618] could not properly claim the 22,000 acres. In the circuit court the United States prevailed, and this court affirmed the decree. Sioux City & St. P. R. Co. v. United States, 159 U. S. 349, 40 L. ed. 177, 16 Sup. Ct. Rep. 17. The ground upon which the decision rested is indicated by the following extract from the opinion (p. 370): "Our conclusion, then, is that the Sioux City Company, having failed to complete the entire road for the construction of which Congress made the grant in question, was not entitled to the whole of the lands granted, but, at most, only to one hundred odd-numbered sections—as those sections were surveyed, whatever their quantity—for each section of 10 consecutive miles constructed *and certified by the governor of the state;* and that, according to the measurement of 1887, which is accepted as the basis of calculation, the railroad company had, prior to the institution of this suit, received more lands, on account of the 50 miles of constructed road, certified by the governor, than it was entitled to receive. Under this view, it is unnecessary to inquire whether the particular lands here in dispute should not have been assigned to the company, rather than other lands, containing a like number of acres, that were, in fact, transferred to it, and which cannot now be recovered by the United States, by reason of their having been disposed of by the company. If the company has received as much in quantity as should have been awarded to it, a court of equity will not recognize its claim to more, in whatever shape the claim is presented."

There was no attempt to make Mrs. Childs, Logan, or the tenant Fitzgerald a party to that suit. During its pendency, and on March 13, 1894, Logan entered into an agreemen in writing with the company whereby the latter extended the time for paying the ten deferred instalments until ninety days after a decision should be rendered in the suit by this court, and whereby he agreed that if the decision should be adverse to the company, he would accept [619] from it the amount already paid, with interest, in full satisfaction of all demands against the company on account of the failure of the title.

Shortly following the decision of this court in that suit the lands recovered by the United States, including this tract, were regularly restored to public entry in conformity with the provisions of the adjust-

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ment act, and a contest at once ensued in the Land Department over this tract. Logan, claiming to be a purchaser in good faith, applied for a confirmatory patent under § 4, and Davis, claiming to be a bona fide occupant, sought to obtain title under the homestead law. A hearing before the local land office, at which the parties presented such evidence as they had in support of their respective claims, resulted in a decision by the local officers in favor of Davis. This was affirmed by the Commissioner of the General Land Office on the theory that the agreement of March 13, 1894, was fatal to Logan's claim as a purchaser; and upon an appeal to the Secretary of the Interior the decisions below were reversed, it being found and held by the Secretary that Logan was a purchaser in good faith within the meaning of § 4 of the adjustment act; that the agreement of March 13, 1894, did not alter his status as a purchaser; and that Davis's possession, acquired after the purchase by Logan, and with knowledge of it, did not eliminate the element of good faith from the latter's purchase, or otherwise defeat his claim. As a result of this decision, Logan made the requisite payment to the government (see amendatory act of February 12, 1896, supra), and was given a confirmatory patent.

It is conceded that Mrs. Childs and Logan were both citizens of the United States, and in that respect within the remedial provisions of § 4 of the adjustment act, and also that in the contest before the Land Department Logan testified that at the time of his purchase from Mrs. Childs, in 1889, he had no knowledge of any adverse claim to the [620] tract. The present record, however, does not purport to contain all the evidence produced in that contest.

When the proceeding in the Land Department was concluded, Logan sued Davis in the local state court to recover the possession, and by the pleadings subsequent to the petition the character of the action was so far changed that Davis sought to have Logan declared a trustee of the title for him, Davis, and directed to convey the same to him, and Logan sought to have his title quieted as against Davis, as well as to recover the possession. In Davis's pleading Logan's right under the confirmatory patent was assailed upon the grounds (1) that the grant of 1864 was completely and finally adjusted by the legislation and action of the state in 1882 and 1884, and so was not within the operation of the adjustment act of 1887; (2) that the remedial provisions of § 4 of that act were confined to purchases made prior to the date of the act, and so were not applicable to Mrs. Childs' purchase in 1888 or Logan's purchase in 1889; (3) that Mrs. Childs and Logan were bound to take notice of the various acts and matters bearing upon the company's right to this tract, and so it was legally impossible for either to be a purchaser in good faith within the meaning of § 4; and (4) that the decision of the Secretary of the Interior, reversing the action of the local officers and of the Commissioner of the General Land Office, was given "unlawfully and without any authority of law." The last ground evidently was intended as a mere conclusion from the others, for nothing else was alleged to make it even colorable. The case was heard upon an agreed statement of facts, the substance of which has been recited, and a decree was rendered in favor of Davis, which was affirmed by the supreme court of the state. 147 Iowa, 441, 124 N. W. 808. That court held that Logan was not a purchaser in good faith within the meaning of § 4 of the adjustment act of 1887, and this upon the theory (a) that he was presumed to have [621] known the character of the company's title, and (b) that § 4 was not applicable to a purchase made after the date of the act. To reverse that decision Logan prosecutes this writ of error.

Messrs. William Milchrist and George C. Scott submitted the cause for plaintiff in error. Mr. W. D. Boies was on the brief:

The plaintiff in error being in actual possession of the land in controversy under claim of right in good faith made, the defendant in error, with full knowledge of such possession and claim, having wrongfully invaded such prior actual possession, initiated no right under the homestead law, and he cannot maintain his counterclaim.

Lyle v. Patterson, 228 U. S. 211, 57 L. ed. 804, 33 Sup. Ct. Rep. 480; Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732; Hosmer v. Wallace, 97 U. S. 575, 24 L. ed. 1130; Swanson v. Sears, 224 U. S. 180, 56 L. ed. 721, 32 Sup. Ct. Rep. 455; Quimby v. Conlan, 104 U. S. 420, 26 L. ed. 800; United States v. Southern P. R. Co. 184 U. S. 49, 46 L. ed. 425, 22 Sup. Ct. Rep. 285; United States v. Winona & St. P. R. Co. 165 U. S. 463, 41 L. ed. 789, 17 Sup. Ct. Rep. 368.

The plaintiff in error, having purchased the land in good faith while it was in the undisputed possession of the railroad company, and before any attempt was made to initiate any homestead right by settlement, improvement, or taking possession, was entitled to protection under the act of March 3, 1887, even though the purchase was made after the passage of the act.

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U. S. 49, 46 L. ed. 425, 22 Sup. Ct. Rep. 285; United States v. Winona & St. P. R. Co. 165 U. S. 463, 41 L. ed. 789, 17 Sup. Ct. Rep. 368; Knepper v. Sands, 194 U. S. 476, 48 L. ed. 1083, 24 Sup. Ct. Rep. 744.

All of the circumstances and conditions being such that the plaintiff in error would be entitled to protection under the act of March 3, 1887, had his purchase dated prior to the approval of that act, and the United States government having treated such act as applying to the plaintiff in error's purchase, and having invited the plaintiff to an adjustment of his claim under that act, and having adjusted such claim and received the full purchase price from the plaintiff in error, and issued to him its patent, the United States government is now estopped from denying the validity of such patent, and the defendant in error, claiming in privity with the United States government, and with notice and knowledge of the acts of the United States when he proffered his homestead filing on February 27, 1896, is also estopped.

Branson v. Wirth, 17 Wall. 32, 21 L. ed. 566; James v. Germania Iron Co. 46 C. C. A. 476, 107 Fed. 597; United States v. Stinson, 60 C. C. A. 615, 125 Fed. 907, 197 U. S. 200, 49 L. ed. 724, 25 Sup. Ct. Rep. 426; United States v. McLaughlin, 30 Fed. 147, 127 U. S. 428, 32 L. ed. 213, 8 Sup. Ct. Rep. 1177; Clark v. United States, 95 U. S. 539, 24 L. ed. 518; Michigan v. Jackson, L. & S. R. Co. 16 C. C. A. 345, 37 U. S. App. 220, 69 Fed. 116; Indiana v. Milk, 11 Biss. 197, 11 Fed. 389; State v. Flint & P. M. R. Co. 89 Mich. 481, 51 N. W. 103; Cahn v. Barnes, 7 Sawy. 48, 5 Fed. 326; Gibbons v. United States, 5 Ct. Cl. 416, 2 Pom. Eq. Jur. 3d ed. § 813; Peters v. Jones, 35 Iowa, 512; Knevals v. Florida C. & P. R. Co. 13 C. C. A. 410, 23 U. S. App. 549, 66 Fed. 224; Bausman v. Eads, 46 Minn. 148, 24 Am. St. Rep. 201, 48 N. W. 769; William Deering & Co. v. Peterson, 75 Minn. 118, 77 N. W. 568; Re McKeag, 141 Cal. 403, 99 Am. St. Rep. 80, 74 Pac. 1039; Portis v. Hill, 30 Tex. 529, 98 Am. Dec. 481; McCravey v. Remson, 19 Ala. 430, 54 Am. Dec. 194.

Mr. Madison B. Davis submitted the cause for defendant in error. Mr. Edwin J. Stason was on the brief:

The trials and decisions of the district and the supreme courts of Iowa did not involve the determination of a Federal question. Both courts based their judgments upon the determination of questions of fact and the application of the rules of the common law. Whether a party is estopped is not a Federal question. The writ of error should therefore be dismissed for want of jurisdiction.

Pittsburgh & L. A. Iron Co. v. Cleveland Iron Min. Co. 178 U. S. 270, 44 L. ed. 1065, 20 Sup. Ct. Rep. 931; Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; De Saussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 35 L. ed. 193, 11 Sup. Ct. Rep. 528; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Rutland R. Co. v. Central Vermont R. Co. 159 U. S. 630, 40 L. ed. 284, 16 Sup. Ct. Rep. 113; Seneca Nation of Indians v. Christy, 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. Rep. 828; Hammond v. Johnston, 142 U. S. 73, 35 L. ed. 941, 12 Sup. Ct. Rep. 141; Delaware City, S. & P. S. B. Nav. Co. v. Reybold, 142 U. S. 636, 35 L. ed. 1141, 12 Sup. Ct. Rep. 290; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 431, 29 Sup. Ct. Rep. 227; Giles v. Teasley, 193 U. S. 146, 48 L. ed. 655, 24 Sup. Ct. Rep. 359; Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; Elder v. Wood, 208 U. S. 226, 52 L. ed. 464, 28 Sup. Ct. Rep. 263; Fowler v. Lamson, 164 U. S. 252, 41 L. ed. 424, 17 Sup. Ct. Rep. 112; Arkansas Southern R. Co. v. German Nat. Bank, 207 U. S. 270, 52 L. ed. 201, 28 Sup. Ct. Rep. 78; Harrison v. Morton, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; California Powder Works v. Davis, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Pierce v. Somerset R. Co. 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; Weyerhaueser v. Minnesota, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485; Leonard v. Vicksburg, S. & P. R. Co. 198 U. S. 416, 49 L. ed. 1108, 25 Sup. Ct. Rep. 750; Gillis v. Stinchfield, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131; Moran v. Horsky, 178 U. S. 205, 44 L. ed. 1038, 20 Sup. Ct. Rep. 856; Rakes v. United States, 212 U. S. 58, 53 L. ed. 402, 29 Sup. Ct. Rep. 244; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790.

The findings of fact by the court below are conclusive in a proceeding in error.

Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Hedrick v. Atchison, T. & S. F. R. Co. 167 U. S. 673, 42 L. ed. 320, 17 Sup. Ct. Rep. 922.

When it is unnecessary to decide a Fed-

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eral question, and the state court has based its decision on a local or state question, the logical course is to dismiss the writ of error.

Eustis v. Bolles, 150 U. S. 370, 37 L. ed. 1113, 14 Sup. Ct. Rep. 131; Hale v. Lewis, 181 U. S. 473, 45 L. ed. 959, 21 Sup. Ct. Rep. 677; St. Louis, G. & Ft. S. R. Co. v. Missouri, 156 U. S. 478, 39 L. ed. 502, 15 Sup. Ct. Rep. 443; Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; Remington Paper Co. v. Watson, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456.

The act of 1864 was not a present grant. Therefore the Sioux City Company, having failed to earn the land, acquired no right or title, legal or equitable, thereto.

Sioux City & St. P. R. Co. v. United States, 159 U. S. 349, 40 L. ed. 177, 16 Sup. Ct. Rep. 17; Sioux City & St. P. R. Co. v. Osceola County, 43 Iowa, 318; Manley v. Tow, 110 Fed. 241.

The grant not being a present one, there was nothing to "adjust" so as to make it possible for one to be a good-faith purchaser who purchased after the act of March 3, 1887, took effect.

St. Louis, I. M. & S. R. Co. v. McGee, 115 U. S. 469, 29 L. ed. 446, 6 Sup. Ct. Rep. 123; Knepper v. Sands, 194 U. S. 476, 48 L. ed. 1083, 24 Sup. Ct. Rep. 744; Manley v. Tow, 110 Fed. 241; Sioux City & St. P. R. Co. v. United States, 159 U. S. 349, 40 L. ed. 177, 16 Sup. Ct. Rep. 17; Logan v. Davis, 147 Iowa, 441, 124 N. W. 808; Ostrom v. Wood, 140 Fed. 294; Olson v. Traver, 26 Land Dec. 350.

The defendant in error, having complied with the requirements of the homestead law, as far as he was permitted to comply, is entitled to the land as a homestead claimant.

26 Am. & Eng. Enc. Law, 2d ed. 397, 398; Duluth & I. Range Co. v. Roy, 173 U. S. 587, 43 L. ed. 820, 19 Sup. Ct. Rep. 549; Knepper v. Sands, 194 U. S. 476, 48 L. ed. 1083, 24 Sup. Ct. Rep. 744; Moss v. Dowman, 176 U. S. 413, 44 L. ed. 526, 20 Sup. Ct. Rep. 429; Clements v. Warner, 24 How. 394, 16 L. ed. 695; Nelson v. Northern P. R. Co. 188 U. S. 108, 47 L. ed. 406, 23 Sup. Ct. Rep. 302; Ard v. Brandon, 156 U. S. 537, 39 L. ed. 524, 15 Sup. Ct. Rep. 406; Lake Superior Ship Canal R. & Iron Co. v. Cunningham, 155 U. S. 354, 39 L. ed. 183, 15 Sup. Ct. Rep. 103; Manley v. Tow, 110 Fed. 241; Benner v. Lane, 116 Fed. 407; Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732; Lyle v. Patterson, 228 U. S. 211, 57 L. ed. 804, 33 Sup. Ct. Rep. 480; Logan v. Davis, 147 Iowa, 441, 124 N. W. 808.

The defendant in error is not estopped to make claim as a homestead entryman by reason of the acts of the Federal courts or officers in recognizing, in the manner in which they did, certain rights of the Sioux City Company.

11 Am. & Eng. Enc. Law, 2d ed. 434; Clark v. Lyster, 84 C. C. A. 27, 155 Fed. 513; Hollenbeck v. Smith, 231 Ill. 484, 83 N. E. 206; Gjerstadengen v. Van Duzen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233; Walker v. Ehresman, 79 Neb. 775, 113 N. W. 218; 21 Am. & Eng. Enc. Law, 2d ed. 588; Benner v. Lane, 116 Fed. 407; Logan v. Davis, 147 Iowa, 451, 124 N. W. 808.

Mr. Justice Van Devanter, after making the foregoing statement, delivered the opinion of the court:

As Logan claimed as a purchaser in good faith within the meaning of § 4 of the adjustment act of 1887, under which a confirmatory patent had been issued to him, and the supreme court of the state denied that claim, and held that he was not entitled to the benefit of the provisions of that section, the judgment is so plainly subject to review by this court under § 237 of the Judicial Code [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227] that a contention to the contrary, found in one of the briefs, is dismissed as not justifying further comment. Gauthier v. Morrison, 232 U. S. 452, ante 680, 34 Sup. Ct. Rep. 384.

And as the Secretary of the Interior found, from the evidence submitted in the contest before the Land Department, that Logan was a purchaser in good faith in the sense of the adjustment act, and no basis was laid in the pleadings or agreed statement of facts for rejecting or disturbing that decision save as it was said to be grounded upon error of law and misconstruction of the statute, it is manifest that unless some of the objections urged against it on that score are well taken, Logan's title should be sustained. Vance v. Burbank, 101 U. S. 514, 519, 25 L. ed. 929, 931; Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; Gertgens v. O'Connor, 191 U. S. 237, 240, 48 L. ed. 163, 164, 24 Sup. Ct. Rep. 94; Ross v. Day, 232 U. S. 110, 116, ante, 528, 529, 34 Sup. Ct. Rep. 233.

The act of 1887, in its 1st section, authorized and required the Secretary of the Interior immediately to adjust, in accordance with the decisions of this court, the several land grants made by Congress to aid in the construction of railroads, "and heretofore unadjusted." This included [624] the grant made by the act of 1864, unless already adjusted. That it had not been adjusted by the Land Department is conceded, but it is in-

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sisted that it had been adjusted by the legislation and action of the state in 1882 and 1884, and so was not within the operation of the adjustment act of 1887. To this we cannot assent. The United States had not committed the adjustment to the state, and neither had the state assumed to make an adjustment for the United States. Prior to the act of 1887 the administration of the several railroad land grants rested with the Land Department, of which the Secretary of the Interior is the head (Catholic Bishop v. Gibbon, 158 U. S. 155, 166, 167, 39 L. ed. 931, 936, 15 Sup. Ct. Rep. 779, and some of the lessor grants had progressed to a final adjustment in regular course of administration. It was because of this that the restrictive words "and heretofore unadjusted" were inserted in the act. They meant only that adjustments theretofore effected by the Land Department in regular course were not to be disturbed. The facts before recited amply illustrate that this grant had not proceeded to such an adjustment. The Secretary of the Interior treated it as unadjusted (Re Sioux City & St. P. R. Co. 6 Land Dec. 54, 71), and this court impliedly, if not expressly, approved his action (Sioux City & St. P. R. Co. v. United States, 159 U. S. 349, 40 L. ed. 177, 16 Sup. Ct. Rep. 17).

The 2d section of the act of 1887 related to the recovery by the United States of lands which, upon the completion of any adjustment, or sooner, appeared to have been erroneously certified or patented by the Land Department "to or for the use or benefit of any company" claiming under a grant to aid in the construction of a railroad. The 3d section related to the reinstatement of pre-emption and homestead entries found, in the course of any adjustment, to have been erroneously canceled by reason of such a grant or a withdrawal, and directed that where the entryman failed to apply for a reinstatement within a [625] reasonable time, to be fixed by the Secretary of the Interior, the land should be disposed of under the public land laws to bona fide purchasers, if any, and, if there were none, then to bona fide settlers. The fourth section read as follows:

"That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney General shall cause suit or suits to be brought against such company for the said amount: Provided, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified, or patented as aforesaid from recovering the purchase money therefor from the grantee company, less the amount paid to the United States by such company, as by this act required: And provided, That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land grant for conditions broken, or as authorizing [626] an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions."

This section was amended February 12, 1896 (29 Stat. at L. 6, chap. 18), by adding to it the following:

"Provided further, That where such purchasers, their heirs or assigns, have paid only a portion, of the purchase price to the company, which is less than the government price of similar lands, they shall be required, before the delivery of patent for their lands, to pay to the government a sum equal to the difference between the portion of the purchase price so paid and the government price, and in such case the amount demanded from the company shall be the amount paid to it by such purchaser."

Section 5 related to lands apparently within such a grant and lying opposite the constructed parts of the road, but excepted from the operation of the grant, and not certified or patented to or for the benefit of the railroad company, and provided that where any such land was sold by the company to a bona fide purchaser, who was a citizen of the United States, or had declared his intention to become such, the purchaser, his heirs or assigns, could obtain a patent by paying the ordinary government price, but that this privilege should not exist if, at the time of the sale by the company, the land was occupied by an adverse claimant under the pre-emption or homestead laws.

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Whether § 4 was confined to purchases made prior to the date of the act, or equally included subsequent purchases, where made in good faith, is one of the controverted questions in the case. Both views have support in the terms of the act, and if the question were altogether new there would be room for a reasonable difference of opinion as to what was intended. Certainly, resort to interpretation would be necessary. But the question is not altogether new. It has often arisen in the administration of the act, and successive Secretaries of the Interior uniformly have [627] held that the remedial sections embraced purchases after the date of the act, no less than prior purchases, if made in good faith. Sethman v. Clise, 17 Land Dec. 307; Holton v. Rutledge, 20 Land Dec. 227; Andrus v. Balch, 22 Land Dec. 238; Briley v. Beach, 22 Land Dec. 549; Re Seaver, 23 Land Dec. 108; Neilsen v. Central P. R. Co. 26 Land Dec. 252. Many thousands of acres have been patented to individuals under that interpretation, and to disturb it now would be productive of serious and harmful results. The situation, therefore, calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons. United States v. Moore, 95 U. S. 760, 763, 24 L. ed. 588, 589; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 366, 33 L. ed. 363, 367, 10 Sup. Ct. Rep. 112; United States v. Alabama G. S. R. Co. 142 U. S. 615, 621, 35 L. ed. 1134, 1136, 12 Sup. Ct. Rep. 306; Kindred v. Union P. R. Co. 225 U. S. 582, 596, 56 L. ed. 1216, 1220, 32 Sup. Ct. Rep. 780.

The remedial sections of the act were also considered by this court in United States v. Southern P. R. Co. 184 U. S. 49, 56, 46 L. ed. 425, 429, 22 Sup. Ct. Rep. 285, which involved several purchases made after the date of the act, and it was there said: "But the act itself bears upon its face evidence that it was not intended to be limited to cases of purchases from the railroad company prior to its date." And, after referring to the language of §§ 2 and 3, it was added: "This seems to imply an intent that all mistakes of the nature referred to which shall have occurred up to the very completion of the adjustment may be rectified. Section 4 makes provision for the issue of patents to certain purchasers from railroad companies, providing proof shall be made 'within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted.' While other sections may not be so specific, yet, placing them [628] alongside of those from which quotations have been made, it is reasonable to hold that the act applies not merely to transactions had before its date, but to any had before the time of final adjustment. In this case the several grants to the Southern Pacific have not yet been finally adjusted. Further, it must be borne in mind that this is a remedial statute, and is to be construed liberally, and so as to effectuate the purpose of Congress and secure the relief which was designed, and the mere date of the transaction between the purchaser and the railroad company is not of itself vital in determining whether there is or is not an equity in behalf of the purchaser."

Counsel for Davis rely upon Knepper v. Sands, 194 U. S. 476, 48 L. ed. 1083, 24 Sup. Ct. Rep. 744, as placing a different interpretation upon the adjustment act. But, although some broad language is found in the opinion, the real decision did not go as far as suggested. The case came here upon a certificate from a circuit court of appeals, and the question presented for decision, considering the facts stated in the certificate, was whether a purchase from the railroad company of land erroneously patented for its benefit under the grant of 1864, could be esteemed a purchase in good faith, within the meaning of § 4 of the act of 1887, where, at the time of the purchase, the land was occupied by a bona fide settler who was residing upon, improving and cultivating the same with a view to acquiring it under the homestead law. The question was answered in the negative, particular emphasis being laid upon the settler's occupancy at the time of the purchase and upon the well known policy of favoring actual settlers. The answer must have been the same whether the purchase was before or after the date of the act, and manifestly there was no purpose to overrule or qualify the decision in United States v. Southern P. R. Co. supra, for it was not even mentioned. So, reading the opinion in Knepper v. Sands with appropriate regard for the facts of the case, we think it is not in point [629] or controlling here, for no one was occupying or claiming this tract under the settlement laws at the time it was purchased from the company.

The contention that Logan was charged with constructive notice of the defect in the company's title, and so was not a purchaser in good faith, in the sense of the adjustment act, must be overruled, as was a like contention in United States v. Winona & St. P. R. Co. 165 U. S. 463, 41 L. ed. 789, 17 Sup. Ct. Rep. 368. It was there said, referring to the remedial provisions of § 4

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(p. 480): "It will be observed that this protection is not granted to simply bona fide purchasers (using that term in the technical sense), but to those who have one of the elements declared to be essential to a bona fide purchaser; to wit, good faith. It matters not what constructive notice may be chargeable to such a purchaser if, in actual ignorance of any defect in the railroad company's title, and in reliance upon the action of the government in the apparent transfer of title by certification or patent, he has made an honest purchase of the lands. The plain intent of this section is to secure him the lands, and to reinforce his defective title by a direct patent from the United States, and to leave to the government a simple claim for money against the railroad company." And, referring to the provisions of § 5, it was further said (p. 481): "It is true the term used here is 'bona fide purchaser,' but it is a bona fide purchaser from the company, and the description given of the lands, as not conveyed and 'for any reason excepted from the operation of the grant,' indicates that the fact of notice of defect of title was not to be considered fatal to the right. Congress attempted to protect an honest transaction between a purchaser and a railroad company, even in the absence of a certification or patent." This view of the purpose and meaning of the act was repeated and applied in Gertgens v. O'Connor, 191 U. S. 237, 48 L. ed. 163, 24 Sup. Ct. Rep. 94, and United States v. Chicago, M. & St. P. R. Co. 195 U. S. 524, 49 L. ed. 306, 25 Sup. Ct. Rep. 113.

[630] As it thus appears that the decision of the Secretary of the Interior was right in point of law, and as it was conclusive upon all questions of fact (Gertgens v. O'Connor, supra), it follows that the state court erred in not sustaining Logan's title obtained under that decision.

Decree reversed.

W. W. SMITH, Plff. in Err.,
v.
STATE OF TEXAS.

(See S. C. Reporter's ed. 630–642.)

Constitutional law — due process of law — restricting right to contract — railway conductors — prior occupation.

An infringement of the liberty of contract without due process of law, contrary to U. S. Const., 14th Amend., results from the provisions of Texas Laws 1909, chap. 46, which make it a misdemeanor for any person to act as a conductor on a railway train in that state without having previously served for two years as a freight conductor or brakeman.

[For other cases, see Constitutional Law, IV. c, 3; IV. b, 7, in Digest Sup. Ct. 1908.]

[No. 268.]

Argued and submitted March 12, 1914. Decided May 11, 1914.

IN ERROR to the Court of Criminal Appeals of the State of Texas to review a judgment which affirmed a conviction in the County Court of Gregg County, in that state, of having acted as conductor of a freight train without previous experience as freight conductor or brakeman. Reversed and remanded for further proceedings.

See same case below, — Tex. Crim. Rep. —, 146 S. W. 900.

The facts are stated in the opinion.

Mr. Gardiner Lathrop argued the cause, and, with Mr. Robert Dunlap, filed a brief for plaintiff in error:

The statute, by unreasonably and arbitrarily restricting the right to engage in a lawful occupation to a favored class, thereby depriving others who are as well fitted to engage therein, and depriving them of all opportunity to show their fitness, is arbitrary and capricious upon its face, and is obviously not passed for the sole purpose of protecting the community against the results of inexperience, but tends to give a monopoly in a particular employment to a favored class. It deprives those who do not fall within the favored class of their liberty or freedom without due process of law, and denies to them the equal protection of the laws of the state.

Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; Barbier v. Connolly, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; Connolly v. Union Sewer Pipe Co. 184 U. S. 559, 46 L. ed. 689, 22 Sup. Ct. Rep. 431; Lochner v. New York, 198 U. S. 53, 49 L. ed. 940, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Adair v. United States, 208 U. S. 173, 174, 52 L. ed. 443, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Dent v. West Virginia, 129 U. S. 114, 124, 125, 32 L. ed. 623, 626, 627, 9 Sup. Ct. Rep. 231; Reetz v. Michigan, 188

NOTE.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On the constitutionality of statutes restricting contracts and business, generally—see note to State v. Loomis, 21 L.R.A. 789.

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U. S. 508, 509, 47 L. ed. 566, 567, 23 Sup. Ct. Rep. 390; Cooley, Const. Lim. 7th ed. pp. 889, 890; State ex rel. Powell v. State Medical Examining Board, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238; Gage v. New Hampshire Electric Medical Soc. 63 N. H. 92, 56 Am. Rep. 492; Bank of Columbia v. Okely, 4 Wheat. 244, 4 L. ed. 561; The Federalist, No. 51; Marbury v. Madison, 1 Cranch, 176, 2 L. ed. 73; Wyeth v. Board of Health (Wyeth v. Thomas) 200 Mass. 474, 23 L.R.A.(N.S.) 147, 128 Am. St. Rep. 439, 86 N. E. 925; Josma v. Western Steel Car & Foundry Co. 249 Ill. 508, 94 N. E. 945; Bonnett v. Vallier, 136 Wis. 193, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885; Chenoweth v. State Bd. of Medical Examiners, — Colo. —, 141 Pac. 132; Ruhstrat v. People, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41, 12 Am. Crim. Rep. 453; People v. Schenck, 257 Ill. 384, 44 L.R.A.(N.S.) 46, 100 N. E. 994, Ann. Cas. 1914A, 1129; Opinion of Justices, 211 Mass. 618, 98 N. E. 337; Morgan v. State, 179 Ind. 300, 101 N. E. 7; State v. Wagener, 69 Minn. 206, 38 L.R.A. 677, 65 Am. St. Rep. 565, 72 N. W. 67; Com. v. Snyder, 182 Pa. 630, 38 Atl. 356; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098; People v. Hawkins, 157 N. Y. 7, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; Vicksburg v. Mullane, — Miss. —, 63 So. 412; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Connolly v. Union Sewer Pipe Co. 184 U. S. 549, 46 L. ed. 685, 22 Sup. Ct. Rep. 431; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Smith v. Board of Examiners of Feeble Minded, — N. J. L. —, 88 Atl. 963; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Lawton v. Steele, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 761, 28 L. ed. 588, 4 Sup. Ct. Rep. 652.

An enactment cannot invade the rights of persons and property under the guise of a police regulation when it is not such in fact.

Eden v. People, 161 Ill. 296, 32 L.R.A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108; People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454.

Statutes prescribing certain tests or qualifications to be possessed by those engaging in certain occupations have been sustained only where it was obvious that they were passed in the interest of public safety or health, and the tests prescribed were general in character and reasonably tended directly to accomplish the object sought. An opportunity was usually accorded for a hearing, and parties were not excluded who were able to show their fitness.

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Nashville C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 42 L.R.A.(N.S.) 1123, 33 Sup. Ct. Rep. 76.

Although a statute may seem fair upon its face, yet if, by its necessary operation, it is destructive of rights guaranteed under the Constitution, it will be held invalid. Its necessary practical effect is of prime consideration.

Minnesota v. Barber, 136 U. S. 319, 34 L. ed. 457, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 268, 23 L. ed. 543, 547.

Mr. B. F. Looney, Attorney General of Texas, submitted the cause for defendant in error. Mr. Luther Nickels was on the brief:

The general purpose of the act was within the police power of the state.

Lochner v. New York, 198 U. S. 53, 49 L. ed. 940, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Re Converse, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191.

The general plan, or principle, for the accomplishment of such purpose, as designed by the act, is also legitimate.

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28.

The state may rightfully prevent unqualified men from occupying the position of conductor of a passenger train; and in doing so the state does not:

I. Unconstitutionally interfere with the right of contract, because:

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The state has the power to prevent individuals from making certain kinds of contracts in regard to which the Federal Constitution offers no protection.

Ibid.; Olsen v. Smith, 195 U. S. 332, 49 L. ed. 224, 25 Sup. Ct. Rep. 52; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

II. Or unconstitutionally interfere with the right to pursue a lawful occupation, for:

A man has no right to engage in or pursue any calling, the proper prosecution of which requires a certain amount of technical knowledge or professional skill, the lack of which may result in material injury to the public or individuals, which can be controlled in all cases, or, in proper cases, to be taken away by state legislation.

Lochner v. New York, 198 U. S. 53, 49 L. ed. 940, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Olsen v. Smith, — Tex. Civ. App. —, 68 S. W. 320, 195 U. S. 332, 49 L. ed. 224, 25 Sup. Ct. Rep. 52; 1 Tiedeman, State & Federal Control of Persons & Property, p. 242.

The legislature, having the power to prevent unqualified men from pursuing the occupation of conductors, had also the power to classify and the power to prescribe the one qualification of prior service.

Smith v. Alabama, 124 U. S. 465; 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Dent v. West Virginia, 129 U. S. 122, 123, 32 L. ed. 626, 9 Sup. Ct. Rep. 231; Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; Jones v. Brim, 165 U. S. 180, 183, 41 L. ed. 677, 678, 17 Sup. Ct. Rep. 282, 1 Am. Neg. Rep. 547; Hawker v. New York, 170 U. S. 191, 193, 197, 198, 42 L. ed. 1004, 1006, 1007, 18 Sup. Ct. Rep. 573; Re County-Seat of Linn County, 15 Kan. 528; Ex parte Garland, 4 Wall. 333, 379, 18 L. ed. 366, 370; Re Admission to the Bar, 61 Neb. 58, 84 N. W. 611; Wilson's Application, 9 Pa. Dist. R. 102; Re Dunn, 43 N. J. L. 359, 39 Am. Rep. 600; A. B.'s Application, 4 Johns. 191; Anonymous, 3 Wend. 450; Ex parte Sayre, 7 Cow. 368; Com. ex rel. Brackenridge v. Cumberland County, 1 Serg. & R. 187; Re Admission to Practice, 14 S. D. 429, 85 N. W. 992; Re Lockwood, 154 U. S. 116, 38 L. ed. 929, 14 Sup. Ct. Rep. 1082; Williams v. People, 121 Ill. 84, 11 N. E. 881; State v. Creditor, 44 Kan. 565, 21 Am. St. Rep. 306, 24 Pac. 346; State v. Vandersluis, 42 Minn. 129, 6 L.R.A. 119, 43 N. W. 789; Bradwell v. Illinois, 16 Wall. 130, 21 L. ed. 442.

When the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional. If the end which the legislature seeks to accomplish be one to which its power extends, although not the wisest or best, and yet not plainly and palpably unauthorized by law, the court cannot interfere.

M'Culloch v. Maryland, 4 Wheat. 316, 421, 4 L. ed. 579, 605.

The presumption is in favor of the validity of the statute; the legislature must be permitted a wide discretion as to the selection of the means to the end.

License Cases, 5 How. 504, 12 L. ed. 256; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730.

When a state legislature has declared that, in its opinion, public policy requires a certain measure, its action should not be disturbed under the 14th Amendment unless the court can clearly see that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.

Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638.

Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state; and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference.

Gundling v. Chicago, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633.

And the courts, in passing upon the va-

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lidity of a statute, should hold strongly to the presumption that the legislature had, in the enactment of the police regulation under inquiry, the sole desire and intention of thereby promoting the public health, comfort, and safety by the prohibition of some act injurious thereto. If the statute admits of two constructions, one of which is a reasonable exercise of the police power and the other is unreasonable, in that it promotes or does not promote the public interests, the former construction should be adopted, and the statute sustained as a constitutional exercise of the police power.

People ex rel. Nechamcus v. Warden, 144 N. Y. 529, 27 L.R.A. 718, 39 N. E. 686; 1 Tiedeman, State & Federal Control of Persons & Property, p. 235.

Mr. Justice Lamar delivered the opinion of the court:

W. W. Smith, the plaintiff in error, a man forty-seven years of age, had spent twenty-one years in the railroad business. He had never been a brakeman or a conductor, but for six years he served as fireman, for three years ran as extra engineer on a freight train, for eight years was engineer on a mixed train, hauling freight and passengers, and for four years had been engineer on a passenger train of the Texas & Gulf Railway. On July 22, 1910, he acted as conductor of a freight train running between two Texas towns on that road. There is no claim in the brief for the state that he was not competent to perform the duties of that position. On the contrary, it affirmatively and without contradiction appeared that the plaintiff in error, like other locomotive engineers, was familiar with the duties of that position, and was competent to discharge them with skill and efficiency. He was, however, found guilty of the offense of violating the Texas statute which makes it unlawful for any person to act† as conductor of a freight train without having [636] previously served for two years as conductor or brakeman on such trains. On that verdict he was sentenced to pay a fine, and the judgment having been affirmed, the case is here on a record in which he contends that the statute under which he was convicted violated the provisions of the 14th Amendment.

1. Life, liberty, property, and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. In so far as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.

If the service is public, the state may prescribe qualifications and require an examination to test the fitness of any person to engage in or remain in the public calling. Re Lockwood, 154 U. S. 116, 38 L. ed. 929, 14 Sup. Ct. Rep. 1082; Hawker v. New York, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644. The private employer may likewise fix standards and tests, but, if his business is one in which the public health or safety is concerned, the state may legislate so as to exclude from work in such private calling those whose incompetence might cause injury to the public. But, as the public interest is the basis of such legislation, the tests and prohibition should be enacted with reference to that object, and so as not unduly to "interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." Lawton v. Steele, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499.

A discussion of legislation of this nature is found in Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 98, 32 L. ed. 353, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28, where this court sustained the validity of a statute which required [637] all locomotive engineers to submit to an examination for color blindness, and then provided that those unable to distinguish signals should not act as engineers on railroad trains. That statute did not prevent any competent per-

†Sec. 2. If any person shall act or engage to act as a conductor on a railroad train in this state without having for two (2) years prior thereto served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than $25 nor more than $500, and each day he so engages shall constitute a separate offense.

Sec. 3. If any person shall knowingly engage, promote, require, persuade, prevail upon, or cause any person to do any act in violation of the provisions of the two preceding sections of this act, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than $25 nor more than $500, and each day he so engages shall constitute a separate offense. [Tex. Laws 1909, chap. 46.]

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son from being employed, but operated merely to exclude those who, on examination, were found to be physically unfit for the discharge of a duty where defective eyesight was almost certain to cause loss of life or limb. Another case cited by the plaintiff in error is that of Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231. The act there under review provided that no one except licensed physicans should be allowed to practise medicine, and declared that licenses should be issued by the state board of health only to those (1) who were graduates of a reputable medical college; (2) to those who had practised medicine continuously for ten years; or (3) to those who, after examination, were found qualified to practice. Ten years' experience was accepted as proof of fitness, but such experience was not made the sole test, since the privilege of practising was attainable by all others who, by producing a diploma or by standing an examination, could show that they were qualified for the performance of the duties of the profession. In answer to the contention that the act was void because it deprived the citizen of the liberty to contract and the right to labor, the court said no objection could be raised to the statutory requirements "because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation."

The necessity of avoiding the fixing of arbitrary tests by which competent persons would be excluded from lawful employment is also recognized in Smith v. Alabama, 124 U. S. 465, 480, 31 L. ed. 508, 513, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564. There the act provided that all engineers should secure a license, and in sustaining the [638] validity of the statute the court pointed out that the law "requires that every locomotive engineer shall have a license, but it does not limit the number of persons who may be licensed, or prescribe any arbitrary conditions of the grant." This and the other cases establish, beyond controversy, that, in the exercise of the police power, the state may prescribe tests and require a license from those who wish to engage in or remain in a private calling affecting the public safety. The liberty of contract is, of course, not unlimited; but there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent to labor on terms mutually satisfactory to employer and employee. None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position. Such a statute would shut the door, without a hearing, upon many persons and classes of persons who were competent to serve, and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves.

2. The statute here under consideration permits those who had been freight conductors for two years before the law was passed, and those who for two years have been freight conductors in other states, to act in the same capacity in the state of Texas. But barring these exceptional cases, the act permits brakemen on freight trains to be promoted to the position of conductor on a freight train, but excludes all other citizens of the United States from the right to engage in such service. The statute does not require the brakeman to prove his fitness, though it does prevent all others from showing that they are competent. The act prescribes no other qualification for appointment as conductor than that for two years the [639] applicant should have been a brakeman on a freight train, but affords no opportunity to any others to prove their fitness. It thus absolutely excludes the whole body of the public, including many railroad men, from the right to secure employment as conductor on a freight train.

For it is to be noted that under this statute, not only the general public, but also four classes of railroad men, familiar with the movement and operation of trains, and having the same kind of experience as a brakeman, are given no chance to show their competency, but are arbitrarily denied the right to act as conductors. The statute excludes firemen and engineers of all trains, and all brakemen and conductors of passenger trains. But no reason is suggested why a brakeman on a passenger train should be denied the right to serve in a position that the brakeman on a freight train is permitted to fill. Both have the same class of work to do, both acquire the same familiarity with rules, signals, and methods of moving and distributing cars, and if the training of one qualifies him to serve as conductor, the like training of the other should not exclude him from the right to earn his living in the same occupation.

It is argued in the brief for the state that, in practice, brakemen on freight trains are generally promoted to the position of freight conductors, and then to the position of conductors on passenger trains. And yet, under this act, even passenger conductors of the greatest experience and highest capacity

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would be punished if they acted as freight conductors without having previously been brakemen.

The statute not only prevents experienced and competent men in the passenger service from acting as freight conductors, but it excludes the engineer on a freight train,—even though, under the rules of all railroads, the freight engineer now acts as conductor in the event the regular conductor is disabled *en route*. This general custom [640] is a practical recognition of their qualification, and is founded on the fact that the engineer, by virtue of his position, is familiar with the rules and signals relating to the train's movement, and peculiarly qualified for the performance of the duties of conductor. If we cannot take judicial knowledge of these facts, the record contains affirmative proof on the subject. For, according to the testimony† of the state's witness, "acting as engineer on [641] a freight train would better acquaint one with the knowledge of how to operate a freight train than acting as brakeman." And yet, though at least equally competent, the engineer is denied the right to serve as conductor, and the exclusive right of appointment and promotion to that position is conferred upon brakemen.

3. So that the case distinctly raises the question as to whether a statute, in permitting certain competent men to serve, can lay down a test which absolutely prohibits other competent men from entering the same private employment. It would seem that to ask the question is to answer,—and the answer in no way denies the right of the state to require examinations to test the fitness and capacity of brakemen, firemen, engineers, and conductors to enter upon a service fraught with so much of risk to themselves and to the public. But all men are entitled to the equal protection of the law in their right to work for the support of themselves and families. A statute which permits the brakeman to act,—because he is presumptively competent,—and prohibits the employment of engineers and all others who can affirmatively prove that they are likewise competent, is not confined to securing the public safety, but denies to many the liberty of contract granted to brakemen, and operates to establish rules of promotion in a private employment.

If brakemen only are allowed the right of appointment to the position of conductors, then a privilege is given to them which is denied all other citizens of the United States. If the statute can fix the class from which conductors on freight trains shall be taken, another statute could limit the class from which brakeman and conductors on passenger trains could be selected, and so, progressively, the whole matter as to who could enter the railroad service, and who could go from one position to another, would be regulated by statute. In the nature of the case, promotion is a matter of private business management, and [642] should be left to the carrier company, which, bound to serve the public, is held to the exercise of diligence in selecting competent men, and responsible in law for the acts of those who fill any of these positions.

4. There was evidence that Smith safely and properly operated the train which had in it cars containing freight destined for points in Texas, Missouri, Oklahoma, and Kansas. But in view of what has been said it is not necessary to consider whether the

†I understand the railroad business, and know that a locomotive engineer learns as much about how a freight train should be operated by a conductor as a brakeman or conductor. Acting as engineer on a freight train will better acquaint one with a knowledge of how to operate a freight train than acting as brakeman. Under the rules of all railroads, and of the Texas & Gulf Railway Company, the engineer is held equally responsible with the conductor for the safe operation of the train. All orders are given to the engineer as well as to the conductor. Every order sent to a conductor in a train is made in duplicate, and one copy of it is given to the conductor and the other to the engineer. It is a rule with railway companies that if anything should happen to disable the conductor, or in any way prevent his proceeding with his train, the engineer is to immediately take charge of the train and handle it into the terminal. The engineer is constantly with the train and knows all of the signals, knows how the couplings are made, knows how the cars are switched and distributed, and knows how they are taken into the train and transported from one place to another. An engineer is so constantly associated with all the work of a conductor on a freight train that he should know as much about how a freight train should be operated by a conductor as the conductor himself. All actions of the conductor that pertain to the safe operation of the train are being carried on in his presence and within his observation all the time. The matter of handling the way bills and ascertaining the destinations of the cars in his train is easy and plain, and it does not take a person that has had experience as a conductor to understand that part of his service. The way bills are plainly written and the destinations plainly given, and booking the way-bills and delivering them with the cars is clerical, and can be done by anyone that can read and write and who has ordinary sense. Every act that is to be done by the engineer, and all of the conductor's acts with reference to this are in the view and observation of the engineer.

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plaintiff, as engineer, was in a position to raise the point that, under the decision in the Adams Express Case (Barrett v. New York, 232 U. S. 14, ante, 483, 34 Sup. Ct. Rep. 203) the statute interfered with interstate commerce. The judgment is reversed and the case remanded to the Court of Criminal Appeals of the State of Texas for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice Holmes dissents.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY OF TEXAS, Plff. in Err.,
v.
L. C. CADE.

(See S. C. Reporter's ed. 642–652.)

Statutes — who may assail validity.

1. One against whom judgment was rendered upon a claim which did not arise out of interstate commerce may not urge the invalidity under the commerce clause of the Federal Constitution and the interstate commerce act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), and its amendments, of Texas Laws 1909, p. 93, allowing a reasonable attorney's fee to the successful plaintiff in a suit upon a claim against "any person or corporation doing business in this state, for personal services rendered, or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees," where the claim was not paid within thirty days after demand, and the recovery is for the full amount claimed.

[For other cases, see Statutes, I. d, 3, in Digest Sup. Ct. 1908.]

Costs and fees — allowing attorney's fee to successful plaintiff.

2. The Federal Supreme Court will not, in the absence of a controlling decision by the state courts, limit to natural persons the benefit of the provisions of Texas Laws 1909, p. 93, allowing a reasonable attorney's fee to the successful plaintiff in a suit upon a claim against "any person or corporation doing business in this state, for personal services rendered, or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees," where the claim was not paid within thirty days after demand, and the recovery is for the full amount claimed.

[For other cases, see Costs and Fees, IV., in Digest Sup. Ct. 1908.]

Statutes — who may assail validity.

3. The validity of the provisions of Texas Laws 1909, p. 93, allowing an attorney's fee to the successful plaintiff in suits upon certain designated claims not paid within thirty days after demand, where the recovery is for the full amount claimed, may not be assailed by a defendant upon the ground that natural persons only may avail themselves of its benefits.

[For other cases, see Statutes, I. d, 3, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — allowing attorney's fee to successful plaintiff.

4. There is no denial of the equal protection of the laws, contrary to U. S. Const., 14th Amend., in the provisions of Texas Laws 1909, p. 93, for the allowance of a reasonable attorney's fee of not over $20 to the successful plaintiff in a suit in which an attorney is actually employed upon a claim not exceeding $200, against "any person or corporation doing business in this state, for personal services rendered, or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees," where such claim is not paid within thirty days after demand, and the recovery is for the full amount claimed, since this statute makes no classification of debtors, and the kinds of claims included cover a wide range, and do not appear to have been grouped for the purpose of bearing against any class or classes of citizens or corporations.

[For other cases, see Constitutional Law, IV. a, 6, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — allowing attorney's fee to successful plaintiff.

5. The mere fact that attorneys' fees are allowed by Texas Laws 1909, p. 93, to successful plaintiffs only, and not to successful defendants, does not involve a denial of the equal protection of the laws, contrary to U. S. Const. 14th Amend., if the classification is otherwise reasonable.

[For other cases, see Constitutional Law, IV. a, 6, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — allowing attorney's fee to successful plaintiff.

6. Due process of law is not denied, contrary to U. S. Const., 14th Amend., by the provisions of Texas Laws 1909, p. 93, for the allowance of a reasonable attorney's

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NOTE.—On validity of statutory provision for attorneys' fee—see notes to Builders' Supply Depot v. O'Connor, 17 L.R.A.(N.S.) 910; and Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 586.

On unconstitutional inequality or discrimination in statutes allowing attorneys' fees—see note to Farmers' & M. Ins. Co. v. Dobney, 47 L. ed. U. S. 821.

As to who may raise objection that statute contains an unconstitutional discrimination—see note to Pugh v. Pugh, 32 L.R.A. (N.S.) 954.

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fee of not over $20 to the successful plaintiff in a suit in which an attorney is actually employed upon a claim not exceeding $200 against "any person or corporation doing business in this state, for personal services rendered, or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees," where such claim is not paid within thirty days after demand, and the recovery is for the full amount claimed.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

[No. 522.]

Submitted February 24, 1914. Decided May 11, 1914.

IN ERROR to the Justice Court, Precinct No. 7, of Dallas County, in the State of Texas, to review a judgment allowing an attorney's fee to the successful plaintiff in a suit upon a claim not paid after demand. Affirmed.

The facts are stated in the opinion.

Messrs. Joseph M. Bryson and Aldis B. Browne submitted the cause for plaintiff in error. Messrs. Alexander S. Coke and A. H. McKnight were on the brief:

The statute in question is void because in conflict with that provision of § 1 of the 14th Amendment to the Constitution of the United States which guarantees the equal protection of the laws.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Central R. Co. v. Murphey, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 Ann. Cas. 514.

The act violates that provision of § 1 of the 14th Amendment to the Constitution of the United States which prohibits the taking of property without due process of law.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 109, 46 L. ed. 108, 22 Sup. Ct. Rep. 30; St. Louis, I. M. & S. R. Co. v. Wynne, 224 U. S. 354, 56 L. ed. 790, 42 L.R.A.(N.S.) 102, 32 Sup. Ct. Rep. 493; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; Bradley v. Richmond, 227 U. S. 481, 57 L. ed. 605, 33 Sup. Ct. Rep. 318; Chicago, M. & St. P. R. Co. v. Polt, 232 U. S. 165, ante, 554, 34 Sup. Ct. Rep. 301.

No appearance for defendant in error.

Mr. Justice Pitney delivered the opinion of the court:

This action was brought in the justice court to recover the sum of $10.75 alleged to be due as wages from the defendant (now plaintiff in error) to the plaintiff below, with an attorney's fee of $9. The fee was claimed only by virtue of an act of the legislature, approved March 19, 1909, Laws, p. 93, now forming arts. 2178 and 2179, Tex. Rev. Civ. Stat. 1911. Defendant specially excepted to this part of plaintiff's claim, on the ground that the act was invalid as constituting a burden upon interstate commerce, contrary to the commerce clause of the Federal Constitution and the act to regulate commerce and amendments thereof, and as violating the "equal protection" and "due process" clauses of the 14th Amendment. Notwithstanding these contentions, judgment was rendered in favor of plaintiff for the amount claimed, including the attorney's fee. Under the local practice, no appeal lies from a decision of the justice court to a higher state court in a case involving less than $20, and so the judgment is brought directly here by writ of error for a review of the Federal questions.

The statute in question (including its caption) is set [646] forth in the margin.† This is the same act that was held invalid under the state Constitution by the court of civil appeals in Ft. Worth & D. C. R. Co. v. Loyd, — Tex. Civ. App. —, 132 S. W. 899, because of which decision this court, in Gulf, C. & [647] S. F. R. Co. v. Dennis, 224 U. S. 503, 56 L. ed. 860, 32 Sup. Ct. Rep. 542, reversed a judgment that included an attorney's fee, without passing upon the question whether

†"An Act to Regulate the Presentation and Collection of Claims for Personal Services or for Labor Rendered or for Material Furnished, or for Overcharges in Freight or Express, or for Any Claim for Lost or Damaged Freight, or for Stock Killed or Injured by Any Person or Corporation, against Any Person or Corporation Doing Business in This State, and Providing a Reasonable Amount of Attorney's Fees to be Recovered, in Cases Where the Amount of Such Claims Shall Not Exceed Two Hundred ($200) Dollars, and Declaring an Emergency.

"Section 1. That hereafter any person in

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the act contravened the 14th Amendment. And see Gulf, C. & S. F. R. Co. v. Thorn, 227 U. S. 675, 57 L. ed. 699, 33 Sup. Ct. Rep. 327. Since that time the supreme court of Texas, overruling the decision in the Loyd Case, has upheld the act under the Texas Constitution, in Missouri, K. & T. R. Co. v. Mahaffey, 105 Tex. 394, 150 S. W. 881. We must therefore now consider the Federal questions.

But first, we should note the construction placed upon the act by the state court of last resort. Section 35 of article 3 of the Constitution of 1876 declares that no bill except appropriation bills shall contain more than one subject, which shall be expressed in its title; "but if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." In the case last mentioned (105 Tex. 394, 398), the court construed the act as limited in its operation to the purpose expressed in the title; that is, as relating only to the collection of claims not exceeding $200 in amount, and as conferring no right upon persons having claims exceeding that amount which did not exist independently of the act. In reaching this conclusion, the court said: "Surely, the legislature did not intend to limit attorney's fees to $20 in a case involving $1,000, and there is no apparent reason for allowing additional attorney's fees of $20 in a case involving so large an amount, but there is a sound reason for allowing and limiting the amount of fee on small claims. If the claim be $200 or less, and suit must be instituted, which makes an attorney necessary, it is a heavy tax on the claimant; therefore, if he present a just demand which is refused, the recovery of the full amount claimed shows that the demand of payment should have [648] been granted, and this law compels one refusing payment of such demand to pay the cost and attorney's fees, not to exceed $20. The limitation of the amount of the fee to $20 and to cases in which an attorney has been actually employed practically implies that such action might be prosecuted without an attorney, which in effect limits the amount of the claim to $200 because the only court in which suits of that character could be instituted by nonprofessional claimants, without the services of an attorney, is that of justice of the peace, whose jurisdiction cannot exceed $200; therefore, the limitation in the caption is in effect the same as that of the body of the law, because the proviso in the law can be harmonized with the title by no other construction."

So far as the present attack is founded upon the commerce clause and the act to regulate commerce, it is sufficient to say that the judgment under review was not based upon a claim arising out of interstate commerce, and hence plaintiff in error does not bring itself within the class with regard to whom it claims the act to be in this respect repugnant to the Constitution and laws of the United States. Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 76, 52 L. ed. 108, 109, 28 Sup. Ct. Rep. 28; Tyler v. Registration Ct. Judges, 179 U. S. 405, 409, 45 L. ed. 252, 254, 21 Sup. Ct. Rep. 206; Hooker v. Burr, 194 U. S. 415, 419, 48 L. ed. 1046, 1050, 24 Sup. Ct. Rep. 706; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Southern R. Co. v. King, 217 U. S. 524, 534, 54 L. ed. 868, 871, 30 Sup. Ct. Rep. 594; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550, 56 L. ed. 1197, 1201, 32 Sup. Ct. Rep. 784; Rosenthal v. New York, 226 U. S. 260, 271, 57 L. ed. 212, 217, 33 Sup. Ct. Rep. 27;

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this state, having a valid, bona fide claim against any person or corporation doing business in this state, for personal services rendered, or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees, may present the same to such person or corporation, or to any duly authorized agent thereof, in any county where suit may be instituted for the same; and if, at the expiration of thirty days after the presentation of such claim, the same has not been paid or satisfied, he may immediately institute suit thereon in the proper court and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such person or corporation in such court, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto a reasonable amount as attorney's fees, provided he has an attorney employed in the case, not to exceed twenty ($20) dollars, to be determined by the court or jury trying the case; provided, however, that nothing in this act shall be construed to repeal or in any manner affect any provision of the law now in force giving a remedy to persons having claims of the character mentioned in this act, but the same shall be considered as cumulative of all other remedies given to such a person or persons.

"Sec. 2. The fact that there is no law now in force in this state providing an effectual remedy for persons having such claims as are mentioned in this act creates an emergency and an imperative public necessity requiring the suspension of the constitutional rule requiring bills to be read on three several days, and this act shall take effect from and after its passage, and it is so enacted.

"Approved March 13, 1909."

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Farmers' & M. Sav. Bank v. Minnesota, 232 U. S. 516, 530, ante, 706, 713, 34 Sup. Ct. Rep. 354; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544, ante, 713, 719, 34 Sup. Ct. Rep. 359.

Upon the other questions, plaintiff in error relies chiefly upon Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255. In that case a previous act of the legislature of Texas (act of April 5, 1889, Laws p. 131; Supp. to Sayles's Tex. Civ. Stat. art. 4266a; p. 768) was held repugnant to the 14th Amendment. That act [649] allowed the recovery of plaintiff's attorneys' fees in certain classes of cases, but only where the defendant was a railroad company, and it was adjudged to be invalid because it singled out a particular class of debtors, and imposed this burden upon them, without any reasonable ground existing for the discrimination. The classification was held to be arbitrary, because having no relation to the special privileges granted to this class of corporations, or to the peculiar features of their business, distinguishing Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 1110.

The present statute, however, differs in essential features. It applies to claims "against any person or corporation doing business in this state for personal services rendered or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees." There is here no classification of debtors; the act bears equally against individuals and against corporations of any class doing business in the state. It applies only to certain kinds of claims; but these cover a wide range, and do not appear to have been grouped together for the purpose of bearing against any class or classes of citizens or corporations. Unless something of this sort did appear, we should not be justified in holding the act to be repugnant to the 14th Amendment. It is a police regulation designed to promote the prompt payment of small claims and to discourage unnecessary litigation in respect to them. The claims included appear to be such as are susceptible of being readily adjusted by the party responsible, within the thirty days that must intervene between the presentation of the claim and the institution of suit. We may imagine that some other kinds of claims might as well have been included; but it is to be presumed that the legislature was dealing with an actual mischief, and made the act as broad in its scope as seemed [650] necessary from the practical standpoint. As has been said before, the 14th Amendment does not require that state laws shall be perfect; and we cannot judicially denounce this act as based upon arbitrary distinctions, in view of the wide discretion that must necessarily reside in a state legislature about resorting to classification when establishing regulations for the welfare of those for whom they legislate. Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594; Orient Ins. Co. v. Daggs, 172 U. S. 557, 562, 43 L. ed. 552, 554, 19 Sup. Ct. Rep. 281; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 52, 54 L. ed. 921, 927, 47 L.R.A. (N.S.) 84, 30 Sup. Ct. Rep. 676; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160.

It is insisted that the benefits of the act are conferred upon natural persons only; but this we cannot concede, in the absence of a decision by the courts of the state, giving to it a construction thus limited. Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 546, ante, 359, 34 Sup. Ct. Rep. 359. And besides, plaintiff in error is not in a position to assail the legislation on the ground that corporation plaintiffs are not included within its benefits. Rosenthal v. New York, 226 U. S. 260, 271, 57 L. ed. 212. 217, 33 Sup. Ct. Rep. 27.

If the classification is otherwise reasonable, the mere fact that attorney's fees are allowed to successful plaintiffs only, and not to successful defendants, does not render the statute repugnant to the "equal protection" clause. This is not a discrimination between different citizens or classes of citizens, since members of any and every class may either sue or be sued. *Actor* and *reus* differ in their respective attitudes towards a litigation; the former has the burden of seeking the proper jurisdiction and bringing the proper parties before it, as well as the burden of proof upon the main issues; and these differences may be made the basis of distinctive treatment respecting the allowance of an attorneys' fee as a part of the costs. Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 304, 47 L. ed. 821, 825, 23 Sup. Ct. Rep. 565; McMullin v. Doughty, 68 N. J. Eq. 776, 781, 55 Atl. 115, 284, 64 Atl. 1134.

[651] Even were the statute to be considered as imposing a penalty upon unsuccessful defendants in cases within its sweep, such penalty is obviously imposed as an incentive to prompt settlement of small but well-founded claims, and as a deterrent of groundless defenses, which are the more oppressive where the amount involved is small. In Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 77, 52 L. ed. 108, 110, 28 Sup. Ct.

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Rep. 28, the court sustained a state enactment that imposed a fixed penalty of $50 upon common carriers, to be recovered by the party aggrieved, for failure to promptly adjust and pay claims for loss or damage to property while in the carrier's possession. In Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. 226 U. S. 217, 219, 57 L. ed. 193, 194, 33 Sup. Ct. Rep. 40, we upheld a state enactment that imposed a penalty of $25 in addition to actual damages for failure to settle claims for lost or damaged freight within a limited time after written notice of the loss. And in Kansas City Southern R. Co. v. Anderson, decided April 13, 1914, 233 U. S. 325, ante, 983, 34 Sup. Ct. Rep. 599, we upheld the imposition of double damages in cases admitting of special treatment.

But we think it is not correct to consider this statute as imposing a penalty. The allowance is confined to a reasonable attorney's fee, not exceeding $20, where an attorney is actually employed; the amount to be determined by the court or jury trying the case. Manifestly, the purpose is merely to require the defendant to reimburse the plaintiff for a part of his expenses not otherwise recoverable as "costs of suit." So far as it goes, it imposes only compensatory damages upon a defendant who, in the judgment of the legislature, unreasonably delays and resists payment of a just demand. The outlay for an attorney's fee is a necessary consequence of the litigation, and since it must fall upon one party or the other, it is reasonable to impose it upon the party whose refusal to pay a just claim renders the litigation necessary. The allowance of ordinary costs of suit to the [652] prevailing party rests upon the same principle. 2 Bacon, Abr. title Costs. Numerous cases in the state courts have sustained similar legislation. Vogel v. Pekoc, 157 Ill. 339, 344, 346, 30 L.R.A. 491, 42 N. E. 386; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 340, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; Cameron v. Chicago, M. & St. P. R. Co. 63 Minn. 384, 388, 31 L.R.A. 553, 65 N. W. 652; Wortman v. Kleinschmidt, 12 Mont. 316, 330, 30 Pac. 280. If a reasonable penalty may be imposed for failure to satisfy a demand found to be just, it follows *a fortiori* that costs and an attorney's fee may be. See Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 105, 43 L. ed. 909, 913, 19 Sup. Ct. Rep. 609; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 304, 47 L. ed. 821, 825, 23 Sup. Ct. Rep. 565.

For these reasons, it seems to us that the statute in question is not repugnant to either the "equal protection" or the "due process" clauses of the 14th Amendment.

Judgment affirmed.

ENNIS WATERWORKS, Plff. in Err.,
v.
CITY OF ENNIS.

(See S. C. Reporter's ed. 652–658.)

Error to state court — frivolousness of Federal question.

The contention that contract rights under a municipal ordinance were impaired by subsequent ordinances is so unsubstantial and frivolous as to afford no basis for a writ of error from the Federal Supreme Court to a state court, to review a judgment adverse to such contention, where the state court, in deciding that the original ordinance was void, merely applied the settled rule of state law existing when such ordinance was adopted.

[For other cases, see Appeal and Error, 1110–1137, in Digest Sup. Ct. 1908.]

[No. 305.]

Argued May 1 and 4, 1914. Decided May 25, 1914.

IN ERROR to the Supreme Court of the State of Texas to review a judgment which affirmed a judgment of the Court of Civil Appeals of that state, affirming a judgment of the District Court of Ellis County in favor of a municipality in a suit to avoid a contract arising out of a municipal ordinance. Dismissed for want of jurisdiction.

See same case below, 105 Tex. 63, 144 S. W. 930.

The facts are stated in the opinion.

Mr. G. C. Groce argued the cause, and, with Mr. Jack Beall, filed a brief for plaintiff in error.

Mr. Rhodes S. Baker argued the cause and filed a brief for defendant in error.

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On necessity of color of merit in Federal question to sustain writ of error to state court—see note to Offield v. New York, N. H. & H. R. Co. 51 L. ed. U. S. 231.

Mr. Chief Justice White delivered the opinion of the court:

In March, 1909, the city of Ennis passed an ordinance which purported to be a contract with A. M. Morrison, the owner of a waterworks system in the city, granting to him for the term of thirty years the privilege of supplying water to the city and its inhabitants from certain lakes or reservoirs owned by the city. Morrison accepted the ordinance and assigned his rights to the Ennis Water Works, the plaintiff in error. In April, 1909, the city passed an ordinance declaring that Morrison and the Ennis Water Works had derived no rights from the supposed contract made with them because the ordinance purporting [655] to confer such rights was originally void, and directing suit to be brought "to adjudicate the nullity of said claim of franchise and to regain for the city its rights in the premises." Suit was then brought to have it decreed that the alleged contract with Morrison was void. Pending the suit, and before its decision, in March, 1910, for reasons which the record does not disclose, another ordinance in terms like the previous one was adopted by the city, which was brought into the case by an amendment to the bill. A judgment in favor of the city was affirmed by the court of civil appeals and by the supreme court (105 Tex. 63, 144 S. W. 930). This writ of error is prosecuted upon the assumption that the original ordinance was a contract, and that the decree below gave effect to the subsequent ordinances, thus impairing the obligation of the contract, in violation of the Constitution of the United States.

At the outset our jurisdiction is challenged upon three grounds: 1. Because, even under the assumption that the city ordinances were the sole authority for bringing the suit, those ordinances did not purport in any way to impair the contract if one existed, but simply directed a legal test to be made, and therefore there was no subsequent act of impairment. 2. That even if the ordinances could be treated as impairing the supposed contract, the court below did not decide the case upon any theory that there was power to impair the contract if one existed, but exclusively rested its action upon the independent ground that the original ordinance, at the time of its adoption, was repugnant to the state Constitution, and was therefore void. 3. That even if it be the duty of this court to determine for itself whether the state court rightly concluded that there was originally no contract, nevertheless there is no jurisdiction in this case because the court below, in deciding that there was originally no contract, based its action upon a rule of state law which had been so conclusively [656] determined at the time the alleged ordinance relied on as a contract was adopted, that the assertion that there is a contract right is of so frivolous and unsubstantial a character as to afford no basis for jurisdiction.

The face of the record so clearly manifests the correctness of the third proposition that we pass at once to its consideration. It is apparent on the face of the opinion of the court below that it did not at all rest its conclusion upon original reasoning concerning the asserted contract, but only applied to the decision of that question a doctrine which, long prior to the adoption of the ordinance relied on as a contract, had been announced by the court of last resort of Texas in Brenham v. Brenham Water Co. 67 Tex. 542, 4 S. W. 143, decided in 1887, in which case there was involved a city ordinance which was substantially identical with the one which is here under consideration. Nothing could more conclusively demonstrate this view than does the following excerpt from the opinion of the court below:

"If this court is to adhere to the holding in the Brenham Case, then we are forced to the conclusion that the judgment of the court of civil appeals should be affirmed, for there is no possible theory upon which this case can be distinguished from the Brenham Case. This statement will receive verification by a comparison of the two contracts as set out in the opinions in the two cases."

After pointing out that the doctrine of the Brenham Case was consecrated by other decisions which had followed it, and that the principle of interpretation which it applied could not be said to be clearly erroneous, the court said:

"However, we do not feel called upon to enter into any further discussion of the subject of the nature of the contract in this case, as it has been construed by the Brenham Case, which authority has stood the acknowledged law [657] of this state for twenty-five years. At the time the contract in the case at bar was entered into the Brenham Case had been promulgated for over thirteen years, and had been approved by all the cases theretofore cited. It had placed upon a similar contract a rule of construction and announced the general policy of the law of this state, that was well known to its general people. No rights could have innocently accrued to the plaintiff in error

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demanding a change of the law to meet a great and imperative necessity. If a harsh rule of construction had been announced, it was not placed under a bushel, but set upon a hill. Such contract had been declared repugnant to the Constitution, and the provisions of that instrument declaring monopolies and perpetuities contrary to the the genius of a free government had received a definite construction."

It is insisted, however, that since it is our duty when the assertion is made that contract rights are impaired to determine for ourselves whether or not there was a valid contract, we must hence now determine this controversy by resort to original reasoning without regard to the action of the court below in applying the state rule. But while the premise upon which this contention rests is well founded, the error lies in the deduction which seeks to make it applicable to this case. This is clearly the case, since the doctrine which the premise embodies is subject to this qualification, that where a contract which is relied upon arises from a state law or municipal ordinance having the effect of such law, in interpreting for itself such law or ordinance this court will not give to it a meaning in conflict with the settled rule of the state at the time the law was enacted or the ordinance adopted. In other words, that where we come to consider a contract arising from a state law or ordinance, we will treat it as if there was embodied in their text the settled rule of law which existed in the state at the time the state action relied upon as a [658] contract was taken. Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; Warburton v. White, 176 U. S. 484, 44 L. ed. 555, 20 Sup. Ct. Rep. 404; Gulf & S. I. R. Co. v. Hewes, 183 U. S. 68, 46 L. ed. 87, 22 Sup. Ct. Rep. 26; Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, 548, 48 L. ed. 778, 787, 24 Sup. Ct. Rep. 576.

As by the application of this settled rule the absolute want of foundation for the asserted claim of Federal right appears on the face of the ordinance relied upon, it follows that there was no foundation whatever for the theory upon which the jurisdiction of this court was invoked, and hence it is our duty to dismiss the cause for want of jurisdiction because of the absolutely unsubstantial and frivolous character of the Federal right relied upon.

Dismissed for want of jurisdiction.

NATHANIEL W. BOWE,[1] Ann Clay Crenshaw, Ellie W. Putney, and Channing M. Bolton, Plffs. in Err.,

v.

ELIZABETH S. SCOTT, Fred H. Scott, E. T. D. Myers, Jr., and City of Richmond.

(See S. C. Reporter's ed. 658–665.)

Error to state court — Federal question — decision on non-Federal ground.

1. A judgment of a state court refusing the injunctive relief sought by certain owners of property abutting on a public alley against the enforcement of a municipal ordinance permitting other owners, whose property abutted on both sides of the alley, to close the same along the lines of their property, does not rest upon an independent non-Federal ground, so as to defeat the appellate jurisdiction of the Federal Supreme Court, although the state court based its decision upon the want of right of the plaintiffs to prevent the closing of the alley because such closing was, in any event, a public wrong, which, under the circumstances, the plaintiffs had no right to redress, where the plaintiffs contended that they had such an interest in the property, or were so peculiarly and specially damaged, that they had a right to prevent the closing of the alley which could not be taken

[1] Death of Nathaniel W. Bowe suggested, and appearance of Emma Lewis Bowe, executrix of the last will and testament of Nathaniel, filed and entered on May 6, 1914.

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

As to when Federal question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court over state courts—see note to Chicago, I. & L. R. Co. v. McGuire, 49 L. ed. U. S. 414.

On error to state court in cases presenting questions of impairment of contract obligations—see note to Osborne v. Clark, 51 L. ed. U. S. 619.

On error to state court in cases involving questions of due process of law—see note to Burt v. Smith, 51 L. ed. U. S. 121.

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from them without depriving them of their Federal rights.

[For other cases, see Appeal and Error, 1465-1528, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — raising on rehearing.

2. The mere assertion in a state court, in a petition for rehearing, of a right under the Federal Constitution, affords no ground for invoking the appellate jurisdiction of the Federal Supreme Court unless the state court, in dealing with such petition, considers and passes upon the Federal ground therein relied upon.

[For other cases, see Appeal and Error, 1292-1310, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — impairing contract obligations.

3. The averment by owners of property abutting on a public alley that a municipal ordinance permitting the closing of such alley unconstitutionally impairs the obligation of the contract between the municipality and the person who dedicated the land for such alley does not present a substantial Federal question which will serve as the basis of a writ of error from the Federal Supreme Court to a state court, there being no allegation of any contract with the aggrieved parties, or any privity between them and the person making the dedication, who was not before the court.

[For other cases, see Appeal and Error, 1673-1716, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — due process of law.

4. An allegation that a municipal ordinance is void as an attempt to take property without "due process of law" is not sufficient to raise a Federal question which will support a writ of error from the Federal Supreme Court to a state court, where no reference to the Constitution of the United States is made, and no express rights thereunder are asserted, since the contention will be regarded as referable solely to the state Constitution if that Constitution contains a due process of law clause.

[For other cases, see Appeal and Error, 1215-1220, in Digest Sup. Ct. 1908.]

[No. 360.]

Argued May 6, 1914. Decided May 25, 1914.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review a decree which affirmed a decree of the Chancery Court of the City of Richmond, in that state, dismissing the bill in a suit to enjoin the enforcement of a municipal ordinance permitting the closing of a public alley. Dismissed for want of jurisdiction.

See same case below, 113 Va. 499, 75 S. E. 123.

The facts are stated in the opinion.

Messrs. **Richard Evelyn Byrd** and **David Meade White** argued the cause and filed a brief for plaintiffs in error.

Messrs. **Legh R. Page** and **John S. Eggleston** argued the cause, and, with Mr. John P. Leary, filed a brief for defendants in error:

The state court gave no effect whatever to the ordinance in question. The state court's decision was exactly what it would have been if such ordinance had never been passed.

Missouri & K. I. R. Co. v. Olathe, 222 U. S. 187, 56 L. ed. 156, 32 Sup. Ct. Rep. 47; McManus v. O'Sullivan, 91 U. S. 578, 23 L. ed. 390; San Francisco v. Itsell, 133 U. S. 65, 33 L. ed. 570, 10 Sup. Ct. Rep. 241; Bolling v. Lersner, 91 U. S. 594, 23 L. ed. 366; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; California Powder Works v. Davis, 151 U. S. 389, 393, 38 L. ed. 206, 207, 14 Sup. Ct. Rep. 350; Dower v. Richards, 151 U. S. 658, 666, 38 L. ed. 305, 308, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 576, 40 L. ed. 536, 540, 16 Sup. Ct. Rep. 389; Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co. 172 U. S. 465, 471, 43 L. ed. 517, 519, 19 Sup. Ct. Rep. 265; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 116, 117, 53 L. ed. 431, 433, 434, 29 Sup. Ct. Rep. 227; De Saussure v. Gaillard, 127 U. S. 216, 233, 234, 32 L. ed. 125, 128, 8 Sup. Ct. Rep. 1053; Detroit City R. Co. v. Guthard, 114 U. S. 133, 136, 29 L. ed. 118, 119, 5 Sup. Ct. Rep. 811; M'Kinney v. Carroll, 12 Pet. 66, 70, 9 L. ed. 1002, 1003; Commonwealth Bank v. Griffith, 14 Pet. 56, 58, 10 L. ed. 352, 353; Walker v. Taylor, 5 How. 64, 68, 12 L. ed. 52, 53; Murdock v. Memphis, 20 Wall. 590, 625, 626, 635, 636, 22 L. ed. 429, 440, 441, 444; Bacon v. Texas, 163 U. S. 207, 216, 41 L. ed. 132, 136, 16 Sup. Ct. Rep. 1023; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 350-352, 46 L. ed. 936, 943, 944, 22 Sup. Ct. Rep. 691; Lehigh Water Co. v. Easton, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 29, 30, 31 L. ed. 607, 611, 612, 8 Sup. Ct. Rep. 741; Smith v. Adsit, 16 Wall. 185, 189, 190, 21 L. ed. 310, 311, 23 Wall. 368, 373, 374, 23 L. ed. 114, 116; Winter v. Montgomery, 156 U. S. 385, 39 L. ed. 460, 15 Sup. Ct. Rep. 649; Commercial Bank v. Rochester, 15 Wall. 639, 642, 21 L. ed. 117.

The original bill of complaint contains no reference to the 14th Amendment. It is true that the bill charges that the ordinance is void, for the reason, among others, that it is "an attempt to take from your complainants, whose property adjoins and abuts upon the said alley, their rights in and to the said alley, without due process of law." This allegation may refer either to the 5th Amendment to the Constitution of the Unit-

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ed States, or to § 11 of the Virginia Constitution of 1902, which provides that no person shall be deprived of his property without due process of law. It is submitted that it will not be construed as referring to the 14th Amendment to the Constitution of the United States.

Harding v. Illinois, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176; Miller v. Cornwall R. Co. 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34.

A review of the judgment of a state court is confined to the assignments of error made and passed upon in the judgment of the state court brought here for review. The assignment of errors in this court cannot bring into the record any new matter for consideration.

Harding v. Illinois, supra; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 115, 116, 53 L. ed. 431, 433, 434, 29 Sup. Ct. Rep. 227.

It was too late to raise a Federal question upon a petition for rehearing, unless such question was passed upon in ruling upon the petition.

Forbes v. State Council, 216 U. S. 396, 398, 399, 54 L. ed. 534–536, 30 Sup. Ct. Rep. 295.

Plaintiffs in error have no right to be heard upon the contention that the ordinance in question constitutes a breach of a public trust, and impairs the obligation of a contract. These objections cannot be raised by plaintiffs in error.

Walsh v. Columbus, H. V. & A. R. Co. 176 U. S. 469, 479, 480, 44 L. ed. 548, 553, 20 Sup. Ct. Rep. 393; Wright v. Columbus, H. V. & A. R. Co. 58 Ohio St. 123, 50 N. E. 442, affirmed in 176 U. S. 481, 44 L. ed. 554, 20 Sup. Ct. Rep. 398; Lampasas v. Bell, 180 U. S. 276, 283, 284, 45 L. ed. 527, 530, 531, 21 Sup. Ct. Rep. 368; Tyler v. Registration Ct. Judges, 179 U. S. 405, 406, 45 L. ed. 252, 253, 21 Sup. Ct. Rep. 206; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188; The Winnebago, 205 U. S. 354, 360, 51 L. ed. 836, 839, 27 Sup. Ct. Rep. 509; Hagar v. Reclamation Dist. 111 U. S. 701, 712, 28 L. ed. 569, 573, 4 Sup. Ct. Rep. 663; Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; Phinney v. Sheppard & E. P. Hospital, 88 Md. 633, 42 Atl. 58, 177 U. S. 170, 44 L. ed. 720, 20 Sup. Ct. Rep. 573; United States v. Illinois C. R. Co. 154 U. S. 225, 238, 239, 38 L. ed. 971, 973, 974, 14 Sup. Ct. Rep. 1015; Chicago v. Union Bldg. Asso. 102 Ill. 395, 40 Am. Rep. 598; Manson v. South Bound R. Co. 64 S. C. 120, 41 S. E. 832; Bancroft v. Bancroft, — Del. Ch. —, 61 Atl. 689; Landes v. Walls, 160 Ind. 216, 66 N. E. 679; Lee v. McCook, 82 Neb. 26, 116 N. W. 955; Davidson v. Baltimore, 96 Md. 509, 53 Atl. 1122; Bryant v. Logan, 56 W. Va. 141, 49 S. E. 21, 3 Ann. Cas. 1011; Mowry v. Providence, 16 R. I. 422, 16 Atl. 511; Brown v. Baldwin, 112 Va. 536, 72 S. E. 143; Culpeper County v. Gorrell, 20 Gratt. 484; Thorne v. Taw Vale R. Co. 13 Beav. 10.

Mr. Chief Justice White delivered the opinion of the court:

To an understanding of this case we outline the situation of the property in controversy:

Shafer owned a tract of land which came to be within the limits of the city of Richmond, bounded on the north by Franklin street, on the south by Park avenue, on the east by Shafer and on the west by Harrison streets. He dedicated to public use by deed in due form, which was accepted by the city, a public alley 20 feet wide, crossing from Shafer to Harrison street at a distance of about 150 feet south of Franklin street, the alley being therefore between Franklin and Park avenue. All the plaintiffs but [660] one owned lots fronting on the south side of Franklin street, running back and abutting on this alley. The exception was Bolton, whose property faced on Harrison street and was at the corner of that street and the alley. East of the lots fronting on Franklin street, owned by the plaintiffs in error, that is, nearer Shafer street than were such lots, the defendants in error, Scott and Myers, also owned lots in the south side of Franklin street, running back to the alley. They also owned property back of the alley, and which extended a considerable distance between parallel lines towards Park avenue. The city of Richmond passed an ordinance allowing Scott and Myers to close the alley along the line of their property for a period of thirty years upon the condition that they should not build upon it, that the right to keep it closed should be revocable by the city whenever it deemed best, and that the city should be held harmless for any damage which might be incurred from closing the alley. As the result of this ordinance the direct movement between Harrison and Shafer streets by means of the alley was cut off, but as the right to close only extended along the abutting lines of the Scott and Myers property, the alley remained open along the space where the property of the plaintiffs in error abutted, and hence did not disturb their direct access to Harrison street, and also did not deprive of access to Shafer street, as there were other alleys opening into the 20-foot alley between Harrison street and the point where the alley was closed by which this result could be accomplished.

The plaintiffs in error then began this

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suit against the defendants in error to enjoin the enforcement of the ordinance on the ground that, as the alley in question had been dedicated to the public by Shafer, and had been accepted by the city, and treated as a public alley for many years, the city was without power to grant the right to close it, and that doing so would wrongfully inflict damage upon [661] the plaintiffs as the owners of the property abutting on the alley for reasons which were fully stated in the bill, and which it is unnecessary here to detail.

The prayer was that the ordinance be declared null and void, and for an injunction enjoining the defendants from closing any portion of the said public alley "so as to obstruct the free passage of your complainants and the public through the said alley." Demurrers were sustained by the court of original jurisdiction, among others upon the ground that, "conceding for the moment that the ordinance of the city of Richmond challenged in the bill is wholly void, yet this is an attempt made by private individuals to enjoin a public nuisance where the complainants do not show that they had suffered any special or peculiar damage." The bill was dismissed.

The court of appeals, in affirming the case, said:

"Speaking generally, the obstruction of a public highway is a public nuisance, and the trend of authority is, that an individual cannot maintain a bill to enjoin such nuisance unless he can show that he has suffered, or will suffer therefrom, special and peculiar injury or damage to himself, as distinguished from injury or damage to the general public. Moreover, such special and peculiar injury or damage must be direct, and not purely consequential, and must be different in kind, and not merely in degree, from that sustained by the community at large." [113 Va. 500, 75 S. E. 123.]

And, referring to the opinion of the lower court, it was said:

"The learned chancellor, in a clear and conclusive opinion, shows that though the injury to the plaintiffs, as stated in the bill, may be greater than that sustained by other persons living more remote from the scene of the obstruction, such injury is nevertheless greater in degree only, and not in kind. Therefore, under the authorities, the [662] bill does not state a case of such special injury as would entitle the plaintiffs to an injunction. . . .

"Concurring, as we do, in the ruling of the court sustaining the demurrer to the bill, it becomes unnecessary, and would, in deed, be improper, to express any opinion with respect to the validity of the ordinance, or the right of the public to redress the alleged invasion of their prerogative by prosecution, or other appropriate remedy, for a common nuisance."

The case is here upon the assumption that we have jurisdiction because Federal rights are involved; which hypothesis is challenged by a motion to dismiss which we at once come to consider.

The grounds of the motion are, first, that as the court below rested its decision upon the want of right of the plaintiff to prevent the closing of the alley because such closing was, in any event, a public wrong which, under the circumstances, the complainants had no right to redress, the case below was decided upon a state ground which was independent of any assumed assertion of Federal right, and there is hence no jurisdiction. We do not stop to notice the many authorities which are cited to sustain from many different angles of vision the premise upon which the proposition rests because we think its inapplicability to the case in hand is so obvious that it is unnecessary to do so. This conclusion is evident because, upon the assumption that Federal rights were asserted, the contention of the complainants was that they had such an interest in the property, or were so peculiarly and especially damaged, that they had a right to prevent the closing of the alley which could not be taken from them without depriving them of their Federal rights. This being true, as it undoubtedly is, it follows that the decision of the court below, under the hypothesis stated, amounted to a denial of the existence of the Federal rights which were adequately asserted. And from this it follows that the proposition [663] now relied upon, when rightly considered, comes to this: that jurisdiction to enforce and protect a Federal right obtains in no case where such Federal right has been denied.

Second. It is further urged that, be this as it may, there is no jurisdiction because no assertion of rights under the Constitution was made below until the petition for rehearing, which was too late, and the tardiness of which was not saved by the action of the court, since it simply declined to grant the rehearing without deciding the questions presented as the basis of the request for rehearing. As it is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of this court unless the court below, in dealing with the petition for rehearing, considers and passes upon the Federal ground therein relied upon, we dismiss that subject from view and come to consider whether the

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record otherwise discloses that a Federal question was so raised below as to support our jurisdiction. The contention that it was can alone rest upon two paragraphs in the bill as originally filed in the trial court; the one, No. 13, to the following effect:

"Complainants charge and aver that the said ordinance is null and void because it is in conflict with § 10, article 1, of the Constitution of the United States; that it impairs the obligation of a contract between the said John C. Shafer, who dedicated the land as for a public alley to the city of Richmond, which alley was accepted by the city of Richmond as an alley for public use."

As at best there was no averment in the bill of any contract made with the complainants, or any privity between them and Shafer, it cannot possibly be said that this averment amounted to the assertion of the existence in favor of the complainants of a contract protected by the Constitution from impairment. As the one party to the contract, [664] Shafer, was not before the court, and was not suing either through himself or by anyone qualified to represent him, or having a legal right in his behalf to assert his contract rights, and as the other party to the contract was the city of Richmond, one of the defendants, the entire want of foundation for the assumption that the bill presented a case of impairment of the obligation of a contract within the guaranty of the Constitution of the United States becomes obvious. Besides, we think the conclusion cannot be escaped that when the paragraph in question is considered in the light of the context of the bill, it is conclusively inferable that the averment in the paragraph of an alleged contract between Shafer and the city was not asserted because of the assumed presence of rights under the Constitution in that regard, but solely as a means of stating in another form the want of power in the city to close the alley because, as the result of the contract with Shafer, it was bound to treat it as a public alley and not close it. And this is reinforced by the fact that no reference to any right under the contract clause is found in the opinion of the trial court, that no suggestion by way of amendment making clear the assertion of a Federal right found expression in an application which was made to amend the bill after the case had been decided, that no assertion of such right was contained in the assignments of error for the purpose of the review by the court of appeals, although the paragraph in question was referred to in the argument filed to support the assignments as made, and for the further reason that no intimation whatever is contained in the opinion of the court of appeals that it deemed that a question under the contract clause of the Constitution arose for decision.

The other passage in the bill is found in subdivision "c" of the tenth paragraph, and is as follows: "That the ordinance is an attempt to take from your complainants, whose property adjoins and abuts upon the said alley, [665] their rights in and to said alley without due process of law." But it is settled that such an averment, making no reference to the Constitution of the United States, and asserting no express rights thereunder, is solely referable to the state Constitution, which, in this instance, has a due process clause, and affords no basis whatever for invoking the jurisdiction of this court. Miller v. Cornwall R. Co. 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; Harding v. Illinois, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176.

As from what we have said it results that there is no foundation whatever for the claims of Federal right relied upon as the basis for invoking the jurisdiction of this court, since such claims are so wholly unsubstantial and frivolous as to be devoid of any merit, it follows that we have not jurisdiction, and the writ of error must be dismissed.

Dismissed for want of jurisdiction.

HECTOR McDONALD and Margaret McDonald, Plffs. in Err.,
v.
OREGON RAILROAD & NAVIGATION COMPANY, Incorporated.

(See S. C. Reporter's ed. 665-670.)

Error to state court — frivolousness of Federal question.

The contention that the due process of law guaranteed by U. S. Const., 14th Amend., was denied by the action of a court of equity, whose jurisdiction had been invoked by a railway company to enjoin its grantors from interfering with its enjoyment of its right of way after a forfeiture incurred by breach of a condition subsequent, in assessing the damages and transferring the title to the railway company as in an eminent domain proceeding, is so absolutely lacking in merit as not to serve as the basis of a writ of error from the Federal Supreme Court to a state court,—especially where plaintiffs in error, who were defendants in the trial court, did not

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re

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simply stand upon their rights as defendants, but went further and sought affirmative relief.

[For other cases, see Appeal and Error, 1110-1137, in Digest Sup. Ct. 1908.]

[No. 463.]

Submitted May 4, 1914. Decided May 25, 1914.

IN ERROR to the Supreme Court of the State of Oregon to review a decree which modified a decree of the Circuit Court of Wallowa County, in that state, in favor of defendants in a suit by a railway company to enjoin interference with its right of way by assessing the damages and transferring the title to the railway company as in an eminent domain proceeding. Dismissed for want of jurisdiction.

See same case below, 58 Or. 228, 32 L.R.A. (N.S.) 117, 112 Pac. 413.

The facts are stated in the opinion.

Messrs. George E. Chamberlain and Will R. King submitted the cause for plaintiffs in error. Mr. Turner Oliver was on the brief:

The state supreme court did act *ultra vires* and arbitrarily, and in violation of the constitutional rights of the plaintiffs in error, and deprived them of their property without due process of law, when it, on March 14, 1911, deprived them of the right of a jury trial, and, without any evidence as to the damage to them, on that date arbitrarily fixed $700 as damages, and declared that their property belonged from that time to the defendant in error.

Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; Scott v. McNeal, 154 U. S. 34, 45, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 228, 235, 242, 41 L. ed. 982, 984, 986, 17 Sup. Ct. Rep. 581; St. Louis. I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 293, 52 L. ed. 1061, 1067, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464.

If the 7th Amendment applies only to Federal courts, nevertheless when the Oregon Constitution makes the same provision, which is ignored by the state supreme court, and the property of a citizen is taken in defiance of such constitutional inhibition, the citizen is surely deprived of his property without due process of law, and is protected by the 14th Amendment.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 233, 41 L. ed. 983, 17 Sup. Ct. Rep. 581; Scott v. McNeal, 154 U. S. 45, 38 L. ed. 901, 14 Sup. Ct. Rep. 1108; Civil Rights Cases, 109 U. S. 11, 27 L. ed. 839, 3 Sup. Ct. Rep. 18.

Due process of law is its regular administration, through courts of justice, by a timely and regular course of proceeding to judgment and execution. As a rule, it includes parties, regular proceedings and a trial, according to the settled course of proceedings.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; Rees v. Watertown, 19 Wall. 107, 22 L. ed. 72; Baker v. Kelley, 11 Minn. 480, Gil. 358; Pearson v. Yewdall, 95 U. S. 294, 24 L. ed. 436; Scott v. McNeal, 154 U. S. 46, 38 L. ed. 901, 14 Sup. Ct. Rep. 1108.

There was no Federal question in the case until it was injected into the case by the decision of the Oregon supreme court. It was therefore impossible for such question to have been brought before the supreme court of Oregon for consideration prior to December 20, 1910, because there was no such question in the case. Is this Federal Supreme Court then without jurisdiction to consider a violation of the Constitution by the state supreme court because the Federal question was not raised until after the state supreme court brought it into the case? Or. can a state supreme court deprive this Supreme Court of jurisdiction by not mentioning in its decree the Federal question brought into the case by its own opinion, and pressed upon the consideration of the court by a motion to modify its decree in harmony with the constitutional rights of the plaintiffs in error, and considered by the justices of the supreme court for a whole month before rendering its final unconstitutional decree?

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 228, 41 L. ed. 982, 17 Sup. Ct. Rep. 581; Meyer v Richmond, 172 U. S. 82, 92, 43 L. ed. 374, 377, 19 Sup. Ct. Rep. 106; Williams v. Bruffy, 102 U. S. 248, 26 L. ed. 135; Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 300, 56 L. ed. 208, 32 Sup. Ct. Rep. 96; San José Land & Water Co. v. San José

Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On error to state court in cases involving questions of due process of law—see note to Burt v. Smith, 51 L. ed. U. S. 121.

On necessity of color of merit in Federal question to sustain writ of error to state court—see note to Offield v. New York, N. H. & H. R. Co. 51 L. ed. U. S. 231.

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Ranch Co. 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487.

In the present case, the Federal question was raised on a motion to modify the decree of the supreme court, after its opinion had been filed, but before it had been certified down. The court entertained the motion and considered it only for a month before denying it.

Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241.

Messrs. W. W. Cotton and Henry W. Clark submitted the cause for defendant in error. Mr. Arthur C. Spencer was on the brief:

Even if a Federal question had been specifically raised in the petition for a rehearing, it would have been too late (Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 326, 334, 57 L. ed. 857, 862, 33 Sup. Ct. Rep. 510), and especially so where the petition for a rehearing was dismissed, and no rehearing was in fact held. Under these circumstances the court has not passed directly upon any constitutional question. It is likewise of no avail for the plaintiffs in error to attempt to raise a Federal question and confer jurisdiction by statements in the assignment of error or writ of error (Hulbert v. Chicago, 202 U. S. 275, 280, 50 L. ed. 1026, 1028, 26 Sup. Ct. Rep. 617; Los Angeles Farming & Mill. Co. v. Los Angeles, 217 U. S. 217, 226, 54 L. ed. 736, 744, 30 Sup. Ct. Rep. 452).

The specific assignments of error raise only questions which have been many times passed upon by this court adversely to the position necessarily taken thereon by plaintiffs in error. The 5th and 7th Amendments of the Constitution of the United States regulate only action under Federal authority, and are not applicable to and do not constitute a proper basis for an assignment of error upon the review of a decision of a state court in a suit which concerns only action under state authority.

Twining v. New Jersey, 211 U. S. 78, 93, 53 L. ed. 97, 103, 29 Sup. Ct. Rep. 14.

The 14th Amendment contains the only guaranty of the Federal Constitution that due process of law shall be observed by the states and their agencies. But any claim under the 14th Amendment comes too late to confer jurisdiction upon this court where, until the assignments or writ of error, the arguments have been based on state statutes and the state Constitution.

Osborne v. Clark, 204 U. S. 565, 569, 51 L. ed. 619, 626, 27 Sup. Ct. Rep. 319; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 326, 334, 57 L. ed. 857, 862, 33 Sup. Ct. Rep. 510.

And in any event a claim of violation of the 14th Amendment cannot be sustained because of irregularities or matters of procedure in the state courts where the parties have been fully heard in the regular course of judicial proceedings (Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 394, 40 L. ed. 467, 469, 16 Sup. Ct. Rep. 344), nor for refusal of trial by jury (Iowa C. R. Co. v. Iowa, supra).

Mr. Chief Justice White delivered the opinion of the court:

The defendant in error, hereafter referred to as the railroad company, was plaintiff below, and sued the plaintiffs in error, who were defendants, to enjoin them from interfering with its right of possession of a strip of land constituting a railroad right of way. It was alleged that this strip, which traversed property belonging to the defendants, had been bought from them by the railroad company for a cash price of $600, which was paid, but nevertheless the defendants, asserting some title to the land, were threatening to disturb the railroad in its possession, to tear up a track where laid, and otherwise to prevent the use of the land for the purpose for which it had been bought. The defendants answered, and although [667] admitting that they had sold the land to the railway for a right of way, and had received the stipulated price, nevertheless asserted that they were yet the owners of the property for the following reasons: (a) Because in the deed by which the property was conveyed there was an express condition "that the Oregon Railroad & Navigation Company will construct the line of road over the above-described premises within two years from the date hereof." (b) Because while after the deed the railroad had commenced to construct its road, and had graded along the right of way, after doing so it suspended all work so that the two years provided in the deed elapsed without the railroad being built, and therefore all right to the land had been lost, and the defendants had reentered and notified the railroad of the fact.

Averring that the land was "reasonably worth the sum of $1,000 and the plaintiff has not paid the same nor any part thereof, and has not offered to pay defendant anything for said land since its failure to comply with the condition of the deed," the answer prayed not merely the rejection of the plaintiffs' demand and the dissolution of the injunction which had been allowed, but asked substantive relief; that is, that the defendants be decreed to be the owners, and that the complainant be enjoined from

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in any way interfering with them, and for the awarding of "such other and further relief as shall seem to the court equitable in the premises." After trial at which considerable testimony was taken, among other things, as to the value of the property, the court, holding in favor of the defendants, decided that the railroad, by virtue of its failure to build within the period specified, and the re-entry of the defendants, had lost all right to the land, and therefore that the subsequent action of the railroad in entering upon the land to complete its railroad was a trespass. The injunction which was issued at the inception of the cause was dissolved. On appeal the court below expressly [668] adopted the legal principles which the trial court had applied; that is, the court likewise declared the cause in the deed to be a condition, and decided that the failure of the railroad to comply with its terms had forfeited all its right and title in and to the land. But nevertheless the decree was not affirmed. After expounding its reasons for fully agreeing with the legal conclusions of the trial court, it was said: "So far, then, we have found that defendants were entitled to a forfeiture and that the land has reverted, but we now recur to the remedy. The situation is anomalous. Plaintiff has constructed its road and has it in operation, thereby preforming an important public function for a large and increasing population. . . . It is to the interest of the public that it should continue to do so, and that the defendants should not be allowed to acquire a portion of its roadbed to the detriment of public travel. The condemnation of land for railway purposes is usually the function of a court of law, but there are in this case such special circumstances as to authorize this court to end the whole litigation at once and forever. The pleadings show that this land is needed for the purpose of a railway, and the evidence shows that the railway is actually there on the ground. Defendants come into court, submit themselves to the jurisdiction of equity, and ask affirmative relief. Much of the testimony was devoted to showing the value of the land taken, the effect of the taking on the remainder of the tract, and all those things which are usually shown in an action to condemn for a railroad right of way. Having jurisdiction of this case, we have concluded to assume it for all purposes, and to so modify the decree that plaintiff shall take title to the land described in this strip upon the paying to defendants the damage occasioned by such taking, which we assess at $700, and the costs and disbursements of this suit." [58 Or. 236, 32 L.R.A.(N.S.) 117, 112 Pac. 413.] Upon the entry of a decree conformably to these views, the defendants asked that the decree be [669] modified so as to confine it to a recognition of their title, and to exclude all its provisions conferring upon the railroad company the right to take the property on paying the adjudged sum. This application was supported by an elaborate argument challenging the right of the court under the state law to exert the power which it had exerted. In none, however, of the elaborate arguments pressed to sustain the motion to modify, was there any reference whatever to any supposed denial by the state court of rights guaranteed by the Constitution of the United States, and for that reason, and because it is insisted that, on the face of the record, it is manifest no Federal question is presented, a motion to dismiss has been made which we come to consider.

All the contentions as to Federal rights rest upon the assumption that the court below denied due process of law when it entered the decree complained of, and this is based upon the conception that the court exceeded its jurisdiction and misconceived or wrongfully interpreted the evidence, and thereby in effect, while recognizing the title of the plaintiffs in error, virtually deprived them of the right conferred by the state law of having a common-law trial for the purpose of determining the questions which would require to be decided in case of the exercise by the railroad company of the right of eminent domain, including, of course, the fixing of compensation to be paid for the taking and the damages incident thereto. Leaving aside for the moment the question of the jurisdiction of the court in the fundamental sense, that is, *ratione materiæ*, it is manifest that the want of foundation for all the propositions insisted upon is quite clear, since, after all, taking the aspect most favorable for the plaintiffs in error, the propositions but assert that the court below, in deciding the case, committed error as to matters involving no Federal question because purely of state cognizance. It is elementary and needs no citation of authority to show that [670] the due process clause of the 14th Amendment does not control methods of state procedure or give jurisdiction to this court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters non-Federal in character. So far as the contentions addressed themselves to the subject-matter of jurisdiction, it is clear that they do not deny jurisdiction in the sense of the fundamental absence of any and all right to take cognizance of the cause, but are confined to jurisdiction in the sense of the duty to

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rightfully decide subjects to which judicial power extends. In this aspect the error of all the contentions is within the principle announced in Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229.

But, aside from the reasons just stated, the absolute want of merit in the Federal right asserted becomes doubly apparent when it is observed that the plaintiffs in error, who were defendants in the trial court, did not simply stand upon their rights as defendants, but went further and sought affirmative relief at its hands, and could only be now heard to deny all power by being permitted to deny the right to exert the very jurisdiction which they invoked.

Dismissed for want of jurisdiction.

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[671] ERIE RAILROAD COMPANY, Plff. in Err.,
v.
PEOPLE OF THE STATE OF NEW YORK.

(See S. C. Reporter's ed. 671–685.)

Commerce — state regulation of hours of railway employees — congressional action.

1. The subject of the hours of labor of the employees of interstate railway carriers using the telegraph or telephone in connection with the movement of trains is so far removed from the field of state regulation by the hours of service act of March 4, 1907 (34 Stat. at L. 1415, chap. 2939, U. S. Comp. Stat. Supp. 1911, p. 1321), as to invalidate the provisions of N. Y. Laws 1897, chap. 415, as amended by Laws 1907, chap. 627, prescribing a still shorter day's work for block system, telegraph, and telephone operators and signal men on railroads, as applied to a telegraph operator of a railway carrier engaged in both interstate and intrastate commerce, who is employed to space trains by the use of the telegraph under the block system, and to report trains to other offices and to train despatchers.

[For other cases, see Commerce, I. c; III., in Digest Sup. Ct. 1908.]

Commerce — state regulation of hours of railway employees — congressional action.

2. Congress has so acted upon the subject of the hours of labor of interstate railway employees by enacting the hours of service act of March 4, 1907, as to preclude a state, during the period between the date of that act and the time when, by its express terms, it should go into effect, from making or enforcing as to such employees a local regulation limiting hours of labor.

[For other cases, see Commerce, I. c; III., in Digest Sup. Ct. 1908.]

[No. 266.]

Argued April 24 and 27, 1914. Decided May 25, 1914.

IN ERROR to the Supreme Court of the State of New York in and for the County of Rockland in that state to review a judgment entered pursuant to the mandate of the Court of Appeals, which reversed a judgment of the Appellate Division of the Supreme Court, Second Department, which had reversed a judgment of the Trial Term of the Supreme Court, penalizing a railway company for violating the state law relative to hours of labor of employees. Reversed and remanded for further proceedings.

See same case below, in appellate division, 135 App. Div. 767, 119 N. Y. Supp. 873; in court of appeals, 198 N. Y. 369, 29 L.R.A.(N.S.) 240, 139 Am. St. Rep. 828, 91 N. E. 849, 19 Ann. Cas. 811.

The facts are stated in the opinion.

Mr. **Frederic D. McKenney** argued the cause, and, with Mr. George F. Brownell, filed a brief for plaintiff in error:

As Congress by the hours of service act of March 4, 1907, had completely regulated the hours of labor of railway employees concerned with the movements of trains, including those making use of the telegraph or telephone for that purpose, the law of the state of New York from the date of its passage was void and of no effect as to all such employees engaged in or performing duties in connection with interstate commerce. And this is so notwithstanding that the prohibitions of the Federal law, by the terms of the act itself, only became effective one year after the date of its passage; that is to say, on March 4, 1908.

Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; Adams Exp. Co. v. Croninger, 226 U. S. 491, 505, 506, 57 L. ed. 314, 319, 320, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; McDermott v. Wisconsin, 228 U. S. 115, 131, 132, 57 L. ed. 754, 765, 766, 47 L.R.A. (N.S.) 984, 33 Sup. Ct. Rep. 431; Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 559, 567, 57 L. ed. 966, 969, 33 Sup. Ct. Rep. 581; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 399, 400, 57 L. ed. 1511, 1541, 1542, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; State v. Missouri P. R. Co. 212 Mo. 658, 111 S. W. 500; State v.

NOTE.—On state regulation of relations between railroad companies engaged in interstate commerce and their employees—see notes to State v. Missouri P. R. Co. 15 L.R.A.(N.S.) 134; People v. Erie R. Co. 29 L.R.A.(N.S.) 240.

On the validity of legislation regulating hours of labor—see notes to People v. Orange County Road Constr. Co. 65 L.R.A. 33; Atkin v. Kansas, 48 L. ed. U. S. 148.

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Chicago, M. & St. P. R. Co. 136 Wis. 407, 19 L.R.A.(N.S.) 326, 117 N. W. 686.

Mr. Wilber W. Chambers argued the cause, and, with Mr. Thomas Carmody, Attorney General of New York, and Mr. Claude T. Dawes, filed a brief for defendant in error:

The statute in question was a valid enactment upon the ground that it was within the reserved power of the state to amend corporate charters.

Adirondack R. Co. v. New York, 176 U. S. 335, 44 L. ed. 492, 20 Sup. Ct. Rep. 460; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Greenwood v. Union Freight R. Co. 105 U. S. 13, 26 L. ed. 961; Lord v. Equitable Life Assur. Soc. 194 N. Y. 212, 22 L.R.A.(N.S.) 420, 87 N. E. 443; New York, C. & H. R. R. Co. v. Williams, 199 N. Y. 108, 35 L.R.A.(N.S.) 549, 139 Am. St. Rep. 850, 92 N. E. 404; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 409, 43 L. ed. 746, 748, 19 Sup. Ct. Rep. 419; State v. Brown & S. Mfg. Co. 18 R. I. 16, 17 L.R.A. 856, 25 Atl. 246; Berea College v. Kentucky, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33.

This court will follow the New York court of appeals in its finding that the state legislation in question was enacted under its reserved control over a corporation created by it.

Adirondack R. Co. v. New York, 176 U. S. 335, 44 L. ed. 492, 20 Sup. Ct. Rep. 460; Elmendorf v. Taylor, 10 Wheat. 152, 159, 6 L. ed. 289, 292; Forsyth v. Hammond, 166 U. S. 506, 518, 41 L. ed. 1095, 1100, 17 Sup. Ct. Rep. 665; Covington v. Kentucky, 173 U. S. 231, 237, 43 L. ed. 679, 681, 19 Sup. Ct. Rep. 383; Schaefer v. Werling, 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449.

Although the state act affects to some extent the operation of interstate commerce, it is none the less local in its character.

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868, 30 Sup. Ct. Rep. 594; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Chicago & N. W. R. Co. v. Fuller, 17 Wall. 560, 21 L. ed. 710; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Richmond & A. R. Co. v. R. A. Patterson Tobacco Co. 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Erb v. Morasch, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 516, 44 L. ed. 868, 869, 20 Sup. Ct. Rep. 722.

Congress, under its commerce power, may, by occupying the entire field of regulation of hours of service on interstate railroads, render nugatory, with respect to that subject, a state's police power or its local power over interstate commerce.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 702, 40 L. ed. 849, 859, 16 Sup. Ct. Rep. 714; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 623, 42 L. ed. 878, 881, 18 Sup. Ct. Rep. 488; Sinnot v. Davenport, 22 How. 227, 243, 16 L. ed. 243, 248; Tua v. Carriere, 117 U. S. 201, 29 L. ed. 855, 6 Sup. Ct. Rep. 565; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Northern P. R. Co. v. Washington, 222 U. S. 370, 378, 56 L. ed. 237, 239, 32 Sup. Ct. Rep. 160.

But not the state's power over its own corporations, which continues and gives force to a state statute regulating hours of service except at those points of conflict with the Federal commerce law.

Gladson v. Minnesota, 166 U. S. 427, 430, 41 L. ed. 1064, 1065, 17 Sup. Ct. Rep. 627; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465.

The statute under discussion is a direct aid to the purpose of the Federal statute, and should be sustained upon the analogy of those cases in which the exercise of a state police power has been construed to be an additional benefit to the state, with no injury to the Federal legislation.

Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, ante, 310, 34 Sup. Ct. Rep. 152.

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The state act having been enacted under the reserved power of the state of New York over one of its corporations, and there being no conflict or repugnance between it and the Federal act, the state act should be held to be valid.

Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506.

Mr. Justice McKenna delivered the opinion of the court:

Action for penalty, brought by the people of the state of New York against defendant in error, herein called the railroad company, for an alleged violation of the labor law of the state, entitled, "An Act in Relation to Labor, Constituting Chapter Thirty-two of the General Laws," as amended by chapter 627 of the Laws of 1907.†

[676] It is alleged that at the times hereinafter mentioned the railroad company was a corporation under the laws of the state of New York, and was and is operating a line of railroad in the state of New York, in Rockland county and [677] other counties, extending from Piermont to Dunkirk, both in that state.

The following facts are also alleged: The railroad company, in violation of § 7a of the labor law, required and permitted one David Henion, a telegraph operator, to be on duty more than eight hours, that is, from 7 o'clock, A. M. to 7 o'clock, P. M., on the 1st day of November, 1907, in the railroad company's tower at Sterlington, in the county of Rockland, New York, there being no extraordinary emergency caused by accident, fire, flood, or danger to life or property.

His duty was to space trains by the use of the telegraph under what is known and termed the "block system," and to report trains to another office or offices and to train despatchers, whose duties pertain to the movement of cars, engines, and trains on the company's railroad, by the use of the telegraph.

There passed over the tracks of the railroad company on the day named more than eight regular passenger trains each way.

Judgment is prayed in the sum of $100.

The answer of the railroad company admits its incorporation and that it is operating a railroad as alleged, but alleges that its road extends from Jersey City, New Jersey, to Suffern, New York, and from Salamanca, New York, to Marion, state of Ohio, and elsewhere, passing through New Jersey, New York, Pennsylvania, and Ohio,

†"Section 1. Chapter 415 of the laws of 1897, entitled, 'An Act in Relation to Labor, Constituting Chapter Thirty-two of the General Laws,' is hereby amended by adding a new section after § 7 thereof, to be § 7a, to read as follows:

"Section 7a. Regulation of hours of labor of block-system telegraph and telephone operators and signalmen on surface, subway, and elevated railroads.—The provisions of § 7 of this chapter shall not be applicable to employees mentioned therein. It shall be unlawful for any corporation or receiver, operating a line of railroad, either surface, subway, or elevated, in whole or in part, in the state of New York, or any officer, agent, or representative of such corporation or receiver to require or permit any telegraph or telephone operator who spaces trains by the use of the telegraph or telephone under what is known and termed the 'block system' (defined as follows): Reporting trains to another office or offices or to a train despatcher operating one or more trains under signals, and telegraph or telephone levermen who manipulate interlocking machines in railroad yards or on main tracks out on the lines, or train despatchers in its service whose duties substantially, as hereinbefore set forth, pertain to the movement of cars, engines, or trains on its railroad by the use of the telegraph or telephone in despatching or reporting trains or receiving or transmitting train orders as interpreted in this section, to be on duty for more than eight hours in a day of twenty-four hours, and it is hereby declared that eight hours shall constitute a day of employment for all laborers or employees engaged in the kind of labor aforesaid; except in cases of extraordinary emergency caused by accident, fire, flood, or danger to life or property, and for each hour of labor so performed in any one day in excess of such eight hours, by any such employee, he shall be paid in addition at least one eighth of his daily compensation. Any person or persons, company or corporation, who shall violate any of the provisions of this section, shall, on conviction, be fined in the sum not less than $100, and such fine shall be recovered by an action in the name of the state of New York, for the use of the state, which shall sue for it against such person, corporation, or association violating this act, said suit to be instituted in any court in this state having appropriate jurisdiction. Such fine, when recovered as aforesaid, shall be paid without any deduction whatever, one half thereof to the informer, and the balance thereof to be paid into the free school fund of the state of New York. The provisions of this act shall not apply to any part of a railroad where not more than eight regular passenger trains in twenty-four hours pass each way; provided, moreover, that where twenty freight trains pass each way generally in each twenty-four hours, then the provisions of this act shall apply, notwithstanding that there may pass a less number of passenger trains than hereinbefore set forth, namely, eight.

"Section 2. This act shall take effect October 1st. 1907."

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and that at all times mentioned in the complaint it was and is now engaged in interstate commerce and the transportation of persons, goods, and merchandise by railroad from one state of the United States to other states of the United States, and to foreign countries.

[678] It admits that the company required and permitted Henion to work as charged, but alleges that the cars, engines, and trains that he was engaged in spacing and reporting were engaged in interstate commerce.

That the labor law of the state violates the 5th and 14th Amendments to the Constitution of the United States, as applied to Henion and other employees in the same class of work, in that it deprives both the railroad company and Henion of the liberty of contract and of property without due process of law, and of the equal protection of the laws.

The answer also set up in defense the Federal "hours of service" act approved March 4, 1907, in force one year after its passage (34 Stat. at L. 1415, chap. 2939, U. S. Comp. Stat. Supp. 1911, p. 1321), entitled, "An Act to Promote the Safety of Employees and Travelers upon Railroads by Limiting the Hours of Service of Employees Thereon."

The law, among other things, authorizes the employment of employees such as Henion was, for nine hours in twenty-four-hour periods when employed night and day, and for thirteen hours when employed only during the daytime, and, in case of extraordinary emergency, to be on duty for four additional hours in such period on not exceeding three days in any week.†

[679] The answer also alleges that the jurisdiction of Congress is exclusive, and that the labor law of 1907 is in excess of the power of the legislature of the state of New York and unconstitutional and void, in that it is an attempt to regulate commerce between the states.

A jury was waived and the case tried by the court, which found the facts as alleged in the complaint, and that upon the trains which passed the tower at Sterlington there "were passengers whose journey commenced and ended in the state of New York, and did not extend into any other state, and some of said trains carrying passengers and property from one point to another in the state of New York."

As a conclusion of law the court found that the railroad company violated the law, had incurred a penalty of $100 by so doing, and that § 7a of the law "is valid and its provisions do not violate and are not in conflict with the Constitution of the United States or the Constitution of the state of New York."

Upon the request of the railroad company the court also found the facts of the interstate character of the railroad as alleged in the answer, and that Henion was employed as alleged, and found a number of other facts concerning the manner of operating the "block system" and the duties of Henion. There were also findings relative to the labor law, the penal law, so called, and the act of Congress of March 4, 1907. The findings only serve to emphasize the defenses of the company, and need not be set out at length.

The court also made the following findings:

"That at all times mentioned in the complaint, or hereinafter mentioned, the defendant was, and now is, engaged in interstate commerce, and the transportation of persons, [680] goods, and merchandise by railroad from one state of the United States to other states of the United States.

"On that day [the day Henion was employed] there were fourteen eastbound and twelve westbound passenger trains, and twelve eastbound and fifteen westbound freight trains, which passed the Sterlington tower during said twelve hours.

"On November 1st, 1907, a majority of the trains which the said David Henion was engaged in spacing and reporting were engaged in interstate commerce or in the transportation of passengers, persons, or property from one state to another."

The court refused to find—"That on November 1, 1907, said David Henion, in the performance of his duties, was an employee of the defendant, engaged in interstate commerce."

The court further found that the effect of the labor law "was materially to in-

†"Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours. . . .

"Provided, That no operator, train despatcher, or other employee who, by the use of the telegraph or telephone, despatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week; . . ."

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crease the cost to the Erie Railroad Company of operating the 'Block System.'"

Judgment was entered for the penalty sued for. It was reversed by the appellate division, and a new trial granted, the court deciding that the jurisdiction of the subject-matter was exclusively in Congress and was exercised by the hours of service law of March 4, 1907.

The court of appeals reversed the action of the appellate division and affirmed the judgment of the trial court. The court of appeals rested its decision on three propositions: (1) The labor law of the state was a legal exercise of the police power of the state. (2) There was no conflict between it and the act of Congress of March 4, 1907. "The state," the court said, "has simply supplemented the action of the Federal authorities. It is the same as if Congress had enacted that the classes of employees named might be employed for nine hours or less, and the state had then fixed the lesser number, which was left open by the Federal statute. The form of the latter [681] fixed the outside limit, but not expressly legalizing employment up to that limit, fairly seems to have invited and to have left the subject open for supplemental state legislation if necessary." (3) A statute does not become controlling until it actually becomes operative; and that therefore, even if it should be decided that there was a conflict between the Federal and the state legislation after the former became effective, as the act of Congress did not take effect until March 4, 1908, in the meantime the state law was in operation.

The propositions decided by the court of appeals express the contentions made here by defendant in error, and they are attempted to be supported by a citation of a number of cases in which this court has sustained legislation by the states more or less affecting interstate commerce. A review of them is unnecessary. Whatever difficulty may otherwise have been in the questions presented by the record has been met and overcome by decisions more apposite than the cited cases. The relative supremacy of the state and national power over interstate commerce need not be commented upon. Where there is conflict, the state legislation must give way. Indeed, when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority, the regulating power of the state ceases to exist. Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148, and cases cited. Also Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174; Chicago I. & L. R. Co. v. Hackett, 228 U. S. 559, 57 L. ed. 966, 33 Sup. Ct. Rep. 581; McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; Taylor v. Taylor, 232 U. S. 363, ante, 638, 34 Sup. Ct. Rep. 350.

This is the general principle. It was given application to an instance like that in the case at bar in Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160. The case arose upon an asserted conflict between the hours of service law of March 4, 1907, the one involved here, and a law of the state of Washington which also regulated the hours [682] of railway employees. The latter became effective June 12, 1907; that is, before the time the Federal hours of service law was in force, but after its enactment. The state act resembled the Federal act, and prohibited the consecutive hours of service which had taken place on the Northern Pacific Railroad, and on account of which the action was brought by the attorney general of the state against the company for the penalties prescribed for violation of the act. The railroad company admitted the facts, but denied liability under the act, asserting that its train was an interstate train and was not subject to the control of the state, because within the exclusive control of Congress on that subject. The trial court granted a motion for judgment on the pleadings, which was affirmed by the supreme court of the state. That court held that the train was an interstate train, and conceded that Congress might prescribe the number of consecutive hours an employee of a carrier so engaged should be required to remain on duty; and when it is so legislated upon the subject, its act superseded any and all state legislation on that particular subject. But the court held that the act of Congress did not apply because of its provision that it should not take effect until one year after its passage, and until such time it should be treated as not existing.

We reversed the judgment on the ground that the view expressed was not "compatible with the paramount power of Congress over interstate commerce," and we considered it elementary that the police power of the state could only exist from the silence of Congress upon the subject, and ceased when Congress acted or manifested its purpose to call into play its exclusive power. It was further said that the mere fact of the enactment of the act of March 4, 1907, was a manifestation of the will of Congress to bring the subject within its control, and to reason that because Congress

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chose to make its prohibitions take effect only after a year, it was intended to leave the subject to state [683] power, was to cause the act of Congress to destroy itself. There was no conceivable reason, it was said, for postponing the prohibitions if it was contemplated that the state law should apply in the meantime. The reason for the postponement, it was pointed out, was to enable the railroads to meet the new conditions.

The reasoning of the opinion and the decision oppose the contention of defendant in error and of the court of appeals, that the state law and the Federal law can stand together, because, as expressed by the court of appeals, "the state has simply supplemented the action of the Federal authorities," and, on account of special conditions prevailing within its limits, has raised the limit of safety; and the form of the Federal statute, although "not expressly legalizing employment up to that limit, fairly seems to have invited and to have left the subject open for supplemental state legislation if necessary."

We realize the strength of these observations, but they put out of view, we think, the ground of decision of the cases, and, indeed, the necessary condition of the supremacy of the congressional power. It is not that there may be division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it.

Regulation is not intended to be a mere wanton exercise of power. It is a restriction upon the management of the railroads. It is induced by the public interest or safety, and the "hours of service" law of March 4, 1907, is the judgment of Congress of the extent of the restriction necessary. It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety, and of the cost and burden which the railroad must endure to secure it.

Defendant in error attempts to distinguish Northern P. R. Co. v. Washington, on the ground that the state was dealing with a corporation organized [684] under the laws of another state, and, the state of Washington had no power to alter or repeal its charter. This power, it is contended, the state of New York has over the Erie Railroad, and exercised the power in the law under review, and that the court of appeals has so decided. It is asserted besides, that Henion was not engaged in interstate commerce. These assertions are not justified. The court of appeals did not decide that the labor law constituted an alteration or repeal of the charter of the company. The learned judge who delivered the opinion of the court expressed such to be his view, saying that "if the statute violated is a valid exercise of the power, personally" he was "not doubtful that under its reserved control over corporations the legislature might pass such an act in regulation of the performance of the business for which a railroad was organized."

It is clear that the learned judge did not express the views of the court. We have no doubt that if the court entertained such view it would have been declared. It would have been a direct, and, from the standpoint of the state, an adequate, solution of the questions involved, and would have made unnecessary the elaborate consideration of the extent of the police power of the state and its coincident exercise and adjustment with congressional power of regulation. The contention of defendant in error, therefore, has not the foundation asserted for it, and we may pass it without further comment, not considering whether it is competent for a state, through its power to alter or repeal the charter of railroads incorporated under its laws, to displace or share the jurisdiction of Congress over interstate commerce.

The assertion that Henion was not engaged in interstate commerce is also without foundation, and is, besides, precluded by the opinion of the court of appeals. The interstate character of the business was recognized by the court, and the law considered in view of such recognition. The [685] court said "that the labor law purports and attempts, indiscriminately and inseparably, to regulate the hours of the classes of employees designated, whether engaged in interstate or local traffic, and that, therefore, its validity must be tested by the power of the legislature over the former." [198 N. Y. 376, 29 L.R.A. (N.S.) 240, 139 Am. St. Rep. 828, 91 N. E. 849, 19 Ann. Cas. 811.]

The trial court, it is true, undertook to make a distinction between the interstate business of the railroad and Henion's duties, but, in view of the cases which we have cited, and of the decision of the appellate division and of the court of appeals, the distinction is untenable. Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621; Second Employers' Liability Cases (Mondou v. New York N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

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ERIE RAILROAD COMPANY, Plff. in Err.,
v.
JOHN WILLIAMS, as Commissioner of Labor of the State of New York.

(See S. C. Reporter's ed. 685–705.)

Statutes — who may assail validity.

1. A railway company cannot complain for its employees of the repugnancy to the due process of law and equal protection of the laws clauses of the Federal Constitution of the provisions of N. Y. Laws 1897, chap. 415, § 10, as amended by Laws 1908, chap. 442, requiring the semimonthly payment of the wages of railway employees.

[For other cases, see Statutes, I. d, 3, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — liberty to contract — requiring semimonthly wage payments — reserved power over corporate charters.

2. The liberty and property of an interstate railway company are not taken without due process of law by the requirement of N. Y. Laws 1897, chap. 415, § 10, as amended by Laws 1908, chap. 442, passed in the exercise of the reserved power of the state over the charters of its corporations, that railway employees shall be paid their wages semimonthly, the effect of which is to prohibit both carrier and employees from contracting otherwise.

[For other cases, see Constitutional Law, 605–607, in Digest Sup. Ct. 1908.]

Commerce — state regulation — time of payment of railway employees — congressional inaction.

3. Requiring an interstate railway carrier to pay its employees semimonthly, as is done by N. Y. Laws 1897, chap. 415, § 10, as amended by Laws 1908, chap. 442, does not, until Congress acts upon the subject, amount to an unlawful burden upon interstate commerce, where, as construed by the state courts, such requirement relates to those railway servants who are employed wholly within the state, and those whose duties take them from that state into other states, but not to those employed in other states.

[For other cases, see Commerce, 68–80, in Digest Sup. Ct. 1908.]

[No. 274.]

NOTE.—On validity and effect of statutes regulating time of payment of wages—see notes to Re House Bill No. 1230, 28 L.R.A. 344; Lawrence v. Rutland R. Co. 15 L.R.A. (N.S.) 350; Arkansas Stave Co. v. State, 27 L.R.A.(N.S.) 255; and New York C. & H. R. R. Co. v. Williams, 35 L.R.A.(N.S.) 549.

On state regulation of relations between railroad companies engaged in interstate commerce and their employees—see notes to State v. Northern P. R. Co. 15 L.R.A. (N.S.) 134, and People v. Erie R. Co. 29 L.R.A.(N.S.) 240.

As to who may raise objection that a statute contains an unconstitutional discrimination—see note to Pugh v. Pugh, 32 L.R.A.(N.S.) 954.

Argued April 27, 1914. Decided May 25, 1914.

IN ERROR to the Supreme Court of the State of New York in and for the County of Albany, in that state, entered pursuant to the mandate of the Court of Appeals, which affirmed a judgment of the Appellate Division of the Supreme Court, Third Department, which had in turn affirmed a judgment of the Special Term of the Supreme Court, dismissing the complaint in a suit to enjoin the enforcement of a state law requiring semimonthly payment of wages of railway employees. Affirmed.[1]

See same case below, in appellate division, 136 App. Div. 902, 120 N. Y. Supp. 1123; in court of appeals, 199 N. Y. 525, 92 N. E. 1084.

Statement by Mr. Justice McKenna:

Suit brought by plaintiff in error, the Erie Railroad Company (as it was plaintiff below, we shall so designate it), to restrain the defendant in error (herein called defendant) from instituting actions to recover penalties for noncompliance with the provisions of the labor law of the state of New York, which required plaintiff to pay its employees semimonthly and in cash.

The object of the suit is to test the constitutionality of the law.

The bill is very elaborate and alleges with much detail the following facts: Plaintiff is a New York corporation, and defendant is commissioner of labor of the state. Plaintiff maintains a railroad in New York which extends into other states, and operates car floats and other floating equipment, navigating the navigable waters of the United States. These and other equipment are used in the business of plaintiff as a common carrier of persons and property under and in compliance with tariffs duly promulgated and filed under the laws of the state and of the United States; and plaintiff is also a carrier of the United States mails. As a rule, the trains of plaintiff run over an operating division without change of employees. Some of the divisions are interstate and some wholly within the state of New York.

[688] Plaintiff, in carrying out its functions, has in its service upon that portion of its road lying east of Meadville, Pennsylvania, upwards of 15,000 men, who are employed either wholly within or partially within the state of New York, and nearly all of them are employed in the movement of in-

[1] Leave granted on June 22, 1914, to present petition for rehearing within thirty days.

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terstate commerce. The great majority of these employees render service in more than one state, and many of them who reside in Pennsylvania or New Jersey render a part of their service in New York, and many who reside in the latter state render service in the other two states. The contracts of employment of many of them were made, and in the future must be made, in states other than New York, in which states they must reside.

By the laws of New York plaintiff was vested with its powers as a railroad and to contract and be contracted with for the employment of persons to conduct its operations and enterprises at and for such wages and upon such terms of payment as should or might be mutually agreed on; and thereunder it has been its custom to pay its employees monthly, and thus pay them prior to or on the 20th day of each month the wages earned during the preceding month.

The great majority of plaintiff's employees were in its service prior to January 1, 1908, and all accepted such service with full knowledge of its general and uniform custom so to pay its employees monthly.

Prior to January 1, 1908, there existed and has since existed a contract between plaintiff and its employees that the latter should be paid monthly as stated, and so to pay them, as distinguished from payment twice a month, is not inconsistent with the public interest, or hurtful to the public order, or detrimental to the common good.

Section 4 of the labor law of the state makes it malfeasance in office for any officer, agent, or employee of the state to violate or evade his duty under [689] the law, or knowingly permit the violation or evasion of the act, and he is subject to removal from office.

Section 9† provides that every railroad company and [690] certain other companies shall pay their employees in cash, and no such company shall pay its employees in script, commonly known as store money orders.

Section 10 requires the payment of employees' wages semimonthly.

Section 11 imposes a penalty of $50 for each failure to so pay, to be recovered by the factory inspector in his name of office in a civil action, and limits the defenses to the action to a valid assignment of such wages, a valid set-off against the same, or the absence of such employee from his regular place of labor at the time of the payment, or an actual tender at the time of the payment, or a breach of contract by such employee, or a denial of the employment.

The commissioner of labor is required to enforce the provisions of the law, and notified plaintiff of his intention to do so, and to sue for the penalties imposed by the act. He expressed his opinion of the act to be that each failure to pay the wages of each employee constituted a separate offense, and that the aggregate of the penalties would be $250,000. Plaintiff believes, unless that officer is restrained, that he will exercise his authority under the act.

The employees of plaintiff are distributed over more than 1,819 miles, and the making of the payment of their wages in money semimonthly instead of monthly will impose upon and subject plaintiff to an increased cost and expense of several thousand dollars each month.

The difficulty of semimonthly payments is described, and it is alleged that the drastic and enormous penalties are, by reason of their necessarily aggregate character and effect, so excessive as to evidence legislative intention to unduly limit or prevent judicial inquiry, and practically constrain plaintiff to submit to the statute rather than, by contesting its validity, to take the chances of the penalties it imposes.

That the statute by its terms prevents plaintiff from [691] setting up in defense the contracts existing between it and its employees for the payment of their wages once a month, and that the statute violates, when applied to plaintiff, various provisions of the Constitution of the state and of the United States, and thereby is repugnant to

†"Section 9. Cash payment of wages.—Every manufacturing, mining, quarrying, mercantile, railroad, street railway, canal, steamboat, telegraph and telephone company, every express company, every corporation engaged in harvesting and storing ice, and every water company, not municipal, and every person, firm, or corporation engaged in or upon any public work for the state or any municipal corporation thereof, either as a contractor or a subcontractor therewith, shall pay to each employee engaged in his, their, or its business, the wages earned by such employee in cash. No such company, person, firm, or corporation shall hereafter pay such employees in script, commonly known as store money orders. [Laws 1897, chap. 415, as amended by Laws 1908, chap. 443.]

"Section 10. When wages are to be paid.—Every corporation or joint stock association, or person carrying on the business thereof by lease or otherwise, shall pay weekly to each employee the wages earned by him to a day not more than six days prior to the date of such payment. But every person or corporation operating a steam surface railroad shall, on or before the 1st day of each month, pay the employees thereof the wages earned by them during the first half of the preceding month, ending with the 15th day thereof, and on

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article 3 of the Constitution of the United States and article 6 of the Constitution of the state of New York, in that it is an invasion by the legislative of the judicial power; and it is also repugnant to § 1 of article 14 of the Constitution of the United States, and § 6, article 1, of the Constitution of the state of New York, in that it deprives plaintiff of property without due process of law; and violates § 10, article 1, of the Constitution of the United States, in that it impairs the obligation of contracts. The act in its other provisions deprives plaintiff of property without due process of law, and of the equal protection of the laws. It also interferes with and impairs plaintiff's performance and discharge of its duties as a common carrier in interstate commerce, is not a valid exercise of the police power, and is illegal and unenforceable and void under articles of the Constitution of the state and of the United States, which are enumerated.

By the enforcement of the act plaintiff will be subjected to enormous penalties, a multiplicity of suits, and to great and irreparable damage, and plaintiff has no adequate remedy at law.

The answer of the defendant admitted the allegations of the complaint as to the statute, and alleged that he intended to give such notice to plaintiff as to enforcing such penalties as he was required by the law to give and enforce. He denied that he had any knowledge or information sufficient to form a belief regarding the truth of the other allegations of the complaint.

A stipulation of facts was entered into by the parties upon which the court entered judgment dismisssing the complaint. The judgment was successively affirmed by [692] the appellate division of the supreme court and by the court of appeals.

The facts stipulated practically sustain the allegations of the answer, and detail the manner of the payment by plaintiff of its employees. The plaintiff also introduced in evidence an exhibit which classified its employees and showed the number of days' work, total compensation and average compensation per day as per pay rolls for the year ending June 30, 1908. Its materiality was contested.

Mr. Frederic D. McKenney argued the cause, and, with Mr. George F. Brownell, filed a brief for plaintiff in error:

The labor law of New York is repugnant to U. S. Const. 14th Amend. in that it deprives the company of property, and specifically deprives the company and those of its employees to whom it applies of liberty without due process of law.

Wright v. Hart, 182 N. Y. 344, 2 L.R.A. (N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 263; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Republican Iron & Steel Co. v. State, 160 Ind. 379, 62 L.R.A. 136, 66 N. E. 1005; Braceville Coal Co. v. People, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; Johnson v. Goodyear Min. Co. 127 Cal. 4, 47 L.R.A. 338, 78 Am. St. Rep. 17, 59 Pac. 304; Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. 354; San Antonio & A. P. R. Co. v. Wilson, 4 Tex. App. Civ. Cas. (Willson) 565, 19 S. W. 910; Toledo, St. L. & W. R. Co. v. Long, 169 Ind. 316, 124 Am. St. Rep. 226, 82 N. E. 757.

The conditions under which the legislature, in the exercise of its reserved right to alter and amend corporate charters, may deprive a person (*i. e.*, a corporation) of liberty or property, are substantially the same as those which will justify such a deprivation in the exercise of the police power.

Lord v. Equitable Life Assur. Soc. 194 N. Y. 212, 22 L.R.A.(N.S.) 420, 87 N. E. 443; Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357; Johnson v. Goodyear Min. Co. 127 Cal. 4, 47 L.R.A. 338, 78 Am. St. Rep. 17, 59 Pac. 304.

The question whether a statute is or is not a valid exercise either of the police power or the power to alter or amend char-

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or before the 15th day of each month pay the employees thereof the wages earned by them during the last half of the preceding calendar month. [Laws 1897, chap. 415, as amended by Laws 1908, chap. 442.]

"Section 11. Penalty for violation of preceding sections.—If a corporation or joint-stock association, its lessee or other person carrying on the business thereof, shall fail to pay the wages of an employee, as provided in this article, it shall forfeit to the people of the state the sum of $50 for each such failure, to be recovered by the factory inspector in his name of office in a civil action; but an action shall not be maintained therefor unless the factory inspector shall have given to the employer at least ten days' written notice that such an action will be brought if the wages due are not sooner paid as provided in this article.

"On the trial of such action, such corporation or association shall not be allowed to set up any defense, other than a valid assignment of such wages, a valid set-off against the same, or the absence of such employee from his regular place of labor at the time of payment, or an actual tender to such employee at the time of the payment of the wages so earned by him, or a breach of contract by such employee, or a denial of the employment." [Laws 1897, chap. 415.]

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ters is a judicial one, not foreclosed by legislative action.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Forster v. Scott, 136 N. Y. 577, 18 L.R.A. 543, 32 N. E. 976; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; People v. Hawkins, 157 N. Y. 1, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; Beardsley v. New York, L. E. & W. R. Co. 162 N. Y. 230, 56 N. E. 488; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; People v. Orange County Road Constr. Co. 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129; People v. Williams, 189 N. Y. 131, 12 L.R.A.(N.S.) 1130, 121 Am. St. Rep. 854, 81 N. E. 778; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133.

There are some cases holding to the contrary.

Opinion of Justices (Re House Bill No. 1230) 163 Mass. 589, 28 L.R.A. 344, 40 N. E. 713; State v. Brown & S. Mfg. Co. 18 R. I. 16, 17 L.R.A. 856, 25 Atl. 246; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 23 L.R.A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; Lawrence v. Rutland R. Co. 80 Vt. 370, 15 L.R.A.(N.S.) 350, 67 Atl. 1091, 13 Ann. Cas. 475.

In the interest of uniformity of operation, so necessary to the success of every great transportation enterprise whose field of operation is national in scope and character, the power to regulate the relations between such an employer and its employees, if any regulation be necessary, should be reserved to Congress exclusively.

Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

It cannot well be said that the requirement to pay many thousand employees, located in several states and on board vessels plying the navigable waters of the United States, is a matter of merely local concern.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 398, 57 L. ed. 1511, 1540, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

The excess cost of paying employees twice a month, as distinguished from once a month, and the burden of care, labor, and responsibility imposed by the statute, constitute a direct burden upon interstate commerce and violate the commerce clause of the Federal Constitution.

Foster v. Master & Wardens, 94 U. S. 246, 24 L. ed. 122; Moran v. New Orleans, 112 U. S. 69, 28 L. ed. 653, 5 Sup. Ct. Rep. 38; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. ed. 231, 28 Sup. Ct. Rep. 121; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638.

The statute violates the 14th Amendment of the Constitution of the United States, and is unconstitutional in that it denies to the employees of the Erie Railroad Company the equal protection of the laws.

Kane v. Erie R. Co. 68 L.R.A. 788, 67 C. C. A. 653, 133 Fed. 686; Bedford Quarries Co. v. Bough, 168 Ind. 671, 14 L.R.A. (N.S.) 418, 80 N. E. 529; Toledo, St. L. & W. R. Co. v. Long, 169 Ind. 316, 124 Am. St. Rep. 226, 82 N. E. 757; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 158, 41 L. ed. 666, 669, 17 Sup. Ct. Rep. 255.

Mr. Joseph A. Kellogg argued the cause, and, with Mr. Thomas Carmody, Attorney General of New York, and Mr. Wilber W. Chambers, filed a brief for defendant in error:

Legislative acts will be presumed to be constitutional, and if there is any doubt at all, such doubt will be resolved in favor of the validity of such acts.

Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 281, 53 L. ed. 176, 186, 29 Sup. Ct. Rep. 50.

These statutes are a proper exercise of the reserved power to amend corporate charters, contained in the Constitution of the state of New York.

Berea College v. Kentucky, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 23 L.R.A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; Adirondack R. Co. v. New York, 176 U. S.

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176 U. S. 335, 44 L. ed. 492, 20 Sup. Ct. Rep. 460; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Greenwood v. Union Freight R. Co. 105 U. S. 13, 26 L. ed. 961; Lord v. Equitable Life Assur. Co. 194 N. Y. 212, 22 L.R.A.(N.S.) 420, 87 N. E. 443.

There is but a single limitation to this general rule of the power to amend charters by the state, enacted under its sovereign power, and that is, the power may not be exercised to destroy property or rights guaranteed by the 14th Amendment of the United States Constitution, and by similar provisions of state Constitutions.

St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 408, 43 L. ed. 746, 747, 19 Sup. Ct. Rep. 419.

The reserved power to amend corporate charters is much greater than the police power.

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; New York v. Twenty-third Street R. Co. 113 N. Y. 317, 21 N. E. 60; Lord v. Equitable Life Assur. Soc. 194 N. Y. 212, 22 L.R.A.(N.S.) 420, 87 N. E. 443.

Regulation of methods of administration or internal management is included within the scope of this reserved power over corporate charters.

Lord v. Equitable Life Assur. Soc. supra; Berea College v. Kentucky, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48.

Only those persons belonging to the class for whose benefit the particular constitutional provision in question was enacted may legally raise the question that the statute violates such provision.

Red River Valley Bank v. Craig, 181 U. S. 548, 558, 45 L. ed. 994, 1000, 21 Sup. Ct. Rep. 703; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40.

These statutes are not unconstitutional as an exercise of the reserved power to amend corporate charters even if we should assume, for argument's sake, that they necessarily limited somewhat the freedom of contract of the employees of such corporations.

State v. Brown & S. Mfg. Co. 18 R. I. 16, 17 L.R.A. 856, 25 Atl. 246.

The validity of similar laws has been frequently upheld by the courts of other states and by this court, upon this very ground.

State v. Peel Splint Coal Co. 36 W. Va. 802, 17 L.R.A. 385, 15 S. E. 1000; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 23 L.R.A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; St. Louis, I. M. & S. R. Co. v. Paul, 64 Ark. 83, 37 L.R.A. 504, 62 Am. St. Rep. 154, 40 S. W. 705; Shaffer v. Union Min. Co. 55 Md. 74, 15 Mor. Min. Rep. 59; Skinner v. Garnett Gold Min. Co. 96 Fed. 744; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124.

The purposes of these acts are within the limits of the police power as repeatedly defined by the courts.

Com. v. Alger, 7 Cush. 53; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; People v. Ewer, 141 N. Y. 132, 25 L.R.A. 794, 38 Am. St. Rep. 788, 36 N. E. 4; People ex rel. Nechamcus v. Warden, 144 N. Y. 535, 27 L.R.A. 718, 39 N. E. 686.

In determining whether the legislature properly exercised this power the court will take into consideration all facts of which it has judicial knowledge, including public records or reports, encyclopedias, laws of other states, and the general or commonly accepted belief of the community.

Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206.

The purpose of these acts is to benefit the community and the public in various ways, arising out of the protection which they afford to the large class of men employed by corporations.

The primary purpose of these laws, of course, is to secure to the laboring men the full value or purchasing power of their wages.

State v. Brown & S. Mfg. Co. 18 R. I. 16, 17 L.R.A. 856, 25 Atl. 246; State v. Peel Splint Coal Co. 36 W. Va. 802, 17 L.R.A. 385, 15 S. E. 1000; Arkansas Stave Co. v. State, 94 Ark. 27, 27 L.R.A.(N.S.) 255, 140 Am. St. Rep. 103, 125 S. W. 1001.

Nor can there be any valid objection to that part of the statute involved because it applies to corporations, and not to natural persons.

Aluminum Co. v. Ramsey, 222 U. S. 251, 56 L. ed. 185, 32 Sup. Ct. Rep. 76, 1 N. C. C. A. 184; Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 47 L.R.A.(N.S.) 84, 30 Sup. Ct.

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Rep. 676; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

The contention of plaintiff is that the labor law is repugnant to the 14th Amendment, "in that it deprives the company of property, and specifically deprives the company, and those of its employees to whom it applies, of liberty, without due process of law." The contention may be limited at the outset to the rights of the company. It cannot complain for its employees; and before considering the contention thus limited, it is well to see what meaning or extent the court of appeals gave to the law.

The court decided that the law operates not only to require the railroads to pay their employees semimonthly, but prohibits them from making contracts with their employees which shall vary the time of payment. If this were not the meaning of the law, the court said, neither railroads nor their employees would have any ground of complaint, "as both master and servant would be left at liberty to make any contract they pleased in regard to the time when the servant's wages should be payable and the medium in which they should be paid." This liberty not existing, the court stated the contention of the plaintiff to be that the law deprives it "of the right to make contracts with its employees on advantageous terms, and that this was beyond the power of the legislature." The plaintiff also contended that it was denied the equal protection of the laws.

[698] The opposing contentions were stated to be: (1) The legislation is a proper exercise of the power reserved by the Constitution of the state to amend corporate charters; (2) it constitutes a legitimate exercise of the police power of the state.

The court rejected both contentions of plaintiff, and sustained the law as an exercise of the power over plaintiff's charter; and, adverting to the objection that the requirement of semimonthly payments was an unconstitutional interference with interstate commerce, the court said: "It is to be observed that it [the law] is not in conflict with any legislation by Congress, nor does it affect interstate commerce directly." And, exhibiting the extent of the operation of the law, it was further said: "It relates to the wages of railway servants employed wholly within the state of New York, as well as to the wages of those whose duties take them from this state into others. The subject is one upon which Congress has not undertaken to act." [New York, C. & H. R. R. Co. v. Williams, 199 N. Y. 123, 35 L.R.A.(N.S.) 549, 139 Am. St. Rep. 850, 92 N. E. 404.]

How far the reserved power of the state over the charters of its corporations was helped out by its police power, the court gave no indication. Indeed, it may be said that, in its reference to the reserved power in reviewing the decisions of other states, the sole ground of its decision was the possession and exercise of such power by the state. The court said:

"There is an irreconcilable conflict in the decisions in different jurisdictions as to the constitutional validity of labor legislation fixing the medium and time of payment of the wages of those who work for corporations. After the foregoing review of the leading cases, I find no difficulty in sustaining our New York statute on the ground which has been stated. It does not confiscate corporate property directly or indirectly. It does impose a greater future burden upon the corporations to which it relates; but that, I think, is within the power of the legislature to the extent to which it has been exercised in this case."

[699] The legislation having been passed in the exercise of the reserved power of the state, is it valid, notwithstanding it prohibits both the plaintiff and its employees from contracting against its provisions? Plaintiff asserts the negative, and attempts to sustain the assertion by a very comprehensive argument in which a number of decisions of this court and of other courts are cited and reviewed. They illustrate by various instances the fundamental and indisputable principle that personal liberty includes the power to make contracts. But liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail—principle or condition—cannot be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint, or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance. Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 562, 55 L. ed. 328, 336, 31 Sup. Ct. Rep.

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259; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, ante, 1011, 34 Sup. Ct. Rep. 612.

In considering the competency of the legislative judgment and the power the courts have to review it, we may inquire, what is here complained of? What does the labor law of New York do that seriously affects the liberty of plaintiff? It requires cash payments. That requirement is not now resisted. It requires semimonthly payments. Plaintiff now pays monthly. The extent of its grievance, therefore, is two payments a month instead of one, with [700] the consequence of expense and inconvenience. It is hardly necessary to say that cost and inconvenience (different words, probably, for the same thing) would have to be very great before they could become an element in the consideration of the right of a state to exert its reserved power or its police power. New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; United States v. Union P. R. Co. 160 U. S. 1, 40 L. ed. 319, 16 Sup. Ct. Rep. 190; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115. See also Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621.

Putting cost and inconvenience to one side, there would would remain only an abstract right. Taking them into consideration, they constitute the detriment to which plaintiff is subjected by not being able to make the forbidden contracts. It may be admitted an advantage is taken away from plaintiff, or, to put it another way, a burden is imposed upon it. Is it within the power of the state to impose the burden by virtue of its reserved control over plaintiff? The question must be answered as if the requirement of the law was part of the charter of plaintiff, and in such case it would seem certainly that a liberty of contract could not be asserted against it, for it would be a part of the contract accepted and binding on plaintiff,—a liberty exercised precluding a liberty to be exercised, —and it would seem necessarily to be the very essence of the right of amendment reserved that what could have been put in the charter originally, whatever its consequence, can be added to the charter, whatever the consequence of the addition. Of course, we mean what was and is competent for the state to impose; and we are brought to the narrow question whether a regulation of the time and manner of payment by a railroad of its employees is within the competency of the state to require. A negative answer is contended for, the argument urged to support the contention being that a contract right of dealing with its employees [701] is conferred by plaintiff's charter, which right the labor law takes away, and plaintiff is deprived of property because of the expense to which it is subjected, which, it is contended, is not justified by a corresponding public benefit. It would seem, therefore, to be the contention of plaintiff that it acquired by its charter a vested right to deal with its employees according to its own judgment, and, as alleged in its answer, that it was vested with its powers as a railroad and to contract and be contracted with, for the employment of persons to conduct its operations and enterprises at and for such wages and upon such terms of payment as might or should be agreed on. In other words, it is the contention that the rights asserted are of the very essence of its grant, giving it the rights of a natural person, and investing it with the same immunity from control, whether exercised under the police power or the reserved power of amendment. We may, in answering the contention, put aside the rights of natural persons and the rights which might exist under a Constitution which did not reserve control in the state. The effect of the control reserved was to make plaintiff, from the moment of creation, subject to the legislative power of alteration, and, if deemed expedient, of absolute extinguishment as a corporate body. Spring Valley Waterworks v. Schottler, 110 U. S. 347, 352, 28 L. ed. 173, 175, 4 Sup. Ct. Rep. 48. And whether expedient or not is a question for the legislature, not for the courts. Id. 357. In other cases the effect of the reserved power of amendment is said to be to make any alteration or amendment of a charter subject to it which will not defeat or substantially impair the object of the grant or any right vested under the grant. Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 697, 698, 43 L. ed. 858, 864, 19 Sup. Ct. Rep. 565; Looker v. Maynard, 179 U. S. 46, 52, 45 L. ed. 79, 81, 21 Sup. Ct. Rep. 21. Surely the manner or time of paying employees does not come within such limitation. It is a matter of pure administration, not comparable in its burden to those sustained in the cases which we have already cited.

[702] In St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419, a law of Arkansas was sustained as an exercise of the reserved power of the state which required a railroad company discharging with or without cause, or refusing to employ, any servant or employee, to pay him his unpaid wages, then earned, at the contract rate, without abatement or de-

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duction, to the date of his discharge, and providing that, if the same be not paid on such day, then, as a penalty for nonpayment, his wages shall continue at the same rate until paid.

In New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437, the railroad company was required to remove various grade crossings at its own expense.

In the Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496, legislation requiring the creation of a sinking fund was sustained under the reserved power of amendment, and, after reviewing the cases, the court said "that whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment." Many other cases might be cited, but to cite them would be to accumulate authorities on a proposition which might well be taken at this late date to be incontestable. Indeed, the contention of defendant that the legislation under review might be supported under the police power of the state has justification in cases.

In Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1, a law of the state of Tennessee which required all persons and corporations to redeem in money evidences of indebtedness given to their laborers or employees, in the hands of their laborers, employees, or a bona fide holder, came up for consideration. The Knoxville Coal Company paid its employees in cash and in coal orders. It made money by the practice. There was no proof of an express agreement between the company and its employees that the orders should be paid only in coal, except as implied from [703] accepting the orders, and no proof of an implied agreement except as drawn from the face of the orders and the custom of the company. There was no proof of compulsion except that if the employees did not accept pay in coal orders they had to submit to be in arrears about twenty days, but the company paid in coal orders the whole wages due at the end of each month. Harbison purchased a number of the coal orders and demanded their payment in cash, which was refused. He then brought suit against the company, relying on the statute. The Supreme Court gave him judgment, which was affirmed by this court on the ground that the law was a proper exercise of the police power of the state. This court, by Mr. Justice Shiras, commenting on St. Louis, I. M. & S. R. Co. v. Paul, supra, said that in that case stress was laid upon the reserved power of amendment which the state had, "but it is also true that, inasmuch as the right of contract is not absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the state and its inhabitants, the police power of the state may, within definite limitations, extend over corporations outside of and regardless of the power to amend charters." Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609. The ruling was followed in Dayton Coal & I. Co. v. Barton, 183 U. S. 23, 46 L. ed. 61, 22 Sup. Ct. Rep. 5, although the Dayton Company was not incorporated under the laws of Tennessee.

In McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206, a law of Arkansas required, where miners were employed at quantity rates, and more than ten were employed, that they should be paid by the weight of coal mined by them as it comes from the mine and before it was passed over a screen of any kind. One of the grounds of attack on the law was that it was an unwarranted invasion of the right of contract secured by the 14th Amendment, the argument being that the law prevented the miners from contracting [704] for wages upon the basis of screened coal instead of the weight of the coal as originally produced at the mine. The law was sustained as a proper exercise of the police power of the state.

It is, however, contended by plaintiff, that the law under review cannot be sustained either as an exertion of the police power or as an alteration of the charter of plaintiff, unless the court can say from a comparison of the systems of payment—monthly and semimonthly—that the former affects adversely the general welfare or public good, and the latter "remedies that evil or condition, and of itself does not constitute an unjust burden upon the employer." But whether the law imposes an unjust burden depends upon its validity, and whether the public welfare is subserved by one system or the other is, as we have said, in the first instance, for the legislature to determine, and its judgment will not be reviewed unless "unmistakably and palpably in excess of legislative power." McLean v. Arkansas, supra. The labor law of New York cannot be so characterized.

There are certainly advantages of cash payment over deferred payments, and an advantage to those who work for a living of a ready purchasing power for their needs over the use of credit. This is found as a fact by the trial court, and even if there is no affirmative evidence of it, it is the expression of experience.

The next contention of plaintiff is that the cost of paying twice a month is a

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direct burden on interstate commerce. It is not necessary to review and compare the cases in which this court has pointed out the difference between a direct and indirect burden of state legislation upon interstate commerce, or the power of the states in the absence of regulation by Congress. It is enough to say in the present case that Congress has not acted, and there is not, therefore, that impediment to the law of the state; nor is there prohibition in the character of the burden. The [705] effect of the provision is merely administrative, and so far as it affects interstate commerce, it does so indirectly. The court of appeals, as we have seen, considered that the law relates to the wages of railway servants employed wholly within the state, and to those whose duties take them from the state into other states. In other words, did not make it applicable to those employed in other states, and it therefore does not embrace all of the employees of plaintiff, and the contention based upon its application to all is without foundation.

The last contention of plaintiff is that the statute violates the 14th Amendment, "in that it denies to the employees of the Erie Railroad Company the equal protection of the laws." Considerable argument is made to support the contention, in which a comparison is made between the employees—mechanics, workmen, and laborers—to whom the law applies, and the other employees of the company, and it is declared that all, if any, suffer from monthly payments, and all are entitled, therefore, to receive the benefit of semimonthly payments. But, as we have said, employees are not complaining, and whatever rights those excluded may have, plaintiff cannot invoke.

Judgment affirmed.

RAMON VALDES,† Appt.,
v.
TULIO LARRINAGA.

(See S. C. Reporter's ed. 705–711.)

Equitable lien — profits.

1. A contract whereby one of the contracting parties was to receive a 10 per cent interest in a concession for helping to secure it and for aiding in the plans, projects, and technical matters, gives him an equitable interest in the concession to the extent of securing his share of the profits, if any, and one which attaches to these profits specifically if and when they come into being.

[For other cases, see Liens, I., in Digest Sup. Ct. 1908.]

Accounting — fiduciary relation — secret profits.

2. Equity has jurisdiction of a suit for an accounting under a contract whereby the complainant was to receive a 10 per cent interest in the concession for helping to secure it and for aiding in the plans, projects, and technical matters, where the bill alleges an abuse of the fiduciary relation thus created by a secret transaction, from which it is alleged that profits accrued.

[Matters as to accounting, see Accounting, in Digest Sup. Ct. 1908.]

Contracts — validity — public policy — affecting official action.

3. There was nothing against public policy in a contract whereby a person was to receive a 10 per cent interest in a concession to a riparian owner of the right to utilize water power in developing electric energy, for helping in the steps necessary to be taken and the plans, projects, and technical matters, under which he joined in an application to the military governor of Porto Rico for a franchise on the footing of a joint interest, and helped to present the matter to the Secretary of War, and prepared plans and specifications to be presented to the executive council of Porto Rico when the first franchise granted by the Secretary of War had been lost by not complying with its terms.

[For other cases, see Contracts, IV. d, 3, in Digest Sup. Ct. 1908.]

Contracts — construction — interest in concession — sale.

4. A preliminary contract for the sale by a riparian owner of a water power concession, after an attempted forfeiture by the public authorities, and the lands, easements, and options, for use in connection with the concession, such contract reciting that he had petitioned for a new concession, or confirmation, entitles a person to whom the former had contracted to give a 10 per cent interest for his services in aid of the original concession, to receive such 10 per cent, although the new concession when granted expressly provided that it should not be deemed a recognition of any right to any previous grant, and although the sale probably would not have taken place

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†Death of Ramon Valdes, appellant herein, suggested, and appearance of Ramon Valdes Cobian filed and entered February 24, 1914, as party appellant herein.

NOTE.—On equitable liens—see note to Walker v. Brown, 41 L. ed. U. S. 865.

On validity of contract as affected by the fact that its performance may involve the necessity of procuring some action by public officials—see note to Cole v. Brown-Hurley Hardware Co. 18 L.R.A.(N.S.) 1161.

On the validity of agreement by which compensation is dependent on success in procuring contract with public officer or board—see note to Kansas City Paper House v. Foley R. Printing Co. 39 L.R.A. (N.S.) 747.

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without a confirmation or regrant of the concession.

[Construction of contracts, generally, see Contracts, II., in Digest Sup. Ct. 1908.]

[No. 343.]

Argued May 4, 1914. Decided May 25, 1914.

APPEAL from the District Court of the United States for Porto Rico to review a decree for an accounting. Affirmed.

The facts are stated in the opinion.

Mr. Hugo Kohlmann argued the cause, and, with Messrs. F. Kingsbury Curtis and Martin Travieso, Jr., filed a brief for appellant:

No fraud, either legal or actual, was alleged or proved. Even if it did exist, it would not be ground for equitable jurisdiction.

Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 50, 53 L. ed. 682, 692, 29 Sup. Ct. Rep. 404; United States v. Bitter Root Development Co. 200 U. S. 451, 472, 50 L. ed. 550, 557, 26 Sup. Ct. Rep. 318; Ambler v. Choteau, 107 U. S. 586, 591, 27 L. ed. 322, 324, 1 Sup. Ct. Rep. 556; Buzard v. Houston, 119 U. S. 347, 352, 30 L. ed. 451, 453, 7 Sup. Ct. Rep. 249.

The fact that, in a contract of employment, the employee's compensation is measured by a certain proportion of the profits, does not make it a partnership.

Meehan v. Valentine, 145 U. S. 611, 619, 620, 623, 624, 36 L. ed. 835, 840–842, 12 Sup. Ct. Rep. 972; Berthold v. Goldsmith, 24 How. 536, 16 L. ed. 762.

Complainant's prayer for specific performance did not confer equitable jurisdiction.

Scott v. Neely, 140 U. S. 106, 110, 35 L. ed. 358, 360, 11 Sup. Ct. Rep. 712.

The fact that complainant's compensation under the contract was fixed at a proportion of the profits realized by the defendant from the franchise did not entitle the complainant to an accounting in equity.

Root v. Lake Shore & M. S. R. Co. 105 U. S. 189, 26 L. ed. 975; Washburn & M. Mfg. Co. v. Freeman Wire Co. 41 Fed. 412; Safford v. Ensign Mfg. Co. 56 C. C. A. 630, 120 Fed. 480; Babbott v. Tewksbury, 46 Fed. 86.

A court of equity is without jurisdiction in a suit in which discovery and relief are sought, where the only ground for equitable relief appears to be a discovery of evidence to be used in the enforcement of a purely legal demand.

Root v. Lake Shore & M. S. R. Co.; Washburn & M. Mfg. Co. v. Freeman Wire Co.; and Safford v. Ensign Mfg. Co.—supra; Grieb v. Equitable Life Assur. Soc. 189 Fed. 502; Brown v. Equitable Life Assur. Co. 142 Fed. 835; Paton v. Majors, 46 Fed. 210.

Equity cannot take jurisdiction merely because of any difficulty in proving the complainant's case.

United States v. Bitter Root Development Co. 200 U. S. 451, 472, 475, 50 L. ed. 550, 560, 562, 26 Sup. Ct. Rep. 318; Martin v. Wilson, 84 C. C. A. 13, 155 Fed. 99.

The relief granted by the decree was a simple money judgment for which there was an adequate remedy at law, and the decree cannot therefore be sustained.

Parkersburg v. Brown, 106 U. S. 487, 500, 27 L. ed. 238, 243, 1 Sup. Ct. Rep. 442.

The contract in suit, being a contract for contingent compensation for services in procuring legislation, or other action by public bodies or officials, is against public policy and void, and therefore not enforceable either in law or in equity.

Hazelton v. Sheckells, 202 U. S. 71, 50 L. ed. 939, 26 Sup. Ct. Rep. 567, 6 Ann. Cas. 217; Clippinger v. Hepbaugh, 5 Watts & S. 321, 40 Am. Dec. 519; Providence Tool Co. v. Norris, 2 Wall. 45, 54–56, 17 L. ed. 868, 870, 871; Wood v. McCann, 6 Dana, 366; Weed v. Black, 2 MacArth. 274, 29 Am. Rep. 618; Trist v. Child (Burke v. Child) 21 Wall. 441, 452, 22 L. ed. 623, 625; Sussman v. Porter, 137 Fed. 164.

Mr. Frederic D. McKenney argued the cause, and, with Mr. Edward S. Paine, filed a brief for appellee:

The arrangement between the parties created a partnership, and accordingly complainant was entitled to an accounting in equity against defendant.

2 Lindley, Partn. 492; Mathewson v. Clarke, 6 How. 122, 12 L. ed. 370.

The contract created an equitable lien in favor of complainant below, which he was entitled to enforce in equity.

Wylie v. Coxe, 15 How. 415, 14 L. ed. 753; Stanton v. Embrey, 93 U. S. 548, 23 L. ed. 983; Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216; Peugh v. Porter, 112 U. S. 737, 28 L. ed. 859, 5 Sup. Ct. Rep. 361; Spofford v. Kirk, 97 U. S. 484, 24 L. ed. 1032; Milliken v. Barrow, 65 Fed. 888.

Complainant was entitled to specific performance of the contract in equity.

Westinghouse Air Brake Co. v. Chicago Brake & Mfg. Co. 85 Fed. 786.

The complainant was to be a joint owner with defendant in the franchise, and accordingly had a right to urge that it be granted.

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Marshall v. Baltimore & O. R. Co. 16 How. 314, 14 L. ed. 953.

The contract provided for necessary and proper professional services to be rendered by complainant, as a civil engineer, and accordingly was not a "lobbying" contract.

Trist v. Child (Burke v. Child) 21 Wall. 441, 450, 22 L. ed. 623, 624; Stanton v. Embrey, 93 U. S. 548, 557, 23 L. ed. 983, 984; Taylor v. Bemiss, 110 U. S. 42, 28 L. ed. 64, 3 Sup. Ct. Rep. 441; Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216; Salinas v. Stillman, 14 C. C. A. 50, 30 U. S. App. 40, 66 Fed. 677; Lyon v. Mitchell, 36 N. Y. 235, 93 Am. Dec. 502; McBratney v. Chandler, 22 Kan. 692, 31 Am. Rep. 213.

In the absence of language necessarily comprehending impropriety, the ordinary principle of contractual interpretation must apply; that is, words used will be given an innocent meaning unless an improper meaning is clearly intended.

Hobbs v. McLean, 117 U. S. 567, 576, 29 L. ed. 940, 943, 6 Sup. Ct. Rep. 870; Delaware, L. & W. R. Co. v. Kutter, 77 C. C. A. 315, 147 Fed. 51; Houlten v. Nichol, 93 Wis. 393, 33 L.R.A. 166, 57 Am. St. Rep. 928, 67 N. W. 715; Providence Tool Co. v. Norris, 2 Wall. 45, 17 L. ed. 868; Trist v. Child (Burke v. Child) 21 Wall. 441, 22 L. ed. 623; Marshall v. Baltimore O. R. Co. 16 How. 314, 14 L. ed. 953.

The general and indefinite language of the letters must be governed by the particular words used in both letters limiting the services to "plans, projects, and all that pertains to the technical part."

Mutual L. Ins. Co. v. Hill, 193 U. S. 551, 48 L. ed. 788, 24 Sup. Ct. Rep. 538.

In a contract otherwise proper, the fact that compensation is to be contingent does not vitiate the contract.

Ball v. Halsell, 161 U. S. 72, 80, 40 L. ed. 622, 624, 16 Sup. Ct. Rep. 554; Taylor v. Bemiss, 110 U. S. 42, 28 L. ed. 64, 3 Sup. Ct. Rep. 441; Stanton v. Embrey, 93 U. S. 548, 23 L. ed. 983; Wright v. Tebbitts, 91 U. S. 252, 23 L. ed. 320.

The contract must have been either valid or invalid at the time it was made; and subsequent acts will not invalidate it once it is an executed, binding, valid, and unambiguous contractual obligation.

Barry v. Capen, 151 Mass. 99, 6 L.R.A. 808, 23 N. E. 735; Dunham v. Hastings Pav. Co. 57 App. Div. 426, 68 N. Y. Supp. 221; Houlton v. Nichol, 93 Wis. 402, 33 L.R.A. 166, 57 Am. St. Rep. 928, 67 N. W. 715.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity for an account under a contract between the parties, upon which the plaintiff (appellee) obtained a decree for $13,000 and interest. The contract was embodied in letters, as follows, according to the official translation: On October 30, 1898, Valdes wrote to Larrinaga, reciting that he had applied for "a water franchise from the river Plata, place called Salto, for the purpose of developing electric power," while Larrinaga was assistant secretary of "Fomento" (now department of the interior), and going on, "So that you may help me in getting it through, and in all the rest in connection with said franchise, such as plans, projects, and in everything concerning the technical part thereof, I need a person of my absolute confidence, and as you deserve it fully to me, and not believing that this is inconsistent with your present position of chief engineer of harbor works, I propose to interest you in the profits of said concession in the amount of a 10 per cent, provided that you accept the obligations hereinabove mentioned." The next day Larrinaga answered, acknowledging the letter "wherein you propose me a share of 10 per cent in the property of the concession for the [709] utilization of waters from the La Plata river at the point called el Salto, near Comerio, I, in exchange, to help you in the steps to be gone through and in everything in connection with said concession, such as plans, projects, and all what concerns to the technical part. I hereby accept the participation of 10 per cent of said concession in exchange of my personal or professional services without any obligation on my part" to contribute money to the exploitation.

It is objected in the first place that the case is not one for equitable relief. But whether the contract created a partnership under the definition of the Civil Code of Porto Rico, § 1567, as argued by the appellee, or not, it gave the appellee an equitable interest in the concession to the extent of securing his share of the profits, if any, and attached to these profits specifically if and when they came into being. Barnes v. Alexander, 232 U. S. 117, 121, ante, 530, 533, 34 Sup. Ct. Rep. 276. It established a fiduciary relation between Valdes, who had legal control, and the plaintiff. The bill alleges an abuse of the relation by a secret transaction from which it is alleged that the profits accrued. It is a proper case for equitable relief.

It is contended more energetically that the contract was against public policy. We shall not speculate nicely as to exactly what the law was in Porto Rico at the time when the contract was made, but shall give the plaintiff the benefit of the decisions

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upon which he relies, such as Hazelton v. Sheckells, 202 U. S. 71, 50 L. ed. 939, 26 Sup. Ct. Rep. 567, 6 Ann. Cas. 217. But we discover nothing in the language of the letters that necessarily imports, or even persuasively suggests, any improper intent or dangerous tendency. Larrinaga had ceased to be assistant secretary, and while in that position had refused to take part in the plan. His answer, which must control if there is any difference, as the parties went ahead on it (Minneapolis & St. L. R. Co. v. Columbus Rolling Mill, 119 U. S. 149, 30 L. ed. 376, 7 Sup. Ct. Rep. 168), binds him to help in the steps to be [710] gone through, and in the technical part. If his help in the steps to be gone through was not to be, like the rest of his work, in the technical part alone, still there is nothing to indicate that it was of a kind that could not be stipulated for. In view of the subject-matter, a grant, it would seem, to a riparian owner, of the right to use water power for public service, the things done, such as joining in an application to the military governor for a franchise on the footing of a joint interest, or helping to present it to the Secretary of War when it came up to him, or preparing plans and specifications to be presented to the executive council of Porto Rico when the first franchise granted by the Secretary of War had been lost by not complying with its terms, have no sinister smack. We see nothing to control the decision of the district judge that the contract was not against the policy of the law.

As we have intimated, the executive council of Porto Rico was applied to after the loss of the first franchise, and it granted a new one on December 17, 1900; but after some extensions of time it declared the grant forfeited in July, 1902. Valdes and the plaintiff, however, did not admit the forfeiture, and Valdes procured the formation of a Maine corporation to take over his rights. On January 14, 1905, he made a preliminary contract for the sale of the franchise alleged to be forfeited, and lands, easements, and options for use in connection with the same, reciting that he had petitioned for a new concession, or confirmation of the franchise. For this he was to receive $27,000, par value, of the mortgage bonds of the new company, and $102,778, par value, of its stock, to be put in escrow until the company got a good title to the water rights and the franchise applied for. On June 1, 1905, in pursuance of the contract, a conveyance was made of the easements and lands that Valdes owned on the La Plata and his right to construct works there on the terms above [711] mentioned, with a slight change of the figures, to $28,000 and $103,000 respectively. The franchise was granted on January 4, 1906, the grant expressly providing that it should not be deemed a recognition of any right of Valdes to any previous grant.

On these facts it is argued that the concession in which Larrinaga was interested was not sold by Valdes, and was not the source of any profit. That Valdes purported to sell it by his conveyance, as he agreed to sell it by the contract which the conveyance referred to and executed, or else that his rights under it passed *sub silentio* with the land, we think admits of no doubt. And while it may be true that the sale would not be likely to have taken place without a confirmation or re-grant of the franchise, still, as between these parties, it seems fairly probable that there was a continuous pursuit of the end; that, while the franchise gave the value to the land, the land gave a *locus standi* to the franchise; that, notwithstanding the disclaimer of the executive council, the position of Valdes as riparian owner and previous grantee had their effect on the final grant; and that, at all events, when the contract was made on January 14, 1905, Larrinaga became entitled to receive his 10 per cent when that contract should be carried out.

The last objection to the decree is, that the court did not deduct from the sum paid the value of the other property which entered into the consideration. We do not think it clear that Larrinaga did not stipulate for 10 per cent of the land as well as of the franchise. The Spanish is not before us, and the words "10 per cent in the property of the concession" well might mean that. At all events no error of magnitude is made out, and without mentioning every detail it is enough to add that no sufficient reason is shown why the decree should not be affirmed.

Decree affirmed.

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[712] DETROIT STEEL COOPERAGE COMPANY, Petitioner,

v.

SISTERSVILLE BREWING COMPANY, Gale Justus, R. H. Skaggs, F. Hogenmiller, et al.

(See S. C. Reporter's ed. 712-718.)

Mortgage — lien — priority — after-acquired property — conditional sale.

The lien of a mortgage executed by a brewing company upon its land, brewery,

NOTE.—On the right of seller of chattel retaining title or lien as against purchaser of realty to which it is affixed by owner—see note to Lawton Pressed Brick & Tile

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and all the buildings, machinery, and appliances thereon, erected or to be erected, does not extend to tanks, fixtures, and fittings installed under a conditional contract of sale, which, because unrecorded, was, under W. Va. Code 1906, § 3101, void as to creditors and purchasers without notice, where such tanks, although bricked in, and essential to the working of the brewery, can be removed with but trifling damage, which the conditional vendor offers to make good.

[For other cases, see Mortgage, I. d, 2; III., in Digest Sup. Ct. Rep. 1908.]

[No. 368.]

Argued May 8, 1914. Decided May 25, 1914.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of West Virginia, dismissing a bill to enjoin the sale of certain property in proceedings to foreclose a mortgage. Reversed.

See same case below, 115 C. C. A. 349, 195 Fed. 447; on rehearing, 115 C. C. A. 669, 195 Fed. 1023.

The facts are stated in the opinion.

Messrs. Charles N. Kimball and George M. Hoffheimer argued the cause, and, with Messrs. Orla B. Taylor and Walter S. Sugden, filed a brief for petitioner:

What annexation of chattels makes them part of the realty is a question of local law.

New York L. Ins. Co. v. Allison, 46 C. C. A. 229, 107 Fed. 179; Re Sunflower State Ref. Co. 115 C. C. A. 132, 195 Fed. 180.

The rights of the vendor of property under a reservation of title are to be determined by the local law.

Bryant v. Swofford Bros. Dry Goods Co. 214 U. S. 279, 53 L. ed. 997, 29 Sup. Ct. Rep. 614; Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; Harkness v. Russell, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. Rep. 51; Hervey v. Rhode Island Locomotive Works, 93 U. S. 664, 23 L. ed. 1003.

Rights under and the validity of a mortgage on either real or personal property are questions of local law.

Abraham v. Casey, 179 U. S. 210, 45 L. ed. 156, 21 Sup. Ct. Rep. 88; Dodge v. Tulleys, 144 U. S. 451, 36 L. ed. 501, 12 Sup. Ct. Rep. 728; Etheridge v. Sperry, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 563; Holt v. Crucible Steel Co. 224 U. S. 264, 56 L. ed. 757, 32 Sup. Ct. Rep. 414.

The effect of a mortgage on after-acquired property is a question of local law.

Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Dooley v. Pease, 180 U. S. 126, 45 L. ed. 457, 21 Sup. Ct. Rep. 329.

If it be true that Patton v. Moore, 16 W. Va. 428, 37 Am. Rep. 789, is at variance with Hurxthal v. Hurxthal, 45 W. Va. 584, 32 S. E. 237, and other later decisions, clearly Patton v. Moore, must be taken to have been superseded. And if Lazear v. Ohio Valley Steel Foundry Co. 65 W. Va. 105, 63 S. E. 772, conflicts with the previous decisions of the same court, it is also true that the Lazear Case was decided after this contract was made and the petitioner's right of action had accrued, and cannot affect the rights of the petitioner, who was entitled to rely on the law as expressed in the Hurxthal Case and other precedent decisions.

Kuhn v. Fairmont Coal Co. 215 U. S. 349, 357, 360, 54 L. ed. 228, 233, 234, 30 Sup. Ct. Rep. 140; Burgess v. Seligman, 107 U. S. 20, 33, 27 L. ed. 359, 365, 2 Sup. Ct Rep. 10; Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, 544, 48 L. ed. 778, 785, 24 Sup. Ct. Rep. 576; Stanley County v. Coler, 190 U. S. 437, 444, 445, 47 L. ed. 1126, 1131, 1132, 23 Sup. Ct. Rep. 811; Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174.

The tanks were placed in the brewery under a valid reservation of title, which was superior to the mortgage, though the latter was prior in point of time. The mortgage could attach to the tanks only subject to such conditions as accompanied them into the possession of the brewing company.

Reynolds v. Ashby, 1 B. R. C. 678, note; Hurxthal v. Hurxthal, 45 W. Va. 584, 32 S. E. 237; Binkley v. Forkner, 117 Ind. 176, 3 L.R.A. 33, 19 N. E. 753; Campbell v. Roddy, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279; Tifft v. Horton, 53 N. Y. 377, 13 Am. Rep. 537; Eaves v. Estes, 10 Kan. 314, 15 Am. Rep. 345; First Nat. Bank v. Hyer, 46 W. Va. 13, 32 S. E. 1000; Webster Lumber Co. v. Keystone Lumber & Min. Co. 51 W. Va. 545, 66 L.R.A. 33, 42 S. E. 632; Gartland v. Hickman, 56 W. Va. 75, 67 L.R.A. 694, 49 S. E. 14; Edwards & B. Lumber Co. v. Rank, 57 Neb. 323, 73 Am. St. Rep. 514, 77 N. W. 765; United States v. New Orleans & O. R. Co. (New Orleans & O. R. Co. v. Mellen) 12 Wall, 362, 20 L. ed. 434; Fosdick v. Schall, 99 U. S. 235.

Co. v. Ross-Kellar Triple Pressure Brick Mach. Co. 49 L.R.A.(N.S.) 396.

On the rights of seller of chattel retaining title thereto or a lien thereon as against existing mortgagees of the realty to which it is affixed by the owner—see note to Trippett v. Barham, 37 L.R.A.(N.S.) 119.

On the right of seller of fixtures retaining title or lien as against purchasers or encumbrancers of realty—see note to Reynolds v. Ashby, 1 B. R. C. 664.

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25 L. ed. 339; Fosdick v. Southwestern Car Co. 99 U. S. 256, 25 L. ed. 344; Myer v. Western Car Co. 102 U. S. 1, 26 L. ed. 59; Bear Lake & River Waterworks & Irrig. Co. v. Garland, 164 U. S. 1, 41 L. ed. 327, 17 Sup. Ct. Rep. 7; York Mfg. Co. v. Cassell, 201 U. S. 344, 351, 352, 50 L. ed. 782, 784, 785, 26 Sup. Ct. Rep. 481; New Chester Water Co. v. Holly Mfg. Co. 3 C. C. A. 399, 3 U. S. App. 264, 53 Fed. 19, 48 Fed. 879; Wickes Bros. v. Island Park Asso. 229 Pa. 400, 78 Atl. 934; Re Sunflower State Ref. Co. 115 C. C. A. 132, 195 Fed. 180.

The foregoing authorities, it is true, relate to the equities between real estate mortgagees and chattel mortgagees; but the same principles apply to real estate mortgagees and vendors of personal property annexed to the realty, where the vendor reserves title until the purchase money is paid.

First Nat. Bank v. Hyer, 46 W. Va. 13, 32 S. E. 1000; Wickes Bros. v. Island Park Asso. 229 Pa. 400, 78 Atl. 934; Cox v. New Bern Lighting & Fuel Co. 151 N. C. 62, 134 Am. St. Rep. 966, 65 S. E. 648, 18 Ann. Cas. 936; Davis v. Bliss, 187 N. Y. 77, 10 L.R.A. (N.S.) 458, 79 N. E. 851; Bernheimer v. Adams, 70 App. Div. 114, 75 N. Y. Supp. 93, affirmed in 175 N. Y. 472, 67 N. E. 1080; Duffus v. Howard Furnace Co. 8 App. Div. 567, 40 N. Y. Supp. 925; Leibowitz v. Joseph B. Thomson Real Estate Co. 158 App. Div. 592, 143 N. Y. Supp. 802; General Electric Co. v. Transit Equipment Co. 57 N. J. Eq. 460, 42 Atl. 101; Northwestern Mut. L. Ins. Co. v. George, 77 Minn. 319, 79 N. W. 1028, 1064; Fred W. Wolf Co. v. Hermann Sav. Bank, 168 Mo. App. 549, 153 S. W. 1094; Blanchard v. Eureka Planing Mill Co. 58 Or. 37, 37 L.R.A. (N.S.) 133, 113 Pac. 55; Baldwin v. Young, 47 La. Ann. 1466, 17 So. 883; Harris v. Hackley, 127 Mich. 46, 86 N. W. 389; Page v. Edwards, 64 Vt. 124, 23 Atl. 917.

Opposite to this doctrine is the so-called Massachusetts rule. It is held that the real estate mortgagee is entitled to the benefit of all accessions to the realty, and that he cannot be deprived of this right by any act of, or agreement between, a conditional vendor and vendee, or chattel mortgagor and mortgagee, to which he was not a party and has not given his assent. This rule, prevalent in Massachusetts, has been adopted in some other states.

Hunt v. Bay State Iron Co. 97 Mass. 279; Southbridge Sav. Bank v. Exeter Mach. Works, 127 Mass. 542; Hopewell Mills v. Taunton Sav. Bank, 150 Mass. 519, 6 L.R.A. 249, 15 Am. St. Rep. 235, 23 N. E. 327; Fuller-Warren Co. v. Harter, 110 Wis. 80, 53 L.R.A. 603, 84 Am. St. Rep. 867, 85 N. W. 698; Meagher v. Hayes, 152 Mass. 228, 23 Am. St. Rep. 819, 25 N. E. 105.

There is another and distinct class of cases in this court, which have been decided in favor of the prior mortgagee, and which appear to have been misunderstood by some of the inferior Federal courts. In all of these cases there was involved the property of a quasi-public corporation, the preservation of the integrity of which, upon special grounds of public interest and necessity, has always been aided.

Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Wood v. Guarantee Trust & S. D. Co. 128 U. S. 416, 32 L. ed. 472, 9 Sup. Ct. Rep. 131; Gregg v. Metropolitan Trust Co. 197 U. S. 183, 49 L. ed. 717, 25 Sup. Ct. Rep. 415; Porter v. Pittsburg-Bessemer Steel Co. 122 U. S. 267, 30 L. ed. 1210, 7 Sup. Ct. Rep. 1206.

In every case in this court, where the reservation of title or lien of the claimant accompanied into the possession of the mortgagor the identical, separate thing against which the reservation of title or lien was sought to be enforced, whether that thing was personalty (United States v. New Orleans & O. R. Co. [New Orleans & O. R. Co. v. Mellen] 12 Wall. 362, 20 L. ed. 434; Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339; Fosdick v. Southwestern Car Co. 99 U. S. 256, 25 L. ed. 344; Myer v. Western Car Co. 102 U. S. 1, 26 L. ed. 59), or whether it was real estate (Bear Lake & River Waterworks & Irrig. Co. v. Garland, 164 U. S. 1, 41 L. ed. 327, 17 Sup. Ct. Rep. 7), the reservation of title or lien has been sustained, as against the prior mortgagee.

But where the thing to which the title or lien is sought to be retained becomes, by the very fact and method of annexation, physically merged in the realty, as an integral part thereof, so that, when the day for the enforcement of the reservation arrives, the chattel brought upon the premises no longer exists, and the reservation must be upheld if at all, by fixing it to a new thing created by the annexation in contemplation when the mortgagor acquired the chattel, and the enforcement of the reservation must be destructive, not only of the integrity of the realty, but of the changed form which the chattel has assumed by its merger with the realty, a very different case arises.

Binkley v. Forkner, 117 Ind. 176, 3 L.R.A. 33, 19 N. E. 753; Campbell v. Roddy, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279; Fred W. Wolf Co. v. Hermann Sav. Bank, 168 Mo. App. 552, 153 S. W. 1094; Porter v. Pittsburg Bessemer Steel Co. 122 U. S. 267, 30 L. ed. 1210, 7 Sup. Ct. Rep. 1206; Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 296, 33 L. ed. 905, 10 Sup. Ct. Rep. 546; Dunham v. Cincinnati, P. & C. R. Co. 1 Wall. 254, 17 L. ed. 584; General

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Electric Co. v. Transit Equipment Co. 57 N. J. Eq. 475, 42 Atl. 101; Galveston, H. & H. R. Co. v. Cowdrey, 11 Wall. 459, 20 L. ed. 199; Dillon v. Barnard, 21 Wall. 430, 22 L. ed. 673; Thompson v. White Water Valley R. Co. 132 U. S. 68, 33 L. ed. 256, 10 Sup. Ct. Rep. 29.

The tanks in question were "loose property," within the meaning of the decisions of this court.

United States v. New Orleans & O. R. Co. (New Orleans & O. R. Co. v. Mellen) 12 Wall. 362, 20 L. ed. 434; Porter v. Pittsburg Bessemer Steel Co. 122 U. S. 267, 30 L. ed. 1210, 7 Sup. Ct. Rep. 1206; Bear Lake & River Waterworks & Irrig. Co. v. Garland, 164 U. S. 1, 41 L. ed. 327, 17 Sup. Ct. Rep. 7; Binkley v. Forkner, 117 Ind. 176, 3 L.R.A. 33, 19 N. E. 753; Campbell v. Roddy, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279; New Chester Water Co. v. Holly Mfg. Co. 3 C. C. A. 399, 3 U. S. App. 264, 53 Fed. 19, affirming 48 Fed. 879; Re Sunflower State Ref. Co. 115 C. C. A. 132, 195 Fed. 180; J. L. Mott Iron Works v. Middle States Loan Bldg. & Constr. Co. 17 App. D. C. 584; Wickes Bros. v. Island Park Asso. 229 Pa. 400, 78 Atl. 934; General Electric Co. v. Transit Equipment Co. 57 N. J. Eq. 460, 42 Atl. 101; Northwestern Mut. L. Ins. Co. v. George, 77 Minn. 319, 79 N. W. 1028, 1064; Fred W. Wolf Co. v. Hermann Sav. Bank, 168 Mo. App. 549, 153 S. W. 1094; Cox v. New Bern Lighting & Fuel Co. 151 N. C. 62, 134 Am. St. Rep. 966, 65 S. E. 648, 18 Ann. Cas. 936.

The view that the petitioner is precluded from asserting its title to the tanks, because the tanks are necessary to the operation of the brewery, is without merit, either in law or fact.

United States v. New Orleans & O. R. Co. (New Orleans & O. R. Co. v. Mellen) 12 Wall. 362, 20 L. ed. 434; Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339; Fosdick v. Southwestern Car Co. 99 U. S. 256, 25 L. ed. 344; Myer v. Western Car Co. 102 U. S. 1, 26 L. ed. 59; Bear Lake & River Waterworks & Irrig. Co. v. Garland, 164 U. S. 1, 41 L. ed. 327, 17 Sup. Ct. Rep. 7; Harris v. Hackley, 127 Mich. 46, 86 N. W. 389; Wolford v. Baxter, 33 Minn. 12, 53 Am. Rep. 1, 21 N. W. 744; Hurxthal v. Hurzthal, 45 W. Va. 584, 32 S. E. 237; Campbell v. Roddy, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279; Fred W. Wolf Co. v. Hermann Sav. Bank, 168 Mo. App. 553, 153 S. W. 1094; Northwestern Mut. L. Ins. Co. v. George, 77 Minn. 319, 79 N. W. 1028, 1064; Cox v. New Bern Light & Fuel Co. 151 N. C. 62, 134 Am. St. Rep. 966, 65 S. E. 648, 18 Ann. Cas. 936.

Nor does the Massachusetts rule establish the integrity theory, countenanced by the circuit court of appeals.

Hunt v. Bay State Iron Co. 97 Mass. 283; Hopewell Mills v. Taunton Sav. Bank, 150 Mass. 519, 6 L.R.A. 249, 15 Am. St. Rep. 235, 23 N. E. 327; Lorain Steel Co. v. Norfolk & B. Street R. Co. 187 Mass. 500, 73 N. E. 646; Southbridge Sav. Bank v. Exeter Mach. Works, 127 Mass. 542.

The after-acquired property clause in the mortgage gave it no additional efficacy, as against the petitioner's reservation of title.

United States v. New Orleans & O. R. Co. (New Orleans & O. R. Co. v. Mellen) 12 Wall. 362, 20 L. ed. 434; Haris v. Youngstown Bridge Co. 33 C. C. A. 69, 62 U. S. App. 112, 90 Fed. 328; Bear Lake & River Waterworks & Irrig. Co. v. Garland, 164 U. S. 1, 41 L. ed. 327, 17 Sup. Ct. Rep. 7; Fosdick v. Schall, 99 U. S. 239, 25 L. ed. 341; Fosdick v. Southwestern Car Co. 99 U. S. 256, 25 L. ed. 344; Myer v. Western Car Co. 102 U. S. 1, 26 L. ed. 59; Cox v. New Bern Lighting & Fuel Co. 151 N. C. 62, 134 Am. St. Rep. 966, 65 S. E. 648, 18 Ann. Cas. 936; Williamson v. New Jersey Southern R. Co. 28 N. J. Eq. 277, 29 N. J. Eq. 311; Wickes Bros. v. Island Park Asso. 229 Pa. 400, 78 Atl. 934; J. L. Mott Iron Works v. Middle States Loan, Bldg. & Constr. Co. 17 App. D. C. 584; Wood v. Holly Mfg. Co. 100 Ala. 326, 46 Am. St. Rep. 56, 13 So. 948; Defiance Mach. Works v. Trisler, 21 Mo. App. 69; Davis v. Bliss, 187 N. Y. 77, 10 L.R.A.(N.S.) 458, 79 N. E. 851; Botsford v. New Haven, M. & W. R. Co. 41 Conn. 454; Central Trust Co. v. Marietta & N. G. R. Co. 1 C. C. A. 130, 2 U. S. App. 120, 48 Fed. 865; Holly Mfg. Co. v. New Chester Water Co. 48 Fed. 879, 3 C. C. A. 399, 3 U. S. App. 264, 53 Fed. 19; Harris v. Youngstown Bridge Co. 33 C. C. A. 69, 62 U. S. App. 112, 90 Fed. 328; Evans v. Kister, 35 C. C. A. 28, 92 Fed. 836; Farmers' Loan & T. Co. v. Denver, L. & G. R. Co. 60 C. C. A. 588, 126 Fed. 49; Tilford v. Atlantic Match Co. 134 Fed. 927.

Mr. Thomas P. Jacobs argued the cause, and, with Mr. Arlen G. Swiger, filed a brief for respondents:

The cooperage or tanks cannot be removed from the brewery under any circumstances, regardless of the question whether the removal would injure the structure or not; and whether they can be removed or not without injury to the building is not determinative of the issues in this case.

Lazear v. Ohio Valley Steel Foundry Co. 65 W. Va. 105, 63 S. E. 772; Patton v. Moore, 16 W. Va. 428, 37 Am. Rep. 789; McFadden v. Crawford, 36 W. Va. 671, 32 Am. St. Rep. 894, 15 S. E. 408; Green v. Phillips, 26 Gratt. 752, 21 Am. Rep. 323:

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Shelton v. Ficklin, 32 Gratt. 727; Bronson, Fixtures, p. 91, § 19; Union Trust Co. v. Southern Sawmills & Lumber Co. 92 C. C. A. 101, 166 Fed. 193; Tippett v. Barham, 37 L.R.A.(N.S.) 119, 103 C. C. A. 430, 180 Fed. 76; New York Secur. & T. Co. v. Capital R. Co. 77 Fed. 529; Hunt v. Bay State Iron Co. 97 Mass. 279; Porter v. Pittsburg Bessemer Steel Co. 122 U. S. 267, 283, 30 L. ed. 1210, 1211, 7 Sup. Ct. Rep. 1206; Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 296–302, 33 L. ed. 905–908, 10 Sup. Ct. Rep. 546; United States v. New Orleans & O. R. Co. (New Orleans & O. R. Co. v. Mellen) 12 Wall. 362, 20 L. ed. 434; Smith v. Altick, 24 Ohio St. 369; Wolford v. Baxter, 33 Minn. 12, 53 Am. Rep. 1, 21 N. W. 744; Equitable Trust Co. v. Christ, 47 Fed. 756; Ege v. Kille, 84 Pa. 333, 10 Mor. Min. Rep. 212; Triplett v. Mays, 13 Ky. L. Rep. 874; Farrar v. Stackpole, 6 Me. 154, 19 Am. Dec. 201; Fratt v. Whittier, 58 Cal. 126, 41 Am. Rep. 255.

Having sold and delivered the chip tanks or casks to the Sistersville Brewing Company to be attached to the real estate, on which said real estate the trust mortgage given to secure the bonds was a first lien, and having permitted the said tanks or casks to enter into and become a material part of the plant of the Sistersville Brewing Company, the Detroit Steel Cooperage Company is now estopped from asserting any right or priority in the property or the proceeds derived from the sale thereof, to the injury of the security of the bondholders, but must be regarded as having waived its rights, if any, as against defendants' prior lien.

Phœnix Iron Works Co. v. New York Secur. & T. Co. 28 C. C. A. 76, 54 U. S. App. 408, 83 Fed. 757; Evans v. Kister, 35 C. C. A. 28, 92 Fed. 836; 35 Cyc. 673.

The rights of the mortgagee cannot be affected by any agreement, to which he is not a party, made between the seller and the mortgagor in possession. The rights of the mortgagee are superior to those of the seller of the fixtures attempting to retain title.

Tippett v. Barham, 37 L.R.A.(N.S.) 130, 103 C. C. A. 430, 180 Fed. 76; Lorain Steel Co. v. Norfolk & B. Street R. Co. 187 Mass. 500, 73 N. E. 646; Watertown Steam Engine Co. v. Davis, 5 Houst. (Del.) 192; Richardson v. Copeland, 6 Gray, 536, 66 Am. Dec. 424; Clary v. Owen, 15 Gray, 522; United States v. New Orleans & O. R. Co. (New Orleans & O. R. Co. v. Mellen) 12 Wall. 362, 20 L. ed. 434; Porter v. Pittsburg Bessemer Steel Co. 122 U. S. 267, 30 L. ed. 1210, 7 Sup. Ct. Rep. 1206; Phœnix Iron Works Co. v. New York Secur. & T. Co. 28 C. C. A. 76, 54 U. S. App. 408, 83 Fed. 757; Hunt v. Bay State Iron Co. 97 Mass. 279; Meagher v. Hayes, 152 Mass. 228, 23 Am. St. Rep. 819, 25 N. E. 105; Union Trust Co. v. Southern Sawmills & Lumber Co. 92 C. C. A. 101, 166 Fed. 193; Re Williamsburg Knitting Mill, 190 Fed. 871.

The failure of the petitioner to have the Sistersville Brewing Company pay it the $2,000 in cash when the tanks were shipped, and the $740 when the tanks were erected and tested, and give a note for the residue, shows laches on its part.

Chapman v. Lathrop, 6 Cow. 110, 16 Am. Dec. 433; Furniss v. Hone, 8 Wend. 248; Lupin v. Marie, 6 Wend. 77, 21 Am. Dec. 256; Mathews v. Smith, 8 Houst. (Del.) 22, 31 Atl. 879; Peabody v. Maguire, 79 Me. 572, 12 Atl. 631.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity for an injunction against the sale of certain tanks, fixtures, and fittings supplied by the petitioner to the defendant brewing company, and for a return of the same. The bill was dismissed by the circuit court, and the decree was affirmed by the circuit court of [716] appeals. 115 C. C. A. 349, 669, 195 Fed. 447, 1023, where Pritchard, J., dissented from the refusal of a rehearing.

The contract under which the tanks were furnished provided that the title should remain in the petitioner until they were fully paid for, and that the petitioner might remove them on default. It was made on August 8, 1908, and duly recorded on December 7 of the same year. Before those dates the brewing company had made a mortgage of its land, brewery, "and all the buildings, machinery, and appliances thereon erected or to be erected," and the mortgage had been recorded. There were subsequent mortgages, judgment liens, etc., but they do not need special mention. A bill was brought to foreclose the first mortgage, to which the petitioner was not made a party. A receiver was appointed and a sale ordered and advertised. The petitioner then brought this bill against the various adverse claimants, joining the receiver by leave of court. The statute of West Virginia makes a reservation of title such as the petitioner's "void as to creditors of, and purchasers without notice from, such buyer" unless a notice of the reservation is recorded as therein required. Code (1906) § 3101.

In Holt v. Henley, 232 U. S. 637, ante, 767, 34 Sup. Ct. Rep. 459, the court had to consider a similar question of priority in view of a Virginia statute like that of West Virginia upon which the petitioner relies, and, although in that case the con-

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ditional sale had not been recorded, it was held that the vendor was to be preferred. The main question now before us is whether this case is to be decided differently on the ground that the tanks were "an essential, indispensable part of the completed structure contemplated by the mortgage,"—a question left open in the former decision. 232 U. S. 641. The tanks were essential to the working of the brewery, and after they were installed the opening into the recess in which they stood was bricked up. It may [717] be assumed that they became part of the realty as between mortgagor and mortgagee, but that is immaterial in equity, however it may have been at the old common law. The question is not whether they were attached to the soil, but we repeat, whether the fact that they were necessary to the working of the brewery gives a preference to the mortgagee. We see no sufficient ground for that result. This class of need to use property belonging to another is not yet recognized by the law as a sufficient ground for authority to appropriate it. If the owner of the tanks had lent them, it would be an extraordinary proposition that it lost title when they were bricked in. That it contemplated the ultimate passing of title upon an event that did not happen makes its case no worse except so far as by statute recording is made necessary to save its rights. The common law knows no objection to what commonly is called a conditional sale. William W. Bierce v. Hutchins, 205 U. S. 340, 347, 348, 51 L. ed. 828, 833, 834, 27 Sup. Ct. Rep. 524.

The cases to which the possible exception left open in Holt v. Henley applies are principally those in which the property claimed has become so intimately connected with or embodied in that which is subject to the mortgage that to reclaim it would more or less physically disintegrate the property held by the mortgagee; *e. g.*, Porter v. Pittsburg Bessemer Steel Co. 122 U. S. 267, 30 L. ed. 1210, 7 Sup. Ct. Rep. 1206. A man sometimes may lose title without his consent, and it has been held that he loses it even to an innocent converter who has added labor of a value far in excess of that of the original chattel. Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653. When the obvious destination of an article is to be incorporated into a structure in such a way that to remove it would destroy the other work, like bricks or beams in a building, there is still stronger ground for not giving to title an absolute right of way. But unless we give a mystic importance to bolts and screws, the mere knowledge that the chattel will be attached to the freehold is of no importance, [718] except, perhaps, as against innocent purchasers for value before the sale was recorded, which the mortgagees were not. Holt v. Henley, 232 U. S. 637, 640, 641, ante, 767, 772, 34 Sup. Ct. Rep. 459. The damage that will be done by removal in this case is trifling and the petitioner offers to make it good.

The West Virginia decisions that had been rendered before the petitioner's contract, was made, like those of Virginia, favored the petitioner's right, Hurxthal v. Hurxthal, 45 W. Va. 584, 32 S. E. 237. We do not understand Lazear v. Ohio Valley Steel Foundry Co. 65 W. Va. 105, 63 S. E. 772, to lay down a different doctrine. We take it rather as turning on the special effect of a sale to receivers whose certificates it was thought were backed by a promise of the court that they should constitute a first lien. Therefore, we find it unnecessary to consider whether otherwise the doctrine of Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10, coupled with our own opinion that the rule applied in the earlier decision is correct, would require us to follow that rather than the later case.

Decree reversed.

Mr. Justice Lurton dissents.

OCEANIC STEAM NAVIGATION COMPANY, Limited, as Owner of the Steamship Titanic,

v.

WILLIAM J. MELLOR and Harry Anderson.

(See S. C. Reporter's ed. 718–734.)

Shipping — limitation of liability — foreign vessel.

1. The owner of a foreign vessel sunk in a collision with an iceberg on the high seas when sued in the United States may maintain in the Federal courts the proceeding for a limitation of liability authorized by U. S. Rev. Stat. §§ 4283–4285, U. S. Comp. Stat. 1901, pp. 2943, 2944, and admiralty rules 54 and 56, although there may either be nothing before the court to show what, if any, is the law of the foreign country to which the vessel belongs touching the owner's liability, or it may appear that such law makes provision for the limitation of the vessel owner's liability upon terms and conditions differing from those prescribed by the Federal laws.

[For other cases, see Shipping, V. c, 2, in Digest Sup. Ct. 1908.]

NOTE.—On limitation of shipowner's liability—see note to Lawton v. Comer, 7 L.R.A. 55.

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Conflict of laws — limitation of shipowner's liability — foreign vessel.

2. The law of the United States, and not that of the foreign country to which the ship belongs, will be enforced by the Federal courts in a proceeding by the owner of a foreign vessel sunk in a collision with an iceberg on the high seas for the limitation of liability authorized by the Federal laws and admiralty rules.

[For other cases, see Conflict of Laws, 110-114, in Digest Sup. Ct. 1908.]

[No. 798.]

Argued January 13 and 14, 1914. Decided May 25, 1914.

ON a Certificate from the United States Circuit Court of Appeals for the Second Circuit presenting two questions respecting the right of the owner of a foreign vessel to maintain proceedings for limitation of liability in the Federal courts, and the further question as to what law will be enforced in such proceedings. First two questions answered in the affirmative. Third question answered by holding that the law of the United States governs.

The facts are stated in the opinion.

Messrs. **Charles C. Burlingham, Norman B. Beecher, and J. Parker Kirlin** argued the cause and filed a brief for the Oceanic Steam Navigation Company:

The limited liability act of the United States applies equally to American and to foreign shipowners. It establishes the maritime law of the United States to be universally applied in our courts as the expression by Congress of our conception of justice.

The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 24, 26 L. ed. 1001; La Bourgogne (Deslions v. La Compagnie Générale Transatlantique) 210 U. S. 95, 52 L. ed. 973, 28 Sup. Ct. Rep. 664.

The English cases which had previously construed the British limited liability act, and refused to extend its provisions to foreign shipowners, were strongly urged upon this court in the Scotland, in support of a narrow construction of our law. The conclusions reached in those cases and the arguments advanced in their support were completely rejected by this court. A consideration of those arguments may be of use in view of the arguments now once more advanced to induce this court to give a narrow construction to our own act.

The Carl Johan, cited in The Dundee, 1 Hagg. Adm. 113; The Girolamo, 3 Hagg. Adm. 187; Cope v. Doherty, 4 Kay & J. 367, 2 De G. & J. 614, 27 L. J. Ch. N. S. 600, 4 Jur. N. S. 699, 6 Week. Rep. 695; General Iron Screw Collier Co. v. Schurmanns, 1 Johns. & H. 180, 29 L. J. Ch. N. S. 877, 6 Jur. N. S. 883, 8 Week. Rep. 732.

The principle of the law of the flag is important only as carrying onto the high seas laws which, by their terms, would otherwise not be effective there.

The Hamilton (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133.

While it cannot be doubted that the law of the flag, namely, the law of Great Britain, will be enforced in our courts so far as relates to the creation of the right, in enforcing the obligation thus created, the law of the forum, namely, the law of the United States, determines the extent to which such obligation will be enforced in our courts.

Cuba R. Co. v. Crosby, 222 U. S. 473, 478, 56 L. ed. 274, 275, 38 L.R.A.(N.S.) 40, 32 Sup. Ct. Rep. 132.

This court has uniformly adhered to the broad and liberal rule of construction laid down in the Scotland.

Butler v. Boston & S. S. S. Co. 130 U. S. 527, 550, 32 L. ed. 1017, 1022, 9 Sup. Ct. Rep. 612; Providence & N. Y. S. S. Co. v. Hill Mfg. Co. 109 U. S. 578, 588, 27 L. ed. 1038, 1042, 3 Sup. Ct. Rep. 379.

The law of limited liability is a part of our maritime code, and is applied whether favorable or adverse to foreign ships.

The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 31, 26 L. ed. 1003; The H. F. Dimock, 52 Fed. 598; Re Morrison, 147 U. S. 14, 22, 37 L. ed. 60, 63, 13 Sup. Ct. Rep. 246; The City of Norwalk, 55 Fed. 98; Butler v. Boston & S. S. S. Co. 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612.

The decisions of this court uniformly applying the Harter act, irrespective of the nationality of the vessel involved, are controlling authorities in the construction of the limited liability act.

The Silvia, 171 U. S. 462, 465, 43 L. ed. 241, 243, 19 Sup. Ct. Rep. 7; The Chattahoochee, 173 U. S. 540, 550, 43 L. ed. 801, 806, 19 Sup. Ct. Rep. 491; The Jason, 225 U. S. 32, 56 L. ed. 969, 32 Sup. Ct. Rep. 560; Knott v. Botany Worsted Mills, 179 U. S. 69, 76, 45 L. ed. 90, 95, 21 Sup. Ct. Rep. 30.

The rule of limited liability as prescribed in the American limited liability act has been applied in every case which has come before the courts of the United States, irrespective of the nationality of the vessel or its owner.

Thomassen v. Whitwell, 9 Ben. 403, Fed. Cas. No. 13,929; The John Bramall, 10 Ben. 495, Fed. Cas. No. 7,334; Churchill v. The British America, 9 Ben. 516, Fed. Cas. No. 2,715; The State of Virginia, 60 Fed. 1018;

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Levinson v. Oceanic Steam Nav. Co. 17 Alb. L. J. 285, Fed. Cas. No. 8,292; The Thingvalla, 1 C. C. A. 87, 1 U. S. App. 829, 48 Fed. 764; The Strathdon, 89 Fed. 374; The Norge, 156 Fed. 845; La Bourgogne (Deslions v. La Compagnie Générale Transatlantique) 210 U. S. 95, 52 L. ed. 973, 28 Sup. Ct. Rep. 664.

The circumstance that the disaster out of which this proceeding arose involved but a single vessel of foreign nationality in no way affects the application of the American limited liability act.

The Wild Ranger, Lush. 553, 31 L. J. Prob. N. S. 206, 6 L. T. N. S. 164; La Bourgogne, supra; Chartered Mercantile Bank v. Netherlands India Steam Nav. Co. L. R. 10 Q. B. Div. 521, 52 L. J. Q. B. N. S. 220, 48 L. T. N. S. 546, 31 Week. Rep. 445, 5 Asp. Mar. L. Cas. 65, 47 J. P. 260.

Mr. Justice Bradley's *dictum* in the Scotland was addressed to the law by which the mutual rights of parties are to be determined in ascertaining their primary liabilities and administering justice between them.

La Bourgogne (Deslions v. La Compagnie Générale Transatlantique) 210 U. S. 95, 115, 52 L. ed. 973, 983, 28 Sup. Ct. Rep. 664; The Chattahoochee, 173 U. S. 540, 550, 43 L. ed. 801, 806, 19 Sup. Ct. Rep. 491; The Belgenland (The Belgenland v. Jensen) 114 U. S. 355, 368, 569, 29 L. ed. 152, 157, 5 Sup. Ct. Rep. 860.

The purpose of the act and of the rules in admiralty adopted to carry out its provisions was not merely to fix a limit upon the liability of the shipowner, but to provide for the determination of that liability in a single proceeding, the result of which would be binding upon all parties.

Providence & N. Y. S. S. Co. v. Hill Mfg. Co. 109 U. S. 578, 590, 27 L. ed. 1038, 1042, 3 Sup. Ct. Rep. 379; Butler v. Boston & S. S. S. Co. 130 U. S. 527, 552, 32 L. ed. 1017, 1022, 9 Sup. Ct. Rep. 612; The San Pedro (Metropolitan Red Wood Lumber Co. v. Doe) 223 U. S. 365, 371, 56 L. ed. 473, 474, 32 Sup. Ct. Rep. 275, Ann. Cas. 1912D, 1221.

Wherever any suggestion is made in Mr. Justice Bradley's opinion that, under certain circumstances, a foreign law might be applied, he is careful to hedge it about with such limitation as—"provided it were shown what that law was. If not shown, we would apply our own law to the case."

The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 29, 26 L. ed. 1003.

And again: "Each nation, however, may declare what it will accept, and, by its courts, enforce, as the law of the sea, when parties choose to resort to its forum for redress. And no persons subject to its jurisdiction, or seeking justice in its courts, can complain of the determination of their rights by that law, unless they can propound some other law by which they ought to be judged."

The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 31, 32, 26 L. ed. 1003, 1004.

If, as may be thought from the reference by the learned district judge to MacLachlan on Shipping as authority for his statement of British law, he intended to take judicial notice of that law, he must have overlooked the case of Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469, where this court said, at page 445: "The law of Great Britain since the Declaration of Independence is the law of a foreign country, and, like any other foreign law, is matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved."

The rule is as well established in courts of admiralty as in courts of common law or courts of equity.

Ibid.

The claimants ask this court to read an exception into our statute, and to refuse to apply it to foreign ships under certain circumstances. This is but to ask a reconsideration of the views expressed in the Scotland, where this court held that, as the terms of our act were not restricted to any nationality or domicil, it should not be restricted by construction. Such an attempt to read qualifying words into an act of Congress proved unsuccessful in the Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 500, 52 L. ed. 297, 309, 28 Sup. Ct. Rep. 141. See also Illinois C. R. Co. v. McKendree, 203 U. S. 514, 528–530, 51 L. ed. 298, 304, 305, 27 Sup. Ct. Rep. 153.

Neither the American nor the British limited liability act in any way inheres in the right, as was the case with the statutes considered in Slater v. Mexican Nat. R. Co. 194 U. S. 120, 48 L. ed. 900, 24 Sup. Ct. Rep. 581, and Davis v. Mills, 194 U. S. 451, 48 L. ed. 1067, 24 Sup. Ct. Rep. 692; Stoomvaart Maatschappy Nederland v. Peninsular & O. Steam Nav. Co. L. R. 7 App. Cas. 800.

Nor is there any interdependence between Lord Campbell's act and the British limited liability act.

Glaholm v. Barker, L. R. 1 Ch. 229, 35 L. J. Ch. N. S. 259, 12 Jur. N. S. 82, 13 L. T. N. S. 653, 14 Week. Rep. 296.

The act complained of is always to be diagnosed in the light of the law of the place where committed, and its character

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determined according to that law; but the particular kind of and the extent of the remedy to be applied necessarily depend on the notions of justice entertained by the forum by which it is to be administered. The rule is like that pertaining to contracts. The *lex loci* determines their validity and meaning, but, when found valid and the true interpretation ascertained, the law of the forum steps in and declares the time, mode, and extent of the remedy.

Dorr Cattle Co. v. Des Moines Nat. Bank, 127 Iowa, 162, 98 N. W. 918, 4 Ann. Cas. 519.

If, then, the limited liability act is to be regarded as a statute respecting the remedy, and of a similar nature to any other statute of limitation, it must necessarily govern as the *lex fori*.

Scudder v. Union Nat. Bank, 91 U. S. 406, 413, 23 L. ed. 245, 249.

Messrs. **Frederick M. Brown** and **George Whitefield Betts, Jr.**, argued the cause, and, with Messrs. Francis H. Kinnicutt, Kenneth Gardner, and John C. Prizer, filed a brief for William J. Mellor and Harry Anderson:

The rule that liability for a tort on land is governed by the *lex loci delicti* is universal.

Kaiser Ferdinand Nordbahn v. M. 57 Reichsgericht, 142; Wilson v. McNamee, 102 U. S. 572, 574, 26 L. ed. 234, 235: Herrick v. Minneapolis & St. L. R. Co. 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413; Huntington v. Attrill, 146 U. S. 657, 670, 36 L. ed. 1123, 1128, 13 Sup. Ct. Rep. 224; Powell v. Great Northern R. Co. 102 Minn. 448, 113 N. W. 1017.

The only instance, according to the weight of the American authorities, in which the *lex loci delicti* will not be permitted to govern substantive rights and liabilities to the same extent as if the courts of the *locus delicti* had been invoked, is that in which the enforcement of the *lex loci delicti* would be contrary to the public policy of the state of the forum.

Northern P. R. Co. v. Babcock, 154 U. S. 190, 198, 38 L. ed. 958, 960, 14 Sup. Ct. Rep. 978.

The Brantford City, 29 Fed. 395.

As regards the enforcement of the penal and criminal laws of a foreign country, the *curia fori* refuses, it is true, to give its co-operation, but it is not ordinarily called upon to apply a rule at variance with that of the *lex loci*.

Huntington v. Attrill, 146 U. S. 657, 681, 36 L. ed. 1123, 1132, 13 Sup. Ct. Rep. 224.

In maritime disasters upon the high seas, involving one foreign vessel or several vessels of the same foreign nationality, the law of the country to which the vessel or vessels belong governs the rights of all parties.

1 Calvo, Droit International, 4th ed. 552, bk. VI. § 3; Bluntschli, International Law, § 317; 1 Vattel, Law of Nations, chap. 19, § 216; 2 Rutherford, Institutes of Natural Law, chap. 9, §§ 8, 19; 1 Kent, Com. p. 26; Wheaton, International Law, 8th ed. § 106; 1 Wharton, International Law Dig. § 26; Whart. Confl. L. 3d ed. §§ 356, 473; Crapo v. Kelly, 16 Wall. 610, 624, 625, 21 L. ed. 430, 436, 437; Minor, Confl. L. § 195; Dicey, Confl. L. 2d ed. § 663; Patterson v. The Eudora, 190 U. S. 169, 176, 47 L. ed. 1002, 1006, 23 Sup. Ct. Rep. 821; The Hamilton (Old Dominiion S. S. Co. v. Gilmore) 207 U. S. 398, 405, 52 L. ed. 264, 270, 28 Sup. Ct. Rep. 133; The Scotia, 14 Wall. 170, 184, 20 L. ed. 822, 824; United States v. Palmer, 3 Wheat. 610, 631, 4 L. ed. 471, 477; United States v. Klintock, 5 Wheat. 144, 5 L. ed. 55; Wilson v. McNamee, 102 U. S. 572, 574, 26 L. ed. 234, 235; Re Ah Sing, 13 Fed. 289; Re Moncan, 8 Sawy. 350, 14 Fed. 48; Marshall v. Murgatroyd, L. R. 6 Q. B. 31, 40 L. J. Mag. Cas. N. S. 7, 23 L. T. N. S. 393, 19 Week. Rep. 72; La Bourgogne (Deslions v. La Compagnie Générale Transatlantique) 210 U. S. 95, 138, 52 L. ed. 973, 993, 28 Sup. Ct. Rep. 664, 71 C. C. A. 489, 139 Fed. 438; The E. B. Ward, Jr. 17 Fed. 459; McDonald v. Mallory, 77 N. Y. 546, 33 Am. Rep. 664; Lindstrom v. International Nav. Co. 117 Fed. 170, 60 C. C. A. 649, 123 Fed. 475; Southern P. Co. v. De Valle Da Costa, 111 C. C. A. 417, 190 Fed. 689, 100 C. C. A. 313, 176 Fed. 843; The Jane Grey, 95 Fed. 693; Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; Lloyd v. Guibert, L. R. 1 Q. B. 127, 5 Eng. Rul. Cas. 870; The Dio Adelphi (1879) 91 Journal du Palais (Court House Journal) for 1880 603, 609, 5 Desjardins, Dr. Comm. Marit, 118; The Amalia, 1 Moore, P. C. C. N. S. 482, Brown. & L. 151, 2 New Reports, 533, 32 L. J. Prob. N. S. 191, 8 Jur. N. S. 1111, 8 L. T. N. S. 805, 12 Week. Rep. 24.

The only exception to this statement which a laborious study of the judicial decisions and the work of text writers and commentarians of many countries has disclosed is a *dictum* by Vice Chancellor Wood, in delivering his judgment in Cope v. Doherty, 4 Kay & Johns, 367, a limitation proceeding, involving a collision in 1857 at sea between two American vessels.

Where, however, a collision occurs on the high seas between vessels of different nations whose laws are in conflict with each other, very divergent views have been expressed as to the proper solution. Only

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two theories, however, are well supported on principle and by authority, *viz.:*

(1) That the rights and liabilities (including limitation of liability) must be governed by the law of the flag of the vessel that was in fault in respect of the collision ("navire abordeur") and

(2) That they must be governed by the *lex fori.*

The former theory was adopted, subject to a slight qualification, by the 1885 International Congress of Antwerp (1885, Clunet, Droit International Privé, 593, 604), and has been applied by the French courts. This court adopted the latter theory in the case of The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 24, 30, 26 L. ed. 1001, 1003. The German courts apply a composite system in which both theories are included.

The Apollo, Decision 4 Nov. 1891 of Cour de Cassation, 103 Journal du Palais (Courthouse Journal) for 1892, pt. 1, p. 69; 1892 Clunet, Dr. Int. Privé, 153, 181; The Apollo, 1903 Clunet, Dr. Int. Privé, 136, 154; The Stokesley (1905 Darras, Dr. Int. Privé, 114, 125); The Kong Inge (S. R. M. v. J. C. B. u. Genossen) 49 Reichsgericht 182, Decision of 18 Nov. 1901; The Seine, 74 Reichsgeright 46, Decision of 6 July, 1910; Valroger, Droit Maritime, § 2124.

The solution which the English courts have adopted, in respect of collisions between ships of different nations, depends upon a conception of sanctity inherent in the "general maritime law" which is extraordinary, to say the least. According to eminent English authorities, positive municipal laws and regulations must, in this class of cases, yield to the general maritime law, even if the collision in question occurs in the territorial waters of the country of the forum (The Zollverein, Swabey, Adm. 96, 2 Jur. N. S. 429, 4 Week. Rep. 555; The Saxonia, Lush. 410, 15 Moore, P. C. C. 262, 31 L. J. Prob. N. S. 201, 8 Jur. N. S. 315, 10 Week. Rep. 431; The Nostra Signora de los Dolores, 1 Dodson, Adm. 290; The Wild Ranger, Lush. 553, 32 L. J. Prob. N. S. 49, 9 Jur. N. S. 134, 7 L. T. N. S. 725, 11 Week. Rep. 255; The Leon, L. R. 6 Prob. Div. 148, 50 L. J. Prob. N. S. 59, 44 L. T. N. S. 613, 29 Week. Rep. 916, 4 Asp. Mar. L. Cas. 404), unless the intention of the lawgiving authority that the municipal law shall displace the general maritime law is expressed with unmistakable clearness (The Amalia, 1 Moore, P. C. C. N. S. 471, Brown. & L. 151, 2 New Reports, 533, 32 L. J. Prob. N. S. 191, 9 Jur. N. S. 1111, 8 L. T. N. S. 805, 12 Week. Rep. 24).

This conception of the British courts has met with little approval even from British scholars.

Westlake, Priv. International Law, 5th ed. §§ 202, 202a, pp. 288–291.

The English conception of the general law maritime is thoroughly discredited in this country, where a greater degree of confidence in the justice and wisdom of statutory enactments seems to be indulged.

The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 24, 32, 26 L. ed. 1001, 1004; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 572, 22 L. ed. 654, 661.

The English doctrine would afford no support to the contentions of the White Star Line. For the limited-liability principle never was a part of the general maritime law (The Volant, 1 W. Rob. 387; The Aline, 1 W. Rob. 117), and has not acquired, for the United States, the force of general maritime law since the act of 1851 was adopted (The Scotland [National Steam Nav. Co. v. Dyer] 105 U. S. 24, 29, 26 L. ed. 1001, 1003; La Bourgogne [Deslions v. La Compagnie Générale Transatlantique] 210 U. S. 95, 116, 52 L. ed. 973, 984, 28 Sup. Ct. Rep. 664).

The readiest reply to appellant's argument is that Mr. Justice Blatchford, who concurred in the Scotland, has explained the scope of the decision of the court in a manner wholly at variance with all of appellant's contentions.

Thommasen v. Whitwill, 21 Blatchf. 45, 12 Fed. 894.

Diversity of citizenship of parties litigant is not a factor of legal significance.

Mulhall v. Fallon, 176 Mass. 266, 54 L.R.A. 934, 79 Am. St. Rep. 309, 57 N. E. 386; Smith v. Condry, 1 How. 28, 11 L. ed. 35; Cammell v. Sewell, 5 Hurlst. & N. 728, 29 L. J. Exch. N. S. 350, 6 Jur. N. S. 916, 2 L. T. N. S. 799, 8 Week. Rep. 639, 5 Eng. Rul. Cas. 891; The Scotia, 14 Wall. 170, 185, 20 L. ed. 822, 825; The Lamington, 87 Fed. 752; The Eagle Point, 136 Fed. 1010, 73 C. C. A. 569, 142 Fed. 453, 201 U. S. 644, 50 L. ed. 902, 26 Sup. Ct. Rep. 760; The Hamilton (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 405, 52 L. ed. 264, 270, 28 Sup. Ct. Rep. 133; Lindstrom v. International Nav. Co. 117 Fed. 170, 60 C. C. A. 649, 123 Fed. 475; Southern P. Co. v. De Valle Da Costa, 111 C. C. A. 417, 190 Fed. 689, 100 C. C. A. 313, 176 Fed. 843; United States v. Holmes, 5 Wheat. 412, 417, 5 L. ed. 122, 123.

In using the word "parties" in several passages of the Scotland decision, Mr. Justice Bradley was probably referring not to parties to the litigation, but to parties or actors in the collision, *i. e.*, ships. It is not unusual in the law maritime to refer to ships as persons or parties.

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Tucker v. Alexandroff, 183 U. S. 424, 438, 46 L. ed. 264, 270, 22 Sup. Ct. Rep. 195; Ralli v. Troop, 157 U. S. 386, 403, 39 L. ed. 742, 750, 15 Sup. Ct. Rep. 657; The John G. Stevens, 170 U. S. 113, 120, 42 L. ed. 969, 18 Sup. Ct. Rep. 544.

The doctrine in the Scotland has invariably been regarded by this and other courts in connection with the decision of subsequent cases, as declaring the law of the flag to be the *lex loci delicti* where the maritime disaster involved a ship or ships of the same nation (as actors or parties in the collision or disaster), or as applying the *lex fori*, as a rule of justice where the disaster involved ships whose nations recognized different laws.

Northern P. R. Co. v. Babcock, 154 U. S. 190, 198, 38 L. ed. 958, 960, 14 Sup. Ct. Rep. 978; Herrick v. Minneapolis & St. L. R. Co. 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; Smith v. Condry, 1 How. 28, 11 L. ed. 35; Huntington v. Attrill, 146 U. S. 657, 670, 36 L. ed. 1123, 1128, 13 Sup. Ct. Rep. 224; La Bourgogne (Deslions v. La Compagnie Générale Transatlantique) 210 U. S. 95, 115, 52 L. ed. 973, 983, 28 Sup. Ct. Rep. 664; Cuba R. Co. v. Crosby, 222 U. S. 473, 478, 56 L. ed. 274, 275, 38 L.R.A.(N.S.) 40, 32 Sup. Ct. Rep. 132; The Brantford City, 29 Fed. 384; Northern P. R. Co. v. Mase, 11 C. C. A. 63, 27 U. S. App. 238, 63 Fed. 116; The Belgenland, 114 U. S. 355, 370, 29 L. ed. 152, 157, 5 Sup. Ct. Rep. 860.

A single-ship disaster involves the same principle as a collision between two ships of the same nation.

The Lamington, 87 Fed. 752; The Egyptian Monarch, 36 Fed. 773; The Maud Carter, 29 Fed. 156; Pope v. Nickerson, 3 Story, 465, Fed. Cas. No. 11,274.

It is fundamental that the statutes of any state or nation have no extraterritorial force or effect in regulating acts or occurrences beyond its territorial boundaries.

Re Sawers, L. R. 12 Ch. Div. 528, 41 L. T. N. S. 46, 28 Week. Rep. 334, 4 Eng. Rul. Cas. 1; Phillips v. Eyre, L. R. 6 Q. B. 28, 10 Best & S. 1004, 40 L. J. Q. B. N. S. 28, 22 L. T. N. S. 869; The Nostra Signora de los Dolores, 1 Dodson, Adm. 290; American Banana Co. v. United Fruit Co. 213 U. S. 347, 357, 53 L. ed. 826, 832, 29 Sup. Ct. Rep. 511, 16 Ann. Cas. 1047; Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 70, 53 L. ed. 695, 702, 29 Sup. Ct. Rep. 397; The Scotia, 14 Wall. 170, 184, 185, 20 L. ed. 822, 824, 825; Crapo v. Kelly, 16 Wall. 610, 21 L. ed. 430; Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; The Lamington, 87 Fed. 752; Whitford v. Panama R. Co. 23 N. Y. 471; Mahler v. Norwich & N. Y. Transp. Co. 35 N. Y. 352; Thompson v. Ketcham, 8 Johns. 190, 5 Am. Dec. 332; Le Forest v. Tolman, 117 Mass. 109, 19 Am. Rep. 400; Powell v. Great Northern R. Co. 102 Minn. 448, 113 N. W. 1017; Northern P. R. Co. v. Babcock, 154 U. S. 190, 197, 38 L. ed. 958, 960, 14 Sup. Ct. Rep. 978; Rundell v. La Compagnie Générale Transatlantique, 49 L.R.A. 92, 40 C. C. A. 625, 100 Fed. 660; United States v. Klintock, 5 Wheat. 144, 5 L. ed. 55; United States v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932; 1 Kent, Com. p. 26; United States v. Palmer, 3 Wheat. 610, 631, 634, 643, 4 L. ed. 471, 477, 478, 480.

Formerly the British limitation act was substantially identical with ours. It read, "No owner of any sea-going ship shall . . . be answerable in damages to an extent beyond the value of his ship and the freight due or to grow due," etc. Our act has always read, "The liability of the owner of any vessel . . . shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

The British courts invariably held American and other foreign vessels liable without limit for negligent disasters at sea, while this form of the British limitation act was in force; although it does not appear that the British courts were ever asked to apply the American act as the *lex loci delicti*, after the American act had been duly pleaded and proved.

The Wild Ranger, Lush. 553, 32 L. J. Prob. N. S. 49, 9 Jur. N. S. 134, 7 L. T. N. S. 725, 11 Week. Rep. 255; Cope v. Doherty, 2 De G. & J. 614, 27 L. J. Ch. N. S. 600, 4 Jur. N. S. 699, 6 Week. Rep. 695; The Carl Johan, cited in The Girolamo, 3 Hagg. Adm. 186; The Amalia, [illegible] Moore, P. C. C. N. S. 471, 475, Brown. [illegible] L. 151, 2 New Reports, 533, 32 L. [illegible] Prob. N. S. 191, 9 Jur. N. S. 1111, 87 [illegible] T. N. S. 805, 12 Week. Rep. 24.

Our courts may well pause before givi[illegible] British shipowners here the benefit of [illegible] more favorable rule of international la[illegible] than is accorded to American shipowne[illegible] in the British courts.

The Amalia, supra; The Santa Cruz, [illegible] C. Rob. 50; The Adeline, 9 Cranch, 24[illegible] 288, 3 L. ed. 719, 734.

It is said that as the Harter act appli[illegible] to acts done at sea by foreign vessels, t[illegible] limitation act should follow the same ru[illegible] The fundamental difference between the t[illegible] acts is indicated by the difference of sco[illegible] which the language of the acts expres[illegible] by the difference in national policy repre[illegible]

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sented by the two acts, as construed by our highest court, and by the difference of actual legislative intent shown by the debates in Congress.

The Chattahoochee, 173 U. S. 540, 550, 43 L. ed. 801, 806, 19 Sup. Ct. Rep. 491; United States v. Klintock, 5 Wheat. 144, 152, 5 L. ed. 55, 56; American Banana Co. v. United Fruit Co. 213 U. S. 347, 53 L. ed. 826, 29 Sup. Ct. Rep. 511, 16 Ann. Cas. 1047; The Delaware, 161 U. S. 459, 472, 40 L. ed. 771, 776, 16 Sup. Ct. Rep. 516; The Irrawaddy (Flint v. Christall) 171 U. S. 187, 43 L. ed. 130, 18 Sup. Ct. Rep. 831; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 459, 32 L. ed. 788, 798, 9 Sup. Ct. Rep. 469; La Bourgogne (Deslions v. La Compagnie Générale Transatlantique) 210 U. S. 95, 120, 52 L. ed. 973, 985, 28 Sup. Ct. Rep. 664; Richardson v. Harmon, 222 U. S. 96, 103, 56 L. ed. 110, 113, 32 Sup. Ct. Rep. 27; Moore v. American Transp. Co. 24 How. 1, 39, 40, 16 L. ed. 674, 681, 682; Providence & N. Y. S. S. Co. v. Hill Mfg. Co. 109 U. S. 578, 588, 27 L. ed. 1038, 1042, 3 Sup. Ct. Rep. 379, 617; The Main v. Williams, 152 U. S. 122, 128, 38 L. ed. 381, 383, 14 Sup. Ct. Rep. 486; Chamberlain v. Western Transp. Co. 44 N. Y. 308, 4 Am. Rep. 681; Ayer & L. Tie Co. v. Kentucky, 202 U. S. 409, 50 L. ed. 1082, 26 Sup. Ct. Rep. 679, 6 Ann. Cas. 205; Blake v. National City Bank, 23 Wall. 307, 317, 23 L. ed. 119, 120; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 333, 53 L. ed. 1013, 1019, 29 Sup. Ct. Rep. 671; Jennison v. Kirk, 98 U. S. 453, 459, 25 L. ed. 240, 243, 4 Mor. Min. Rep. 504; Church of the Holy Trinity v. United States, 143 U. S. 457, 464, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511; Wadsworth v. Boysen, 78 C. C. A. 437, 148 Fed. 771; Shallus v. United States, 89 C. C. A. 445, 162 Fed. 653; American Net & Twine Co. v. Worthington, 141 U. S. 468, 474, 35 L. ed. 821, 824, 12 Sup. Ct. Rep. 55; The Collector v. Richards (Arthur v. Richards) 23 Wall. 246, 258, 23 L. ed. 95, 96; Buttfield v. Stranahan, 192 U. S. 470, 495, 48 L. ed. 525, 535, 24 Sup. Ct. Rep. 349; United States v. Wilson, 58 Fed. 768; Ex parte Farley, 40 Fed. 69.

Messrs. Benjamin Micou, Richard P. Whiteley, and George S. Graham filed a brief as *amici curiæ* on behalf of Louise Robins et al.:

In effect, the collision might just as well have taken place in an English port, as a ship on the high seas is a part of the country to which she belongs.

The Lamington, 87 Fed. 752; Crapo v. Kelly, 16 Wall. 610, 21 L. ed. 430; Wilson v. McNamee, 102 U. S. 572, 26 L. ed. 234; Wheaton, International Law, 8th ed. §§ 106 et seq; 1 Kent, Com. p. 26; Whart. Confl. L. § 356; 2 Grotius, De Jure Belli, chap. 4, § 13.

If the tort complained of was committed within the limits of Great Britain (and a British ship in collision with an iceberg upon the high seas is, to this extent, British territory) then its liability must be governed by British laws.

Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; Slater v. Mexican Nat. R. Co. 194 U. S. 120, 48 L. ed. 900, 24 Sup. Ct. Rep. 581; Mexican C. R. Co. v. Eckman, 205 U. S. 538, 51 L. ed. 920, 27 Sup. Ct. Rep. 791.

As far back as the learned Chief Justice Taney's day, that eminent jurist, in a case involving the collision of two American-owned vessels in the port of Liverpool, held that when a collision of vessels occurs in an English port, the rights of the parties depend upon the provisions of the British statutes then in force; and if doubt exists as to their true construction, that this court will adopt that which is sanctioned by the courts of Great Britain.

Smith v. Condry, 1 How. 28, 11 L. ed. 35. See also The China, 74 U. S. 53, 19 L. ed. 67; The Halley, L. R. 2 Adm. & Eccl. 3.

Where the *lex loci delicti* governs and is sued under in a foreign jurisdiction, any limitations upon liability must be those of the *lex loci delicti*, and not of the *lex fori*.

Slater v. Mexican Nat. R. Co. 194 U. S. 120, 48 L. ed. 900, 24 Sup. Ct. Rep. 581.

Since any suit for damages must be brought against the steamship company under the laws of Great Britain, and since those laws control the rights of parties interested and the liabilities of the company defendant, our courts would be clearly without jurisdiction to entertain any proceedings to limit liability under our statutes and rules. The tort having been committed within British territory, the laws of Great Britain only can apply.

American Banana Co. v. United Fruit Co. 213 U. S. 347, 53 L. ed. 826, 29 Sup. Ct. Rep. 511, 16 Ann. Cas. 1047; The Eagle Point, 73 C. C. A. 569, 142 Fed. 453; The Lamington, 87 Fed. 752; Cuba R. Co. v. Crosby, 222 U. S. 473, 56 L. ed. 274, 38 L.R.A.(N.S.) 40, 32 Sup. Ct. Rep. 132; The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 24, 26 L. ed. 1001; The Belgenland, 114 U. S. 355, 29 L. ed. 152, 5 Sup. Ct. Rep. 860; La Bourgogne (Deslions v. La Compagnie Générale Transatlantique) 210 U. S. 95, 52 L. ed. 973, 28 Sup. Ct. Rep. 664.

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Messrs. Howard S. Harrington, Henry J. Bigham, D. Roger Englar, and Oscar R. Houston filed a brief for Mary A. Holverson et al.:

A vessel on the high seas is regarded as part of the territory of the nation whose flag she flies.

Crapo v. Kelly, 16 Wall. 610, 21 L. ed 430; The Hamilton (Old Dominion S. S Co. v. Gilmore) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133; Wilson v. McNamee, 102 U. S. 572, 574, 26 L. ed. 234, 235; The Lamington, 87 Fed. 752.

In tort actions the *lex loci delicti commissi* governs with respect to all matters of substantive law.

The Hamilton (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133; Cuba R. Co. v. Crosby, 222 U. S. 473, 478, 56 L. ed. 274, 275, 38 L.R.A.(N.S.) 40, 32 Sup. Ct. Rep. 132.

The amount to which the owner of a vessel may limit his liability for injuries to passengers and cargo is a question of substantive right, and not of procedure.

Huntington v. Attrill, 146 U. S. 657, 670, 36 L. ed. 1123, 1128, 13 Sup. Ct. Rep. 224; Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; Slater v. Mexican Nat. R. Co. 194 U. S. 120, 48 L. ed. 900, 24 Sup. Ct. Rep. 581; Mexican C. R. Co. v. Eckman, 205 U. S. 538, 51 L. ed. 920, 27 Sup. Ct. Rep. 791; Dicey, Confl. L. 2d ed. p. 651; Minor, Confl. L. § 195; Whart. Confl. L. § 473.

Similar limitations have been held to be matters of substantive law, governable by the *lex loci*.

The Eagle Point, 73 C. C. A. 569, 142 Fed. 453; Pope v. Nickerson, 3 Story, 465, Fed. Cas. No. 11,274; The Lamington, 87 Fed. 752.

The American limitation act was intended to apply only to cases arising within the jurisdiction of the United States, or to cases in which it would be unjust to apply any other law.

United States v. Palmer, 3 Wheat. 610, 4 L. ed. 471; American Banana Co. v. United Fruit Co. 213 U. S. 347, 357, 53 L. ed. 826, 832, 29 Sup. Ct. Rep. 511, 16 Ann. Cas. 1047; The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 24, 26 L. ed. 1001.

Considering both the decision and the *dictum* in the Scotland together, the case may be analyzed as laying down the following principles:

(1) If a collision occurs on the high seas between American vessels, or between vessels of two or more different nationalities having different laws on the subject, or if a collision occurs within the territorial waters of the United States, the American courts will apply the American limitation act.

(2) If a collision occurs on the high seas between vessels of the same nationality, or between vessels of different nationalities whose laws with respect to limitation of liability are similar, or if a collision occurs within the territorial waters of a foreign country, the American courts will apply the law of the flag of the vessel or of the country in whose territorial waters the disaster occurred.

This case has been cited with approval and followed in the following cases in this court involving the limitation act:

The Great Western, 118 U. S. 520, 537, 30 L. ed. 156, 162, 6 Sup. Ct. Rep. 1172; The City of Norwich (Place v. Norwich & N. Y. Transp. Co.) 118 U. S. 468, 490, 30 L. ed. 134, 142, 6 Sup. Ct. Rep. 1150; Butler v. Boston & S. S. S. Co. 130 U. S. 527, 555, 556, 32 L. ed. 1017, 1023, 1024, 9 Sup. Ct. Rep. 612; Re Garnett, 141 U. S. 12, 13, 35 L. ed. 633, 634, 11 Sup. Ct. Rep. 840; Craig v. Continental Ins. Co. 141 U. S. 638, 645, 35 L. ed. 886, 887, 12 Sup. Ct. Rep. 97; La Bourgogne (Deslions v. La Compagnie Générale Transatlantique) 210 U. S. 95, 115, 120, 52 L. ed. 973, 983, 985, 28 Sup. Ct. Rep. 664.

The decision in each of these cases is entirely consistent with the opinion of Mr. Justice Bradley, and there is nothing in any of them that suggests any criticism of any portion of that opinion.

The fact that the Harter act has been held to apply to all foreign vessels carrying goods to and from American ports is quite beside the point. The purposes of the two acts are quite different; one is intended to promote American shipping, the other to protect American importers and exporters from unreasonable provisions in bills of lading. The distinction between the two acts is shown by the very case upon which the petitioner relies.

The Chattahoochee, 173 U. S. 540, 550, 43 L. ed. 801, 806, 19 Sup. Ct. Rep. 491.

Mr. A. Gordon Murray filed a brief for Adele Nasrallah et al.:

The English law is a fact to be proved and shown to apply.

The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 24, 26 L. ed. 1001; Cuba R. Co. v. Crosby, 222 U. S. 473, 56 L. ed. 274, 38 L.R.A.(N.S.) 40, 32 Sup. Ct. Rep. 132; La Bourgogne (Deslions v. La Compagnie Générale Transatlantique) 210 U. S. 95, 52 L. ed. 973, 28 Sup. Ct. Rep. 664.

Claims for loss of life are within the statute.

Butler v. Boston & S. S. S. Co. 130 U. S.

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555, 32 L. ed. 1023, 9 Sup. Ct. Rep. 612; La Bourgogne (Deslions v. La Compagnie Générale Transatlantique) 210 U. S. 95, 140, 52 L. ed. 973, 993, 28 Sup. Ct. Rep. 664.

Where such losses occurred under circumstances where it was conceived that the particular law of the land in which the court called upon to adjudicate between the parties is situated did not apply, it has been pointed out that the court would consider by which law the rights of the respective parties were to be adjudged; and it is a fundamental principle that where the law of the land or forum does not apply, it is perfectly competent for the court to judge the parties by the law that does apply, provided it is shown what that law is, and that applying such law does not work injustice to any particular party.

The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 24, 29, 30, 26 L. ed. 1001, 1003.

The proceeding in the court below is a proceeding in admiralty for the prevention of a multiplicity of suits, as well as to award limitation of liability, if the owner is entitled to it.

Oregon R. & Nav. Co. v. Balfour, 179 U. S. 55, 45 L. ed. 82, 21 Sup. Ct. Rep. 28; Dowdell v. United States Dist. Ct. 71 C. C. A. 288, 139 Fed. 444.

It has been denominated an equitable action.

Re Morrison, 147 U. S. 14, 34, 37 L. ed. 60, 67, 13 Sup. Ct. Rep. 246.

Not in a sense inconsistent with the admiralty jurisdiction however.

Oregon R. & Nav. Co. v. Balfour, 179 U. S. 55, 45 L. ed. 82, 21 Sup. Ct. Rep. 28.

A court of equity will do full justice.

Camp v. Boyd, 229 U. S. 530, 551, 57 L. ed. 1317, 1326, 33 Sup. Ct. Rep. 785; Cuba R. Co. v. Crosby, 222 U. S. 473, 479, 56 L. ed. 274, 276, 38 L.R.A.(N.S.) 40, 32 Sup. Ct. Rep. 132.

The doctrine of *stare decisis* is a wholesome doctrine.

Vail v. Arizona, 207 U. S. 201, 205, 52 L. ed. 169, 171, 28 Sup. Ct. Rep. 107.

Mr. Justice Holmes delivered the opinion of the court:

This case comes here upon a certificate from the circuit court of appeals. The facts stated are as follows, with slight abbreviation. The Titanic, a British steamship, which had sailed from Southampton, England, on her maiden voyage for New York, collided on the high seas with an iceberg, on April 14, and sank the next morning, with the loss of many lives and total loss of vessel, cargo, personal effects, mails, and everything connected with the ship except certain lifeboats. The owner, alleging that the loss was occasioned and incurred without its privity or knowledge, filed a petition for limitation of its liability under the laws of the United States (Rev. Stat. §§ 4283–4285, U. S. Comp. Stat. 1901, pp. 2943, 2944), and Admiralty Rules 54 and 56. Before it did so a number of actions to recover for loss of life and personal injuries resulting from the disaster had been brought against the petitioners in Federal and state courts. The persons who sustained loss were of many different nationalities, including citizens of the United States. Mellor, a British subject, excepted to the petition, on the ground that "the acts by reason of which and for which [the petitioner] claims limitation of liability took place on board a British registered vessel on the high seas," and therefore the law of the United States would not apply. Anderson, a citizen of the United States, excepted on the ground that the law of the United States [731] could not and that of England was not shown to apply. The district court dismissed the petition as to these two. 209 Fed. 501. The petitioner appealed, and the circuit court of appeals certified the following questions:

A. Whether, in the case of a disaster upon the high seas, where (1) only a single vessel of British nationality is concerned and there are claimants of many different nationalities; and where (2) there is nothing before the court to show what, if any, is the law of the foreign country to which the vessel belongs, touching the owner's liability for such disaster,—such owner can maintain a proceeding under §§ 4283–4285, U. S. Revised Statutes (U. S. Comp. Stat. 1901, pp. 2943, 2944), and the 54th and 56th Rules in Admiralty?

B. Whether if, in such a case, it appears that the law of the foreign country to which the vessel belongs makes provision for the limitation of the vessel owner's liability, upon terms and conditions different from those prescribed in the statutes of this country, the owners of such foreign vessel can maintain a proceeding in the courts of the United States, under said statutes and rules?

In the event of the answer to question B being in the affirmative,

C. Will the courts of the United States in such proceeding enforce the law of the United States or of the foreign country in respect to the amount of such owner's liability?

The general proposition that a foreign ship may resort to the courts of the United States for a limitation of liability under Rev. Stat. § 4283 is established. The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 24, 26 L. ed. 1001; La

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Bourgogne (Deslions v. La Compagnie Générale Transatlantique) 210 U. S. 95, 52 L. ed. 973, 28 Sup. Ct. Rep. 664. These were cases respectively of collisions between American and English and English and French vessels. See also The Chattahoochee, 173 U. S. 540, 43 L. ed. 801, 19 Sup. Ct. Rep. 491. The Germanic (Oceanic Steam Nav. Co. v. Aitken) 196 U. S. 589, 598, 49 L. ed. 610, 614, 25 Sup. Ct. Rep. 317. But it is argued that there is an exception in a case like this, where only a single foreign ship is concerned. The argument is supported by a quotation from Mr. Justice Bradley in The Scotland, to the effect that if a collision occurred [732] on the high seas between two vessels belonging to the same nation, the court would determine the controversy by the law of their flag. For, it is said, if the foreign law would govern in that case, it must govern in this, and therefore, at least, in the absence of allegations bringing the case within the foreign law, the petition must be dismissed. If, in the observation referred to, Mr. Justice Bradley had been speaking of proceedings of this class, it would be important, as sanctioning the view that the United States courts offered a *forum concursus* for the administration of other systems as well as of our own; but we apprehend that he was speaking of an ordinary collision case, and merely indicating that, in such a case, the principle usually governing foreign torts would apply. That principle may be accepted as equally governing here, but it does not carry us far.

It is true that the act of Congress does not control or profess to control the conduct of a British ship on the high seas. See American Banana Co. v. United Fruit Co. 213 U. S. 347, 356, 53 L. ed. 826, 832, 29 Sup. Ct. Rep. 511, 16 Ann. Cas. 1047. It is true that the foundation for a recovery upon a British tort is an obligation created by British law. But it also is true that the laws of the forum may decline altogether to enforce that obligation on the ground that it is contrary to the domestic policy, or may decline to enforce it except within such limits as it may impose. Cuba R. Co. v. Crosby, 222 U. S. 473, 478, 480, 56 L. ed. 274-276, 38 L.R.A.(N.S.) 40, 32 Sup. Ct. Rep. 132; Dicey, Confl. L. 2d ed. 647. It is competent, therefore, to Congress to enact that, in certain matters belonging to admiralty jurisdiction, parties resorting to our courts shall recover only to such extent or in such way as it may mark out. Butler v. Boston & S. S. S. Co. 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612. The question is not whether the owner of the Titanic by this proceeding can require all claimants to come in, and can cut down rights vested under English law, as against, for instance, Englishmen living in England, who do not appear. It is only whether those who do see [733] fit to sue in this country are limited in their recovery irrespective of the English law. That they are so limited results, in our opinion, from the decisions of this court. For on what ground was the limitation of liability allowed in The Scotland or La Bourgogne? Not on their being subject to the act of Congress or any law of the United States in their conduct, but if not on that ground, then it must have been because our statute permits a foreign vessel to limit its liability according to the act when sued in the United States. There may be some little uncertainty in the language of Mr. Justice Bradley in the earlier case. A slight suggestion that the statute is applied because of a vacuum,—the absence of any law properly governing the transaction. But it was no necessary part of his argument that people were to be made liable after the event by the mere choice of a forum; and if they were, it would not be because of the act of Congress. That does not impose, but only limits, the liability,—a liability assumed already to exist on other grounds. The essential point was that the limitation might be applied to foreign ships if sued in this country, although they were not subject to our substantive law.

It is not necessary to consider whether the act of Congress may not limit the rights of shippers or American vessels to recover for injuries in our waters or on the high seas, so that if they sued in a foreign court they could not be allowed to recover more than the act allows, if our construction of the law were followed. A law that limits a right in one case may limit a remedy in another. This statute well might be held to announce a general policy, governing both obligations that arise within the jurisdiction and suits that are brought in the courts of the United States. Emery v. Burbank, 163 Mass. 326, 328, 28 L.R.A. 57, 47 Am. St. Rep. 456, 39 N. E. 1026. It clearly limits the remedy, as we have shown, in cases where it has nothing to say about the rights. With the explanation that we have made we may repeat here Justice [734] Bradley's words: "The rule of limited responsibility is now our maritime rule. It is the rule by which, through the act of Congress, we have announced that we propose to administer justice in maritime cases."

We see no absurdity in supposing that if the owner of the Titanic were sued in different countries, each having a different rule affecting the remedy there, the local rule should be applied in each case. It

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can be imagined that, in consequence of such diverse proceedings, the owner might not be able to comply with the local requirements for limitation, as it also is conceivable that, if it sought the advantage of an alien law, it might as a condition have to pay more than its liability under the law of its flag in some cases. But the imagining of such possible difficulties is no sufficient reason for not applying the statute as it has been construed, on the whole, it would seem, with good effect.

It follows from what we have said that the first two questions must be answered in the affirmative, and the third, the law of the United States.

Answer: A, Yes.

B, Yes.

C, The law of the United States.

Mr. Justice McKenna considers it a proper deduction from The Scotland that the law of the foreign country should be enforced in respect of the amount of the owner's liability.

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1913.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1913.

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[1] UNITED STATES and Interstate Commerce Commission, Appts.,[1]
v.
LOUISIANA & PACIFIC RAILWAY COMPANY et al. (No. 829.)

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY et al., Appts.,
v.
LOUISIANA & PACIFIC RAILWAY COMPANY et al. (No. 830.)

UNITED STATES and Interstate Commerce Commission, Appts.,
v.
WOODWORTH & LOUISIANA CENTRAL RAILWAY COMPANY et al. (No. 831.)

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY et al., Appts.,
v.
WOODWORTH & LOUISIANA CENTRAL RAILWAY COMPANY et al. (No. 832.)

UNITED STATES and Interstate Commerce Commission, Appts.,
v.
MANSFIELD RAILWAY & TRANSPORTATION COMPANY et al. (No. 833.)

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY et al., Appts.,
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MANSFIELD RAILWAY & TRANSPORTATION COMPANY et al. (No. 834.)

UNITED STATES and Interstate Commerce Commission, Appts.,
v.
VICTORIA, FISHER, & WESTERN RAILROAD COMPANY et al. (No. 835.)

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY et al., Appts.,
v.
VICTORIA, FISHER, & WESTERN RAILROAD COMPANY et al. (No. 836.)

(See S. C. Reporter's ed. 1-29.)

Commerce court — review of order of Interstate Commerce Commission — affirmative or negative action.

1. An order of the Interstate Commerce Commission which, amending a prior order refusing to compel certain trunk line railroads to establish or re-establish through routes and joint rates with, and to grant allowances and divisions to, certain "tap lines," required such trunk lines to desist from making allowances to the tap lines out of joint through rates for proprietary freight, and provided that if the trunk lines should fail, by a stated time, to re-establish through routes and joint rates on nonproprietary freight, the Commission would, upon proper petition, enter an order requiring the establishment of such routes and rates, or enter upon an inquiry with respect thereto,—is affirmative rather than negative in character, and was hence reviewable in the commerce court.

[For other cases, see Commerce Court, in Digest Sup. Ct. 1913 Supp.]

Carriers — who are.

2. The right of the public to use the facilities of a railroad, and to demand service of it, rather than the extent of its business, is the real criterion by which to determine whether or not it is a common carrier.

[For other cases, see Carriers, I., in Digest Sup. Ct. 1908.]

Carriers — tap lines — division of joint rates.

3. "Tap line" railroads connecting timber lands and lumber mills with trunk line railroads, although owned by the persons who also own the timber and mills which they principally serve, must be regarded as common carriers as well of the freight be-

[1] Reported by the Official Reporter under the title of "The Tap Line Cases."

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longing to the owners of such tap lines as of nonproprietary traffic, and as such to be entitled to participate with such trunk line railroads in joint through rates, where such tap line roads are organized as common carriers under the state laws, are so treated by the public authorities of the state, are engaged in carrying for hire the goods of those who see fit to employ them, are authorized to exercise the right of eminent domain by the state of their incorporation, and are treated and dealt with as common carriers by connecting systems of other carriers.

[For other cases, see Carriers, III., in Digest Sup. Ct. 1908.]

[Nos. 829, 830, 831, 832, 833, 834, 835, 836.]

Argued April 8, 9, and 13, 1914. Decided May 25, 1914.

EIGHT APPEALS from the United States Commerce Court to review decrees annulling in part orders of the Interstate Commerce Commission denying in part the right of certain tap line railroads to participate as common carriers in joint rates. Affirmed.

See same case below, 209 Fed. 244.

Statement by Mr. Justice Day:

These are all appeals from decrees of the United States commerce court (209 Fed. 244), annulling orders of the Interstate Commerce Commission, refusing in whole or in part to compel certain common carriers which had filed schedules canceling former schedules covering through routes and joint rates with the Louisiana & Pacific Railway Company, the Woodworth & Louisiana Central Railway Company, the Mansfield Railway & Transportation Company, and the Victoria, Fisher, & Western Railroad Company, appellees, hereinafter referred to as the tap lines, to establish or re-establish through routes and joint rates and to grant allowances and divisions to the tap lines.

The Commission, after an extensive investigation of the tap lines in the lumber regions, particularly in the states of Arkansas, Missouri, Louisiana, and Texas, on April 23 and May 14, 1912, filed its report and supplementary report (23 Inters. Com. Rep. 277, 549). The report deals at some length with the manner in which logs and lumber are moved in that territory, and the practices attending such traffic. The Commission found the identification of the road with the industry, the necessity of incorporation to secure divisions and allowances, the great amount in the aggregate paid by the trunk lines to the tap lines, and the resulting discrimination, the fact that allowances were dependent upon the bargain the tap lines might exact from the trunk lines for a proportion of their traffic, and not upon the amount of service rendered, and the fact that most of the lumber mills were near public carriers, and that the tap lines would not be kept in operation if the mills were removed. General principles for determining the charactor [4] of carriers were set forth, and the conclusion stated that the real relation of a tap line was a question to be decided upon the facts in each case.

The Commission entered upon a particular examination of the various lines under investigation, among others, the appellees in these appeals. It found:

The Louisiana & Pacific Railway Company, controlled by the R. A. Long interests, owning a controlling interest in the Hudson River Lumber Company, the King-Ryder Lumber Company, Longville Lumber Company, and the Calcasieu Long Leaf Lumber Company, consists of the following tracks, all of which were originally constructed as private logging roads: (1) A track from De Ridder Junction, Louisiana (all of the lines involved in these cases are within that state), to Bundicks, a distance of 8 miles. The mill of the Hudson River Lumber Company, in whose interest this track is operated, is located at De Ridder, within a few hundred feet of the trunk lines; Bundicks is apparently a logging camp with a company store. (2) A track from Lilly Junction to Walla, about 7½ miles, the latter being a point in the woods where the King-Ryder Lumber Company has a commissary, and where is located a small independent yellow-pine mill, owned by the Bundick Creek Lumber Company. The mill of the King-Ryder Company is at Bon Ami, a town of 2,000, located on the Lake Charles & Northern Railroad Company, a short distance from and connected by it with Lilly Junction. (3) A track of 2 miles at Longville, a town of 2,000 people, where the Longville Lumber Company has its mill and a store, and where also are several independent stores. (4) A track of 9 miles from Fayette to Camp Curtis, a place of 200 population, where the Calcasieu Long Leaf Lumber Company has a store, its mill being at Lake Charles. (5) A track of 1 mile from Bridge Junction to Lake Charles station. The towns De Ridder, Bon Ami, Lilly Junction, Longville, Fayette, and [5] Lake Charles are connected by the Lake Charles & Northern Railroad, a Southern Pacific Railway Company line, originally built by the Long interests as a part of the Louisiana & Pacific, and sold to the Lake Charles & Northern with the reservation of trackage rights advantageous to the Louisiana & Pacific. By means of this arrangement the Louisiana & Pacific connects with the Kansas City

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Southern and the Santa Fe at De Ridder, with the Frisco at Fulton (a station south of Fayette), and with the Southern Pacific, Iron Mountain, & Kansas City Southern at Lake Charles. Its equipment consists of 22 locomotives, 6 cabooses, 41 freight cars, and 270 logging cars, and a private car used by its officers, who are connected with the lumber companies, in traveling around the country. The lumber companies have many miles of unincorporated logging tracks connecting with the Louisiana & Pacific at various points. There are a number of other stations on the line, among them Bannister, where the Brown Lumber Company owns a small, independent mill.

The operation is this: The lumber companies load the logs and switch them over the logging spurs to connection with the tap line which hauls them to the mill, an average distance of 30 miles, for which no charge is made. The tap line switches the carloads of lumber from the mill at Lake Charles, a distance of three quarters of a mile, to the Southern Pacific; at De Ridder, only a few hundred feet to the trunk lines; from the Lake Charles mill to the Frisco, a distance of 18 miles; from the Bon Ami mill to the Southern Pacific at Lake Charles, a distance of 40 miles; and from the Longville mill to the Southern Pacific at Lake Charles, a distance of 24 miles,—the average haul for the controlling companies being nearly 20 miles. By written agreement 50 per cent of the lumber must be routed over the Frisco and 40 per cent over the Southern Pacific, but this is not always done. 243,122 tons of lumber, as against 8,819 tons of merchandise, were shipped in 1910, 98 per cent of the whole tonnage [6] being supplied by the controlling interests. The passenger receipts for 1910 were $473.77. A logging train runs daily on each branch, and there is one "mixed" train, loaded chiefly with logs and lumber, between Lake Charles and De Ridder. The allowances paid by the trunk lines range from 1½ to 5½c. per 100 pounds out of their earnings under the group-lumber rate. The operating revenue for the year ending June 30, 1910, was $220,985.94, with operating expenses of $145,433.69, and there was an accumulated surplus of $73,581.07 on that date.

The Commission found that no charge was made for hauling the logs to the mills by the tap line, and that for the short switching service allowances were made as above stated, and concluded that it regarded the whole arrangement as indefensible and unlawful, and saw no ground upon which any allowance might lawfully be made.

The Woodworth & Louisiana Central Railway Company and the Rapides Lumber Company, situated at Woodworth, are identical in interest. The mill is near the Iron Mountain, which has a spur track to the mill, and the tap line has a standard gauge track from the mill to La Moria, about 6 miles, where it connects with the Southern Pacific Railway, Texas & Pacific Railway, and Chicago, Rock Island, & Pacific Railway, and a narrow-gauge track in the other direction for 18 miles, whence spur tracks go into the timber. The equipment consists of 1 standard-gauge locomotive, 5 narrow-gauge locomotives, and 2 standard and 9 narrow-gauge cars. The steel in the logging spurs and 4 of the narrow-gauge locomotives used by the lumber company on the spurs are owned by the tap line and leased to the lumber company; while the right of way for the narrow-gauge track is leased from the lumber company.

The tap line hauls the logs from its terminus to the mill without charge, where they are dumped by the trainmen into the mill pond. The carloads of lumber are switched [7] by the tap line from the planing mill to the place where they are taken by the Iron Mountain, about 25 feet. About 95 per cent of the lumber goes through La Moria, being switched there by the tap line; the allowances from the Iron Mountain out of through rates being from 1½ to 5½c. per 100 pounds, while from the trunk lines at La Moria from 2 to 5½c. There are no joint rates except on lumber. For the year ending June 30, 1910, there were 40,707 tons of freight handled for the lumber company and 2,100 tons of outside traffic. It has no passenger business. Its operations for that year showed a deficit, but there was a surplus from previous years of nearly $10,000. It files annual reports with the Commission.

The Mansfield Railway & Transportation Company and the Frost-Johnson Lumber Company are identical in interest. The tap line extends from Mansfield to a logging camp in the woods, known as Hunter, a distance of about 16 miles, and the line which was originally incorporated by the citizens of Mansfield in 1881, consisting of 2 miles of track from the town to a connection with the Texas & Pacific at Mansfield Junction. Later the Mansfield Company acquired the 2 mile track and equipment, and the interests controlling it purchased a large amount of timber lands near Mansfield at a point called Oak Hill, where a mill was built, and spur tracks were laid into the timber, which were later turned over to the Mansfield Company, with the free privilege reserved to the lumber company to operate logging trains between the timber and the mill, which operation is

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performed by a subsidiary company. The purchase price did not reflect the value of the reservation. There are about 25 miles of unincorporated logging tracks. The tap line also has a connection with the Kansas City Southern. It owns a locomotive, a passenger coach, and a box car.

The service performed by the tap line is switching cars between the mill and the Kansas City Southern, about ¾ [8] of a mile, although the mill is within 300 feet of the Kansas City Southern, and was formerly connected by a spur track which was abandoned and taken up, and to the Texas & Pacific, a distance of 2¼ miles. The tap line bears the expense of maintaining its tracks extending into the woods.

No other yellow-pine mills are served by the tap line, but there is a hardwood mill adjacent to the Frost-Johnson mill, obtaining a substantial portion of its logs from the latter company or subsidiaries, the price including delivery at the hardwood mill, the logs being hauled by the logging company under its trackage right. Some logs are also obtained from the Texas & Pacific, for the switching of which the hardwood mill pays the tap line $2.50 a car or less. The tap line maintains joint rates on hardwood as well as yellow pine.

Practically no traffic other than that in which the lumber company is interested moves over the track from Mansfield to Hunter, but a good deal of outside traffic moves over the original 2 miles from Mansfield to Mansfield Junction. 16,539 tons of miscellaneous freight were handled during the year ending June 30, 1910, most of which passed over the Mansfield Junction branch, and much of which was for the controlling interests or their employees; while during the same time 28,596 tons, of lumber were handled, 91.4 per cent of which was supplied by the lumber company. A daily train is operated by the tap line in each direction on regular schedule, handling passengers, mail, and express; but in 1910 the passenger revenues were only $1,209.76, while its freight revenues were $25,617.19.

The Commission noticed the abandonment of the 300-foot spur track, and then the payment of an allowance of 1 to 4c. per 100 pounds, and held that it was a mere manipulation of the situation in order to establish an unlawful relation; and also held that since the tap line crosses the [9] right of way of the Texas & Pacific within a short distance, the allowance of a like amount by the Texas & Pacific for switching from the mill to Mansfield and down to the junction was unlawful.

The Victoria, Fisher, & Western Railroad Company and the Louisiana Long Leaf Lumber Company have the same stockholders and officers. The tap line extends from Victoria, where it connects with the Texas & Pacific, to Fisher, where it crosses the Kansas City Southern Railway, and then extends to Cain, in all about 31 miles. A part of the track was built some time ago, and was acquired by the lumber company in 1900. In 1902 the railroad company was incorporated and its stock exchanged as a stock dividend for the line. There are about 25 miles of logging spurs and side tracks. The equipment consists of 5 locomotives, 4 cabooses, 3 box cars, 1 flat car, and 105 logging cars. It does not operate any trains on regular schedule. There are two mills owned by the Lumber Company, one about a mile from the junction with the Texas & Pacific, and the other about half a mile from the tracks of the Kansas City Southern.

The tap line hauls the logs from the forest to the mill, charging $1.50 per 1,000 feet, which is supposed to cover only the service performed on the logging spurs, and not the haul over the main track. The greater part of the lumber from Fisher is turned over to the Kansas City Southern, involving a one-half mile switch by the tap line, and from Victoria is moved by the tap line 1 mile to the Texas & Pacific; a small amount of the lumber from each mill is taken by the tap line to the more distant trunk line, but the same divisions are paid. The allowances range from ¾ to 4c. per 100 pounds, and the joint rates are the same as the rates published from adjacent mills on the trunk lines, except traffic moving to Texas, for which 1¼c. per 100 pounds is added to the junction-point rate. No passengers are carried, and of 316,670 tons [10] of freight for the year 1910, over 99 per cent was furnished by the proprietary company. And the accumulated surplus at the end of June, 1910, was $13,509.17.

The Commission held that the tap line could not participate as a common carrier in joint rates on the products of the proprietary company, but said that the lumber rate of the trunk lines applied from the adjacent mills, and that they might make a reasonable allowance for switching.

The Commission made an order in such matter on May 14, 1912, which it amended on October 30, 1912. The amended order, so far as these appeals are concerned, provided:

"The Commission upon the record finds in the case of the . . . Woodworth & Louisiana Central Railway Company; Mansfield Railway & Transportation Company; Louisiana & Pacific Railway Company; Victoria, Fisher, & Western Railroad Company,—that the tracks and equipment, with respect to the industry of the

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several proprietary companies, are plant facilities, and that the service performed therewith for the respective proprietary lumber companies in moving logs to their respective mills, and performed therewith in moving the products of the mills to the trunk lines, is not a service of transportation by a common carrier railroad, but is a plant service by a plant facility; and that any allowances or divisions out of the rate on account thereof are unlawful and result in undue and unreasonable preferences and unjust discriminations, as found in the said reports;"

and it ordered that the trunk lines should cease and for two years abstain from making any such allowances to the tap lines named.

The commission further ordered that if the trunk lines failed by a time stated, to re-establish the through routes and joint rates in effect on April 30, 1912, on traffic other than the products of the mills of certain proprietary companies, [11] among others, the appellees herein, it would, upon proper petition, enter an order requiring the establishment of such routes and rates, or enter upon an inquiry with respect thereto, and further provided that all divisions of joint rates should be submitted to the Commission for approval.

The appellees thereupon, by their several petitions filed in the United States commerce court, sought to have the order of the Commission, so far as applicable to them, enjoined and annulled. The Interstate Commerce Commission, the Atchison, Topeka, & Santa Fe Railway Company, the Gulf, Colorado, & Santa Fe Railway Company, and the Railroad Commission of Louisiana, intervened. The commerce court said that the question was whether the Commission had acted arbitrarily and on improper considerations in determining under what circumstances a common carrier tap line would be deemed to be performing a mere plant service for a proprietary company, and held that as the service rendered to the proprietary and nonproprietary mills by the tap lines was the same, and as it was held to be a transportation service by an interstate common carrier as to the nonproprietary mills, it must be held to be a similar service as to the proprietary mills, and concluded that the Commission was without power to prohibit the making of joint rates by the trunk lines and the tap lines, and the payment of some division of such rates to the tap lines for their services in hauling logs to and lumber from the proprietary mills, and annulled the order of the Commission in this respect and so far as it applied to the appellees.

The United States and the Interstate Commerce Commission, and the Atchison, Topeka, & Santa Fe Railway Company, and the Gulf, Colorado, & Santa Fe Railway Company, entered separate appeals from the decrees of the commerce court in the four cases instituted by the appellees.

Mr. Blackburn Esterline, Special Assistant to the Attorney General, argued the cause, and, with Solicitor General Davis and Mr. Karl W. Kirchwey, filed a brief for the United States:

The portion of the Commission's order of which appellees complain was merely a refusal of the relief for which they prayed, and was negative in character.

Hooker v. Knapp, 225 U. S. 302, 56 L. ed. 1099, 32 Sup. Ct. Rep. 769; Procter & G. Co. v. United States, 225 U. S. 282, 56 L. ed. 1091, 32 Sup. Ct. Rep. 761; United States v. Pacific & A. R. & Nav. Co. 228 U. S. 87, 57 L. ed. 742, 33 Sup. Ct. Rep. 443.

The findings of the Commission, if based on substantial evidence, are conclusive.

Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 548, 56 L. ed. 308, 311, 32 Sup. Ct. Rep. 108; Procter & G. Co. v. United States, 225 U. S. 282, 297, 56 L. ed. 1091, 1096, 32 Sup. Ct. Rep. 761; United States v. Baltimore & O. R. Co. 225 U. S. 306, 325, 56 L. ed. 1100, 1106, 32 Sup. Ct. Rep. 817.

The court will look behind the fact of separate incorporation to ascertain the actual relations of the parties.

Crane Iron Works v. United States, 209 Fed. 238; Fourche River Lumber Co. v. Bryant Lumber Co. 230 U. S. 316, 57 L. ed. 1498, 33 Sup. Ct. Rep. 887; Miller & Lux v. East Side Canal & Irrig. Co. 211 U. S. 293, 53 L. ed. 189, 29 Sup. Ct. Rep. 111; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 521, 55 L. ed. 310, 318, 31 Sup. Ct. Rep. 279; United States v. Union Stock Yard & Transit Co. 226 U. S. 286, 304, 57 L. ed. 226, 233, 33 Sup. Ct. Rep. 83.

The conclusions reached by the Commission did not proceed upon arbitrary or unlawful distinctions, and are supported by evidence:

1. That certain of the tap lines before it were not bona fide common carriers as to their proprietary traffic, but merely plant facilities, and were therefore not entitled to a division out of the through rate.

Central Yellow Pine Asso. v. Vicksburg, S. & P. R. Co. 10 Inters. Com. Rep. 193; Chicago & A. R. Co. v. United States, 26 L.R.A.(N.S.) 551, 84 C. C. A. 324, 156 Fed. 558, affirmed in 212 U. S. 563, 53 L. ed.

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653, 29 Sup. Ct. Rep. 689; Chesapeake & O. R. Co. v. Standard Lumber Co. 98 C. C. A. 81, 174 Fed. 107; Crane Iron Works v. United States, 209 Fed. 238; Fathauer Co. v. St. Louis, I. M. & S. R. Co. 18 Inters. Com. Rep. 517; Fourche River Lumber Co. v. Bryant Lumber Co. 230 U. S. 316, 322, 57 L. ed. 1498, 1501, 33 Sup. Ct. Rep. 887; General Electric Co. v. New York C. & H. R. R. Co. 14 Inters. Com. Rep. 237; Re Allowances for Transfer of Sugar, 14 Inters. Com. Rep. 619; Re Transportation of Salt, 10 Inters. Com. Rep. 1; Industrial Lumber Co. v. St. Louis, W. & G. R. Co. 19 Inters. Com. Rep. 50; Industrial Railways Case, 29 Inters. Com. Rep. 212; Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22; Kaul Lumber Co. v. Central of Georgia R. Co. 20 Inters. Com. Rep. 450; Santa Fe, P. & P. R. Co. v. Grant Bros. Constr. Co. 228 U. S. 177, 185, 57 L. ed. 787, 791, 33 Sup. Ct. Rep. 474; Star Grain & Lumber Co. v. Atchison, T. & S. F. R. Co. 17 Inters. Com. Rep. 338; Solvay Process Co. v. Delaware, L. & W. R. Co. 14 Inters. Com. Rep. 246; E. E. Taenzer & Co. v. Chicago, R. I. & P. R. Co. 112 C. C. A. 153, 191 Fed. 543; United States v. Baltimore & O. R. Co. 231 U. S. 274, ante, 218, 34 Sup. Ct. Rep. 75.

2. That the switching service within 3 miles of the trunk line, being one which the trunk line held itself out to perform under the through rate, was a service "connected with transportation" when performed by the shipper or its agent; but that switching for a greater distance, so performed, was purely an accessorial service.

American Sugar Ref. Co. v. Delaware, L. & W. R. Co. 200 Fed. 652; Chicago & A. R. Co. v. United States, 26 L.R.A.(N.S.) 551, 84 C. C. A. 324, 156 Fed. 561; Fourche River Lumber Co. v. Bryant Lumber Co. 230 U. S. 316, 323, 57 L. ed. 1498, 1501, 33 Sup. Ct. Rep. 887; General Electric Co. v. New York, C. & H. R. R. Co. 14 Inters. Com. Rep. 237; Industrial Railways Case, 29 Inters. Com. Rep. 212; Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22; Re Allowances for Transfer of Sugar, 14 Inters. Com. Rep. 619; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 264, 57 L. ed. 1472, 1479, 33 Sup. Ct. Rep. 916; Solvay Process Co. v. Delaware, L. & W. R. Co. 14 Inters. Com. Rep. 246; United States v. Baltimore & O. R. Co. 231 U. S. 274, 293, ante, 218, 227, 34 Sup. Ct. Rep. 75.

3. Hence, that a plant facility tap line performing this service within the 3-mile limit was entitled to an allowance under § 15, but to no division out of the through rate.

4. That a common carrier tap line was entitled to a division or allowance out of the through rate on a haul of either more or less than 3 miles.

5. That the movement of the logs to the mill was not a transportation service to be paid for out of the through rate, but an accessorial service for which the shipper should pay.

6. That any allowance for switching within 1,000 feet of a trunk line was a mere device to effect an unlawful payment.

Fourche River Lumber Co. v. Bryant Lumber Co. 230 U. S. 316, 57 L. ed. 1498, 33 Sup. Ct. Rep. 887; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 265, 57 L. ed. 1472, 1479, 33 Sup. Ct. Rep. 946.

Assuming that the commerce court correctly interpreted the Commission's finding and order, the latter were not without support in the evidence nor erroneous in law.

Crane Iron Works v. United States, 209 Fed. 238; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 470, 54 L. ed. 280, 287, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 547, 56 L. ed. 308, 310, 32 Sup. Ct. Rep. 108.

Questions of discrimination, preference, divisions, and allowances are questions of fact peculiarly within the competency of the Commission.

Atchison, T. & S. F. R. Co. v. United States, 231 U. S. 736, ante, 460, 34 Sup. Ct. Rep. 316; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Interstate Commerce Commission v. Chicago & A. R. Co. 215 U. S. 479, 54 L. ed. 291, 30 Sup. Ct. Rep. 163; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 54 L. ed. 946, 30 Sup. Ct. Rep. 651; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916; Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct. Rep. 938; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; United States v. Pacific & A. R. & Nav. Co. 228 U. S. 87, 57 L. ed. 742, 33 Sup. Ct. Rep. 443.

Any inference drawn by the Commission even from undisputed testimony is conclusive upon the courts unless erroneous as a matter of law.

Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 547, 56 L. ed. 308, 311, 32 Sup. Ct. Rep. 108; Louisville & N. R. Co. v. United States, 197 Fed. 58.

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Mr. Charles W. Needham argued the cause, and, with Mr. Joseph W. Folk, filed a brief for the Interstate Commerce Commission:

A switching service upon a private siding or spur track is an independent service which precedes or follows a line haul.

Dixon v. Central of Georgia R. Co. 110 Ga. 173, 35 S. E. 369.

An accessorial service allowed to a single shipper is discriminatory where the service was not given to all shippers at that place.

Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822.

Prior to the enactment of the "commodities clause" and the conference of power upon the Commission to determine whether or not rates and practices by railroads are unlawful, and to prescribe reasonable rates and practices for the future, this court held that a practice by two line carriers which resulted in a violation of the Federal act prohibiting discrimination in transportation rates could be enjoined: that the court could look through the forms adopted by the carriers—the business in itself then being otherwise legitimate—to ascertain whether in fact it resulted in a violation of the act to regulate commerce. New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272. The power which the court in that case exercised has since been vested in this Commission.

The fact that these tap lines have been incorporated by proprietary mill owners, and may be regarded as common carriers as to some outside traffic, does not prevent the Commission from finding, if it be true, that as to the traffic of the proprietary mill, they are a plant facility performing a plant service.

Sante Fe, P. & P. R. Co. v. Grant Bros. Constr. Co. 228 U. S. 177, 57 L. ed. 787, 33 Sup. Ct. Rep. 474.

The act to regulate commerce prohibits rebating, directly or indirectly, "by any device whatever."

Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428.

A common carrier may, however, as to some of its work, act in a strictly private capacity.

Sante Fe, P. & P. R. Co. v. Grant Bros. Constr. Co. supra.

And it may as to certain shippers, and particularly as to a proprietary company, be a mere plant facility, and perform merely plant or industrial services, as distinguished from transportation services.

Crane Iron Works v. United States, 209 Fed. 238.

Messrs. Robert Dunlap and James L. Coleman argued the cause, and, with Messrs. T. J. Norton and Gardiner Lathrop, filed a brief for the Atchison, Topeka, & Santa Fe Railway Company:

The tap line division is a rebate, and the various steps taken by appellees in their attempts to legalize such rebate are mere devices to evade the payment of the published tariff rate in full. The incorporation of the various tap line railroads and the other steps taken by them were for the sole purpose of continuing, under the name of a division, the old open rebate which was paid direct to the lumber companies. Masquerading as railroads the lumber companies were making their traffic a matter of bargain and sale, and by the device of a secret division were compelling the trunk lines to bid against each other in the dark for such business. Such was the finding of the Interstate Commerce Commission.

Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 444, 51 L. ed. 1128, 1129, 27 Sup. Ct. Rep. 700.

The Federal law cannot be evaded by a resort to incorporation under a state statute, for all that may be done under the state statute is subject to the paramount Federal law.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436.

While it is true, perhaps, that each of the steps taken by the tap lines and lumber companies in pursuance of this scheme might be called legal, yet they result in an illegality.

Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Brundred v. Rice, 49 Ohio St. 640, 34 Am. St. Rep. 589, 32 N. E. 169.

The Commission is not precluded by the mere charter or professions of the tap line incorporation papers to inquire whether it has been utilized and is being used as a device to circumvent the prohibitions of the interstate commerce law.

United States v. Milwaukee Refrigerator Transit Co. 142 Fed. 247; E. E. Taenzer & Co. v. Chicago, R. I. & P. R. Co. 112 C. C. A. 153, 191 Fed. 543, 95 C. C. A. 436, 170 Fed. 240.

Fictions of law shall not be permitted to work any wrong.

United States v. 1960 Bags of Coffee, 8 Cranch, 415, 3 L. ed. 608.

When logic and the policy of a state conflict with a fiction due to historical tradition, the fiction must give way.

Blackstone v. Miller, 188 U. S. 206, 47 L. ed. 445, 23 Sup. Ct. Rep. 277.

Courts have frequently, and especially of late years, gone behind the corporate fic-

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tion and ascertained who were the real parties in interest, in order to prevent the carrying out of either some fraud or some circumvention of the law.

1 Cook, Corp. 6th ed. § 6, pp. 31, 32; 2 Cook, Corp. 6th ed. §§ 663, 664, pp. 1972, 1974, 1975, 1983–1987; Re Rieger, 157 Fed. 609; Miller & Lux v. East Side Canal & Irrig. Co. 211 U. S. 293, 53 L. ed. 189, 29 Sup. Ct. Rep. 111; Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 327, 40 L. ed. 444, 16 Sup. Ct. Rep. 307; Kendall v. Klapperthal Co. 202 Pa. 596, 52 Atl. 92; Watson v. Bonfils, 53 C. C. A. 535, 116 Fed. 157; Seymour v. Spring Forest Cemetery Asso. 144 N. Y. 340, 26 L.R.A. 859, 39 N. E. 365; Hunter v. Baker Motor Vehicle Co. 190 Fed. 665.

Passing from these cases which announce the general principle that incorporation cannot cover fraud, we come to cases involving the same principle, but with reference to facts almost identical with the facts in this case.

Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; United States v. Union Stock Yard & Transit Co. 226 U. S. 286, 307, 309, 57 L. ed. 226, 234, 235, 33 Sup. Ct. Rep. 83; E. E. Taenzer & Co. v. Chicago, R. I. & P. R. Co. 95 C. C. A. 436, 170 Fed. 240; General Electric Co. v. New York C. & H. R. R. Co. 14 Inters. Com. Rep. 237; Solvay Process Co. v. Delaware, L. & W. R. Co. 14 Inters. Com. Rep. 246; Crane R. Co. v. Philadelphia & R. R. Co. 16 Inters. Com. Rep. 248; Crane Iron Works v. Central R. Co. 17 Inters Com. Rep. 514; Re Transportation of Salt, 10 Inters Com. Rep. 1; Chicago & A. R. Co. v. United States, 26 L.R.A.(N.S.) 551, 84 C. C. A. 324, 156 Fed. 558; Industrial Railways Case, 29 Inters. Com. Rep. 212.

The tap line, as was found by the Interstate Commerce Commission, is a mere agency of the lumber company, and is therefore, as to the traffic of the lumber company, no more a common carrier than would be the lumber company itself. Being an agency of the shipper, the tap line cannot secure indirectly for the shipper that rebate which the shipper could not have secured directly.

Crane Iron Works v. United States, 209 Fed. 238.

It seems quite clear that a common carrier is one who carries for everyone, or the public in general, and not one who carries principally for himself. Indeed, in so far as a railroad company may carry free for its own use or in its own interest, it is a private carrier, and as to such traffic the railroad company is not subject to the prohibitions of the interstate commerce law aimed against common carriers.

Santa Fe, P. & P. R. Co. v. Grant Bros. Constr. Co. 228 U. S. 177, 57 L. ed. 787, 33 Sup. Ct. Rep. 474.

Yet no one would contend that the railroad company, because it is a common carrier, could lawfully, in respect to its own property, prefer itself, directly or indirectly, in respect to the transportation or marketing of the same over that of other shippers.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272.

In many cases where roads of this character have come before the courts upon matters requiring the court to ascertain their true nature, it has been held that they were not common carriers.

Wade v. Lutcher & M. Cypress Lumber Co. 33 L.R.A. 255, 20 C. C. A. 515, 41 U. S. App. 45, 74 Fed. 517; Demko v. Carbon Hill Coal Co. 69 C. C. A. 74, 136 Fed. 162; Williams v. Northern Lumber Co. 113 Fed. 382; Eastern & W. Lumber Co. v. Rayley, 85 C. C. A. 296, 157 Fed. 532; E. E. Taenzer & Co. v. Chicago, R. I. & P. R. Co. 95 C. C. A. 436, 170 Fed. 240; McKilvergan v. Alexander & E. Lumber Co. 124 Wis. 60, 102 N. W. 332, 17 Am. Neg. Rep. 751.

Messrs. H. M. Garwood and Luther M. Walter argued the cause, and, with Mr. W. R. Thurmond, filed a brief for appellees:

The Commission has already held, and rightly, that since the act did not define the term "common carrier," the Commission must look to the common law for the definition.

Manufacturers' R. Co. v. St. Louis, I. M. & S. R. Co. 21 Inters. Com. Rep. 312.

The service performed by each of the appellee railroads herein is a service of transportation by a common carrier railroad within the meaning of the act to regulate commerce.

Columbia Conduit Co. v. Com. 90 Pa. 307, 14 Mor. Min. Rep. 197; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Kansas & T. Coal R. Co. v. Northwestern Coal & Min. Co. 161 Mo. 288, 51 L.R.A. 936, 84 Am. St. Rep. 717, 61 S. W. 864; Butte, A. & P. R. Co. v. Montana Union R. Co. 16 Mont. 504, 31 L.R.A. 298, 50 Am. St. Rep. 508, 41 Pac. 232; Bridal Veil Lumber Co. v. Johnson, 30 Or. 205, 34 L.R.A. 368, 60 Am. St. Rep. 818, 46 Pac. 790; Madera R. Co. v. Raymond Granite Co. 3 Cal. App. 668, 87 Pac. 27; Contra Costa Coal Mines R. Co. v. Moss, 23 Cal. 323; Kettle River R. Co. v. Eastern R. Co. 41 Minn. 461, 6 L.R.A. 111, 43 N. W. 473; State, DeCamp, Prosecutor, v. Hibernia Underground R. Co. 47 N. J.

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L. 46; Ulmer v. Lime Rock R. Co. 98 Me. 581, 66 L.R.A. 387, 57 Atl. 1001; Amos Kent Lumber & Brick Co. v. Tax Assessor, 114 La. 862, 38 So. 587; Chapman v. Trinity Valley & N. R. Co. — Tex. Civ. App. —, 138 S. W. 440; Greasy Creek Mineral Co. v. Ely Jellico Coal Co. 132 Ky. 692, 116 S. W. 1189; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 417, 53 L. ed. 836, 852; 29 Sup. Ct. Rep. 527; United States v. Union Stock Yard & Transit Co. 226 U. S. 286, 57 L. ed. 226, 33 Sup. Ct. Rep. 83; United States v. Baltimore & O. R. Co. 231 U. S. 274, ante, 218, 34 Sup. Ct. Rep. 75.

The appellee railroads are not plant facilities, and do not perform a plant facility service for the appellee lumber companies herein.

Beaumont & G. N. R. Co. v. Atchison, T. & S. F. R. Co. 24 Inters. Com. Rep. 163; Crane Iron Works v. United States, 209 Fed. 238.

There was no evidence upon which the Commission could base its finding that the participation by the appellee railroads in joint rates upon the logs and lumber of the appellee lumber companies constitutes an undue and unreasonable preference, or subjects any party to unjust discrimination within the meaning of the act to regulate commerce.

F. H. Beavey & Co. v. Union P. R. Co. 176 Fed. 409, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 264, 265, 277, 57 L. ed. 1472, 1479, 1480, 1484, 33 Sup. Ct. Rep. 916.

Mr. Wylie M. Barrow argued the cause, and, with Mr. Ruffin G. Pleasant, Attorney General of Louisiana, filed a brief for the Railroad Commission of Louisiana:

We cannot apprehend how any doubt should arise as to the standing of these railroads as common carriers.

Winona R. Co. v. Blake, 94 U. S. 180, 24 L. ed. 99; Agee v. Louisville & N. R. Co. 142 Ala. 344, 37 So. 680; Amos Kent Lumber & Brick Co. v. Tax Assessor, 114 La. 862, 38 So. 587; New York C. R. Co. v. Lockwood, 17 Wall. 357-384, 21 L. ed. 627-642; Ulmer v. Lime Rock R. Co. 98 Me. 579, 66 L.R.A. 387, 57 Atl. 1001; State, De Camp, Prosecutor, v. Hibernia Underground R. Co. 47 N. J. L. 43; National Docks R. Co. v. Central R. Co. 32 N. J. Eq. 755; Chicago, B. & N. R. Co. v. Porter, 43 Minn. 527, 46 N. W. 75; Phillips v. Watson, 63 Iowa, 28, 18 N. W. 659; Chicago Dock & Canal Co. v. Garrity, 115 Ill. 155, 3 N. E. 448; Gaylord v. Chicago Sanitary Dist. 204 Ill. 576, 63 L.R.A. 582, 98 Am. St. Rep. 235, 68 N. E. 522; Butte, A. & P. R. Co. v. Montana Union R. Co. 16 Mont. 504, 31 L.R.A. 298, 50 Am. St. Rep. 508, 41 Pac. 232; Lake Superior & M. R. Co v. United States, 93 U. S. 442, 23 L. ed. 965; United States v. Union Stock Yard & Transit Co. 226 U. S. 286, 57 L. ed. 226, 33 Sup. Ct. Rep. 83; Norway Plains Co. v. Boston & M. R. Co. 1 Gray, 263, 61 Am. Dec. 423.

The courts have always taken judicial notice of the fact that a railroad company is a common carrier where a statute declares it to be such, and declaration and proof of such a fact is unnecessary.

Caldwell v. Richmond & D. R. Co. 89 Ga. 550, 15 S. E. 678; Denver & R. G. R. Co. v. Cahill, 8 Colo. App. 158, 45 Pac. 285.

Mr. Justice Day, after making the foregoing statement, delivered the opinion of the court:

A preliminary objection is made to the jurisdiction of the commerce court in that the order of the Commission is not reviewable because merely of a negative character. The commerce court examined this question, and in view of the amended order of October 30, 1912, reached the conclusion that the order was affirmative in its nature, and of a character permitting of review by proper proceedings in that court under the act giving it jurisdiction in such cases. We find no reason to differ with this conclusion, and are of opinion that the commerce court had jurisdiction in the case.

It is further insisted upon the authority of Proctor & G. Co. v. United States, 225 U. S. 282, 56 L. ed. 1091, 32 Sup. Ct. Rep. 761, and other cases in this court which have followed that decision, that in the present cases the decision rests upon conclusions of the Commission as to matters of fact only, which are within the sole jurisdiction of that body, and not reviewable in the courts. But we shall consider the case upon the findings of fact preceding this opinion, which are identical with those made by the Commission, and test the conclusions reached as matters of law, giving proper consideration to matters of fact which are not in dispute.

The final decree of the commerce court vacated and set aside the portion of the Commission's order reading as follows:

"That the tracks and equipment with respect to the industry of the several proprietary companies are plant facilities, and that the service performed therewith for the [23] respective proprietary lumber companies in moving logs to their respective mills, and performed therewith in moving the products of the mills to the trunk lines, is not a service of transportation by a common carrier railroad, but is a plant service by a plant facility; and that any

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allowances or divisions out of the rate on account thereof are unlawful and result in undue and unreasonable preferences and unjust discriminations, as found in the said reports.

"3. It is ordered, that the principal defendants [trunk lines, naming them], be, and they are hereby, notified and required to cease and desist, and for a period of two years hereafter, or until otherwise ordered, to abstain from making any such allowances to any of the above-named parties to the record in respect of any such above-described service."

The question now before this court is the correctness of this decree.

A perusal of the findings and orders of the Commission make it apparent that the grounds of decision upon which it proceeded were two: first, that these roads were mere plant facilities; second, that they were not common carriers as to proprietary traffic. The Commission held that before incorporation they were plant facilities, and that after incorporation they remained such. What the Commission means by plant facilities may be gathered from a consideration of some of its decisions. In General Electric Co. v. New York C. & H. R. R. Co. 14 Inters. Com. Rep. 237, a network of interior switching tracks, constructed to meet the necessities of the business, were held to be mere plant facilities. The same principle was applied to the internal trackage of large industrial plants in Solvay Process Co. v. Delaware, L. & W. R. Co. 14 Inters. Com. Rep. 246. These systems of internal trackage were not common carriers, and. however extensive, were intended to and did furnish service for the plants which owned and [24] operated them. But a common carrier performing service as such, regulated and operated under competent authority, as observed by Commissioner Prouty in Kaul Lumber Co. v. Central of Georgia R. Co. 20 Inters. Com. Rep. 450, 456, is no longer a mere appendage of a mill, "but a public institution." It thus becomes apparent that the real question in these cases is the true character of the roads here involved. Are they plant facilities merely, or common carriers with rights and obligations as such?

It is insisted that these roads are not carriers because the most of their traffic is in their own logs and lumber, and that only a small part of the traffic carried is the property of others. But this conclusion loses sight of the principle that the extent to which a railroad is in fact used does not determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it, rather than the extent of its business, which is the real criterion determinative of its character. This principle has been frequently recognized in the decision of the courts. We need not cite the many state cases in which it has been so held, in view of the fact that the same principle was laid down in the late case of Union Lime Co. v. Chicago & N. W. R. Co. 233 U. S. 211, ante, 924, 34 Sup. Ct. Rep. 522. In that case the supreme court of Wisconsin sustained the extension of a spur track to reach the quarries and lime kilns of a single company as a public use authorizing the exercise of the right of eminent domain, and this court affirmed the judgment. Dealing with the contention that the Wisconsin statute was invalid because it authorized action appropriating property upon the exigency of a private business, this court said (p. 221):

"A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the products of a particular plant; its cost may be defrayed by those in special need of its service at the [25] time. But none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service and are subject to the regulation of public authority. As was said by this court in Hairston v. Danville & W. R. Co. 208 U. S. 608, 52 L. ed. 641, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008: 'The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost.' There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation, and merely private sidings. See State, De Camp, Prosecutor, v. Hibernia Underground R. Co. 47 N. J. L. 43; Chicago, B & N. R. Co. v. Porter, 43 Minn. 527, 46 N. W. 75; Ulmer v. Lime Rock R. Co. 98 Me. 579, 66 L.R.A. 387, 57 Atl. 101; St. Louis, I. M. & S. R. Co. v. Petty, 57 Ark. 359, 20 L.R.A. 434, 21 S. W. 884; Dietrich v. Murdock, 42 Mo. 279; Bedford Quarries Co. v. Chicago, I. & L. R. Co. 175 Ind. 303, 35 L.R.A.(N.S.) 641, 94 N. E. 326."

The Commission has recognized this principle as applicable to tap lines, for in Central Yellow Pine Asso. v. Vicksburg, S. & P. R. Co. 10 Inters. Com. Rep. 193, 199, it said:

"While these logging roads are almost or quite without exception mill propositions

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at the outset, built exclusively for the purpose of transporting logs to the mill, they soon reach a point where they engage in other business to a greater or less extent. As the length of the road increases, as the lumber is taken off and other operations obtain a foothold along the line, various commodities besides lumber are transported, and this business gradually develops until in several cases what was at first a logging road pure and simple has become a common carrier of miscellaneous freight and passengers. Almost all these lines, even where they are run as private enterprises, [26] do more or less outside transportation, and it would be difficult to draw any line of demarcation between the logging road as such and the logging road which has become a general carrier of freight."

This representation, it is contended by the attorney general of Louisiana, who appears here in behalf of the Louisiana Railroad Commission, intervener, is aptly descriptive of the growth and development of railroads in that state.

Furthermore, these roads are common carriers when tried by the test of organization for that purpose under competent legislation of the state. They are so treated by the public authorities of the state, who insist in this case that they are such, and submit in oral discussion and printed briefs cogent arguments to justify that conclusion. They are engaged in carrying for hire the goods of those who see fit to employ them. They are authorized to exercise the right of eminent domain by the state of their incorporation. They were treated and dealt with as common carriers by connecting systems of other carriers,—a circumstance to be noticed in determining their true character. United States v. Union Stock Yard & Transit Co. 226 U. S. 286, 57 L. ed. 226, 33 Sup. Ct. Rep. 83. They are engaged in transportation as that term is defined in the commerce act and described in decisions of this court. Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Covington Stock-Yards Co. v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; United States v. Union Stock Yard & Transit Co. supra.

Applying the principles which we have stated as determinative of the character of these roads, and without repeating the facts concerning them, they would seem to fill all the requirements of common carriers so employed, unless the grounds upon which they were determined not to be such by the Commission are adequate to that end. The Commission itself as to all shippers other than those controlled by the so-called proprietary companies treated [27] them as common carriers, for it has ordered the trunk lines to re-establish through routes and joint rates as to such traffic. But, says the government (and it insists that this fact alone might well control the decision), the roads are owned by the persons who also own the timber and mills which they principally serve.

This fact is not shown to be inconsistent with the laws of the state in which they are organized and operated. On the contrary, the public authorities of that state are here insisting that these companies are common carriers. Congress has not made it illegal for roads thus owned to operate in interstate commerce. While Congress, in enacting the commodities clause amending § 1 of the act to regulate commerce (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), sought to divorce transportation from production and manufacture, and to make transportation a business of and by itself, unallied with manufacture and production in which a carrier was itself interested, the debates, which may be resorted to for the purpose of ascertaining the situation which prompted this legislation, show that the situation in some of the states as to the logging industry and transportation was sharply brought to the attention of Congress, and led to the exemption from the commodities clause of timber and the manufactured products thereof, thus indicating the intention to permit railroads to haul such lumber and products although it owned them itself. And that Congress had the constitutional power to enact such exemption was held in United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 416, 417, 53 L. ed. 836, 852, 853, 29 Sup. Ct. Rep. 527. This declaration of public policy which is now part of the commerce act cannot be ignored in interpreting the power and authority of the Commission under the act. The discussion resulting in the action of Congress shows that railroads built and owned by the same persons who own the timber were regarded as essential to the development of the timber regions in the Southwest, [28] and the necessity of such roads was dwelt upon and set forth with ample illustration by Commissioner Prouty in his concurring opinion in this case.

As we have said, the Commission by its order herein required the trunk lines to re-establish through routes and joint rates as to property to be transported by others than the proprietary owners over the trunk lines. This order would of itself create a discrimination against proprietary owners, for lumber products are carried from this

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territory upon blanket rates applicable to all within its limits. It follows that independent owners would get this blanket rate for the entire haul of their products while proprietary owners would pay the same rate plus the cost of getting to the trunk line over the tap line. The Commission, by the effect of its order, recognizes that railroads organized and operated as these tap lines are, if owned by others than those who own the timber and mills, would be entitled to be treated as common carriers and to participate in joint rates with other carriers. We think the Commission exceeded its authority when it condemned these roads as a mere attempt to evade the law and to secure rebates and preferences for themselves.

It is doubtless true, as the Commission amply shows in its full report and supplemental report in these cases, that abuses exist in the conduct and practice of these lines and in their dealings with other carriers, which have resulted in unfair advantages to the owners of some tap lines and in discriminations against the owners of others. Because we reach the conclusion that the tap lines involved in these appeals are common carriers, as well of proprietary as nonproprietary traffic, and as such entitled to participate in joint rates with other common carriers, that the determination falls far short of deciding—indeed, does not at all decide—that the division of such joint rates may be made at the will of the carriers involved and without any power of the Commission to control. That body has the [29] authority and it is its duty to reach all unlawful discriminatory practices resulting in favoritism and unfair advantages to particular shippers or carriers. It is not only within its power, but the law makes it the duty, of the Commission to make orders which shall nullify such practices resulting in rebating or preferences, whatever form they take and in whatsoever guise they may appear. If the divisions of joint rates are such as to amount to rebates or discriminations in favor of the owners of the tap lines because of their disproportionate amount in view of the service rendered, it is within the province of the Commission to reduce the amount so that a tap line shall receive just compensation only for what it actually does.

For the reasons stated, we think the Commerce Court did not err in reaching its conclusion and decision, and its judgment is affirmed.

UNITED STATES and Interstate Commerce Commission, Appts.,
v.
BUTLER COUNTY RAILROAD COMPANY.

(See S. C. Reporter's ed. 29–36.)

Carriers — tap lines — division of joint rates.

A "tap line" railroad is entitled to the same allowance from the trunk lines out of joint through rates for logs and lumber offered to such tap line by its proprietary company as it receives out of the joint rate for nonproprietary log and lumber traffic, in view of the exception in favor of lumber and manufactured products thereof contained in the provisions of the Hepburn act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), forbidding railway carriers to transport in interstate commerce articles or commodities with which they are associated or in which they are interested.

[For other cases, see Carriers, III., in Digest Sup. Ct. 1908.]

[No. 837.]

Argued April 13, 1914. Decided May 25, 1914.

APPEAL from the United States Commerce Court to review a decree annulling in part an order of the Interstate Commerce Commission under which a tap line railroad was denied the right to receive the same allowance from the trunk lines out of the joint through rates for proprietary as for nonproprietary log and lumber traffic. Affirmed.

See same case below, 209 Fed. 260.

The facts are stated in the opinion.

Mr. Blackburn Esterline, Special Assistant to the Attorney General, argued the cause, and, with Solicitor General Davis and Mr. Karl W. Kirchwey, filed a brief for the United States.

Mr. Charles W. Needham argued the cause, and, with Mr. Joseph W. Folk, filed a brief for the Interstate Commerce Commission.

Mr. William A. Glasgow, Jr., argued the cause, and, with Mr. James M. Beck, filed a brief for appellee:

The commerce court had jurisdiction of the complainant's bill and power to grant the relief prayed.

Procter & G. Co. v. United States, 225 U. S. 282, 293, 56 L. ed. 1091, 1095, 32 Sup. Ct. Rep. 761.

Having fixed the proper and legal joint rate on lumber and forest products, the Commission had no power to prescribe the proportion or division of such rate to be received by each carrier party thereto, unless the carriers should fail to agree among

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themselves upon the apportionment or division thereof.

Interstate Commerce Commission v. Northern P. R. Co. 216 U. S. 538, 545, 54 L. ed. 608, 609, 30 Sup. Ct. Rep. 417.

The fact that a company shipping over a line of railroad owns the stock of that road does not determine the question of whether the road is a common carrier or not.

Re Divisions of Joint Rates, 10 Inters. Com. Rep. 399; Crane R. Co. v. Philadelphia & R. R. Co. 15 Inters. Com. Rep. 252.

If complainant is a common carrier, it must be entitled to its share of interstate rates. The law enjoins that very thing upon the litigating parties, and it enjoins upon the Interstate Commerce Commission, upon proper showing and conditions, the enforcement of that law.

Malvern & F. Valley R. Co. v. Chicago, R. I. & P. R. Co. 182 Fed. 685.

Mr. Justice Day delivered the opinion of the court:

The appellee, the Butler County Railroad Company, filed with the Interstate Commerce Commission its petition asking for the re-establishment of through routes and joint rates with certain trunk lines, which was consolidated with and decided upon the same record as the complaints before the Commission in the Tap Line Case involved in [32] the previous cases Nos. 829 to 836, just decided, 234 U. S. 1, ante, 1185, 34 Sup. Ct. Rep. 741. The general statement of the Commission in its report and supplemental report, filed April 23 and May 14, 1912 (23 Inters. Com. Rep. 277, 549), referred to in those cases, preceded the following findings of fact:

The Butler County Railroad Company, the Brooklyn Cooperage Company, which owns the railroad company, and the Great Western Land Company, owning most of the timber reached by the railroad, are all subsidiaries of the American Sugar Refining Company.

The tap line, which was acquired from the cooperage company, consists of a section of track at Linstead, near Poplar Bluff, Missouri, extending into the plant of the cooperage company, and connecting it with the St. Louis, Iron Mountain & Southern Railway and the St. Louis & San Francisco Railroad, which are within three-quarters of a mile of the plant, and the principal track extending about 7 miles from Lowell Junction, a station on the Iron Mountain, 7½ miles from Poplar Bluff, to Baileys, with a branch about 3 miles from Rossville, an intermediate point, and with trackage rights over unincorporated spurs from Baileys belonging to the cooperage company, and over the Iron Mountain from Lowell Junction to Poplar Bluff, paying for the latter 65c. a train mile for 25 cars. It has 2 locomotives, 2 passenger coaches, 3 cabooses, and about 100 freight and log cars.

The tap line hauls the logs, all of which are hardwood, from a connection with the unincorporated track to Lowell Junction, then over the Iron Mountain to Linstead, and thence to the mill over its own track, where they are unloaded by the cooperage company. The regular manufacturing rate under the Missouri distance tariff is charged the cooperage company by the tap line, 1 to 1½ c. per 100 pounds, approximately $4 per car. The loaded cars are switched to the Frisco or Iron Mountain, less than 1 [33] mile, and the appellee receives from them an allowance of from 2 to 5c. per 100 pounds. The rates from tap line points, including the mill at Linstead, are in all cases 2c. higher than the rates of the trunk lines from Poplar Bluff, excepting to New Orleans and New York, to which points most of the shipments of the cooperage company go, and to which Poplar Bluff rates apply.

One hundred and eighty-four thousand six hundred and eighty-eight tons of forest products and 2,475 tons of other freight were hauled during the year ending June 30, 1910; of the first amount 107,527 tons being furnished by the controlling interests, 77,161 tons by outsiders, but all the timber coming from the lands of the Great Western Land Company, and of the miscellaneous freight, 1,195 tons of inbound machinery and coal being for the proprietary companies. Passenger revenues were $4,104.22. Three mixed trains in each direction are operated daily between Linstead and Melville, a point beyond Baileys on the unincorporated track, two being used principally for passenger service.

The Great Western Land Company furnishes timber to several independent industries on the tracks of the tap line near Linstead, the tap line switching their product to the trunk lines. Their factory sites are leased from the cooperage company, the purpose of making such leases being to secure traffic upon which the tap line might obtain divisions. A few independent producers on the main track of the tap line team their supplies and ship their products over the tap line. They pay the local rate of the tap line and the trunk line rate, or a through rate that is 2 cents higher than the Poplar Bluff rate.

The Commission found that the sugar company, having refineries at New Orleans and New York, so adjusted the rates to such places as to induce movements to them and restrict movements to other points, and

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limited the amount the tap line might receive on proprietary traffic [34] moved from the mill to the Iron Mountain and Frisco to a switching charge fixed at $1.50 per car.

The order of the Commission, so far as it related to the appellee, required the trunk lines named to re-establish and maintain with it the through interstate routes and joint rates in effect, in accordance with their respective tariffs filed with the Commission on April 30, 1912; provided that the rates on yellow-pine lumber and articles taking the same rates from points on the line of the appellee should not exceed the current rates in effect from the junction points, and

"Provided further, that the allowances or divisions out of such joint rates to be paid by said principal defendants [the trunk lines], respectively, to the said last-named parties to the record [the appellee and others] on the products of the mills of the said respective proprietary companies named in said report, shall not exceed the divisions or allowances specified in the aforesaid supplemental report of the Commission [in this instance the switching charge of $1.50 per car] which are hereby fixed as maximum divisions or allowances thereon, until further order, the Commission finding upon the record that any allowances or divisions in excess thereof result in undue preferences and unjust discriminations and are unlawful."

The appellee then brought suit in the United States commerce court, seeking to enjoin and annul the order of the Commission in so far as it forbade a division out of the joint rates of more than $1.50 per car. The commerce court held, after stating that the Commission had found this road to be a common carrier both of logs and of lumber, and not a plant facility, but had denied it the right to receive either a division or allowance for the log traffic, and only an allowance for the lumber traffic of the proprietary mill, while permitting it to receive a division out of the joint rate for both log and lumber traffic of nonproprietary companies, that the reasons stated in the other [35] opinion applied here, and that the distinctions made were arbitrary, and the order beyond the power of the Commission, and the commerce court decreed that that part of the order of the commerce court above quoted, with reference to the divisions and allowances to be made out of the joint rates, be vacated and set aside as to the appellee. 209 Fed. 260.

The United States and the Interstate Commerce Commission, the latter having intervened in the proceeding in the commerce court, prosecuted this appeal.

This case was argued on the same day with the other tap line cases, and much that is said in those cases is applicable here. The Commission ordered the restoration of the schedule of tariffs of April 30, 1912, thus recognizing the right of this road to participate in joint tariffs with other common carriers and to receive a division out of the joint rates. But the Commission excepted from this right traffic offered to the appellee by its proprietary company, evidently upon the theory enforced in the other cases before the Commission that, as to such traffic, the railroad company had not the rights of a common carrier, and as to such traffic limited the compensation of the railroad company to a switching charge of $1.50 per car.

We think the commerce court correctly held the fact that the same ownership controlled the freight offered and the railroad company would not justify the different rate imposed upon the same kind of traffic. Under the commodities clause of the act to regulate commerce, as amended (34 Stat. at L.) 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), the right of a carrier, as we have said in the former opinion in these cases, to carry this class of freight, although owned by it, is recognized as lawful. This being so, such carrier, until the law otherwise provides, has the right to treat such freight in the same manner as it does like freight independently owned. Of course, if the division of the rates [36] is a mere cover for rebates or discriminations, such practices may be controlled by the Commission under the authority given to it in the act to regulate commerce.

We find no error in the disposition the Commerce Court made of this case, and its judgment is therefore affirmed.

UNITED STATES OF AMERICA, Plff. in Err.,
v.
RUDOLPH AXMAN† and American Bonding Company of Baltimore.

(See S. C. Reporter's ed. 36–45.)

Public contracts — breach — reletting.

A change in the place of dumping the spoil, made when reletting the contract for the completion of the dredging work in San Pablo bay, prevents the United States from recovering under the provision of the original contract by which it might annul the same for the contractor's default, and recover whatever sums might

†Death of Rudolph Axman, one of the defendants in error herein, suggested, and appearance of Julia A. Axman filed and entered March 9, 1914, as a party defendant in error herein.

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be expended in completing the contract in excess of the contract price, where, by the original contract, the place of dumping the spoil was made an essential and specific requirement, which could only be modified by written agreement, and the engineer in charge had refused permission to dump the spoil elsewhere.

[For other cases, see Contracts, VIII.; United States, VI. e, in Digest Sup. Ct. 1908.]

[No. 242.]

Argued March 9, 1914. Decided May 25, 1914.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed, on a second writ of error, a judgment of the Circuit Court for the Northern District of California in favor of defendants in a suit by the United States to recover on a contract for public work. Affirmed.

See same case below, 113 C. C. A. 512, 193 Fed. 644.

The facts are stated in the opinion.

Solicitor General **Davis** argued the cause and filed a brief for the United States:

Where the government relets a contract, the sureties—and *a fortiori* the principal—are not relieved because there are differences in the terms which diminish the cost of the work as relet.

United States v. McMullen, 222 U. S. 460, 56 L. ed. 269, 32 Sup. Ct. Rep. 128.

Mr. **Frank W. Aitken** argued the cause, and, with Mr. John R. Aitken, filed a brief for Julia A. Axman:

There can be no recovery except for completing the work.

O'Connor v. Henderson Bridge Co. 95 Ky. 633, 27 S. W. 251, 983; American Surety Co. v. Woods, 45 C. C. A. 282, 105 Fed. 741, 106 Fed. 263.

In completing a contract, the cost of doing the same work, in accordance with the same specifications, can alone be considered, even where there has been a breach and damages are allowed.

White v. Sisters of Charity, 79 Ill. App. 646.

Perhaps no principle is better established than the rule that where a surety's liability has been changed by the substitution of one obligation for another, the court will not enter upon an inquiry as to whether the change was in fact detrimental. Where a substantial change is shown, the question of detriment will not be inquired into.

Miller v. Stewart, 9 Wheat. 700, 6 L. ed. 194; Prairie State Nat. Bank v. United States, 164 U. S. 227, 41 L. ed. 412, 17 Sup. Ct. Rep. 142; Reese v. United States, 9 Wall. 13, 19 L. ed. 541; Stearns, Suretyship, §§ 50, 72; State v. Medary, 17 Ohio, 565; Brandt, Suretyship, 812; Taylor v. Johnson, 17 Ga. 521; Calvert v. London Dock Co. 2 Keen, 638, 7 L. J. Ch. N. S. 90, 2 Jur. 62; Holme v. Brunskill, L. R. 3 Q. B. Div. 495, 47 L. J. Q. B. N. S. 610, 38 L. T. N. S. 838; Burnes v. Fidelity & D. Co. 96 Mo. App. 467, 70 S. W. 518; Alcatraz Masonic Hall Asso. v. United States Fidelity & G. Co. 3 Cal. App. 338, 85 Pac. 157; Durrell v. Farwell, 88 Tex. 98, 30 S. W. 539, 31 S. W. 185; United States v. Freel, 92 Fed. 306.

The surety on such a contract as this is released even by a mere waiver, by the government, of part of the work.

United States v. Corwine, 1 Bond, 339, Fed. Cas. No. 14,871.

The contract did not authorize the change.

United States v. Freel, 92 Fed. 299, 39 C. C. A. 491, 99 Fed. 239, 186 U. S. 309, 46 L. ed. 1177, 22 Sup. Ct. Rep. 875; American Bonding & T. Co. v. Gibson County, 62 C. C. A. 397, 127 Fed. 673; United States v. Robeson, 9 Pet. 319, 327, 9 L. ed. 142, 145.

The question is not whether the government would have had to do the work exactly and precisely as required by the specifications. The change made was material and substantial. The identity of the work was changed: the things to be done under the second contract were not the things contemplated by the first. The rule is well stated in Reissaus v. Whites, 128 Mo. App. 135, 106 S. W. 607.

Mr. **Edward Duffy** argued the cause, and, with Mr. Jesse W. Lilienthal, filed a brief for the American Bonding Company:

The test of the liability of the defendants is not to be measured by the question as to whether or not the main purpose of the contract was the dredging of the channel. The test is whether or not the work done by the North American Dredging Company was the work which Axman had left undone.

United States v. McMullen, 222 U. S. 460, 56 L. ed. 269, 32 Sup. Ct. Rep. 128.

In arriving at the intention of the parties it is necessary to consider the terms of the contract, and to keep in mind that, as this contract was drawn by the plaintiff in error, any ambiguity in its terms must be solved most strongly against it.

United States v. O'Brien, 220 U. S. 321, 55 L. ed. 481, 31 Sup. Ct. Rep. 406.

The changes made did not bind either Axman or his surety.

United States v. McMullen, supra; United States v. Freel, 186 U. S. 309, 46 L. ed. 1177, 22 Sup. Ct. Rep. 875.

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Mr. Justice Day delivered the opinion of the court:

Suit was brought by the United States to recover on a contract between the United States and Axman, with the American Bonding Company, as surety, for dredging in San Pablo bay, California. The first trial resulted in a judgment for the United States, which was reversed by the circuit court of appeals for the ninth circuit. 93 C. C. A. 322, 167 Fed. 922. [39] On new trial judgment directed in favor of the defendants was affirmed by the circuit court of appeals (113 C. C. A. 512, 193 Fed. 644), and the case is brought here.

It appears that on the 25th of August, 1902, the United States called for bids for dredging in San Pablo bay. On September 30, 1902, Axman submitted his proposal to furnish all the plant, labor, and materials for the work. On November 21, 1902, a written contract was entered into between Axman and the United States for the work. Axman was to do such dredging in the bay as might be required by the government engineer, in accordance with certain specifications, for the sum of 11.44 cents per cubic yard. The specifications, which were made a part of the contract, contained, among others, the following paragraphs:

"35. The shoal to be dredged is in San Pablo bay, California, is about 5 miles in length, and has a least depth of 19 feet at low water. It extends from Pinole point to Lone Tree point, and is distant 1¼ to 1½ statute miles N. W. of the points referred to. The average depth of the excavation is about 9 feet.

"36. The work to be done is to excavate a channel through the shoal, to have a bottom width of 300 feet; a depth of 30 feet at mean low water, and a length of about 27,000 feet; to deposit the spoil as near the south shore as practicable, within lines drawn between Pinole point and Lone Tree point, at such places as may be designated by the engineer officer in charge; and to impound the material behind bulkheads or dikes of suitable construction, subject to approval by the engineer officer in charge. which must be built and maintained by and at the expense of the contractor during the life of the contract."

"39. All dredging material is to be deposited within the limits of the area described in paragraph 36. The method of deposit will be subject to approval by the engineer officer in charge."

[40] "31. The contractor will be required to commence work under the contract within sixty days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, to prosecute the said work with faithfulness and energy, and to complete it within twenty-eight (28) months after the date of commencement."

"46. The work must progress at the rate of at least 100,000 cubic yards per month, and to entitle the contractor to the monthly payments provided for in paragraph 30 of these specifications, an average of not less than 100,000 cubic yards per month must have been dredged and deposited; the calculation of averages to be made from the day on which the contract requires the work to be commenced."

A place for the building of the bulkhead was designated in accordance with paragraph 36 of the specifications, and Axman built a bulkhead 2,400 feet long, consisting of two arms, one of 1,800 feet and one of 600 feet. The outlines of the channel to be dredged were also indicated. Axman began work and continued intermittently until December 24, 1903, up to which date he had removed 196,000 cubic yards, but had not in any month removed 100,000 cubic yards. It appears that the barges in Axman's outfit were of such draft that they were unable to get behind the bulkhead except at high tide; that he applied to the engineer officer in charge to be allowed to dump the spoil on the north side of the channel or down at "The Sisters," but permission was refused him so to do. This place is the one where the material was subsequently dumped when the contract was relet.

Paragraph 4 of the contract provides:

"4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the [41] work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successors legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money or reserve percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be

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paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States, in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserve percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise, in accordance with law."

There are other paragraphs permitting the Chief of Engineers, if he sees fit, to employ additional plant or purchase materials, etc., to insure the completion of the work within the time specified, charging the cost thereof to the contractor; such provision, however, not to be construed so as to affect the right of the government to annul the contract. The government, on the ground that Axman [42] had failed to comply with the requirements of the specifications, proceeded under the provisions of paragraph 4, wherein it will be seen it was stipulated that the United States might have the right to recover from the party of the second part whatever sums might be expended by the party of the first part in completing the contract.

When the contract was relet it was advertised in the alternative, giving the contractor the right to deposit spoil where Axman was required to deposit it within lines drawn between Pinole point and Lone Tree point at such places as might be designated by the engineer officer, and to impound the material behind bulkheads of suitable construction, subject to the approval of the engineer officer, to be built and maintained at the expense of the contractor, or to deposit the spoil in water exceeding 50 feet in depth lying within the area bounded by lines drawn from The Sisters to Point San Pablo, thence to Marin Islands, and thence back to The Sisters. The bid accepted and the contract made provided for the deposit of the spoil in deep water at The Sisters. At the trial the government offered evidence of witnesses as to the fairness of the price paid the North American Dredging Company, the new contractor, under the relet contract, and as to whether it cost more to dredge and dump the spoil behind the line drawn between Pinole point and Lone Tree point than to dredge and dump in deep water. All of the opinion evidence offered by the government was received by the court under objection, and at the conclusion of the case ruled out, and the jury instructed to render a verdict for the defendants.

It is thus apparent that the real question in the case is whether the contract relet for the completion of the work under paragraph 4 of the original contract was a contract for work for which Axman was bound and which he had failed to carry out, or whether it was a different contract, and therefore one for which Axman and his surety cannot [43] be held, and which cannot be used for the measure of recovery for breach of the original contract.

The government insists that the main purpose of the original contract was to secure the dredging of the channel, and that the place of dumping the spoil was but incidental. The contract, however, does not so read. It specifically made the place of dumping the spoil an essential and particular term of the contract. It is not necessary to inquire into the reason which actuated the government in making this requirement. It may be that it desired the spoil to be retained at a place outside of the channel, and that such retention was a better way of doing the work than to deposit the spoil in deep water. It is enough to say that the contract, part of which we have heretofore set forth, specifically provided for dumping the spoil behind the bulkhead. As we have said, the engineer refused permission to dump the spoil at a place other than that designated in the specifications. This position of the engineer was warranted by the terms of the contract, for by paragraph 36 of the specifications the depositing of material and impounding it behind bulkheads, as provided in the contract, were made an essential part of the work to be done, and it is provided by specification 38 that material deposited otherwise than as specified will not be paid for, and by paragraph 39 that all dredged material was to be deposited within the area specified in paragraph 36, and by paragraph 53 that all material must be excavated and deposited under the supervision of the engineer officer in charge. It therefore follows that not only was Axman to dredge the channel as required by the contract, but he was to deposit the spoil as therein specified. Dredging the channel would not be enough to show performance of his contract, unless he complied with the other material requirement as to the deposit of the spoil. The new contract contained a different stipulation as to the dumping of the spoil. Upon the showing made in this case we think the change in the [44] place of dumping the spoil was very material, and could not be made consistently with the terms of the agreement under which Axman undertook to perform the

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work or be liable as stipulated in paragraph 4.

Both sides refer to the case of United States v. McMullen, 222 U. S. 460, 56 L. ed. 269, 32 Sup. Ct. Rep. 128. In that case a suit was brought upon a contract and bond, the contract providing for certain dredging. The contractor asked for leave to dump the spoil in deep water instead of on shore, which was at first refused, but afterwards granted. The contractor, however, failed to do the work and abandoned it. The Navy Department declared the contract void, and, after advertising, entered into a new contract. The defense principally made and treated of in the opinion of the court rested upon the alleged extension of time, which, it was contended, worked a discharge of the surety. After disposing of that question in favor of the government, this court said (p. 471):

"The objection that the second contractor does not appear to have completed the work intended to be accomplished by the first, that is, to have made a channel of a certain depth, does not impress us. The first contract was for certain work for a certain object, but limited and subject to change as the appropriations might require. The second was for the same on the same plans and specifications, the only difference being in the parties, the price, and the liberty given to the second contractor to dump in deep water, which diminished the cost. In the first contract the government reserved an absolute right of choice in this regard. Whether the object of the contract was attained is immaterial, so long as the work done towards it was work that the first contractor had agreed to perform."

We thus observe that in the McMullen Case it was found that the liberty given to the second contractor to dump in deep water did not change the contract, because in the [45] first contract the government reserved an absolute right of choice in this regard. In the present case there was no such right of choice. The place of dumping spoil was made, as we have said, a specific requirement of the contract. Under § 6 such changes as are here involved must be agreed upon in writing by the contracting parties, the agreement setting forth clearly reasons for the change, giving quantity and prices, to take effect only upon the approval of the Secretary of War. Minor changes are provided for in § 58 of the specifications, but clearly such an important change as this one has proven to be is not of that character.

In the McMullen Case, in treating of the right reserved in the first contract giving the government an absolute choice of the dumping ground, it was concluded, "whether the object of the contract was attained is immaterial, so long as the work done towards it was work that the first contractor had agreed to perform." We are clearly of the opinion in this case that the work done under the second contract was not the work which the first contractor had agreed to perform. While it is true it accomplished the dredging of the channel in the same bay, it did this with a disposition of the spoil not permitted under the first contract, and in a material matter was different from the contract first entered upon.

We reach the conclusion that the Circuit Court of Appeals rightly decided this case, and its judgment is accordingly affirmed.

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[46] LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plff. in Err.,
v.
CATESBY WOODFORD and John T. Ireland.

(See S. C. Reporter's ed. 46-52.)

Error to state court — Federal question — how raised.

A Federal question is not so presented as to sustain a writ of error from the Federal Supreme Court to the highest court of a state where the latter court declined to pass upon the question, because it was not appropriately raised in the trial court in the manner required by the state practice, and there does not appear to have been any attempt on the part of the state court to evade the decision of such question by an unwarranted resort to alleged rules of local practice.

[For other cases, see Appeal and Error, 1251-1256, 1271-1277, in Digest Sup. Ct. 1908.]

[No. 531.]

Submitted March 23, 1914. Decided May 25, 1914.

Note.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

As to when Federal question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court over state courts—see note to Chicago, I. & L. R. Co. v. McGuire, 49 L. ed. U. S. 414.

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IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Fayette Circuit Court, in that state, in favor of plaintiffs in a suit against a carrier to recover damages for the loss of a shipment. Dismissed for want of jurisdiction.

See same case below, 152 Ky. 398, 153 S. W. 722; on rehearing, 153 Ky. 185, 154 S. W. 1083.

The facts are stated in the opinion.

Messrs. Charles H. Moorman, Benjamin D. Warfield, and Henry Lane Stone submitted the cause for plaintiff in error. Mr. Robert A. Thornton was on the brief:

This case does not fall under the third clause, but under the second clause, of § 709, of the Revised Statutes of the United States.

Chapman v. Goodnow (Chapman v. Crane) 123 U. S. 540, 548, 31 L. ed. 235, 238, 8 Sup. Ct. Rep. 211; Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 488, 43 L. ed. 521, 525, 19 Sup. Ct. Rep. 247; Erie R. Co. v. Purdy, 185 U. S. 153, 46 L. ed. 850, 22 Sup. Ct. Rep. 605; French v. Hopkins, 124 U. S. 524, 31 L. ed. 536, 8 Sup. Ct. Rep. 589; Morrison v. Watson, 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 53, 54, 56 L. ed. 327, 347, 348, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240.

There was no intentional relinquishment by plaintiff in error of a known right; therefore, there was no waiver amounting to an estoppel.

29 Am. & Eng. Enc. Law, 2d ed. 1091, 1095; Cable v. United States L. Ins. Co. 49 C. C. A. 216, 111 Fed. 19; Christenson v. Carleton, 69 Vt. 91, 37 Atl. 226; First Nat. Bank v. Hartford Life & Annuity Ins. Co. 45 Conn. 25; Ansonia v. Cooper, 66 Conn. 184, 33 Atl. 905; Rice v. Fidelity & D. Co. 43 C. C. A. 270, 103 Fed. 427; Stackhouse v. Barnston, 10 Ves. Jr. 466; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267.

Messrs. R. A. Thornton, Charles H. Moorman, and Benjamin D. Warfield filed a separate brief for plaintiff in error.

Mr. Robert B. Franklin submitted the cause for defendant in error. Mr. Robert C. Talbott was on the brief:

The final judgment of the highest court of a state is not reviewable in the Supreme Court of the United States as a decision in favor of the validity of a state statute challenged as repugnant to the Federal Constitution, or as a denial of a right or immunity under such Constitution, where such question is not raised or specially set up in the trial court, and the appellate court does nothing more than decline to pass upon the Federal question because it is not raised in the trial court as required by the state practice.

Erie R. Co. v. Purdy, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605.

A judgment of a state court upholding a state statute which is claimed to violate the Federal Constitution is not reviewable in the Supreme Court of the United States where the state court declined to pass on the Federal question, because it was not raised in the trial court as required by the state practice.

Layton v. Missouri, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137.

The Federal right, title, privilege, or immunity must be set up or claimed in the trial court whenever, under the state practice, the highest state court, in reviewing the judgments of the trial court, refuses to consider questions not therein raised.

Baldwin v. Kansas, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; Spies v. Illinois, 123 U. S. 143, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22; Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; Morrison v. Watson, 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995; Erie R. Co. v. Purdy, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605.

To give this court jurisdiction to review the decision of a state court, any title, right, privilege, or immunity claimed under the Constitution or United States statutes must have been specially set up in the proper court below.

Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22.

To give this court jurisdiction to revise the judgment of the state court, it must appear that the point on which plaintiff relies was made in the state court and decided against him.

Maxwell v. Newbold, 18 How. 511, 15 L. ed. 506; Taylor v. Morton, 2 Black, 481, 17 L. ed. 277; Susquehanna Boom Co. v. West Branch Boom Co. 110 U. S. 57, 28 L. ed. 69, 3 Sup. Ct. Rep. 408; Caperton v. Bowyer, 14 Wall. 216, 20 L. ed. 882; Cockroft v. Vose, 14 Wall. 5, 20 L. ed. 875; Messenger v. Mason, 10 Wall. 507, 19 L. ed. 1028; Farney v. Towle, 1 Black, 350; 17 L. ed. 216; Hoyt v. Shelden (Hoyt v. Thompson) 1 Black, 518, 17 L. ed. 65; Santa Cruz County v. Santa Cruz R. Co. 111 U. S. 361, 28 L. ed. 456, 4 Sup. Ct.

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Rep. 474; The Victory, 6 Wall. 382, 18 L. ed. 848.

The Supreme Court of the United States can exercise appellate jurisdiction over the supreme court of a state in only a few special cases; and the ground of jurisdiction must be stated with precision, and it must appear of record that the right claimed was presented to the state court, and that the decision was against such right.

Poydras De La Lande v. Louisiana, 18 How. 192, 15 L. ed. 350.

It is necessary to the jurisdiction of the Supreme Court under U. S. Rev. Stat. 709, U. S. Comp. Stat. 1901, p. 575, that the title, right, privilege, or immunity relied on be specifically set up or claimed in the state court at the proper time and in the proper way. The decision must be against the title, right, privilege, or immunity so set up or claimed.

Schuyler Nat. Bank v. Bollong, 150 U. S. 85, 37 L. ed. 1008, 14 Sup. Ct. Rep. 24.

Where, at the trial before a jury, no objection was made to the form of the oath, or on making the motion for a new trial, or on the motion for arrest of judgment, and such objection was first suggested in the state supreme court, and that court refused to consider the objection on the ground that it was not taken at the trial,—the Supreme Court of the United States cannot consider it, because the right was not set up or claimed in the proper court below.

Baldwin v. Kansas, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193.

A title is not claimed under an act of Congress so as to give the Supreme Court of the United States jurisdiction of a state court denying the validity of such title, where the claim is made only in the argument of counsel, and not in the pleadings.

Yesler v. Washington Harbor Line, 146 U. S. 646, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190.

The suggestion of a violation of a Federal right, first made in a petition for the review, in the highest state court, of the judgment of an intermediate appellate court, is too late to serve as a basis for the exercise of the appellate jurisdiction of the Supreme Court of the United States, where it does not affirmatively appear that the state court passed upon the Federal question, and the denial of the petition may well have been upon the ground that the question, not having been suggested in the court below, could not be made available on appeal.

Chicago, I. & L. R. Co. v. McGuire, 196 U. S. 128, 49 L. ed. 413, 25 Sup. Ct. Rep. 200.

A Federal question is not set up in a state court soon enough to sustain a writ of error from the Supreme Court of the United States, where it is first presented by new pleas filed after the case was decided by the supreme court of the state and remanded to the lower court for a new trial, and the supreme court, on a second appeal, refused to reopen the question involved on the first hearing, to let in the Federal defense presented by the new pleas.

Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240.

A writ of error to a state court must be dismissed by the Supreme Court of the United States if no Federal question was decided by the state court.

California v. Holladay, 159 U. S. 415, 40 L. ed. 202, 16 Sup. Ct. Rep. 53.

It is not sufficient to give the Supreme Court jurisdiction in the case of a writ of error to the supreme court of a state that a Federal question might have been raised, or might have been decided, and was involved in the case; but it must appear, either in direct terms or by necessary intendment, that it was in fact brought to the notice of the court and decided by it.

Crowell v. Randell, 10 Pet. 368, 9 L. ed. 458; Ocean Ins. Co. v. Polleys, 13 Pet. 157, 10 L. ed. 105; Coons v. Gallaher, 15 Pet. 18, 10 L. ed. 645; Mills v. Brown, 16 Pet. 525, 10 L. ed. 1055.

To give the United States Supreme Court jurisdiction of a writ of error to the state court, the record must show that a Federal question not only might have been, but actually was, raised and decided adversely to the plaintiff in error.

Endowment Benev. Asso. v. Kansas, 120 U. S. 103, 30 L. ed. 593, 4 Sup. Ct. Rep. 499; Church v. Kelsey, 121 U. S. 282, 30 L. ed. 960, 7 Sup. Ct. Rep. 897; Clark v. Pennsylvania, 128 U. S. 395, 32 L. ed. 487, 9 Sup. Ct. Rep. 113; Gray v. Coan, 154 U. S. 589, 38 L. ed. 1088, 14 Sup. Ct. Rep. 1168.

Even though it does not conclusively appear to be the fact, yet, where the state court may properly have disposed of the case without deciding the Federal question, its judgment is not reviewable in the Supreme Court of the United States.

Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635.

The Supreme Court will not review a final state court judgment, even if it denies some title, right, privilege, or immunity of the unsuccessful party, unless it appears from the record that such title, right, privilege, or immunity was specially set up or claimed and denied in the state court as belonging to such party under the Constitution or some treaty, statute, commission, or authority of the United States.

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F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

To give the United States Supreme Court jurisdiction, under U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, it must appear of record that a Federal question was specifically set up or claimed in the state court at the proper time and in the proper way, and that its decision was against it.

Brooks v. Missouri, 124 U. S. 394, 31 L ed. 454, 8 Sup. Ct. Rep. 443; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; Texas & P. R. Co. v. Southern P. Co. 137 U. S. 48, 34 L. ed. 614, 11 Sup. Ct. Rep. 10; French v. Hopkins, 124 U. S. 524, 31 L. ed. 536, 8 Sup. Ct. Rep. 589; Chappell v. Bradshaw, 128 U. S. 132, 32 L. ed. 369, 9 Sup. Ct. Rep. 40.

An assignment of errors cannot avail to present a Federal question when there is an entire absence in the record of any fact showing that such question was decided in the state court.

Fowler v. Lamson, 164 U. S. 252, 41 L. ed. 424, 17 Sup. Ct. Rep. 112.

The right, title, privilege, or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way.

Mutual L. Ins. Co. v. McGrew, 188 U. S. 292, 47 L. ed. 480, 62 L.R.A. 33, 23 Sup. Ct. Rep. 375; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Morrison v. Watson, 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995; Miller v. Texas, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; Maxwell v. Newbold, 18 How. 515, 15 L. ed. 508; Hoyt v. Shelden (Hoyt v. Thompson) 1 Black, 518, 17 L. ed. 65.

The proper time is in the trial court, whenever that is required by the state practice, in accordance with which the highest court of a state will not revise the judgment of the court below, on questions not therein raised.

Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22; Jacobi v. Alabama, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48; Layton v. Missouri, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137; Erie R. Co. v. Purdy, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; Mutual L. Ins. Co. v. McGrew, 188 U. S. 308, 47 L. ed. 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Baldwin v. Kansas, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193.

The decision of a supreme court of a state on the second appeal in the case, that it will not reopen the question involved upon the first hearing to let in a Federal defense presented by new pleas filed after the case was sent down for a new trial, merely settles the question of practice, and does not present a Federal question.

Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 8, 45 L. ed. 401, 21 Sup. Ct. Rep. 240.

Where the case is diposed of on the ground of waiver, no Federal question is presented.

Beaupre v. Noyes, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131.

A decision of a state court resting on the grounds of state procedure does not present a Federal question.

Tripp v. Santa Rosa Street R. Co. 144 U. S. 126, 36 L. ed. 371, 12 Sup. Ct. Rep. 655; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; Wood v. Brady, 150 U. S. 18, 37 L. ed. 981, 14 Sup. Ct. Rep. 6; Gibson v. Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904.

A decision of a state court in an action founded on a statute of another state creating an action for death, qualified by one year's limitation, that the failure to plead the statute in the complaint was cured by its inclusion in the answers, filed more than one year after the death, presents no question as to the full faith and credit to be given such statute, so as to sustain a writ of error under U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, but involves nothing more than a question of local pleading and practice.

Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 55 L. ed. 789, 31 Sup. Ct. Rep. 534; Texas & N. O. R. Co. v. Gross, 221 U. S. 417, 55 L. ed. 796, 31 Sup. Ct. Rep. 536.

A Federal question, although referred to in the assignments of error in the state appellate court and in the Federal Supreme Court, cannot be considered by the latter where it does not appear that the state court dealt with the question, and it may have refused to do so on the ground that it was not raised in the trial court.

Cox v. Texas, 202 U. S. 446, 50 L. ed. 1099, 26 Sup. Ct. Rep. 671.

The Federal Supreme Court has no jurisdiction to review a judgment of a state court involving a question of estoppel or quasi estoppel broad enough to support the judgment without reference to any Federal question. Leonard v. Vicksburg, S. & P. R. Co. 198 U. S. 416, 49 L. ed. 1108, 25 Sup. Ct. Rep. 750, holding that a decision of a state court that defendants in ejectment, who had successfully insisted in a prior suit in a Federal court that only a portion of a tract of land was in issue, cannot in-

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voke the rule that a judgment determining the ownership of a portion of a tract is conclusive between the same parties, claiming under the same titles, as to the ownership of the entire tract, is not reviewable as denying any Federal rights asserted under the Federal court's judgment; as the state court merely applied the doctrine which forbids parties from assuming inconsistent positions in judicial proceedings.

Even, however, if we were at liberty to disregard the action of the state court and attribute to the plaintiff in error the status claimed by him, as in addition the court below held that the right to the relief prayed was in any event barred by long delay and laches, this would be sufficient to prevent us from reviewing the alleged Federal question.

Moran v. Horsky, 178 U. S. 205, 207, 44 L. ed. 1038, 1039, 20 Sup. Ct. Rep. 856; Preston v. Chicago, 226 U. S. 447, 57 L. ed. 293, 33 Sup. Ct. Rep. 177.

Whether the jurisdiction of this court is properly invoked depends upon whether any Federal right or immunity was duly set up or claimed by the plaintiff in error in the state court, and there overruled.

El Paso & S. W. R. Co. v. Eichel, 226 U. S. 590, 57 L. ed. 369, 33 Sup. Ct. Rep. 179.

The preliminary question is whether any such claim or right, under the 14th Amendment, was "specially set up" in the state court, and whether the record shows that the right so specially set up was denied.

Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 326, 57 L. ed. 857, 33 Sup. Ct. Rep. 510.

The court's denial of the petition for rehearing after having "maturely considered" it, is no more than a refusal to rehear the case.

Ibid.

The right to review the judgment of the Illinois court arises under § 709 of U. S. Rev. Stat. and is therefore limited to a Federal right specially set up by the party seeking to take advantage of it, and denied by the state court.

Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 559, 57 L. ed. 966, 33 Sup. Ct. Rep. 581.

No question of Federal right reviewable by the Federal Supreme Court by writ of error to the Oklahoma supreme court was raised by the act of the United States court for the Indian territory in overruling a demurrer by which defendant sought to assert a right under the Federal Constitution to a trial by jury, where, under the local practice, such an objection is not a ground for demurrer.

Dill v. Ebey, 229 U. S. 199, 57 L. ed. 1148, 33 Sup. Ct. Rep. 620.

A judgment of the supreme court of Oklahoma in a case originally begun in the United States court for the Indian territory is not reviewable in the Federal Supreme Court, under U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, on the ground of a deprivation of the right to trial by jury, where such right was asserted in the territorial court by demurrer, in which, under the local practice, it had no proper place, and was first reiterated in a motion for new trial in the state court when there was no issue of fact to be tried.

Dill v. Ebey, supra.

A decision of the state court adverse to the parties asserting a title to lands under state grants, which they claim cannot be defeated without a denial of Federal constitutional immunities, is not reviewable by writ of error from the Federal Supreme Court, where the state court rested its decision upon the effect of a decree in another suit as *res judicata*, and on the statute of limitations and laches as barring an attempt to vacate such decree.

Wood v. Chesborough, 228 U. S. 672, 57 L. ed. 1018, 33 Sup. Ct. Rep. 706.

[48] Mr. Justice Day delivered the opinion of the court:

Catesby Woodford and John T. Ireland, defendants in error, plaintiffs below, brought suit in the Fayette circuit court, of Kentucky, against the Louisville & Nashville Railroad Company, plaintiff in error, defendant below, to recover damages for the loss of a number of race horses and injury to others shipped by them on November 17, 1910, over the lines of the defendant from Lexington, Kentucky, to Juarez, Mexico. There was a verdict for the plaintiffs in the trial court, judgment upon which was affirmed by the court of appeals of Kentucky (152 Ky. 398, 153 S. W. 722), and the case is here upon writ of error.

The amended petition contained an allegation that the defendant agreed by contract entered into in Fayette county, Kentucky, to transport the horses from Lexington to Juarez, and set forth the cause and extent of the loss to plaintiffs. The defendant answered, traversing the allegations of the petition, and pleading contributory negligence, and the plaintiffs filed their reply. The defendant by motion sought to have the contract sued upon, which it alleged was in writing, filed as an exhibit to the petition, and subsequently the plaintiffs filed the contract of shipment, and the same was noted of record. It provided, among other things, that, in consideration

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of the reduced rate, the extent of the damages for which the defendant would be liable should not exceed $150 for a stallion or jack, and $100 for a horse or mule, the agreed value of the animals, and across the face of the contract were stamped the following words: "The attention of the shippers has been called to the terms, conditions, value, etc., herein named." It also appears that the contract of shipment was produced and filed in evidence by the plaintiffs.

One of the instructions requested by the defendant was to the effect that, if the jury found for the plaintiffs, they [49] should fix the damages at the fair market value of the horses killed, and the difference in value before and after the injury of the other horses. After verdict and judgment for plaintiffs, the defendant filed its motion and grounds, and additional grounds, for a new trial, none of which, however, were based upon the provisions of the contract of shipment or any act of Congress. The court, in overruling the motion, said, however, that it had also heard counsel "upon the Federal question raised by the defendant as to whether the contract in question for the transportation of said colts and fillies mentioned in the petition from Lexington, Kentucky, to Juarez, in the Republic of Mexico, was in violation of the provisions, or any of them, of an act of Congress of the United States entitled, 'An Act to Regulate Commerce,' approved February 4, 1887 [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154]," as amended, "and having considered the said motion and grounds for a new trial of this cause, and having also considered the said Federal question, and being of the opinion that said contract did not and does not violate any of the provisions of said act of Congress, the motion is hereby overruled and a new trial is refused."

The case was taken by appeal to the court of appeals of Kentucky. After submission of the case to that court, the defendant filed a supplemental brief, urging the application of the law of the case of Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148, and further insisted upon such application in its brief in reply to the plaintiffs' reply brief. The court of appeals noticed that the claim that the law of the Croninger Case controlled was first suggested by defendant in its supplemental brief, after submission of the case to that court, and that the case had been tried under the rule of law in Kentucky that a contract relieving a carrier from its common-law liability, and limiting recovery to less than the value of the property carried, is in violation of the Kentucky Constitution, and held that it was elementary that questions not raised in the trial court in an appropriate [50] way, which, by the Code of Practice of Kentucky, is in writing, would not be considered on appeal; and, after detailing the proceedings in the trial court, concluded that no Federal question had thus been made. The defendant, by petition for rehearing, again insisted that the Federal question had been properly presented, but the court of appeals, admitting that state courts must take judicial notice of acts of Congress, and that it was not essential that the Federal question should have been raised in any special form in the trial court, held that the facts on which such question rested must be presented in the record; that the provisions of the written contract, upon which the defendant then relied, not having been pleaded, no Federal question was presented; and moreover, that the defendant had asked for an instruction inconsistent with the view then presented, and conducted its case throughout the trial on that basis (153 Ky. 185, 154 S. W. 1083).

That the defendant was entitled to make a defense under the act to regulate commerce, as amended (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), is evidently an afterthought. The case was tried upon the theory that the Kentucky Constitution and statutes were controlling, and it was not until after the decision of Adams Exp. Co. v. Croninger, supra, that an attempt was made to claim the benefit of the bill of lading based upon schedules filed with the Interstate Commerce Commission. It is true that a written bill of lading showing a limitation of $100 in value for each horse was filed in the case by the plaintiff below after the motion of the defendant had been filed, as the amended record discloses, but in order to assert this defense it was necessary not only to have the contract filed, but that the defendant below should set up the facts showing that such defense was available to it. No pleading was filed by the defendant alleging compliance with the act to regulate commerce by the filing of schedules containing the limitation as to the liability upon which [51] reliance is now placed. As we have already said, the record discloses that, at the trial, the defendant, instead of relying upon the limited liability now claimed, entirely ignoring such limitation, itself asked and obtained an instruction that if the jury should find for the plaintiff, it should fix the damages in such sum as would represent the loss suffered. Of course, the request to give this instruction was entirely inconsistent with the claim of limited liability under the Federal statute.

If a Federal question can be said to be

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involved at all, it was introduced into the record upon the argument of the motion for a new trial. Disposing of that question, the court of appeals of Kentucky set forth that the question was not raised by the pleadings or requested instructions, or by motion for a new trial, or written motion of any kind, and concluded that it must have been raised orally. It pointed out that under the Kentucky Code of Practice such contentions were required to be in writing, and that if the defendant desired to take advantage of its limited liability, it must, under the Code of the state, specifically rely upon that defense in its answer. In making this holding, the Kentucky court but enforced a rule of practice of that state. The decisions of this court not only have repeatedly held that a Federal right, in order to be reviewable here, must be set up and denied in the state court, but have often held that such claim of denial is not properly brought to the attention of this court where it appears that the state court declined to pass upon the question because it was not raised in the trial court, as required by the state practice. Schuyler Nat. Bank v. Bollong, 150 U. S. 85, 37 L. ed. 1008, 14 Sup. Ct. Rep. 24; Erie R. Co. v. Purdy, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; Layton v. Missouri, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137. In this case there is no reason to believe that there was an attempt on the part of the state court to evade the decision of Federal questions, duly set up, by unwarranted resort to alleged rules under local practice, and upon this [52] point this case comes within former rulings of this court, as we have seen.

As to the contention that the case really raised a Federal question because it involved the constitutional validity of a state statute when opposed to the exclusive rights secured under a Federal law,—an examination of the record shows that no such question was made in the state court, nor was it necessarily involved in the decision made, in such sense as to make the case reviewable here on that ground.

It follows that the case must be dismissed for want of jurisdiction.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Petitioner,
v.
FRANK IMBROVEK.

(See S. C. Reporter's ed. 52–63.)

Admiralty jurisdiction — torts — injury to stevedore.

The admiralty jurisdiction of a Federal district court extends to a cause of action against a stevedore company arising out of an injury to one of its employees, caused by its negligent failure to secure the hatch covers on a vessel lying in navigable waters, whereby such employee was injured while engaged in loading and stowing the ship's cargo, since even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still the wrong which was the subject of the suit was of a maritime nature.

[For other cases, see Admiralty, 118–121, 135–138, 299–301, in Digest Sup. Ct. 1908.]

[No. 215.]

Argued January 29 and 30, 1914. Decided May 25, 1914.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which affirmed a decree of the District Court for the District of Maryland in favor of the libellant in a suit to recover for personal injuries received in loading and stowing a ship's cargo. Affirmed.

See same case below, 113 C. C. A. 398, 193 Fed. 1019.

The facts are stated in the opinion.

Mr. Edward Duffy argued the cause, and, with Messrs. Ralph Robinson and Nicholas P. Bond, filed a brief for petitioner:

One fact must be kept in mind in order to understand the English decisions. We refer to the venue. In a common-law court, locality was the basis of jurisdiction. The judge was a county judge, and the venue had to be laid originally in the hundred and later in the county where the cause of action arose, and the jury which tried the case must come from that county. In the earliest time all causes of action were local. In the course of time, however, there crept into the law from necessity the distinction between local and transitory actions. Thereafter a transitory action could be brought where the defendant was found; but in order to get jurisdiction over a foreign transitory action a fiction was finally devised under which the action must be stated to have arisen in its true locality, to which was added under a *videlicet*, the place where the action was brought, and this latter statement could not be traversed. To such an extent was this carried, that if a suit were brought at common law for the seizure of a ship on the high seas, the pleading stated that the ship was taken on the high seas, to wit, at Cheapside in London, and the defendant was not allowed to prove that Cheapside was not on the high seas.

Bacon, Abr. "Actions Local & Transitory;" McKenna v. Fiske, 1 How. 241, 247, 11 L. ed. 117, 119; Reg. v. Keyn, L. R. 2

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Exch. Div. 162, 46 L. J. Mag. Cas. N. S. 17, 13 Cox, C. C. 403, 5 Eng. Rul. Cas. 946; Mostyn v. Fabrigas, Cowp. pt. 1, p. 161, 1 Smith, Lead. Cas. 11th ed. 591; Gilbert, Pr. 3d ed. 84, 85; British South Africa Co. v. Companhia de Mocambique [1893] A. C. 617, 63 L. J. Q. B. N. S. 70, 6 Reports, 1, 69 L. T. N. S. 604.

The jurisdiction, as of right, of the admiralty, was limited to causes of a maritime nature.

2 Browne, Adm. 1 Am. ed. pp. 94, 95; Benedict, Adm. 4th ed. pp. 39, 46, 47; Stevens v. The Sandwich, 1 Pet. Adm. 233, Fed. Cas. No. 13,409.

All Justice Story is contending for in DeLovio v. Boit, 2 Gall. 399, Fed. Cas. No. 3,776, is, that the nature of the cause is the sole test.

The Blackheath (United States v. Evans) 195 U. S. 361, 49 L. ed. 236, 25 Sup. Ct. Rep. 46; Martin v. West, 222 U. S. 191, 56 L. ed. 159, 36 L.R.A.(N.S.) 592, 32 Sup. Ct. Rep. 42.

In determining whether a tort is maritime or not we must consider three things: locality, subject-matter of complaint, and person with regard to whom complaint is made.

Reg. v. London Ct. Judge [1892] 1 Q. B. 273.

We believe that we have noted in this brief all the torts which are mentioned in the Black Book of Admiralty as within the jurisdiction of admiralty.

They are as follows:

(1) Negligent collision between ships. The ship is personified, at least, under the modern cases, and it can injure and is responsible for the injury, irrespective of whether or not it is being navigated by its owner. The modern cases refuse jurisdiction in the case of a collision of a ship with a bridge or wharf, although the latter is used for commerce on water.

Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co. 208 U. S. 316, 52 L. ed. 508, 28 Sup. Ct. Rep. 414, 13 Ann. Cas. 1215; Martin v. West, supra.

(2) Collision with an anchor of another ship. This is nothing but the modern doctrine of jurisdiction in cases of obstruction to navigation. Admiralty has always had within its jurisdiction the regulation of navigation. It looks after both obstructions to navigation and aids to navigation. It enforces a claim for damages whether arising from a submerged pile (Philadelphia, W. & B. R. Co. v. Philadelphia, & H. de G. Steam Towboat Co. 23 How. 209, 16 L. ed. 433) or from an unlawful structure in the water (Atlee v Northwestern Union Packet Co. 21 Wall. 389, 22 L. ed. 619). It likewise enforces a claim for damages to an aid to navigation done by a ship (The Blackheath, supra), and would probably enforce such a claim when the damage is done by an individual.

(3) Damage to a ship by the negligence of its pilot. The English court has refused to extend this jurisdiction to a claim for damages to one ship by the negligence of the pilot of another.

Reg. v. London Ct. Judge, supra.

(4) Injury to a ship by reason of someone removing the anchor or cutting the cable.

(5) Injury to a mariner in the service of the ship. In such case the ship was liable whether negligent or otherwise only for the maintenance and care of the mariner. This is the rule to-day, except where the injury happens by reason of the unseaworthiness of the ship, or of a failure to supply and keep in order the proper appliances appurtenant to the ship (The Osceola, 189 U. S. 158, 47 L. ed. 760, 23 Sup. Ct. Rep. 483), in which event the mariner is entitled to damages. The modern cases have brought within this jurisdiction an injury to a person lawfully on board a ship, caused by the negligence of the ship (Leathers v. Blessing, 105 U. S. 626, 26 L. ed. 1192), and to a stevedore, injured by the negligence of the ship (The Max Morris, 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29). But the modern cases have refused jurisdiction when the negligence of the ship operates injuriously to a structure on land (The Plymouth [Hough v. Western Transp. Co.] 3 Wall. 20, 18 L. ed. 125).

The doctrine of locality has produced endless difficulties, as witness the discussion of the two ladder cases: The Strabo, 90 Fed. 110, and The H. S. Pickands, 42 Fed. 239, and the discussion as to whether, if a sailor falls from the yard arm by the negligence of the ship, the jurisdiction would depend on whether he fell into the water and was drowned, or fell on the wharf and was killed. Indeed, Justice Brown has pointed out the difficulties of the locality doctrine in an article in 9 Columbia L. Rev. 1.

As a result of the Hackfeld Case (U. S. Dist. Ct. Hawaii, 1902) and this case three articles have been written which may aid this court in the determination of the question of jurisdiction.

16 Harvard L. Rev. 210; 18 Harvard L. Rev. 299; 25 Harvard L. Rev. 381.

Messrs. W. H. Price, Jr., and John E. Semmes, Jr., argued the cause, and, with Messrs. John E. Semmes, Jesse N. Bowen, and Matthew Gault, filed a brief for respondent:

The allegations of the libel, that is, the statement of the case, confer jurisdiction

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in the absence of evidence that such allegations are fraudulently made solely for the purpose of obtaining jurisdiction.

(1) Where there is an allegation that the jurisdictional amount is involved, and it subsequently develops by the evidence that the jurisdictional amount is not involved, the court has authority to enter judgment for a less amount, unless the allegations were fraudulently made for obtaining jurisdiction.

Smith v. Greenhow, 109 U. S. 669, 27 L. ed. 1080, 3 Sup. Ct. Rep. 421; Barry v. Edmunds, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501; Schunk v. Moline, M. & S. Co. 147 U. S. 500, 37 L. ed. 255, 13 Sup. Ct. Rep. 416; Smithers v. Smith, 204 U. S. 632, 51 L. ed. 656, 27 Sup. Ct. Rep. 297.

(2) Where the requisite diversity of citizenship exists at the commencement of a suit, no subsequent change in the situation of the parties ousts the jurisdiction of the court.

Morgan v. Morgan, 2 Wheat. 290, 4 L. ed. 242; Clarke v. Mathewson, 12 Pet. 164, 9 L. ed. 1041; Mollan v. Torrance, 9 Wheat. 537, 6 L. ed. 154.

(3) Where Federal and non-Federal questions are involved in the same suit, and jurisdiction has properly attached for the purpose of determining the Federal question, the Federal court has a right, and in fact, it is its duty, to finally determine all matters in dispute.

Tennessee v. Davis, 100 U. S. 257, 270, 25 L. ed. 648, 652; New Orleans, M. & T. R. Co. v. Mississippi, 102 U. S. 135, 141, 26 L. ed. 96, 98; Chappell v. United States, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; Siler v. Louisville & N. R. Co. 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. Rep. 451; Omaha Horse R. Co. v. Cable Tram-Way Co. 32 Fed. 729.

In questions of contracts, as distinguished from torts, admiralty jurisdiction depends mainly upon the subject-matter, —that is, the nature of the service and engagement,—and is limited to such subjects as are purely maritime.

Ex parte Easton, 95 U. S. 72, 24 L. ed. 374; New England Mut. M. Ins. Co. v. Dunham, 11 Wall. 1, 26, 20 L. ed. 90, 97.

By reason of the jealousy of the English common-law courts against the admiralty, the latter's jurisdiction is narrower and more restricted in England than in any other country. In the United States the admiralty jurisdiction of the courts is not confined or restricted by restraining statutes, or the prejudiced interpretations of these statutes by the judiciary.

Morewood v. Enequist, 23 How. 492, 16 L. ed. 516; New England Mut. M. Ins. Co. v. Dunham, 11 Wall. 1, 20 L. ed. 90; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 385, 12 L. ed. 465, 483; The Blackheath (United States v. Evans) 195 U. S. 361, 49 L. ed. 236, 25 Sup. Ct. Rep. 46; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 574, 22 L. ed. 654, 661.

The sole test of admiralty jurisdiction has been the locality of the person or thing injured at the time of impact with the intentional or negligent force.

The Plymouth (Hough v. Western Transp. Co.) 3 Wall. 36, 18 L. ed. 128; Thomas v. Lane, 2 Sumn. 9, Fed. Cas. No. 13,902; De Lovio v. Boit, 2 Gall. 398, Fed. Cas. No. 3,776; Leathers v. Blessing, 105 U. S. 626, 26 L. ed. 1192; The Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. ed. 1058; The Blackheath (United States v. Evans) 195 U. S. 361, 49 L. ed. 236, 25 Sup. Ct. Rep. 46; Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co. 208 U. S. 316, 52 L. ed. 508, 28 Sup. Ct. Rep. 414, 13 Ann. Cas. 125; The Troy, 208 U. S. 321, 52 L. ed. 512, 28 Sup. Ct. Rep. 416; The Jefferson, 215 U. S. 130, 54 L. ed. 125, 30 Sup. Ct. Rep. 54, 17 Ann. Cas. 907; Martin v. West, 222 U. S. 191, 56 L. ed. 159, 36 L.R.A.(N.S.) 592, 32 Sup. Ct. Rep. 42.

The tort in this case was essentially maritime in its nature.

The Gilbert Knapp, 37 Fed. 209; The George T. Kemp, 2 Low. Dec. 477, Fed. Cas. No. 5,341; The Segurança, 58 Fed. 908; The Mattie May, 47 Fed. 69; The Senator, 21 Fed. 191; The Coningsby, 202 Fed. 814.

Mr. Justice Hughes delivered the opinion of the court:

This is a libel to recover for personal injuries sustained by the libellant as a stevedore in the employ of the Atlantic Transport Company (the petitioner), which was engaged in loading the Pretoria, belonging to the Hamburg-American Steam Packet Company, while lying in the port [57] of Baltimore. The libel was brought against both the owner of the ship and the stevedore company. It was dismissed as to the former, but a recovery against the latter was allowed by the district court (190 Fed. 229) and sustained by the circuit court of appeals (113 C. C. A. 398, 193 Fed. 1019). This writ of certiorari was granted.

The libellant was one of a gang engaged in loading and stowing copper. He was working on the ship, under one of the hatches. The covers of the hatch were in three sections, the division being made by two movable iron beams placed athwart the

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ship. The coverings of the middle section had been removed and placed on top of the fore and after sections. On the dock, the copper was piled upon a rope mat which was lifted by a winch, swung over the hatch, and lowered into the hold. On one of its return trips the mat caught under the after cross beam, which was instantly jerked out of its support, and, with the lengthwise timbers resting on it and the hatch covers, fell into the hold, severely injuring the libellant. The district court (referring to the petitioner, the Atlantic Transport Company, as the stevedore) said: "There would have been no accident had the entire hatch been uncovered. To uncover a hatch takes time and labor. If bad weather comes, it must be covered. Unnecessary uncovering is to be avoided. It is easy to make a partially covered hatch absolutely safe. The cross beams of the hatch have holes in their ends. There are corresponding holes in the hatch combings. Pins can be put through these holes. It takes about five minutes to put them in. When in place, an accident such as gave rise to this case cannot happen. The ship's carpenter of the Pretoria keeps the pins when not in use. Accidents often happen because an opened hatch has been left unguarded, or because the hatch coverings fall into the hold. When they do there is usually a dispute as to whether the ship or the stevedore is to blame. In the case at bar the ship and the stevedore were represented [58] by the same proctors and by the same advocates. The stevedore acquits the ship. . . . The stevedore proved that, when the ship came into port, it took complete charge of the hatches. It uncovered so much of them as it saw fit. If the pins were in and it wanted them cut, it took them out. It laid them on the deck. The ship's carpenter gathered them up. If the pins were out and it wanted them in, it told the ship's carpenter. He put them in." For its failure to use due diligence in seeing that the libellant had a safe place in which to work, the district court held the Transport Company liable.

The principal question is whether the district court had jurisdiction; that is, whether the cause was one "of admiralty and maritime jurisdiction." Const. Art. 3, § 2; Rev. Stat. § 563, U. S. Comp. Stat. 1901, p. 455; Judicial Code, § 24 [36 Stat. at L. 1091, chap. 231, U. S. Comp. Stat. Supp 1911, p. 135], act of Sept. 24, 1789, chap. 20, § 9, 1 Stat. at L. 73, 77. As the injury occurred on board a ship while it was lying in navigable waters, there is no doubt that the requirement as to locality was fully met. The petitioner insists, however, that locality is not the sole test, and that it must appear that the tort was otherwise of a maritime nature. And this was the view taken by the circuit court of appeals for the ninth circuit, in affirming a decree dismissing a libel for want of jurisdiction in a similar case. Campbell v. H. Hackfeld & Co. 62 C. C. A. 274, 125 Fed. 696.

At an early period the court of admiralty in England exercised jurisdiction "over torts, injuries, and offenses at ports within the ebb and flow of the tide, on the British seas and on the high seas." De Lovio v. Boit, 2 Gall. 398, 406, 464, 474, Fed. Cas. No. 3,776. While its authority was denied when the injurious action took place *infra corpus comitatus*, it was not disputed that jurisdiction existed when the wrong was done "upon the sea, or any part thereof which is not within any county." 4 Co. Inst. 134. The jurisdiction in admiralty of the courts of the United States is not controlled by the restrictive statutes and judicial prohibitions [59] of England (Waring v. Clarke, 5 How. 441, 457, 458, 12 L. ed. 226, 234, 235; New England Mut. M. Ins. Co. v. Dunham, 11 Wall. 1, 24, 20 L. ed. 90, 97; The Lottawanna [Rodd v. Heartt] 21 Wall. 558, 576, 22 L. ed. 654, 662), and the limitation with respect to torts committed within the body of any county is not applicable here. Waring v. Clarke, supra; Jackson v. The Magnolia, 20 How. 296, 15 L. ed. 909. "In regard to torts," said Mr. Justice Story in Thomas v. Lane, 2 Sumn. 1, 9, Fed. Cas. No. 13,902, "I have always understood, that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never (I believe) deliberately claimed to have, any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide." This rule —that locality furnishes the test—has been frequently reiterated, with the substitution (under the doctrine of The Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. ed. 1058) of navigable waters for tide waters. Thus, in the case of Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co. 23 How. 209, 215, 16 L. ed. 433, 435, the court said: "The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract; but in torts, it depends entirely on locality." Again, in the case of The Plymouth (Hough v. Western Transp. Co.) 3 Wall. 20, 18 L. ed. 125, where jurisdiction was denied upon the ground that the substance and consummation of the wrong took place on land, and not on navigable water, the court said: "The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its

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having been committed upon the high seas or other navigable waters. A trespass on board of a vessel, or by the vessel itself, above tidewater, when that was the limit of jurisdiction, was not of admiralty cognizance. The reason was, that it was not committed within the locality that gave the jurisdiction. The vessel itself was unimportant. . . . The jurisdiction of the admiralty does not depend upon the [60] fact that the injury was inflicted by the vessel, but upon the locality, —the high seas or navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." See Manro v. Almeida, 10 Wheat. 473, 6 L. ed. 369; Waring v. Clarke, 5 How. 459, 12 L. ed. 235; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 394, 12 L. ed. 465, 487; The Commerce (Commercial Transp. Co. v. Fitzhugh) 1 Black, 574, 579, 17 L. ed. 107, 109; Rock Island Bridge (Galena, D. D. & M. Packet Co. v. Rock Island Bridge Co.) 6 Wall. 213, 215, 18 L. ed. 753, 754; The Belfast, 7 Wall. 624, 637, 19 L. ed. 266, 269; Ex parte Easton, 95 U. S. 68, 72, 24 L. ed. 373, 374; Leathers v. Blessing, 105 U. S. 626, 630, 26 L. ed. 1192, 1194; Panama R. Co. v. Napier Shipping Co. 166 U. S. 280, 285, 41 L. ed. 1004, 1005, 17 Sup. Ct. Rep. 572; The Blackheath (United States v. Evans) 195 U. S. 361, 365, 367, 49 L. ed. 236-238, 25 Sup. Ct. Rep. 46; Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co. 208 U. S. 316, 319, 52 L. ed. 508, 511, 28 Sup. Ct. Rep. 414, 13 Ann. Cas. 1215; Martin v. West, 222 U. S. 191, 56 L. ed. 159, 36 L.R.A.(N.S.) 592, 32 Sup. Ct. Rep. 42; The Neil Cochran, Brown, Adm. 162, Fed. Cas. No. 10,087; The Ottawa, Brown, Adm. 356, Fed. Cas. No. 10,616; Holmes v. Oregon & C. R. Co. 6 Sawy. 262, 5 Fed. 75, 77; The Arkansas, 5 McCrary, 364, 17 Fed. 383, 384; The F. & P. M. 33 Fed. 511, 513; The H. S. Pickands, 42 Fed. 239, 240; Hermann v. Port Blakely Mill Co. 69 Fed. 646, 647; The Strabo, 90 Fed. 110; 2 Story, Const. § 1666. It is also apparent that Congress, in providing for the punishment of crimes committed upon navigable waters, has regarded the locality of the offense as the basis for the exercise of its authority. Act of April 30, 1790, chap. 9, § 8, 1 Stat. at L. 112, 113; act of March 3, 1825, chap. 65, 4 Stat. at L. 115; Rev. Stat. §§ 5339, 5345, 5346, U. S. Comp. Stat. 1901, pp. 3627, 3630, 3631; Criminal Code, § 272, 35 Stat. at L. 1088, 1142, chap. 321, U. S. Comp. Stat. Supp. 1911, pp. 1588, 1671; United States v. Bevans, 3 Wheat. 336, 387, 4 L. ed. 404, 416; United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37; United States v. Rodgers, 150 U. S. 249, 260, 261, 285, 37 L. ed. 1071, 1075, 1076, 1084, 14 Sup. Ct. Rep. 109; Wynne v. United States, 217 U. S. 234, 240, 54 L. ed. 748, 749, 30 Sup. Ct. Rep. 447.

But the petitioners urge that the general statements which we have cited, with respect to the exclusiveness of the test of locality in cases of tort, are not controlling; and that in every adjudicated case in this country in which the jurisdiction of admiralty with respect to torts has been sustained, the tort, apart from the mere place of its occurrence, [61] has been of a maritime character. It is asked whether admiralty would entertain a suit for libel or slander circulated on board a ship by one passenger against another. See Benedict, Admiralty, 4th ed. § 231. The appropriate basis, it is said, of all admiralty jurisdiction, whether in contract or in tort, is the maritime nature of the transaction or event; it is suggested that the wider authority exercised in very early times in England may be due to its antedating the recognition by the common-law courts of transitory causes of action, and thus arose by virtue of necessity.

We do not find it necessary to enter upon this broad inquiry. As this court has observed, the precise scope of admiralty jurisdiction is not a matter of "obvious principle or of very accurate history." The Blackheath (United States v. Evans) 195 U. S. 361, 365, 367, 49 L. ed. 236-238, 25 Sup. Ct. Rep. 46. And we are not now concerned with the extreme cases which are hypothetically presented. Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature, and hence the district court, from any point of view, had jurisdiction. The petitioner contends that a maritime tort is one arising out of an injury to a ship, caused by the negligence of a ship or a person, or out of an injury to a person by the negligence of a ship; that there must either be an injury to a ship or an injury by the negligence of the ship, including therein the negligence of her owners or mariners; and that, as there was no negligence of the ship in the present case, the tort was not maritime. This view we deem to be altogether too narrow.

The libellant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the [62] safe carrying of the cargo and the safe-

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ty of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class "as clearly identified with maritime affairs as are the mariners." See The George T. Kemp, 2 Low. Dec. 482, Fed. Cas. No. 5,341; The Circassian, 1 Ben. 209, Fed. Cas. No. 2,722; Roberts v. The Windermere, 2 Fed. 722; The Canada, 7 Sawy. 173, 7 Fed. 119; The Hattie M. Bain, 20 Fed. 389; The Gilbert Knapp, 37 Fed. 209; The Main, 2 C. C. A. 569, 2 U. S. App. 349, 51 Fed. 954; Norwegian S. S. Co. v. Washington, 6 C. C. A. 313, 13 U. S. App. 459, 57 Fed. 224; The Seguranca, 58 Fed. 908; The Allerton, 93 Fed. 219; Hughes, Admiralty, 113; Benedict, Admiralty, 4th ed. § 207. The libellant was injured because the care required by the law was not taken to protect him while he was doing this work. We take it to be clear that the district court, sitting in admiralty, was entitled to declare the applicable law in such a case, as it was within the power of Congress to modify that law. Waring v. Clarke, 5 How. 459, 12 L. ed. 235; The Lottawana (Rodd v. Heartt) 21 Wall. 558, 576, 22 L. ed. 654, 662. The fact that the ship was not found to be liable for the neglect is not controlling. If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation, and to commerce on navigable waters, was quite sufficient. Even with respect to contracts where subject-matter is the exclusive test, it has been said that the true criterion is "whether it was a maritime contract, having reference to maritime service or maritime transactions." New England Mut. M. Ins. Co. v. Dunham, 11 Wall. 1, 26, 20 L. ed. 90, 97. The Constitution provides that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction," and the act of Congress defines the jurisdiction of the district court, with respect to civil causes, in terms of like scope. To hold that a case of a tort committed on board a ship [63] in navigable waters, by one who has undertaken a maritime service, against one engaged in the performance of that service, is not embraced within the constitutional grant and the jurisdictional act, would be to establish a limitation wholly without warrant.

The remaining question relates to the finding of negligence. It is urged that the neglect was that of a fellow servant, and hence that the petitioner was not liable. Both courts below, however, concurred in the finding that the petitioner omitted to use proper diligence to provide a safe place of work. Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 386, 37 L. ed. 772, 780, 13 Sup. Ct. Rep. 914. As the question belongs to a class which, under the distribution of judicial power, is determinable by the circuit court of appeals in last resort, we shall not undertake to discuss it at length or to restate the evidence. Chicago Junction R. Co. v. King, 222 U. S. 222, 224, 56 L. ed. 173, 174, 32 Sup. Ct. Rep. 79; Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 320, 57 L. ed. 1204, 1205, 33 Sup. Ct. Rep. 840, 3 N. C. C. A. 826; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 50, ante, 838, 34 Sup. Ct. Rep. 581. It is sufficient to say that we are satisfied, from an examination of the record, that the ruling was justified.

Affirmed.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Petitioner,

v.

STATE OF MARYLAND TO THE USE OF MARY SZCZESEK, Widow of Martin Szczesek.

(See S. C. Reporter's ed. 63, 64.)

This case is governed by the decision in Atlantic Transport Company v. Imbrovek, ante, 1208.

[No. 216]

Argued January 29 and 30, 1914. Decided May 25, 1914.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which affirmed a decree of the District Court for the District of Maryland in favor of the libellant in a suit to recover for personal injuries received in loading and stowing a ship's cargo. Affirmed.

See same case below, 113 C. C. A. 408, 193 Fed. 1019.

The facts are stated in the opinion.

Mr. Edward Duffy argued the cause, and, with Messrs. Ralph Robinson and Nicholas P. Bond, filed a brief for petitioner.

Messrs. W. H. Price, Jr., and John E. Semmes, Jr., argued the cause, and, with Messrs. John E. Semmes, Jesse N. Bowen, and Matthew Gault, filed a brief for respondent.

For contentions of counsel, see their briefs as reported in Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, ante, 1208, 34 Sup. Ct. Rep. 733.

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Mr. Justice Hughes delivered the opinion of the court:

This is a libel filed on behalf of the widow and infant children of Martin Szczesek to recover damages for injuries resulting in his death. Szczesek was a stevedore in the employ of the Atlantic Transport Company, the petitioner, and was engaged in loading the ship Pretoria. The district court allowed a recovery against the petitioner (190 Fed. 240), which the circuit court of appeals affirmed. 113 C. C. A. 408, 193 Fed. 1019.

The questions presented are the same as those which were considered in Atlantic Transport Co. v. Imbrovek, decided this day [234 U. S. 52, ante, 1208, 34 Sup. Ct. Rep. 733], and, for the reasons stated in the opinion in that case, the decree is affirmed.

Affirmed.

SCHMIDT & STORY, Franz Schmidt, Charles M. Story, Charles M. Crossman, et al., Plffs. in Err.,

v.

BANK OF COMMERCE.

(See S. C. Reporter's ed. 64–70.)

Error to territorial supreme court — following decision below — pleading and practice.

1. The rulings of a territorial supreme court on questions of pleading and practice will ordinarily be accepted by the Federal Supreme Court.

[For other cases, see Appeal and Error, VIII. m, 1; Courts, VII. d, in Digest Sup. Ct. 1908.]

Bills and notes — defenses — fraud — renewals.

2. Makers of promissory notes whose signatures thereto were obtained by the fraudulent representations of the payee may defend on that ground a suit brought by such payee, although they were liable upon prior notes for the same amount, which were renewed by the notes in suit,—especially where there were additional makers and in effect new cosureties on the new notes.

[For other cases, see Bills and Notes, VII. b, in Digest Sup. Ct. 1908.]

Bills and notes — defenses — fraud — comakers.

3. The payee's fraud in obtaining the signatures of some of the makers of the promissory notes in suit is available to other makers as a defense under N. M. Laws 1907, chap. 83, § 55, providing that "the title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument or any signature thereto by fraud, duress, or force and fear, or other unlawful means, for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

[For other cases, see Bills and Notes, VII. b, in Digest Sup. Ct. 1908.]

Bills and notes — defenses — fraud — comakers.

4. The defense that the signatures of several comakers of the promissory notes in suit were obtained by means of fraudulent representations by the payee is no less available to other makers because they signed the notes several days before they were signed by the makers upon whom the fraud was practised, where the payee's position, sustained by the court, is that the defense under N. M. Laws 1907, chap. 83, § 125, that the notes were altered by the addition of the other signatures, is not available under the pleadings and cannot be considered.

[For other cases, see Bills and Notes, VII. b, in Digest Sup. Ct. 1908.]

[No. 281.]

Argued March 19, 1914. Decided May 25, 1914.

IN ERROR to the Supreme Court of the Territory of New Mexico to review a judgment which affirmed a judgment of the District Court of the County of Socorro, in that territory, entered upon a verdict directed in favor of the payee of certain promissory notes, as against all the makers except one, as to whom the payee was permitted to take a nonsuit. Reversed and remanded for further proceedings.

See same case below, 16 N. M. 414, 120 Pac. 670.

The facts are stated in the opinion.

Mr. Francis E. Wood argued the cause, and, with Mr. O. N. Marron, filed a brief for plaintiffs in error:

Plaintiffs in error were sureties to the bank on the notes for the principal debt of Broyles, and any change in their contract, or the slightest fraud in procuring their signatures thereto, released them.

Smith v. Sheldon, 35 Mich. 42, 24 Am. Rep. 533; Putney v. Schmidt, 16 N. M. 400, 120 Pac. 720; Magee v. Manhattan L. Ins. Co. 92 U. S. 93, 23 L. ed. 679; Griswold v. Hazard, 141 U. S. 260, 35 L. ed. 678, 11 Sup. Ct. Rep. 972, 999; Davies v. London & P. M. Ins. Co. L. R. 8 Ch. Div. 469, 47 L. J. Ch. N. S. 511, 38 L. T. N. S. 478, 26 Week. Rep. 794; McMicken v. Webb, 6 How. 292, 12 L. ed. 443; Martin v. Thomas, 24 How. 315, 16 L. ed. 689; United States v. Freel, 186 U. S. 309, 316, 46 L. ed. 1177, 1181, 22 Sup. Ct. Rep. 875; Page v. Krekey, 137 N. Y. 307, 21 L.R.A. 409, 33 Am. St. Rep. 731, 33 N. E. 311; Dan. Neg. Inst. 4th ed. § 1309.

The lower courts erred in ruling that the fraud and alteration in the notes were not

NOTE.—As to review by the United States Supreme Court of territorial decisions—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

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available to the defendants because they failed to show themselves injured thereby.

14 Am. & Eng. Enc. Law, 137, 140, 141; Harlow v. La Brum, 151 N. Y. 278, 45 N. E. 859; Williams v. Kerr, 152 Pa. 565, 25 Atl. 618; Stewart v. Lester, 49 Hun, 63, 1 N. Y. Supp. 699; MacLaren v. Cochran, 44 Minn. 255, 46 N. W. 408; Sonnesyn v. Akin, 14 N. D. 248, 104 N. W. 1026; Brett v. Cooney, 75 Conn. 338, 33 Atl. 729; United States v. The Amistad, 15 Pet. 518, 10 L. ed. 826; Rogers v. Hadley, 32 L. J. Exch. N. S. 248, 2 Hurlst. & C. 227, 9 Jur. N. S. 898, 9 L. T. N. S. 292, 11 Week. Rep. 1074; Dan. Neg. Inst. 4th ed. § 177; Joyce, Defenses to Commercial Paper, § 116.

It was error to refuse to submit to the jury the question as to whether the signature of Lewis was not obtained by fraud.

Hodge v. Smith, 130 Wis. 326, 110 N. W. 192; Aukland v. Arnold, 131 Wis. 64, 111 N. W. 212.

Mr. Harry M. Dougherty argued the cause, and, with Mr. James G. Fitch, filed a brief for defendant in error:

Had all the allegations of fraud been properly pleaded and been permissible under the issues, still the facts in this case are such that the defendant in error would have been entitled to a peremptory instruction.

Mersman v. Werges, 112 U. S. 142, 28 L. ed. 642, 5 Sup. Ct. Rep. 65; Ming v. Woolfolk, 116 U. S. 599, 29 L. ed. 740, 6 Sup. Ct. Rep. 489; Marshall v. Hubbard, 117 U. S. 416, 29 L. ed. 919, 6 Sup. Ct. Rep. 806; Stratton's Independence v. Dines, 126 Fed. 978; 20 Cyc. 42; First Nat. Bank v. Maxfield, 83 Me. 576, 22 Atl. 479; Parker v. Jewett, 52 Minn. 514, 55 N. W. 56.

Mr. Justice Hughes delivered the opinion of the court:

This suit was brought by the Bank of Commerce in the district court for Socorro county in the territory of New Mexico to recover upon two promissory notes. The plaintiff bank was the payee and the defendants Broyles, Schmidt & Story, Crossman, Brown, Pratt (alias Anderson), Lewis, and Evans, were the makers. Broyles defaulted; [66] the other defendants answered, alleging in substance that they had signed the notes for Broyles's accommodation, and had been induced to sign by the fraudulent representations of the bank. Upon the trial, the motion of the plaintiff for a direction of a verdict was granted as against all the defendants except Lewis, and as to him the plaintiff was permitted to take a nonsuit. The judgment on the verdict was affirmed by the supreme court of the territory. 16 N. M. 414, 120 Pac. 670.

Several questions of pleading and practice are presented, but, in view of their local character, we accept, as to these, the rulings of the territorial court. Phœnix L. Co. v. Landis, 231 U. S. 578, ante, 377, 34 Sup. Ct. Rep. 179; Work v. United Globe Mines, 231 U. S. 595, ante, 389, 34 Sup. Ct. Rep. 274; Santa Fé C. R. Co. v. Friday, 232 U. S. 694, ante, 802, 34 Sup. Ct. Rep. 468. We shall therefore assume that the complaint was sufficient; and that the defenses of alteration, the unauthorized filling of blanks, and the failure to credit certain payments, were not available because not suitably pleaded. The supreme court of the territory also held that although both parties had requested peremptory instructions, the defendants were entitled, upon the denial of their motion, to ask that the case be submitted to the jury, and that this request was properly made. See Empire State Cattle Co. v. Atchison, T. & S. F. R. Co. 210 U. S. 1, 52 L. ed. 931, 28 Sup. Ct. Rep. 607, 15 Ann. Cas. 70.

The question before us, then, is whether, in view of the state of the evidence upon the defense that the notes were procured by fraud, the trial court erred in directing a verdict for the plaintiff. It is apparent that there was evidence sufficient to go to the jury that the signatures of some of the defendants had been obtained by means of fraudulent representations. Upon this point, the supreme court of the territory said: "The defense, as we have seen, was principally that the signing of the notes was procured by fraud. There was undoubtedly evidence that the defendants Anderson" (impleaded as Pratt), "Evans, Brown, and Lewis were told by plaintiff's representative [67] prior to signing the notes that Broyles was solvent, and were further told that plaintiff had ample collateral for the notes, and there was also evidence from which the jury might have concluded that the defendants signed the notes in reliance upon these representations. We find also upon the record room for a conclusion by the jury, that these statements were untrue, and that they were known when made to be untrue. Indeed, the trial court recognized this, for as to Lewis, in whose favor the testimony on this point was no stronger than on behalf of Anderson, Evans, and Brown, the court held that the matter was one for the jury." Notwithstanding this estimate of the evidence, the court sustained the recovery against the last-named defendants, holding that, as they were liable upon former notes for the same amount, which were renewed by the notes in suit, the defense was not available. It was said that, even assuming the notes in suit to have been given "as the result of a wilful misrepresentation," the defendants, being bound by the former notes, were "held to no greater duty than previous-

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ly rested upon them," and hence could not defend upon the ground that they were induced to sign the notes by fraudulent representations.

We are unable to agree with this conclusion. The question was not one of a recovery of damages in deceit. Ming v. Woolfolk, 116 U. S. 599, 602, 603, 29 L. ed. 740, 741, 6 Sup. Ct. Rep. 489. If there was fraud, it vitiated the transaction, and the plaintiff could not avail itself of its own wrong by enforcing the notes. The fact that the three defendants, Anderson, Evans, and Brown, were liable on the former notes, did not place them under any legal obligation whatever to make the notes in suit. It appeared that the former notes were signed by Broyles, Anderson, Evans, and Brown; the last three being in effect sureties for Broyles; and as the court states, "upon the giving of the present notes, these former notes were surrendered by plaintiff bank and destroyed." On the new notes Lewis, Schmidt & Story, and Crossman were additional [68] makers and in effect new cosureties. Not only was there new paper, but the legal position of Anderson, Evans, and Brown was materially changed. Broyles was discharged from liability on the old notes, and, with respect to the new, there were six (treating the firm of Schmidt & Story as one) in the position of cosureties instead of three. No one of the three defendants in question who were parties to the original paper could pay it and hold the other two to their original measure of contribution. The new notes constituted new promises with distinct legal consequences. It is clear that the plaintiff could not enforce them if they were fraudulently induced.

There was no evidence of fraudulent representations to the defendants Schmidt & Story and Crossman, but they contend that they are not bound if their comakers were relieved from liability by reason of the plaintiff's fraud. Reference is made to § 55 of the negotiable instruments act, Laws of 1907 (N. M.) chap. 83, which provides: "The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." It has been held by the supreme court of Wisconsin, in construing the same language in the Wisconsin act, that if one of the signatures of several comakers is obtained by fraud, the defense is also available to the other makers, since the equality of burden is disturbed. Hodge v. Smith, 130 Wis. 326, 110 N. W. 192; Aukland v. Arnold, 131 Wis. 64, 66, 67, 111 N. W. 212. In the case last cited the court said, referring to Hodge v. Smith, supra: "It was there held that the title of a person who negotiates commercial paper is defective when he has obtained any signature thereto by fraud, and that if the party so defrauded be relieved from liability thereon, then such fraud makes such paper voidable [69] by all the other persons who signed it, though they did not participate in and were ignorant of such fraudulent conduct at the time they signed it. This conclusion was reached upon the ground that, when several persons assume such an obligation, it is material and important that all who join as makers should share equally in bearing the burden of its payment, and if, through the fraud of the person holding it, such equality of burden is disturbed and the burden increased as to some of the persons signing it, such fraud renders the title defective as to all of the persons who signed it." While this construction of the statute was apparently accepted, it was held that the defense was not open to Schmidt & Story and Crossman for the reason that they signed the notes several days before the signatures of the other defendants upon whom the fraud was practised were obtained, and that there was no evidence in the record "as to whether the defendants Schmidt, Story, and Crossman, or any of them, had any knowledge that there were to be any other signers than themselves." Accordingly, it was said that, so far as the record showed, the notes were "complete and binding obligations" upon these defendants at the time they executed the same, and that fraud in obtaining the signatures of the subsequent cosigners would not affect the equality of the burden they had assumed.

This, as it seems to us, is not an adequate answer to the defendants' contention. It is true that these defendants have endeavored to maintain that the notes were altered by the addition of the other signatures, relying upon negotiable instruments law, § 125. See Dan. Neg. Inst. § 1387. But the supreme court of the territory ruled that under the pleadings this defense was not available and could not be considered. The plaintiff could not maintain this position and at the same time defeat the defense of fraud upon the ground that the notes were complete instruments, and as such had become the binding [70] obligations of these defendants before the others signed. Taking the notes as they stood upon the pleadings and proof, we think that these defendants (Schmidt & Story and Crossman) must be regarded as comakers with the other defendants, to whom the representations are said to have been made, and it follows that

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if any of the signatures of these comakers were obtained by fraud, the equality of burden was altered. The plaintiff's fraud, assuming it to have been committed, changed the legal effect of the promise of these defendants. For these reasons we think that they were entitled to have the evidence as to fraudulent representation submitted to the jury, and that the direction of the verdict in favor of the plaintiff was error.

The judgment is reversed and the case is remanded to the Supreme Court of the State of New Mexico for further proceedings not inconsistent with this opinion.

It is so ordered.

EX PARTE ROE.

(See S. C. Reporter's ed. 70-73.)

Mandamus — to review judicial action —remand of cause to state court.

The refusal of a Federal district judge to remand to the state court whence it had been removed a suit against a Federal corporation involving the requisite jurisdictional amount, and therefore removable, unless made otherwise by the fact that it also arose under the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1324), cannot be reviewed by mandamus, since such ruling would be subject to appellate review after final judgment.

[For other cases, see Mandamus, 61-66, in Digest Sup. Ct. 1908.]

[No. 13, Original.]

Argued April 6, 1914. Decided May 25, 1914.

PETITION for Writ of Mandamus to the judge of the District Court of the United States for the Eastern District of Texas, to compel the remand of a cause to the state court whence it had been removed. Rule discharged. Petition dismissed.

The facts are stated in the opinion.

Mr. S. P. Jones argued the cause and filed a brief for petitioner.

Mr. F. H. Prendergast argued the cause and filed a brief for respondent:

A mandamus will not issue from the Supreme Court to compel the district judge to remand a cause to the state court, when the judge has heard the motion to remand and denied it, because the action of the court on the motion to remand involved the exercise of judicial discretion.

Ex parte Harding, 219 U. S. 363, 37 L.R.A. (N.S.) 392, 55 L. ed. 252, 31 Sup. Ct. Rep. 324.

Mr. Joseph W. Bailey also argued the cause for respondent.

Mr. Justice Van Devanter delivered the opinion of the court:

By an action begun in a state court in Harrison county, Texas, W. L. Roe sought to recover from the Texas & Pacific Railway Company, a Federal corporation, $30,000 as damages for personal injuries sustained through its negligence while he was in its employ as a brakeman, and while both were engaged in interstate commerce. In due time and in the accustomed way, the case was removed into the district court of the United States for that district upon the sole ground that it was one arising under a law of the United States, in that the defendant was chartered by an act of Congress. The plaintiff then moved that the case be remanded upon the ground that it also arose under the Federal employers' liability act (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322; 36 Stat. at L. 291, chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1324), and therefore was not removable. After a hearing, the motion was denied, for reasons assigned in the second branch of the opinion in Van Brimmer v. Texas & P. R. Co. 190 Fed. 394, 397. The plaintiff then petitioned this court for a writ of mandamus commanding [72] the judge of the district court to remand the case. A rule to show cause was granted, and the respondent answered that the motion to remand had been denied because, upon consideration, he believed the case was lawfully removed.

As the case arose under a law of the United States, namely, the defendant's Federal charter (see Pacific R. Removal Cases, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113; Texas & P. R. Co. v. Cody, 166 U. S. 606, 41 L. ed. 1132, 17 Sup. Ct. Rep. 703, 1 Am. Neg. Rep. 763), and the requisite amount was in controversy, it is conceded that it was removable unless made otherwise by the fact that it also arose under the Federal employers' liability act. In the 6th section, as amended in 1910, that act declares: "The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act, and brought in any state court of competent jurisdiction, shall be removed to any court of the United States." A like restriction upon removals appears in § 28 of the Ju-

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NOTE.—On mandamus to compel removal of case to Federal court, or the remanding of case to state court—see note to Re Harding, 37 L.R.A.(N.S.) 392.

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dicial Code [36 Stat. at L. 1094, chap. 231, U. S. Comp. Stat. Supp. p. 140].

The question presented to the district court by the motion to remand was whether these provisions were intended to forbid a removal in every case falling within the employers' liability act, regardless of the presence of some independent ground of removal, as in this instance, or only to declare that the fact that a case arises under that act shall not be a ground of removal. Regarding the latter of these alternatives as sustained by the better reasoning, the court denied the motion; and upon this petition for mandamus we are asked to review that ruling, pronounce it erroneous, and direct the respondent to retract it and remand the case.

Whether the ruling was right or wrong, it was a judicial act, done in the exercise of a jurisdiction conferred by law, and, even if erroneous, was not void or open to collateral attack, but only subject to correction in an appropriate appellate proceeding. Chesapeake & O. R. Co. v. [73] McCabe, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. Rep. 430; Re Metropolitan Trust Co. 218 U. S. 312, 54 L. ed. 1051, 31 Sup. Ct. Rep. 18. Like any other ruling in the progress of the case, it will be regularly subject to appellate review after final judgment, and the authorized mode of obtaining such a review, the action being at law, is by a writ of error. Judicial Code, §§ 128, 238; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 582, 40 L. ed. 536, 542, 16 Sup. Ct. Rep. 389.

The accustomed office of a writ of mandamus, when directed to a judicial officer, is to compel an exercise of existing jurisdiction, but not to control his decision. It does not lie to compel a reversal of a decision, either interlocutory or final, made in the exercise of a lawful jurisdiction, especially where in regular course the decision may be reviewed upon a writ of error or an appeal. Bank of Columbia v. Sweeney, 1 Pet. 567, 7 L. ed. 265; Life & Fire Ins. Co. v. Adams, 9 Pet. 571, 602, 9 L. ed. 233, 244; Ex parte Taylor, 14 How. 3, 13, 14 L. ed. 302, 306; Ex parte Many, 14 How. 24, 14 L. ed. 311; Ex parte Newman, 14 Wall. 152, 169, 20 L. ed. 877, 888; Ex parte Sawyer, 21 Wall. 235, 22 L. ed. 617; Ex parte Flippin, 94 U. S. 348, 24 L. ed. 194; Ex parte Loring, 94 U. S. 418, 24 L. ed. 165; Ex parte Des Moines & M. R. Co. 103 U. S. 794, 26 L. ed. 461; Ex parte Baltimore & O. R. Co. 108 U. S. 566, 27 L. ed. 812, 2 Sup. Ct. Rep. 876; American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 372, 379, 37 L. ed. 486, 489, 13 Sup. Ct. Rep. 758; Re Atlantic City R. Co. 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208; Re Oklahoma, 220 U. S. 191, 209, 55 L. ed. 431, 435, 31 Sup. Ct. Rep. 426; Ex parte First Nat. Bank, 228 U. S. 516, 57 L. ed. 946, 33 Sup. Ct. Rep. 591. And this is true of a decision denying a motion to remand. Ex parte Hoard, 105 U. S. 578, 26 L. ed. 1176; Re Pollitz, 206 U. S. 623, 51 L. ed. 1081, 27 Sup. Ct. Rep. 729; Ex parte Nebraska, 209 U. S. 436, 52 L. ed 876, 28 Sup. Ct. Rep. 581; Ex parte Gruetter, 217 U. S. 586, 54 L. ed. 892, 30 Sup. Ct. Rep. 690; Ex parte Harding, 219 U. S. 363, 55 L. ed. 252, 37 L.R.A.(N.S.) 392, 31 Sup. Ct. Rep. 324. In the last case the subject was extensively considered and it was held that the writ of mandamus may not be used to correct alleged error in a refusal to remand where, after final judgment, the order may be reviewed upon a writ of error or an appeal. To that view we adhere, and therefore we are not here at liberty to consider the merits of the question involved in the District Court's ruling.

Rule discharged; petition dismissed.

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[74] SIMON TAYLOR et al., Plffs. in Err.,
v.
JOE ANDERSON et al.

(See S. C. Reporter's ed. 74–76.)

Pleading — jurisdictional averments — raising Federal question by anticipating defense.

Allegations in the petition in an action of ejectment that defendants were asserting ownership in themselves under a certain deed, and that such deed was void under congressional legislation restricting the alienation of lands allotted to the Choctaw and Chickasaw Indians, do not present a case arising under the laws of the United States of which a Federal circuit court has jurisdiction without diversity of citizenship.

[For other cases, see Pleading, 337–349; Courts, 506–508, in Digest Sup. Ct. 1908.]

[No. 338.]

Submitted April 30, 1914. Decided May 25, 1914.

IN ERROR to the Circuit Court of the United States for the Eastern District of Oklahoma to review a judgment dismissing, for want of jurisdiction, the petition in an action in ejectment. Affirmed.

See same case below on demurrer, 197 Fed. 383.

The facts are stated in the opinion.

Mr. Napoleon B. Maxey submitted the cause for plaintiffs in error:

The petition in this case states more than is necessary, but plaintiff was only trying to meet the suggestions of the trial court, and those statements may be treated as surplusage; and we most earnestly contend that, when stripped of all unnecessary alle-

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gations, there is still a Federal question stated.

Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365; Doolan v. Carr, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; Macon Grocery Co. v. Atlantic Coast Line R. Co. 215 U. S. 501, 54 L. ed. 300, 30 Sup. Ct. Rep. 184.

Mr. H. A. Ledbetter submitted the cause for defendants in error:

A plaintiff whose statement of his own claim does not disclose a Federal question cannot create jurisdiction in a circuit court by anticipating the defendants' claim, and by alleging that the defendants will set up a defense under some law of the United States.

Tennessee v. Union & Planters' Bank, 152 U. S. 454, 460, 38 L. ed. 511, 513, 14 Sup. Ct. Rep. 654; Central R. Co. v. Mills, 113 U. S. 249, 28 L. ed. 949, 5 Sup. Ct. Rep. 456; Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545; Oregon Short Line & U. N. R. Co. v. Skottowe, 162 U. S. 490, 40 L. ed. 1048, 16 Sup. Ct. Rep. 869; Galveston, H. & S. A. R. Co. v. Texas, 170 U. S. 226, 42 L. ed. 1017, 18 Sup. Ct. Rep. 603; Joy v. St. Louis, 201 U. S. 332, 50 L. ed. 776, 26 Sup. Ct. Rep. 478; Cook County v. Calumet & C. Canal & Dock Co. 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; Telluride Power Transmission Co. v. Rio Grande Western R. Co. 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245; Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; Florida C. & P. R. Co. v. Bell, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704; Filhiol v. Maurice, 185 U. S. 108, 46 L. ed. 827, 22 Sup. Ct. Rep. 560.

Mr. Justice Van Devanter delivered the opinion of the court:

The judgment here under review is one of dismissal for want of jurisdiction. The action was in ejectment. The petition alleged that the plaintiffs were owners in fee and entitled to the possession; that the defendants had forcibly taken possession and were wrongfully keeping the plaintiffs out of possession, and that the latter were damaged thereby in a sum named. Nothing more was required to state a good cause of action. Snyder's Comp. Laws (Okla.) §§ 5627, 6122; Joy v. St. Louis, 201 U. S. 332, 340, 50 L. ed. 776, 780, 26 Sup. Ct. Rep. 478. But the petition, going beyond what was required, alleged [75] with much detail that the defendants were asserting ownership in themselves under a certain deed, and that it was void under the legislation of Congress restricting the alienation of lands allotted to the Choctaw and Chickasaw Indians. However essential or appropriate these allegations might have been in a bill in equity to cancel or annul the deed, they were neither essential nor appropriate in a petition in ejectment. Apparently, their purpose was to anticipate and avoid a defense which it was supposed the defendants would interpose; but, of course, it rested with the defendants to select their ground of defense, and it well might be that this one would not be interposed. In the orderly course, the plaintiffs were required to state their own case in the first instance, and then to deal with the defendants' after it should be disclosed in the answer. Snyder's Comp. Laws, §§ 5634, 5642, 5668; Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 188 U. S. 632, 639, 47 L. ed. 626, 631, 23 Sup. Ct. Rep. 434. Diversity of citizenship was not alleged, and, unless the allegations respecting the invalidity, under the legislation of Congress, of the defensive claim attributed to the defendants, operated to bring the case within the jurisdiction of the circuit court, the judgment of dismissal was plainly right.

It is now contended that these allegations showed that the case was one arising under the laws of the United States,—namely, the acts restricting the alienation of Choctaw and Chickasaw allotments,—and therefore brought it within the circuit court's jurisdiction. But the contention overlooks repeated decisions of this court by which it has become firmly settled that whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute (now § 24, Judicial Code [36 Stat. at L. 1091, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 135]), must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which [76] it is thought the defendant may interpose. Tennessee v. Union & Planters' Bank, 152 U. S. 454, 460, 464, 38 L. ed. 511, 513, 515, 14 Sup. Ct. Rep. 654; Third Street & Suburban R. Co. v. Lewis, 173 U. S. 457, 460, 43 L. ed. 766, 767, 19 Sup. Ct. Rep. 451; Florida C. & P. R. Co. v. Bell, 176 U. S. 321, 329, 44 L. ed. 486, 490, 20 Sup. Ct. Rep. 399; Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. and Joy v. St. Louis, supra; Devine v. Los Angeles, 202 U. S. 313, 333, 50 L. ed. 1046, 1053, 26 Sup. Ct. Rep. 652; Louisville & N. R. Co. v. Mottley, 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. Rep. 42; Shulthis v. McDougal, 225 U. S. 561, 569, 56 L. ed. 1205, 1210, 32 Sup. Ct. Rep. 704; Denver v. New York Trust Co. 229 U. S. 123, 133-135, 57 L. ed. 1101, 1120, 1121, 33 Sup. Ct. Rep. 651. Tested by this standard, as it must be, the case disclosed

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by the petition was not one arising under a law of the United States.

Whether or not in other respects the plaintiffs overlooked an authorized mode of securing relief to which they may be entitled need not now be considered. See 35 Stat. at L. 312, 314, chap. 199, § 6; Bowling v. United States, decided May 4, 1914 [233 U. S. 528, ante, 1080, 34 Sup. Ct. Rep. 659], and cases cited.

Judgment affirmed.

WASHINGTON SECURITIES COMPANY, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 76–80.)

Appeal — review of facts — concurrent findings.

1. Findings of fact in a suit to cancel patents for public land as fraudulently procured will not be disturbed by the Federal Supreme Court unless shown to be clearly erroneous.

[For other cases, see Appeal and Error, 4931–4959, in Digest Sup. Ct. 1908.]

Evidence — sufficiency — knowledge of fraud in homestead entry.

2. A finding that a corporation purchasing from the patentees under the homestead laws took title with notice or knowledge that such patents were fraudulently procured by falsely representing to the land officers that the lands were agricultural in character, and not known to be valuable coal lands, is supported by evidence that the vice president of such corporation, who represented it in the negotiations, had theretofore as the agent of another company, learned that the latter was interested in coal development work on such lands, and was, with others, bearing the expense of that work with a view to acquiring the lands as coal lands; that this was recalled to his mind at the time of the negotiations; that he caused the land to be examined by an engineer, who found and reported the existence of a tunnel and other openings disclosing the coal; and that, following that report, the transaction was consummated on the theory that the lands were valuable for their coal contents, there being no claim that there was any development work or coal discovery after the entries were made, and both tunnel and openings giving visible evidence that they were not recently made.

[For other cases, see Evidence, XII. f, in Digest Sup. Ct. 1908.]

Courts — conclusiveness of decision of Land Department — fraud.

3. The finding of the land officers, in proceedings resulting in the issuance of patents upon commuted homestead entries, that such lands were agricultural and not coal lands, although not open to collateral attack, is not conclusive against the government when it sues to cancel the resulting patents upon the ground that they were fraudulently procured by false representations as to the character of the lands.

[For other cases, see Courts, 260a–267a, in Digest Sup. Ct. 1908.]

[No. 367.]

Argued May 7 and 8, 1914. Decided May 25, 1914.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court of the Western District of Washington, Northern Division, canceling certain homestead patents. Affirmed.

See same case below, 114 C. C. A. 79, 194 Fed. 59.

The facts are stated in the opinion.

Mr. H. R. Clise argued the cause, and, with Messrs. Charles Kennedy Poe and Charles Poe, filed a brief for appellant:

Where the findings of the lower courts are based wholly upon flimsy or insufficient testimony, or are unsupported by any substantial testimony whatever, they will be set aside.

Beyer v. Le Fevre, 186 U. S. 114–119, 46 L. ed. 1080–1082, 22 Sup. Ct. Rep. 765.

This rule applies to the government as well as to an individual; and its application is doubly essential in a case of this character, where the very gravamen of the suit is fraud, and its object the cancelation of a patent.

United States v. Stinson, 197 U. S. 200, 49 L. ed. 724, 25 Sup. Ct. Rep. 426.

As fraud is never presumed, it is incumbent upon the government to establish it by clear, unequivocal, and convincing testimony.

United States v. Mills, 169 Fed. 686; United States v. Detroit Timber & Lumber Co. 124 Fed. 393, 200 U. S. 321, 50 L. ed. 499, 26 Sup. Ct. Rep. 282; United States v. Clark, 200 U. S. 601, 50 L. ed. 613, 26 Sup. Ct. Rep. 340.

Knowledge acquired by an agent, outside the scope of his employment, is not imputable to the principal.

Houseman v. Girard Mut. Bldg. & Loan Asso. 81 Pa. 256; Story, Agency, § 140; Davis Improved Wrought Iron Wagon Wheel Co. v. Davis Wrought Iron Wagon Co. 22 Blatchf. 221, 20 Fed. 699; Brennan v. Emery-Bird-Thayer Dry Goods Co. 99 Fed. 971.

In Distilled Spirits (Harrington v. United States) 11 Wall. 356, 20 L. ed. 167, the question of how far a purchaser is affected by notice of prior liens, trusts, or frauds, by the knowledge of his agent who effects the purchase, was directly before this court, and the doctrine of imputed knowledge discussed at length. The court care-

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fully reviewed the authorities and concluded:

(1) That the presumption of knowledge depends upon the lapse of time between the purchase and the time when the knowledge was acquired by the agent.

(2) That the principal was not bound by such knowledge unless present to the agent's mind at the time of the purchase.

(3) That there must be clear and satisfactory proof that it was so present, and that, if the agent acquired the knowledge at the time he effected the purchase, no question can be raised as to his having it at the time.

It certainly cannot be presumed as a matter of law that Mr. Smith recalled the meager circumstances connected with this land, which the record shows to have occurred nearly sixteen years ago, and it is only reasonable to assume that he forgot them, or, at least, that they were not so clearly present to his mind as to charge the appellant with them by invoking the doctrine of imputed knowledge. This seems especially true, in view of his direct denial.

United States v. Clark, 200 U. S. 601, 50 L. ed. 613, 26 Sup. Ct. Rep. 340.

The cancelation of an executed contract is an exercise of the most extraordinary power of a court of equity, and one which should never be used for an alleged fraud unless it is established by clear, unequivocal, and convincing testimony. It cannot be done upon a bare preponderance of evidence; and fraud is never presumed, but the burden of producing proof, and of establishing it, is upon the government, from which it is not relieved, although the proposition to be established is of a negative nature.

United States v. Detroit Timber & Lumber Co. 124 Fed. 393, affirmed in 200 U. S. 321. 50 L. ed. 499, 26 Sup. Ct. Rep. 282; United States v. Mills, 169 Fed. 686; Maxwell Land-Grant Case (United States v. Maxwell Land-Grant Co.) 121 U. S. 325, 381, 30 L. ed. 949, 959, 7 Sup. Ct. Rep. 1015; United States v. Iron Silver Min. Co. 128 U. S. 673, 674, 32 L. ed. 571, 572, 9 Sup. Ct. Rep. 195; Colorado Coal & I. Co. v. United States, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; United States v. Stinson, 197 U. S. 200, 204, 49 L. ed. 724, 725, 25 Sup. Ct. Rep. 426; United States v. Clark, 200 U. S. 601, 50 L. ed. 613, 26 Sup. Ct. Rep. 340; United States v. Marshall Silver Min. Co. 129 U. S. 579, 32 L. ed. 734, 9 Sup. Ct. Rep. 343, 16 Mor. Min. Rep. 205; United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; United States v. San Jacinto Tin Co. 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850; Beyer v. Le Fevre, 186 U. S. 114, 46 L. ed. 1080, 22 Sup. Ct. Rep. 765.

There is unquestionably testimony, and a good deal of it of a hearsay character, which tends to show that the property was known as mineral land; but this does not satisfy the statutes of the United States, or the decisions of this court, construing them, as the land must be known to be mineral-ly valuable as required by law at the date of the patent. And none of the witnesses testified that there were any known mines upon the land, or anything more than a mere prospect, which might or might not prove valuable.

Colorado Coal & I. Co. v. United States, 123 U. S. 307, 327, 328, 31 L. ed. 182, 190, 8 Sup. Ct. Rep. 131; United States v. Central P. R. Co. 93 Fed. 871; Deffeback v. Hawke, 115 U. S. 392, 404, 405, 29 L. ed. 423, 426, 427, 6 Sup. Ct. Rep. 95; Davis v. Wiebbold, 139 U. S. 507, 521, 524, 35 L. ed. 238, 243, 244, 11 Sup. Ct. Rep. 628; Dower v. Richards, 151 U. S. 658, 663, 38 L. ed. 305, 307, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704.

There must be knowledge, and not mere belief, of the mineral character of the land.

Iron Silver Min. Co. v. Reynolds, 124 U. S. 374, 383, 384, 31 L. ed. 466, 470, 471, 8 Sup. Ct. Rep. 598.

The rule is less liberal in favor of the mineral character of land where the contest is between an agricultural claimant and a mineral claimant than where it is between two mineral claimants.

Chrisman v. Miller, 197 U. S. 313, 323, 49 L. ed. 770, 774, 25 Sup. Ct. Rep. 468.

The law constantly presumes that public officers charged with the performance of official duty have not neglected the same.

Hays v. Hill, 23 Wash. 740, 63 Pac. 576; United States v. Clark, 200 U. S. 601, 50 L. ed. 613, 26 Sup. Ct. Rep. 340.

We do not understand that it is the practice of this court, in the exercise of its great appellate jurisdiction, to go out of its way to decide facts properly for the consideration of another branch of the government, or to vacate patents upon such miscroscopic equities as are presented here.

Ross v. Day, 232 U. S. 110, ante, 528, 34 Sup. Ct. Rep. 233.

Where the proceedings are wholly *ex parte*, and the governor compelled to rely on the evidence of the party charged with fraud, the Department's finding of a particular fact or circumstance is not binding or conclusive. On the other hand, where there is a disputed question presented to or considered by the Department, their decisions are final to the same extent as those of other judicial or quasi judicial tribunals.

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United States v. Minor, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836; Vance v. Burbank, 101 U. S. 514, 25 L. ed. 929; Greenameyer v. Coate, 212 U. S. 434, 53 L. ed. 587, 29 Sup. Ct. Rep. 345; Quinby v. Conlan, 104 U. S. 420, 26 L. ed. 800; DeCambra v. Rogers, 189 U. S. 119, 47 L. ed. 734, 23 Sup. Ct. Rep. 519.

Assistant Attorney General Knaebel argued the cause and filed a brief for appellee:

Since this question depends entirely upon the facts, the finding of both courts below is conclusive, in the absence of clear error.

Texas & P. R. Co. v. Railroad Commission, 232 U. S. 338, ante, 630, 34 Sup. Ct. Rep. 438; Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; Dun v. Lumbermen's Credit Asso. 209 U. S. 20, 52 L. ed. 663, 28 Sup. Ct. Rep. 335, 14 Ann. Cas. 501.

The finding of the courts below was sustained by ample evidence.

(a) The land was known coal land, and therefore reserved by law from homestead entry.

Diamond Coal & Coke Co. v. United States, 233 U. S. 236, ante, 936, 34 Sup. Ct. Rep. 507.

(b) There was fraud in the entries: the entrymen knew, or were chargeable with knowledge of, the character of the land.

(c) The patents were unlawful even though the entrymen were honestly mistaken. Even if it were possible to believe that the entrymen were all honestly mistaken, the result would be the same. The legal right to issue the patents depended on the character of the land, and not upon the state of the entrymen's minds.

Mullan v. United States, 118 U. S. 271, 278, 30 L. ed. 170, 173, 6 Sup. Ct. Rep. 1041.

The burden was upon the defendant to allege and prove clearly all the elements of the defense.

Boone v. Chiles, 10 Pet. 177, 211, 9 L. ed. 388, 400; McDonald v. Belding, 145 U. S. 492, 498, 36 L. ed. 788, 790, 12 Sup. Ct. Rep. 892; Smith v. Orton, 131 U. S. lxxv, lxxviii, Appx. and 18 L. ed. 62, 64; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 437, 35 L. ed. 1063, 1071, 12 Sup. Ct. Rep. 239; Johnson v. Georgia Loan & T. Co. 72 C. C. A. 639, 141 Fed. 593; Secombe v. Campbell, 5 Bann. & Ard. 429, 632, 2 Fed. 358; Nickerson v. Meacham, 5 McCrary, 5, 14 Fed. 884; Lakin v. Sierra Buttes Gold Min. Co. 25 Fed. 337; Jewett v. Palmer, 7 Johns. Ch. 65, 11 Am. Dec. 401; Rozell v. Chicago Mill. & Lumber Co. 76 Ark. 525, 89 S. W. 469; 39 Cyc. 1778.

Conceding that, generally speaking, it is not incumbent on the purchaser of patented land to inquire into the proceedings before patent, it must also be conceded as a self-evident proposition that he is charged with notice of the recitals contained in the patent itself.

Simmons Creek Coal Co. v. Doran, 142 U. S. 437, 35 L. ed. 1063, 12 Sup. Ct. Rep. 239.

Notice to the attorney was notice to the defendant.

39 Cyc. 1763, note 96; Armstrong v. Ashley, 204 U. S. 272, 51 L. ed. 482, 27 Sup. Ct. Rep. 270; Jennings v. Carter, 53 Ark. 242, 13 S. W. 800; Stokes v. Riley, 121 Ill. 166, 11 N. E. 877; Griffith v. Griffith, 9 Paige, 315; Sickles v. White, 66 Tex. 178, 17 S. W. 543; Polk v. Cosgrove, 4 Biss. 437, Fed. Cas. No. 11,248; Griffin v. Franklin, 224 Mo. 667, 123 S. W. 1092.

The rule that notice to the agent is notice to the principal applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction, and present to his mind when he is acting as such agent.

Distilled Spirits (Harrington v. United States) 11 Wall. 356, 20 L. ed. 167.

There was no conclusive adjudication of the character of the land in the Land Office proceedings.

United States v. Stone, 2 Wall. 525, 17 L. ed. 765; Mullan v. United States, 118 U. S. 271, 30 L. ed. 170, 6 Sup. Ct. Rep. 1041; Germania Iron Co. v. United States, 165 U. S. 379, 41 L. ed. 754, 17 Sup. Ct. Rep. 337; Williams v. United States, 138 U. S. 514, 34 L. ed. 1026, 11 Sup. Ct. Rep. 457.

Mr. Justice Van Devanter delivered the opinion of the court:

This was a suit to cancel four patents issued under the commutation provision of the homestead law, and embracing a full section of land in King county, Washington. The bill charged that the patents were fraudulently procured by falsely representing to the land officers that the lands were agricultural in character, and therefore subject to homestead entry, when in truth they were at the time known to be valuable coal lands, and therefore excepted from the operation of the homestead law. After the patents were issued the lands were conveyed to the appellant, and there was a further charge that it took the title with notice and knowledge of the fraud. The circuit court found that these charges were true, and entered [78] a decree for the government; and the circuit court of appeals, taking a like view of the evidence, affirmed the decree. 114 C. C. A. 79, 194 Fed. 59.

The rule is well settled that findings of fact concurred in by two lower courts will

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not be disturbed by this court unless shown to be clearly erroneous. Stuart v. Hayden, 169 U. S. 1, 14, 42 L. ed. 639, 643, 18 Sup. Ct. Rep. 274; Towson v. Moore, 173 U. S. 17, 24, 43 L. ed. 597, 600, 19 Sup. Ct. Rep. 332; Dun v. Lumbermen's Credit Asso. 209 U. S. 20, 23, 52 L. ed. 663, 665, 28 Sup. Ct. Rep. 335, 14 Ann. Cas. 501; Texas & P. R. Co. v. Railroad Commission, 232 U. S. 338, ante, 630, 34 Sup. Ct. Rep. 438. Applying the rule to the evidence in this case, we think the findings below should not be disturbed.

Only two of appellant's contentions merit special notice.

Without any uncertainty the evidence demonstrated that the lands were known to be valuable coal lands when the homestead entries were made and commuted, and that the affidavits and proofs to the contrary, upon which the patents were procured, were false. Not only were the lands in a well-known coal region and generally reputed to be coal lands, but a tunnel, slope, and other openings upon them, costing about $8,000, had disclosed that they contained coal of such quality and quantity as to render them valuable for coal mining. The entrymen so understood, and resorted to severe measures to keep coal prospectors off the lands.

The appellant's chief contention is, that there was no evidence, or, at least, no substantial evidence, that it took the title with notice or knowledge of the fraud perpetrated by the entrymen. But the record shows otherwise. The appellant's vice president, who represented it in the negotiations, had theretofore, as agent of another company, learned that the latter was interested in the coal development work before mentioned, and was, with others, bearing the expense of that work with a view to acquiring the lands as coal lands. This was recalled to his mind at the time of the negotiations. He caused the section to be [79] examined by an engineer, who found and reported the tunnel and other openings disclosing the coal, and, following that report, the transaction was consummated on the theory that the lands were valuable for their coal contents. There was no claim that there was any development work or coal discovery after the entries were made, and it is quite apparent from what was said of the engineer's report that the tunnel and openings gave visible evidence that they were not recently made. Of course, the appellant was bound to take notice that the patentees with whom it was dealing had obtained the lands under the homestead law, for it was so recited in the patents. Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 437, 35 L. ed. 1063, 1071, 12 Sup. Ct. Rep. 239. In these facts there was, as we think, persuasive evidence that the appellant took the title with notice or knowledge of the fraud.

It is contended also that the proceedings resulting in the patents were not *ex parte*, but adversary; that the land officers found the lands to be agricultural in character, and that this finding was conclusive upon the government. No doubt those officers found from the proofs submitted to them that the lands were agricultural, and not coal lands, for that was a prerequisite to issuing the patents, but the proceedings were not adversary in any true sense of the term. The applications and proofs of the entrymen were strictly *ex parte*. The government was not called upon to make any adverse showing, no issue was framed, no hearing was had, and no one represented the government save in the sense that the land officers did so. As this court has often held, the finding of the land officers in such a proceeding, although not open to collateral attack, is not conclusive against the government when it sues to cancel the resulting patent upon the ground that it was obtained by means of false and fraudulent proofs. United States v. Minor, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836; J. J. McCaskill Co. v. United States, 216 U. S. 504, 509, 54 L. ed. 590, 594, 30 Sup. Ct. Rep. 386, and cases cited. In such [80] a suit the action of the land officers is given appropriate effect by treating it as presumptively right, and as requiring the government to carry the burden of proving the fraud by that class of evidence which commands respect, and that amount of it which produces conviction. Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 239, ante, 936, 939, 34 Sup. Ct. Rep. 507.

Decree affirmed.

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY and Southern Railway Company, Plffs. in Err.,

v.

NATIONAL RICE MILLING COMPANY.

(See S. C. Reporter's ed. 80–86.)

Error to state court — Federal question — decision on non-Federal ground.

A judgment of a state court enforcing the liability of two connecting carriers for the loss of an interstate shipment of rice,

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NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme

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caused by an extraordinary flood, the waters of which, reaching some cars containing quicklime, started a fire which spread to the rice, is not reviewable in the Federal Supreme Court, although the state court ruled adversely upon the carriers' contention that, under the combined operation of the Carmack amendment of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1307), § 7, stipulations in the bill of lading, and the common-law rule, they were not liable unless the plaintiff should show that the carrier on whose line the loss occurred negligently failed to take reasonable precautions to avoid it, where the court also found as a matter of fact from the testimony of the carriers' witnesses that such carrier negligently permitted the cars containing the rice to remain within the influence of the rising flood and in immediate proximity to the quicklime, when ordinary prudence required their removal to a place of safety.

[For other cases, see Appeal and Error, 1465-1528, in Digest Sup. Ct. 1908.]

[No. 615.]

Argued February 27, 1914. Decided May 25, 1914.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which, on a rehearing, affirmed a judgment of the Civil District Court for the Parish of Orleans, enforcing the liability of connecting carriers for the loss of an interstate shipment. Dismissed for want of jurisdiction.

See same case below, 132 La. 615, 61 So. 708.

The facts are stated in the opinion.

Mr. J. Blanc Monroe argued the cause, and, with Mr. John K. Graves, filed a brief for plaintiffs in error:

The sole issue, in our judgment, is not an issue of fact, but is an issue of law. That issue is: Is the Federal rule of liability to be applied to this case, or must the state rule be applied?

Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316; Dower v. Richards, 151 U. S. 658, 667, 38 L. ed. 305, 308, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 300, 305, 56 L. ed. 208, 212, 32 Sup. Ct. Rep. 96; Creswill v. Grand Lodge, K. P. 225 U. S. 246, 261, 56 L. ed. 1074, 1080, 32 Sup. Ct. Rep. 822; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 11, 51 L. ed. 681, 685, 27 Sup. Ct. Rep. 407.

Does the judgment of the lower court rest upon a question of general law, broad enough to sustain it, so that the decision of the Federal question is unnecessary?

Henderson Bridge Co. v. Henderson, 173 U. S. 592, 608, 43 L. ed. 823, 829, 19 Sup. Ct. Rep. 553.

The state court's decision, as is plainly shown by its opinion on rehearing, is based upon the fundamental error that the burden to negative the existence of negligence contributing to the loss caused by the act of God was upon the carriers. This error was an error of law, and an error in misinterpreting or failing to apply the Federal law. This error goes to the root of the decision, and its correction will destroy the decision. The application of the doctrine of Schlemmer v. Buffalo, R. & P. R. Co. supra, requires a review by this court.

Messrs. J. Blanc Monroe, Monte M. Lemann, and John K. Graves also filed a brief for plaintiffs in error:

The Federal question is properly before this court.

Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241; Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390.

Mr. William Catesby Jones argued the cause, and, with Messrs. Gustave Lemle and Arthur A. Moreno, filed a brief for defendant in error:

The judgment of the lower court rests upon a question of general law broad enough to sustain it, and the decision of the so-called Federal question is unnecessary.

Arkansas Southern R. Co. v. German Nat. Bank, 207 U. S. 270, 52 L. ed. 201, 28 Sup. Ct. Rep. 78; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Baker v. Baldwin, 187 U. S. 61, 47 L. ed. 75, 23 Sup. Ct. Rep. 19; Vandalia R. Co. v. Indiana, 207 U. S. 359, 52 L. ed. 246, 28 Sup. Ct. Rep. 130; Seneca Nation of Indians v. Christy, 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. Rep. 828; Pierce v. Somerset R. Co. 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; Gaar, S. & Co. v. Shannon, 223 U. S. 468, 56 L. ed. 510, 32 Sup. Ct. Rep. 236; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 57 L. ed. 982, 33 Sup. Ct. Rep. 609.

Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

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Mr. Justice Van Devanter delivered the opinion of the court:

This was an action to recover the value of two cars of rice destroyed by fire in August, 1908, while being transported over connecting railroads from New Orleans, Louisiana, to Charleston, South Carolina. The rice was shipped upon through bills of lading issued by the initial carrier, and was destroyed while in the second carrier's custody at Old Hamburg, South Carolina. The two cars, with others [82] containing quicklime, were side-tracked in the yard at that place awaiting further movement towards their destination. The yards adjoined the Savannah river, which was then almost out of its banks and steadily rising as a result of extraordinary rains and cloudbursts extending up the river and its tributaries 100 miles. The waters continued to rise, spread over the yard to a considerable depth, and ultimately reached the quicklime, thereby causing the cars to burn and destroying the rice. The cars had been in the yard about sixteen hours when the fire started. The action was against both carriers, and it was alleged in the petition, which based the right of recovery upon the Carmack amendment to the interstate commerce act (34 Stat. at L. 584, 595, chap. 3591, § 7, U. S. Comp. Stat. Supp. 1911, p. 1307), that the loss of the rice was caused by the negligence of the second carrier, and that the two carriers were jointly liable. Issue was joined, and, after a trial, the district court of the parish rendered a judgment against the carriers jointly and *in solido*, which the supreme court of the state at first reversed, and then, after a rehearing, affirmed. 132 La. 615, 61 So. 708. The carriers sued out this writ of error, basing their right so to do upon a claim that by the judgment of affirmance they were denied a right or immunity asserted under a law of the United States.

A motion to dismiss was presented along with the merits, and we think it is well taken.

The bills of lading contained these stipulations:

"This company or other carriers over whose line the property may pass shall not be held responsible for loss or damage (unless through proved carelessness or negligence of their employees) resulting . . . from heat, cold, fire, flood, storms, mobs, or other causes not subject to the carrier's control.

"Neither this company nor any of its connecting carriers shall be liable for any damage to or destruction of [83] said property by fire, unless such damage or destruction shall result directly and exclusively from their negligence or that of their employees, and unless such negligence shall be affirmatively established by the owner of said property."

In the supreme court of the state the carriers contended that, under the combined operation of the Carmack amendment as interpreted in Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148, the stipulations in the bills of lading, and the common-law rule applied in Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 19 L. ed. 909, and other cases,† they were entitled to exoneration upon showing that the rice was destroyed by the extraordinary flood, unless it also was shown that the second carrier contributed to the loss by negligently failing to take reasonable precautions to avoid it when the rising waters gave warning of the danger; and it was particularly urged as a part of this contention that the burden was upon the plaintiff to show such negligence, and not upon the carriers to show the absence of it. But the court, although disapproving the latter phase of the contention, and thinking the carriers were charged by the law of Louisiana with the burden of showing that there was no negligence, did not rest its judgment upon that ground. On the contrary, it examined the evidence, which comprehensively covered the subject, to ascertain whether, upon the hypothesis that the contention of the carriers was sound, they were liable, and from that examination it found as matter of fact that the second carrier had negligently permitted the cars of rice to remain within the influence of the rising flood and in immediate proximity to the quicklime when ordinary prudence required that they be moved to a place of safety; and that this was [84] made an independent ground of the judgment is shown by the court's extended discussion of the evidence and by the following excerpts from its opinion:

"A close reading of the evidence compels the conclusion that there was not sufficient forethought on the part of the officers in charge of the railroad yards. We have seen that the river was rising rapidly on the morning of the 26th of August. Some of the witnesses testified that by 7 o'clock it had covered the switch tracks, and yet nothing was done to protect property. Leisurely enough, the employees went about their business and gave very little concern

†Clark v. Barnwell, 12 How. 272, 280, 281, 283, 13 L. ed. 985, 988, 989; Western Transp. Co. v. Downer, 11 Wall. 129, 133, 20 L. ed. 160, 161; Cau v. Texas & P. R. Co. 194 U. S. 427, 432, 48 L. ed. 1053, 1057, 24 Sup. Ct. Rep. 663, 16 Am. Neg. Rep. 659.

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to the rising waters. Those who did attempt to save property (if what they did can be considered in that light) displayed very little activity, beginning at 8 o'clock, taking out a few cars and leaving others in the old Hamburg yards. That is all they did. These yards were submerged by water to a height above the floor of the cars. The question arises: Was it possible, before the waters reached their greatest height, to move the cars to a safer place than where they were hauled to on the morning of the 26th of August; that is, to the old Hamburg yards? We have noted, before 8 o'clock or 8:30 o'clock A. M., not the least attempt was made to move the cars out of the yard where they had been placed. Mr. Benson, inspector of the Southern Railway Company, testified that on the morning of the 26th of August, he reported at the Hamburg yard at 7 o'clock to go to work, and at that time the water had just reached the rail in front of the block office. There were a crew and an engine in the yard. Why were they not put at work at that time to save the freight?

"Another witness, the night operator, renders it still more evident that it was possible to move the train in the morning, for he says that when he went to work the yard was entirely free from water on the 26th of August in the morning. An attempt was made to rescue the cars between 8 and half past 8 o'clock A. M. It failed. They [85] went too late to rescue these cars. There had been ample time to save them.

. . . . . .

"These floods were frequent, and yet defendant remained indifferent, and even sent its cars to the lowest places on the yard, where they were permitted to remain without making a serious and timely attempt to take them away.

"From all this evidence we are led to the inference, which we think is positive, that there was negligence. A little timely activity would have brought about a different result, and would have saved plaintiff's property, or would have placed defendant in a position to successfully defend itself.

"Unquestionably the river was rising rapidly on the morning of the 26th at 7 o'clock; in thirty-five minutes it covered the switch tracks. It does not seem that anything was done to prevent the destruction of the cars. Leisurely enough, the employees went about their respective occupations, and now, when they give an account of themselves, it does seem as if they wish to lay all the trouble on the rising waters, although they remained indifferent when they should have exerted themselves.

. . . . . .

"Admitting for a moment all that is claimed under the Carmack amendment, under any of the laws of this country, indifferent railroad people, who receive freight to be transported some distance, and who, just before the waters of a storm have flowed down, stop the cars on the way, and run them to the lowest part of their yards, and place them next to cars loaded with quicklime, easily ignited by water, and leave them at that place while other cars are taken out, and who make no attempt to haul them out, although the waters are rising slowly enough for such work after warning given, are not protected from the charge of negligence under the law."

[86] True, the testimony upon which the court rested its conclusion that negligence was proved did not come from the plaintiff's witnesses, but from those for the carriers, and was largely elicited by cross-examination, but that is quite immaterial. The plaintiff was entitled to the benefit of all the testimony in the case, from whatever source it came, and was not required, even though having the burden of proof, to go through the ceremony of proving any fact otherwise established.

As it clearly appears that the judgment rested upon a ground which was not only adequate to sustain it, but in entire harmony with the carrier's asserted Federal right, it cannot be said that there was a denial of that right in the sense contemplated by § 237 of the Judicial Code [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227]. Whether the right was well founded we therefore need not consider.

Writ of error dismissed.

WABASH RAILROAD COMPANY, Plff. in Err.,
v.
JOHN R. HAYES.

(See S. C. Reporter's ed. 86-91.)

Commerce — employers' liability — exclusiveness of Federal regulation — local practice.

1. A declaration stating a good cause of action under the Federal employers' liability

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Note.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

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act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), may be treated as affording a basis for a recovery under the state law after first eliminating the allegation that the injury occurred in interstate commerce, which the proof demonstrated was unwarranted, since by so doing the court is merely giving effect to a rule of local practice, the application of which was not in anywise in contravention of the Federal statute.

[For other cases, see Commerce, I. c, in Digest Sup. Ct. 1908.]

Error to state court — frivolousness of Federal question.

2. The contention that a right or immunity under the Federal employers' liability act of April 22, 1908, was denied by the ruling of a state court that a declaration stating a good cause of action under that act could serve as the basis of recovery under the state law after first eliminating the allegation that the injury occurred in interstate commerce, which the proof demonstrated was unwarranted, is so lacking in merit as not to serve as the basis for a writ of error from the Federal Supreme Court to the state court.

[For other cases, see Appeal and Error, 1110-1137, in Digest Sup. Ct. 1908.]

[No. 843.]

Submitted April 27, 1914. Decided May 25, 1914.

IN ERROR to the Appellate Court of Illinois for the First District to review a judgment which affirmed a judgment of the Superior Court of Cook County, in that state, in favor of plaintiff in a personal-injury action against a common carrier. Dismissed for want of jurisdiction.

See same case below, 180 Ill. App. 511.

The facts are stated in the opinion.

Messrs. J. L. Minnis, John Maxey Zane, and Charles F. Morse submitted the cause for plaintiff in error:

The rule that the question of what may

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On necessity of color of merit in Federal question to sustain writ of error to state court—see note to Offield v. New York, N. H. & H. R. Co. 51 L. ed. U. S. 231.

Recovery under state law when action under Federal employers' liability act fails.

Although the action was brought under the Federal employers' liability act, and the proof demonstrates that there is no cause of action under that statute, still the suit will not be dismissed if the plaintiff has made out a good cause of action at common law. Jones v. Chesapeake & O. R. Co. 149 Ky. 566, 149 S. W. 951. Here the complaint stated a cause of action under the Federal statute which it was held error to dismiss upon the ground that the employee was not engaged in interstate commerce, the evidence being such that the jury might have found him entitled to recover at common law.

To the same effect is Midland Valley R. Co. v. Ennis, 109 Ark. 206, 159 S. W. 214, where, the proof having failed to establish the allegation in the complaint that the deceased employee was engaged in handling interstate commerce at the time he received his injury, defendant asked for a peremptory instruction to the jury. The court said: "It is insisted now that, appellee having sued under the employers' liability act, he cannot recover in this action under the laws of the state of Oklahoma for an injury which occurred while deceased was engaged in intrastate commerce. Facts which gave the right to recover under the state law, and those which give the right to recover under the Federal statutes, constitute separate and distinct causes of action, for the Federal statute is exclusive where the incident is embraced within interstate commerce service, and does not apply where it is in intrastate service. The two causes of action may, however, be joined in the same complaint. Kirby's Dig. § 6079, subdiv. 6. There cannot, however, be a recovery upon a cause of action other than that stated in the pleadings and upon which the issue is joined. Patrick v. Whitely, 75 Ark. 465, 87 S. W. 1179, 5 Ann. Cas. 672; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651. A change in the cause of action may, however, be waived. Sarber v. McConnell, 64 Ark. 450, 43 S. W. 395.

"Our statute on the subject of amendment of pleadings is very liberal and provides that 'the court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved.' Kirby's Dig. § 6145. Under this section the court may, in its discretion, before the commencement of the trial, allow a complaint to be amended so as to change the cause of action to another one which might have been joined in the same action, and at any time during the progress of the trial may permit an amendment which does not change substantially the claim, so as to conform to the facts proved. The only limitation in the statute is that, after the proof is introduced, the pleadings cannot be amended so as to substantially change the cause of action.

"It is unnecessary to determine now, in view of the fact that the case is to be re-

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and what may not be treated as surplusage is a question on which the decision of the state courts is final obviously has no application where, as here, the ruling on the question of surplusage finds its only justification and support in, and proceeds directly and logically from, the refusal of the court to give to a Federal law the construction asked by the party aggrieved.

Leathe v. Thomas, 207 U. S. 93, 99, 52 L. ed. 118, 120, 28 Sup. Ct. Rep. 30; Vandalia R. Co. v. Indiana, 207 U. S. 359, 367, 52 L. ed. 246, 248, 28 Sup. Ct. Rep. 130.

If the facts stated are the facts necessary to state a cause of action under the statute, the statute need not be pleaded nor need reference be made to it.

Cound v. Atchison, T. & S. F. R. Co. 173 Fed. 527; Clark v. Southern P. Co. 175 Fed. 122; Hall v. Chicago, R. I. & P. R. Co. 149 Fed. 564.

Since it is immaterial for the purpose of this motion whether our construction of the Federal statute or that adopted and applied by the appellate court of Illinois is the correct one,—since in either case a Federal question is involved conferring jurisdiction upon this court,—we shall not enter upon any extended argument on that question. However, it seems to us that, notwithstanding the holdings of a few state courts and possibly of inferior Federal courts to the contrary, the decisions of this court have removed whatever doubt there may ever have been on this subject.

St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; North Carolina R. Co. v. Zachary, 232 U. S. 248, ante, 591, 34 Sup. Ct. Rep. 305; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21;

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versed on another ground, whether appellant waived the change in the cause of action, or whether the error in allowing the change was prejudicial so as to call for reversal of the case. On the remand of the cause the appellee can, if so advised, amend the pleadings so as to state a cause of action based upon intrastate service of the deceased, and thus make out a right of action under the state law."

The cases bear out the suggestion in Wabash R. Co. v. Hayes that, had the suit been presented in an alternative way in separate counts, one containing and another omitting the allegation that the injury occurred in interstate commerce, there would be no objection to proceeding to a judgment under the latter count, after it appeared that the first could not be sustained.

Thus, in Bankson v. Illinois C. R. Co. 196 Fed. 171, the court said: "No reason is perceived why, if the plaintiff, at the time of commencing the action, is uncertain as to whether, under the facts, she is entitled to recover under the employers' liability act of Congress, or the general law of negligence in force in the states of Iowa or Illinois, she may not state in different counts of her petition the acts of negligence she relies upon, and recover either under the act of Congress or the general law of negligence as the facts, when developed, may show; and it seems entirely clear that, under the Iowa practice act, she cannot, upon filing her petition, be required to then elect upon which of said causes of action she will rely for recovery."

And a demurrer on the ground of misjoinder of counts will not lie to a declaration in which counts at common law were joined with counts under the Federal employers' liability act. Bouchard v. Central Vermont R. Co. — Vt. —, — L.R.A. (N.S.) —, 89 Atl. 475. The court said that the object of the pleader in joining the two sets of counts may be inferred to have been uncertainty as to what the evidence would develop as to the interstate character of the employment of the injured servant, and a purpose to have a count applicable to the facts that the evidence might tend to show; that the two sets of counts state what might be regarded as different causes of action, but that this alone was not an objection to the joinder. "There is no difficulty about the matter," said the court, "unless it is found in the inconsistency of the counts,—a point somewhat dwelt upon by the defendant. It is true that the counts are inconsistent in that the Federal law is exclusive to the extent to which it applies, so that if the plaintiff makes out a case of liability under that law there can be no liability under the common-law counts. But the common-law doctrine of repugnancy relates to inconsistent matters of substance in the same count or plea. Counts and pleas which are merely inconsistent are not, for that reason, repugnant in a legal sense."

But where a state law differs so radically from the Federal statute that it is impossible for the court to proceed under both statutes, the plaintiff will be required to elect upon which cause of action she will rely for recovery. South Covington & C. Street R. Co. v. Finan, 153 Ky. 340, 155 S. W. 742. The court pointed out that under the state statute a prima facie case of negligence on the part of the employer was made out when any defect or unsafe condition was shown, while under the Federal statute the plaintiff must show negligence under the ordinarily applicable rules, and that the court must, of necessity, proceed under one of the statutes and discard the other.

Generally, on the question of constitutionality, application, and effect of the Federal employers' liability act—see note to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A. (N.S.) 38.

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Cound v. Atchison, T. & S. F. R. Co. 173 Fed. 527.

The right conferred by the Federal employers' liability act was claimed in the courts of Illinois and was there expressly denied.

St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; St. Louis, S. F. & T. R. Co. v. Seale, supra; Troxell v. Delaware, L. & W. R. Co. 227 U. S. 434, 57 L. ed. 586, 33 Sup. Ct. Rep. 274.

A Federal right is sufficiently set up or claimed in the state court to satisfy the requirements of § 237 of the Federal Judicial Code, irrespective of the time when the question is raised, if the state court actually passes upon the question so raised.

Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34; North Carolina R. Co. v. Zachary, 232 U. S. 248, ante, 591, 34 Sup. Ct. Rep. 305; McKay v. Kalyton, 204 U. S. 458, 463, 51 L. ed. 566, 569, 27 Sup. Ct. Rep. 346; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. ed. 137, 31 Sup. Ct. Rep. 171; Illinois C. R. Co. v. Kentucky, 218 U. S. 551, 54 L. ed. 1147, 31 Sup. Ct. Rep. 95; Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241; Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 67, 43 L. ed. 364, 368, 19 Sup. Ct. Rep. 97; Powell v. Brunswick County, 150 U. S. 440, 37 L. ed. 1136, 14 Sup. Ct. Rep. 166.

Mr. James C. McShane submitted the cause for defendant in error:

Even if defendant's claim, as now made, had been specially set up as a right or immunity under the Federal act, it was not such, but was merely a question of general law relating to pleading and practice in a state court, and does not present a Federal question.

Buena Vista County v. Iowa Falls & S. C. R. Co. 112 U. S. 165, 28 L. ed. 680, 5 Sup. Ct. Rep. 84; Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 416, 55 L. ed. 789, 796, 31 Sup. Ct. Rep. 534; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 91, 40 L. ed. 85, 86, 15 Sup. Ct. Rep. 991; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; Johnson v. Drew, 171 U. S. 93, 43 L. ed. 88, 18 Sup. Ct. Rep. 800; Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; Western U. Teleg. Co. v. Wilson, 213 U. S. 52, 53 L. ed. 693, 29 Sup. Ct. Rep. 403; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; Brinkmeier v. Missouri P. R. Co. 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570–578, 57 L. ed. 355–364, 33 Sup. Ct. Rep. 135.

The decision of the state courts on the question of pleading involved was correct.

Chicago & G. T. R. Co. v. Spurney, 197 Ill. 471, 64 N. E. 302; Barnes v. Northern Trust Co. 169 Ill. 118, 48 N. E. 31; Illinois Steel Co. v. Schymanowski, 162 Ill. 447, 44 N. E. 876; New York, C. & St. L. R. Co. v. Blumenthal, 160 Ill. 40, 43 N. E. 809; Weber Wagon Co. v. Kehl, 139 Ill. 644, 29 N. E. 714; Chicago City R. Co. v. O'Donnell, 207 Ill. 478, 69 N. E. 882, 15 Am. Neg. Rep. 517; Jones v. Chesapeake & O. R. Co. 149 Ky. 566, 149 S. W. 951; Payne v. New York, S. & W. R. Co. 201 N. Y. 436, 95 N. E. 20; Acardo v. New York Contracting & Trucking Co. 116 App. Div. 793, 102 N. Y. Supp. 7; Paris & G. N. R. Co. v. Boston, — Tex. Civ. App. —, 142 S. W. 947, affirmed in 231 U. S. 742, ante, 462, 34 Sup. Ct. Rep. 318; Bennett v. Great Northern R. Co. 115 Minn. 128, 131 N. W. 1066; Southern R. Co. v. Howerton, — Ind. App. —, 101 N. E. 121; Taylor v. Southern R. Co. — Ind. App. —, 101 N. E. 506; Erie R. Co. v. Kennedy, 112 C. C. A. 76, 191 Fed. 332; Ullrich v. New York, N. H. & H. R. Co. 193 Fed. 768; Ahrens v. Chicago, M. & St. P. R. Co. 121 Minn. 335, 141 N. W. 297; Helm v. Cincinnati, N. O. & T. P. R. Co. 156 Ky. 240, 160 S. W. 945; Atkinson v. Bullard, — Ga. App. —, 80 S. E. 220.

Mr. Justice Van Devanter delivered the opinion of the court:

This was an action against a railroad company to recover for a personal injury sustained by the plaintiff through the negligence of the company while he was employed as a switchman in it railroad yard in Cook county, Illinois. The action was brought in the superior court of that county, and a trial to the court and a jury resulted in a verdict and judgment for the plaintiff. The judgment was affirmed by the appellate court for that district (180 Ill. App. 511), which was the highest court of the state in which a decision of the case could be had, and this writ of error was then sued out by the company. By a motion to dismiss the writ our jurisdiction to review the judgment is challenged. Shortly stated,

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the facts bearing upon the disposition of the motion are these:

The plaintiff's declaration alleged that the injury occurred while the defendant was engaged, and while the plaintiff was employed by it, in interstate commerce. The [89] other allegations were such that, with that one, they stated a good cause of action under the Federal employers' liability act (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), and, without it, they stated a good cause of action under the common law prevailing in the state. There was a plea of not guilty; and upon the trial, the proof failing to show that the injury occurred in interstate commerce, the court, at the defendant's request, instructed the jury that the Federal employers' liability act had no application to the case. Then, over the defendant's objection, the court treated the allegation respecting interstate commerce as eliminated, and submitted the case to the jury as one controlled by the common law prevailing in the state. The plaintiff recovered under that law. In the appellate court the defendant contended that, even though the allegation that the injury occurred in interstate commerce proved unwarranted, the declaration could not be treated, consistently with the Federal act, as affording any basis for a recovery under the law of the state, common or statutory. But the court held otherwise and sustained the recovery under the state law. Whether that ruling operated as a denial of a right or immunity to which the defendant was entitled under the Federal act is the question, and the only question, sought to be presented by the assignments of error.

Had the injury occurred in interstate commerce, as was alleged, the Federal act undoubtedly would have been controlling, and a recovery could not have been had under the common or statute law of the state; in other words, the Federal act would have been exclusive in its operation, not merely cumulative. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 53-55, 56 L. ed. 327, 347, 348, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 158, 57 L. ed. 1129, 1133, 33 Sup. Ct. Rep. 651; North Carolina R. Co. v. Zachary, 232 U. S. 248, 256, ante, 591, 34 Sup. Ct. Rep. 305; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, ante, 1062, 34 Sup. Ct. Rep. 635. On the other hand, if the injury occurred outside of interstate [90] commerce, the Federal act was without application, and the law of the state was controlling. Illinois C. R. Co. v. Behrens, 233 U. S. 473, ante, 1051, 34 Sup. Ct. Rep. 646. That the injury did occur outside of interstate commerce was declared in the court's instruction to the jury, and the defendant, having requested the instruction, is bound by it. It therefore must be taken as settled that the right of recovery arose under the state law.

The plaintiff asserted only one right to recover for the injury, and in the nature of things he could have but one. Whether it arose under the Federal act or under the state law, it was equally cognizable in the state court; and had it been presented in an alternative way in separate counts, one containing and another omitting the allegation that the injury occurred in interstate commerce, the propriety of proceeding to a judgment under the latter count, after it appeared that the first could not be sustained, doubtless would have been freely conceded. Certainly, nothing in the Federal act would have been in the way.

Instead of presenting his case in an alternative way, the plaintiff so stated it as to indicate that he was claiming only under the Federal act. And when the proofs demonstrated that the injury arose outside of interstate commerce, and therefore that no recovery could be had under the Federal act, the court was confronted with the question whether the declaration could be amended, or regarded as amended, to conform to the proofs. Holding that this could be done, the court treated the mistaken allegation that the injury occurred in interstate commerce as eliminated. Therein the court merely gave effect to a rule of local practice, the application of which was not in anywise in contravention of the Federal act. See Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 56, 57, 56 L. ed. 348, 349, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

It follows that the contention that the defendant was denied a right or immunity to which it was entitled under [91] the Federal act is not only untenable, but so devoid of color as to furnish no basis for this writ of error. See Sawyer v. Piper, 189 U. S. 154, 47 L. ed. 757, 23 Sup. Ct. Rep. 633.

As it is not claimed that, by reason of the shifting from one law to the other, the defendant was cut off from presenting any defense which was open only under the latter, or that the course taken by the plaintiff deprived the defendant of a right of removal otherwise existing, we intimate no opinion in either connection.

Writ of error dismissed.

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MARTIN OCAMPO and Teodoro M. Kalaw, Plffs. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 91–103.)

Constitutional law — due process of law —criminal prosecutions — preliminary examination.

1. The right of the accused under existing laws to a preliminary examination could be dispensed with, as is done by Philippine Commission act No. 612, § 2, in cases triable only in the court of first instance in the city of Manila, where the prosecuting attorney, after a due investigation of the facts, shall have presented an information against such accused in proper form, without infringing the prohibition of the Philippine Bill of Rights (act of July 1, 1902, 32 Stat. at L. 692, chap. 1369), § 5, against the denial of due process of law.

[For other cases, see Constitutional Law, IV. b, 9, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — criminal prosecutions —preliminary examination.

2. Denying to an inhabitant of Manila the right to a preliminary examination which is accorded to all other persons in the Philippine Islands, as is done by the provision of the Philippine Commission act No. 612, § 2, that in cases triable only in the court of first instance in the city of Manila, the accused shall not be entitled as of right to a preliminary examination in any case where the prosecuting attorney, after a due investigation of the facts, shall have presented an information against him in proper form, does not contravene the prohibition of the Philippine Bill of Rights (act July 1, 1902, § 5), against the denial of the equal protection of the laws.

[For other cases, see Constitutional Law, IV. a, 8, in Digest Sup. Ct. 1908.]

Constitutional law — delegation of judicial power — finding of probable cause.

3. A preliminary finding of probable cause for the arrest of the accused is only a quasi judicial act, not such that, because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal.

[For other cases, see Constitutional Law, III. b, 4, in Digest Sup. Ct. 1908.]

Criminal law — commitment — probable cause.

4. The preliminary inquiry into the facts conducted by the prosecuting attorney of the city of Manila, under Philippine Commission act No. 612, § 2, and upon which he files a sworn information against the accused, must be deemed a sufficient compliance with the requirement of the act of July 1, 1902, § 5, enacting a Bill of Rights for the Philippine Islands, that "no warrant shall issue but upon probable cause, supported by oath or affirmation," in view of the provision in § 9 of that act, authorizing modifications of practice and procedure.

[For other cases, see Criminal Law, III. c, in Digest Sup. Ct. 1908.]

Libel — in newspaper — liability of owner.

5. An administrator, manager, and one of the owners of a newspaper, is a proprietor within the meaning of Philippine Commission act No. 277, § 6, making every author, editor, or proprietor of a newspaper chargeable with the publication of any libel therein as fully as if he were the author of the same.

[For other cases, see Libel, I., in Digest Sup. Ct. 1908.]

Appeal — in criminal cases — increasing sentence.

6. The supreme court of the Philippine Islands, established in place of the existing audiencia or supreme court by Philippine Commission act No. 136, with original and appellate jurisdiction, has the power to increase the punishment on an appeal from a conviction of criminal libel, notwithstanding General Orders No. 58, §§ 42–44, 50, and Philippine Commission act No. 194, § 4, under which the judgments of the courts of first instance are final unless an appeal be taken.

[For other cases, see Appeal and Error, IX. e, in Digest Sup. Ct. 1908.]

[No. 270.]

Argued March 12 and 13, 1914. Decided May 25, 1914.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which affirmed, with an increase in the sentence imposed upon one of the defendants, a conviction of libel in the Court of First Instance of the City of Manila. Affirmed.

See same case below, 18 Philippine, 1.

The facts are stated in the opinion.

Mr. William R. Harr argued the cause, and, with Mr. Clement L. Bouvé, filed a brief for plaintiffs in error:

The proof of probable cause required by the fundamental law must be submitted to

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NOTE.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621; and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

On liability of editor or manager of newspaper for libel published without his knowledge—see note to Folwell v. Miller, 10 L.R.A.(N.S.) 332.

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the committing magistrate himself, and not simply to an official accuser.

Re Rule of Court, 3 Woods, 502, Fed. Cas. No. 12,126; United States v. Tureaud, 20 Fed. 621; State v. Gleason, 32 Kan. 245, 4 Pac. 363, 5 Am. Crim. Rep. 172; Swart v. Kimball, 43 Mich. 443, 5 N. W. 635.

The right to a preliminary examination or hearing is manifestly a valuable right, especially in a jurisdiction where grand juries do not exist, and if such protection against unjust prosecution is accorded to one person or class of persons by the Philippine Commission, it is manifestly a denial of the equal protection of the laws not to accord it to others.

Re Lowrie, 8 Colo. 499, 54 Am. Rep. 558, 9 Pac. 489; Re Jilz, 3 Mo. App. 243; People v. Mangold, 71 Mich. 335, 39 N. W. 6; People ex rel. Jeschly v. Police Justice, 7 Mich. 456.

Ocampo was not and is not proprietor of the paper.

8 Cyc. 683; Folwell v. Miller, 10 L.R.A. (N.S.) 332, 75 C. C. A. 489, 145 Fed. 495, 7 Ann. Cas. 455; Rex v. Gutch, Moody & M. 437.

Not only is an "administrator" not within the language of the statute, but he is also not within the considerations which have suggested that responsibility for the publication of a libelous article should be imposed upon the proprietor and editor.

Folwell v. Miller, supra; Mecabe v. Jones, 10 Daly, 223; Weil v. Nevin, 1 Monaghan (Pa.) 65; Spooner v. Daniels, Fed. Cas. No. 13,244a.

Solicitor General Davis argued the cause and filed a brief for defendant in error:

Trial upon information is due process of law.

Bolln v. Nebraska, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287; Davis v. Burke, 179 U. S. 399, 45 L. ed. 249, 21 Sup. Ct. Rep. 210; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; McNulty v. California, 149 U. S. 645, 37 L. ed. 882, 13 Sup. Ct. Rep. 959.

Investigation by the prosecuting attorney, with the aid of compulsory process, is an adequate substitute for preliminary examination before a committing magistrate.

United States v. McGovern, 6 Philippine, 621; United States v. Raymundo, 14 Philippine, 416; United States v. Wilson, 4 Philippine, 317.

The information, being under oath, was a sufficient showing of probable cause.

Ackerman v. State, 7 Wyo. 504, 54 Pac. 228; State v. Belding, 43 Or. 95, 71 Pac. 330; State v. McGilvery, 20 Wash. 240, 55 Pac. 115; United States v. Ronzone, 14 Blatchf. 69, Fed. Cas. No. 16,192.

Act No. 612, although confined to the city of Manila, does not deny to plaintiffs in error or to others the equal protection of the laws.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Gardner v. Michigan, 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989.

The words "proprietor" and "owner" may be treated as fairly synonymous.

Ferguson v. Arthur, 117 U. S. 482, 29 L. ed. 979, 6 Sup. Ct. Rep. 861; Koppel v. Downing, 11 App. D. C. 93; Latham v. Roach, 72 Ill. 179; Yeungling v. Schile, 20 Blatchf. 452, 12 Fed. 97.

One who, as owner or proprietor, furnishes the machinery, the money, or the men to circulate a publication, cannot shut his eyes to its contents and so escape responsibility.

Folwell v. Miller, 10 L.R.A.(N.S.) 332, 75 C. C. A. 489, 145 Fed. 495, 7 Ann. Cas. 455; Gebhardt v. England, 8 N. J. L. J. 146; Ickes v. State, 16 Ohio C. C. 31, 8 Ohio C. D. 442; McDonald v. Woodruff, 2 Dill. 244, Fed. Cas. No. 8,770; Perret v. New Orleans Times Newspaper, 25 La. Ann. 170; Townshend, Slander & Libel, 4th ed. § 123.

The supreme court of the Philippine Islands had the power to increase the punishment of Kalaw.

Dowdell v. United States, 221 U. S. 325, 55 L. ed. 753, 31 Sup. Ct. Rep. 590; Flemister v. United States, 207 U. S. 372, 52 L. ed. 252, 28 Sup. Ct. Rep. 129; Pico v. United States, 228 U. S. 225, 57 L. ed. 812, 33 Sup. Ct. Rep. 482; Trono v. United States, 199 U. S. 521, 50 L. ed. 292, 26 Sup. Ct. Rep. 121, 4 Ann. Cas. 773; United States v. Abijan, 1 Philippine, 83; United States v. Atienza, 1 Philippine, 736.

Mr. Justice Pitney delivered the opinion of the court:

On November 5, 1908, an information was filed in the court of first instance of the city of Manila, charging plaintiffs in error, with others, as editors, proprietors, owners, directors, writers, managers, administrators, printers, and publishers of the newspaper "El Renacimiento," with publishing in that city a libel against Dean C. Worcester, then a member of the Philippine Commission. The information was subscribed and sworn to by the acting prosecuting attorney, and appended to it, and likewise sworn to by him, was the following

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declaration: [93] "A preliminary investigation has been conducted under my direction, having examined the witnesses under oath, in accordance with the provisions of § 39 of act 183 (Manila charter), as amended by § 2 of act 612 of the Philippine Commission." Both affidavits were made before the judge of the court of first instance, who thereupon issued warrants of arrest, pursuant to which the parties accused were on the same day brought before the court. The information was read to them, and the court allowed them until November 7th to answer. Their attorney, being present, asked that they be furnished with a copy of the information, which request was granted, and a copy was delivered to each of the accused. Thereafter, and on November 7th, before entering any demurrer or answer, they moved to vacate the order of arrest, upon the ground that it was made without any preliminary investigation held by the court, and without any tribunal, magistrate, or other competent authority having first determined that the alleged crime had been committed, and that there was probable cause to believe the defendants guilty of it; the procedure adopted being, as was claimed, in violation of §§ 12 and 13 of General Orders, No. 58, issued by the military governor April 23, 1910, and of paragraphs 1, 3, 11, and 18 of § 5 of the Philippines bill, enacted by the Congress of the United States on July 1, 1902; and it was insisted that § 2 of act No. 612 of the Philippine Commission, which took from accused persons in the city of Manila the right to a preliminary investigation, was contrary to the cited paragraphs of the Philippines bill, because it provided that accused persons in that city might be deprived of their liberty without due process of law, denied to the inhabitants of that city the equal protection of the law, deprived persons detained there to answer for a criminal offense of the "proper judicial proceedings," and violated the guaranty against arbitrary detention.

[94] This motion being overruled, defendants moved for an order requiring the prosecuting attorney to submit to the court and to them for examination the proceedings of the preliminary investigation alleged to have been conducted by him. This motion was likewise overruled.

Defendants then asked the court to hold a preliminary investigation before calling upon them to either demur to or answer the complaint. This motion being denied, demurrers were filed, which were overruled, and the defendants were called upon to plead to the information. They stood mute, and a plea of not guilty was entered for each of them. Upon their request, separate trials were granted. Ocampo was found guilty, and sentenced to six months' imprisonment and to pay a fine of 2,000 pesos and one fifth of the costs of the action. Kalaw was also found guilty, and sentenced to nine months' imprisonment and to pay a fine of 3,000 pesos and one fifth of the costs. Upon their writ of error, the supreme court of the Philippine Islands affirmed the judgment as to Ocampo, and modified the sentence imposed upon Kalaw so as to increase the period of his imprisonment to twelve months. 18 Philippine, 1. The present writ of error was then sued out.

The insistence is here renewed, that the arrest and trial of plaintiffs in error were without a preliminary finding of probable cause, and therefore in violation of rights secured to them by the Philippine Bill of Rights (act of July 1, 1902, § 5, chap. 1369, 32 Stat. at L. 692). This act, following the provisions of certain of the Amendments of the Constitution of the United States, declares, *inter alia:*

"Sec 5. That no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law or deny to any person therein the equal protection of the laws.

. . . . . .

[95] "That no person shall be held to answer for a criminal offense without due process of law; . . .

. . . . . .

"That no warrant shall issue but upon probable cause, supported by oath or affirmation. . . . ".

Prior to its enactment, and under date April 23, 1900, General Orders, No. 58, had been promulgated by the military governor, amending the Criminal Code of Procedure in certain respects, and providing by §§ 12 and 13 that every person making complaint charging the commission of a crime must inform the magistrate of all persons believed to have any knowledge of its commission, whereupon the magistrate must issue subpœnas requiring them to attend as witnesses, and must examine the informant or prosecutor and the witnesses, and take their depositions in writing, and, if satisfied from the investigation that the crime complained of had been committed, and that there was reasonable ground to believe that the party charged had committed it, the magistrate must issue an order of arrest.

By § 40 of act No. 183 of the Philippine Commission (the Manila charter, enacted August 1, 1901), municipal courts with criminal jurisdiction were established, and were empowered to conduct preliminary examinations, and to release, or commit

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and bind over, any person charged with an offense, to secure his appearance before the proper court; it being, among other things, provided that "every person arrested shall, without unnecessary delay, be brought before a municipal court or a court of first instance for preliminary hearing, release on bail, or trial."

Section 44 provided for two justices of the peace for the city of Manila, to exercise within the city the civil jurisdiction conferred upon justices of the peace in act No. 136; but they were debarred from exercising any criminal jurisdiction, such jurisdiction within the city being confined to courts of first instance and the municipal courts.

[96] By act No. 186 (August 5, 1901), the existing courts of justices of the peace in the city of Manila were abolished, and civil actions and proceedings then pending therein were transferred to the courts of justices of the peace established under act No. 183, while pending criminal actions and proceedings were transferred to the municipal courts established under act No. 183.

Act No. 194 (August 10, 1901), in its 1st section provides: "Every justice of the peace in the Philippine Islands is hereby invested with authority to make preliminary investigation of any crime alleged to have been committed within his municipality, jurisdiction to hear and determine which is by law now vested in the judges of courts of first instance." And it is by the same section made the duty of every justice of the peace, when written complaint under oath is made to him that a crime has been committed within his municipality, and there is reason to believe that any person has committed it, or when he has knowledge of facts tending to show the commission of a crime within his municipality by any person, to issue an order for the arrest of the accused, and have him brought before the justice for preliminary examination. Section 2 prescribes the procedure, which accords to the accused the right to examine the complaint and affidavits, to be present and hear and cross-examine the witnesses for the government, to offer witnesses in his own behalf, and give his own testimony if he desires; and "upon the conclusion of the preliminary investigation, if the justice of the peace is of the opinion that there is reasonable cause to believe that an offense has been committed and that the accused is guilty thereof, he shall so declare, and shall adjudge that the accused be remanded to jail for safe-keeping to await the action of the judge or court of first instance, unless he give bail, etc. On the other hand, if the justice of the peace be of the opinion that no crime has been committed, or that there is no reasonable ground to [97] believe the accused guilty thereof, the justice of the peace shall order the discharge of the accused. Such discharge, however, shall not operate as a final acquittal of the accused, but he may be again arrested and prosecuted for the same offense."

It was and is contended by plaintiffs in error that the procedure thus indicated ought to have been followed in their case.

The prosecution proceeded upon the theory that the above requirements as to preliminary examination and the finding of probable cause were repealed as to the city of Manila by act No. 612 of the Philippine Commission (February 3, 1903), § 2 of which provides:

"In cases triable only in the court of first instance in the city of Manila, the defendant shall have a speedy trial, but shall not be entitled as of right to a preliminary examination in any case where the prosecuting attorney, after a due investigation of the facts, under § 39 of the act of which this is an amendment [act No. 183], shall have presented an information against him in proper form: Provided, however, that the court of first instance may make such summary investigation into the case as it may deem necessary to enable it to fix bail or determine whether the offense is bailable."

Section 39 of the charter act, here referred to, provides:

"The prosecuting attorney of the city of Manila shall have charge of the prosecution of all crimes, misdemeanors, and violations of city ordinances, in the court of first instance and the municipal courts of the city of Manila. He shall investigate all charges of crimes, misdemeanors, and violations of ordinances, and prepare the necessary informations, or make the necessary complaints against the persons accused, and discharge all other duties in respect to criminal prosecutions enjoined upon provincial fiscals in the general provincial act and the Criminal Code of Procedure. . . . The prosecuting attorney or any [98] of his assistants may, if he deems it wise, conduct investigations in respect to crimes, misdemeanors, and violations of ordinances by taking oral evidence of reputed witnesses, and for this purpose may, by subpœna, summon witnesses to appear and testify under oath before him, and the attendance or evidence of an absent or recalcitrant witness may be enforced by application to the municipal court or the court of first instance."

It was this procedure that was followed in the present case. If act No. 612 is consistent with the Declaration of Rights con-

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tained in § 5 of the act of Congress of July 1, 1902, there can be no question that it necessarily operates to repeal, with respect to the city of Manila, inconsistent provisions previously in force there, as above mentioned.

Section 5 of the act of Congress contains no specific requirement of a presentment or indictment by grand jury, such as is contained in the 5th Amendment of the Constitution of the United States. And in this respect the Constitution does not, of its own force, apply to the Islands. Hawaii v. Mankichi, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787, 12 Am. Crim. Rep. 465; Dorr v. United States, 195 U. S. 138, 49 L. ed. 128, 24 Sup. Ct. Rep. 808, 1 Ann. Cas. 697; Dowdell v. United States, 221 U. S. 325, 332, 55 L. ed. 753, 757, 31 Sup. Ct. Rep. 590.

That the requirement of an indictment by grand jury is not included within the guaranty of "due process of law" is, of course, well settled. Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; McNulty v. California, 149 U. S. 645, 37 L. ed. 882, 13 Sup. Ct. Rep. 959; Dowdell v. United States, 221 U. S. 325, 332, 55 L. ed. 753, 757, 31 Sup. Ct. Rep. 590; Lem Woon v. Oregon, 229 U. S. 586, 589, 57 L. ed. 1340, 1341, 33 Sup. Ct. Rep. 783, and cases cited.

It is contended that since act No. 612 denies to the inhabitants of Manila the right to a preliminary examination which is accorded to all other people in the Islands, it denies the equal protection of the laws guaranteed by the act of Congress. But it was long ago decided that this guaranty does not require territorial uniformity. In Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 30, 25 L. ed. 989, 992, this court (by Mr. Justice Bradley) said:

"The last restriction [of the 14th Amendment], [99] as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. Each state has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a state to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the Amendments thereto."

And see Hayes v. Missouri, 120 U. S. 68, 72, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 350; Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co. 172 U. S. 474, 43 L. ed. 520, 19 Sup. Ct. Rep. 268; Mallett v. North Carolina, 181 U. S. 589, 598, 45 L. ed. 1015, 1020, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241.

It is, however, further contended that act No. 612 only undertakes to deny to the inhabitants of the city the right to a preliminary investigation when the prosecuting attorney sees fit to conduct an *ex parte* examination, and that it does not cover the subject of probable cause for the arrest of the accused, or affect the right accorded by §§ 12 and 13 of General Orders, No. 58, and by that paragraph of § 5 of the act of Congress of July 1, 1902, which declares "that no warrant shall issue but upon probable cause, supported by oath or affirmation." In overruling this contention the supreme court of the Philippine Islands followed its previous rulings in United States v. Wilson, 4 Philippine, 317, 322; United States v. McGovern, 6 Philippine, 621, 623; United States v. Raymundo, 14 Philippine, 416, 436.

[100] It is insisted that the finding of probable cause is a judicial act, and cannot properly be delegated to a prosecuting attorney. We think, however, that it is erroneous to regard this function, as performed by committing magistrates generally, or under General Orders, No. 58, as being judicial in the proper sense. There is no definite adjudication. A finding that there is no probable cause is not equivalent to an acquittal, but only entitles the accused to his liberty for the present, leaving him subject to rearrest. It is expressly so provided by § 14 of General Orders, No. 58, as it is by § 2 of act 194, above quoted. Such was the nature of the duty of a committing magistrate in the common-law practice, and it is recognized in Rev. Stat. § 1014, U. S. Comp. Stat. 1901, p. 716. Benson v. McMahon, 127 U. S. 457, 462, 463, 32 L. ed. 234, 236, 237, 8 Sup. Ct. Rep. 1240; Re Oteiza y Cortes, 136 U. S. 330, 335, 34 L. ed. 464, 467, 10 Sup. Ct. Rep. 1031, 8 Am. Crim. Rep. 241; Todd v. United States, 158 U. S. 278, 283, 39 L. ed. 982, 983, 15 Sup. Ct. Rep. 889. In short, the function of determining that probable cause exists for the arrest of a person accused is only quasi judicial, and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal. By § 9 of the act of July 1,

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1902 (32 Stat. at L. 695, chap. 1369), Congress enacted: "That the supreme court and the courts of first instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided and such additional jurisdiction as shall hereafter be prescribed by the government of said Islands, subject to the power of said government to change the practice and method of procedure. The municipal courts of said Islands shall possess and exercise jurisdiction as heretofore provided by the Philippine Commission subject in all matters to such alteration and amendment as may be hereafter enacted by law;" etc. Here we find clear warrant for modifications of the practice and procedure; and since § 5 of the same act (quoted above) does not prescribe how "probable cause" shall be determined, it is, in our opinion, as permissible for the local legislature to confide this duty to a prosecuting [101] officer as to intrust it to a justice of the peace. Consequently, a preliminary investigation conducted by the prosecuting attorney of the city of Manila, under act No. 612, and upon which he files a sworn information against the party accused, is a sufficient compliance with the requirement "that no warrant shall issue but upon probable cause, supported by oath or affirmation."

The views above expressed render it unnecessary for us to consider whether the objections thus far dealt with were waived by the plaintiffs in error when they gave bond at the time of their arrest.

It is next insisted that the conviction of Ocampo was erroneous for want of evidence that he was a proprietor of the newspaper or participated in the publication of the libel. The law is to be found in act No. 277 of the Philippine Commission (Phil. Penal Code 1911, p. 167), of which two sections may be quoted:

"Sec. 2. Every person who wilfully and with a malicious intent to injure another publishes or procures to be published any libel shall be punished by a fine of not exceeding $2,000, or imprisonment for not exceeding one year, or both."

"Sec. 6. Every author, editor, or proprietor of any book, newspaper, or serial publication is chargeable with the publication of any words contained in any part of such book or number of each newspaper or serial as fully as if he were the author of the same."

The evidence abundantly supports the conclusion of the courts below that Ocampo was the administrator, manager, and one of the owners of the newspaper known as "El Renacimiento," and there was no error in holding him to be a proprietor within the meaning of § 6.

Finally, it is contended that the supreme court of the Philippines had no jurisdiction to increase the punishment of Kalaw. The court was established by act No. 136 of the Philippine Commission (June 11, 1901), with original [102] and appellate jurisdiction. By § 18 it was given appellate jurisdiction over the courts of first instance; and by § 39 it was enacted that "the existing audiencia or supreme court is hereby abolished, and the supreme court provided by this act is substituted in place thereof." It is in effect conceded that under the Spanish system the courts of first instance were deemed examining courts, having a sort of preliminary jurisdiction, and that their judgments of conviction or acquittal were not final until the case had been passed upon in the audiencia or supreme court. But it is contended that this was so far changed by General Orders, No. 58, §§ 42, 43, 44, and 50, and by act No. 194 of the Philippine Commission, § 4 (August 10, 1901), that the judgments of the court of first instance are final unless an appeal be taken. And so it was held, with respect to cases other than capital, in Kepner v. United States, 195 U. S. 100, 121, 49 L. ed. 114, 121, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655. But this does not settle the question of the jurisdiction of the supreme court of the Islands where an appeal is taken. In the acts referred to, the right of the government, as well as of the defendant, to appeal from the judgment in a criminal case, was recognized. In the Kepner Case it was held that § 5 of the act of Congress of July 1, 1902, in declaring that "no person for the same offense shall be twice put in jeopardy of punishment," prevented an appeal by the government from a judgment of acquittal in the court of first instance. But in Trono v. United States, 199 U. S. 521, 50 L. ed. 292, 26 Sup. Ct. Rep. 121, 4 Ann. Cas. 773, where the defendants appealed from a judgment of the court of first instance, which, upon an indictment for murder, had found them guilty of the lower crime of homicide, it was held the supreme court of the Islands had power to reverse the judgment and find the accused guilty of the higher crime of murder; distinguishing the Kepner Case. In Flemister v. United States, 207 U. S. 372, 52 L. ed. 252, 28 Sup. Ct. Rep. 129, a judgment of the insular supreme court, increasing the sentence imposed by the court of first instance, was affirmed. See [103] also Dowdell v. United States, 221 U. S. 325, 327, 55 L. ed. 753, 756, 31 Sup. Ct. Rep. 590; Pico v. United States, 228 U. S. 225, 230, 57 L. ed. 812, 814, 33 Sup. Ct. Rep. 482. In short, the appellate jurisdiction of the supreme court of the Philip-

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pine Islands in criminal cases is not confined to mere errors of law, but extends to a review of the whole case. And such is the settled practice of that court. United States v. Abijan, 1 Philippine, 83, 85; United States v. Atienza, 1 Philippine, 736, 738.

Judgment affirmed.

P. A. CARLSON, Plff. in Err.,
v.
STATE OF WASHINGTON, ON THE RELATION OF CHARLES P. CURTISS.

(See S. C. Reporter's ed. 103–117.)

Error to state court — Federal question — how raised.

1. A decree of the highest state court, which affirmed a decree below, adjudging a person to be in contempt, is reviewable in the Federal Supreme Court, where the state court, instead of disregarding the claim of Federal right set up by defendant in his answer, on the ground that it had been abandoned in the trial court, recognized the Federal contention, and by its decision necessarily overruled it.

[For other cases, see Appeal and Error, 1168–1279, in Digest Sup. Ct. 1908.]

Error to state court — review of facts.

2. The Federal Supreme Court, when reviewing the judgment of a state court, must examine the evidence, if the state court's findings are inadequate, in order to determine what facts might reasonably be found therefrom, and which would furnish a basis for the asserted Federal right.

[For other cases, see Appeal and Error, 2175–2208, in Digest Sup. Ct. 1908.]

Canals — altering established water level — authority of War Department.

3. The War Department cannot be regarded as having authority to order the blasting out of the embankment at the head of a ship canal under construction, connecting Lake Washington with Salmon bay, on Puget sound, thereby lowering the Lake level, where, prior to the river and harbor act of June 25, 1910 (36 Stat. at L. 630, chap. 382), all that was done by authority of Congress on the part of the Federal government (aside from surveys and estimates and the acceptance of a conveyance of lands for the right of way) consisted of dredging work in Salmon bay, the first construction work authorized in aid of the ship canal proper being provided for by that act, and being therein limited to the construction by the government of a lock at the narrows at the entrance to Salmon bay, in the expectation that the excavation in the waterway above the lock would be done by state agency, Congress having at all times scrupulously refrained from authorizing anything to be done on the part of the Federal government with reference to lowering the level of Lake Washington, raising the level of Salmon bay, or otherwise altering the level of any part of the waterway, and expressly providing in such statute that all responsibility for this should be assumed by the state agency; and it is immaterial that the title to the right of way was vested in the United States, and that it was presumably intended that the Secretary of War should take charge of the work when finished.

[Matters as to canals, see Canals, in Digest Sup. Ct. 1908.]

Contempt — disobedience of injunction — justifying under executive order.

4. A disobedience of a decree of a state court enjoining any further excavation of the ship canal connecting Lake Washington with the tidal waters of Puget sound cannot be justified on the ground that the acts charged as amounting to a contempt were done under the direction of the officials of the War Department, acting in pursuance of and in accordance with acts of Congress, if the War Department had no authority to order such action.

[Matters as to contempt, see Contempt, in Digest Sup. Ct. 1908.]

[No. 307.]

Submitted March 17, 1914. Decided May 25, 1914.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court of Thurston County, in that state, punishing a contempt of court. Affirmed.

See same case below, 66 Wash. 639, 120 Pac. 104.

The facts are stated in the opinion.

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On review of questions of fact upon writ of error to a state court—see note to Smiley v. Kansas, 49 L. ed. U. S. 546.

On construction and operation of canals—see note to Mullen v. Lake Drummond Canal & Water Co. 61 L.R.A. 833.

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Mr. Corwin S. Shank submitted the cause for plaintiff in error:

The injunction which the plaintiff in error disobeyed was in effect an order to tie the hands of the United States government, and was therefore entirely beyond the jurisdiction of the court which granted it.

Belknap v. Schild, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443; International Postal Supply Co. v. Bruce, 194 U. S. 601, 48 L. ed. 1134, 24 Sup. Ct. Rep. 820; Re Neagle, 135 U. S. 1, 34 L. ed. 55; Ohio v. Thomas, 173 U. S. 276, 43 L. ed. 699, 19 Sup. Ct. Rep. 453; Boske v. Comingore, 177 U. S. 459, 44 L. ed. 846, 20 Sup. Ct. Rep. 701; Minnesota v. Hitchcock, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650; Oregon v. Hitchcock, 202 U. S. 60, 50 L. ed. 935, 26 Sup. Ct. Rep. 568; Campbell v. Waite, 31 C. C. A. 403, 59 U. S. App. 734, 88 Fed. 102; Re Weeks, 82 Fed. 729; Stegall v. Thurman, 175 Fed. 813; United States v. Lipsett, 156 Fed. 65; Re Turner, 119 Fed. 231.

No appearance for defendant in error.

Mr. Justice Pitney delivered the opinion of the court:

Plaintiff in error was adjudged by the superior court of Thurston county, in the state of Washington, to be in contempt of that court, in that, with notice of a decree made by it, restraining and enjoining any further excavation of the Lake Washington canal, or any lowering of the waters of Lake Washington, he proceeded to blow out an embankment at the head of the canal, which, until that [105] time, held the waters of the lake at their natural level, so as to permit these waters to flow into the canal and thereby lower the level of the lake. The supreme court of the state affirmed the judgment (66 Wash. 639, 120 Pac. 104), and the case comes here under § 237, Judicial Code [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227], upon the ground that the acts done by plaintiff in error, and because of which he was held to be in contempt of court, were done under the direction and authorization of officers of the War Department of the United States, acting in the performance of their duties in constructing a public improvement consisting of a ship canal extending from Lake Washington to Salmon bay, in pursuance of statutes of the United States.

Our examination of the Federal question is somewhat embarrassed because the findings and statements of fact by the state courts contain no finding respecting some of the facts that are alleged as the basis of the present contention of plaintiff in error. The inadequacy is attributable, no doubt, to the mode in which the alleged Federal right was asserted. Plaintiff in error having been brought before the trial court upon an order to show cause, based upon a sworn complaint or information made by the relator, setting forth circumstantially the blowing out of the embankment in question by one Erickson and by plaintiff in error as his foreman, the latter in his answer denied that he blew out the embankment upon the orders of Erickson, and on the contrary averred that he "did so by express orders of the engineering department of the United States government." There was testimony tending to support this averment, but the trial court, while making no specific finding upon the subject, in effect held that the work was done in behalf of the state of Washington, one of the parties to the cause in which the restraining decree was made. To its findings numerous exceptions were taken, but in none of these was any Federal right asserted, nor was any deficiency in the findings suggested. The supreme [106] court, however, instead of disregarding the claim of Federal right upon the ground that it had been abandoned in the trial court, recognized the contention of plaintiff in error that the "work was done under the direction of the United States engineers who had charge of the work for the government," and by its decision necessarily overruled it. We must therefore deal with the Federal question. North Carolina R. Co. v. Zachary, 232 U. S. 248, 257, ante, 591, 595, 34 Sup. Ct. Rep. 305.

Among the assignments of error is one based upon the refusal of the supreme court to find as a fact that the acts for the performance of which plaintiff in error was held guilty of contempt were done under the direction and authorization of officials of the War Department of the United States, acting in pursuance of and in accordance with the acts of Congress. While, in ordinary cases, we are bound by the findings of the state court of last resort respecting matters of fact, it is hardly necessary to say that that court cannot, by omitting to pass upon the basic questions of fact, deprive a litigant of the benefit of a Federal right, any more than it could do so by making findings that were wholly without support in the evidence. And just as this court, where its appellate jurisdiction is properly invoked and all the evidence is brought before it, will, if necessary for a decision of a Federal question, examine the entire record in order to determine whether there is evidence to support the findings of the state court, so it is our duty, in the absence of adequate findings, to examine the evidence in order to determine what facts might reasonably be found therefrom,

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and which would furnish a basis for the asserted Federal right. Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. ed. 662, 669, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277, and cases cited.

Since the present record appears to contain all the evidence that was submitted to the state courts, we proceed to supplement the statement made by the supreme court by adding such further facts pertaining to the asserted [107] claim of Federal right as might reasonably have been found, with the following result:

One Erickson, a general contractor, had entered into a contract for excavating a part of the Lake Washington canal. The contract was in writing, dated August 16, 1910, and was made between "Arthur Williams, Captain Corps Engineers, United States Army, hereinafter represented as the contracting officer representing the state of Washington, on the one part, and C. J. Erickson, of Seattle, in the county of King, state of Washington, hereinafter designated as the contractor, of the second part." The work covered by the contract was nearing completion when, on October 22, 1910, in an action pending in the superior court in and for the county of Thurston, between William L. Bilger and others, plaintiffs, and the state of Washington, King county, and Erickson, defendants, upon the application of the plaintiffs for an order enjoining defendants from removing the embankment between the excavated portion of the canal and Lake Washington, the court, being satisfied that such removal might tend to lower the waters of the lake to the detriment and damage of the plaintiffs, announced that a restraining order would issue. In accordance with this announcement a formal decree was made under date October 28. Erickson had notice of the announced decree, and plaintiff in error, who was acting as his foreman upon the work, had written notice of it on October 26, after which he proceeded to blow up the embankment, contrary to the prohibition. Under the state practice, the decree bound them from the time they were informed of it, although it was not yet formally entered. There was evidence tending to show that plaintiff in error acted under orders coming not from Erickson, but from Captain Williams; and his own testimony was to this effect. Other evidence tended to show that the canal strip or right of way was in the control of the War Department, with a watchman actually upon [108] the ground. The contract was not introduced in evidence, and there was only meager testimony as to its contents, which left it doubtful whether the final work of excavating the opening between the head of the canal and the lake was within its provisions. Since there is no distinct finding upon this subject, we will consider the case in both aspects.

The act of Congress especially invoked as authority for what was done by plaintiff in error under direction of Captain Williams is the river and harbor act of June 25, 1910 (36 Stat. at L. 630, 666, chap. 382), which contains the following:

"Puget sound—Lake Washington waterway: Continuing improvement by the construction of a double lock, with the necessary accessory works, to be located at 'the Narrows,' at the entrance to Salmon bay, in accordance with the project set forth in House Document numbered nine hundred and fifty-three, Sixtieth Congress, first session, one hundred and fifty thousand dollars; and the Secretary of War may enter into a contract or contracts for such material and work as may be necessary to complete said lock and accessory works, to be paid for as funds may be provided from time to time by law, not to exceed in the aggregate two million, two hundred and seventy-five thousand dollars, including the amount herein appropriated; Provided, that before beginning said work, or making such contract or contracts, the Secretary of War shall be satisfied that King county, or some other local agency, will do the excavation in the waterway above the lock to the dimensions recommended in said project, and will also secure the United States from liability for any claims or damages on account of the grant made to James A. Moore or his assigns by the act of Congress approved June eleventh, nineteen hundred and six [34 Stat. at L. 231, chap. 3072, U. S. Comp. Stat. Supp. 1911, p. 1535], or on account of the lowering of the level of Lake Washington, raising the level of Salmon bay, or any other alteration of the level of any part of said waterway."

[109] In order to correctly appreciate the meaning and effect of this language, it is necessary to refer to House Document No. 953, 60th Cong., 1st Sess. (vol. 20), and to certain previous acts of Congress therein mentioned; and while reviewing these acts we may at the same time consider whether any of them contains any justification of what was done by plaintiff in error.

By way of preface, it should be stated that the city of Seattle lies between the tidal waters of Puget sound and Lake Washington, the latter being a body of fresh water 2 miles or more in width and 19 miles or more in length, and having a natural level 30 feet or more above mean low water in the sound. Between this lake and the sound is Lake Union, a smaller body of fresh water (covering about 1,000 acres), and having a natural level much

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lower than that of Lake Washington, yet considerably above the tide. The lakes had independent natural outlets. Salmon bay is a small body of water connected through Shilshole bay with Puget sound, and is (or was) affected by the ebb and flow of the tide. The outlet of Salmon bay is known as "the Narrows." Salmon bay and Lake Union are wholly within the exterior limits of Seattle, and the city has also a considerable frontage on Lake Washington. This lake, as well as the city, lies within the limits of King county.

As early as the year 1890 (26 Stat. at L. 452, chap. 907, U. S. Comp. Stat. 1901, p. 3527), Congress authorized a survey and estimate to be made for a ship canal to connect the waters of these lakes with Puget sound. A survey and report were made accordingly, but nothing resulted until 1894 (28 Stat. at L. 360, chap. 299), when Congress appropriated $25,000 for dredging Salmon bay, and the improvement of the waterway connecting its waters with the lakes, but with a proviso that no part of the money should be expended upon the improvement of the connecting waterway until the entire right of way and a release [110] from all liability to adjacent property owners had been secured to the United States free of cost and to the satisfaction of the Secretary of War. By act of March 2, 1895 (28 Stat. at L. 948, chap. 189), $5,000 of this amount was authorized to be expended in making a definite survey and location of the improvement and in preparing a cadastral map showing each property required to be deeded to the United States, or from which a release was required. The act of June 3, 1896 (29 Stat. at L. 234, chap. 314, U. S. Comp. Stat. Supp. 1911, p. 1540), appropriated $150,000, again with the proviso that no part of it should be expended on the improvement of the waterway connecting the sound with the lakes until the entire right of way and a release from all liability to adjacent property owners had been secured to the United States; and with the further declaration that the canal might be constructed either by the Smith's cove route or by the Shilshole bay route, in the discretion of the Secretary of War.

In 1898 a Board of Engineer Officers was appointed to determine the choice, and recommended the Shilshole bay route, with a lock at the Narrows, near the foot of Salmon bay. This recommendation was approved by the Secretary of War April 14, 1899, and right of way proceedings were completed and deeds obtained and accepted by the Secretary of War in 1900.

The legislature of Washington, by act approved February 8, 1901 (Sess. Laws, p. 7), granted to the United States the right to construct and operate the ship canal upon any lands belonging to and waters of the state in King county, within limits to be defined by the plans and specifications for the improvement as approved by the Secretary of War, with the right to raise the waters of Salmon bay and to lower the waters of Lake Washington in the prosecution of the improvement.

Congress was still unwilling to sanction any particular project for the canal, and by act of June 13, 1902 (32 Stat. at L. 347, chap. 1079), while an appropriation of $160,000 was [111] made under the usual designation for "improving waterway connecting Puget sound with Lakes Union and Washington," it was provided that this sum, together with the unexpended balance to the credit of the improvement, should be expended in dredging a low-water channel 10 feet in depth from Shilshole bay through Salmon bay to the wharves at Ballard (at the head of the bay); with a further proviso that a board of engineers should be appointed by the Secretary of War to make surveys, examinations, and investigations to determine the feasibility and advisability of constructing a canal with necessary locks and dams, connecting Puget sound with the lakes, of sufficient width and depth to accommodate the largest commercial and naval vessels, to examine the route for a similar canal connecting Elliott bay with the lakes, and to report upon the relative advantages of all proposed routes; and it was declared that "nothing herein shall be construed as the adoption of any project for the construction of a waterway connecting Puget sound with Lakes Union and Washington." The board reported, January 6, 1903, that a canal sufficient to accommodate the largest commercial and naval vessels was feasible, but not advisable, chiefly because of the great cost, estimated at over $8,000,000.

The act of March 3, 1905 (33 Stat. at L. 1144, chap. 1482), made a further appropriation of $125,000, limited to dredging the channel to Ballard.

Meanwhile, it appears, the people of Seattle had become discouraged about the prospect of obtaining government aid, and therefore accepted the proposition of one James A. Moore to build upon the government right of way a canal with a suitable timber lock, if the county of King would contribute $500,000 toward it; and an act of Congress of June 11, 1906 (34 Stat. at L. 231, chap. 3072, U. S. Comp. Stat. Supp. 1911, p. 1535), was secured, authorizing him to proceed with this work, subject to such conditions and stipulations as should be imposed by the [112] Chief of Engineers and the Secretary of

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War for the protection of navigation and the property and other interests of the United States, to include provision for the discharge of waters from Lakes Union and Washington, and afford adequate protection against claims for damages for changing the level of Lake Washington, and subject to provisos which required that plans and specifications should be approved by the Secretary of War, that Moore and his assigns should be liable for any damage occasioned by the construction of the lock and canal by overflow, by a lowering of the waters affected, or otherwise, and that the canal and lock when completed should be turned over to the United States ready for use and free of all expense.

The Moore plan included a timber lock between the lakes, and seems to have contemplated another lock to be constructed by the government at the mouth of Salmon bay. Shortly after the passage of the act just mentioned King county pledged its credit to the extent of $500,000 in aid of the Moore project. A little later however, the local interests inaugurated a movement for the installation of a permanent masonry lock in place of the timber lock, and legislative authorization was procured (act of March 18, 1907, Sess. Laws, p. 582) for the establishment of an assessment district in order to impose upon the shore lands benefited a part of the cost of the improvement. The same legislature supplemented the act of 1901 by a specific grant of a right of way over state lands between the lakes (act of March 16, 1907, Sess. Laws, p. 498).

About the same time Congress was again appealed to, and by act of March 2, 1907 (34 Stat. at L. 1108, chap. 2509), the Secretary of War was authorized to "make a survey and estimate of cost of said waterway or canal with one lock, with a view to the construction of the same, in conjunction with the county authorities of King county or other agency, of sufficient size to accommodate the largest commercial or naval vessels afloat; or, if deemed more [113] advisable, with a view to the construction of a canal of less dimensions, and to submit dimensions and estimate of cost of same, together with a report upon what portion of said work will be done or contribution to be made by said county or other agency." And the provisions of the act of June 11, 1906, were thereby so modified as to permit Moore or his assigns to excavate a channel from deep water in Puget sound at the mouth of Salmon bay to deep water in Lake Washington, in lieu of constructing the canal and timber lock specified in that act. In June, 1907, Moore assigned his rights to a corporation created for the purpose of taking them over and co-operating with the assessment district in carrying out the work proposed to be done by local agencies; and it appears that some preliminary work was done upon the ground. By act of Congress of February 6, 1909 (35 Stat. at L. 613, chap. 83), the time allowed to Moore or his assigns for completion of the canal was extended until June 11, 1912.

In view of the history of the matter, the phrase "waterway or canal with one lock" in the act of 1907 evidently indicated a lock at the Narrows, and a continuous waterway thence to Lake Washington; and so it was construed. Pursuant to the authorization of Congress, an elaborate report of a survey and estimate of the cost of the proposed waterway was made by Major Chittenden, of the Engineer Corps, under date December 2, 1907, and submitted with the approval of the Division Engineer to the Chief of Engineers at Washington. It was reviewed by the Board of Engineers for Rivers and Harbors, and approved by them under date March 30, 1908, transmitted by the Chief of Engineers, with his approval, to the Secretary of War, and by the Acting Secretary transmitted to Congress under date May 20, 1908. It is this report and the accompanying documents which constitute House Doc. No. 953, 60th Congress, 1st Sess., vol. 20, referred to in the act of June 25, 1910 (36 Stat. at L. 666, chap. 382), above quoted. [114] The project as thus submitted contemplated the construction of a double lock, to be located at the Narrows at the entrance to Salmon bay, and an unbroken waterway through Salmon bay and Lakes Union and Washington, the differences in level to be overcome by raising Salmon bay and lowering Lake Washington approximately to the level of Lake Union. With reference to that part of the act of 1907 requiring report to be made as to what portion of the work would be done or contribution made by King county or other agency, the recommendation was that, in lieu of a cash contribution, the local interests should be asked to do a specific portion of the work. Major Chittenden proposed that the government should build the lock, and that the local agency should excavate the canal. His recommendation to this effect was concurred in by the Division Engineer and by the Board of Engineers for Rivers and Harbors, and the board further recommended: "That the undertaking of the project by the United States be made contingent upon the furnishing to the Secretary of War of satisfactory evidence: First. That King county or other local agency will do the excavation in the waterway above the lock

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to the dimensions recommended. Second. That the said King county or other local agency will hold the United States free from any claims or damages on account of the grant made to James A. Moore or his assigns on account of the act of June 11, 1906. Third. That the said King county or other local agency will hold the United States free against any claims or damages on account of lowering the level of Lake Washington, raising the level of Salmon bay, or any other alteration of the level of any part of said waterway."

As will appear by reference to the act of 1910, these recommendations were approved and adopted by Congress as a part of the project, and the appropriation, as well as the authorization of the contract, was confined to the construction of a double lock at the Narrows. From the foregoing [115] review, it becomes evident that prior to this act all that was done by authority of Congress on the part of the Federal government (aside from surveys and estimates and the acceptance of a conveyance of lands for the right of way of the canal) consisted of dredging work in Salmon bay; and that the first construction work authorized in aid of the ship canal proper was that provided by the act of 1910, and was limited to the construction by the government of a lock at the Narrows. It is further evident that at all times, and notably in the act of 1910, Congress has scrupulously refrained from authorizing anything to be done on the part of the Federal government with reference to lowering the level of Lake Washington, raising the level of Salmon bay, or otherwise altering the level of any part of the waterway, and that by the act of 1910 it was expressly provided that all responsibility for this should be assumed by King county or some other local agency.

Now, the Bilger suit, as appears by the decree therein already mentioned, was brought by parties who were owners of shore lands abutting upon Lake Washington, and riparian rights pertaining thereto, and the action was based upon the injury threatened to their property and rights by the material lowering of the water of that lake, which was a necessary part of the public improvement. The defendants were the state, the county, and the contractor, and the object of the decree forbidding the further excavation of the canal was to prevent the lowering of the water to the detriment of plaintiffs' property rights. There is nothing to show that the United States had acquired any rights as against these plaintiffs or other property owners of the same class, and any assumption by the War Department of responsibility for interfering with the natural level of the lake is inconsistent with the whole course of legislation to which reference has been made, and especially with the act of 1910. And this renders more [116] clear, what would probably be sufficiently plain from the language above quoted from the instrument, that the contract of August 16, 1910, between Captain Williams and Erickson, was made not in behalf of the United States, but in behalf of the state of Washington. An engineer officer of the United States Army was probably selected to represent the state as a matter of convenience, in view of the fact that before acceptance of the finished work by the government, the approval of the Secretary of War was a necessary prerequisite. But this did not in any wise enlarge the authority of Captain Williams with respect to the performance of the agreement. The act of Congress gave him no authority to act in behalf of the Federal government with respect to the work of excavating the canal, or making a connection between it and Lake Washington which would necessarily lower the level of that lake. Hence it is a matter of no moment, for present purposes, whether the work for which plaintiff in error was held guilty of contempt of court, and which he claims was done under order of Captain Williams, was within or without the Erickson contract.

We are aware that the supreme court of the state of Washington, upon review of the decree in the Bilger suit, held that while the actual work of dredging the canal was done by the state and the county, it was done on behalf of the United States. It was for this reason, in part, that the decree awarding an injunction to restrain the further excavation of the canal was reversed. 63 Wash. 457, 467, 116 Pac. 19. So far as this view may have influenced the court in declaring the policy of the state, we have no concern with it. But we deem it clear that, under the acts of Congress, no agency for the Federal government could arise with respect to anything done in the construction of the canal or the lowering of the level of Lake Washington. Neither the fact that the title to the right of way was vested in the United States, nor [117] the presumed purpose that the Secretary of War should take charge of the work when finished, can override the evident policy of Congress that the canal should be accepted only when completed and ready for use, free of cost to the United States, and that the local interests should do the work of excavation and assume sole responsibility for lowering the level of the water.

Since we are of the opinion that Captain Williams derived no authority from the acts of Congress, it follows that the im-

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munity here asserted with respect to acts done under his command is without legal support. And this renders it unnecessary to consider whether plaintiff in error, being subject to the restraint of the decree of the state court in the Bilger suit as an agent of Erickson, one of the parties thereto, could, without modification of that decree, have successfully claimed immunity for a violation of the restraint upon the plea that he acted under the authority of the Federal government. Upon this question, therefore, we express no opinion.

Judgment affirmed.

COMMONWEALTH OF VIRGINIA v. STATE OF WEST VIRGINIA.

(See S. C. Reporter's ed. 117–122.)

Supreme Court — original jurisdiction — suit between states — filing supplemental answer.

The extraordinary nature of the suit between the commonwealth of Virginia and the state of West Virginia, to determine the amount due to the former by the latter as its equitable share of the public debt of the original state of Virginia, which was assumed by West Virginia at the time of its creation as a state, requires that, contrary to the ordinary rules of legal procedure, the state of West Virginia be permitted, after the Federal Supreme Court has adjudged the amount due, save for clerical errors and the question of interest, to file a supplemental answer asserting the existence of credits which it is averred if properly considered would materially reduce the sum so fixed, and alleging various objections to the allowance of interest, although most of the items embraced in such supplemental answer were contained in the master's report, and all were available then for every defense now based upon them if their consideration had been pressed in the aspect and with the assertions of right now made.

[For other cases, see Supreme Court of the United States, in Digest Sup. Ct. 1908.]

[No. 2, Original.]

Argued April 16, 17, 1914. Decided June 8, 1914.

ORIGINAL BILL in equity, filed by the commonwealth of Virginia against the state of West Virginia, seeking an adjudication of the amount due to the former as the equitable share of the public debt of the original state of Virginia, which was assumed by the state of West Virginia at the time of its creation as a state. On motion of the state of West Virginia for leave to file a supplemental answer. Granted.

The facts are stated in the opinion.

Mr. A. A. Lilly, Attorney General of West Virginia, and Mr. John H. Holt, argued the cause, and, with Mr. Charles E. Hogg, filed a brief in support of the motion:

This being a controversy between two sovereign states, the court will afford the fullest opportunity to each of them to bring into the case every substantial matter in any manner bearing upon its settlement, and the widest latitude will be extended with reference to the mode of procedure to reach this end. The court will not concern itself with the ordinary rules of equity procedure observed in suits between individual persons. A case of this sort rests upon higher grounds than those involving merely personal rights and liabilities.

Washington v. Northern Securities Co. 185 U. S. 254, 46 L. ed. 897, 22 Sup. Ct. Rep. 623.

This court has only recognized certain rules in the exercise of its original jurisdiction as a matter of convenience, rather than of guidance, and probably to avoid confusion and embarrassment to the parties litigant.

Florida v. Georgia, 17 How. 478, 493, 15 L. ed. 181, 189.

In a case in which two sovereign states are contesting a question of boundary, the utmost liberality of practice should unquestionably be adopted in order to enable both parties to present their claims in their full strength.

Rhode Island v. Massachusetts, 14 Pet. 210, 10 L. ed. 423; Iowa v. Illinois, 151 U. S. 238, 242, 38 L. ed. 145, 148, 14 Sup. Ct. Rep. 333.

Mr. V. B. Archer also filed a brief in support of the motion.

Messrs. William A. Anderson and Randolph Harrison argued the cause, and, with Mr. John Garland Pollard, Attorney General of Virginia, and Mr. John B. Moon, filed a brief in opposition.

Mr. Sanford Robinson argued the cause, and, with Mr. Holmes Conrad, also filed a brief in opposition.

Mr. Chief Justice White delivered the opinion of the court:

This case, which was begun in 1906, was elaborately argued in 1907 on a demurrer, which was overruled. 206 U. S. 290, 51 L. ed. 1068, 27 Sup. Ct. Rep. 702. It was again argued in 1908 on a motion to appoint a master. 209 U. S. 514, 52 L. ed. 914, 28 Sup. Ct. Rep. 614. Before that officer there was an extended hearing, and a full report of all the matters involved was filed in March, 1910. It was then argued on a motion to take further testimony, and was ultimately heard in an argument which

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extended many [119] days, every party in interest being represented, in the month of January, 1911.

Notwithstanding these facts, when in March, 1911, the court came to decide the controversy, although it fully reviewed and passed upon the fundamental issues, as its obvious duty required it to do, and fixed the principal sum due by the state of West Virginia to the state of Virginia, in view of the consideration due to the parties as states, and that the cause was, as then said, "no ordinary commercial suit, but, . . . a quasi-international difference referred to this court in reliance upon the honor and constitutional obligations of the states concerned rather than upon ordinary remedies," the controversy was not completely and irrevocably disposed of, but was left open for a time not specified, to the end that any clerical errors that might have crept into the calculations of the sums due could be corrected, and to give the states time to consider the subject of liability for interest in the light of what had been decided, and to agree as to the rate and period of the interest to be paid on the principal sum which was determined. 220 U. S. 1, 55 L. ed. 353, 31 Sup. Ct. Rep. 330.

On the convening of the court in the following October, 1911, a motion was made on behalf of the state of Virginia to proceed at once to a final decree. Listening to the suggestion of the state of West Virginia to the effect that it desired further time to consider the subject, and in view of the public considerations which had prevailed when the decree was entered, the motion of Virginia was overruled. 222 U. S. 17, 56 L. ed. 71, 32 Sup. Ct. Rep. 4.

Yet further, when, in November, 1913, another motion on the part of Virginia was made to set the case down to be finally disposed of at once upon the statement that no agreement between the parties was possible, again giving heed to the request of West Virginia, through its constituted officers, for a postponement for a stated time, and to the statement that they were engaged in an honest endeavor [120] to deal with the controversy, and, if possible, to come to an agreement as to the subjects left open, the motion of Virginia was again refused (231 U. S. 89, ante, 135, 34 Sup. Ct. Rep. 29), and as it was possible to give to the state of West Virginia all the time which that state, in resisting the motion, asked, and yet secure against the possibility of the hearing being carried over to another term, the case was assigned for hearing on the 13th of April of this year. When that day was reached, the state of West Virginia, in accord with a motion filed some days before, prayed leave to be permitted to file a supplemental answer asserting the existence of credits which, if properly considered, would materially reduce the sum fixed as due to the state of Virginia, the said answer in addition asserting various grounds why interest should not be allowed in favor of Virginia and against West Virginia on the sum due. Resisting this request, the state of Virginia insists that the items embraced in the supplemental answer asked to be filed had in effect already entered into the considerations by which the principal sum due was fixed, and that if not, the case should not be postponed for the purpose of permitting the rights urged in the answer to be availed of because every item concerning such alleged rights was proved in the case before the master, was mentioned in his report, and was known or could have been known by the use of ordinary diligence by those representing West Virginia. And it is this controversy we now come to dispose of.

Without intimating any opinion whatever as to whether the items with which the proposed supplemental answer deals entered into the processes of calculation or reasoning by which the sum due was previously fixed, and moreover, without intimating any opinion as to how far the items embraced in the answer could serve as credits upon the sum previously found due, and therefore to that extent reduce the amount, we think it is obvious that most of the [121] items embraced in the answer were contained in the master's report, and in any event all were available then for every defense now based upon them if their consideration had been pressed in the aspect and with the assertions of right now made.

The question then is, Under these conditions ought the permission to file the supplemental answer be granted? We think it must be conceded that in a case between ordinary litigants the application of the ordinary rules of legal procedure would render it impossible, under the circumstances which we have stated, to grant the request. We are of the opinion, however, that such concession ought not to be here controlling. As we have pointed out, in acting in this case from first to last the fact that the suit was not an ordinary one concerning a difference between individuals but was a controversy between states, involving grave questions of public law, determinable by this court under the exceptional grant of power conferred upon it by

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the Constitution, has been the guide by which every step and every conclusion hitherto expressed has been controlled. And we are of the opinion that this guiding principle should not now be lost sight of, to the end that when the case comes ultimately to be finally and irrevocably disposed of, as come ultimately it must, in the absence of agreement between the parties, there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice, after the amplest opportunity to be heard, has in any degree entered into the disposition of the case. This conclusion, which we think is required by the duty owed to the moving state, also in our opinion operates no injustice to the opposing state, since it but affords an additional opportunity to guard against the possibility of error, and thus reach the result most consonant with the honor and dignity of both parties to the controversy.

[122] Because of these convictions, we therefore make the following order:

That the motion on the part of the state of West Virginia to file the supplemental answer be and the same is hereby granted; and that the averments in such answer be and the same shall be considered as traversed by the state of Virginia; that the subject-matter of the supplemental answer as traversed be at once referred for consideration and report to Charles E. Littlefield, Esq., the master before whom the previous hearings were had, with directions to hear and consider such evidence and testimony as to the matters set forth in the supplemental answer as the state of West Virginia may deem advisable to proffer, and such counter showing on the part of the state of Virginia as that state may deem advisable to make. The report on the subject to embrace the testimony so taken and the conclusions deduced therefrom, as well as the views of the master concerning the operation and effect of the proof thus offered, if any, upon the principal sum found to be due by the previous decree of this court. Nothing in this order to vacate or change in any manner or in any particular the previous decree, and the same to stand wholly unaffected by the order now made or any action taken thereunder until the examination and report herein provided for is made and this court acts upon the same. It is further directed that the proceedings before the master be so conducted as to secure a report on or before the 2d Monday of October, 1914.

[123] MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK and United States Fidelity & Guaranty Company, Plffs. in Err.,

v.

DAVID COHEN, Independent Executor of the Estate of Jacob Cohen, Deceased.

(See S. C. Reporter's ed. 123-137.)

Error to state court — Federal question — full faith and credit — decision on non-Federal grounds.

1. No question concerning the full faith and credit clause of the Federal Constitution which will support a writ of error from the Federal Supreme Court is involved in a ruling of a state court that the validity of an assignment of life insurance policies must be tested by the law of the state of the residence of the insured as to the necessity of an insurable interest, rather than by the law of the state of the assignee's residence, where both parties, wholly independent of the existence of an insurable interest, affirmed the illegality of the transaction out of which the assignments of the policies grew because of the alleged gambling nature of such transaction, and the admitted facts without dispute established that situation, the only dispute being as to the consequences arising out of such illegality, as to which the defendant in error alone suggested that the consideration of full faith and credit controlled.

[For other cases, see Appeal and Error, 1465-1528, in Digest Sup. Ct. 1908.]

Error to state court — frivolousness of Federal question — validity of statute penalizing insurance company's failure to pay claim.

2. The contention that the Texas statute imposing upon life insurance companies a liability to pay damages and an attorney's fee in case of default in the payment of a loss is repugnant to the provisions of U.

NOTE.—On validity of statutory provision for attorney's fee—see note to Builders' Supply Depot v. O'Connor, 17 L.R.A.(N.S.) 910.

On unconstitutional inequality or discrimination in statutes allowing attorneys' fees—see note to Farmers' & M. Ins. Co. v. Dobney, 47 L. ed. U. S. 821.

Error to state courts in cases involving questions of the equal protection of the laws.

Whether the equal-protection-of-the-laws clause of U. S. Const., 14th Amend., constituted a bar to mandamus proceedings in a state court, is a Federal question. Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617.

A case presents a Federal question where the defense of the denial of the equal protection of the laws guaranteed by U. S. Const., 14th Amend., is invoked, and is at least plausible on its face. American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43.

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S. Const., 14th Amend., has been so foreclosed by prior decisions as not to serve as the basis of a writ of error from the Federal Supreme Court to a state court to review a judgment enforcing such statutory penalty and damages, which rests upon the premise that the payment of the loss to one of two adverse claimants was one which took the insurance company out of the category of a mere stakeholder, seeking to discharge his duty in good faith, and placed it in the position of a person espousing the cause of one as against the other, and thereby subjecting himself to the legal consequences.

[For other cases, see Appeal and Error, 1110–1137; Constitutional Law, IV. a, 6, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — local or general law.

3. The action of a state court in declaring an assignment of life insurance policies to be void because of the gambling nature of the contract, while permitting the assignor to retain the price paid for such assignment, does not involve a Federal question which will support a writ of error from the Federal Supreme Court, where such action was involved in and controlled by the court's ruling concerning the alleged nature of the transaction, and the applicable principles of both local and general law.

[For other cases, see Appeal and Error, 1529–1572, in Digest Sup. Ct. 1908.]

[No. 160.]

Submitted April 17, 1914. Decided June 8, 1914.

The question must be a real and substantial one (see note to Offield v. New York, N. H. & H. R. Co. 51 L. ed. U. S. 231).

The contention that a state railroad commissioner was denied the equal protection of the laws by his temporary suspension from office by the governor of the state by proceedings taken in accordance with the state laws and Constitution is too unfounded in substance to confer jurisdiction on the Supreme Court of the United States, where there was not, by reason of the statute and the proceedings under it, a plain and substantial departure from the fundamental principles upon which the government is based. Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435.

And the claim that a forfeiture of the charter of a waterworks company for maintaining illegal rates by a decree of a state court after full hearing by all parties in a proceeding by quo warranto denied the company the equal protection of the laws, because by its charter mandamus was prescribed as the remedy for illegal rates, is so clearly without color of foundation as to give the Supreme Court of the United States no jurisdiction to review such decree. New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691.

And, apparently because of the obvious want of merit in the contention that a railroad corporation was deprived of its rights under U. S. Const., 14th Amend., by enforcing a claim against it by mandatory injunction, instead of by another and summary form of action, the court, in Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344, dismissed, for want of jurisdiction, a writ of error to review a judgment of a state court compelling a railroad company to operate its road.

A Federal question of serious import, essential to support a writ of error from the Federal Supreme Court, is not involved in a contention that riparian owners were denied the equal protection of the laws by the decision of a state court awarding a municipality paramount rights in the waters of the stream under Spanish and Mexican laws, confirmed by the United States to the municipality as the successor of a Spanish pueblo. Los Angeles Farming & Mill. Co. v. Los Angeles, 217 U. S. 217, 54 L. ed. 736, 30 Sup. Ct. Rep. 452.

But the contention that the exemption of banks or trust companies and bona fide mortgagees from the operation of Conn. Pub. Acts 1907, chap. 238, prohibiting exacting more than 15 per cent on loans, or accepting a note for a greater amount than that actually loaned, with intent to evade this provision, denies the equal protection of the laws guaranteed by U. S. Const., 14th Amend., is not so clearly lacking in merit as not to serve as the basis of a writ of error from the Federal Supreme Court to a state court. Griffith v. Connecticut, 218 U. S. 563, 572, 54 L. ed. 1151, 1155, 31 Sup. Ct. Rep. 132, 134.

The question must not be merely an abstract or moot one. Hence, a taxpayer who admits that his own tax is correct cannot, on the ground that he will be denied the equal protection of the laws, contrary to the 14th Amendment of the Constitution of the United States, have a writ of error from the United States Supreme Court to review a construction by the supreme court of the state of the statutes thereof, as exempting in whole or in part certain corporations from the payment of taxes. Missouri v. Dockery, 191 U. S. 165, 48 L. ed. 133, 63 L.R.A. 571, 24 Sup. Ct. Rep. 53.

One who has not availed himself of the opportunity to appeal and be heard upon the question of classification which is afforded by a municipal ordinance providing for the licensing of occupations is not in a position to urge upon the Federal Supreme Court, upon writ of error to a state court, that he has been unjustly and illegally discriminated against in the actual operation of the ordinance, in that he has been classified in such a manner as to subject him and his business to a higher tax as a condition of issuing to him a license than that required of many others in the same business. Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 Sup. Ct. Rep. 318.

But the fact that there are no resident

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IN ERROR to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the District Court of Harris County, in that state, enforcing the statutory liability of an insurance company for damages and attorneys' fees because of its failure to pay a claim. Dismissed for want of jurisdiction.

See same case below, — Tex. Civ. App. —, 139 S. W. 51.

Statement by Mr. Chief Justice White:

The defendant in error was the plaintiff below, and sued the Manhattan Life Insurance Company, which we shall speak of as the company, on two policies on the life of Jacob Cohen in his own favor, written in 1893, in Texas, where Cohen resided, the company then doing business in that state through an agency. It was averred that although the company had admitted liability on the policies, it had not paid the loss, and was therefore responsible [124] not only for the sum due insured, with interest, but also for 12 per cent as statutory penalty or damages, and $1,000 attorneys' fees.

The answer denied liability to the plaintiff. It admitted issuing the policies, but averred that in 1907 the insured, Cohen, borrowed $875 on each, and pledged the policies as security, which loans were unpaid. It was averred that in July, 1907, Cohen sold to Hilsman, of Atlanta, Georgia, his interest in the policies, and executed assignments and orders on the company to

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mortgagees in a particular case does not make the question of discrimination between nonresident and resident mortgagees by a state statute a merely abstract or moot question, so as to preclude a decision against the validity of the statute on writ of error to a state court, if such statute makes a discrimination against nonresident mortgagees with respect to sharing in the distribution of the assets of an insolvent foreign corporation. Sully v. American Nat. Bank, 178 U. S. 289, 44 L. ed. 1072, 20 Sup. Ct. Rep. 935.

And the enactment by a state of a new inheritance tax law after a decision of the highest court of the state sustaining the previous legislation on that subject as against the contention that it denied the equal protection of the laws guaranteed by U. S. Const., 14th Amend., does not convert such Federal question into a moot question, so as to preclude a review in the Supreme Court of the United States, unless it is obvious that such new legislation relieved the plaintiffs in error from their obligations under the earlier law. Campbell v. California, 200 U. S. 87, 50 L. ed. 382, 26 Sup. Ct. Rep. 182.

The question must be adequately presented to, and decided by, the state court, or the Federal Supreme Court will be without jurisdiction. (See note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.)

An allegation that a statute, as construed by the court, is in violation of the Constitution of the state and of the United States, made in a motion to set aside a judgment on an agreed case which presents no issue as to the validity of the statute, is not sufficient to present a Federal question on the theory that, as the proper construction of the statute has been definitively settled, it can be seen that the statute as thus construed denies the equal protection of the laws. Louisville & N. R. Co. v. Louisville, 166 U. S. 709, 41 L. ed. 1173, 17 Sup. Ct. Rep. 725.

Objections to the valuation of national bank stock for taxation, as being in excess of the actual value, exorbitant and unjust, and not in proportion to other like personal property, but grossly in excess thereof, and constituting unfair and unequal taxation, do not raise any Federal question which will sustain a writ of error from the Federal Supreme Court to a state court, where no mention of the national bank act was made, nor of any right or privilege claimed under it, and the provisions of the United States Revised Statutes were not invoked, by name or otherwise, and there was no assertion that the local statutes under which the assessment was made were repugnant to the terms of U. S. Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502, or to the Federal Constitution. First Nat. Bank v. Estherville, 215 U. S. 341, 54 L. ed. 223, 30 Sup. Ct. Rep. 152.

The judgment of the Ohio supreme court upholding the validity of the provisions of the free banking act of March 21, 1851, § 30, as amended April 24, 1879, under which an indictment had been found against the cashier of a bank incorporated under that act, in the face of the objection that such section, by subjecting officers of institutions so incorporated to criminal liability, when officers of other banking institutions guilty of similar acts are not so subjected, denies the equal protection of the laws, cannot be reviewed by the Federal Supreme Court, where the failure of the state court to file an opinion leaves it doubtful whether that court may not have held that the words "any banking company," as used in the section in question, embrace all banking institutions in the state, whether incorporated under the free banking act or not. Bachtel v. Wilson, 204 U. S. 36, 51 L. ed. 357, 27 Sup. Ct. Rep. 243.

The decision in the opinion of the highest state court, in reviewing a conviction of crime, of questions respecting due process of law, the equal protection of the laws, and cruel and unusual punishment, will not confer jurisdiction on the Supreme Court of the United States of a writ of error to the state court, in the absence of any claim to protection under the Federal Constitution made therein. Howard v. Fleming, 191 U. S. 126, 48 L. ed. 121, 24 Sup. Ct. Rep. 49.

A decision upon a Federal question re-

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deliver the policies to him on payment of the debts for which they were pledged. These documents were annexed to the answer. The origin and course of the negotiation which ultimated in the assignments were thus stated: Hilsman had an agent at San Antonio, Texas, where Cohen lived. The transactions "were begun" and "definitely agreed upon" between Cohen and the agent, "the agreement being that Hilsman would pay Jacob Cohen $460 for his equity in said policies, whereupon Cohen wired Hilsman to send papers, and the following correspondence, by letter and telegram, passed between them." Hilsman in answer to the first telegram from Cohen wrote, inclosing him assignment of the policy and necessary notices to the company, with directions for their execution, and asking, besides, for certain papers which he required to show Cohen's ownership free from the claims of other persons, the letter ending with the statement, "Send all the papers that are herewith inclosed, duly executed, in a sealed envelop, with this draft attached (evidently the draft for the price), and upon arrival, if in good shape, we will duly honor." Cohen replied by letter, explaining that he did not have particular papers which had been asked for, but had others which he thought were their equivalent, and proposing to execute the assignment and send these papers, the letter concluding with the statement, "if this meets with your approval, please wire me upon receipt of this letter, and I [125] shall forward papers." Hilsman answered by telegram favorably, and confirmed it by letter, saying that if the papers were sent, "we will promptly honor the draft, provided the papers are in good shape." On the day the telegram last referred to was received, Cohen transmitted the executed papers with the accompanying documents by mail, saying, "I beg to inclose all documents . . . which I trust you will find correct, and will honor my draft for $460 attached to these documents." The answer specifically alleges that the draft was sent from San Antonio for collection through a bank in that place, and as the answer states that the draft was attached to the papers, and this conformed

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specting the constitutional guaranty of the equal protection of the laws is involved in the ruling of a state court upon a motion to quash an indictment because of the exclusion of negroes from the grand-jury lists, by which such motion, though but two printed octavo pages in length, was struck from the files under the color of local practice, for prolixity, because it contained an allegation that certain provisions of the newly adopted state Constitution, claimed to have the effect of disfranchising negroes because of their race, worked as a reason and consideration in the minds of the jury commissioners for their action. Rogers v. Alabama, 192 U. S. 226, 48 L. ed. 417, 24 Sup. Ct. Rep. 257.

The whole merits of the controversy are not open for consideration by the Federal Supreme Court merely because the record in the state court presents a question as to the denial of the equal protection of the laws. (See note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.)

The decision of the supreme court of a state that it is competent on a new assessment to determine questions of benefit from the proof, even though in so doing a different result would be reached from that which had been arrived at when a former assessment which has been set aside was made, decides merely a local question, which cannot be considered in reviewing the judgment of the state court. Lombard v. West Chicago Park Comrs. 181 U. S. 33, 45 L. ed. 731, 21 Sup. Ct. Rep. 507. The court said: "The theory lying at the foundation of all the arguments advanced to show that the court below committed error of a Federal nature is this, and nothing more: that the equal protection of the laws was denied by the supreme court of Illinois because that court, although it treated the assessing ordinance as invalid for the purposes of the first assessment, upheld that ordinance as valid for the second assessment. This but asserts that, because it is considered that there was inconsistency in the reasoning by which the supreme court of Illinois sustained its conclusion, therefore the equal protection of the laws was denied. If the proposition as thus understood was held to be sound, as it cannot be, every case decided in the courts of last resort of the several states would be subject to the revisory power of this court wherever the losing party deemed that the reasoning by which the state court had been led to decide adversely to his rights was inconsistent with the reasoning previously announced by the same court in former cases. In thus stating the ultimate deduction to which the proposition necessarily leads, we do not wish to be understood as implying that we think the reasoning upon which the supreme court of the state of Illinois placed its decision in this case is amenable to the inconsistency which it is insisted it embodies. As that consideration is wholly beyond the pale of our jurisdiction, we have not even approached its consideration."

Whether or not discrimination against negroes because of their race or color was practised by the jury commissioners in the selection of grand and petit jurors is a question of fact, the decision of which by the state court is conclusive on the Federal Supreme Court, on writ of error, unless so grossly wrong as to amount to an infraction of the Federal Constitution. Thomas v. Texas, 212 U. S. 278, 53 L. ed. 512, 29 Sup. Ct. Rep. 393. (See also note to Smiley v. Kansas, 49 L. ed. U. S. 546.)

The conclusion of a state court that a

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to the instructions which we have seen were given by Hilsman to Cohen, the answer therefore in effect averred that the papers and draft were delivered to a bank in San Antonio, to be transmitted to Atlanta, the papers to be delivered to Hilsman if, after examination, he found the papers satisfactory and paid the draft. The answer then, in paragraph 8, contained the following averments:

"Said Jacob Cohen, Hilsman, and his said agent, were engaged in speculative transactions, and said assignments were made as a part of and in connection with a certain transaction in what is commonly called 'cotton futures,' the money being paid to and received and used by Jacob Cohen to speculate in the future price of cotton, without its being contemplated that there would be actual delivery thereof, or bargain and sale, and said Hilsman or his said agent, being interested in the transaction, and the purpose of the transaction being known by all the parties, which purpose was carried into effect, through the said agency of J. H. Hilsman and J. H. Hilsman, he being engaged in the brokerage business."

It was averred that after the death of Cohen, both his executor and Hilsman, as owners of the policies, made demand upon the company for payment; that the company admitted liability to someone, and simply professed its [126] desire to have the matter as to who was owner of the policies settled so that it might make payment with safety. To reach this result it was alleged that an unsuccessful effort was made to have the parties agree to appear in a suit where, as to both of them, the company admitting liability, their rights might have been determined; and that failing in this respect, and being advised that under the law of Georgia, where the assignment to Hilsman was made, it was legal, and therefore his claim was valid, as the most expeditious way of clearing up the matter the company paid Hilsman, and took from him an indemnity bond. While admitting that before the assignment and at the time of its

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tax is uniform, within the meaning of the requirement of the state Constitution, when it is equal upon all persons belonging to the described class on which it is imposed, is not open to review upon writ of error from the Supreme Court of the United States to the state court. Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232.

The construction given by the state courts to Tex. act May 25, 1899, as removing the discriminatory features of prior anti-trust laws, is conclusive on the Federal Supreme Court in determining, on writ of error to the state court, whether such statute denies the equal protection of the laws. National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 698, 25 Sup. Ct. Rep. 379.

In Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, the question presented on a writ of error to a state court was whether due process of law, or the equal protection of the laws, was denied the Chinese by proceedings under certain municipal ordinances providing that it should be unlawful for any person to engage in the laundry business in wooden buildings within the corporate limits "without having first obtained the consent of the board of supervisors." The state court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. The Federal Supreme Court, however, held that the power conferred by these ordinances was a naked and purely arbitrary power, acknowledging neither guidance nor restraint. "The determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States," said Mr. Justice Matthews, in delivering the unanimous opinion of the court, "necessarily involves the meaning of the ordinance which, for that purpose, we are required to ascertain and adjudge."

It is the duty of the Supreme Court, by the 14th Amendment, in a case properly before it, to inquire whether, in the administration of the criminal laws of a state, it is sought arbitrarily to deprive any person of his liberty or property, or to refuse him the equal protection of the laws; and such inquiry is not precluded or ended by the mere fact that the judgment complained of was rendered by a state court pursuant to a state statute. Hodgson v. Vermont, 168 U. S. 262, 42 L. ed. 461, 18 Sup. Ct. Rep. 80.

On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On review of decisions of state courts presenting the question of full faith and credit—see note to Allen v. Alleghany Co. 49 L. ed. U. S. 551.

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delivery Hilsman had no interest whatever in the life of Cohen, it was nevertheless averred that the assignment of the policies was valid and authorized under the laws of the states of Georgia and New York. Averring, moreover, that all the acts of the company in the premises had been in good faith, and arose not from any desire to deny liability, but simply from an honest purpose to have it determined who owned the claims under the policy, it was asserted that there could be in no event any liability for interest by way of damages and for the attorneys' fees as prayed.

By leave the plaintiff amended his petition "in replication and answer to . . . the answer of the defendant, Manhattan Life Insurance Company," and asserted, among other things, that the assignments of the policies alleged in the answer were void upon two distinct grounds: (1) Because "under and by virtue of the laws of the state of Texas, the state of New York, and the state of Georgia, and each of them, an assignment of a life insurance policy to a person without insurable interest in the life of the insured is invalid and not binding upon the assignor or his representative." (2) Because "said alleged assignments of the policies of insurance sued upon herein are invalid and not binding upon it, and were without legal consideration under [127] the laws of the state of Texas, the state of New York, and the state of Georgia, for this: that at the time that said assignments and each of them were made, executed, and delivered, that the said Jacob Cohen, J. H. Hilsman, and his said agent, were engaged in speculative transactions, and that said assignments and each of them were made as a part of and in connection with the said transactions in what is commonly called 'cotton futures,' the money being paid to and received and used by the said Jacob Cohen to speculate in future prices of cotton without its being contemplated that there would be actual delivery thereof, or bargain and sale; the said Hilsman and his agent being interested in the transaction, and the purpose of the transaction being at and before the time known to and by all the parties, which said purpose was carried into effect through the said agency, J. H. Hilsman and J. H. Hilsman, he being engaged at that time in the brokerage business; all of which said facts were well known to the defendant insurance company at and before the time that it paid the said policies to the said Hilsman, as in its said answer alleged and set forth."

For the purpose of the trial by the court without a jury a written statement of facts was agreed to by both parties in the form of petitioner's case, the case of the defendant company, and the reply of the petitioner. The statement of the plaintiff admitted the issue of the policies, the lending of the money by the company, and the pledging of the policies to secure it, the transfer or assignment by Cohen for the consideration we have stated, and under the circumstances which we have detailed, the gambling nature of the transaction being expressly stated in accordance with the averment of the answer of the company, and with the allegation of the amended pleading of the plaintiff, the death of Cohen, the claim of both parties on the insurance company, the effort of the company to secure a suit to which both the claimants should be parties in order to [128] relieve it from responsibility, its failure to secure that result, and its payment to Hilsman of the amount upon the giving by him of indemnity, all substantially as alleged in the pleadings we have stated. The agreed facts contained this statement:

"It was not the purpose of the insurance company to contest or delay payment, and the payment to Hilsman was made under the circumstances above set out. It is not the purpose of this agreement to determine how far, if at all, the facts in respect to notice and good faith are material issues in this case, that being deemed a question of law; nor is this agreement to be construed as admitting as a matter of law that Hilsman had any right to said policy or their proceeds, or that said payment, or any part thereof, was rightfully made to him. It is, however, agreed as a fact that Hilsman has not been repaid said sum of $460, and the insurance company has not been repaid the amount of said loan, except as above stated, and that nothing has yet been paid to the plaintiff."

The company, as part of its case, introduced certain statutes of the state of Georgia and decisions of the court of last resort of that state, interpreting the same for the purpose of showing that Cohen had a right to sell and Hilsman to purchase in Georgia the insurance policies, although Hilsman had no insurable interest in Cohen's life. In rebuttal the plaintiff introduced certain decisions of the court of last resort of Georgia, deemed to establish the contrary result, and also offered statutes of that state dealing with gambling transactions and the right to sue concerning the same. The trial court found the facts substantially as embodied in the statements referred to.

Mr. William J. Moroney submitted the cause for plaintiffs in error:

(a) A party has the right, by proper procedure, to protect himself against illegal or excessive demands, or double liability; and a state statute, when it is so construed

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and applied as to penalize the proper exercise of this right, is repugnant to the 14th Amendment.

(b) The Texas statute, Revised Statutes (1905), art. 3071, as construed and applied by the state courts in this case, is wanting in due process of law, and repugnant to the 14th Amendment.

(c) The Federal question presented by the foregoing propositions has not been foreclosed against plaintiffs in error by any previous decision of this court construing the Texas statute; and a Federal question is properly before this court for review.

Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; Iowa L. Ins. Co. v. Lewis, 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. Rep. 126; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; St. Louis, I. M. & S. R. Co. v. Wynne, 224 U. S. 354, 56 L. ed. 799, 42 L.R.A.(N.S.) 102, 32 Sup. Ct. Rep. 493; Chicago, M. & St. P. R. Co. v. Polt, 232 U. S. 165, ante, 554, 34 Sup. Ct. Rep. 301.

On writ of error to a state court, presenting the question whether or not a state statute violates a Federal right, this court will accept the construction placed upon the state statute by the state court of last resort in the particular case under review, and will then determine whether or not the statute, as thus construed, and as applied to the particular facts before the court, violates a Federal right. It may thus occur that this court will sustain a state statute, as construed one way, or as applied to one state of facts, while, as construed a different way, or as applied to a different state of facts, the statute would be declared violative of a Federal right. See St. Louis, I. M. & S. R. Co. v. Wynne, 224 U. S. 354, 56 L. ed. 799, 42 L.R.A. (N.S.) 102, 32 Sup. Ct. Rep. 493; Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40; Collins v. Texas, 223 U. S. 288, 56 L. ed. 439, 32 Sup. Ct. Rep. 286; Martin v. West, 222 U. S. 191, 56 L. ed. 159, 36 L.R.A.(N.S.) 592, 32 Sup. Ct. Rep. 42.

It is, of course, elementary that a mere stakeholder of a fund against which conflicting claims are asserted has a right to have the conflict determined before he can be rightfully compelled to pay to either claimant. This is certainly true when the stakeholder, as in the present case, was rightfully in possession of the fund when the conflicting claims arose, and when the stakeholder was neither a party to the controversy nor in any way responsible for its existence. Not only this, but the courts of Texas have held, in accordance with the general rule of equity on the subject, not only that such stakeholder cannot be penalized because of his innocent connection with a dispute to which he is not a party, but that, instead of paying attorneys' fees to the successful claimant, he is entitled to his own necessary costs and attorneys' fees out of the fund as a credit against the successful claimant.

Bolin v. St. Louis Southwestern R. Co. — Tex. Civ. App. —, 61 S. W. 444.

The statutes of Georgia were clearly and fully pleaded and proved by the insurance company in defense of this suit. This defense was not only necessarily involved, but it was actually considered by the state court; and in giving judgment against the insurance company the state court both necessarily and actually denied to these statutes of Georgia the force and effect that the insurance company claimed for them. A claim of Federal right was thus specifically set up by the insurance company, and unequivocally denied by the state court. This was sufficient to confer jurisdiction on this court, although there may have been a failure in the state court to label the proceedings accurately.

Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21; Furman v. Nichol, 8 Wall. 44, 19 L. ed. 370; Tilt v. Kelsey, 207 U. S. 43, 52 L. ed. 95, 28 Sup. Ct. Rep. 1; Willson v. Black Bird Creek Marsh Co. 2 Pet. 245, 7 L. ed. 412.

On writ of error to a state court this court will review questions of local or general law, when the correct decision of Federal questions depends in whole or in part on such non-Federal question.

Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; Bridge Proprs. v. Hoboken Land & Improv. Co. 1 Wall. 116, 145, 17 L. ed. 571, 576; Hoadley v. San Francisco (Clark v. San Francisco) 124 U. S. 639, 31 L. ed. 553, 8 Sup. Ct. Rep. 659; Atty. Gen. ex rel. Kies v. Lowrey, 199 U. S. 239, 50 L. ed. 170, 26 Sup. Ct. Rep. 27; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121.

Again, and for like reasons, even when the state court places its decision on a non-Federal ground, not directly connected with any Federal question presented for review, and broad enough to support the judgment, in a proper case this court will examine such non-Federal question to determine whether or not its decision by the state court rested on any real or substantial

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foundation, or whether it was not rather an arbitrary exercise of judicial power.

Vandalia R. Co. v. Indiana, 207 U. S. 359, 52 L. ed. 246, 28 Sup. Ct. Rep. 130.

Again, when it unmistakably appears that the state court erroneously decided a question of local or general law, this court may notice such error, without attributing any improper motive to the state court.

Gulf, C. & S. F. R. Co. v. Dennis, 224 U. S. 503, 56 L. ed. 860, 32 Sup. Ct. Rep. 542.

Even if it should be held that the Federal question arising from the "full faith and credit" clause of the Constitution was not so presented in the state court as to confer jurisdiction on this court, nevertheless we submit that, as this court has clearly acquired jurisdiction of the case through another Federal question that admittedly was raised in a proper and timely manner, this court has thereby acquired the jurisdiction at least to decide all Federal questions actually in the case, however inartificially they may be or may have been presented, and also the jurisdiction to decide all non-Federal questions incidental to the review of the Federal questions.

Mr. Wilmer S. Hunt submitted the cause for defendant in error. Messrs. Sterling Myer and C. A. Teagle were on the brief:

When there is a Federal question in the case, but it is so frivolous as to make it manifest that the writ of error was taken for delay merely, the Supreme Court will affirm on motion.

Ruckman v. Bergholz, 131 U. S. cxliii. Appx. and 23 L. ed. 1008; Micas v. Williams, 104 U. S. 556, 26 L. ed. 842; Evans v. Brown, 109 U. S. 180, 27 L. ed 898, 3 Sup. Ct. Rep. 83; Blythe v. Hinckley, 180 U. S. 333, 45 L. ed. 537, 21 Sup. Ct. Rep. 390.

The objections to the constitutionality of art. 3071, Revised Statutes of Texas, were frivolous, and merely for delay, as such question had been theretofore passed on by the Supreme Court of the United States, and decided in favor of its validity.

Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; Iowa L. Ins. Co. v. Lewis, 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. Rep. 126; Union Cent. L. Ins. Co. v. Chowning, 86 Tex. 654, 24 L.R.A. 504, 26 S. W. 982; Fidelity & C. Co. v. Allibone, 90 Tex. 660, 40 S. W. 399; Penn Mut. L. Ins. Co. v. Maner, 101 Tex. 553, 109 S. W. 1084; Mutual Reserve L. Ins. Co. v. Jay, 50 Tex. Civ. App. 165, 109 S. W. 1117.

When the Federal questions involved in a case are correctly decided by the state supreme court, the judgment of that court must be affirmed without determining any other question not of Federal character.

Myrick v. Thompson, 99 U. S. 297, 25 L. ed. 326; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Swope v. Leffingwell, 105 U. S. 3, 26 L. ed. 939; Gillis v. Stinchfield, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; Missouri P. R. Co. v. Castle, 224 U. S. 541, 56 L. ed. 875, 32 Sup. Ct. Rep. 606.

The Supreme Court will not consider questions not raised and passed on in the court below, nor will the raising of one Federal question in the state court permit the consideration of other Federal questions than the one raised.

Wilson v. McNamee, 102 U. S. 572, 26 L. ed. 234; Keokuk & H. Bridge Co. v. Illinois, 175 U. S. 626, 44 L. ed. 299, 20 Sup. Ct. Rep. 205; Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; Messenger v. Mason, 10 Wall. 507, 19 L. ed. 1028; Maxwell v. Newbold, 18 How. 511, 15 L. ed. 506; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120.

Mr. Chief Justice White, after making the foregoing statement, delivered the opinion of the court:

Upon the pleadings which we have just stated and the facts stipulated, the trial court gave judgment for the plaintiff, Cohen, against the defendant company for the amount of the policies, less the sums which had been loaned thereon by the company, with interest, and with the statutory penalties and attorneys' fees claimed.

To recapitulate, it suffices to say that the assignments of error made by the company in the court below for the [132] purpose of the appeal by it taken but expressed the defenses resulting from its answer and the stipulated facts which we have stated. That is to say, reliance was placed (1) upon the proposition that, in any event, the recourse of the plaintiff was against Hilsman, and not against the company; (2) that the transfer of the policies to Hilsman was a Georgia contract, and valid under the law of that state because the existence of insurable interest at the time of the transfer, although necessary under the Texas law, was not necessary under the Georgia law; (3) that as, in any event, the transaction out of which the assignment of the policies from Cohen to Hilsman grew was admittedly a gambling one, the court would not allow the executor of Cohen to derive any rights from assailing that transaction, but

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would leave the parties where their illegal contract had placed them; that is, let the assignment to Hilsman stand, and hence leave no right in Cohen, executor, to recover; (4) that the court erred in giving judgment for the statutory penalties and damages because, under the circumstances stated, the liability to pay them was not embraced by the statute under which they were imposed, and that if the statute, as construed, imposed the damages and attorney's fee which were allowed, it was in violation of § 1 of the 14th Amendment.

In an elaborate opinion the court disposed of all these contentions. It held that the suit need not be brought against Hilsman, but that it could be brought directly against the company. It decided that the contract of assignment was a Texas contract, and for want of insurable interest in Hilsman was invalid under the laws of that state, although it was in substance admitted that it would have been valid, so far as the question of insurable interest was concerned, if it had been a Georgia contract. Coming to consider the fact that both parties had conceded that the transaction out of which the assignment of the policies grew was purely of a gambling nature, and that that fact [133] had been stipulated, the court refused to sustain the following proposition which was insisted upon by the defendant company: "When an insurance policy is assigned as part of a gaming transaction, the law will give no relief to either party, or to their heirs, executors, or assigns, regardless of all other questions, but will leave the parties where they have voluntarily placed themselves." [— Tex. Civ. App.—, 139 S. W. 58.] On the contrary, the court, relying upon the Texas law upon that subject, the Georgia law on the same subject, and the principles of general law applicable thereto, held that instead of leaving the assignment growing out of the gambling transaction enforceable in the hands of Hilsman, it would, in consequence of the illegality, strike down the whole transaction, and therefore leave the policy in the hands of Cohen, the insured, to whom it belonged before the assignment had been made. And for this reason also the court decided that the sum paid by Hilsman for the transfer need not be repaid by Cohen in order to recover. On the subject of the penalties the court, referring to the cases of Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662, and Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565, held that the statute under which they were imposed was not repugnant to the 14th Amendment, and said: "The action of the insurance company in paying the money due on the policies was not, as in Southwestern Ins. Co. v. Woods Nat. Bank, — Tex. Civ. App. —, 107 S. W. 119, an offer of the insurance company to pay to the one of the two real claimants when it should be determined who he was, but a voluntary payment to the rival claimant, who had no right whatever to the amount due on the policy. The company has indemnified itself against its act in paying the money due on the policy to one who was not entitled to receive it; now let it resort to its indemnity."

At the threshold we must dispose of a motion to dismiss. It is apparent from the statement of the case that the only express assertion of Federal right had reference to [134] the statutory penalty and the attorney's fee. The assignments of error, however, assert violations of rights under the Constitution in many particulars, but more especially with reference to the action of the court in treating the sales of the policies as Texas contracts, and refusing to apply the Georgia law, which admittedly differed fundamentally from that of Texas. It is elementary that a Federal question may not be imported into a record for the first time by way of assignments of error made for the purposes of review by this court. Moreover, as a general rule, it is true that for the purposes of review by this court rights under the full faith and credit clause, § 1, article 4 of the Constitution, come within that class which are required to be expressly set up and claimed in the court below. Johnson v. New York L. Ins. Co. 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; El Paso & S. W. R. Co. v. Eichel, 226 U. S. 590, 597, 57 L. ed. 369, 373, 33 Sup. Ct. Rep. 179; Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 559, 565, 57 L. ed. 966, 968, 33 Sup. Ct. Rep. 581. Let it be conceded, as we think it must be, where the record leaves no doubt that rights under the full faith and credit clause were essentially involved and were necessarily passed upon, there would be jurisdiction to review even although such rights had not been expressly asserted below (see Tilt v. Kelsey, 207 U. S. 43, 51, 52 L. ed. 95, 99, 28 Sup. Ct. Rep. 1); the right to review under such condition being in effect but a result of the elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided. But these concessions are irrelevant, even although it be further conceded that the ruling of the court below as to the necessity for an insurable interest, and its governing the case by the law of Texas instead of by the law of Georgia, bring this case within the doctrines just

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stated. We say this because of the existence of another and fundamental question which causes the concessions stated to be immaterial. Both parties, as we have seen, wholly independent of the existence of an insurable [135] interest, affirmed the illegality of the transaction out of which the assignments of the policies grew because of the alleged gambling nature of the transaction, and the admitted facts without dispute established that situation. There being thus an admission by both parties, and no dispute concerning the illegality of the transaction, and a difference only as to the consequences to arise from such illegality, it follows that the case reduces itself to a consideration of that subject. But, on coming to its consideration, it is plain that no question concerning the full faith and credit clause was involved in any contention made below by the plaintiff in error in that regard, since the rights deduced from the admitted illegality of the transaction were placed solely on considerations of the local law of the state of Texas and of the state of Georgia, deemed to be applicable to such condition of things, or upon what was deemed to be the controlling principles of general law on the subject. Indeed, so absolutely is this the case that, as we have seen, the company itself insisted on the illegality and based rights upon it. And it was only on behalf of the defendant in error that considerations involving the full faith and credit clause were suggested as controlling the results in consequence of the admitted illegality of the transaction as a gambling one. A condition which is illustrated by the fact that the reply petition of the plaintiff, while accepting and reiterating the averment of illegality made in the answer of the defendant company, in addition specially alleged that the illegality resulting from the gambling transaction caused the assignment of the policies to be void under the law of New York, where the company was organized, and under the law of Texas, as well as under the law of Georgia. And it was for this reason that the proof which was offered as to the statute law of Georgia on the subject of gambling transactions and the decision or decisions of that state, which it was deemed made the statute applicable, were tendered on behalf of the plaintiff, [136] and not by the defendant company. It would be indeed anomalous when the parties had both relied upon the illegality of the transaction upon grounds wholly independent of any Federal right, and the case had been decided upon that ground, which, in and of itself, is sufficient to sustain the action of the court below, to permit one of the parties, because of his dissatisfaction with the application of such principles, to assert the existence of jurisdiction because the case rested on a Federal issue. It becomes, hence, obvious that the assignments of error outside of the one referring to the repugnancy to the 14th Amendment of the statute imposing damages and penalties afford not the slightest pretext for the exercise of jurisdiction, and they therefore may be put out of view.

Coming to consider the latter subject, it may not be doubted that the nonrepugnancy of the assailed statute to the Constitution of the United States has been directly determined by this court in the cases upon which the lower court based its ruling. Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565. But it is said that, as previously upheld, the statute, as construed by the state court, contemplated a liability for the penalties or damages and attorneys' fees only in case there was a wilful refusal to pay, and therefore those decisions have no application here, since the statute, as applied in this case, enforces a liability against the company in spite of its action in the utmost good faith, taken solely for the purpose of determining to whom it must pay the sum due, liability as to which was frankly conceded. But the deduction simply disregards the basis upon which the court below rested its conclusion, and invites us upon a conception of injustice to commit a wrong by reviewing a matter of purely local concern which is not within our cognizance. We say this because clearly the court below rested its conclusion as to liability for the penalty and damages not upon the construction of the [137] statute suggested, but upon the premise that the payment to Hilsman by the insurance company of the sum of the policies under the circumstances stated was a payment which took it out of the category of a mere stakeholder seeking to discharge his duty in good faith, and placed it in the position of a person espousing the cause of one as against the other, and thereby subjecting himself to the legal consequences arising from such action. And the considerations which we have stated also dispose of the contention concerning the wrong which it was insisted was done in declaring the assignment of the policies void because of the gambling nature of the contract, and yet permitting the assignor to hold onto the price paid for such assignment. That question was involved in and controlled by the court's ruling concerning the illegal nature of the transaction and the principles applicable thereto, and therefore it is beyond our competency to review.

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As the repugnancy of the statute concerning the damages and attorney's fee was the only semblance of ground for invoking our jurisdiction, and as that ground was conclusively established to be without merit when the writ of error was sued out, it follows that there is nothing upon which to base jurisdiction, and the writ of error must be dismissed.

Dismissed for want of jurisdiction.

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[138] TEXAS & PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.
AMERICAN TIE & TIMBER COMPANY, Ltd.

(See S. C. Reporter's ed. 138–149.)

Carriers — discrimination — refusal to accept shipment — exhausting remedy before Interstate Commerce Commission.

1. A suit against a railway company to recover the damages resulting from its refusal to accept interstate shipments of oak railway cross-ties destined for a point beyond its own line may not be maintained in the absence of previous action of the Interstate Commerce Commission, where the carrier's refusal was based upon the want of any applicable filed and published rate, its position being that railway cross-ties were a separate, distinct freight commodity, and, not being specifically mentioned, were not embraced by its filed tariff fixing joint through lumber rates.

[For other cases, see Carriers, III. e, in Digest Sup. Ct. 1908.]

Carriers — discrimination — refusal to accept shipment — exhausting remedy before Interstate Commerce Commission.

2. The acceptance by a railway company of three interstate carload shipments of oak railway cross-ties destined for a point beyond its own line under its joint through lumber rate does not dispense with the necessity of previous action by the Interstate Commerce Commission before the shipper may maintain a suit against the carrier to recover damages for its failure to accept further shipments, where its refusal is based upon the want of any applicable filed and published rate, its position then being that railway cross-ties were not embraced by its filed tariff fixing joint through lumber rates.

[For other cases, see Carriers, III. e, in Digest Sup. Ct. 1908.]

Carriers — discrimination — refusal to accept shipment — exhausting remedy before Interstate Commerce Commission.

3. A carrier's insistence, as a mere pretext to prevent an interstate shipment over its line, upon the absence of an applicable filed and published rate, does not justify a resort by the shipper to the courts, in advance of action by the Interstate Commerce Commission, to recover damages resulting from the carrier's refusal to furnish cars for such a shipment.

[For other cases, see Carriers, III. e, in Digest Sup. Ct. 1908.]

Trial — issues — bad faith.

4. The bad faith of a railway company in insisting, as a mere pretext to prevent an interstate shipment of railway cross-ties over its line, that its filed and published joint through interstate rate on lumber did not cover cross-ties, is not open to consideration in a suit by the shipper against the carrier, based upon the unlawfulness of the carrier's refusal, in view of the filed tariff, to accept the shipment.

[For other cases, see Trial, II., in Digest Sup. Ct. 1908.]

[No. 180.]

Argued January 20, 21, 1914. Decided June 8, 1914.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern District of Texas, in favor of a shipper in a suit to recover the damages alleged to have resulted from the refusal of a railway company to furnish cars. Reversed.[1]

See same case below, 111 C. C. A. 673, 190 Fed. 1022.

The facts are stated in the opinion.

Mr. Hiram Glass argued the cause, and, with Mr. W. L. Hall, filed a brief for plaintiff in error:

In determining whether certain rates shown in tariffs on file with the Interstate Commerce Commission must be applied to certain commodities moving from one state to another, where, under the pleadings and the evidence, that question may be determined by one court one way and by the Interstate Commerce Commission or another court a different way, thereby bringing about a want of uniformity in the meaning and construction of railroad interstate tariffs, and in the application of rates named in such tariffs, the question must, in the first instance, be determined by the Interstate Commerce Commission; and the circuit courts cannot, compatibly with the interstate commerce act, consider and decide such question, or award the relief that is dependent upon a correct decision of such question of fact.

Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed.

[1] Leave granted on June 22, 1914, to present petition for rehearing within sixty days.

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553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075, Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct. Rep. 938; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916; Atlantic Coast Line R. Co. v. Macon Grocery Co. 92 C. C. A. 114, 166 Fed. 206; Smith v. Detroit & T. Shore Line R. Co. 175 Fed. 506; Columbus Iron & Steel Co. v. Kanawha & M. R. Co. 101 C. C. A. 621, 178 Fed. 261; Franklin v. Pennsylvania & R. R. Co. 203 Fed. 134; Pacific Coast Biscuit Co. v. Spokane, P. & S. R. Co. 20 Inters. Com. Rep. 546.

Mr. Rollin W. Rodgers argued the cause, and, with Mr. R. P. Dorough, filed a brief for defendant in error:

Every phase of this case, so far as the Commission could pass on it, had been affirmatively settled according to the tie company's contention, and the only question left, as we think, is the amount of the damages. No court before which the case could be filed would or could reach a different conclusion on the undisputed facts, and these rulings of the Commission are binding upon all such courts.

Reynolds v. Western New York & P. R. Co. 1 Inters. Com. Rep. 685; Foster Bros. Co. v. Duluth, S. S. & A. R. Co. 14 Inters. Com. Rep. 232; Pacific Coast Biscuit Co. v. Oregon R. & Nav. Co. 20 Inters. Com. Rep. 180; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392.

Previous action by the Interstate Commerce Commission was not necessary.

Lyne v. Delaware, L. & W. R. Co. 170 Fed. 847; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893.

The Interstate Commerce Commission has construed the act as to the authority conferred to award reparation, and the character of claims within its powers.

Blume v. Wells, F. & Co. 15 Inters. Com. Rep. 53; Laning-Harris Coal & Grain Co. v. St. Louis & S. F. R. Co. 15 Inters. Com. Rep. 37; Woodward v. Louisville & N. R. Co. 15 Inters. Com. Rep. 170; Pueblo Transp. Asso. v. Southern P. Co. 14 Inters. Com. Rep. 82; Joynes v. Pennsylvania R. Co. 17 Inters. Com. Rep. 361; S. R. Washer Grain Co. v. Missouri P. R. Co. 15 Inters. Com. Rep. 152.

Mr. Chief Justice White delivered the opinion of the court:

Basing its cause of action on the act to regulate commerce, the American Tie & Timber Company, defendant [141] in error, hereafter called the tie company, commenced suits in the circuit court of the United States for the northern district of Texas against the Texas & Pacific Railway Company, plaintiff in error, and the Kansas City Southern Railway Company, to recover damages alleged to have resulted from the refusal of the railway companies to furnish, in September, October, and November, 1907, cars for the loading of oak railway cross-ties at various points on the line of the railways in Arkansas and Louisiana for shipment to Linwood, Kansas, beyond the lines of the companies. The cases were consolidated for trial, subject to a plea to the jurisdiction filed by the Kansas City Southern Railway Company, which plea was afterward sustained and the suit as to that company dismissed. There was a trial, however, as to the Texas & Pacific Railway Company, resulting in a verdict and judgment thereon for $17,112.33, and the writ of error now before us is prosecuted by the railway company to a judgment of the court below affirming the trial court. 111 C. C. A. 673, 190 Fed. 1022.

At the close of the evidence a motion was made to dismiss "because, under the facts and circumstances now disclosed by the record, and compatibly with the act of Congress of the United States to regulate interstate commerce, this court has no power to consider and decide the subject-matters which are complained of, or to award the relief prayed for by plaintiff." The denial of this motion is assigned as error, and we come at once to consider it, and state only so much of the pleadings and evidence as is necessary to adequately present the issue to be decided.

The amended petition, after averring that the tie company was a Louisiana corporation and that the railway company was a corporation organized under the laws of the United States, alleged in substance that in 1901 the railway company issued and filed with the Interstate Commerce Commission "its joint through lumber tariff, T. & P. No. 8500-H, applying on lumber, all kinds (except [142] walnut and cherry), laths and shingles and articles taking same rates from points on the Texas & Pacific Railway Company to points in Kansas," by which a joint through rate of 24 cents per 100 pounds was put into effect from points on the railway company's line in Arkansas

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and Louisiana to Linwood, Kansas, "on, amongst other things, oak lumber," which rate, it was averred, had been continuously in effect from the date of the filing of the said tariff up to the happening of the events complained of.

It was averred that on July 23, 1907, the tie company entered into a contract with the Union Pacific Railway Company to deliver to said company f. o. b. cars Linwood, Kansas, 150,000 oak railway cross-ties of specified dimensions at the rate of 15,000 per month, beginning on or before October 1, 1907; at the price of 86 cents per tie, which contract was by its terms based on the rate of 24 cents per hundredweight fixed in the tariff filed as above stated in 1901. That, for the purpose of performing said contract, the tie company accumulated at stations on the railway company's line in Arkansas and Louisiana 44,541 oak cross-ties for shipment to Linwood, Kansas, and on October 10, 1907, requested the railway to furnish cars for the loading of the cross-ties at such points. It was alleged that after furnishing three cars, which were loaded by the railway company and shipped at the rate of 24 cents per 100 pounds, the railway company refused to provide further cars, or to receive the cross-ties for shipment, upon the ground, as stated by it, that it had no through rate applicable to oak railway cross-ties from the several points on its line to Linwood, Kansas. The petition charged, however, that the joint through lumber tariff above referred to and the rate of 24 cents thereby established included oak ties, and that the railway's refusal to provide cars and to carry the ties at its published rate was an unjust and unreasonable discrimination against the tie company, against the several places on the railway [143] company's line where the ties had been accumulated, and against the ties as an article of commerce, which discrimination, it was averred, was practised by the railway company with the object of preventing the movement of the cross-ties to points beyond its line, and of thus compelling the tie company to sell the ties which it had accumulated to the railway company. It was alleged that the refusal to transport the ties had resulted in unreasonable prejudice and disadvantage to the tie company and to the traffic in ties, and in benefit to the railway company as a purchaser and consumer of cross-ties, all of which constituted a violation of the act to regulate commerce. It was averred that, in consequence of the refusal of the railway to furnish the cars, and the resulting inability of the tie company to deliver the ties to the Union Pacific Railway under the contract, that company had canceled the contract to buy the ties. And the amount sought to be recovered was alleged to be the loss resulting to the tie company consequent on such cancelation, together with punitive damages based on the "wilful, wanton, and malicious" conduct on the part of the railway company, and a reasonable attorney's fee.

The railway company, besides denying generally the allegations of the amended petition, alleged that its joint through lumber tariff did not include a rate on oak railway cross-ties, but that cross-ties were a separate and distinct and well-recognized freight commodity, and that at the time mentioned in the petition it had not filed with the Interstate Commerce Commission any tariff under which it could lawfully accept for interstate shipment, at a through rate, the cross-ties offered by the tie company. The answer further denied that its failure to have in effect such a rate was a discrimination against cross-ties or the tie company or any locality, and alleged that oak cross-ties had never before been offered to it in Arkansas and Louisiana for shipment to interstate points on its lines or [144] connections so as to render it advisable to establish such a rate. It was averred that when the railway company first learned, in September, 1907, of the purpose of the tie company to ship cross-ties, it at once notified the tie company that it had no through rate on ties, and therefore would not be able to offer such a rate, but would seek to establish a through rate of 50 cents per hundredweight if sufficient time was allowed it to give the public notices of the filing of the tariff as required by the statute. It was then alleged that thereafter the first intimation that the railway company had of the purposes of the tie company was a letter transmitted to one of its officers from the Interstate Commerce Commission, informing the railway company of the fact that the tie company had filed an informal complaint with the Commission on the ground that, although the railway company's tariff on lumber embraced cross-ties, it had announced its intention not to receive them under the lumber schedule, and protesting in advance against permitting the railway company to file a specific tariff on cross-ties at 50 cents per hundredweight, because, as compared with the 24-cent lumber rate, it would be unreasonable. That at once, to avoid difficulty, the railway company applied to the Interstate Commerce Commission to be allowed immediately to put into effect a cross-tie rate at 24 cents per 100 pounds, the same as the lumber rate, and such request was refused by the Commission. Request was then made to put in such a rate after five

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days' notice, which was likewise refused, and thereupon in January, 1908, the railway company issued and filed with the Interstate Commerce Commission a joint through lumber tariff amended so as to include at the lumber rate "wood railroad cross-ties, all kinds, carloads." The answer then charged that at no time until such tariff became effective, February 13, 1908, could the railway company have lawfully accepted and carried oak railway cross-ties under the provisions of the [145] act to regulate commerce. Referring to an averment in the petition concerning the acceptance of three cars of cross-ties at about this time for shipment at the lumber rate, the answer averred that if the facts were true, it furnished no basis for recovery, as the receipt of the ties inadvertently or otherwise, in the absence of a rate, would have been a violation of law, and afforded no ground for inferring the obligation to continue to do so, and, besides, did not aid the plaintiff's case, which was based upon the refusal of the railway company to take freight at an established and existing rate, not upon any supposed obligation by estoppel to do so when there was no established rate. And by an amendment to the answer it was insisted that under § 9 of the act to regulate commerce (act Feb. 4, 1887, chap. 104, 24 Stat. at L. 382, U. S. Comp. Stat. 1901, p. 3159) the plaintiff could not prosecute its action because, by making a complaint, as it had done, to the Interstate Commerce Commission, concerning the failure to treat the lumber tariff as embracing a rate on cross-ties, the plaintiff had elected to proceed before the Commission.

The evidence at the trial tended to support the allegations of the amended petition as to the making of the contract with the Union Pacific Railway Company, the accumulation of cross-ties at the several stations on the railway's line, the request for cars for the shipment of the ties to Linwood, Kansas, the refusal of the railway to provide the cars, the cancelation of the contract by the Union Pacific Railway Company, and the consequent loss to the tie company. The railway company's joint through lumber tariff was introduced in evidence, and it was not disputed that by it a rate of 24 cents per 100 pounds was established on oak lumber, and that oak railway cross-ties were not specifically mentioned. The railway company also introduced in evidence the correspondence between it and the Interstate Commerce Commission, showing, among other things, the request to be allowed to put immediately into effect the cross-tie rate, and the refusal of the [146] Commission to grant the request, and the other facts and circumstances stated in the answer. It is not disputable that the pivotal question in the case was whether oak railway cross-ties were included in the filed tariff fixing a through lumber rate of 24 cents per hundredweight, and so far as the solution of that inquiry depended upon the views of men engaged in the lumber and railroad business, as developed in the testimony, it is equally indisputable that there was an irreconcilable conflict. And this conflict at once leads to a consideration of the principle which dominates the controversy, and upon which its decision, therefore, depends.

There is no room for controversy that the law required a tariff, and therefore, if there was no tariff on cross-ties, the making and filing of such tariff conformably to the statute was essential. And it is equally clear that the controversy as to whether the lumber tariff included cross-ties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute. Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that, for the preservation of the uniformity which it was the purpose of the act to regulate commerce to secure, the courts may not, as an original question, exert authority over subjects which primarily come with the jurisdiction of the Commission. Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916; Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct. Rep. 938. No question is made as to the controlling effect of the doctrine as a general rule, but it is urged that it is not applicable to this case for the following reasons:

(a) The foundation upon which the doctrine rests, it is [147] insisted, is the necessity of a uniform enforcement of the interstate commerce act and the danger of diversity and conflict arising if questions concerning the existence of tariffs or their reasonableness, of discriminations and preferences, were left to be originally determined by courts of general jurisdiction, thus giving rise to the possibility of one rule in one jurisdiction and another in another. But the argument proceeds to insist that upon the principle that where the reason for the application of a law ceases to exist the law itself ceases to apply, the settled construe-

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tion of the act to regulate commerce, announced and enforced in the Abilene and other cases, has here no application because it is so plain that oak cross-ties were included in the lumber rate as fixed in the tariff of the railway company that there is no reason for proceeding primarily before the Commission, as there is no possibility of difference on the subject if left to the consideration of the courts. We need not pause to point out the palpable error of law which the proposition involves, since, on the face of the record, it is apparent that the assumption of fact upon which it rests is absolutely without foundation. We say this because nothing could more clearly demonstrate such result than does the conflict and confusion in the testimony concerning whether cross-ties were included in the filed lumber tariff. And indeed, the same demonstration arises from a consideration of some decided cases; as, for instance, American Tie & Timber Co. v. Kansas City Southern R. Co. 99 C. C. A. 44, 175 Fed. 28, 33, presumably a report of this case, where it appears that at the first hearing the trial judge was so clearly of the opinion that cross-ties were not lumber that he so charged the jury, and directed a verdict for the railroad company. See also Greason v. St. Louis, I. M. & S. R. Co. 112 Mo. App. 116, 86 S. W. 722, where it is apparent that the same conclusion was reached.

(b) Because the question has been determined by the Interstate Commerce Commission in Reynolds v. Western New York & P. R. [148] Co. 1 I. C. C. Rep. 393, 1 Inters. Com. Rep. 685. An examination of that report, however, discloses that the railway had in effect a published rate on cross-ties *eo nomine*, and the complaint was that it was unreasonable because it was higher than the rate on lumber. The ruling of the Commission was not that the lumber rate included a rate on ties, but that the rate on ties was unreasonable as compared with the lumber rate, and should be reduced.

(c) Because the railway company, by loading and carrying the three cars of ties under the 24-cent rate, had itself recognized the applicability of the lumber rate to cross-ties, and was concluded thereby. But, without stopping to consider the tendency of the proof establishing the want of foundation for the proposition, we think it is wanting in merit for this obvious reason: If, as we have seen, the question of whether cross-ties were embraced in the filed tariff concerning lumber was involved in such conflict and doubt as to require the action of the Interstate Commerce Commission, the situation was such that the railway company could not do by indirection that which the statute permitted it to do only by compliance with the law; that is, filing its tariffs in the regular way. Nothing could better serve to demonstrate this self-evident truth than by recurring to the fact that, at the very inception of the controversy the request made by the railway company to the Interstate Commerce Commission to be allowed to immediately put in the rate on cross-ties was refused by that body.

(d) Because the railway company did not refuse to transport the ties in good faith, and insisted upon the absence of a scheduled rate simply as a pretext and device for preventing the shipment of the ties and their delivery in performance of the contract with the Union Pacific Railway, and with the ulterior and wrongful motive of keeping the ties on its line, so as to be able to purchase them itself from the tie company. But without pausing [149] to do more than direct attention to the fact that this proposition is necessarily disposed of by what we have said, that is, by the lawfulness, in view of the state of the existing and filed tariff, of the refusal until the Commission had acted, we think all the contentions under this last head are completely answered by the statement that the suit was based upon the unlawfulness of the action of the railway company in refusing to carry the ties in view of the filed tariffs, and therefore the contentions are not open for our consideration.

It results that error was committed by the court in declining to sustain the motion to dismiss for want of jurisdiction, and therefore it is our duty to reverse.

Reversed.

Mr. Justice Pitney dissents.

NEW YORK LIFE INSURANCE COMPANY, Plff. in Err.,
v.
MARY E. HEAD.

(See S. C. Reporter's ed. 149-165.)

Constitutional law — due process of law — freedom to contract — extraterritorial operation of statute.

The nonforfeiture provisions of Mo. Rev. Stat. 1899, §§ 5856-5859, 7897-7900, cannot, without denying the right of freedom to contract, guaranteed by U. S. Const., 14th Amend., be applied to invalidate a policy loan agreement made in the state of

NOTE.—On the constitutionality of statutes restricting contracts and business, generally—see note to State v. Loomis, 21 L.R.A. 789.

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New York between a life insurance corporation of that state and the beneficiary, who was a resident of New Mexico, and the settlement effected in New York in accordance with such agreement, conformably to the New York laws, although the original contract was made in the state of Missouri, which had exacted as a condition of the license granted to the insurance company to do business in the state that such company should be subject to the laws of the state as if it were a domestic corporation.

[For other cases, see Constitutional Law, IV. b, 7, b, in Digest Sup. Ct. 1908.]

[No. 254.]

Argued March 10, 1914. Decided June 8, 1914.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court of Jackson County, in that state, for the recovery of the full amount of a policy of life insurance notwithstanding an adjustment under a policy loan agreement in accordance with the laws of the state of New York. Reversed.

See same case below, 241 Mo. 403, 147 S. W. 827.

The facts are stated in the opinion.

Mr. James H. McIntosh argued the cause, and, with Messrs. Gardiner Lathrop, Cyrus Crane, and O. W. Pratt, filed a brief for plaintiff in error:

The original contract of insurance was entered into between nonresidents of Missouri, who agreed that it should be controlled by the laws of New York. This was a valid provision and cannot be annulled by the courts of Missouri.

Smith v. Mutual Ben. L. Ins. Co. 173 Mo. 329, 72 S. W. 935; Burridge v. New York L. Ins. Co. 211 Mo. 158, 109 S. W. 560; Gibson v. Connecticut F. Ins. Co. 77 Fed. 561; London Assur. Co. v. Companhia de Moagens, 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. Rep. 785; Kroegher v. Calivada Colonization Co. 56 C. C. A. 257, 119 Fed. 652; Mutual L. Ins. Co. v. Dingley, 49 L.R.A. 132, 40 C. C. A. 459, 100 Fed. 408.

The following cases relied on by defendant in error dealt with contracts of residents or citizens of Missouri, and are therefore distinguishable, to wit:

Cravens v. New York L. Ins. Co. 148 Mo. 604, 53 L.R.A. 305, 71 Am. St. Rep. 628, 50 S. W. 519; Price v. Connecticut Mut. L. Ins. Co. 48 Mo. App. 281; Horton v. New York L. Ins. Co. 151 Mo. 612, 52 S. W. 356; Burridge v. New York L. Ins. Co. 211 Mo. 162, 109 S. W. 560; Smith v. Mutual Ben. L. Ins. Co. 173 Mo. 329, 72 S. W. 935; Whitfield v. Ætna L. Ins. Co. 205 U. S. 489, 51 L. ed. 895, 27 Sup. Ct. Rep. 578; Equitable Life Assur. Soc. v. Clements (Equitable Life Assur. Soc. v. Pettus) 140 U. S. 226, 229, 35 L. ed. 497, 498, 11 Sup. Ct. Rep. 822; New York L. Ins. Co. v. Russell, 23 C. C. A. 43, 40 U. S. App. 530, 77 Fed. 94.

The policy loan agreement was not a Missouri contract. It was signed and delivered outside the state of Missouri by parties who were nonresidents of that state, and cannot be controlled or governed by the Missouri nonforfeiture laws.

The original contract could be lawfully amended or changed by the loan agreement.

1 Cooley, Briefs on Ins. p. 900; S. S. White Dental Co. v. Delaware Ins. Co. 105 Fed. 642; Leonard v. Charter Oak L. Ins. Co. 65 Conn. 529, 33 Atl. 511; Fireman's Fund Ins. Co. v. Dunn, 22 Ind. App. 333, 53 N. E. 251; Kattelman v. Fire Asso. 79 Mo. App. 447.

The right of plaintiff in error to make contracts is protected by § 1 of the 14th Amendment; and to attempt to deprive it of this right raises a constitutional question and gives this court jurisdiction.

Allgeyer v. Louisiana, 165 U. S. 578, 590, 591, 41 L. ed. 832, 836, 17 Sup. Ct. Rep. 427; Lochner v. New York, 198 U. S 45, 46, 52, 53, 49 L. ed. 937, 939, 940, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Lohse Patent Door Co. v. Fuelle, 215 Mo. 458, 22 L.R.A.(N.S.) 607, 128 Am. St. Rep. 492, 114 S. W. 997; Pennoyer v. Neff, 95 U. S. 714, 722, 24 L. ed. 565, 568; Union Bank v. Oxford, 90 Fed. 9; Olcott v. Fond du Lac County, 16 Wall. 678, 690, 21 L. ed. 382, 386; Havemeyer v. Iowa County, 3 Wall. 294, 18 L. ed. 38; Keller v. Travelers' Ins. Co. 58 Mo. App. 560; Whitfield v. Ætna L. Ins. Co. 205 U. S. 489, 51 L. ed. 895, 27 Sup. Ct. Rep. 578; Greenhood, Pub. Pol. p. 2; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Lawton v. Steele, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098.

Messrs. James H. McIntosh, Gardiner Lathrop, S. W. Moore, O. W. Pratt, and Cyrus Crane also filed a brief for plaintiff in error.

Mr. Buckner F. Deatherage argued the cause, and, with Messrs. James S. Botsford and Goodwin Creason, filed a brief for defendant in error:

Under U. S. Const., 14th Amend., Mr. Head and these plaintiff children were guaranteed the same right as if they had lived in Missouri.

Yick Wo v. Hopkins, 118 U. S. 356-

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369, 30 L. ed. 220–225, 6 Sup. Ct. Rep. 1064; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 209, 32 L. ed. 107, 109, 8 Sup. Ct. Rep. 1161; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; Frazer v. McConway & T. Co. 82 Fed. 257; Templar v. State Examiners, 131 Mich. 254, 100 Am. St. Rep. 610, 90 N. W. 1058; Steed v. Harvey, 18 Utah, 367, 72 Am. St. Rep. 789, 54 Pac. 1011; Pearson v. Portland, 69 Me. 278, 31 Am. Rep. 276.

The courts do not consider the residence of the parties as having any influence in determining the place where a contract is made.

Napier v. Bankers' L. Ins. Co. 51 Misc. 283, 100 N. Y. Supp. 1072; Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241; Golson v. Ebert, 52 Mo. 260; Richardson v. DeGiverville, 107 Mo. 422, 28 Am. St. Rep. 426, 17 S. W. 974; Ruhe v. Buck, 124 Mo. 178, 25 L.R.A. 178, 46 Am. St. Rep. 439, 27 S. W. 412; Reed v. Western U. Teleg. Co. 135 Mo. 661, 34 L.R.A. 492, 58 Am. St. Rep. 609, 37 S. W. 904; Horton v. New York L. Ins. Co. 151 Mo. 604, 52 S. W. 356; Elliott v. Des Moines Life Asso. 163 Mo. 132, 63 S. W. 400; Thompson v. Traders' Ins. Co. 169 Mo. 12, 68 S. W. 889; Parks v. Connecticut F. Ins. Co. 26 Mo. App. 511; F. B. Hauck Clothing Co. v. Sharpe, 83 Mo. App. 385; Pietri v. Seguenot, 96 Mo. App. 258, 69 S. W. 1055.

These policies were and are Missouri contracts.

Cravens v. New York L. Ins. Co. 148 Mo. 583, 53 L.R.A. 305, 71 Am. St. Rep. 628, 50 S. W. 519, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; Equitable Life Assur. Soc. v. Clements (Equitable Life Assur. Soc. v. Pettus) 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; Whitfield v. Ætna L. Ins. Co. 205 U. S. 489, 51 L. ed. 895, 27 Sup. Ct. Rep. 578; Moore v. Northwestern L. Ins. Co. 112 Mo. App. 696, 87 S. W. 988; New York L. Ins. Co. v. Russell, 23 C. C. A. 43, 40 U. S. App. 530, 77 Fed. 94; Mutual L. Ins. Co. v. Twyman, 122 Ky. 513, 121 Am. St. Rep. 471, 92 S. W. 335, 97 S. W. 391; Capp v. Security Mut. L. Ins. Co. 117 Mo. App. 532, 94 S. W. 734; Horton v. New York L. Ins. Co. 151 Mo. 604, 52 S. W. 356; Joyce, Ins. § 194; Napier v. Bankers' L. Ins. Co. 51 Misc. 283, 100 N. Y. Supp. 1072; Burridge v. New York L. Ins. Co. 211 Mo. 178, 109 S. W. 560.

The loan contracts of 1904 did not have the effect of wiping out the policies.

Smith v. Mutual Ben. L. Ins. Co. 173 Mo. 341, 72 S. W. 935; Burridge v. New York L. Ins. Co. 211 Mo. 178, 109 S. W. 560; Christensen v. New York L. Ins. Co. 152 Mo. App. 551, 134 S. W. 100.

The policies having contained provisions and stipulations for the making of loans and loan contracts, these loans and loan contracts made in 1904 cannot be considered as separate loans and loan contracts.

Burridge v. New York L. Ins. Co. 211 Mo. 158, 109 S. W. 560; Christensen v. New York L. Ins. Co. 152 Mo. App. 551, 134 S. W. 100.

Respecting the suggestion and argument of counsel that defendant had the right to come into Missouri and make contracts in defiance of law, we submit that the right of contract is not an unlimited, unqualified one, but is always subject to the law in force at the time of making the contract.

Wilson v. Drumrite, 21 Mo. 325; Villa v. Rodriguez (Alexander v. Rodriguez) 12 Wall. 339, 20 L. ed. 410; State ex rel. Crow v. Firemen's Fund Ins. Co. 152 Mo. 1, 45 L.R.A. 363, 52 S. W. 595; State v. Cantwell, 179 Mo. 245, 78 S. W. 569; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Karnes v. American F. Ins. Co. 144 Mo. 413, 46 S. W. 166; Havens v. Germania F. Ins. Co. 123 Mo. 403, 26 L.R.A. 107, 45 Am. St. Rep. 570, 27 S. W. 718; Henry & C. Co. v. Evans, 97 Mo. 47, 3 L.R.A. 332, 10 S. W. 868.

These decisions all proceed upon the theory that where the relation of mortgagor and mortgagee, pledgeor and pledgee, insurance company and insured, or other like fiduciary relations, subsist between the parties, legislation forbidding or governing the subject of contracts is permissible and sustainable. The relation between an insurance company and a policy holder is certainly fiduciary in its character, and is one that courts have more than once decided calls for the protection of the legislature by such wholesome legislation as lies at the foundation of these actions.

Smith v. Mutual Ben. L. Ins. Co. 173 Mo. 329, 72 S. W. 935; Mutual L. Ins. Co. v. Twyman, 122 Ky. 513, 121 Am. St. Rep. 571, 92 S. W. 335, 97 S. W. 391; Narramore v. Cleveland, C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298; Andrus v. Fidelity Mut. L. Ins. Asso. 168 Mo. 151, 67 S. W. 582; Orient Ins. Co. v. Daggs, 172 U. S. 557, 562, 43 L. ed. 552, 554, 19 Sup. Ct. Rep. 281.

Messrs. James S. Botsford, Buckner F. Deatherage, Goodwin Creason, W. P. Borland, and James A. Reed also filed a brief for defendant in error.

Mr. Chief Justice White delivered the opinion of the court:

In March, 1894, Richard G. Head, a citizen and resident of New Mexico, being temporarily in Kansas City, Missouri, made ap-

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plication at a branch office of the New York Life Insurance Company for two policies of insurance for $10,000 each on his own life, for the benefit of his minor son, Richard G. Head, Jr. The application stated the residence of Head in New Mexico, and it was stipulated that the policy applied for when issued should [155] be considered as having been issued in New York, and be treated as a New York contract. When Head made the application he handed a note for the premium to the agent with instructions, when the policies came, to turn them over to a friend to hold for him. The policies were issued, were delivered as directed, and were subsequently turned over to Head when he again came to Kansas City. All the premiums but the first, with perhaps one exception, were paid in New Mexico or at an agency of the company in Colorado. Nine years after the issue of the policies, that is, in 1903, in New Mexico, Head transferred one of the policies to his daughter, Mary E. Head, the transfer having been either by way of original authority or ratification duly sanctioned by the proper probate court in the county of New Mexico where Head was domiciled. In 1904, Mary E. Head, under the policy of which she thus became the beneficiary, borrowed from the New York Life Insurance Company the sum of $2,270. The loan was requested by a letter written from Las Vegas, New Mexico, to New York, and accompanied by the policy and an executed loan agreement in the form usually required by the company, and which conformed to the requirements of the New York law. The loan bore 5 per cent interest and the agreement provided that it should be payable at the home office in New York, and that if any premium on the policy or any interest on the loan were not paid when due, "settlement of said loan and of any other indebtedness under said policy shall be made by contin ing said policy without further notice as paid-up insurance of reduced amount in accordance with § 88, chapter 690, of the Laws of 1892 of the state of New York."

There was default in April, 1905, in the payment of the interest on the loan and the premium on the policy, and pursuant to the terms of the loan agreement and the law of New York the policy was settled, the sum remaining from the accumulated surplus after paying the loan and [156] the past-due premium being applied to the purchase of paid-up insurance, and the policy was, at the request of Head and his daughter, sent to them in New Mexico in May, 1905, and was in the possession of the daughter when Head died in April, 1906.

In September, 1906, this suit was commenced in a court of the state of Missouri, by Mary E. Head, the beneficiary, to recover the full amount of the policy. Stating the grounds for relief which were relied upon not as literally expressed in the pleadings, but with reference to the ultimate assumption upon which the right to recover was essentially based, it was as follows: That although it was true that if the face of the policy was adhered to and the terms of the loan agreement were considered and the law of New York applied, the settlement of the policy would be binding, it was not so binding, but, on the contrary, was void, because at the time the policy was written there were statutes in force in the state of Missouri which made it the duty of the company to retain from the accumulated surplus a given percentage thereof, and in case it was necessary to save forfeiture, to apply the sum of such retained percentage to the payment of premium on temporary insurance as far as it would go, and if this duty had been discharged when the failure to pay took place, the sum of the retained percentage would have been adequate to extend the insurance to such a period as would have caused the full amount of the policy to be a valid and existing risk at the death of Head. Resting thus upon the Missouri statutes, of course the fundamental assumption upon which the right to recover was based was the controlling operation and effect of the Missouri law upon the policy, upon the terms of the loan agreement, and upon the law of the state of New York which would otherwise govern, as New York was the place where the loan agreement was made and the adjustment of the policy took place. As there is no controversy concerning the meaning of the [157] Missouri statutes if they were controlling, we content ourselves with referring to the sections of the Revised Statutes of Missouri which are relied upon as having produced the consequences stated: Sections 5856–5859 and 7897–7900 of the Revised Statutes of Missouri of 1899. And the defense, considered also in its ultimate aspect, but asserted the validity of the settlement made in New York under the loan agreement, denied the applicability of the statutes of Missouri to that settlement, and expressly insisted that such statutes could not be applied to the situation without violating the due process clause of the 14th Amendment, and depriving of the right of freedom of contract guaranteed by that Amendment, and giving rise to the impairment of the obligation of a contract, contrary to the provisions of § 10, article 1 of the Constitution of the United States.

There was recovery in the court of first instance for the amount claimed under the policy, the court maintaining the supremacy

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of the Missouri statutes. In the supreme court to which the case was taken after a hearing in a division thereof the judgment below was affirmed on an opinion which expressly held that the policy of insurance was a Missouri contract, controlled by the Missouri law, and that, by the operation and effect of that law, the loan agreement made in the state of New York, and the settlement effected in that state in accordance with that agreement, conformably to the laws of New York, was controlled by the Missouri statute and was void. And the opinion so holding was in express terms adopted by the court in banc where the case was reheard.

The rights under the contract clause of the Constitution of the United States and the 14th Amendment, which, as we have stated, were asserted below, form the basis of the assignments of error. As the conflicting contentions concerning these constitutional questions advanced to refute, on the one hand, and to sustain, on the [158] other, the reasons which led the court below to its conclusion, involve the whole case, to briefly state at the outset the propositions upheld below will concentrate the issues and serve to give bold relief to the questions which require to be decided. (a) Determining whether the contract was a Missouri contract, made in that state and governed by its laws, the court held that the express stipulation in the contract to the effect that the policy was to be considered as issued from the home office, and be treated as a New York contract, was overborne by the fact that the application for the policy was made to the Kansas City agency, that the policy was sent there for delivery, and that the first premium was there paid. (b) In deciding that this view was not modified by the fact that the insured was a nonresident of Missouri, and by the further fact that, on the face of the policy, it was clearly manifest that it was executed not for the purpose of having effect in Missouri, but to be operative outside of that state, the court said:

"It has been repeatedly ruled in this state since the enactment of §§ 5856 *et seq.* of the Revision of 1889 (now Rev. Stat. 1909, § 6946) and the act of 1891 (Laws 1891, p. 75), Rev. Stat. 1899, §§ 1024 and 1026 (now Rev. Stat. 1909, §§ 3037, 3040), that foreign insurance companies admitted to carry on their business in this state can only contract within the limits prescribed by our statutes, and that, in the conduct of the business under the license granted by this state, they 'shall be subjected to all the liabilities, restrictions, and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers.' The effect of these decisions is to write into every insurance contract made by a foreign insurance company, so licensed, in this state, all of the provisions of the statutes of this state appurtenant to the making of such contract, and which define and measure the reciprocal rights and duties of the parties thereto. [159] These statutes are declaratory of the public policy of this state, and inhibit the doing of the business of insurance in this state by any corporation contrary to their regulations by annulling all the stipulations which offend the provisions of the statutes. Horton v. New York L. Ins. Co. 151 Mo. 604, 52 S. W. 356; Smith v. Mutual Ben. L. Ins. Co. 173 Mo. 329, 72 S. W. 935; Burridge v. New York L. Ins. Co. 211 Mo. 158, 109 S. W. 560; Cravens v. New York L. Ins. Co. 148 Mo. 583, 53 L.R.A. 305, 71 Am. St. Rep. 628, 50 S. W. 519; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; Whitfield v. Ætna L. Ins. Co. 205 U. S. 489, 51 L. ed. 895, 27 Sup. Ct. Rep. 578, affirming Keller v. Travelers' Ins. Co. 58 Mo. App. 557." [241 Mo. 413, 147 S. W. 827.]

(c) In disposing of the contention that, as the loan agreement was made in New York by persons not citizens of Missouri, and was sanctioned by the law of New York, it could not be treated as void by extending the Missouri statutes into the state of New York without a violation of the 14th Amendment, and without impairing the obligation of a contract, the court said:

"It is not an open question in this state, that all subsidiary contracts made by the parties to an insurance contract are within the contemplation and purview of the original contract, and are not to be treated as independent agreements. This being so, they are inefficacious to alter, change, or modify the rights and obligations as they existed under the original contract of insurance. Burridge v. New York L. Ins. Co. 211 Mo. 158, 109 S. W. 560; Smith v. Mutual Ben. L. Ins. Co. 173 Mo. 329, 72 S. W. 935."

Before approaching the constitutional questions relied upon in the light of these rulings we must dispose of a motion to dismiss. It rests upon the ground that, as the court below sustained its ruling by reference to a line of state decisions, a leading one of which had been affirmed by this court (New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962) prior to the decision below, therefore, as the basis for jurisdiction had been demonstrated to be unfounded by a

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decision of this court announced prior to the time the writ of error was prosecuted, there was no substantial ground upon which to base the suing out of the writ, and it [160] must be dismissed. But the contention rests upon a plain misconception as to what was involved and decided in the Cravens Case, since that case but concerned a contract of insurance made in Missouri as to a citizen of that state, and required it only to be determined whether rights under the Constitution of the United States had been denied by the ruling of the state court holding void a forfeiture of a policy which had been declared by the corporation for a failure to pay in Missouri a premium there due when such forfeiture was in direct violation of the prohibition of the state law. The difference, therefore, between that case and this, is that which, in the nature of things, must obtain between questions concerning the operation and effect of a state law within its borders and upon the conduct of persons confessedly within its jurisdiction, and its right to extend its authority beyond its borders so as to control contracts made between citizens of other states, and virtually, in fact, to disregard the law of such other states by which the acts done were admittedly valid.

Coming to the merits, to narrow the subject to be decided as much as possible, we pass the consideration of the ruling below, holding that, under the proof, the contract was a Missouri contract, and therefore, for the sake of argument only, concede that there was power in the state to treat the contract made for the purposes stated as a Missouri contract, and to subject it, as to matters and things which were legitimately within the state authority, to the rule of the state law. And this concession brings us to consider the second general inquiry, which is the power of the state of Missouri to extend the operation of its statutes beyond its borders into the jurisdiction of other states, so as in such other states to destroy or impair the right of persons not citizens of Missouri to contract, although the contract could in no sense be operative in Missouri, and although the contract was sanctioned by the law of the state where made. That is to say, the right of a state where a contract [161] concerning a particular subject-matter not in its essence intrinsically and inherently local is once made within its borders not merely to legislate concerning acts done or agreements made within the state in the future, concerning such original contract, but to affect the parties to such original contract with a perpetual contractual paralysis following them outside of the jurisdiction of the state or original contract by prohibiting them from doing any act or making any agreement concerning the original contract not in accord with the law of the state where the contract was originally made. In other words, concretely speaking, we must consider the validity of the loan agreement; that is, how far it was within the power of the state of Missouri to extend its authority into the state of New York, and there forbid the parties, one of whom was a citizen of New Mexico and the other a citizen of New York, from making such loan agreement in New York simply because it modified a contract originally made in Missouri. Such question, we think, admits of but one answer, since it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state and in the state of New York, and there destroy freedom of contract without throwing down the constitutional barriers by which all the states are restricted within the orbits of their lawful authority, and upon the preservation of which the government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question, and hence authorities directly dealing with it do not abound. The principle, however, lies at the foundation of the full faith and credit clause and the many rulings which have given effect to that clause.[1]

[162] It is illustrated as regards the right to freedom of contract by the ruling in Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427, and it finds expression in the decisions of this court affirmatively establishing that a state may not, consistently with due process clause of the 14th Amendment, extend its authority beyond its legitimate jurisdiction either by way of the wrongful exertion of judicial power or the unwarranted exercise of the taxing power.[2]

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[1]Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; Tilt v. Kelsey, 207 U. S. 43, 52 L. ed. 95, 28 Sup. Ct. Rep. 1; Fauntleroy v. Lum, 210 U. S. 230, 52 L. ed. 1039, 28 Sup. Ct. Rep. 641; American Exp. Co. v. Mullins, 212 U. S. 311, 53 L. ed. 525, 29 Sup. Ct. Rep. 381, 15 Ann. Cas. 536; Converse v. Hamilton, 224 U. S. 243, 56 L. ed. 749, 32 Sup. Ct. Rep. 415, Ann. Cas. 1913D, 1292. And see Bedford v. Eastern Bldg. & L. Asso. 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597.

[2]Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Overby v. Gordon, 177 U. S. 214, 222, 44 L. ed. 741, 744, 20 Sup. Ct. Rep. 603; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 51 L. ed. 345, 27 Sup. Ct. Rep. 236; Louisville & J. Ferry Co. v. Pennsylvania, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; Delaware,

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And an analysis of the opinion of the court below makes it clear that its ruling was rested not upon any doubt concerning the obvious operation of the Constitution which we have pointed out, but because it was deemed that the peculiar facts and circumstances of this case took it out of the general rule and caused it to be therefore a law unto itself. We say this because, while it is true the court based its conclusion upon a line of cases previously decided in that state, as all the cases thus relied upon involved only policies of insurance issued in Missouri to citizens of Missouri, and were solely concerned with the effect of acts done in Missouri which it was asserted were forbidden by the statutes of that state existing at the time when the acts were done, it could not have been that the cases were deemed to be controlling upon the principle of *stare decisis*, but they must have been held to be controlling because of the persuasive force of the reasoning upon which they had been decided. Indeed, this is not left to inference, since the court below in its opinion summarized the reasoning in the previous cases as shown by the passage which we have quoted, and made it the groundwork of its ruling in this case, that reasoning being as follows: Insurance companies chartered by Missouri took their existence from [**163**] the grant of the state, and therefore had no power to contract in excess of that which was conferred upon them by the state; hence, all acts done by them which were prohibited by the state law were *ultra vires* and void. But, as foreign insurance companies have no right to come into the state and there do business except as the result of a license from the state, and as the state exacts as a condition of a license that all foreign insurance companies shall be subject to the laws of the state as if they were domestic corporations, it follows that the limitations of the state law resting upon domestic corporations also rest upon foreign companies, and therefore deprive them of any power which a domestic company could not enjoy, thus rendering void or inoperative any provision of their charter or condition in policies issued by them or contracts made by them inconsistent with the Missouri law. But when this reasoning is analyzed, we think it affords no ground whatever for taking this case out of the general rule and making the distinction relied upon. This is so as the proposition cannot be maintained without holding that because a state has power to license a foreign insurance company to do business within its borders, and the authority to regulate such business, therefore a state has power to regulate the business of such company outside its borders, and which would otherwise be beyond the state's authority. A distinction which brings the contention right back to the primordial conception upon which alone it would be possible to sanction the doctrine contended for, that is, that because a state has power to regulate its domestic concerns, therefore it has the right to control the domestic concerns of other states. It is apparent, therefore, that to accept the doctrine it would have to be said that the distribution of powers and the limitations which arise from the existence of the Constitution are ephemeral, and depend simply upon the willingness of any of the states to exact as a condition of a license granted to a foreign corporation [**164**] to do business within its borders that the Constitution shall be inapplicable and its limitations worth nothing. It would go further than this, since it would require it to be decided not only that the constitutional limitations on state powers could be set aside as the result of a license, but that the granting of such license could be made the means of extending state power so as to cause it to embrace subjects wholly beyond its legitimate authority.

It is true it has been held that, in view of the power of a state over insurance, it might, as the condition of a license given to a foreign insurance company to do business within its borders, impose a condition as to business within the state, which otherwise, but for the complete power to exclude, would be held repugnant to the Constitution. In other words, that a company having otherwise no right whatever, for any purpose, to go in without a license, would not be heard, after accepting the same, to complain of exactions upon which the license was conditioned as unconstitutional, because of its voluntary submission to the same. But even if it be put out of view that this doctrine has been either expressly or by necessary implication overruled, or, at all events, so restricted as to deprive it of all application to this case (see Harrison v. St. Louis & S. F. R. Co. 232 U. S. 318, 332, ante, 621, 626, 34 Sup. Ct. Rep. 333, and authorities there cited), it here can have no possible application since such doctrine, at best, but recognized the power of a state, under the circumstances stated, to impose conditions upon the right to do the

L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 38, 54 L. ed. 355, 370, 30 Sup. Ct. Rep. 190.

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business embraced by the license, and therefore gives no support to the contention here presented, which is that a state, by a license, may acquire the right to exert an authority beyond its borders which it cannot exercise consistently with the Constitution. But the Constitution and its limitations are the safeguards of all the states, preventing any and all of them, under the guise of license or otherwise, from exercising powers not possessed.

[165] As it follows from what we have said that the primary conception upon which the court below assumed this case might be taken out of the general rule, and thereby the state of Missouri be endowed with authority which could not be exercised consistently with the Constitution, was erroneous, it results that the necessity for reversal is demonstrated without requiring us to consider other propositions. But before we come to direct the judgment of reversal, we briefly refer to another aspect of the subject, that is, the ruling of the court below as to the subsidiary nature of the loan agreement, and its consequent control by the broader principle upon which its conclusion was really based. Of course, under the view which we have taken of the case, that is, of the want of power of the state of Missouri, because the contract of insurance was made within its jurisdiction, to forever thereafter control by its laws all subsequent agreements made in other jurisdictions by persons not citizens of Missouri, and lawful where made,—that is, to stereotype, as it were, the will of the parties contracting in Missouri as of the date of the contract,—it is unnecessary to consider whether the loan agreement was or was not subsidiary; but see on this subject, Leonard v. Charter Oak L. Ins. Co. 65 Conn. 529, 33 Atl. 511; Fireman's Fund Ins. Co. v. Dunn, 22 Ind. App. 332, 53 N. E. 251; S. S. White Dental Mfg. Co. v. Delaware Ins. Co. 105 Fed. 642; 2 Wharton, Confl. L. § 467g and cases cited; and see note in 63 L.R.A. 833.

Reversed.

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[166] NEW YORK LIFE INSURANCE COMPANY, Plff. in Err.,
v.
RICHARD G. HEAD, JR., by His Next Friend, B. F. Deatherage.

(See S. C. Reporter's ed. 166, 167.)

This case is governed by the decision in New York Life Ins. Co. v. Head, ante, 1259.

[No. 225.]

Argued March 10, 1914. Decided June 8, 1914.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court of Jackson County, in that state, for the recovery of the full amount of a policy of life insurance, notwithstanding an adjustment under a policy loan agreement in accordance with the laws of the state of New York. Reversed.

See same case below, 241 Mo. 420, 147 S. W. 832.

The facts are stated in the opinion.

Mr. James H. McIntosh argued the cause, and, with Messrs. Gardiner Lathrop, Cyrus Crane, and O. W. Pratt, filed a brief for plaintiff in error:

Messrs. James H. McIntosh, Gardiner Lathrop, S. W. Moore, O. W. Pratt, and Cyrus Crane also filed a brief for plaintiff in error.

Mr. Buckner F. Deatherage argued the cause, and, with Messrs. James S. Botsford and Goodwin Creason, filed a brief for defendant in error:

Messrs. James S. Botsford, Buckner F. Deatherage, Goodwin Creason, W. P. Borland, and James A. Reed also filed a brief for defendant in error.

For contentions of counsel, see their briefs as reported in New York L. Ins. Co. v. Head, ante, 1259.

Mr. Chief Justice White delivered the opinion of the court:

This case is governed by the opinion in No. 254, just decided [234 U. S. 149, ante, 1259, 34 Sup. Ct. Rep. 879]. The policy sued on was one of the two issued to Richard G. Head in Kansas City, Missouri, in favor of his minor son. It was delivered at Kansas City and the first premium paid there, as in the previous case, and the subsequent premiums were paid in New Mexico. There was borrowed upon the policy by authority of the proper probate court in New Mexico the sum of $2,270, under a loan agreement and pledge; there was a default and an adjustment of the policy as in the other case. The case was tried in the court of first instance with the other case, was embraced in the supreme court of Missouri by the [167] same opinion by which the other case was disposed of, and there thus being no distinction between the two cases, for reasons given in the other case, No. 254, the judgment is reversed.

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FLORIDA EAST COAST RAILWAY COMPANY, Appt.,
v.
UNITED STATES, Interstate Commerce Commission, Railroad Commissioners of Florida, et al.

(See S. C. Reporter's ed. 167–188.)

Interstate commerce commission — judicial review — order without evidence to support it.

The enforcement of an order of the Interstate Commerce Commission reducing gathering rates for citrus fruits and vegetables from production points in Florida to a basing point in the same state will be enjoined where it was rendered without any evidence whatever to support it, this being a question of law which it is the duty of the courts to examine and decide.

[For other cases, see Interstate Commerce Commission, 8–14, in Digest Sup. Ct. 1908.]

[No. 383.]

Argued January 15 and 16, 1913. Decided June 8, 1914.

APPEAL from the United States Commerce Court to review a decree refusing to enjoin the enforcement of an order of the Interstate Commerce Commission reducing rates. Reversed.

See same case below, 200 Fed. 797.

The facts are stated in the opinion.

Messrs. **Frederick C. Bryan** and **Alexander St. Clair-Abrams** argued the cause and filed a brief for appellant.

Mr. **Blackburn Esterline**, Special Assistant to the Attorney General, argued the cause, and, with Solicitor General Bullitt, filed a brief for the United States.

Mr. **Charles W. Needham** argued the cause and filed a brief for the Interstate Commerce Commission.

Mr. **Frederick M. Hudson** argued the cause and filed a brief for the Railroad Commissioners of Florida.

Mr. **A. A. Boggs** filed a brief for intervening appellees.

Mr. Chief Justice **White** delivered the opinion of the court:

The order of the Interstate Commerce Commission concerning which the appellant, hereafter called the East Coast Line, complained before the court below, and which that court refused to enjoin, was made on a second supplemental petition presented in controversies which had been long pending and twice before decided, such controversies involving many railroads, and being concerned with the rates as to pineapples, citrus fruits, and vegetables from places of production in Florida to exterior points of distribution or consumption. While the report here under consideration, made on the second supplemental petition, deals with only a few of the railroads concerned in the previous inquiries, and with only a part of the controversies involved in the previous cases, yet the reports in the previous cases and the reasons stated by the Commission for its action in those cases are so connected with its action complained of in this case that it is impossible to understand this controversy without recurring to and stating the previous reports of the Commission in the controversies to which we have referred.

[174] We observe before coming to make that statement that none of the testimony taken before the Commission in the cases prior to this one is in the record, it having been stipulated that the facts stated by the Commission in its reports in such previous cases should be taken as the facts of such controversies. For the purpose of the statement which we shall make, the record therefore consists of the reports in such previous cases, of the report in this case, and the testimony taken in this case before the Commission and in the court below. The future application of the facts which we shall state will be facilitated by giving a description of the East Coast Line as stated in the several reports of the Commission to which we shall immediately recur.

The East Coast Line is wholly within the state of Florida, the main line extending from Jacksonville south along the Atlantic coast to Miami, a distance of 366 miles, then to Homestead, 28 miles south, and thence across the Florida Keys to Key West. At the time of the final hearing before the Commission on March 2, 1911, the road was not fully constructed, and was only completed and being operated to Knight's Key, about 83 miles below Homestead. The total mileage of the road was about 583 miles, including 477 miles of main line from Jacksonville to Knight's Key and about 106 miles of branch line above Miami. The cost of the construction from Homestead on was enormous, amounting to nearly $175,000 per mile, and the total cost of the extension from Homestead to Knight's Key, 83 miles, nearly equalled the entire cost of the balance of the road, 500 miles. On July 3, 1907, a petition was filed by the Florida Fruit & Vegetable Shippers' Protective Association against the Atlantic Coast Line, the Seaboard Air Line and Southern Railway Companies and the East Coast Line, complaining of and asking a reduction in interstate rates on pineapples, citrus fruits, and

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vegetables. The East Coast Line was the only one [175] of the defendant railroads whose traffic was confined to the producing regions in Florida because, while the other lines also undoubtedly penetrated to the area of production, their lines were not confined to Florida, but were trunk lines, carrying not only the product committed to them by producers in Florida, but also the products committed by producers to roads like the East Coast Line, which did not extend beyond Florida, and had therefore to be transshipped if destined to points beyond the state by other roads. In coming to make its report in the case thus referred to, the Commission thus stated the general situation of the railroad traffic of all the roads in Florida concerning the subjects under discussion (No. 1168, 14 Inters. Com. Rep. 483):

"The shape and location of the state of Florida is such that these railroads which handle this traffic from the point of production up to the base point necessarily do but a limited business. They extend south considerable distances through a sparsely settled country which neither originates nor consumes a considerable amount of traffic. Some of them reach the seacoast, but none of them connect or can connect with railroads leading beyond, and the amount of through business handled is extremely light. Their traffic is confined almost entirely to bringing out the products which originate upon their lines, and carrying in the supplies which are consumed in the territory served by them. Fruits and vegetables, lumber, naval stores, and in some cases cotton and phosphate rock are the principal commodities carried, and of these, fruits and vegetables produce the most revenue."

In the report by which the Commission disposed of this controversy (No. 1168, 14 Inters. Com. Rep. 476) it divided the rates to be considered into two classes: (a) gathering charges from production points in Florida to base points of which Jacksonville was the only one on the East Coast Line, and (b) rates from base points to points of final [176] destination in other states, the sum of the two rates being the joint through rate.

Considering the three products whose traffic charges were under consideration, the Commission said:

(a) Citrus fruits:

"From an examination of the elaborate figures which were introduced upon the trial showing the character of the traffic handled by these Florida roads, the conditions under which it is handled, their earnings, and the cost of operation running through a series of years, it is difficult to see how these railroads can be expected to transport in a suitable way this fruit and vegetable traffic from points of production to these basing points for a less sum than they now receive. It is difficult to see how, even upon the present tariff, those lines can, in the immediate future, expect to pay any considerable return upon their investment. We feel that these local rates, although they are high in comparison with other local rates, are as low as should be established under all the circumstances."

(b) Vegetables:

"The same observations which have been made upon the orange rates to base points apply with equal pertinency to those upon vegetables. They are named by the railroad commission of Florida. They are made with the understanding that they are really parts of through rates from the point of production to the market of consumption. They are low in comparison with other rates because it is understood that this industry is an important one to the state of Florida, and that a low cost of transportation is essential to its development.

"While these local rates are essentially part of the through charge, and should be dealt with by this Commission as such, it is difficult to see how these Florida railroads can render a proper service upon a lower scale of rates than is now applied. It must be remembered that without the railroad this industry could not exist at all, and that [177] to its satisfactory carrying on the character of the service is fully as important as the rate. It is better that these fruits and vegetables should reach the market on time, and in good condition, than that a few cents per box should be subtracted from the carrying charge. There was very little complaint as to the service; nor did the shippers who testified manifest any desire that these carriers should be required to accept less than reasonable compensation for that service. Our conclusion upon this branch of the case is that the present rates up to the base points, while high in comparison with similar rates in other localities, are as low as they ought to be under the conditions obtaining upon these Florida lines, so that here, as in case of oranges, the real question arises upon the rate from the base point to the northern market."

(c) Pineapples:

"Pineapples are mainly produced in Florida, upon the line of the Florida East Coast Railway, which extends, as already said, down the east side of Florida. This industry has, within recent years, developed rapidly. Florida pineapples to-day sell in all the markets of the United States in competition with foreign pineapples, usual-

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ly commanding much higher prices than the foreign article. While the period of production in the United States and in Cuba is not exactly the same, still it may fairly be said that the two products do compete.

"It was said that Jansen might be selected as a typical producing point upon the Florida East Coast Railway. This station is 257 miles south of Jacksonville, and the rate on pineapples is 24 cents per box of 80 pounds. Rates from other points are relatively about the same as from Jansen; somewhat lower, it will be seen, for the same distance, than from most producing points upon oranges."

Presumably, deeming that the particular situation on the East Coast Line as to the character of its business, its [178] location, its cost, etc., etc., required to be specially pointed out in addition to what was said in the passages quoted, the Commission said:

"The Florida East Coast Railway was built as part of a hotel scheme, and its principal business is the carrying of passengers who frequent these Florida winter resorts. Over 50 per cent of its total receipts are from passenger traffic. Its most important freight business is the transportation of fruits and vegetables, and of these pineapples afford the most considerable amount of revenue. The management of the railroad has paid great attention to the development of this business. In the pineapples region highways are few and transportation by wagon is therefore costly. To relieve this difficulty sidings have been put in the pineapple region at frequent intervals. The traffic representative of this railroad stated that it was possible to load pineapples every half mile upon his line in the pineapple-producing region. When once loaded, great attention is paid to sending the fruit to Jacksonville upon a reliable and expeditious schedule.

"Very elaborate tables were introduced, showing the cost of constructing this railroad and the financial results of its past operations. These statements and tables have been examined by the Commission, but it does not seem necessary to reproduce them here, or to state in detail the grounds of our conclusions. But for this railroad the pineapple industry in Florida would not to-day exist. The quality of the service rendered that industry by this road is not criticized. The shippers of this fruit ought not to object, nor do they object, to paying a fair compensation for the service, and in our opinion the present rates do not exceed such just compensation for the transportation of pineapples from various producing points to Jacksonville, and we so hold."

And concerning the earnings of the East Coast Line, it was said:

[179] "The total earnings of the Florida East Coast Railway for the same year [ending June 30, 1907] were $5,911 per mile, and its operating expenses $4,502. The greater part of the receipts of this railroad are from its passenger service. The evidence shows that a considerable portion of what little freight revenue it has comes from the transportation of fruits and vegetables. It has given in the past great attention to this service, and has apparently satisfied its patrons in this respect. It makes no through rates, but receives its full local in all cases up to Jacksonville."

Giving effect to the foregoing, the Commission held that the complaint as to gathering charges was wholly unfounded, and they were maintained. A different conclusion, however, was reached as to charges from the base points to points of distribution or consumption, as to which some reduction was made. It consequently follows that all the other roads who were defendants were subjected to some reduction as to their rates, while the East Coast Line, because of its being a purely gathering road, was subjected to no reduction whatever.

Within a year after this action by the Commission the same complainant commenced a new proceeding (No. 2566) against two hundred railroads, including, among others, the East Coast Line, to establish carload rates from base points in Florida to interstate points. At the same time in No. 1168, which, as we have seen, had been previously passed upon by the Commission and decided in favor of the East Coast Line, a supplemental petition was filed against that road, the sole complaint against the East Coast Line in such petitions being as to its gathering rates on pineapples from points of production to Jacksonville. And it is to be presumed that the complaint as to pineapple-gathering rates was made only against the East Coast Line, because, as we have seen, as stated by the Commission, that road was almost the exclusive carrier of such [180] product, and in fact had virtually built up that industry. The controversy, while it involved a claim of reduction, in its broad aspect presented only a controversy as to whether there should be put in force carload and less-than-carload instead of any-quantity rates in the performance of its duty of gathering pineapples. On the filing of the new and original as well as of the supplemental petition, the Commission directed the rescinding of its previous order

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concerning the reasonableness of gathering rates, as well as its finding on the subject of rates from base points, and directed the matter to be reheard. Without referring to the conclusion of the Commission concerning the controversy as to the many railroads who were before it as to their interstate rates, we come to state the ruling of the Commission as to the East Coast Line (17 Inters. Com. Rep. 552):

"The evidence produced upon the present hearing suggests no change in what was said so far as that applies to the Florida East Coast Railway. That line operates at the present time 477 miles of main line and 106 miles of branches. It has a first mortgage of $10,000,000, a second mortgage of $20,000,000, and a capital stock of $3,000,000, making in all $33,000,000. This capitalization, with the exception of about $4,000,000, represents an actual cash investment.

"It is urged by the complainant that the portion of the line from Miami south, which has cost some $14,000,000, was not at the present time a paying investment, and that the balance of the line from Jacksonville to Miami, which is used by the growers of pineapples, ought not to be taxed with the cost of this construction. Admitting this to be so, and laying out of view altogether the $14,000,000 which have been invested in that part of the property, it is still true that, during the entire existence of the Florida East Coast Railway, so far as this record shows, that property has never earned in any single year 6 per cent upon the money invested, with the single exception of the year 1909. [181] During much of the time its net earnings have been but little above its operating expenses. We certainly cannot hold that these rates should be reduced because for a single twelve months, under what may be termed abnormal conditions, this railway earned about 6 per cent on the money which has been actually invested in its construction. The years when no return has been received must certainly be given some consideration. Upon no other theory could private capital be induced to invest in the construction of railroads.

"While, however, we adhere to what was said in the previous case, we do think, upon more careful examination, that these rates of the Florida East Coast Railway on pineapples ought to be somewhat revised. They are not consistent with one another, and in our opinion those from the more distant points are too high as compared with rates from nearby points.

"The present rates are in any quantity. About 60 per cent of these pineapples move from the point of origin in carloads, 40 per cent in less than carloads. Carload shipments are stripped and loaded by the shipper, and are not unloaded at Jacksonville, which probably saves the carrier not far from 2 cents per box. The less-than-carload shipment is loaded by the railway and usually unloaded at the station in South Jacksonville or Jacksonville. In our opinion carload rates should be established which are less than the present any-quantity rates by 3 cents per box.

"The establishment of such carload rates will not of a certainty work a decrease in the net earnings of the carriers. It is a false theory of transportation which seeks to force the shipper to avail himself of a less-than-carload service, which is more expensive to render, for the purpose of increasing the gross revenues of the carrier. The true object should be to perform the service in the most economical manner, and to charge for that service reasonable compensation. In the end this makes to the advantage [182] of both the carrier and its patron. The vice president of the Florida East Coast Railway stated that he had always thought that carload rates should be established, and that, in his opinion, to establish carload rates, 3 cents per box less than the present any-quantity rates would not prejudice the net revenues of his company, since he would make up by saving in operating expenses what he lost in gross income."

The order of the Commission which gave effect to these views entered February 8, 1910, changed gathering charges on pineapples and citrus fruits on the East Coast Line from any-quantity to carload and less-than-carload rates, and modified the mileage basis. On attention being directed to the fact that the complaint related only to pineapples, while the order applied to that product and to citrus fruits, the order was modified and restricted to the subject complained of,—pineapples. The East Coast Line conformed to the order, and, indeed, shortly after doing so, also voluntarily put into effect carload and less-than-carload gathering rates on citrus fruits and vegetables, and although the rates thus fixed were somewhat higher than the rates on pineapples which the Commission had established, they were lower than the citrus fruit and vegetable rates which had been expressly sustained by the Commission.

Some months after this was done the same complainant who had filed the previous petitions presented in No. 1168 a second supplemental complaint against the East Coast Line, and new petitions against the Seaboard Air Line and Atlantic Coast Line Railways (No. 3808). So far as the East Coast Line was concerned, the complaint was against the citrus fruit and vegetable-

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gathering rates, and asked that they be equalized with or made the same as the pineapple rate. The Florida Railroad Commission intervened and asked the same relief. The Commission in effect granted the prayer of this second supplemental complaint, found the rates of the East Coast Line on [183] citrus fruits and vegetables to be unjust and unreasonable, and directed the putting into operation of a lower stated schedule of gathering rates which was made applicable not only to the East Coast Line, but also to the other roads which were parties to the proceeding. And it is this order which the railroad refused to obey, and to enjoin the enforcement of which this suit was brought.

Without going into detail, it suffices to say that the report of the Commission concerning the action just stated did not purport to question the correctness of its previous findings sustaining the citrus fruit and vegetable rates of the East Coast Line, but was based upon what was deemed to be a change in conditions since the previous decisions. After pointing out that it had previously ordered a change from any-quantity to carload and less-than-carload rates on pineapples from gathering points to the base point on the East Coast Line, and on all fruits and vegetables from base points outward, and that on both the Atlantic Coast Line and the Seaboard Air Line any-quantity rates yet remained from gathering points as to all fruits and vegetables, although such was not the case as to the East Coast Line, because of the change which it had voluntarily made, it was said (22 Inters. Com. Rep. 11, 14-16):

"No material change has taken place since then [that is, since the previous decisions], so far as this record discloses, which would lead to a different conclusion if the same subject were before us to-day. The volume of business transacted has increased, but the expenses of operation have also increased to an extent which offsets the greater amount of business.

. . . . . .

"It appeared in the original case that citrus fruits to some extent, and vegetables to a much greater extent, were shipped in small lots to Jacksonville, and there reloaded for movement beyond. It was our impression that, in [184] establishing carload rates from the base point, that this would permit the movement in small lots up to the base point and the consolidation at such point, and that the carload movement would in fact be mainly beyond the base point. Such has not been the result. In order to obtain the carload rate beyond the base point it seems to be necessary for the shipper, in actual practice, to present a full carload at the point of origin, and from this it follows that the movement up to the base point at the present time is entirely different from what it was when we approved these any-quantity rates. At that time the loading was by the carrier; now it is mainly by the shipper. The loading of the cars from the point of origin to the base points is much heavier now than formerly. In 1907 the average loading of citrus fruits and pineapples upon the Atlantic Coast Line up to the base point was 215 boxes. In 1910 this loading had increased to 279 boxes. In case of vegetables the increase is even more marked. The number of cars now required to transport the same amount of this traffic from points of origin to base points would be materially less than in 1908. Otherwise stated, it costs the shipper more to handle his business to-day and it costs the railroad less."

And upon that changed circumstance an order was awarded directing the change from any-quantity to carload and less-than-carload, and fixing a rate which was the same as that previously fixed for pineapples. Of course, as the East Coast Line had voluntarily put in carload and less-than-carload rates, it was only affected by this order to the extent that it lowered the traffic charge as contained in the schedule which had been previously voluntarily established.

It is insisted that the order of the Commission was wrongful, and that the court below erred in not restraining its enforcement for the following reasons: (a) because the order complained of was rendered without any evidence [185] whatever to sustain it; (b) because it confiscated the property of the railway in a twofold aspect; first, by fixing a rate so unreasonably low as to afford no remuneration to the corporation for the use of its property; and second, because, although the Commission, in order to justify the rate which it fixed, took into account the revenue derived from the extended road, it nevertheless declined to at all consider the value of the extended road and the right to earn a return thereon. We come as briefly as possible to consider these contentions separately.

(a) *That there was no evidence whatever tending to sustain the reduction of the rates on citrus fruits and vegetables as to the East Coast Line which the Commission ordered.*

While a finding of fact made by the Commission concerning a matter within the scope of the authority delegated to it is binding, and may not be re-examined in the courts, it is undoubted that where it is contended that an order whose enforcement

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is resisted was rendered without any evidence whatever to support it, the consideration of such a question involves not an issue of fact, but one of law, which it is the duty of the courts to examine and decide. Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 91, 92, 57 L. ed. 431, 433, 434, 33 Sup. Ct. Rep. 185, and cases cited.

In view of what we have said concerning the state of the record, the solution of the question must depend upon an examination and analysis of two subjects: the one, the reports of the Commission in the previous cases, and the other, the testimony which was before it and the report made in this case. As to the first, in view of the statements made by the Commission in its report in the original case (No. 1168, 14 Inters. Com. Rep. 476) as to the earning power of the road, the nature of its business, and the reasonableness of its rates, and the express finding that the citrus fruit and vegetable rates were just and reasonable and should not be changed, and the further fact that they were not called in question in the second proceeding, it [186] follows that the inquiry narrows itself to the mere consideration of the testimony taken in this proceeding, and the report of the Commission in such proceeding, and the testimony taken before the court below in so far as it is proper to consider it in connection with the particular question under consideration. But, coming to make a review of the testimony before the Commission on the issue raised by the second supplemental petition, we fail to find the slightest proof tending to sustain the reduction in rates as to the East Coast Line, which was made.

There are only three subjects referred to in the testimony which can in any view be considered as having any possible tendency to show such a change as would cause the rate which was found by the Commission in the past reasonable, and not to justify a change, to be unreasonable and therefore require reduction. The three subjects are these: (a) testimony by the chairman of the Florida Railroad Commission that there had been a considerable increase in the volume of traffic in citrus fruits and vegetables since the previous finding; (b) a further statement or admission made by an officer of the East Coast Line in a colloquy which took place at the hearing in this case, to the effect that, as shippers under carload rates loaded their own cars, there was some difference in cost, to the advantage of the road over the cost of loading when the any-quantity rates prevailed; (c) testimony with reference to the Atlantic Coast Line and the Seaboard Air Line (but none as to the East Coast Line), to the effect that on those roads it had come to pass that there was a saving in expense and an increase in earning capacity because, even under the any-quantity rates, carload shipments had greatly increased, and cars so shipped were much more heavily loaded and moved from the point of production through the base point to their ultimate destination, when such was not the case at the time the previous order was made. Testimony which, as we have seen, was expressly [187] declared by the Commission to be in effect the cause which gave rise to the reduction. But at once it is to be observed that, so far as any inference alone from the difference between carload and less-than-carload rates and any-quantity rates is concerned, it had no application to the East Coast Line, since that road had put in the carload and less-than-carload rates while the other two roads had not. And so far as the consideration of the increased loading is concerned, as stated by the Commission, whatever may have been the proof as to the Seaboard Air Line and the Atlantic Coast Line, it is beyond controversy that no such proof can be found in the record as to the East Coast Line except the vague intimation to which we have referred.

Thus, by analysis, the case comes to this: Did the facts as to the increased loading which the Commission found to exist in the case of the Seaboard Air Line and the Atlantic Coast Line support or tend to support the order as to the East Coast Line in the absence of all testimony in the record concerning the existence of such fact as to the traffic on that road? In other words, the question is, Because there was testimony as to the traffic of those roads, can such testimony be said to tend to establish the same condition on the East Coast Line? Conceding that, from an abstract point of view, an affirmative answer would have to be given to such question, we think such is not the case here for the following reasons: (a) because of the difference in business carried on by the two roads named and the East Coast Line, they being not only gatherers of the local product, but trunk line carriers; (b) because of the difference in the situation and traffic of the two trunk lines named and the East Coast Line, as deduced solely from the peculiar environment and movement of business on that road so aptly stated in the passages from the reports of the Commission which we have quoted. Differences which presumably gave rise to [188] separate statements in the previous reports in considering that road. While we do not say that the conclusion is affirmatively sus-

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tained, nevertheless we think the state of the record at least tends to give some support to the suggestion in the argument that the greater magnitude and importance of the consideration of the business and rates of the two trunk line carriers concentrated attention in that direction, and therefore caused the inquiry on that subject and the facts concerning the same to eclipse the distinctions between those lines and the East Coast Line,—distinctions which, if otherwise taken under consideration, should have produced a different result.

As it follows from these views that the order in question as to the East Coast Line and its enforcement should have been enjoined by the court below, our duty is to reverse the action of that court, and to remand the case to the proper district court, with directions to grant the prayer of the East Coast Line, and restrain the enforcement of the order in question; and it is so ordered.

Reversed.

CLEVE W. VAN DYKE, Plff. in Err.,
v.
CORDOVA COPPER COMPANY.

(See S. C. Reporter's ed. 188–192.)

Error to state court — suit begun prior to statehood.

A judgment of the Supreme Court of the State of Arizona in a case which, though begun prior to the admission of said state into the Union, was tried after the conferring of statehood, and judgment rendered in a state court, is not reviewable in the Federal Supreme Court by virtue of the provision of the Arizona enabling act of June 20, 1910 (36 Stat. at L. p. 557, chap 310), § 32, that "from all judgments and decrees or other determinations of any court of the said territory, in any case begun prior to admission, the parties to such cause shall have the same right to prosecute appeals, writs of error, and petitions for review to the Supreme Court of the United States or to the circuit court of appeals as they would have had by law prior to the admission of said state into the Union."

[For other cases, see Appeal and Error, 1030–1035, in Digest Sup. Ct. 1908.]

[No. 735.]

Submitted May 11, 1914. Decided June 8, 1914.

IN ERROR to the Supreme Court of the State of Arizona to review a judgment which affirmed a judgment of the Superior Court of Gila County, in that state, in favor of plaintiff in a suit for money loaned, begun prior to the admission of the state into the Union, in the District Court of the Fifth Judicial District of the Territory of Arizona. Dismissed for want of jurisdiction.

See same case below, 14 Ariz. 499, 132 Pac. 94.

The facts are stated in the opinion.

Messrs. Richard E. Sloan and James Westervelt submitted the cause for plaintiff in error.

Messrs. John H. Campbell and W. J. Hughes submitted the cause for defendant in error. Mr. Karl W. Kirchwey was on the brief.

Memorandum opinion by Mr. Chief Justice White, by direction of the Court:

This action was brought on December 2, 1911, by the Cordova Copper Company in the "district court of the fifth judicial district of the territory of Arizona in and for the county of Gila" to recover sums of money alleged to have been loaned to Van Dyke, the plaintiff in error, and remaining unpaid. The case was tried in April and May, 1912, after the admission of Arizona as a state, in the "superior court of Gila county, state of Arizona," and resulted in a verdict on May 4 for $15,364.75, upon which judgment was entered on the same day. On May 16, Van Dyke moved for a new trial, which motion was, at the instance of the company, stricken from the files. An appeal was taken to the supreme court of the state. The court, deciding that the appeal was taken alone from the judgment, and that there was no reversible error in the [190] judgment roll, held that it could not review errors which were alone susceptible of being reviewed upon an appeal from an order refusing a new trial, although treating the motion to strike out as equivalent to such refusal, and the judgment was consequently affirmed. This writ of error was then prosecuted, and the case is before us on a motion to dismiss.

Neither in the assignments of error nor in the argument at bar is it asserted that Federal rights were raised or involved in the court below, but the assertion that the case is within our jurisdiction rests solely upon the provisions of §§ 32 and 33 of the Arizona enabling act of June 20, 1910 (36 Stat. at L. pp. 557, 576, 577, chap. 310). The sections in question, generally speaking, provide for the trial of cases pending at the time of admission to statehood, and for their transfer to the appropriate courts established under the new system, and the particular language upon which the controversy turns is this:

". . . and that from all judgments

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and decrees or other determinations of any court of the said territory, in any case begun prior to admission, the parties to such cause shall have the same right to prosecute appeals, writs of error, and petitions for review to the Supreme Court of the United States or to the circuit court of appeals as they would have had by law prior to the admission of said state into the Union."

The contention is that as this case was "begun prior to admission," and is one which, in consequence of the amount involved, might have been brought to this court from a judgment of the supreme court of the territory; therefore it comes within the express terms of the statute and there is jurisdiction. But, conceding the premise, we think the conclusion is clearly in conflict with the plain language of the provision relied upon. We say this because the right to prosecute writs of error conferred is limited to "judgments and decrees or other determinations of any court of [191] the said territory," thus obviously excluding the right to review in a case like this where, although "begun prior to admission," the case was tried after the conferring of statehood, and judgment rendered in a state court. It may indeed be, as suggested in the argument, that to thus construe the provision renders superfluous the phrase "in any cause begun prior to admission," since, in the nature of things, no judgment could be rendered by a territorial court unless the action had been brought prior to the admission of Arizona as a state. But we may not, in order to give effect to those words, virtually destroy the meaning of the entire context; that is, give them a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent. The statute was enacted for a twofold purpose: first, to save the right of appeal which had arisen and was in existence in cases decided prior to statehood in the methods contemplated by existing laws; and second, to appropriately distribute and provide for the transfer of untried and pending causes to the new courts which would come into existence under the new system. Passing the question of power to so do, it could not be assumed, except as the result of the most unequivocal direction to that end, that the statute was intended to create a new and strange method of procedure unknown to our constitutional system of government, by which the judgments to be rendered by state courts in cases which the statute contemplated should be transferred to such courts for trial, should be reviewed not according to the methods provided by the state law for such judgments, but by the Federal courts, although no Federal question of any kind was present to give such courts jurisdiction. That no such anomaly could possibly have been contemplated is shown by the proviso of § 33 of the act, making cases in the supreme court of the territory, which were pending at the time of statehood, and which were transferred to the highest [192] court of the state, reviewable by this court not as judgments of territorial courts, but, on the contrary, as judgments of state courts; in other words, making it plain that it was not contemplated that, after a case had been transferred to and decided by a state court, it would be subject to a review in this court, simply because it was pending in the territorial court at the time of the enabling act, as if it were a judgment of a territorial court.

Dismissed for want of jurisdictoin.

L. V. MULLEN, Plff. in Err.,
v.
N. H. SIMMONS, Sheriff of Johnston County, Oklahoma, et al.

(See S. C. Reporter's ed. 192-199.)

Execution — property subject to — Indian allotments.

Lands allotted to a Choctaw Indian could not be subjected, after the restrictions on alienation were removed, to the levy of an execution under a judgment in damages for a tort, theretofore recovered, without violating the provisions of the act of July 1, 1902 (32 Stat. at L. 642, chap. 1362), § 15, that "lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character, contracted prior to the time at which said lands may be alienated under this act, nor shall said lands be sold except as herein provided."

[For other cases, see Execution, II. a; Indians, VIII., in Digest Sup. Ct. 1908.]

[No. 263.]

Submitted May 11, 1914. Decided June 8, 1914.

IN ERROR to the Supreme Court of the State of Oklahoma to review a decree which reversed a decree of the District Court in and for the Seventh Judicial District, Johnston County, in that state, enjoining the sale of an Indian allotment under execution. Reversed and remanded for further proceedings.

See same case below, 33 Okla. 184, 122 Pac. 518.

The facts are stated in the opinion.

Mr. S. T. Bledsoe submitted the cause for plaintiff in error. Mr. J. R. Cottingham was on the brief.

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Mr. John E. Dolman submitted the cause for defendants in error. Mr. L. S. Dolman was on the brief.

[195] Mr. Justice McKenna delivered the opinion of the court:

Plaintiff in error brought suit in the district court in and for the seventh judicial district, Johnston county, state of Oklahoma, to restrain defendant in error, who was defendant in the trial court, from selling under execution issued upon a judgment obtained against one F. A. Bonner certain lands, which are described, belonging to plaintiff in error. He was plaintiff in the action, and we will so refer to him. Plaintiff, it is alleged, derived his title from F. A. Bonner by warranty deed dated October 17, 1908, Bonner then having unrestricted right to sell. Bonner is a member and citizen of the Choctaw Tribe of Indians, of one-sixteenth degree of Indian blood, and that the lands described constitute his allotment as a member and citizen of such tribe; that the judgment upon which the execution was issued was rendered and the debt evidenced by it contracted more than five years prior to the issuance of the execution, and at a time when the lands were inalienable, and that under the laws of the United States and the treaties between the Chickasaw and Choctaw Nations and the United States the lands were exempt from the operation of the judgment. That defendant threatens to sell the lands, and that a sale thereof and the deed which may be executed will cast a cloud upon plaintiff's title. A restraining order was issued. Defendant in his answer alleged that when the restraining order was served upon him, he was in possession of the lands under the execution which he set up as a defense. He admitted the other allegations of the plaintiff, and alleged that E. F. Ham et al., plaintiffs in the judgment, were necessary parties. He prayed a dissolution of the restraining order and that the suit be dismissed.

Subsequently Millord F. Ham and others filed "their interplea in said cause" and asked to be made defendants. [196] For answer to plaintiff's petition they alleged the following: They recovered the judgment in controversy against Frank Bonner for the sum of $2,066.66⅔ on January 31, 1901, as damages for the killing of the husband of one of the interpleaders and the father of the others, upon which executions were issued, but all returned unsatisfied, and finally, on the 29th of September, 1908, the interpleaders caused the execution in controversy to be issued and levied upon the lands described in plaintiff's petition. On February 23, 1906, Bonner became the owner of the lands by allotment of the same as an Indian, and the judgment thereupon became a lien upon the lands. Subsequently that part of the Indian territory and the southern district where the lands are located became a part of what is now Johnston county, and the judgment is still a lien upon the lands and was a lien at the time of the purchase by Mullen, who, at the time of the alleged conveyance to him, had full knowledge and notice of the judgment, and knew that an execution had been issued and levied upon the lands, and that, therefore, he is not an innocent purchaser of them, but took them subject to the judgment.

Mullen demurred to the answer of Simmons and to that of the interpleaders upon the grounds (1) that they did not constitute a defense. (2) They failed to show that the execution was a lien upon the lands, failed to show that the lands were seized by the sheriff prior to the deed to plaintiff, and failed to show that a lien attached by virtue of the execution. (3) The lands, having been taken in allotment by Bonner, were not subject under the law to any debt, deed, contract, or obligation of any character made prior to the time at which the lands could be alienated by the allottee; that the judgment was recovered against him more than five years before the lands were alienable, and that the lands were not subject to it or to the execution issued upon it.

The judgment of the court was that it "doth overrule [197] plaintiff's general demurrer and his first special demurrer . . . and doth sustain plaintiff's second special demurrer . . . and the interpleaders and the defendant elect to stand upon their answer and interplea herein, refuse to plead further, and the court finds for the plaintiff, and that he is entitled to the relief prayed for in his petition. . . ." And it was adjudged that the defendant Simmons, as sheriff of Johnston county, and his deputies, and the interpleaders, be enjoined and restrained forever from issuing or causing to be issued any execution or other process upon the judgment rendered against Frank Bonner in favor of the interpleaders, and from levying the same upon the lands described.

The supreme court of the state reversed the judgment, deciding "that the lien of interpleader's judgment attached to the allotment as soon as it came into being; that plaintiff took the land subject thereto, and that the same should be enforced and said land sold to satisfy the same, and that, too, notwithstanding the provisions of the 15th section of the act of July 1, 1902, which has no material bearing on the question."

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The section referred to is as follows: "Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided." [32 Stat. at L. 642, chap. 1362.]

The supreme court of Oklahoma, in deciding that this provision did not apply, distinguished between the obligations resulting from an Indian's wrongful conduct and the obligations resulting from his contracts, saying: "A judgment in damages for tort is not a 'debt contracted'" within the contemplation of § 15. In other words, the court was of the view that the tort retained its identity, though merged in the judgment. However, we need not enter into the controversy of the cases and the [198] books as to whether a judgment is a contract. Passing such considerations, and regarding the policy of § 15 and its language, we are unable to concur with the supreme court of Oklahoma.

This court said, in Starr v. Long Jim, 227 U. S. 613, 625, 57 L. ed. 670, 675, 33 Sup. Ct. Rep. 358, that the title to lands allotted to Indians was "retained by the United States for reasons of public policy, and in order to protect the Indians against their own improvidence." It was held, applying the principle, that a warranty deed made by Long Jim at a time when he did not have the power of alienation "was in the very teeth of the policy of the law, and could not operate as a conveyance, either by its primary force or by way of estoppel," after he had received a patent for the land.

The principle was applied again in Franklin v. Lynch, 233 U. S. 269, ante, 954, 34 Sup. Ct. Rep. 505, and its strict character enforced against the deed of a white woman who acquired title in an Indian right. It is true, in these cases the act of the Indian was voluntary or contractual, and, it is contended, a different effect can be ascribed to the wrongs done by an Indian, and that in reparation or retribution of them the state law may subject his inalienable lands —inalienable by the national law—to alienation. The consequence of the contention repels its acceptance. Torts are of variable degree. In the present case that counted on reached, perhaps, the degree of a crime, but a tort may be a breach of a mere legal duty,—a consequence of negligent conduct. The policy of the law is, as we have said, to protect the Indians against their improvidence, and improvidence may affect all of their acts,—those of commission and omission, contracts and torts. And we think § 15 of the act of July 1, 1902, was purposely made broadly protective, broadly preclusive of alienation by any conduct of the Indian, and not only its policy but its language distinguishes it from the statute passed on in Brun v. Mann, 12 L.R.A.(N.S.) 154, 80 C. C. A. 513, 151 Fed. 145. Its language is that "lands allotted . . . [199] shall not be *affected* or encumbered by any deed, debt, or *obligation* of any *character contracted* prior to the time at which" the lands may be alienated, "nor shall said lands be sold except" as in the act provided. The prohibition, then, is that the lands shall not be "affected . . . by any obligation of any character," and, as we have seen, an obligation may arise from a tort as well as from a contract,—from a breach of duty or the violation of a right. Exchange Bank v. Ford, 7 Colo. 314, 316, 3 Pac. 449. If this were not so, a prearranged tort and a judgment confessed would become an easy means of circumventing the policy of the law.

Judgment reversed and case remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Day dissents.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Plff. in Err.,
v.
STATE OF MISSOURI, ON THE INFORMATION OF ITS ATTORNEY GENERAL.

(See S. C. Reporter's ed. 199-215.)

Error to state court — Federal question — where and when raised.

1. Federal questions first raised by exceptions to the report of a special commissioner to whom an original proceeding in the highest state court had been referred to take evidence and report his conclusions will support a writ of error from the Federal Supreme Court, although the highest state court did not refer to the Federal questions in its opinion, and although that court has laid down the rule that constitutional questions must be raised at the first opportunity.

[For other cases, see Appeal and Error, 1249-1318, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — freedom to contract — state anti-trust laws.

2. The application to a combination which has benefited instead of injured the public, of the prohibitions of Mo. Rev. Stat. 1909, § 10,301, and Rev. Stat. 1899, § 8966, against combinations which tend to lessen competition in the importation, transporta-

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Note.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western

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tion, manufacture, or sale of commodities, does not render such legislation repugnant to U. S. Const., 14th Amend., as unreasonably and arbitrarily limiting the right of contract.

[For other cases, see Constitutional Law, 598-600, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification — state anti-trust laws.

3. Confining to manufacturers and vendors of articles the prohibitions of Mo. Rev. Stat. 1909, § 10,301, and Rev. Stat. 1899, § 8966, against combinations to lessen competition and regulate prices, while permitting such combinations among purchasers, does not render the legislation repugnant to U. S. Const., 14th Amend., as denying the equal protection of the laws.

[For other cases, see Constitutional Law, IV. a, 5, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification — state anti-trust laws.

4. Excluding combinations of wage earners from statutory prohibitions against combinations to lessen competition and regulate prices, as is done by Mo. Rev. Stat. 1909, § 10,301, and Rev. Stat. 1899, § 8966, as construed by the state courts, does not render such legislation repugnant to U. S. Const., 14th Amend., as denying the equal protection of the laws.

[For other cases, see Constitutional Law, IV. a, 5, in Digest Sup. Ct. 1908.]

[No. 166.]

Argued April 29, 1914. Decided June 8, 1914.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment of ouster in a proceeding in the nature of quo warranto against a foreign corporation charged with violations of the state anti-trust laws. Affirmed.

See same case below, 237 Mo. 369, 141 S. W. 672.

The facts are stated in the opinion.

Messrs. Edgar A. Bancroft and William M. Williams argued the cause, and, with Messrs. Selden P. Spencer and Victor A. Remy, filed a brief for plaintiff in error:

A Federal question was raised and was decided by the Missouri supreme court adversely to plaintiff in error.

Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 534, 46 L. ed. 673, 676, 22 Sup. Ct. Rep. 446; Meyer v. Richmond, 172 U. S. 82, 91, 93, 43 L. ed. 374, 377, 378, 19 Sup. Ct. Rep. 106; Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 487, 43 L. ed. 521, 524, 19 Sup. Ct. Rep. 247; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 276, 57 L. ed. 1179, 1186, 33 Sup. Ct. Rep. 858.

It has been adjudged by the supreme court of Missouri that the anti-trust statute does not apply to persons engaged in labor pursuits (State ex rel. Hadley v. Standard Oil Co. 218 Mo. 370, 116 S. W. 902) or to business of mere personal service (State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 456, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91).

Such combinations may restrain trade and were illegal at common law.

Dier's Case, Y. B. 2 Hen. V. fol. 5, pl. 26; Ipswich Tailors' Case, 11 Coke, 53a; More v. Bennett, 140 Ill. 77, 15 L.R.A. 361, 33 Am. St. Rep. 216, 29 N. E. 888; Bailey v. Master Plumbers' Asso. 103 Tenn. 99, 46 L.R.A. 561, 52 S. W. 853.

There is no ground for the attempted distinction between owners of commodities and owners of services. Both may restrain trade. Anti-trust laws—aiming to protect the freedom of trade and resting on the police power—must include all persons who are capable of restraining trade. Such laws must be coextensive with the evils to be prevented and remedied, and should be enacted, as well as construed, according to the rule of reason.

Slaughter-House Cases, 16 Wall. 127, 21

Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

As to when Federal question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court over state courts—see note to Chicago, I. & L. R. Co. v. McGuire, 49 L. ed. U. S. 414.

On illegal trusts under modern anti-trust acts—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to the validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

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L. ed. 425; 21 Cong. Rec. 1890, pp. 2727, 2729; Loewe v. Lawlor, 208 U. S. 274, 301, 302, 52 L. ed. 488, 502, 503, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 556, 560, 563, 46 L. ed. 679, 688, 690, 691, 22 Sup. Ct. Rep. 431; People ex rel. Akin v. Butler Street Foundry & Iron Co. 201 Ill. 258, 66 N. E. 349; Eddy, Combinations, §§ 910, 912, pp. 1021, 1022; Cong. Rec. 62d Congress, 3d Session, p. 4838; Adams v. Brenan, 177 Ill. 194, 42 L.R.A. 718, 69 Am. St. Rep. 222, 52 N. E. 314.

The following state court decisions support the exemption of labor and services, but on different, inconsistent, and fallacious grounds:

State v. Duluth Bd. of Trade, 107 Minn. 546, 23 L.R.A.(N.S.) 1260, 121 N. W. 395; Rohlf v. Kasemeier, 140 Iowa, 182, 23 L.R.A. (N.S.) 1284, 132 Am. St. Rep. 261, 118 N. W. 276, 17 Ann. Cas. 750; Cleland v. Anderson, 66 Neb. 260, 5 L.R.A.(N.S.) 136, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 105 N. W. 1092. Contrary holding. Niagara F. Ins. Co. v. Cornell, 110 Fed. 825; State v. Coyle, 7 Okla. Crim. Rep. 50, 122 Pac. 243; Cote v. Murphy, 159 Pa. 420, 23 L.R.A. 135, 39 Am. St. Rep. 686, 28 Atl. 190; Hunt v. Riverside Co-op. Club, 140 Mich. 538, 112 Am. St. Rep. 420, 104 N. W. 40; Owen County Burley Tobacco Soc. v. Brumback, 128 Ky. 137, 107 S. W. 710; Com. v. International Harvester Co. 131 Ky. 551, 133 Am. St. Rep. 256, 115 S. W. 703.

The Missouri anti-trust statute is unconstitutional because, while it prohibits arrangements and combinations designed or tending to lessen competition in the manufacture or sale of commodities, or to increase market prices, it does not prohibit arrangements or combinations between purchasers of commodities, designed or tending to lessen competition or to decrease market prices.

Swift & Co. v. United States, 196 U. S. 375, 395, 400, 49 L. ed. 518, 523, 526, 25 Sup. Ct. Rep. 276; Chapin v. Brown Bros. 83 Iowa, 157, 12 L.R.A. 428, 32 Am. St. Rep. 297, 48 N. W. 1074.

The Missouri anti-trust statute, as construed and applied by the state court in its judgment herein, is unconstitutional because it unreasonably and arbitrarily violates and restrains plaintiff in error's right and freedom of contract beyond the police power of the state, thus depriving it of property without due process of law.

Smiley v. Kansas, 196 U. S. 447, 454, 49 L. ed. 546, 550, 25 Sup. Ct. Rep. 289.

Mr. John T. Barker, Attorney General of Missouri, argued the cause, and, with Messrs. W. T. Rutherford and Thomas J. Higgs, filed a brief for defendant in error:

A Federal or constitutional question must be raised at the very first opportunity.

Lohmeyer v. St. Louis Cordage Co. 214 Mo. 688, 113 S. W. 1108; Brown v. Missouri, K. & T. R. Co. 175 Mo. 189, 74 S. W. 973, Dahnke-Walker Mill. Co. v. Blake, 242 Mo. 31, 145 S. W. 438; Ross v. Grand Pants Co. 241 Mo. 299, 145 S. W. 410; Pickel v. Pickel, 243 Mo. 666, 147 S. W. 1059; Hartzler v. Metropolitan Street R. Co. 218 Mo. 564, 117 S. W. 1124; Astor v. Merritt, 111 U. S. 202, 28 L. ed. 401, 4 Sup. Ct. Rep. 413; Powell v. Brunswick County, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216.

The Missouri anti-trust statutes have been held constitutional by the Supreme Court of the United States, and the very questions now raised by the plaintiff in error, the International Harvester Company of America, were settled long ago by this court in the case of Standard Oil Co. v. Missouri, 224 U. S. 270, 56 L. ed. 760, 32 Sup. Ct. Rep. 406, Ann. Cas. 1913D, 936.

Messrs. John T. Barker, W. T. Rutherford, W. M. Fitch, and Paul P. Prosser also filed a brief for defendant in error:

There is no Federal question in this case and the judgment of the Missouri supreme court should be affirmed.

Astor v. Merritt, 111 U. S. 202, 28 L. ed. 401, 4 Sup. Ct. Rep. 413; Powell v. Brunswick County, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216; Lohmeyer v. St. Louis Cordage Co. 214 Mo. 688, 113 S. W. 1108; Brown v. Missouri, K. & T. R. Co. 175 Mo. 189, 74 S. W. 973; Ross v. Grand Pants Co. 241 Mo. 299, 145 S. W. 410.

The Missouri anti-trust statutes are constitutional, and have been held so many times.

Standard Oil Co. v. Missouri, 224 U. S. 270, 56 L. ed. 760, 32 Sup. Ct. Rep. 406, Ann. Cas. 1913D, 936, 218 Mo. 368, 116 S. W. 902; State ex rel. Barker v. Assurance Co. 251 Mo. 278, 46 L.R.A.(N.S.) 955, 158 S. W. 640; State ex rel. Crow v. Continental Tobacco Co. 177 Mo. 37, 75 S. W. 737; Missouri P. R. Co. v. Mackey, 127 U. S. 209, 32 L. ed. 109, 8 Sup. Ct. Rep. 1161; Barbier v. Connolly, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; Gulf, C. & S. F. R. Co.

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v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; State ex rel. Major v. International Harvester Co. 237 Mo. 369, 141 S. W. 672.

Mr. Justice McKenna delivered the opinion of the court:

Information in the nature of quo warranto, brought in the supreme court of the state, to exclude plaintiff in error from the corporate rights, privileges, and franchises exercised [203] or enjoyed by it under the laws of the state, that they be forfeited, and all or such portion of its property as the court may deem proper be confiscated, or, in lieu thereof, a fine be imposed upon it in "punishment of the perversion, usurpation, abuse, and misuse of franchises."

The ground of the action is the alleged violation of the statutes of the state passed respectively in 1899 and 1909, and entitled "Pools, Trusts, and Conspiracies," and "Pools, Trusts, and Conspiracies and Discriminations."

The facts alleged in the information are these: Plaintiff in error is a Wisconsin corporation engaged in the manufacture and sale of agricultural implements, binders, mowers, etc., and was licensed on the 5th of April, 1892, to do business in Missouri under the name of the Milwaukee Harvester Company, and on September 18, 1902, became licensed to do and engaged in such business in the state. In that year the International Harvester Company of New Jersey was organized with a capital stock of $120,000,000 for the purpose of effecting a combination of plaintiff in error and certain other companies to restrain competition in the manufacture and sale of such agricultural implements in Missouri, and the New Jersey company has maintained plaintiff in error as its sole selling agent in Missouri. Before the combination the companies combined were competitors of one another and of other corporations, individuals, and partnerships engaged in the same business in the state, and that thereby the people of the state, and particularly the retail dealers and farmers of the state, received the benefit of competition in the purchase and sale of farm implements. The combination was designed and made with a view to lessen, and it tended to lessen, free competition in such implements, and thereby the said corporations entered into and became members of a pool, trust, combination, and agreement. In furtherance thereof, and for the purpose of giving the International Harvester Company of New Jersey a [204] monopoly of the business of manufacturing and selling agricultural implements in the state, and for the purpose of preventing competition in the sale thereof, plaintiff in error has compelled the retail dealers in each county of the state who desire to handle and sell or act as agent for it to refrain from selling implements manufactured or sold by competing companies or persons. By reason thereof competition in such implements has been restrained, prices controlled, the quantity of such implements has been fixed and limited, and plaintiff in error has been able to secure, and for several years enjoy, from 85 per cent to 90 per cent of the business, all to the great damage and loss of the people of the state, and by reason of its participation in the pool, trust, and combination, and by reason of the acts and things done by it, plaintiff in error has been guilty of an illegal, wilful, and malicious perversion and abuse of its franchises, privileges, and licenses granted to it by the state.

The answer of plaintiff in error denied that it had become a party to any combination, or that, in its transactions, there was any purpose to restrain or lessen competition, or that trade had been or was restrained.

The case was referred to a special commissioner to take the evidence and report his conclusions. He found, as alleged in the information, that the International Harvester Company of New Jersey was a combination of the properties and businesses of formerly competing harvester companies, and plaintiff in error being one of such companies, and thereafter, by selling the New Jersey company's products in Missouri, had violated the Missouri statutes against pools, trusts, and conspiracies.

In exceptions to the report of the special commissioner plaintiff in error urged that the statute of Missouri violated the equality clause and due process clause of the 14th Amendment to the Constitution of the United States, "(1) Because said statute arbitrarily discriminates [205] between persons making or selling products and commodities and persons selling labor and service of all kinds: In that each section of said statute applies only to articles of merchandise, and not to labor or services and the like, the prices of which are equally and similarly determined by competition, and may be equally and similarly the subject of combination and conspiracy to the detriment of the public. (2) Because said statute arbitrarily discriminates between the *makers and sellers* of products and commodities and the *purchasers* thereof: It prohibits manufacturers and sellers from making contracts or arrangements intended or tending to increase the market price of the articles they

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make or sell, but does not prohibit purchasers from combining to fix or reduce the market price of the commodities or articles to be purchased by them. (3) Because said statute, as construed by the commissioner, unreasonably and arbitrarily interferes with plaintiff in error's right to make proper and reasonable business contracts, and deprives it of property rights in respect thereto."

These exceptions were urged and argued in the supreme court upon the filing of the commissioner's report. Judgment was entered upon the report, in which it was adjudged that by reason of the violation of the statutes of the state, as charged in the information, plaintiff in error had forfeited the license theretofore granted to it to do business in the state, and it was adjudged that the license be forfeited and canceled and the company ousted from its rights and franchises granted by the state to do business in the state, and a fine of $50,000 was imposed upon it. It was, however, provided that upon payment of the fine on or before the 1st of January, 1912, and immediately ceasing all connection with the International Harvester Company of New Jersey and the corporations and copartnerships with which it had combined, and not continuing and maintaining the unlawful agreement and combination [206] with them to lessen and destroy competition in the sale of the enumerated farm implements, and giving satisfactory evidence thereof to the court, the judgment of ouster should be suspended. The company was given until March 1, 1912, "to file its proof of willingness" to comply with the judgment. It was also adjudged that upon a subsequent violation of the statute "the suspension of the writ of ouster shall be removed" by the court "and absolute ouster be enforced," and to that end the court retained "its full and complete jurisdiction over the cause." 237 Mo. 369, 141 S. W. 672.

A motion is made to dismiss on the ground that plaintiff in error in its answer simply denied that it had violated the anti-trust laws of the state, and it is contended that by not alleging in its answer that those laws violated the Constitution of the United States, it waived such defense. It is further contended that because the Federal right was not asserted in the answer, the supreme court of the state could not have considered, and did not consider or decide it. Decisions of the supreme court of Missouri are cited to sustain the contentions. The decisions declare the proposition that constitutional questions must be raised at the first opportunity, or, as it is expressed in one of the cases (Brown v. Missouri, K. & T. R. Co. 175 Mo. 185, 74 S. W. 973), "the protection of the Constitution must be timely and properly invoked in the trial court."

In Dahnke-Walker Mill. Co. v. Blake, 242 Mo. 31, 145 S. W. 438, it is said: "The rule of this court is that so grave a question [constitutional question] must be lodged at the first opportunity, or it will be deemed to have been waived. If it can be appropriately and naturally raised in the pleadings, and thereby be a question lodged in the record proper, such is the time and place to raise it;" and that it is too late to raise the question after judgment in a motion for new trial. In Hartzler v. Metropolitan Street R. Co. 218 Mo. 562, 117 S. W. 1124, it was held: "The motion for a new trial was not [207] the first door for the question to enter, and in our later decisions we have ruled that a question of such gravity must be raised as soon as orderly procedure will allow. This in order that the trial court may be treated fairly, and the question get into the case under correct safeguards, and earmarked as of substance, and not mere color."

It is manifest, we think, that the court only intended to express the condition of appellate review to be that in the trial court constitutional questions should not be reserved until the case had gone to judgment on other issues, and then used to secure a new trial. The principle of the rulings is satisfied in the case at bar. It is, as we have seen, an original proceeding in the supreme court, and upon the report of the commissioner which brought the case to the court for decision of the issues and questions involved in it the Federal questions were made "under correct safeguards and earmarked as of substance, and not mere color." It is true the court has not referred to them in its opinion, but we cannot regard its silence as a condemnation of the time or manner at or in which they were raised. The motion to dismiss is therefore denied.

The assignments of error necessarily involve a consideration of the statutes. The relevant provisions are contained in § 10,301 of the Revised Statutes of the state of 1909, and § 8,966 of the Revised Statutes of 1899.

Section 10,301 provides that "all arrangements, contracts, agreements, combinations, or understandings made or entered into between two or more persons, designed or made with a view to lessen, or which tend to lessen, lawful trade, or full and free competition in the importation, transportation, manufacture, or sale" in the state "of any product, commodity, or article, or thing bought and sold," and all such arrangements, etc., "which are designed or made

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with a view to increase, or which tend to increase, the market price of any product, commodity, or article, or thing, of any class or kind whatsoever, [208] bought and sold," are declared to be against public policy, unlawful and void, and those offending "shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and punished" as provided.

Section 8,966 provides that arrangements, etc., such as described in § 10,301, having like purpose, and all such arrangements, etc., "whereby or under the terms of which it is proposed, stipulated, provided, agreed, or understood that any person, association of persons, or corporations doing business in" the state, "shall deal in, sell, or offer for sale" in the state "any particular or specific article, product, or commodity, and shall not, during the continuance or existence of any such arrangement, . . . deal in, sell, or offer for sale," in the state, "any competing article, product, or commodity," are declared to be against public policy, unlawful and void; and any person offending "shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to the penalties" provided.

By § 10,304 of the Revised Statutes of 1909, it is provided that domestic offending corporations shall forfeit their charters and all or any part of their property as shall be adjudged by a court of competent jurisdiction, or be fined in lieu of the forfeiture of charters or of property.

Foreign offending corporations shall forfeit their right to do business in the state, with forfeiture also of property, or, in lieu thereof, the payment of a fine.

In State ex rel. Hadley v. Standard Oil Co. 218 Mo. 1, 370, 372, 116 S. W. 902, the supreme court held that the anti-trust statutes of the state "are limited in their scope and operation to persons and corporations dealing in commodities, and do not include combinations of persons engaged in labor pursuits." And, justifying the statutes against a charge of illegal discrimination, the court further said that "it must be borne in mind that the differentiation between labor and property is so great that they do not belong to the same [209] general or natural classification of rights or things, and have never been so recognized by the common law or by legislative enactments."

Accepting the construction put upon the statute, but contesting its legality as thus construed, plaintiff in error makes three contentions: (1) The statutes, as so construed, unreasonably and arbitrarily limit the right of contract; (2) discriminate between the vendors of commodities and the vendors of labor and services; and (3) between vendors and purchasers of commodities.

(1) The specification under this head is that the supreme court found, it is contended, benefit—not injury—to the public had resulted from the alleged combination. Granting that this is not an overstatement of the opinion, the answer is immediate. It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions and has had some good effect. Armour Packing Co. v. United States, 209 U. S. 56, 62, 52 L. ed. 681, 684, 28 Sup. Ct. Rep. 428; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 49, 57 L. ed. 107, 117, 33 Sup. Ct. Rep. 9. The purpose of such statutes is to secure competition and preclude combinations which tend to defeat it. And such is explicitly the purpose and policy of the Missouri statutes; and they have been sustained by the Supreme Court. There is nothing in the Constitution of the United States which precludes a state from adopting and enforcing such policy. To so decide would be stepping backwards. Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. Rep. 66; Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 Sup. Ct. Rep. 66.

It is true that the supreme court did not find a definite abuse of its powers by plaintiff in error, but it did find that there was an offending against the statute, a union of able competitors, and a cessation of their competition, and the court said: "Some of the smaller concerns that were competitors in the market have ceased their struggle for existence and retired from the field." This is one [210] of the results which the statute was intended to prevent,—the unequal struggle of individual effort against the power of combination. The preventing of the engrossment of trade is as definitely the object of the law as is price regulation of commodities, its prohibition being against combinations "made with a view to lessen, or which tend to lessen, lawful trade or full and free competition in the importation, transportation, manufacture, or sale of any commodity, or article, or thing bought or sold." See Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; United States v. Patten, 226 U. S. 525, 57 L. ed. 333, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141.

(2) and (3). These contentions may be considered together, both involving a charge of discrimination,—the one because the law does not embrace vendors of labor; the

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other because it does not cover purchasers of commodities as well as vendors of them. Both, therefore, invoke a consideration of the power of classification which may be exerted in the legislation of the state. And we shall presently see that power has very broad range. A classification is not invalid because of simple inequality. We said in Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 106, 43 L. ed. 909, 913, 19 Sup. Ct. Rep. 609, by Mr. Justice Brewer: "The very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality." Therefore, it may be there is restraint of competition in a combination of laborers and in a combination of purchasers, but that does not demonstrate that legislation which does not include either combination is illegal. Whether it would have been better policy to have made such comprehensive classification it is not our province to decide. In other words, whether a combination of wage earners or purchasers of commodities called for repression by law under the conditions in the state was for the legislature of the state to determine.

[211] In Carroll v. Greenwich Ins. Co. supra, a statute of Iowa was considered which made it unlawful for two or more fire insurance companies doing business in the state, or their officers or agents, to make or enter into combinations or agreements in relation to the rates to be charged for insurance, and certain other matters. The provision was held invalid by the circuit court of the United States for the district of Iowa on the ground of depriving of liberty of contract secured by the 14th Amendment and of the equal protection of the laws. This court reversed the decision, saying, after stating that there was a general statute of Iowa which prohibited combinations to fix the price of any article of merchandise or commodity, or to limit the quantity of the same produced or sold in the state: "Therefore, the act in question does little, if anything, more than apply and work out the policy of the general law in a particular case." Again, "If an evil is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms." And, "If the legislature of the state of Iowa deems it desirable artificially to prevent, so far as it can, the substitution of combination for competition, this court cannot say that fire insurance may not present so conspicuous an example of what that legislature thinks an evil as to justify special treatment. The imposition of a more specific liability upon life and health insurance companies was held valid in Fidelity Mutual Life Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662." Other cases were also cited in illustration.

Carroll v. Greenwich Ins. Co. supra, is especially apposite. It contains the elements of the case at bar and a decision upon them. It will be observed that the statute, which it was said declared the general policy of Iowa, was a prohibition against a combination of producers and sellers. There was the same distinction, therefore, between [212] vendors and purchasers of commodities as in the Missouri statute, and the same omission of prohibition of combinations of vendors of labor and services as in the Missouri law. The distinction and omission were continued when the policy of the state was extended to insurance companies. The law was not condemned because it went no farther,—because it did not prohibit the combination of all trades, businesses, and persons. We held that the omission was not for judicial cognizance, and that a court could not say that fire insurance might not present so conspicuous an example of what the legislature might think an evil "as to justify special treatment."

We might leave the discussion with that and the other cases. They decide that we are helped little in determining the legality of a legislative classification by making broad generalizations, and it is for a broad generalization that plaintiff in error contends,—indeed, a generalization which includes all the activities and occupations of life; and there is an enumeration of wage earners in emphasis of the discrimination in which manufacturers and sellers are singled out from all others. The contention is deceptive, and yet it is earnestly urged in various ways which it would extend this opinion too much to detail. "In dealing with restraints of trade," it is said, "the proper basis of classification is obviously neither in commodities nor services, nor in persons, but in *restraints*." A law, to be valid, therefore, is the inflexible deduction, cannot distinguish between "*restraints*," but must apply to all restraints, whatever their degree or effect or purpose; and that because the Missouri statute has not this universal operation it offends against the equality required by the 14th Amendment. This court has decided many times that a legislative classification does not have to possess such comprehensive extent. Classification must be accommodated to the problems of legislation; and we decided in Ozan Lumber Co. v. Union County

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Nat. Bank, 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. Rep. 89, [213] that it may depend upon degrees of evil without being arbitrary or unreasonable. We repeated the ruling in Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114, in Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190, in Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529, and again in German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 418, ante, 1011, 34 Sup. Ct. Rep. 612. In the latter case a distinction was sustained against a charge of discrimination between stock fire insurance companies and farmers' mutual insurance companies insuring farm property. If this power of classification did not exist, to what straits legislation would be brought. We may illustrate by the examples furnished by plaintiff in error. In the enumeration of those who, it is contended, by combination are able to restrain trade, are included, among others, "persons engaged in domestic service" and "nurses;" and because these are not embraced in the law, plaintiff in error, it is contended, although a combination of companies uniting the power of $120,000,000, and able thereby to engross 85 per cent or 90 per cent of the trade in agricultural implements, is nevertheless beyond the competency of the legislature to prohibit. As great as the contrast is, a greater one may be made. Under the principle applied a combination of all the great industrial enterprises (and why not railroads as well?) could not be condemned unless the law applied as well to a combination of maidservants or to infants' nurses, whose humble functions preclude effective combination. Such contrasts and the considerations they suggest must be pushed aside by government, and a rigid and universal classification applied, is the contention of plaintiff in error; and to this the contention must come. Admit exceptions, and you admit the power of the legislature to select them. But it may be said the comparison of extremes is forensic, and, it may be, fallacious; that there may be powerful labor combinations as well as powerful industrial combinations, and weak ones of both, and that the law, to be valid, cannot distinguish [214] between strong and weak offenders. This may be granted (Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190), but the comparisons are not without value in estimating the contentions of plaintiff in error. The foundation of our decision is, of course, the power of classification which a legislature may exercise, and the cases we have cited, as well as others which may be cited, demonstrate that some latitude must be allowed to the legislative judgment in selecting the "basis of community." We have said that it must be palpably arbitrary to authorize a judicial review of it, and that it cannot be disturbed by the courts "unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched." Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 269, 48 L. ed. 971, 972, 24 Sup. Ct. Rep. 638; Williams v. Arkansas, 217 U. S. 79, 90, 54 L. ed. 673, 677, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Watson v. Maryland, 218 U. S. 173, 179, 54 L. ed. 987, 990, 30 Sup. Ct. Rep. 644.

The instances of these cases are instructive. In the first there was a difference made between landowners as to liability for permitting certain noxious grasses to go to seed on the lands. In the second, the statute passed on made a difference between businesses in the solicitation of patronage on railroad trains and at depots. In the third, a difference based on the evidence of qualification of physicians was declared valid.

In Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815, a distinction was made between common carriers in the power to limit liability for negligence. In Engel v. O'Malley, supra, a distinction between bankers was sustained; and in Provident Inst. for Sav. v. Malone, 221 U. S. 660, 55 L. ed. 899, 34 L.R.A.(N.S.) 1129, 31 Sup. Ct. Rep. 661, deposits in savings banks were distinguished from deposits in other banks in the application of the statute of limitations.

Other cases might be cited whose instances illustrate the same principle, in which this court has refused to accept the higher generalizations urged as necessary to the fulfilment of the constitutional guaranty of the equal protection [215] of the law, and in which we, in effect, held that it is competent for a legislature to determine upon what differences a distinction may be made for the purpose of statutory classification between objects otherwise having resemblances. Such power, of course, cannot be arbitrarily exercised. The distinction made must have reasonable basis. Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Petit v. Minnesota, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666; Williams v. Fears, 179 U. S.

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270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151, 31 Sup. Ct. Rep. 132; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 466, 55 L. ed. 290, 296, 31 Sup. Ct. Rep. 275; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 79, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Fifth Ave. Coach Co. v. New York, 221 U. S. 467, 55 L. ed. 815, 31 Sup. Ct. Rep. 709; Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 41 L.R.A. (N.S.) 153, 32 Sup. Ct. Rep. 697; Rosenthal v. New York, 226 U. S. 269, 270, 57 L. ed. 216, 217, 33 Sup. Ct. Rep. 27; Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, ante, 1135, 34 Sup. Ct. Rep. 678.

And so in the case at bar. Whether the Missouri statute should have set its condemnation on restraints generally, prohibiting combined action for any purpose and to everybody, or confined it as the statute does to manufacturers and vendors of articles, and permitting it to purchasers of such articles; prohibiting it to sellers of commodities and permitting it to sellers of services, was a matter of legislative judgment; and we cannot say that the distinctions made are palpably arbitrary, which we have seen is the condition of judicial review. It is to be remembered that the question presented is of the power of the legislature, not the policy of the exercise of the power. To be able to find fault, therefore, with such policy, is not to establish the invalidity of the law based upon it.

It is said that the statute as construed by the supreme court of the state comes within our ruling in Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, but we do not think so. If it did, we should, of course, apply that ruling here.

Judgment affirmed.

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[216] INTERNATIONAL HARVESTER COMPANY OF AMERICA, Plff. in Err.,
v.
COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 216–224.)

Error to state court — following decision below — statutory construction.

1. The meaning derived by the highest state court by construing together several statutes somewhat far apart in time, and of seemingly contradictory import, is as conclusive upon the Federal Supreme Court on writ of error to the state court as though such legislation were embodied in a single act.

[For other cases, see Appeal and Error, 2124–2151, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — indefiniteness in criminal statutes — state anti-trust laws.

2. The uncertainty as to what the selling price of an article would have been had there been no combination of its manufacturers renders invalid convictions under the Kentucky anti-trust legislation (Ky. Const. 1891, § 198; Carroll's Ky. Stat. §§ 3915–3917; Ky. Laws 1906, chap. 117), under which, as construed by the state courts, combinations for the purpose of controlling prices are made unlawful only when for the purpose, or with the effect, of fixing a price for an article greater or less than its real value, which is further declared by such courts to be the market value under fair competition and under normal conditions.

[For other cases, see Constitutional Law, IV. b, 9; Criminal Law, I. a, in Digest Sup. Ct. 1908.]

[Nos. 276, 291, 292.]

Argued April 23 and 24, 1914. Decided June 8, 1914.

THREE WRITS of Error to the Court of Appeals of the State of Kentucky to review judgments which affirmed convictions respectively of the Circuit Courts of Bullitt, Grayson, and Todd Counties, in that state, of combining to control prices. Reversed.

See same case below in 276, 147 Ky. 564, 144 S. W. 1064; in 291, 148 Ky. 572, 147 S. W. 1199; in 292, 147 Ky. 795, 146 S. W. 12.

The facts are stated in the opinion.

Messrs. **Alexander Pope Humphrey** and **Edgar A. Bancroft** argued the cause, and, with Mr. Victor A. Remy, filed a brief for plaintiff in error:

To hold, as the decision below does, that

NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to state decisions and laws as rules of decision in Federal courts—see notes to Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; United States ex rel. Buts v. Muscatine, 19 L. ed. U. S. 490; Clark v. Graham, 5 L. ed. U. S. 334; Mitchell v. Burlington, 18 L. ed. U. S. 351; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; and Snare & T. Co. v. Friedman, 40 L.R.A. (N.S.) 380.

On illegal trusts under modern anti-trust acts—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

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a merchant cannot take into consideration the superior quality of his goods, in fixing their price, not only deprives him of all freedom of contract, but denies him equal protection.

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 94, 104, 46 L. ed. 92, 103, 106, 22 Sup. Ct. Rep. 30.

This question was properly saved under the Kentucky practice.

Louisville, H. & St. L. R. Co. v. Roberts, 144 Ky. 824, 139 S. W. 1073.

In Owen County Burley Tobacco Soc. v. Brumback, 128 Ky. 137, 107 S. W. 710, and Com. v. International Harvester Co. 131 Ky. 551, 133 Am. St. Rep. 256, 115 S. W. 703, the court of appeals held that the constitutional provision (Ky. Const. § 198) and the acts of 1890 and 1906 were to be construed together, and the act of 1906 was in effect an amendment of the act of 1890; that under each the offense consisted in continuing to fix prices or to sell goods above or below their real value.

The anti-trust law was thus rendered too obscure and indefinite for a penal statute.

United States v. Sharp, Pet. C. C. 118, Fed. Cas. No. 16,264; United States v. Brewer, 139 U. S. 278, 288, 35 L. ed. 190, 193, 11 Sup. Ct. Rep. 538; Com. v. International Harvester Co. 131 Ky. 551, 133 Am. St. Rep. 256, 115 S. W. 703.

The indefiniteness and obscurity of the law were emphasized by the later Kentucky decisions.

International Harvester Co. v. Com. 137 Ky. 668, 126 S. W. 352, 144 Ky. 403, 138 S. W. 248.

The act of 1890 was held not to be limited by § 198 of the Kentucky Constitution.

Com. v. Grinstead, 108 Ky. 59, 55 S. W. 720, 57 S. W. 471; Com. v. Bavarian Brewing Co. 112 Ky. 925, 66 S. W. 1016.

The sole purpose of the act of 1906 was to legalize all contracts for pooling farm products.

Owen County Burley Tobacco Soc. v. Brumback, 128 Ky. 137, 107 S. W. 710.

The act of 1908 aided and emphasized the purpose of the act of 1906, by making it a misdemeanor for breaking, or inducing another to break, such pooling contract. It was held, however, to apply only to pools of farm products.

O'Bannion v. Com. — Ky. —, 113 S. W. 907; Com. v. Hodges, 137 Ky. 233, 125 S. W. 689; Collins v. Com. 141 Ky. 565, 133 S. W. 233; Malone v. Com. 141 Ky. 570, 133 S. W. 235.

The character and explanation of this class of legislation are common knowledge.

Census 1910, vol. II. p. 702: vol. VI. pp. 606–608, 617; vol. IX. pp. 391, 392; 15 Enc. Britannica, 11th ed. p. 741c; Robinson v. Van Hooser, 116 C. C. A. 294, 196 Fed. 621; Steers v. United States, 112 C. C. A. 423, 192 Fed. 3.

The forced construction given to the statutes in Com. v. International Harvester Co. 131 Ky. 551, 133 Am. St. Rep. 256, 115 S. W. 703, does not cure the vital defect.

Even as construed, the law denies equal protection, because, in the case of farmers, the combination is judicially presumed not to seek an enhancement of price above the real value.

Owen County Burley Tobacco Soc. v. Brumback, 128 Ky. 137, 107 S. W. 710; Com. v. Hodges, 137 Ky. 233, 125 S. W. 689; Collins v. Com. 141 Ky. 565, 133 S. W. 233; Malone v. Com. 141 Ky. 570, 133 S. W. 235.

Whereas, in the case of manufacturers and dealers, including plaintiff in error, the legal presumption indulged was that any increase in price following a combination is an increase above the real value.

International Harvester Co. v. Com. 137 Ky. 677, 126 S. W. 352, 144 Ky. 410, 138 S. W. 248, 147 Ky. 564, 144 S. W. 1070.

The statutes, as construed and enforced, furnish a double standard, and deny the equal protection of the law. No combination among farmers has been prosecuted, though their many pools have doubled or trebled the price of tobacco, while the advance in prices of the different machines sold by plaintiff in error has amounted only to from 5 to 15 per cent. The 14th Amendment, against denial of the equal protection of the laws, applies to all agencies of the state: it forbids discrimination, not only in the law itself, but in its unequal enforcement.

Henderson v. New York Immigration Comrs. (Henderson v. Wickham) 92 U. S. 259, 268, 23 L. ed. 543, 547; Ex parte Virginia, 100 U. S. 339, 346, 25 L. ed. 676, 679, 3 Am. Crim. Rep. 547; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

As construed and enforced, the Kentucky anti-trust law falls within the scope of Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 560, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431, and within the reasoning of the opinion in Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 104, 105, 112, 46 L. ed. 92, 106, 107, 109, 22 Sup. Ct. Rep. 30.

A court cannot, by judicial legislation, save a statute clearly unconstitutional upon its face. The statute itself must preserve the fundamental, constitutional rights of parties. They cannot be left to the discretion of courts.

Louisville & N. R. Co. v. Central Stock

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Yards Co. 212 U. S. 133, 143, 144, 53 L. ed. 441, 445, 446, 29 Sup. Ct. Rep. 246.

Mr. James Garnett, Attorney General of Kentucky, and Mr. Charles Carroll argued the cause, and, with Messrs. J. R. Mallory, J. Robert Layman, and Frank E. Daugherty, filed a brief for defendant in error:

This court will consider the construction placed upon the Constitution or statute of a state by the court of last resort in that state, as a correct construction, and determine whether or not that Constitution or statute, so construed, is prohibited by any provision of the Federal Constitution.

National Cotton Oil Co. v. Texas, 197 U. S. 130, 49 L. ed. 694, 25 Sup. Ct. Rep. 379; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 73, 55 L. ed. 375, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160.

Under the laws of Kentucky prior to the institution of the instant cases, and upon which they were based, it was no offense to form a pool, trust, or combination for the purpose of receiving a higher price for the commodity or article pooled, or concerning which the combination or trust was formed. Trusts, pools, and combinations may be formed for the purpose of selling manufactured articles or agricultural products at a higher price than before the combination, and carried out by actual sale at a higher price. The law only prohibits a trust or combination formed for the purpose of selling the manufactured articles or agricultural products at a price in excess of their real or market value. This is all the laws of Kentucky prohibit.

Com. v. International Harvester Co. 131 Ky. 551, 133 Am. St. Rep. 256, 115 S. W. 703; Com. v. Hodges, 137 Ky. 233, 125 S. W. 689.

The standard adopted for determining whether or not there has been a violation of the Kentucky anti-trust law is fixed and certain.

Com. v. International Harvester Co. 131 Ky. 576, 133 Am. St. Rep. 256, 115 S. W. 703, 137 Ky. 677, 126 S. W. 352, 144 Ky. 410, 138 S. W. 248, 147 Ky. 564, 144 S. W. 1070.

If the policy adopted by the Kentucky courts is reasonable, this court will not review it.

Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Hunter v. Pittsburgh, 207 U. S. 176, 52 L. ed. 158, 28 Sup. Ct. Rep. 40.

The question as to instructions was not raised in the Kentucky courts, hence cannot avail here.

Dewey v. Des Moines, 173 U. S. 199, 43 L. ed. 666, 19 Sup. Ct. Rep. 379; Bolin v. Nebraska, 176 U. S. 90, 44 L. ed. 384, 20 Sup. Ct. Rep. 287.

The statutes as construed and enforced do not deny the equal protection of the law.

Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676, 3 Am. Crim. Rep. 547; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Louisiana & N. R. Co. v. Central Stock Yards Co. 212 U. S. 133, 53 L. ed. 441, 29 Sup. Ct. Rep. 246.

Mr. Justice Holmes delivered the opinion of the court:

The plaintiff in error was prosecuted, convicted, and fined in three different counties for having entered into an agreement with other named companies for the purpose of controlling the price of harvesters, etc., manufactured by them, and of enhancing it above their real value; and for having so fixed and enhanced the price, and for having sold their harvesters, etc., at a price in excess of their real value, in pursuance of the agreement alleged. The judgments were affirmed by the court of appeals. 147 Ky. 564, 144 S. W. 1064, id. 144 Ky. 795, 146 S. W. 12, 148 Ky. 572, 147 S. W. 1199. The plaintiff in error saved its rights under the 14th Amendment and brought the cases here.

The law of Kentucky in its present form is the result of the construction of several statutes somewhat far apart in time and of seemingly contradictory import. It was argued that construction could not take the place of express language in a statute, and Louisville & N. [220] R. Co. v. Central Stock Yards Co. 212 U. S. 132, 144, 53 L. ed. 441, 446, 29 Sup. Ct. Rep. 246, was cited for the proposition. But the case gives no sanction to it. The point there was that a defect in a law could not be cured by precautions in a judgment; not that what seemed a defect could not be cured by the construction given to the words by the court having final authority to declare their intent. We follow the Kentucky court of appeals in taking what they derive from the legislation of the state as if it were embodied in a single act.

The history in brief is this: By an act of May 20, 1890, agreements for the purpose of fixing or limiting the amount or quantity of any article of merchandise to be produced or manufactured, mined, bought, or sold; as also combinations by corporations with others to put the business of the combination under control with intent to limit, fix, or change the price of articles of commerce, or in any way to

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diminish the output of such articles, were made punishable by fine, imprisonment, or both. Carroll's Stat. (Ky.) §§ 3915–3917. In 1891 a new Constitution was adopted by the state, by § 198 of which it was made the duty of the general assembly "from time to time, as necessity may require, to enact such laws as may be necessary to prevent all trusts . . . from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value." (This was held not to repeal the earlier statute. Com. v. International Harvester Co. 131 Ky. 551, 566, 133 Am. St. Rep. 256, 115 S. W. 703). But Kentucky grows tobacco, and the farmers were dissatisfied with the prices that they were able to get, being oppressed, as they alleged, by a combination of buyers. So, on March 21, 1906, a statute was enacted that made it lawful for any number of persons to combine the crops of wheat, tobacco, corn, oats, hay, or other farm products raised by them, for the purpose of obtaining a higher price than they could get by selling them separately. Session Laws 1906, chap. 117, p. 429. And later, by an act of [221] March 13, 1908, not only was the legality of these last-mentioned combinations reaffirmed, but they were protected by injunction, and the sale by or purchase from the owner contrary to his agreement was punished by a fine.

When the court of appeals came to deal with the act of 1890, the Constitution of 1891, and the act of 1906, it reached the conclusion, which now may be regarded as the established construction of the three, taken together, that by interaction and to avoid questions of constitutionality, they were to be taken to make any combination for the purpose of controlling prices lawful unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article. Owen County Burley Tobacco Soc. v. Brumback, 128 Ky. 137, 151, 107 S. W. 710; Com. v. International Harvester Co. 131 Ky. 551, 568, 571–573, 133 Am. St. Rep. 256, 115 S. W. 703; International Harvester Co. v. Com. 137 Ky. 668, 126 S. W. 352. The result seems to be that combinations of tobacco growers are held to do no more than restore an equilibrium that has been disturbed by a combination of buyers (Owen County Burley Tobacco Soc. v. Brumback, 128 Ky. 137, 152, 107 S. W. 710; Collins v. Com. 141 Ky. 564, 133 S. W. 233); whereas, if prices rise after a combination of manufacturers, it very nearly is presumed that the advance is above the real value, and that there is a crime. International Harvester Co. v. Com. 144 Ky. 403, 410, 411, 138 S. W. 248.

The plaintiff in error contends that the law as construed offers no standard of conduct that it is possible to know. To meet this, in the present and earlier cases the real value is declared to be "the market value under fair competition, and under normal market conditions." 147 Ky. 566. Com. v. International Harvester Co. 131 Ky. 551, 576, 133 Am. St. Rep. 256, 115 S. W. 703; International Harvester Co. v. Com. 137 [222] Ky. 668, 677, 678, 126 S. W. 352. We have to consider whether, in application, this is more than an illusory form of words, when, nine years after it was incorporated, a combination invited by the law is required to guess at its peril what its product would have sold for if the combination had not existed and nothing else violently affecting values had occurred. It seems that since 1902 the price of the machinery sold by the plaintiff in error has risen from 10 to 15 per cent. The testimony on its behalf showed that meantime the cost of materials used had increased from 20 to 25 per cent and labor 27½ per cent. Whatever doubt there may be about the exact figures, we hardly suppose the fact of a rise to be denied. But, in order to reach what is called the real value,—a price from which all effects of the combination are to be eliminated,—the plaintiff in error is told that it cannot avail itself of the rise in materials because it was able to get them cheaper through one of the subsidiary companies of the combination, and that the saving through the combination more than offset all the rise in cost.

This perhaps more plainly concerns the justice of the law in its bearing upon the plaintiff in error, when compared with its operation upon tobacco raisers who are said to have doubled or trebled their prices, than on the constitutional question proposed. But it also concerns that, for it shows how impossible it is to think away the principal facts of the case as it exists, and say what would have been the price in an imaginary world. Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact, and generally is more or less easy to ascertain. But what it would be with such increase of a never extinguished competition as it might be guessed would have existed had the combination not been made,

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with exclusion of the actual effect of other abnormal influences, and, it would seem, with exclusion also of any increased [223] efficiency in the machines, but with inclusion of the effect of the combination so far as it was economically beneficial to itself and the community, is a problem that no human ingenuity could solve. The reason is not the general uncertainties of a jury trial, but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts. It is easy to put simple cases; but the one before us is at least as complex as we have supposed, and the law must be judged by it. In our opinion it cannot stand.

We regard this decision as consistent with Nash v. United States, 229 U. S. 373, 377, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780, in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree,—what is an undue restraint of trade. That deals with the actual, not with an imaginary condition other than the facts. It goes no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach, and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust. The conditions are as permanent as anything human, and a great body of precedents on the civil side, coupled with familiar practice, make it comparatively easy for common sense to keep to what is safe. But if business is to go on, men must unite to do it and must sell their wares. To compel them to guess, on peril of indictment, what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate [224] facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess.

Judgments reversed.

Mr. Justice McKenna and Mr. Justice Pitney dissent.

KEOKEE CONSOLIDATED COKE COMPANY, Plff. in Err.,
v.
W. W. TAYLOR, Isaac Taylor, James Taylor, and S. T. Witt, Partners under the Firm Name of W. W. Taylor, Sons & Witt. (No. 372.)

KEOKEE CONSOLIDATED COKE COMPANY, Plff. in Err.,
v.
J. P. KELLY, A. P. Hickam, and G. E. Woliver, Partners under the Firm Name of Kelly, Hickam Company. (No. 373.)

(See S. C. Reporter's ed. 224-227.)

Constitutional law — due process of law — freedom to contract — redemption of store orders in money.

1. Freedom to contract is not infringed contrary to U. S. Const., 14th Amend., by Va. act of February 13, 1888, amending and re-enacting Laws 1887, chap. 391, § 3, forbidding any person, firm, or corporation engaged in mining coal or ore, or manufacturing iron or steel, or any other kind of manufacturing, to issue, for the payment of labor, any order unless the same purports to be redeemable for its face value in lawful money of the United States.

[For other cases, see Constitutional Law, 605-607, 894, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification — redemption of store orders in money.

2. Singling out persons, firms, or corporations engaged in mining and manufacturing as the ones to be forbidden to issue orders for the payment of labor not purporting to be redeemable in money, as is done by Va. act of February 13, 1888, amending and re-enacting Laws 1887, chap. 391, § 3, does not render such statute invalid under U. S. Const., 14th Amend., as class legislation denying the equal protection of the laws.

[For other cases, see Constitutional Law, IV. a, 5, in Digest Sup. Ct. 1908.]

[Nos. 372, 373.]

Submitted May 7, 1914. Decided June 8, 1914.

TWO WRITS of Error to the Supreme Court of Appeals of the State of Virginia to review judgments which affirmed judgments of the Circuit Court of Lee County, in that state, in favor of plaintiffs in

NOTE.—On validity and effect of statutes requiring wages to be paid in lawful money —see note to Avent-Beattyville Coal Co. v. Com. 28 L.R.A. 273.

On the constitutionality of statutes restricting contracts and business, generally —see note to State v. Loomis, 21 L.R.A. 789.

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actions of assumpsit brought upon store orders. Affirmed.

The facts are stated in the opinion.

Mr. J. F. Bullitt submitted the cause for plaintiff in error. Mr. R. T. Irvine was on the brief:

The Virginia act complained of is repugnant to the 1st section of the 14th Amendment of the Constitution of the United States, because it is class legislation, and because it seeks to deprive certain citizens of their liberty and property without due process of law.

State v. Goodwill, 33 W. Va. 179, 25 Am. St. Rep. 863, 10 S. E. 286; Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; Braceville Coal Co. v. People, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; Avent-Beattyville Coal Co. v. Com. 96 Ky. 218, 28 L.R.A. 273, 28 S. W. 502; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395.

The Virginia act cannot be upheld as a valid exercise of the police power.

Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133.

An act of the legislature is certainly unconstitutional if it does not apply to all of a class; but the reverse does not follow—it may apply to all of a class and still be unconstitutional.

Cooley, Const. Lim. 7th ed. 561; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

If an act of the legislature is clearly repugnant to the Constitution, then it is not saved by the police power doctrine.

State ex rel. Jones v. Froehlich, 115 Wis. 32, 58 L.R.A. 757, 95 Am. St. Rep. 894, 91 N. W. 115.

The usual statement of the "police power" doctrine is much too broad.

People v. Jackson & M. Pl. Road Co. 9 Mich. 307.

Mr. J. C. Noel submitted the cause for defendants in error. Mr. C. T. Duncan was on the brief:

The statute in question does not conflict either with the state or Federal Constitution.

26 Am. & Eng. Enc. Law, 2d ed. 574; Austin v. Tennessee, 179 U. S. 349, 45 L. ed. 228, 21 Sup. Ct. Rep. 132; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Cooper v. Telfair, 4 Dall. 18, 1 L. ed. 723; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Knoxville Iron Co. v. Harbison, 183 U. S. 17, 46 L. ed. 59, 22 Sup. Ct. Rep. 1; Lawrence v. Rutland R. Co. 80 Vt. 370, 15 L.R.A.(N.S.) 350, 67 Atl. 1091, 13 Ann. Cas. 475; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; Pine Grove Twp. v. Talcott, 19 Wall. 666, 22 L. ed. 227; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; Jones v. Brim, 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282, 1 Am. Neg. Rep. 547; Trehy v. Marye, 100 Va. 40, 40 S. E. 126; Virginia Development Co. v. Crozer Iron Co. 90 Va. 126, 44 Am. St. Rep. 893, 17 S. E. 806.

Mr. Justice Holmes delivered the opinion of the court:

These are actions of assumpsit brought by the defendants in error upon orders signed by employees of the plaintiff in error and addressed to it, directing it to pay to bearer "in merchandise only from your store," to the value specified. These orders were upon scrip issued by the plaintiff in error as an advance of monthly wages in payment for labor performed, and the only controversy between the parties arises from the refusal of the plaintiff in error to pay the indicated amounts in money. The facts were agreed, the circuit court gave judgment for the plaintiffs, and a writ of error was refused by the supreme court of appeals. The ground of the judgment was an act of February 13, 1888, amending and re-enacting an act of 1887, chap. 391, § 3, forbidding any person, firm, or corporation engaged in mining coal or ore, or manufacturing iron or steel or any other kind of manufacturing, to issue for the payment of labor any order unless the same purported to be redeemable for its face value in lawful money of the United States. The plaintiff in error saved its rights under the 14th Amendment, and, when the court of appeals refused to hear the cases, brought them here. The writ of error was allowed on September 25, 1912. Norfolk & S. Turnp. Co. v. Virginia, 225 U. S. 264, 269, 56 L. ed. 1082, 1086, 32 Sup. Ct. Rep. 828.

Of course we do not go behind the construction given to the state law by the state courts. The objections that are urged here are that the statute interferes with freedom of contract, and, more especially, that it is class legislation [227] of a kind supposed to be inconsistent with the 14th Amendment; a West Virginia decision upon a similar statute being cited to that effect. State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285. The former of these objections, however, is disposed of by Knoxville Iron Co. v.

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Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1, and Dayton Coal & I. Co. v. Barton, 183 U. S. 23, 46 L. ed. 61, 22 Sup. Ct. Rep. 5.

It is more pressed that the act discriminates unconstitutionally against certain classes. But while there are differences of opinion as to the degree and kind of discrimination permitted by the 14th Amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see. That is for the legislature to judge unless the case is very clear. Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 81, 55 L. ed. 369, 378, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Central Lumber Co. v. South Dakota, 226 U. S. 157, 160, 57 L. ed. 164, 169, 33 Sup. Ct. Rep. 66; Patsone v. Pennsylvania, 232 U. S. 138, 144, ante, 539, 543, 34 Sup. Ct. Rep. 281. The suggestion that others besides mining and manufacturing companies may keep shops and pay their workmen with orders on themselves for merchandise is not enough to overthrow a law that must be presumed to be deemed by the legislature coextensive with the practical need.

Judgments affirmed.

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[228] UNITED STATES, Plff. in Err.,
v.
BUFFALO PITTS COMPANY.

(See S. C. Reporter's ed. 228–236.)

United States — implied contract — use of mortgaged property.

The United States must be held liable upon an implied contract to pay the chattel mortgagee of a traction engine for its use by the government in the Reclamation Service in completing a contract which the public contractor, who was the chattel mortgagor, had assigned to the United States, where the government's representatives knew of the existence of the mortgage, and represented that it would continue to use the engine, and that, if left in its possession, payment for the use would be recommended, and the mortgagee left such engine with the government, relying upon such representations, and upon the fact that its title under the mortgage, because of the mortgagor's breach of condition, was undisputed, and consented to such retention of possession by the government in the expectation of receiving due compensation, —especially since the government was authorized by the act of June 17, 1902 (32 Stat. at L. 388, chap. 1093, U. S. Comp. Stat. Supp. 1911, p. 662), § 7, under which the improvement was being made, to acquire any property necessary for the purpose, and, if need be, to appropriate it.

[For other cases, see United States, VI. e, in Digest Sup. Ct. 1908.]

[No. 369.]

Submitted May 15, 1914. Decided June 8, 1914.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Western District of New York against the United States for the value of the use of certain property under an implied contract for payment. Affirmed.

See same case below, 114 C. C. A. 119, 193 Fed. 905.

The facts are stated in the opinion.

Assistant Attorney General Underwood submitted the cause for plaintiff in error:

The United States cannot be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction, in this respect, between contract and tort, be evaded by framing the claim as upon an implied contract.

Hill v. United States, 149 U. S. 593, 598, 37 L. ed. 862, 864, 13 Sup. Ct. Rep. 1011.

In order to give the court of claims jurisdiction under the act of March 3, 1887, the demand sued on must be founded on a convention between the parties,—a coming together of minds; and contracts or obligations implied by law from torts do not meet this condition.

Harley v. United States, 198 U. S. 229, 49 L. ed. 1029, 25 Sup. Ct. Rep. 634.

Implied contracts in fact do not arise from the denials and contentions of parties, but from their common understanding in the ordinary course of business whereby mutual intent to contract, without formal words therefor, is shown.

Knapp v. United States, 46 Ct. Cl. 643.

No officer of the government, however high in rank, had authority to make a valid contract to pay plaintiff's claim unless the special fund provided by Congress therefor was sufficient to cover same.

Hooe v. United States, 218 U. S. 322, 54 L. ed. 1055, 31 Sup. Ct. Rep. 85.

The engine having been taken under a claim of right, and not in recognition of a paramount title in plaintiff, no action upon an implied contract will lie.

Hill v. United States, 149 U. S. 593, 599, 37 L. ed. 862, 864, 13 Sup. Ct. Rep. 1011;

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Gibbons v. United States, 8 Wall. 269, 275, 19 L. ed. 453, 454; Langford v. United States, 101 U. S. 341, 344, 25 L. ed. 1010, 1012.

Mr. Edward Payson White submitted the cause for defendant in error:

The Buffalo Pitts Company was the lawful owner of the engine, and became entitled to possession of it as soon as the mortgagor attempted to dispose of it to the government, unless the government exercised the right of eminent domain.

Jones, Chat. Mortg. § 1; Conard v. Atlantic Ins. Co. 1 Pet. 386, 7 L. ed. 189; Hall v. Sampson, 35 N. Y. 274, 91 Am. Dec. 56; Coles v. Clark, 3 Cush. 402; Kitchen v. Schuster, 14 N. M. 164, 89 Pac. 261; First Nat. Bank v. Stewart, 13 N. M. 551, 86 Pac. 622.

The United States is bound to pay the Buffalo Pitts Company for devoting its property to public use.

Gibbons v. United States, 8 Wall. 269, 19 L. ed. 453; United States v. Lynah, 188 U. S. 455, 465, 47 L. ed. 542, 546, 23 Sup. Ct. Rep. 349.

The law implies a contract that the United States will pay the Buffalo Pitts Company just compensation.

Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 459, 17 L. ed. 805, 807; 1 Parsons, Contr. p. 5; 15 Am. & Eng. Enc. Law, 1078; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 179, 20 L. ed. 557, 560; United States v. Jones, 109 U. S. 513, 27 L. ed. 1015, 3 Sup. Ct. Rep. 346; United States v. Great Falls Mfg. Co. 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; Hollister v. Benedict & B. Mfg. Co. 113 U. S. 59, 28 L. ed. 901, 5 Sup. Ct. Rep. 717; United States v. Palmer, 128 U. S. 262, 32 L. ed. 442, 9 Sup. Ct. Rep. 104; United States v. Berdan Fire-Arms Mfg. Co. 156 U. S. 552, 39 L. ed. 530, 15 Sup. Ct. Rep. 420; Dooley v. United States, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; United States v. Cornell S. B. Co. 202 U. S. 184, 50 L. ed. 987, 26 Sup. Ct. Rep. 648; United States v. Russell, 13 Wall. 623, 20 L. ed. 474.

Mr. Justice Day delivered the opinion of the court:

This suit was brought by the Buffalo Pitts Company in the circuit court of the United States for the western district of New York to recover for the value of the use of a certain engine which it was alleged the United States was under an implied contract to pay. The action was begun under the Tucker act of March 3, 1887 (24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752), and the court of original jurisdiction, as required by the statute, § 7, made findings of fact and conclusions of law under which it held the government liable and rendered judgment for the plaintiff's claim. On writ of error the circuit court of appeals affirmed that judgment (114 C. C. A. 119, 193 Fed. 905), and the case is brought here.

The findings of fact show that: The plaintiff is a corporation organized under the laws of New York, and having its principal place of business at Buffalo, New York, manufacturing, among other things, traction engines. On May 20, 1905, it sold a traction engine with appurtenances to the Taylor-Moore Construction Company, delivered [230] at Roswell, New Mexico, and took a chattel mortgage thereon to secure the payment of $1,600 of the purchase price. The chattel mortgage conveyed the engine and appurtenances to the plaintiff on condition that if the mortgagor should fail to pay the sum of $1,600 according to certain notes, or should attempt to dispose of or injure the property, or remove the same from the county of Chaves, New Mexico, or if the mortgagor should not take proper care of the property, or if the mortgagee should at any time deem itself unsafe or insecure, then the whole amount unpaid should be considered immediately due and payable, and it should be lawful for the mortgagee to take the property and remove the same, and hold or sell it and all equity of redemption at public auction, with notice as provided by law. The mortgage was duly recorded May 22, 1905, and no part of the money thereby secured has ever been paid to the mortgagee, which has ever since been the owner and holder of the mortgage. The engine was put to work by the construction company upon the so-called Hondo Project, being part of the Reclamation Service undertaken by the Department of the Interior of the United States, which work was being prosecuted under a contract between the United States and the construction company, the engine being located at or near Roswell, New Mexico.

The construction company having made default in the performance of its contract, on or about June 7, 1905, work was suspended thereunder, and the construction company then assigned all its interest in the contract to the United States, which, pursuant to the contract, took possession of all material, supplies, and equipment belonging to the construction company, including the engine and appurtenances. On June 16, 1905, at Roswell, New Mexico, the plaintiff, by its agents, made a demand upon the defendant through Wendell M.

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Reed, District Engineer of the Reclamation Service under the Department of the Interior, [231] for the possession of the engine and appurtenances, which the defendant then and there refused, and thereafter it retained and used the property in the work under the contract until June 21, 1906. Reed was, during, and before, and after, such period, the local representative of the government in charge of the work under the contract at and near Roswell, and as such took possession of the engine and appurtenances for the United States. Thereafter the defendant, by the Director of the United States Geological Survey, to whom the Secretary of the Interior referred the matter, and by the Chief Engineer and Assistant Chief Engineer of the Reclamation Service, under the direction of the Department, ratified and adopted the acts of Reed in respect to the possession of the engine and appurtenances. The mortgagor has never made any claim to the property since the suspension and assignment of the contract to the defendant.

Plaintiff, on or about June 16, 1905, and also on or about September 30, 1905, notified the defendant of the execution and filing of the chattel mortgage, and that the plaintiff claimed the property under the title thereby vested in it, and claimed the right of possession because of the default by the mortgagor in the conditions thereof, and the defendant at all times well knew of the existence and filing of the chattel mortgage, and did not at any time dispute the validity thereof. On September 30, 1905, the defendant represented to the plaintiff that it was using and would continue to use the engine and appurtenances in its work, and that any legal proceedings to recover the possession thereof would be resisted by the defendant, and further represented to the plaintiff that if such property was left in the defendant's possession, its attorney would recommend payment therefor. The plaintiff relied upon the fact that its title to the property under the chattel mortgage was not disputed by the defendant, and upon the representations made to it as aforesaid, and consented [232] to defendant's retaining possession of the property in expectation of receiving due compensation therefor.

The question in this case is, did these facts warrant the deduction that the government was liable upon an implied contract to pay for the use of the engine? In cases brought under this act coming up from a district or circuit court of the United States, the findings of fact of the trial court are conclusive, and the question is whether the conclusions of law were warranted by the facts found (Chase v. United States, 155 U. S. 489, 500, 39 L. ed. 234, 288, 15 Sup. Ct. Rep. 174). Exceptions to the rule may exist if the record enables the court to conclude that the ultimate facts found are not supported by any evidence whatever (Collier v. United States, 173 U. S. 79, 43 L. ed. 621, 19 Sup. Ct. Rep. 330).

We think the circuit court and the circuit court of appeals were right in concluding that, under the facts found, the United States was liable upon an implied contract. As to the plaintiff, it is specifically found that it left the property with the defendant, relying upon the fact that its title to the property under the mortgage was not disputed, and upon the representations made to it, and consented to the defendant's retaining possession of the property in expectation of receiving compensation for it; as to the government, it is found that it was well known to it that the chattel mortgage existed, and its validity was undisputed, and that it would continue the use of the engine and appurtenances, and, if left in its possession, payment would be recommended for such use.

True it is that under the Tucker act there is no jurisdiction in the court of claims or district courts of the United States to recover for acts merely tortious, the statute providing that there shall be no recovery except in cases not sounding in tort. It has been said in the case cited for the government, Harley v. United States, 198 U. S. 229, 49 L. ed. 1029, 25 Sup. Ct. Rep. 634, that there must be some meeting of the minds of the parties upon the fact that compensation will be made. In [233] that case it was found that there was no demand based upon a convention between the parties, or coming together of minds, for while the plaintiff, an employee of the government in the Bureau of Printing and Engraving, supposed and understood he would be entitled to compensation for certain improvements made in printing presses which were used for many years by the Bureau, the findings also set forth in express terms that it was supposed and understood by the officers of the government that the claimant would neither expect nor demand remuneration, and this fact, said this court, distinguished it from McKeever v. United States, 14 Ct. Cl. 396, affirmed by this court; also from United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349, and the other cases cited by appellant.

In the present case, as we have said, there is nothing to show that the government expected to use the engine and appurtenances without compensation. It did not dispute the mortgage, and the findings of fact clearly show that if the government

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had the right to take the property, notwithstanding the mortgage interest which the plaintiff had in it, it made no claim of right to take and use it without compensation as against the prior outstanding mortgage, which distinctly reserved the right to take and sell the property under the circumstances shown, and which, after the breach of condition, vested the right of possession and the right to convert the property in the mortgagee. Kitchen v. Schuster, 14 N. M. 164, 89 Pac. 261.

Furthermore, the government was authorized by § 7 of the act of June 17, 1902 (32 Stat. at L. 388, chap. 1093, U. S. Comp. Stat. Supp. 1911, p. 662), under which this improvement was being made, to acquire any property necessary for the purpose, and, if need be, to appropriate it. It may be said, as contended, that under the contract with the construction company the government had a right to take possession of this engine, which was in possession of the company as mortgagor, and by virtue of the terms of the agreement complete the work, but it could not in this [234] manner extinguish the rights of the mortgagee, nor did it undertake to do so. Under such circumstances we think the former decisions of this court, recognizing the general principles of justice which give rise to implied obligations, and enforcing the right of compensation when private property is taken for a public use, require the government to make compensation for the use of this engine, and that the facts bring this case within United States v. Great Falls Mfg. Co. 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306, and United States v. Lynah, supra. In the latter case, where it was sought to recover damages for the alleged taking of the plaintiff's property in the construction of a dam which had the effect to overflow lands belonging to him, and destroy their value, after an extended review of the previous cases in this court, it was said (p. 464):

"The rule deducible from these cases is that when the government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates. It is earnestly contended in argument that the government had a right to appropriate this property. This may be conceded, but there is a vast difference between a proprietary and a governmental right. When the government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership, and if an officer of the government takes possession of property under the claim that it belongs to the government (when in fact it does not), that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the government to pay for that which it claims to own. Very different from this proprietary right of the government in respect to property which it owns is its governmental right to appropriate the property of individuals. All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The government may take personal or real [235] property whenever its necessities or the exigencies of the occasion demand. So the contention that the government had a paramount right to appropriate this property may be conceded, but the Constitution, in the 5th Amendment, guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised, it shall be attended by compensation.

" . . . Whenever, in the exercise of its governmental rights, it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others."

In Hooe v. United States, 218 U. S. 322, 54 L. ed. 1055, 31 Sup. Ct. Rep. 85, the attempt to make the government liable for rent was in the face of a statute of the United States which provided that no contract should be made for rent until an appropriation for that purpose had been made by Congress. In the present case, the government had the right to contract for this work under statutory authority, and to acquire property necessary to that end. Under the contract it might take possession of the construction company's property, and, it may be conceded, finish the contract with such property, but it had no right to use the property of others without compensation, and in this case it did not assume to do so. The mortgagee had a distinct right in the property, which had accrued to it before the property was entered upon, and was authorized to take and hold the same as against the attempted transfer of the mortgagor. While the government claimed the right to thus take and use the property, it nevertheless held it without denying the right of the owner to compensation. When it takes property under such circumstances for an authorized governmental use, it impliedly promises to pay therefor. This accords with the principles declared in the previous cases in this court, and arises because of the Constitutional obligation embodied in the 5th Amendment to the Constitution of the United [236] States, guarantying the owner

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of property against its appropriation for a governmental use without compensation.

We find no error in the judgment of the Circuit Court of Appeals, and it is affirmed.

UNITED STATES, Appt.,
v.
UNITED ENGINEERING & CONTRACTING COMPANY.

(See S. C. Reporter's ed. 236–244.)

Damages — stipulated — delay in completing public contract — fault of government.

1. A contractor who unreasonably delays the completion of a public work under a supplemental contract which fixes no definite time for performance cannot be charged therefor by the rule of the original contract stipulating liquidated damages for each day's delay, where the work under the original contract was delayed solely because of the government's fault beyond the time fixed therein for completion, since the government must, under such circumstances, be deemed to have waived the stipulation for liquidated damages, and, in order to recover on account of the contractor's subsequent delays, must show the actual damages sustained, no matter how impracticable it may be to prove actual damages.

[For other cases, see Damages, V., in Digest Sup. Ct. 1908.]

United States — contracts — extra expense.

2. The extra cost of inclosing certain machinery in casing, necessitated by the building of a plank walk across the top of a pipe in a pumping plant, to protect the workmen from high-speed gearing, must be allowed the contractor for the construction of such pumping plant for the government, where the expense was made necessary by the government.

[For other cases, see United States, VI. f, in Digest Sup. Ct. 1908.]

United States — contracts — extra expense.

3. A contractor for the construction of a pumping plant for the government should be allowed the cost of repairs made necessary by the breakage of certain pipes, due to the sudden increase in the pressure in the salt and fresh-water system in a government Navy Yard, which was caused by the government without notice to the contractor, and without his fault.

[For other cases, see United States, VI. f, in Digest Sup. Ct. 1908.]

NOTE.—On stipulation for damages in building contract as penalty or liquidated damages—see note to Crawford v. Heatwole, 34 L.R.A.(N.S.) 588.

On applicability of provision for stipulated damages or penalty for delay in the completion of a contract, where the entire contract is abandoned or repudiated—see note to Moses v. Autuono, 20 L.R.A.(N.S.) 350.

[No. 381.]

Submitted May 8, 1914. Decided June 8, 1914.

APPEAL from the Court of Claims to review a judgment against the United States in a suit upon a contract for public work. Affirmed.

See same case below, 47 Ct. Cl. 489.

The facts are stated in the opinion.

Assistant Attorney General **Thompson** submitted the cause for appellant:

The court of claims was in error in holding that the rights of the government under the liquidated clause of the contract were waived by the government preventing the completion of the work within the contract time.

Wallis v. Wenham, 204 Mass. 83, 90 N. E. 396, 17 Ann. Cas. 644; Wilkens v. Wilkerson, — Tex. Civ. App. —, 41 S. W. 178; Mason v. Rempe, — Tex. Civ. App. —, 41 S. W. 694; Neblett v. McGraw, 41 Tex. Civ. App. 244, 91 S. W. 309; Hebert v. Weil, 115 La. 425, 39 So. 389; Vanderhoof v. Shell, 42 Or. 591, 72 Pac. 126; Reichenbach v. Sage, 13 Wash. 364, 52 Am. St. Rep. 51, 43 Pac. 354; Wiley v. Hart, 74 Wash. 142, 132 Pac. 1015; Pittsburg Iron & Steel Engineering Co. v. National Tube Works Co. 184 Pa. 261, 39 Atl. 76; Coal & I. R. Co. v. Reherd, 123 C. C. A. 155, 204 Fed. 879; Morse Dry Dock & Repair Co. v. Seaboard Transp. Co. 88 C. C. A. 263, 161 Fed. 99; Schmulbach v. Caldwell, 115 C. C. A. 650, 196 Fed. 24; McGowan v. American Pressed Tan Bark Co. 121 U. S. 575, 30 L. ed. 1027, 7 Sup. Ct. Rep. 1315; United States v. Bethlehem Steel Co. 205 U. S. 105, 51 L. ed. 731, 27 Sup. Ct. Rep. 450.

Mr. **P. M. Ashford** also submitted the cause for appellant.

Messrs. **Frederic D. McKenney, John Spalding Flannery, and William Hitz** submitted the cause for appellee:

Forfeitures or penalties for delay or failure to deliver articles under a contract cannot be recovered if strict performance by the plaintiff has been prevented or waived by the defendant.

District of Columbia v. Camden Iron Works, 181 U. S. 453, 45 L. ed. 948, 21 Sup. Ct. Rep. 680; King v. United States, 37 Ct. Cl. 428; N. P. Pratt Laboratory v. Buffalo Forge Co. 106 C. C. A. 429, 184 Fed. 287; United States v. Gleason, 175 U. S. 588, 609, 44 L. ed. 284, 292, 20 Sup. Ct. Rep. 228.

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The abandonment of rights under a contract by executing a later substituted contract for the same work is not prevented by protesting that the rights still exist under the former contract.

United States ex rel. International Contracting Co. v. Lamont, 155 U. S. 303, 39 L. ed. 160, 15 Sup. Ct. Rep. 97; Wait, Engineering & A. Jur. §§ 325, 726, 727, pp. 269, 270, 667, 669; Flynn v. Des Moines & St. L. R. Co. 63 Iowa, 491, 19 N. W. 312; Phillips & C. Constr. Co. v. Seymour, 91 U. S. 646, 23 L. ed. 341; Anson, Contr. p. 337; Lawson v. Hogan, 93 N. Y. 44; Sinclair v. Tallmadge, 35 Barb. 602; Dunn v. Steubing, 120 N. Y. 232, 24 N. E. 315; Foster v. Worthington, 58 Vt. 65, 4 Atl. 565.

The power to establish a forfeiture must be exercised within the time mentioned in the contract, and before the time for the completion of the work has expired.

Wait, Engineering & A. Jur. §§ 723, 724, p. 664; Walker v. London & N. W. R. Co. L. R. 1 C. P. Div. 518, 45 L. J. C. P. N. S. 787, 36 L. T. N. S. 53, 25 Week. Rep. 10; Henderson Bridge Co. v. O'Connor, 88 Ky. 303, 11 S. W. 18, 957.

To sustain the assessment of $25 a day as "liquidated damages," the appellant was bound to show strict compliance with the letter of the contract, and establish a fixed date of completion, which was not abandoned, and a delay which was not waived, but declared to be a default, as the contract expressly provided. Failing to do this, the appellant could only justify the assessment of this large penalty as unliquidated damages by proving that the contractor was bound to complete within a reasonable time; that it failed to do so, and that, by reason of such failure, the appellant sustained a pecuniary loss equivalent to the amount deducted.

The Conqueror, 166 U. S. 110, 125, 41 L. ed. 937, 944, 17 Sup. Ct. Rep. 510.

The action of the appellant was not predicated upon the terms of the contract, with which it was bound to comply before it could assess this penalty of $6,000 as liquidated damages, but was based upon the theory that it could substitute for a fixed date of completion what it deemed to be a reasonable time for such completion, and assess damages at the contract rate for failure to complete within such time; in other words, that it could arbitrarily adjudicate and settle by this deduction the government's claim against the contractor for unliquidated and unproven damages growing out of the delay which it found to exist,—exactly what this court in William Cramp & Sons Ship & Engine Bldg. Co. v. United States, 216 U. S. 494, 502, 54 L. ed. 587, 589, 30 Sup. Ct. Rep. 392, decided the executive officers of the government had no power to do.

Exactions for delay, whether they be characterized as "penalties," "forfeitures," "fines," or "liquidated damages," take an agreed portion of the contract price for a contractor's admitted or ascertained delays in completing the work by the required date. The court, in construing and interpreting the words in such agreements, looks to substance rather than to form, and seeks the intention of the parties instead of wholly relying upon their expressions.

Sun Printing & Pub. Co. v. Moore, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240.

The construction of the contract should be taken most strongly against the government, whose officers prepared it.

United States v. Gibbons, 109 U. S. 200, 27 L. ed. 906, 3 Sup. Ct. Rep. 117.

When nothing to the contrary appears, the well-known usage of trade prevails in the construction of a contract.

Clark v. United States, 6 Wall. 543, 18 L. ed. 916; Robinson v. United States, 13 Wall. 363, 20 L. ed. 653.

Where, in a contract for the construction of waterworks, the size or cost of valve boxes was not mentioned, this court held the usual size and cost was to be understood, and the extra cost of those of unusual size required by the defendant might be recovered.

Wood v. Ft. Wayne, 119 U. S. 312, 30 L. ed. 416, 7 Sup. Ct. Rep. 219.

A specific provision in a contract calling for one injector and one pump controls a general provision of a contract that everything needed for a lighthouse shall be supplied to make it ready for use.

Erickson v. United States, 107 Fed. 204.

Alterations increasing or varying the quantity of work from that contemplated by the parties when they made their agreement constitute a new and different work, not covered by the agreement, for which the contractor may recover its reasonable value.

Salt Lake City v. Smith, 43 C. C. A. 637, 104 Fed. 466; Henderson Bridge Co. v. McGrath, 134 U. S. 260, 33 L. ed. 934, 10 Sup. Ct. Rep. 730.

Mr. Justice Day delivered the opinion of the court:

Suit was brought in the court of claims by the United Engineering & Contracting Company to recover of the United States upon a contract, dated the 15th of September, 1900, for the construction within seven calendar months from the date of the contract, namely, by April 15, 1901, of a pumping plant for Dry Dock No. 3 at the New York Navy Yards, the work to be done in accordance with certain plans and

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specifications annexed to and forming a part of the contract. The claimant recovered a judgment (47 Ct. Cl. 489), and the United States brings this appeal.

The principal question in the case involves the correctness of that part of the judgment of the court of claims which permitted the claimant to recover $6,000, which the government had deducted as liquidated damages for 240 days' delay in the completion of the work, at the rate of $25 per day. To understand this question the terms of the contract and certain facts found by the court of claims, upon which the case is to be considered here, must be had in view.

The claimant commenced the construction of the work in accordance with the contract, and after a portion thereof had been done the Navy Department concluded to connect Dry Dock No. 2 with Dry Dock No. 3, and to build a single pumping plant for both docks. To that end, on July 21, 1901, [238] a supplemental contract was entered into with the United States, whereby the claimant agreed, for an additional sum, to furnish all the material and labor necessary to carry out the changes in and additions to the plant originally contracted for, and to complete the work on or before October 15, 1901, to which date the original contract was extended.

While the work was progressing under the original and supplemental contracts, a controversy arose between the claimant and the civil engineer in charge as to the proper method of designing and constructing the floor of the pump well, and as to the correct interpretation of the requirements of the specifications concerning other matters, which resulted in considerable delay and the cessation of work without the fault of the claimant. On January 13, 1903, the chief of the Bureau of Yards and Docks appointed a board to consider changes in the bottom of the pump well, and the compensation to be paid therefor, of which the claimant was advised by letter, and it was informed that it would be expected to immediately resume work under its contract, and push the same to completion with utmost despatch, otherwise the Bureau would annul the contract and take over the entire work. The claimant thereupon promised to push the work to completion as rapidly as possible, with which promise the Bureau appears to have been satisfied.

On February 15, 1903, after the date fixed for the completion of the work under the original and supplemental contracts, a second supplemental contract was entered into, whereby the claimant agreed to construct three hatches in the roof of the pump well for additional compensation. Nothing was said in this contract as to the time of completion, or as to delays under prior contracts.

The board of officers appointed to consider the design of the floor of the pump well and other matters in controversy reported February 16, 1903, that there were, as [239] conceded by the Bureau, errors in the design of the pump well floor; that the work done and materials furnished by the claimant complied with the specifications, and that it was not chargeable with improper work or procedure, and the board estimated the increased compensation for the new work, and made certain allowances to the claimant. On March 7, 1903, a third supplemental contract was entered into, which embodied the changes found necessary in the original plan for the construction of the floor of the pump well, and the increased compensation to claimant therefor. Nothing was said in this contract as to the date of the completion of the work theretofore contracted for, nor as to prior delays.

The claimant proceeded under the contracts with reasonable despatch and without delay on its part until May 1, 1903, when the work was ready for the installation of the machinery. Up to this date the claimant was delayed by the government in making changes and alterations in the work, and in the use of the docks for docking vessels while the work was going forward. No delays were chargeable to the claimant up to October 15, 1901, the time fixed for the completion of the work, nor thereafter to May 1, 1903. During this period, due to the delays of the government, the claimant incurred additional expenses for superintendence and maintenance. During the period from May 1, 1903, to April 21, 1904, the work was delayed by the claimant's subcontractors in not getting the pump castings in place, for which the government was not responsible. The claimant was also delayed for a few days during said period by the government while using the docks for docking vessels.

At the request of the Bureau a civil engineer made a review of the matter of delays, and in February, 1905, reported that, notwithstanding the increased work required by the supplemental agreements and the restrictions placed upon the work, the claimant was up to time [240] on its contracts to May 1, 1903, but that subsequent to that date, and up to April 21, 1904, it had taken seven calendar months' more time than was necessary. After the plant was completed a board was appointed to pass upon it, which recommended certain deductions from the contract price for failure to strictly comply with the specifications. On March 24, 1905, the civil engineer in charge transmitted to the claimant a supplemental

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agreement covering the deductions, which agreement contained a reservation that nothing therein and no action taken under it should affect the rights of either party in the matter of delay and the completion of the work, or otherwise, except as specifically stated, which supplemental agreement claimant refused to execute. In February, 1906, long after the plant had been accepted, the Bureau held the claimant responsible for 240 days' delay at the rate of $25 per day, or $6000, as liquidated damages, and deducted the same from the balance due under the contract, which the claimant accepted under protest, and it subsequently filed with the Bureau a written protest against the deductions for delays and disallowances. The work was completed and accepted finally by the government on April 5, 1905.

Notwithstanding the delays of the government, the court of claims found that the claimant, with reasonable diligence, could have completed the plant for tests during the period by about September 21, 1903, and found that if it was chargeable for the delay according to the liquidated damage clause of paragraph 12 of the specifications of $25 per day, the deduction would be $750 less than the government had deducted. But it found that, if the claimant was only liable for actual damages, and it did so determine, since there was no evidence as to such damages, the claimant was entitled to recover the entire amount deducted.

In the original contract the specifications provided, [241] paragraph 12, for liquidated damages for delay, as follows:

"12. Damages for delay.—In case the work is not completed within the time specified in the contract, or the time allowed by the Chief of the Bureau of Yards and Docks under paragraph 11 of this specification, it is distinctly understood and agreed that deductions at the rate of $25 per day shall be made from the contract price for each and every calendar day after and exclusive of the date within which completion was required up to and including the date of completion and acceptance of the work, said sum being specifically agreed upon as the measure of damage to the United States by reason of delay in the completion of the work; and the contractor shall agree and consent that the contract price, reduced by the aggregate of damages so deducted, shall be accepted in full satisfaction for all work done under the contract."

Under the provisions of this paragraph, if there had been nothing subsequently changing the rights of the parties, and the delay had resulted from the failure of the claimant to complete the work within the time specified, the deduction at the rate of $25 per day might have been made by the United States as liquidated damages. This was the sum estimated and agreed upon between the parties as the damages which might be regarded as sustained by the government in event of the breach of the claimant's obligation to complete the work within the stipulated time. Such contracts for liquidated damages, when reasonable in their character, are not to be regarded as penalties, and may be enforced between the parties. See Sun Printing & Pub. Asso. v. Moore, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240, in which the matter is fully discussed.

The precise question here is whether, when the work was delayed solely because of the government's fault beyond the time fixed for its completion, and afterwards the work was completed without any definite time being fixed in [242] which it was to be done, the claimant can be charged for the subsequent delays for which he was at fault by the rule of the original contract, stipulating liquidated damages, or was that stipulation waived by the conduct of the government, and was it obligatory upon it, in order to recover for the subsequent delays, to show the actual damages sustained. We think the better rule is that when the contractor has agreed to do a piece of work within a given time, and the parties have stipulated a fixed sum as liquidated damages, not wholly disproportionate to the loss for each day's delay, in order to enforce such payment the other party must not prevent the performance of the contract within the stipulated time; and that where such is the case, and thereafter the work is completed, though delayed by the fault of the contractor, the rule of the original contract cannot be insisted upon, and liquidated damages measured thereby are waived. Under the original and first supplemental agreements, the claimant knew definitely that he was required to complete the work by a fixed date. Presumably the claimant had made its arrangements for completion within the time named. Certainly the other contracting party ought not to be permitted to insist upon liquidated damages when it is responsible for the failure to complete by the stipulated date; to do this would permit it to recover damages for delay caused by its own conduct.

It may be that damages were sustained by the failure to carry out the subsequent agreement. But the government, as well as the claimant, saw fit to go on with the work with no fixed rule for the time of its completion, so that it be reasonable, and the government required no stipulation in the second and third supplemental contracts as to damages in a fixed and definite sum

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for failure to complete the work as required. Under such circumstances we think it must be content to recover such damages as it is able to prove were actually suffered.

[243] This conclusion is in accord with the rule of the English cases. In Dodd v. Churton, [1897] 1 Q. B. 562, Chitty, L. J., said:

"The law on the subject is well settled. The case of Holme v. Guppy, 3 Mees. & W. 387, 1 Jur. 825, and the subsequent cases in which that decision has been followed, are merely examples of the well-known principle stated in Comyns's Digest, Condition L, (6), that, where performance of a condition has been rendered impossible by the act of the grantee himself, the grantor is exonerated from performance of it. The law on the subject was very neatly put by Byles, J., in Russell v. Sa da Bandeira, 13 C. B. N. S. 149, 32 L. J. C. P. N. S. 68, 9 Jur. N. S. 718, 7 L. T. N. S. 804. This principle is applicable not to building contracts only, but to all contracts. If a man agrees to do something by a particular day, or, in default, to pay a sum of money as liquidated damages, the other party to the contract must not do anything to prevent him from doing the thing contracted for within the specified time."

The same rule was followed with approval by the New York Court of Appeals in a well-considered case, Mosler Safe Co. v. Maiden Lane S. D. Co. 199 N. Y. 479, 37 L.R.A.(N.S.) 363, 93 N. E. 81, in which it was held that, even where both parties are responsible for the delays beyond the fixed time, the obligation for liquidated damages is annulled, and, in the absence of a provision substituting another date, it cannot be revived, and the recovery for subsequent delays must be for actual loss proved to have been sustained.

This principle is applicable here; the conduct of the government's agents had caused the delays up to May 1, 1913, and the subsequent delays, though chargeable to the claimant, would only give rise to a claim for damages measured by the actual loss sustained. Mosler Safe Co. v. Maiden Lane S. D. Co. supra. We think the application of this rule is not changed by the difficulty suggested, that it might be impracticable to prove actual damages. This fact, if such it be, would not permit the government [244] by its own fault to prevent the performance of the contract, and to do that which amounts to a waiver of the stipulation, and then insist upon it as a rule of damages. We think the court of claims was right upon this principal branch of the case.

There are certain minor assignments of error to the conclusions and judgment of the court of claims. The government was held responsible for the extra cost of enclosing certain machinery in casing necessitated by its building a plank walk across the top of the pipe in the pumping plant to protect its workmen from high speed gearing. The court of claims found that this expense was made necessary by the government, and allowed for it. We find no error in this. Also, as to the assignment of error to the judgment of the court of claims under finding 11, awarding damages for repairs made necessary by the breakage of certain pipes, caused by sudden increase in the pressure in the salt and fresh water systems in the Navy Yard, the court of claims found that these breaks were caused by the government without notice to the claimant, and without its fault. We find no error in the judgment of the court of claims awarding damages under this finding.

It follows that the judgment of the Court of Claims is affirmed.

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[245] UNITED STATES, Appt.,
v.
FIRST NATIONAL BANK OF DETROIT, MINNESOTA. (No. 873.)

UNITED STATES, Appt.,
v.
NICHOLS-CHISHOLM LUMBER COMPANY, the Minneapolis Trust Company, and Hiram R. Lyon. (No. 874.)

UNITED STATES, Appt.,
v.
NICHOLS-CHISHOLM LUMBER COMPANY, the Minneapolis Trust Company, and Hovey C. Clark. (No. 875.)

(See S. C. Reporter's ed. 245-262.)

Indians — restrictions on alienation — removal — mixed bloods.

Every Chippewa Indian having an identifiable admixture of white blood, however small, is a "mixed-blood" Indian within the meaning of the Clapp amendment (act of June 21, 1906 [34 Stat. at L. 325, chap. 3504], act of March 1, 1907 [34 Stat. at L. 1015, chap. 2285]), removing all restrictions as to sale, encumbrance, or taxation of allotments within the White Earth Indian Reservation, held by mixed-blood Indians, and providing that the right of full-blood Indians to be free from such restrictions shall rest with the Secretary of the Interior, who may remove the same when satisfied that such full-blood Indians are competent to handle their own affairs.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

[Nos. 873, 874, 875.]

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Argued April 7, 1914. Decided June 8, 1914.

TWO APPEALS from the United States Circuit Court of Appeals for the Eighth Circuit to review decrees which reversed decrees of the District Court for the District of Minnesota, in favor of the government in a suit to set aside Indian conveyances. Affirmed. Also an

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree dismissing the bill in a suit by the United States to set aside an Indian conveyance. Affirmed.

See same case below, 126 C. C. A. 76, 208 Fed. 988.

Statement by Mr. Justice Day:

These suits were brought by the United States in the circuit court of the United States for the district of Minnesota against the appellees, to set aside certain conveyances under and through which the appellees claimed title to lands, particularly described, in the White Earth Indian Reservation in Minnesota. The decree of the district court (which had succeeded the circuit court) in the first two cases in favor of the government was reversed by the circuit court of appeals for the eighth circuit, while the decree dismissing the bill in the last case was affirmed (126 C. C. A. 76, 208 Fed. 988).

By the treaty of March 19, 1867 (16 Stat. at L. 719), creating the White Earth Indian Reservation, the Chippewas of the Mississippi ceded all their land in Minnesota, except certain described tracts, to the United States, and the government set apart the White Earth Reservation for their use, and provision was made for the certification to each Indian of not to exceed 160 acres of the land of such reservation in lots of 40 acres each, upon the cultivation of 10 acres, provided, that the land should be exempt from taxation and sale for debt, and should not be alienated [247] except with the approval of the Secretary of the Interior, and then only to a Chippewa Indian. The act of February 8, 1887 (24 Stat. at L. 388, chap. 119), provided for the allotment of land in the Indian reservations in severalty to the Indians, and that (§ 5) upon the approval of the allotments patents should issue therefor in the name of the allottees, which should be of the legal effect and declare that the United States held the land for twenty-five years, in trust for the sole use and benefit of the Indian to whom the allotment was made, or, in case of his death, of his heirs, according to the laws of the state or territory where the land was located, and that, at the expiration of that time, the United States would convey the same to the Indian or his heirs in fee, discharged of the trust, and free of all charge or encumbrance whatsoever; provided that the President of the United States might, in his discretion, extend the period, and provided that any conveyance or contract touching the lands before the expiration of the trust period should be null and void. The Nelson act of January 14, 1889 (25 Stat. at L. 642, chap. 24), provided for the relinquishment to the United States of that part of the reservation remaining after the allotment, subject to the act of February 8, 1887, supra, in severalty, to the Chippewa Indians in Minnesota, the act to become operative only upon the assent of a certain number of Indians being obtained. By the act of February 28, 1891 (26 Stat. at L. 794, chap. 383), the allotments were limited to 80 acres to each Indian; but by the Steenerson act of April 28, 1904 (33 Stat. at L. 539, chap. 1786), the maximum allotments of the White Earth Reservation were made 160 acres. The acts of June 21, 1906 (34 Stat. at L. 325, 353, chap. 3504), and March 1, 1907 (34 Stat. at L. 1015, 1034, chap. 2285), in what is known as the Clapp amendment, removed the restrictions upon alienation as respects mixed-blood Indians, but left the matter, so far as full bloods were concerned, to the Secretary of the Interior.

The government relied, in the first case, upon its title [248] to a certain parcel of land as a part of the public domain set apart as the White Earth Reservation, and the fact that, although, under the various acts of Congress above mentioned, authority was given to segregate certain parcels of land from others in the reservation, and to allot them to members of the band, and O-bah-baum, an Indian woman of that tribe, had been given a trust patent, as provided for by the act of February 8, 1887, supra, and had given a mortgage to the defendant in that case upon such land, she had no right or authority so to do. It prayed that the mortgage be annulled, as being a cloud upon the government's title.

The allegations of the complaints in the second and third cases are the same, except that the allottee in the former is named Bay-bah-mah-ge-wabe, and in the latter Equay-zaince, and in both cases that there are outstanding warranty deeds and mortgages, that there were intermediate parties not made parties of record, and that an accounting was asked for timber already cut, and an injunction from cutting standing timber.

The defendant in the first case, besides

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denying that the reservation was a part of the public domain, and alleging that the property was that of the Indians, and that, after selection, the allottee acquired a fee-simple title, notwithstanding the acts of Congress, particularly set up the fact that O-bah-baum is a mixed-blood Chippewa Indian, and one of the class referred to in the Clapp amendment, and therefore emancipated from the pretended supervision of the government, and able to transfer her property as a citizen of the United States. The defendant also alleged that, under the facts, the Indians having made affidavit that they were mixed bloods and the good faith of the defendant, the government should be required to place the defendant *in statu quo* before the relief asked could be granted. The lumber company, defendant in the second case, and the defendants in the third case, filed [249] answers of similar purport, with the additional averment that, under the facts stated, the matter relating to the timber was immaterial; but, if the court found against defendants' title, they would account for the timber cut by them.

By stipulation or introduction in evidence the following facts were made to appear:

The three Indians here involved are adult Chippewa Indians, residing upon the White Earth Reservation. O-bah-baum has some white blood, derived from a remote ancestor, but not to exceed one thirty-second; Bay-bah-mah-ge-wabe has one sixteenth of white blood, and Equay-zaince has one eighth of white blood.

A question having arisen with reference to the construction of the term "mixed blood," as used in the treaty of September 30, 1854 (10 Stat. at L. 1109), between the United States and the Chippewa Indians of Lake Superior and the Mississippi, the Commissioner of Indian Affairs, in a letter to the Indian agent at Detroit, Michigan, said that "the term 'mixed-bloods' has been construed to mean all who are identified as having a mixture of Indian and white blood. The particular proportion of each blood is therefore immaterial, where the provision is so broad as that stated in the treaty."

The Indian agent at the White Earth Reservation, after the passage of the Clapp amendment, came to Washington to consult the Commissioner of Indian Affairs, and was referred by him to the Land Division; and, after discussing the situation with a man represented to be in charge of such matters, it was agreed that the act did not require a showing of any definite quantum of foreign blood to constitute a mixed blood, and to his knowledge this was the construction generally adopted by those who dealt with the Indians on the White Earth Reservation. The Chief of the Land Division at the time of the passage of the Clapp amendment testified that, to his knowledge, no question [250] was raised as to the quantum of foreign blood. In a communication dated October 6, 1910, to the Commissioner of Indian Affairs, the Special Assistant to the Attorney General and the special Indian agent at Detroit, Minnesota, expressed the belief that the attorneys for the government were going to contend that the term "mixed blood" should be interpreted to embrace only those of half or less of Indian blood, and cited a certain act of the United States (of February 6, 1909, 35 Stat. at L. 600, chap. 80) in which the term "Indian" was defined to include the aboriginal races inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood, which act concerned the sale of liquor or firearms to an Indian or half breed. They also cited certain treaties with the Chippewas wherein it was shown that half breeds are persons of less than half blood, and not regarded as Indians or members of the Chippewa nation: article 3 of the treaty of July 29, 1837 (7 Stat. at L. 536), article 4 of the treaty of October 4, 1842 (7 Stat. at L. 591), article 4 of the treaty of August 2, 1847 (9 Stat. at L. 904), article 6 of the treaty of February 22, 1855 (10 Stat. at L. 1165), and article 4 of the treaty of March 19, 1867 (16 Stat. at L. 719), from which it was summarized that in these treaties persons classed as half breeds or mixed bloods, or less than half blood, were not recognized by the government or the Chippewas as Indians entitled to the rights and privileges of Chippewa Indians unless by special provisions of treaties, as theretofore shown. The Second Assistant Commissioner, in his reply of November 19, 1910, stated that the Office was inclined to give the expressions "full bloods" and "mixed bloods" their ordinary meaning, which would be more reasonable than to hold that the term "full bloods" included those of admitted pure blood and others above the half blood. It was also said in his letter, however, that a conference would be had with the Department of Justice, and further advice given. The Commissioner of Indian Affairs [251] said that he had never given an official construction to the term "mixed blood."

It was stipulated that, in administering the Bureau of Indian Affairs under the Clapp amendment, and especially in issuing patents thereunder, the Department had not required any statement as to the quantum of foreign blood, but had issued patents upon the showing that the applicant was a mixed blood. Several instances were

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shown by the records of allotments having been made to allottees on the White Earth Reservation having but one sixteenth or one thirty-second of Indian blood, while other instances were shown where allotment had been denied because applicant was of "doubtful blood."

A white man who had resided for a long time among the Chippewa Indians stated that in the early period the terms "mixed blood" and "half breed" were synonymous, applying to one of mixed white and Indian blood, irrespective of the percentage, and that later the term "mixed blood" was more commonly used, while the term "half breed" was applied to one having nearly equal parts of white and Indian blood. The general impression of business men in and about the White Earth Reservation was that any Indian who had white blood in his veins was a mixed blood.

Several very elderly Indians testified, however, that the Indians regarded the term "mixed blood" as applying to those having practically half white and half Indian blood.

The district court, after stating that the question was one of first impression, said that Congress intended competency to be the test, and came to the conclusion that an Indian having an admixture of one eighth white blood might come within the term, but that beyond that the white blood would not affect the capacity of the Indian to manage his own affairs, and therefore dismissed the bill in the third case and entered a decree in favor of the complainants in the other two cases. The circuit court of appeals reached the conclusion that every Chippewa [252] Indian having an identifiable mixture of other than Indian blood, however small, is a mixed-blood Indian, and all others are full-blood Indians within the meaning of the Clapp amendment, and accordingly reversed the decree of the district court in the first two cases and affirmed the decree in the third case.

Solicitor General Davis argued the cause, and, with Mr. W. A. Norton, Special Assistant to the Attorney General, and Mr. C. C. Daniels, filed a brief for appellant:

The act should be so construed as to subserve the well-defined and well-established policy of Congress.

Church of the Holy Trinity v. United States, 143 U. S. 457, 459, 36 L. ed. 226, 228, 12 Sup. Ct. Rep. 511; Durousseau v. United States, 6 Cranch, 307, 3 L. ed. 232; Llonberger v. Rouse, 9 Wall. 468, 475, 19 L. ed. 721, 724; United States v. Freeman, 3 How. 556, 11 L. ed. 724; United States v. Lacher, 134 U. S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625.

It has been the settled policy of Congress in dealing with the Indians to make competency alone the test for removing these restrictions.

Smith v. Stevens, 10 Wall. 321, 326, 19 L. ed. 933, 935.

Congress having declared in plain and unmistakable language that lands allotted to these Indians would be held in trust for them for a period of twenty-five years, and the assent of the Indians to a cession of their reservation having been given in reliance upon that promise, no subsequent act of Congress should be construed to revoke this promise unless couched in language so plain and certain as to leave room for no other interpretation.

Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216.

Assuming the competency of the white man and the incompetency of the Indians, it is but reasonable, in making a classification based on blood, to include in the competent class all who have more than one-half white blood, and in the incompetent class all who have more than one-half Indian blood.

Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511.

The act is to be interpreted according to the understanding of its terms among the Indians themselves.

Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; Starr v. Long Jim, 227 U. S. 613, 57 L. ed. 670, 33 Sup. Ct. Rep. 358.

The meaning for which the government contends is not foreclosed either by departmental construction or judicial decisions.

Northern P. R. Co. v. United States, 227 U. S. 355, 57 L. ed. 544, 33 Sup. Ct. Rep. 368; Merritt v. Cameron, 137 U. S. 542, 551, 34 L. ed. 772, 775, 11 Sup. Ct. Rep. 174; Deweese v. Smith, 66 L.R.A. 971, 45 C. C. A. 408, 106 Fed. 438; Jeffries v. Ankeny, 11 Ohio, 375; Thacker v. Hawk, 11 Ohio, 376; Lane v. Baker, 12 Ohio, 237.

Mr. Ransom J. Powell argued the cause, and, with Messrs. George T. Simpson and Ernest C. Carman, filed a brief for appellees:

The Clapp act was obviously designed to create an arbitrary classification.

(a) The language is clear and explicit, and the term "mixed blood" had acquired a definite and well-understood meaning.

Standard Dict.; Century Dict.; 14 Enc. Britannica, p. 467; Hodge, Hand Book of American Indians, Government Printing Office, 1907, pp. 365, 850, 913; 5 Words & Phrases, p. 4546; 27 Cyc. 811; Hamilton v. Wabash, St. L. & P. R. Co. 21 Mo. App. 152; Daniel v. Guy, 19 Ark. 121; Thur-

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man v. State, 18 Ala. 276; Johnson v. Norwich, 29 Conn. 407; Van Camp v. Board of Education, 9 Ohio St. 407; Gentry v. McMinnis, 3 Dana, 382; Scott v. Raub, 88 Va. 727, 14 S. E. 178; Jones v. Com. 80 Va. 538; State v. Dempsey, 31 N. C. (9 Ired. L.) 384; State v. Chavers, 50 N. C. (5 Jones, L.) 11; Hopkins v. Bowers, 111 N. C. 175, 16 S. E. 1; State v. Davis, 2 Bail. L. 558; Thacker v. Hawk, 11 Ohio, 377.

(b) The tendency at that time was toward the removal of restrictions by arbitrary act of Congress.

(c) If competency was the controlling element of the classification in the Clapp act, there was no excuse for its passage. All cases of competency were provided for by the Burke act of May 8, 1906.

(d) The interpretation of the term "mixed blood" necessitates the interpretation of the term "full blood." Congress made two classes, not three.

In seeking the intent of the legislature, the first consideration is the natural, ordinary, and generally understood meaning of the terms used.

United States v. Fisher, 2 Cranch, 358, 2 L. ed. 304; Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; Sloan v. United States, 118 Fed. 285; United States v. Temple, 105 U. S. 97, 26 L. ed. 967; Maillard v. Lawrence, 16 How. 251, 14 L. ed. 925; United States v. Union P. R. Co. 91 U. S. 72, 23 L. ed. 224; Parsons v. Hunter, 2 Sumn. 422, Fed. Cas. No. 10,778; Levy v. M'Cartee, 6 Pet. 102, 110, 8 L. ed. 334, 337; United States v. Goldenberg, 168 U. S. 95, 102, 42 L. ed. 394, 398, 18 Sup. Ct. Rep. 3; The Cherokee Tobacco (Boudinot v. United States) 11 Wall. 616, 20 L. ed. 227; Edison Electric Light Co. v. United States Electric Lighting Co. 35 Fed. 138.

A dispute over the meaning of a statute does not, of itself, show an ambiguity in the act.

Northern P. R. Co. v. Sanders, 47 Fed. 610; Webber v. St. Paul City R. Co. 38 C. C. A. 79, 97 Fed. 140; Swarts v. Siegel, 117 Fed. 13; Shreve v. Cheesman, 16 C. C. A. 413, 32 U. S. App. 676, 69 Fed. 789.

Subsequent experience is no guide to interpretation.

United States v. Union P. R. Co. 91 U. S. 72, 23 L. ed. 224; Platt v. Union P. R. Co. 99 U. S. 48, 25 L. ed. 424.

Where Congress has by apt terms created a class, or drawn distinctions between classes of persons or objects, it is not competent for the courts, under the guise of interpretation, to extend or limit the operation of the statute.

United States v. Colorado & N. W. R. Co. 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 321, 13 Ann. Cas. 893; Brun v. Mann, 12 L.R.A.(N.S.) 154, 80 C. C. A. 513, 151 Fed. 145; United States v. Temple, 105 U. S. 97, 26 L. ed. 967; Minor v. Mechanics' Bank, 1 Pet. 46, 7 L. ed. 47; Folsom v. United States, 160 U. S. 121, 40 L. ed. 363, 16 Sup. Ct. Rep. 222; United States v. Choctaw Nation, 179 U. S. 494, 45 L. ed. 291, 21 Sup. Ct. Rep. 149; Pirie v. Chicago Title & T. Co. 182 U. S. 438, 451, 45 L. ed. 1171, 1178, 21 Sup. Ct. Rep. 906; The Paulina v. United States, 7 Cranch, 52, 61, 3 L. ed. 266, 269; Barnitz v. Casey, 7 Cranch, 456, 468, 3 L. ed. 403, 407; United States v. Goldenberg, 168 U. S. 95, 102, 42 L. ed. 394, 398, 18 Sup. Ct. Rep. 3; Maxwell v. Moore, 22 How. 185, 191, 16 L. ed. 251, 253; Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 55 L ed. 738, 31 Sup. Ct. Rep. 578; Thurman v. State, 18 Ala. 276.

The court is not at liberty to amend the statute, or read words into it to make it conform to what the court may believe to be the spirit of the act, or in order to escape the injustice of the law.

Maxwell v. Moore, 22 How. 185, 16 L. ed. 251; United States v. Goldenberg, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3; Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. Rep. 870; Re Conway, 17 Wis. 527; 17 Ops. Atty. Gen. 65; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Hadden v. The Collector (Hadden v. Barney) 5 Wall. 107, 18 L. ed. 518; Gardner v. Collins, 2 Pet. 92, 7 L. ed. 359.

The practical construction by the departments of the government, and the dealings of the citizens with the subject in reliance upon that construction, are entitled to consideration in cases of doubt.

United States v. Union P. R. Co. 37 Fed. 555, 148 U. S. 562, 37 L. ed. 560, 13 Sup. Ct. Rep. 724; Le Marchal v. Tegarden, 99 C. C. A. 236, 175 Fed. 682; Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; Malonny v. Mahar, 1 Mich. 26; Westbrook v. Miller, 56 Mich. 148, 22 N. W. 256; United States v. Alabama G. S. R. Co. 142 U. S. 615, 35 L. ed. 1134, 12 Sup. Ct. Rep. 306; Kelly v. Multnomah County, 18 Or. 356, 22 Pac. 1110; Schell v. Fauché, 138 U. S. 562, 34 L. ed. 1040, 11 Sup. Ct. Rep. 376; United States v. Moore, 95 U. S. 760, 763, 24 L. ed. 588, 589; Kirkman v. McClaughry, 90 C. C. A. 86, 160 Fed. 436; United States v. State Bank, 6 Pet. 29, 8 L. ed. 308; 2 Ops. Atty. Gen. 558; Re State Lands, 18 Colo. 359, 32 Pac. 986; United States v. Hill, 120 U. S. 169, 182, 30 L. ed. 627, 632,

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7 Sup. Ct. Rep. 510; Bloxham v. Consumers' Electric Light & Street R. Co. 36 Fla. 519, 29 L.R.A. 507, 51 Am. St. Rep. 44, 18 So. 444; Harrison v. Com. 83 Ky. 162; Iowa v. Carr, 112 C. C. A. 477, 191 Fed. 257; Heckman v. United States, 224 U. S. 413, 56 L. ed. 820, 32 Sup. Ct. Rep. 424; Johnson v. Ballou, 28 Mich. 378; State Tax Comrs. v. Holliday, 150 Ind. 216, 42 L.R.A. 826, 49 N. E. 14; United States v. Chandler-Dunbar Water Power Co. 81 C. C. A. 221, 152 Fed. 25; United States v. Walker, 139 Fed. 409; St. Paul, S. & T. F. R. Co. v. First Div. St. Paul & P. R. Co. 26 Minn. 31, 49 N. W. 303; Menard v. Massey, 8 Haw. 293, 12 L. ed. 1085; Magee v. Doe, 22 Ala. 718.

Congress was familiar with apt terms to create a classification based upon a given quantum of Indian and other than Indian blood. If it had intended to make the classification urged by the government, it could easily have said so.

Pennock v. Franklin County, 103 U. S. 44, 26 L. ed. 367; Smith v. Bonifer, 154 Fed. 883; Farrington v. Tennessee, 95 U. S. 679, 689, 24 L. ed. 558, 561; Union Nat. Bank v. Matthews, 98 U. S. 621, 627, 25 L. ed. 188, 189; United States v. Koch, 5 L.R.A. 130, 40 Fed. 252; Re Drake, 114 Fed. 229; Moore v. American Transp. Co. 24 Haw. 1, 32, 16 L. ed. 674; Shaw v. North Pennsylvania R. Co. (Shaw v. Merchants' Nat. Bank) 101 U. S. 557, 565, 25 L. ed. 892, 894; Harrington v. Herrick, 12 C. C. A. 231, 29 U. S. App. 103, 64 Fed. 469; Austin v. United States, 155 U. S. 417, 39 L. ed. 206, 15 Sup. Ct. Rep. 167; Re Downing, 5 C. C. A. 575, 14 U. S. App. 434, 56 Fed. 470; 21 Ops. Atty. Gen. 418; Louisville Trust Co. v. Cincinnati, 73 Fed. 726; Parker v. United States, 22 Ct. Cl. 104; Grace v. Collector of Customs, 24 C. C. A. 606, 48 U. S. App. 225, 79 Fed. 319; Strode v. Stafford Justices, 1 Brock. 162, Fed. Cas. No. 13,537; Ryan v. Carter, 93 U. S. 83, 23 L. ed. 809; Tompkins v. Little Rock & Ft. S. R. Co. 125 U. S. 127, 31 L. ed. 624, 8 Sup. Ct. Rep. 762; United States v. Ryder, 110 U. S. 739, 28 L. ed. 311, 4 Sup. Ct. Rep. 196; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 744, 23 L. ed. 638; Butz v. Muscatine. 8 Wall. 580, 19 L. ed. 492; James v. Milwaukee, 16 Wall. 161, 21 L. ed. 267; United States v. Anderson, 9 Wall. 66, 19 L. ed. 617; Lawrence v. Allen, 7 How. 796, 12 L. ed. 918; Northern P. R. Co. v. Dudley, 85 Fed. 86; Re Baker, 96 Fed. 957; Re Baumann, 96 Fed. 948; Steele v. Buel, 44 C. C. A. 287, 104 Fed. 970; United States v. Slazenger, 113 Fed. 524; Ex parte Byers, 32 Fed. 409; Ullman v. Meyer, 10 Fed. 243; Hall's Case, 17 Ct. Cl. 46; The Cherokee Tobacco (Boudinot v. United States) 11 Wall. 616, 20 L. ed. 227; Gardner v. Collins, 2 Pet. 87, 7 L. ed. 357.

Mr. Justice Day, after making the foregoing statement, delivered the opinion of the court:

Before the transfers here complained of, and while the lands were held in trust, subject to the provisions of the act of February 8, 1887, supra, the Clapp amendment was passed, having the purpose of removing the restrictions upon alienation in certain cases. This act provides:

"That all restrictions as to the sale, encumbrance, or taxation for allotments within the White Earth Reservation in the state of Minnesota, heretofore [amended March 1, 1907, the word 'heretofore' being substituted for the word 'now'] or hereafter held by adult mixed-blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple, or such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments; and as to full bloods, said restrictions shall be removed when the Secretary of the Interior is satisfied that said adult full-blood Indians are competent to handle their own affairs, and in such case the Secretary of the Interior shall issue to such Indian allottee a patent in fee simple upon application."

[258] It is at once apparent from reading this act that it deals with two classes,—adult mixed-blood Indians, concerning whom all restrictions as to sale, encumbrance, or taxation are removed, and full-blood Indians, whose right to be free from restrictions shall rest with the Secretary of the Interior, who may remove the same upon being satisfied that such full-blood Indians are competent to handle their own affairs.

This case turns upon the construction of the words "mixed-blood Indians." It is the contention of the government that mixed blood means those of half white or more than half white blood, while the appellees insist, and this was the view adopted by the circuit court of appeals, that the term "mixed blood" includes all who have an identifiable mixture of white blood. If the government's contention be correct, it follows that, for the purposes of this suit, all of less than half white blood must be regarded as full-blood Indians, all others as mixed bloods. Upon the appellees' contention the line is drawn between full bloods as one class, and all having an identifiable admixture of white blood as the other.

If we apply the general rule of statutory construction that words are to be given

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their usual and ordinary meaning, it would seem clear that the appellees' construction is right; for a full blood is obviously one of pure blood, thoroughbred, having no admixture of foreign blood. That this natural and usual signification of plain terms is to be adopted as the legislative meaning in the absence of clear showing that something else was meant is an elementary rule of construction frequently recognized and followed in this court. United States v. Fisher, 2 Cranch, 358, 399, 2 L. ed. 304, 317; Lake County v. Rollins, 130 U. S. 662, 670, 32 L. ed. 1060, 1063, 9 Sup. Ct. Rep. 651; Dewey v. United States, 178 U. S. 510, 521, 44 L. ed. 1170, 1174, 20 Sup. Ct. Rep. 981. Interpreted according to the plain import of the words, the persons intended to be reached by the clause are divided into two, and only two, well-defined classes—full-blood Indians and mixed [259] bloods. There is no suggestion of a third class, having more than half of white blood or any other proportion than is indicated in the term "mixed blood," as contrasted with full blood. If the government's contention is correct, the Indians of full blood must necessarily include half bloods, and mixed bloods must mean all having less than half white blood, and none others. Such construction is an obvious wresting of terms of plain import from their usual and well-understood signification.

But the government insists that to effect the legislative purpose the words must be interpreted as the Indians understood them, and cases from this court (Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; Starr v. Long Jim, 227 U. S. 613, 57 L. ed. 670, 33 Sup. Ct. Rep. 358) are cited to the effect that Indian treaties and acts to which the Indians must give consent before they become operative must be interpreted so as to conform to the understanding of the Indians as to the meaning of the terms used. The justice and propriety of this method of interpretation are obvious and essential to the protection of an unlettered race, dealing with those of better education and skill, themselves framing contracts which the Indians are induced to sign. But the legislation here in question is not in the nature of contract, and contains no provision that makes it effectual only upon consent of the Indians whose rights and privileges are to be affected. Evidently this legislation contemplated in some measure the rights of others who might deal with the Indians, and obviously was intended to enlarge the right to acquire as well as to part with lands held in trust for the Indians.

The government refers, in support of its contention, to reports of congressional committees, showing after effects of this legislation, which was followed, as the reports tend to show, by improvident sales and encumbrances of Indian lands and wasteful extravagance in the disposition of the proceeds of sales, resulting in suffering to the former proprietors of the lands sold and mortgaged. But [260] these after effects can have little weight in determining the meaning of the legislation, and certainly cannot overcome the meaning of plain words used in legislative enactments. If the effect of the legislation has been disastrous to the Indians, that fact will not justify the courts in departing from the terms of the act as written. If the true construction has been followed with harsh consequences, it cannot influence the courts in administering the law. The responsibility for the justice or wisdom of legislation rests with the Congress, and it is the province of the courts to enforce, not to make, the laws. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 294, 52 L. ed. 1061, 1067, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; United States ex rel. Texas Portland Cement Co. v. McCord, 233 U. S. 157, 163, ante, 893, 897, 34 Sup. Ct. Rep. 550.

The government further insists that its interpretation of the act is consistent with its policy to make competency the test of the right to alienate, and that the legislation in question proceeds upon the theory that those of half or more white blood are more likely to be able to take care of themselves in making contracts and disposing of their lands than those of lesser admixture of such blood. But the policy of the government in passing legislation is often an uncertain thing, as to which varying opinions may be formed, and may, as is the fact in this case, afford an unstable ground of statutory interpretation. Hadden v. The Collector (Hadden v. Barney), 5 Wall. 107, 111, 18 L. ed. 518, 519. And again, Congress has in other legislation not hesitated to place full-blood Indians in one class and all others in another. Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578. In that case this court had occasion to deal with certain sections of the act of April 26, 1906 (34 Stat. at L. 137, chap. 1876), providing that no full-blood Indian of certain tribes should have power to alienate or encumber allotted lands for a period of twenty-five years, unless restrictions were removed by act of Congress. By § 22 of the act all adult heirs of deceased Indians were given the right to convey their lands, but for the last sentence of the section, which kept full-blood [261] Indians to their right to convey under the supervision of the Secretary of the Interior. Therefore all

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adult heirs of any deceased Indian other than a full blood might convey, but the full blood only with the approval of the Secretary of the Interior. In this important provision the restrictions were removed as to all classes of Indians other than full bloods. In other words, there as here, the Indians were divided into two classes,—full bloods in one class and all others in the second class.

Furthermore, the appellees' construction accords with the departmental construction, as shown by the facts stipulated. Such was the construction given by the Indian Commissioner to the treaty of September 30, 1854, 10 Stat. at L. 1109, wherein provision was made for mixed-blood Indians among the Chippewas, and the Indian agent at Detroit, Michigan, was instructed by the Indian Commissioner that the term "mixed blood" had been construed to mean all who are identified as having a mixture of Indian and white blood. Such was the interpretation of the Department of Interior, in the first place, at least, in administering the matter under the Clapp amendment. It is true that the government representatives at Detroit, Minnesota, were of the opposite opinion, for the reasons we have stated above, and that the Second Assistant Commissioner, in his reply, while reaching the conclusion we have, stated that he would confer with the Department of Justice.

While departmental construction of the Clapp amendment does not have the weight which such constructions sometimes have in long-continued observance, nevertheless it is entitled to consideration,—the early administration of that amendment showing the interpretation placed upon it by competent men having to do with its enforcement. The conviction is very strong that if Congress intended to remove restrictions only from those who had half white blood or more, it would have inserted in the [262] act the words necessary to make that intention clear; that is, we deem this a case for the application of the often expressed consideration, aiding interpretation, that if a given construction was intended, it would have been easy for the legislative body to have expressed it in apt terms. Farrington v. Tennessee, 95 U. S. 679, 689, 24 L. ed. 558, 561; Union Nat. Bank v. Matthews, 98 U. S. 621, 627, 25 L. ed. 188, 189; Tompkins v. Little Rock & Ft. S. R. Co. 125 U. S. 109, 127, 31 L. ed. 615, 624, 8 Sup. Ct. Rep. 762; United States v. Lexington Mill & Elevator Co. 232 U. S. 399, 410, ante, 658, 662, 34 Sup. Ct. Rep. 337.

Congress was very familiar with the situation, the subject having been before it in many debates and discussions concerning Indian affairs. This was a reservation inhabited by Indians of full blood and others of all degrees of mixed blood, some with a preponderance of white blood, others with less, and many with very little. If Congress, having competency in mind, and that alone, had intended to emancipate from the prevailing restriction on alienation only those who were half white or more, by a few simple words it could have effected that purpose. We cannot believe that such was the congressional intent, and we are clearly of opinion that the courts may not supply the words which Congress omitted. Nor can such course be induced by any consideration of public policy or the desire to promote justice, if such would be its effect, in dealing with dependent people.

We reach the conclusion that the Circuit Court of Appeals rightly construed this statute, and its decrees are affirmed.

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[263] LAZARUS, MICHEL, & LAZARUS, etc., Appts.,
v.
EZRA P. PRENTICE, Ancillary Receiver of A. Musica & Son, et al.

(See S. C. Reporter's ed. 263-269.)

Appeal — from circuit court of appeals — bankruptcy case.

1. A controversy in bankruptcy, appealable under the Judicial Code, § 128 (36 Stat. at L. 1133, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 193), to the circuit court of appeals, and thence to the Federal Supreme Court, was not initiated by an attempted intervention in a summary proceeding in a court of ancillary jurisdiction to restore certain property of bankrupts in the custody of those having no right to it to the bankruptcy court of original jurisdiction, where the interveners claim solely under alleged assignments of the property, made after the filing of the petition in the bankruptcy proceedings in the original case. [For other cases, see Appeal and Error, 804, 805, in Digest Sup. Ct. 1908.]

Appeal — motion to dismiss — prematurity — record not printed.

2. A motion to dismiss, for want of jurisdiction, an appeal to the Federal Supreme Court from a circuit court of appeals, is not premature because the record has not

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NOTE.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

On appellate jurisdiction of Federal Supreme Court in bankruptcy cases—see note to James v. Stone, 57 L. ed. U. S. 573.

On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to Wedding v. Meyler, 66 L.R.A. 833.

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been printed, where the Supreme Court is sufficiently advised as to the situation of the case from a printed transcript of the proceedings in the district court to dispose of the motion without doing injustice to the parties.

[For other cases, see Appeal and Error, VII. c, in Digest Sup. Ct. 1908.]

[No. 1012.]

Submitted May 4, 1914. Decided June 8, 1914.

APPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which affirmed a decree of the District Court for the Eastern District of Louisiana, dismissing a petition in intervention in an ancillary bankruptcy proceeding. Dismissed for want of jurisdiction.

See same case below, 211 Fed. 326.

The facts are stated in the opinion.

Messrs. **Henry L. Lazarus, David Sessler,** and **Girault Farrar** submitted the cause for appellants. Messrs. Herman Michel and Eldon S. Lazarus were on the brief:

This court has jurisdiction.

Houghton v. Burden, 228 U. S. 161, 57 L. ed. 780, 33 Sup. Ct. Rep. 491; Greey v. Dockendorff, 231 U. S. 513, ante, 339, 34 Sup. Ct. Rep. 166; Knapp v. Milwaukee Trust Co. 216 U. S. 545, 54 L. ed. 610, 30 Sup. Ct. Rep. 412; Hewit v. Berlin Mach. Works, 194 U. S. 206, 48 L. ed. 986, 24 Sup. Ct. Rep. 690.

No printed record having been submitted to appellants or to the court, the motion to dismiss or affirm should be denied, or be postponed until the regular hearing of this cause.

Power v. Baker, 112 U. S. 710, 28 L. ed. 825, 5 Sup. Ct. Rep. 361; Crane Iron Co. v. Hoagland, 108 U. S. 5, 27 L. ed. 630, 1 Sup. Ct. Rep. 17; St. Louis Nat. Bank v. United States Ins. Co. 100 U. S. 43, 25 L. ed. 547; Waterville v. Van Slyke, 115 U. S. 290, 29 L. ed. 406, 6 Sup. Ct. Rep. 39.

A motion to affirm, coupled with a motion to dismiss, will not be entertained unless there is color of ground in the motion to dismiss.

Chanute v. Trader, 132 U. S. 213, 33 L. ed. 346, 10 Sup. Ct. Rep. 67.

The question of jurisdiction in this case cannot be determined without opening the record and looking into the merits of the controversy; and hence the motion to dismiss should be denied, or referred to the hearing on the merits.

Lynch v. DeBarnal, 131 U. S. xciv, App. and 19 L. ed. 395.

Messrs. **H. Generes Dufour** and **Edwin T. Rice** submitted the cause for appellees:

This is a "proceeding in bankruptcy" within the meaning and intendment of the bankruptcy statute, as distinguished from a "controversy in bankruptcy."

Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269; Re Franklin Suit & Skirt Co. 197 Fed. 599; Re Friedman, 88 C. C. A. 306, 161 Fed. 260; Re Norris, 177 Fed. 598; Re Weinreb, 76 C. C. A. 609, 146 Fed. 243; Re Frankfort, 144 Fed. 721.

It would seem that the judgment of the district court should have been reviewed in the circuit court of appeals upon a petition for review, and that the decree of the circuit court of appeals upon such petition to review is final, and not subject to review in this court. Notwithstanding the fact that the review in the court of appeals was on appeal, it was proper to consider the same as on petition for review.

Holden v. Stratton, 191 U. S. 115, 48 L. ed. 116, 24 Sup. Ct. Rep. 45.

[265] Mr. Justice **Day** delivered the opinion of the court:

This is a motion to dismiss the appeal of Lazarus, Michel, & Lazarus, interveners in a certain bankruptcy proceeding in the district court of the United States for the eastern district of Louisiana, where the intervening petition was dismissed (205 Fed. 413), which order was affirmed on appeal to the circuit court of appeals for the fifth circuit (211 Fed. 326). The interveners now attempt to bring the case to this court by appeal on the ground that the judgment of the circuit court of appeals was not final in the proceeding.

The facts are not materially in dispute, and, as found by both the district court and the circuit court of appeals, appear to be: Antonio Musica and Philip Musica were partners in trade under the firm name of A. Musica & Son, importers of hair in the city of New York. They had become largely indebted, and on the 19th of March, 1913, a petition in involuntary bankruptcy was filed in the district court of the United States for the southern district of New York against the firm and the individual members thereof, and a receiver was appointed of the bankrupt estate, the partnership and its members being subsequently adjudicated bankrupts. On the same day the petition was filed the bankrupts and Arthur Musica were arrested as fugitives from justice in the city of New Orleans, and Lucy Grace Musica was held as a material witness. Upon search there was found upon their persons, variously distributed among them and concealed in divers ways, about $75,000 in money, and

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notes, mortgages, and insurance policies amounting in value to some $50,000 more. Without going into detail, upon the admissions of the parties it became perfectly apparent that the property in question belonged to the bankrupt estate. The district court for the eastern district of Louisiana, upon petition, confirmed the receiver [266] as temporary receiver of that court, and directed that all the property be turned over to him, to be transmitted to the trustee or trustees in bankruptcy of A. Musica & Son, elected and qualified in the district court for the southern district of New York, to be disposed of under and subject to the orders of that court.

While the Musicas took the case to the Circuit court of appeals, no appeal has been sued out by them to this court, and the only questions here concern the intervention of Lazarus, Michel, & Lazarus, who, on April 28, 1913, filed an intervening petition in the district court for the eastern district of Louisiana, claiming $15,000 as attorney fees for services rendered the Musicas in the proceedings against them in the courts of Louisiana to protect their property rights and possession, and for services to be rendered in representing them in proceedings in New York, if their services were there required. The decree of the district court, which was affirmed in the circuit court of appeals, dismissed the petition in intervention of Lazarus, Michel, & Lazarus, reserving their right to assert whatever claim they may have in the bankruptcy court of original and primary jurisdiction.

The filing of the petition and adjudication in the bankruptcy court in New York brought the property of the bankrupts, wherever situated, into *custodia legis*, and it was thus held from the date of the filing of the petition, so that subsequent liens could not be given or obtained thereon, nor proceedings had in other courts to reach the property, the court of original jurisdiction having acquired the full right to administer the estate under the bankruptcy law. Muller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269; Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 300, 56 L. ed. 208, 32 Sup. Ct. Rep. 96. Under clause 3 of § 2 of the bankruptcy act of 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418) the receiver in the original case would have had the right, acting under authority of the court to take possession in a summary [267] proceeding of the bankrupts' property, found as was this, in possession of those admittedly holding it for the bankrupts, and to hold the property until the qualification of the trustee, or until the bankruptcy petition should be dismissed, if that should happen. Bryan v. Bernheimer, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557; Mueller v. Nugent, supra. Prior to the amendment of June 25, 1910 (36 Stat. at L. 838, chap. 412, U. S. Comp. Stat. Supp. 1911, p. 1493), this court had held that in cases where the bankruptcy court of original jurisdiction could itself make a summary order for the delivery of property to the trustee or receiver, the court of ancillary jurisdiction could do so (Babbitt v. Dutcher, 216 U. S. 102, 54 L. ed. 402, 30 Sup. Ct. Rep. 372, 17 Ann. Cas. 969), and by clause 20, added to § 2 by the amendment of June 25, 1910, the bankruptcy courts were specifically given ancillary jurisdiction over persons or property within their respective territorial limits in aid of a trustee or receiver appointed in any court of bankruptcy. Under this amendment there can be no question that the district court in Louisiana had authority to appoint a receiver, and to take summary proceedings for the restoration of the bankrupts' estate, which was in the custody of people having no right to it, in order that the same might be turned over to the bankruptcy court having jurisdiction for administration. Under the circumstances here shown, there can be no question that this authority was properly exercised in this case.

The property, when seized, was, by virtue of the terms of the bankruptcy act, held for and to be turned over to the court of original jurisdiction, and no right could be acquired in it by assignment subsequent to the filing of the petition which would defeat this purpose. Such assignment was a mere nullity, properly disregarded by the bankruptcy court, and notwithstanding which it could direct the delivery of the bankrupts' property to the receiver by summary order. Babbitt v. Dutcher, supra. There is no contention that Lazarus, Michel, & Lazarus had any lien upon this property at the time of the apprehension [268] of the parties and the seizure of the property. Whatever rights they had are asserted to arise by virtue of the assignments made April 1, 1913, and after the filing of the original petition in bankruptcy.

For an attorney fee for services to be rendered in contemplation of bankruptcy the act makes specific provision in subdivision d of § 60, and the amount thus attempted to be used in contemplation of bankruptcy proceedings is subject to revision in the court of original jurisdiction, and not elsewhere. See Re Wood & Henderson, 210 U. S. 246, 52 L. ed. 1046, 28 Sup. Ct. Rep. 621.

The contention of the appellants, and the proposition upon which they rely to sustain jurisdiction in this court, is that, by

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their intervention in the proceeding in the United States district court in Louisiana, they initiated a controversy in the bankruptcy proceeding which is appealable to this court from the circuit court of appeals, as are ordinary cases in equity where original jurisdiction does not rest on diverse citizenship entirely (Judicial Code, § 128 [36 Stat. at L. 1133, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 193]). To maintain that proposition Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008; Knapp v. Milwaukee Trust Co. 216 U. S. 545, 54 L. ed. 610, 30 Sup. Ct. Rep. 412; Houghton v. Burden, 228 U. S. 161, 57 L. ed. 780, 33 Sup. Ct. Rep. 491, and cases of that character, are cited. In those cases it was held that controversies arising in bankruptcy, in the nature of plenary suits, concerning property claimed by others than the bankrupt, do not come under the special provisions of the bankruptcy act governing petitions for review and appeals, but take the course of ordinary cases in equity, and are not final in the circuit court of appeals where other cases of a similar character would not be.

The bankruptcy act provides for review under § 24b of administrative orders and decrees in the course of bankruptcy proceedings which are not made specially appealable under § 25a. And controversies arising in bankruptcy proceedings, of the character of which we [269] have spoken, under § 24a, are appealable like other equity cases. See Re Loving, 224 U. S. 183, 56 L. ed. 725, 32 Sup. Ct. Rep. 446. In this case the merely ancillary jurisdiction invoked in the seizure of this property in the hands of those holding it for the bankrupts was in a mere summary proceeding in bankruptcy, and its character could not be changed or its jurisdiction enlarged, by the attempted intervention of Lazarus, Michel, & Lazarus under alleged assignments of the property, made after the filing of the petition in bankruptcy proceedings in the original case. We think the district court was right in holding, and the circuit court of appeals right in affirming its decision, that whatever claim Lazarus, Michel, & Lazarus had under the circumstances here shown must be asserted in the court of original jurisdiction. The attempted intervention in the ancillary proceeding did not give jurisdiction over a controversy in bankruptcy appealable under the Judicial Code to the court of appeals, and thence to this court. This conclusion must result in the dismissal of the attempted appeal here.

It is contended, however, that this motion is premature, because the record in this case has not been printed. It is true that ordinarily such motions, made before the record is printed, must be accompanied by a statement of facts upon which they rest, or by printed copies of so much of the record as will enable the court to understand the case. Under the present practice it is permissible to file the record printed in the court below, and we have a printed transcript of the proceedings in the district court. In this printed record matters which the briefs do not dispute are shown, and we think we are sufficiently advised as to the situation of the case to dispose of it now without doing injustice to the parties. St. Louis Nat. Bank v. United States Ins. Co. 100 U. S. 43, 25 L. ed. 547.

We reach the conclusion that this appeal must be dismissed.

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[270] STONE, SAND, & GRAVEL COMPANY and American Surety Company of New York, Plffs. in Err.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 270–280.)

Damages — contract for public work — excess cost of reletting.

The exclusive measure of damages in case the government annuls a contract for public work because of the contractor's failure to commence the work by a stipulated day is to be found in a provision in such contract that the contractor shall forfeit all moneys and retained percentages due or to become due under the contract upon the giving of notice of annulment in case he fails to commence the performance of the work on the day specified therein, or, having commenced the work, fails, in the judgment of the engineer in charge, to prosecute the same faithfully and diligently, and the government therefore cannot recover, as damages sustained by reason of the contractor's default, the excess cost of reletting the contract.

[For other cases, see Damages, VI. b, in Digest Sup. Ct. 1908.]

[No. 302.]

Argued April 23, 1914. Decided June 8, 1914.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which, on a second writ of error, affirmed a judgment of the Circuit Court for the Eastern District of Louisiana in favor of the United States in a suit to recover from a public contractor and its surety the excess cost of reletting the contract after the contractor's default. Reversed and a new trial awarded.

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See same case below on first writ of error, 100 C. C. A. 651, 177 Fed. 321; on second writ of error, 115 C. C. A. 252, 195 Fed. 68.

The facts are stated in the opinion.

Mr. William Marshall Bullitt argued the cause and, with Messrs. Henry C. Willcox and T. M. Miller, filed a brief for plaintiffs in error:

This case turns upon the rights of the parties under a standard printed form of contract prepared and in general use by the United States; and hence, in case of doubt, should be construed most strongly against it.

United States v. O'Brien 220 U. S. 321, 327, 328, 55 L. ed. 481, 484, 485, 31 Sup. Ct. Rep. 406; Noonan v. Bradley, 9 Wall. 394, 407, 19 L. ed. 757, 761; Garrison v. United States, 7 Wall. 688, 690, 19 L. ed. 277, 278; Royal Ins. Co. v. Martin, 192 U. S. 149, 165, 48 L. ed. 385, 390, 24 Sup. Ct. Rep. 247; Texas & P. R. Co. v. Reiss, 183 U. S. 621, 626, 46 L. ed. 358, 360, 22 Sup. Ct. Rep. 252; Christian v. First Nat. Bank, 84 C. C. A. 53, 155 Fed. 709; Farrelly v. United States, 86 C. C. A. 539, 159 Fed. 674; Mt. Vernon Refrigerating Co. v. Fred W. Wolf Co. 110 C. C. A. 200, 188 Fed. 168.

It is precisely the same clause that was construed in United States v. O'Brien, 220 U. S. 321, 55 L. ed. 481, 31 Sup. Ct. Rep. 406, and the construction then given it should be either authoritatively controlling or conclusively persuasive here.

United States v. Harvey Steel Co. 227 U. S. 165, 166, 57 L. ed. 464, 465, 33 Sup. Ct. Rep. 258.

As such clause did not contain any provision for charging the excess cost of completion against the contractor, the contractor should neither be charged with such excess cost (United States v. O'Brien, 220 U. S. 321, 327, 55 L. ed. 481, 484, 31 Sup. Ct. Rep. 406), nor receive the profit from a cheaper completion (Quinn v. United States, 99 U. S. 30, 32, 25 L. ed. 269, 270).

The United States would have had no right to rescind or refuse to permit the contractor to perform further, merely because he did not begin on January 24, 1900, or even because he was slow and it seemed likely he had taken too big a job, and could not complete it within the contract time.

Kenedy Town & Improv. Co. v. First Nat. Bank, — Tex. Civ. App. —, 136 S. W. 558; Dingley v. Oler, 117 U. S. 490, 502, 503, 29 L. ed. 984, 987, 988, 6 Sup. Ct. Rep. 850; Smoot's Case (United States v. Smoot) 15 Wall. 36, 49, 21 L. ed. 107, 111; Holt v. United Security L. Ins. & T. Co. 21 L.R.A. (N.S.) 695, and note, 76 N. J. L. 585, 72 Atl. 301; King Iron Bridge & Mfg. Co. v. St. Louis, 10 L.R.A. 828, and note, 43 Fed. 768; Brady v. Oliver, 41 L.R.A.(N.S.) 67 and note, 125 Tenn. 595, 147 S. W. 1135, Ann Cas. 1913C, 376.

When the United States annulled the contract and retained the money or reserve percentage due the contractor, then, *ipso facto*, the United States exercised the sole, exclusive, and entire right it had under the contract, and it cannot hold the contractor liable for the excess cost of completing the work, which it had, by annulment, prohibited the contractor from further trying to perform.

Farrelly v. United States, 86 C. C. A. 539, 159 Fed. 674; United States v. O'Brien, 89 C. C. A. 664, 163 Fed. 1022, 220 U. S. 321, 327, 55 L. ed. 481, 484, 31 Sup. Ct. Rep. 406.

The forfeiture of retained pay is liquidated damages.

United States v. O'Brien, 220 U. S. 321, 55 L. ed. 481, 31 Sup. Ct. Rep. 406; Crawford v. Heatwole, 34 L.R.A.(N.S.) 587, and note, 110 Va. 358, 66 S. E. 46; Madler v. Silverstone, 34 L.R.A.(N.S.) 1, and note, 55 Wash. 159, 104 Pac. 165; King Iron Bridge & Mfg. Co. v. St. Louis, 10 L.R.A. 826, and note, 43 Fed. 768; K. P. Min. Co. v. Jacobson, 4 L.R.A.(N.S.) 755, and note, 30 Utah, 115, 83 Pac. 728; Sun Printing & Pub. Asso. v. Moore, 183 U. S. 642, 669, 46 L. ed. 366, 380, 22 Sup. Ct. Rep. 240; United States v. Bethlehem Steel Co. 205 U. S. 105, 119, 51 L. ed. 731, 736, 27 Sup. Ct. Rep. 450.

It is obvious that the present case is wholly different from those cases where the employer annulled the contract because the contractor, although still at work, had not completed the work by the time specified (Philadelphia, W. & B. R. Co. v. Howard, 13 How. 307, 14 L. ed. 157; Quinn v. United States, 99 U. S. 30, 25 L. ed. 269; Baer v. Sleicher, 82 C. C. A. 281, 153 Fed. 129; United States v. McGee, 171 Fed. 206); or where the contractor, failing to complete the work within the contract time, the employer refused to let him continue on it longer (United States v. Gleason, 175 U. S. 588, 44 L. ed. 284, 20 Sup. Ct. Rep. 228); or where, before the time for completion arrived, the contractor, having done some work, absolutely abandoned the work, and the employer waited until after the date specified for completion, and then annulled it (United States v. McMullen, 222 U. S. 460, 56 L. ed. 269, 32 Sup. Ct. Rep. 128; Hayes v. Nashville, 26 C. C. A. 59, 47 U. S. App. 713, 80 Fed. 641); or where, after the time for completion passed, the contractor abandoned the contract, left the work unfinished, and the employer then annulled the contract (Graham v. United States, 231 U. S. 474, 58 L. ed. 319, 34 Sup. Ct. Rep. 148);

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or where the contractor abandoned the contract *ab initio* and refused to do any work whatever (United States v. Grosjean, 106 C. C. A. 573, 184 Fed. 593; Sparhawk v. United States, 67 C. C. A. 274, 134 Fed. 720; Chesapeake Transit Co. v. Walker, 158 Fed. 850); or where the contractor, while engaged on the work, abandoned and repudiated the contract before the time for completion (American Surety Co. v. Woods, 45 C. C. A. 282, 105 Fed. 741).

It is equally unlike those cases where the contractor abandoned the work because wrongfully interfered with by the other party (Anvil Min. Co. v. Humble, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. Rep. 876, 18 Mor. Min. Rep. 97), or where the employer stopped a contractor who was not in default (United States v. Behan, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81), or where the employer annulled the contract while the contractor was in full prosecution of the work, with no intention of abandoning it (American Bonding Co. v. United States, 93 C. C. A. 310, 167 Fed. 915).

Solicitor General Davis argued the cause, and, with Mr. Francis H. McAdoo, Special Assistant to the Attorney General, filed a brief for defendant in error:

The government's right of action on the breach was not lost by annulling the contract.

United States v. McMullen, 222 U. S. 460, 56 L. ed. 269, 32 Sup. Ct. Rep. 128; United States v. O'Brien, 220 U. S. 321, 55 L. ed. 481, 31 Sup. Ct. Rep. 406.

The measure of recovery for the breach was the excess cost of completing the work, and was not limited to liquidated damages.

United States v. Maloney, 4 App. D. C. 505.

The government had a right to repudiate the contract on common-law principles, and is entitled to recover actual damages for the breach.

Bollman v. Burt, 61 Md. 415; Cleveland Rolling Mill Co. v. Rhodes, 121 U. S. 255, 30 L. ed. 920, 7 Sup. Ct. Rep. 882; Johnson v. Allen, 78 Ala. 387, 56 Am. Rep. 34; Norrington v. Wright, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12; Pope v. Porter, 102 N. Y. 366, 7 N. E. 304.

Mr. Justice Lurton delivered the opinion of the court:

This was an action by the United States against the Stone, Sand, & Gravel Company, a corporation, hereinafter styled the contractor, and its surety, the American Surety Company of New York, to recover the excess cost of completion of a certain contract for excavating 7,500,000 cubic yards of earth within certain designated localities in the work of improving the harbor of Vicksburg, Mississippi. For this work the United States agreed to pay 8.49 cents per cubic yard as the work progressed, and the contractor agreed to begin active work on or before December 5, 1899, with sufficient force and plant for an output of not less than 260,000 cubic yards per month, to be increased on or before January 5, 1900, to a plant adequate for an output of 330,000 cubic yards per month. Subsequently, upon application of the contractor, the time for beginning was extended to January 24, 1900. While by [275] January 24th the contractor had made large expenditures in preparing to commence work, it had not on that day assembled the necessary force or plant. For this reason the Chief of Engineers on the following day confirmed a prior, anticipatory recommendation of the engineer in charge that the contract should be annulled. An application for an extension of time was denied by the Secretary of War, and on March 7, 1900, formal notice was given to the contractor, as required by the contract, that it had failed to prosecute the work of excavation, etc., "in accordance with specifications and requirements . . . and the said contract is hereby annulled." The work was relet at a price of 12.4 cents per cubic yard, making an excess cost of $228,201.91, and an action was brought and judgment had against the contractor for that sum, minus a credit of $6,206.69, on account of certain voluntary work of an experimental character, which sum had been retained by the United States. There was also judgment against the surety company for $75,000, the full penalty of the bond.

The only breach of contract alleged was the failure to begin active operations on the day stipulated with a plant and force adequate to produce the monthly output required. The breach is confessed, but the error insisted upon here is that the contract, for such a breach, limits the measure of recovery to liquidated damages; namely, a forfeiture of all money or retained percentages due or to become due under the contract, and that the court below erred in allowing as damages the excess cost of the work under the reletting.

The clauses of the contract which give rise to this contention occur in the standard form of contract used by the War Department, known as form 19, and are the same clauses construed by this court in United States v. O'Brien, 220 U. S. 321, 55 L. ed. 481, 31 Sup. Ct. Rep. 406. The clauses involved for purposes of reference may be described as clauses A and B. In clause A [276] it is expressly provided that if the contractor "fail to commence with the performance of the work on the day specified herein, or shall, in the judgment of the en-

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gineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case . . . the engineer in charge shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect . . . and upon the giving of such notice all money or reserved percentage due or to become due . . . by reason of this contract shall be and become forfeited to the United States. . . ." The engineer in charge is thereupon authorized, if an immediate performance of the work "be, in his opinion, required by the public exigency, to proceed to provide for the same . . ." as prescribed in § 3709, Revised Statutes (U. S. Comp. Stat. 1901, p. 2484).

Following clause A are three other clauses dealing with changes in the work, cost of extra work, and liabilities for labor and material furnished. Then comes B, which reads as follows:

"It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentages retained shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same."

That there was no abandonment of the contract by the plaintiffs in error is too plain to need discussion. Large expenditures were made to get ready, and further extensions [277] of time were sought both before and after notice of annulment. The explanation of the failure to get ready lies in the obvious fact that the contract was larger than the financial capacity of the contractor, and the United States was plainly within its contract right in putting it off the job and in reletting the work.

What is the measure of recovery against the contractor where the government "annuls" the contract for failure to commence the work upon a stipulated day? The right to "annul," that is, to prohibit the contractor from going on under the contract, is plainly conferred in two distinct cases by clause A,—first, when the contractor fails to begin upon the day stipulated, and, second, when, having commenced the work, the contractor fails, "in the judgment of the engineer in charge, to prosecute the work faithfully and diligently." In either case the same section specifically declares that upon the giving of the notice of annulment, "all money or reserved percentages due or to become due to the contractor . . . shall be and become forfeited to the United States."

It is therefore obvious that if the right to annul this contract depends upon clause A, the measure of damages recoverable in this action is limited by that clause to the forfeiture of all moneys or retained percentages due or to become due under the contract. United States v. O'Brien, supra. This is plainly conceded in the brief of the Solicitor General.

To escape confession of error in the judgment below, in so far as the United States was permitted to recover the excess cost of reletting the job, it has been argued that the right to annul the contract did not arise out of clause A, but was "a right inherent" in this and every other contract when time is of the essence, and that when there was, as in this case, a breach of an express agreement to begin the work upon a certain day, the right to annul was complete; and upon annulment the right to [278] recover all actual damages followed. Of course, this so-called "inherent right" to annul a contract, with the consequent right to recover all actual damages as for a complete breach, are rights supposed to arise not out of any express agreement, but out of the common law. But the assumption that, aside from clause A, an agreement to begin such a work on a particular day would be such a vital term of the contract as to justify the other party in an immediate annulment if the work was not so begun is seriously challenged. The vital character of time to the contract would depend upon its nature and particular circumstances. These might be such that time would not be of the essence of the contract at all. Any resort to the contract here involved as making time the essence of the agreement must include clause A, which expressly determines the consequences. Such an appeal to the contract would naturally result detrimentally to the argument here made, since the contract, while making time vital, provides also for the consequence of a breach in that respect. The benefit and the burden of clause A must hang together.

But we need not deal with the consequences as if clause A had been omitted. The right might have been inherent, or not so vital as to justify the rigor of annulment. Both parties elected to deal with the matter by express stipulation, and that should be and is the end of it. In such a situation

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there would be no justice in straining the contract for a construction which would limit its application to cases where the right of annulment would not exist without it. This contract was prepared in advance of the bidding by the United States. The bidder was required to bid with strict reference to its terms. One term was that the work should begin with a plant and force of definite capacity on or before a particular day. Another was that if this term was not complied with the United States might annul the contract, and that, as a consequence [279] of such annulment, all money earned under it should be forfeited. This forfeiture is not made dependent upon the existence of any actual damage. Thus, damages were, by stipulation, liquidated. That such damages may be in this instance inadequate may be true, but the fact affords no ground for frittering away the agreement by fanciful distinctions which never entered the head of either party to it.

The plain purpose was to obtain for the United States the right to take the contract from a bidder who should break his agreement at its threshhold and let the work to another, possibly for a better price. At any rate, the right to annul for a breach in respect of the time of beginning was a valuable right, and for it the government stipulated and liquidated the damages in the event of its exercise. The contractor would not only lose his contract, but also would forfeit everything due him. The agreement settled the right and all the consequences of its exercise.

There is nothing in the case of United States v. O'Brien, supra, which would justify the limitation that the United States would now have us place upon this plain provision of the contract. The contract in that case was a dredging contract. The work was to begin on a day named and be completed on another. The contract was according to form 19, and included the two clauses, A and B, above set out. The work was begun on time. The first member of clause A was therefore eliminated from any consideration. The dredging did not progress to the satisfaction of the engineer in charge, who elected to stop the contractor from going on, when, confessedly, time enough remained to complete the work within contract time. The United States, under these circumstances, sought to recover the excess cost of completing the work, but this court held that such excess cost could only be recovered under clause B for failure to complete according to the terms of the agreement. There had been no breach of the agreement, [280] as time remained to finish the work had the contractor not been prohibited from going on because the engineer in charge was not satisfied with the progress of the job. But the right to annul for the later reason was a right conferred by clause A, with the damages limited as therein provided. The United States was precluded from the rule of damages prescribed by clause B, and, being forced to justify under clause A, was held bound by the limitation of that clause.

The right to annul is expressly conferred by clause A for a failure to begin on the stipulated day. The United States resorted to that clause for its authority, and pursued the procedure therein pointed out. It is plainly bound by the limitation of damages therein prescribed. For the error in not so confining the recovery, the judgment is reversed and a new trial awarded.

ATLANTIC COAST LINE RAILROAD COMPANY, Plff. in Err.,
v.
STATE OF GEORGIA.

(See S. C. Reporter's ed. 280-294.)

Constitutional law — due process of law — liberty to contract — police power — requiring electric headlights on locomotives.

1. Requiring railway locomotives running on the main line to be equipped with electric headlights which shall consume not less than 300 watts at the arc, with reflectors not less than 23 inches in diameter, as is done by Georgia Pub. Laws 1908, pp. 50, 51, does not deprive the carriers of liberty of contract and property without due process of law, contrary to U. S. Const., 14th Amend., but such requirement is a

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Note.—On state regulations of equipment of railroad rolling stock as interference with interstate commerce—see note to Atlantic Coast Line R. Co. v. State, 32 L.R.A.(N.S.) 20.

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107, and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to the validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

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valid exercise of the police power of the state.

[For other cases, see Constitutional Law, IV. b, 3; IV. b, 5; IV. c, 2, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — requiring electric headlights on locomotives.

2. The equal protection of the laws clause of U. S. Const., 14th Amend., cannot be deemed to be infringed by the provisions of Georgia Pub. Laws 1908, pp. 50, 51, requiring railway locomotives running on the main line to be equipped with electric headlights, merely because the act may not apply to receivers operating railways, in view of the temporary and special character of receivers' management.

[For other cases, see Constitutional Law, IV. a, 3, b, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — requiring electric headlights on locomotives.

3. The exceptions in favor of tram roads, mill roads, and roads engaged principally in lumber or logging transportation in connection with mills, made by Georgia Pub. Laws 1908, pp. 50, 51, when requiring railway locomotives running on the main line to be equipped with electric headlights, do not render the statute repugnant to U. S. Const., 14th Amend., as denying equal protection of the laws.

[For other cases, see Constitutional Law, IV. a, 3, b, in Digest Sup. Ct. 1908.]

Commerce — state regulation — congressional inaction — requiring electric headlights on locomotives.

4. The incidental application to railway locomotives, equipped with oil headlights, and regularly used in hauling interstate freight trains over the carrier's main line, of the provisions of Georgia Pub. Laws 1908, pp. 50, 51, requiring railway locomotives running on the main line to be equipped with electric headlights which shall consume not less than 300 watts at the arc, with reflectors not less than 23 inches in diameter, does not render such statute invalid, in the absence of congressional legislation on the subject, as constituting an unwarrantable interference with interstate commerce.

[For other cases, see Commerce, I. c; III. in Digest Sup. Ct. 1908.]

Commerce — conflicting state and Federal regulations — requiring electric headlights on locomotives.

5. The subject of electric headlights for locomotives has not been so far covered by the various acts of Congress relating to safety appliances and to the functions of the Interstate Commerce Commission respecting such appliances and the prevention of accidents, *i. e.*, act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), act of March 2, 1903 (32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1911, p. 1314), act of May 27, 1908 (35 Stat. at L. 324, 325, chap. 200, U. S. Comp. Stat. Supp. 1911, p. 1325), act of May 30, 1908 (35 Stat. at L. 476, chap. 225, U. S. Comp. Stat. Supp. 1911, p. 1326), act of April 14, 1910 (36 Stat. at L. 298, chap. 160, U. S. Comp. Stat. Supp. 1911, p. 1327), act of May 6, 1910 (36 Stat. at L. 350, chap. 208, U. S. Comp. Stat. Supp. 1911, p. 1329), act of February 17, 1911 (36 Stat. at L. 913, chap. 103, U. S. Comp. Stat. Supp. 1911, p. 1333), or by any regulation established by the Commission, acting under the authority of Congress, as to invalidate, as applied to railway locomotives equipped with oil headlights, and regularly used in hauling interstate freight trains over the carrier's main line, the provisions of Georgia Pub. Laws 1908, pp. 50, 51, requiring railway locomotives running on the main line to be equipped with electric headlights which shall consume not less than 300 watts at the arc, with reflectors not less than 23 inches in diameter.

[For other cases, see Commerce, I. c; III. in Digest Sup. Ct. 1908.]

[No. 24.]

Argued April 17, 1913. Decided June 8, 1914.

IN ERROR to the Court of Appeals of the State of Georgia to review a judgment which, conformably to the answers of the Supreme Court of the state to certified questions, affirmed a conviction of a carrier in the City Court of Richmond County for violating the headlight law. Affirmed.

See same case below, 135 Ga. 545, 32 L.R.A.(N.S.) 20, 69 S. E. 725.

The facts are stated in the opinion.

Mr. Henry L. Stone argued the cause, and, with Messrs. Alfred P. Thom, Alexander Hamilton, and Robert C. Alston, filed a brief for plaintiff in error:

The act known as the Georgia headlight law is violative of the due process clause of the 14th Amendment.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; Baxendale v. Great Western R. Co. 5 C. B. N. S. 336, 28 L. J. C. P. N. S. 81, 4 Jur. N. S. 1279, 7 Week. Rep. 64; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; Bonnett v. Vallier, 136 Wis. 193, 17 L.R.A.(N.S.) 492, 128 Am. St. Rep. 1061, 116 N. W. 885; Braceville Coal Co. v. People, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; Cincinnati, H. & D. R. Co. v. Bowling Green, 57 Ohio St. 336, 41 L.R.A. 426, 49 N. E. 121; Cleveland, C. C. & St. L. R. Co. v. Connersville, 147 Ind. 277, 37 L.R.A. 175, 62 Am. St. Rep. 418, 46 N. E. 579; Cleveland v. Clements Bros. Constr. Co. 67 Ohio St. 197, 59 L.R.A. 775, 93 Am. St. Rep. 670, 65 N. E. 885; Dobbins v. Los

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Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; 2 Elliott, Railroads, 2d ed. § 668, note, p. 24; Harbison v. Knoxville Iron Co. 103 Tenn. 421, 56 L.R.A. 316, 76 Am. St. Rep. 682, 53 S. W. 955; Health Dept. v. Trinity Church, 145 N. Y. 41, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 329, 50 L. ed. 772, 775, 26 Sup. Ct. Rep. 491; Hollister v. Benedict & B. Mfg. Co. 113 U. S. 59, 28 L. ed. 901, 5 Sup. Ct. Rep. 717; Interstate Commerce Commission v. Baltimore & O. R. Co. 3 Inters. Com. Rep. 192, 43 Fed. 52; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; McLean v. Arkansas, 211 U. S. 547, 53 L. ed 319, 29 Sup. Ct. Rep. 206; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; National Phonograph Co. v. Schlegel, 64 C. C. A. 594, 128 Fed. 733; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Shelbyville v. Cleveland, C. C. & St. L. R. Co. 146 Ind. 66, 44 N. E. 929; United States v. Palmer, 128 U. S. 262, 271, 32 L. ed. 442, 445, 9 Sup. Ct. Rep. 104; Welch v. Swasey, 214 U. S. 105, 53 L. ed. 929, 29 Sup. Ct. Rep. 567; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A. 751, 91 Am. St. Rep. 934, 90 N. W. 1098.

The act in question violates the equal protection clause of the 14th Amendment.

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 159, 160, 165, 41 L. ed. 666, 668-671, 17 Sup. Ct. Rep. 255; Harding v. People, 160 Ill. 459, 32 L.R.A. 445, 52 Am. St. Rep. 344, 43 N. E. 624; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Los Angeles County v. Hollywood Cemetery Asso. 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153; Yick Wo v. Hopkins, 118 U. S. 356 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

The headlight act of the state of Georgia is unenforceable and void, under the commerce clause of the Federal Constitution, and because Congress by its legislation has pre-empted and occupied the field of regulation of the same subject-matter.

1. The act interferes with and places a burden upon interstate commerce.

Adams Exp. Co. v. Kentucky, 214 U. S. 218, 223, 53 L. ed. 972, 973, 29 Sup. Ct. Rep. 633; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 334, 52 L. ed. 230, 234, 28 Sup. Ct. Rep. 121; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 209-212, 38 L. ed. 962, 965-967, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Hall v. De Cuir, 95 U. S. 485-488, 24 L. ed. 547, 548; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. Rep. 1173; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190.

2. Congress by its legislation has pre-empted and occupied the field of regulation of the same subject-matter, to the exclusion of state legislation.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Chicago, St. P. M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155; Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 466, 55 L. ed. 290, 296, 31 Sup. Ct. Rep. 275; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 55, 56 L. ed. 327, 348, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 632, 41 L. ed. 853, 854. 17 Sup. Ct. Rep. 418; New York C. & H. R. R. Co. v. Hudson County, 227 U. S. 248, 57 L. ed. 499, 33 Sup. Ct. Rep. 269; Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Southern R. Co. v. Reid, 222 U. S. 444, 56 L. ed. 263, 32 Sup. Ct. Rep. 145.

Mr. Thomas S. Felder, Attorney General of Georgia, argued the cause and filed a brief for defendant in error:

Statutes of states of the character of the one under consideration, being designed for the protection of the property and lives of

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the people, are not unconstitutional because they may in a manner affect interstate commerce, nor do they violate the due process clause of the Constitution because an expense may be incurred in obeying their regulations.

New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 622, 53 L. ed. 360, 29 Sup. Ct. Rep. 214; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; New York & N. E. R. Co. v. Bristol, 151 U. S. 567, 38 L. ed. 272, 14 Sup. Ct. Rep. 437; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868, 30 Sup. Ct. Rep. 594; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28.

The act does not violate the equal protection clause of the Constitution because it excepts from its operation tram roads, mill roads, and roads engaged principally in lumber or logging transportation in connection with mills.

Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; People v. New York, N. H. & H. R. Co. 55 Hun, 409, 8 N. Y. Supp. 672; Missouri & N. A. R. Co. v. State, 92 Ark. 1, 31 L.R.A.(N.S.) 861, 135 Am. St. Rep. 164, 121 S. W. 930; Chicago, I. & L. R. Co. v. Railroad Commission, 173 Ind. 469, 87 N. E. 1030, 90 N. E. 1011.

Nor is the statute subject to the criticism made that it interferes with the right of the railroad company to contract.

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437; McGehee, Due Process of Law, 345.

It is not a taking of property without due proceses of law, in contemplation of this provision of the Constitution, because the railroad, in order to comply with the statute, would have to discard the headlight used by it, which it considers a good headlight, and replace the same with the headlights required under the act. All property is held subject to the police regulations of the state.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Bacon v. Boston & M. R. Co. 83 Vt. 421, 76 Atl. 128; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110.

Courts always presume that a legislature, in enacting statutes, acts advisedly and with full knowledge of the situation, . . . and they must accept its action as that of a body having full power to act, and only acting when it has acquired sufficient information to justify its action.

Chesapeake & P. Teleg. Co. v. Manning, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. Rep. 881.

Assuming that several measures are equally efficient to avert danger to health or safety, it would still seem to be within the legislative power to select one method and require its adoption; for it is easier to enforce uniform police regulations than a great variety of measures, the efficiency of each of which would be a question of fact in each particular case.

Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 102, 43 L. ed. 909, 912, 19 Sup. Ct. Rep. 609; Freund, Pol. Power, § 34.

This statute is in the interest of the public, and its wisdom cannot be questioned by the courts. The lawmaking body has determined the matter in this regard. The public policy of the government is to be found in its statutes, and when the lawmaking power speaks upon a particular subject over which it has constitutional power to legislate, public policy in such cases is what the statute enacts.

Logan v. Postal Teleg. & Cable Co. 157 Fed. 570; United States v. Trans-Missouri Freight Asso. 166 U. S. 340, 41 L. ed. 1027, 17 Sup. Ct. Rep. 540; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 569, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259.

This act of the legislature of Georgia does not in any way conflict with any act of Congress or any rule or regulation of the Interstate Commerce Commission: and in the absence of such conflict the Federal courts will not declare the act invalid as interfering with interstate commerce. As long as the field has not been completely

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covered by Congress, the states have the right, under their reserved police power, to legislate upon the subject.

Savage v. Jones, 225 U. S. 501, 533, 56 L. ed. 1182, 1194, 32 Sup. Ct. Rep. 715; Missouri P. R. Co. v. Larabee Four Mills Co. 211 U. S. 612, 623, 53 L. ed. 352, 361, 29 Sup. Ct. Rep. 214; Reid v. Colorado, 187 U. S. 137, 148, 47 L. ed. 108, 114, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506.

Mr. Justice Hughes delivered the opinion of the court:

The Atlantic Coast Line Railroad Company, the plaintiff in error, was convicted of violating a statute of the state of Georgia known as the "headlight law." Pub. Laws (Ga.) 1908, pp. 50, 51; Civil Code, §§ 2697, 2698. In defense it was insisted that the act contravened the commerce clause and the 14th Amendment of the Constitution of the United States. On appeal from the judgment of conviction, the court of appeals of the state of Georgia certified the questions thus raised, together with others involving the application of the state Constitution, to the supreme court of the state. Answering these questions, that court sustained the validity of the statute (135 Ga. 545, 32 L.R.A.(N.S.) 20, 69 S. E. 725), whereupon final judgment was entered and this writ of error was sued out.

The material portions of the statute are as follows:

[287] "Section 1. Be it enacted by the general assembly of Georgia, and it is hereby enacted by authority of the same, that all railroad companies are hereby required to equip and maintain each and every locomotive used by such company to run on its main line after dark with a good and sufficient headlight, which shall consume not less than 300 watts at the arc, and with a reflector not less than 23 inches in diameter, and to keep the same in good condition. The word main line as used herein means all portions of the railway line, not used solely as yards, spurs, and side tracks.

"Section 2. Be it further enacted that any railroad company violating this act in any respect shall be liable to indictment as for a misdemeanor in any county in which the locomotive not so equipped and maintained may run, and on conviction shall be punished by fine as prescribed in § 1039 of the Code of 1895. . . .

"Section 4. Provided this act shall not apply to tram roads, mill roads, and roads engaged principally in lumber or logging transportation in connection with mills."

The contention is made that this act deprives the company of its liberty of contract, and of its property without due process of law. It compels the disuse of a material part of the company's present equipment, and the substitution of a new appliance. The use of locomotive headlights, however, is directly related to safety in operation. It cannot be denied that the protective power of government, subject to which the carrier conducts its business and manages its property, extends as well to the regulation of this part of the carrier's equipment as to apparatus for heating cars or to automatic couplers. The legislature may require an adequate headlight and whether the carrier's practice is properly conducive to safety, or a new method affording greater protection should be substituted, is a matter for the legislative judgment. But it is insisted that the legislature has gone beyond the [288] limits of its authority in making the specific requirements contained in the act as to the character and power of the light and the dimensions of the reflector. This argument ignores the established principle that if its action is not arbitrary,—is reasonably related to a proper purpose,—the legislature may select the means which it deems to be appropriate to the end to be achieved. It is not bound to content itself with general directions when it considers that more detailed measures are necessary to attain a legitimate object. Particularization has had many familiar illustrations in cases where there has been a conviction of the need of it; as, for example, in building regulations and in provisions for safeguarding persons in the use of dangerous machinery. So far as governmental power is concerned, we know of no ground for an exception in the case of a locomotive headlight.

It cannot be said that the legislature acted arbitrarily in prescribing electric light, in preference to others, or that, having made this selection, it was not entitled to impose minimum requirements to be observed in the use of the light. Witnesses for the plaintiff in error, including its general superintendent of motive power and other employees holding important positions and conversant with the exigencies of operation, presented their objections to the use of the electric headlight. Locomotive engineers who, for many years, had driven locomotives with such a light, testified for the state, expressing a decided opinion in favor of the use of electric headlights in the interest of safe operation, and submitting their views in answer to the objections that had been urged. Assuming that there is room for differences of opinion, this fact does not preclude the exercise of the legislative discretion. So far as the question

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was one simply of expediency,—as to the best method to provide the desired security,—it was within the competency of the legislature to decide it. New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 571, 38 L. ed. 269, 274, 14 Sup. Ct. Rep. 437; Chicago, B. & Q. [289] R. Co. v. Illinois, 200 U. S. 561, 583, 584, 50 L. ed. 596, 605, 606, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; McLean v. Arkansas, 211 U. S. 539, 547, 548, 53 L. ed. 315, 319, 320, 29 Sup. Ct. Rep. 206; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 568, 569, 55 L. ed. 328, 338, 339, 31 Sup. Ct. Rep. 259, and cases there cited.

As to the objection that the statute makes no provision for conditions beyond the carrier's control, it is sufficient to say that in the light of the construction placed upon the act by the supreme court of the state, we are not at liberty to regard it as open to this criticism (135 Ga. pp. 561, 562); certainly, no such case is here presented. We conclude that there is no valid objection to the statute upon the ground that it deprives the carrier of liberty or property without due process of law.

The further contention is that the statute offends in denying to the plaintiff in error the equal protection of the laws. Specifically, the complaint is that the act does not apply to receivers operating railroads, and that it expressly excepts tram roads, mill roads, and roads engaged principally in lumber or logging transportation in connection with mills. As to the first, it cannot be said that the act does exclude receivers from its requirements. The state court has ruled that the words "railroad company" in the statute include natural persons as well as corporations. It declined to decide that receivers were not included; but, conceding, without deciding, that they were not, it was held that the statute would not for that reason violate the equal protection clause in view of the temporary and special character of receivers' management. 135 Ga. pp. 555, 556. We concur in this view. As to the exceptions made by the statute of tram roads, mill roads, etc., it is impossible to say that the differences with respect to operation and traffic conditions did not present a reasonable basis for classification. Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 78, 81, 55 L. ed. 369, 377, 378, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Barrett v. Indiana, 229 U. S. 26, 30, 57 L. ed. 1050, 1052, 33 Sup. Ct. Rep. 692; German Alliance Ins. Co. v. Kansas, 233 U. S. 389, 418, ante, 1011, 1024, 34 Sup. Ct. Rep. 612.

[290] Finally, it is urged that the statute constitutes an unwarrantable interference with interstate commerce. The locomotive with respect to which the accusation was made was at the time being regularly used in the hauling of interstate freight trains over the company's main line of railroad, and was equipped with an oil headlight. The statute, as the supreme court of the state said, was not directed against interstate commerce, but it was held that it incidentally applied to locomotives used in hauling interstate trains while these were moving on the main line in the state of Georgia. This being so, the act is said to be repugnant to the exclusive power of Congress. It is argued that if Georgia may prescribe an electric headlight, other states through which the road runs may require headlights of a different sort; that, for example, some may demand the use of acetylene, and that others may require oil; and that, if state requirements conflict, it will be necessary to carry additional apparatus and to make various adjustments at state lines, which would delay and inconvenience interstate traffic.

The argument is substantially the same as that which was strongly presented to the court in New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418, where the plaintiff in error was held subject to penalty for the violation of a New York statute which in substance made it unlawful for any steam railroad doing business in that state to heat its passenger cars, on any other than mixed trains, by any stove or furnace kept inside of the car or suspended therefrom. The railroad company was a Connecticut corporation having but a few miles of road within the state of New York, and operating through trains from New York through Connecticut to Massachusetts. As this court said in its opinion, the argument was made that "a conflict between state regulations in respect of the heating of passenger cars used in interstate commerce would make safe and rapid [291] transportation impossible; that to stop an express train on its trip from New York to Boston at the Connecticut line in order that passengers may leave the cars heated as required by New York, and get into other cars heated in a different mode, in conformity with the laws of Connecticut, and then at the Massachusetts line to get into cars heated by still another mode, as required by the laws of that commonwealth, would be a hardship on travel that could not be endured." But the court ruled that these "possible inconveniences" could not affect "the question of power in each state to make such reasonable regulations for the safety of passengers on interstate trains as, in its judgment, all things considered, is

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appropriate and effective." Supra, pp. 632, 633.

In thus deciding, the court applied the settled principle that, in the absence of legislation by Congress, the states are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce. That has been the law since the beginning of railroad transportation. It was not intended that, pending Federal action, the use of such agencies, which, unless carefully guarded, was fraught with danger to the community, should go unregulated, and that the states should be without authority to secure needed local protection. The requirements of a state, of course, must not be arbitrary, or pass beyond the limits of a fair judgment as to what the exigency demands, but they are not invalid because another state, in the exercise of a similar power, may not impose the same regulation. We may repeat what was said in Smith v. Alabama, 124 U. S. 465, 481, 482, 31 L. ed. 508, 513, 514, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564: "It is to be remembered that railroads are not natural highways of trade and commerce. . . . The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the state. Their operation requires the use of instruments [292] and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill, and care. The safety of the public in person and property demands the use of specific guards and precautions. . . . The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution." See also Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; New York, N. H. & H. R. Co. v. New York, supra; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 402, 410, 57 L. ed. 1511, 1542, 1546, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729.

If there is a conflict in such local regulations, by which interstate commerce may be inconvenienced,—if there appears to be need of standardization of safety appliances, and of providing rules of operation which will govern the entire interstate road, irrespective of state boundaries,—there is a simple remedy; and it cannot be assumed that it will not be readily applied if there be real occasion for it. That remedy does not rest in a denial to the state, in the absence of conflicting Federal action, of its power to protect life and property within its borders, but it does lie in the exercise of the paramount authority of Congress, in its control of interstate commerce, to establish such regulations as, in its judgment, may be deemed appropriate and sufficient. Congress, when it pleases, may give the rule and make the standard to be observed on the interstate highway.

[293] It is suggested that Congress has acted in the present instance. Reference is made to the act of March 2, 1893, chap. 196 (27 Stat. at L. 531, U. S. Comp. Stat. 1901, p. 3174), relating to power driving-wheel brakes for locomotives, grab irons, automatic couplers, and height of drawbars; to the act of March 2, 1903, chap. 976 (32 Stat. at L. 943, U. S. Comp. Stat. Supp. 1911, p. 1314), amending the act of 1893; to the act of May 27, 1908, chap. 200 (35 Stat. at L. 324, 325, U. S. Comp. Stat. Supp. 1911, p. 1325) authorizing the Interstate Commerce Commission to keep informed regarding compliance with the safety-appliance act, and to investigate and report on the need of any appliances or systems intended to promote the safety of railway operations; to the act of May 30, 1908, chap. 225 (35 Stat. at L. 476, U. S. Comp. Stat. Supp. 1911, p. 1326), relating to locomotive ash pans; to the act of April 14, 1910, chap. 160 (36 Stat. at L. 298, U. S. Comp. Stat. Supp. 1911, p. 1327), relating to sill steps, hand brakes, ladders, running boards, and hand holds, and providing that the Interstate Commerce Commission should, after hearing, designate the number, dimensions, location, and manner of application of these appliances, and of those required by the act of 1893; to the detailed regulations prescribed by the Commission, on March 13, 1911, pursuant to this authority; to the act of May 6, 1910, chap. 208 (36 Stat. at L. 350, U. S. Comp. Stat. Supp. 1911, p. 1329), requiring the

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Commission to investigate accidents and make report as to their causes, with such recommendations as they may deem proper; and to the act of February 17, 1911, chap. 103 (36 Stat. at L. 913, U. S. Comp. Stat. Supp. 1911, p. 1333), relating to locomotive boilers.

But it is manifest that none of these acts provides regulations for locomotive headlights. Attention is also called to the investigations conducted by what is known as the "block signal and train control board" (organized by the Commission), and the reports of that board with respect to sundry devices and appliances, including headlights. It does not appear, however, either that Congress has acted, or that the Commission, under the authority of Congress, has established any regulation so far as headlights are concerned. As to these, the situation has not been altered by any exertion of Federal power, and the [294] case stands as it has always stood, without regulation, unless it be supplied by local authority. The most that can be said is that inquiries have been made, but that Congress has not yet decided to establish regulations, either directly or through its subordinate body, as to the appliance in question. The intent to supersede the exercise of the state's police power with respect to this subject cannot be inferred from the restricted action which thus far has been taken. Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; Savage v. Jones, 225 U. S. 501, 533, 56 L. ed. 1182, 1194, 32 Sup. Ct. Rep. 715.

The judgment is affirmed.

Affirmed.

INTERSTATE COMMERCE COMMISSION, the United States of America, Associated Jobbers of Los Angeles, and Pacific Coast Jobbers & Manufacturers Association, Appts.,

v.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Southern Pacific Company, and San Pedro, Los Angeles, & Salt Lake Railroad Company.[1]

(See S. C. Reporter's ed. 294–314.)

Carriers — rates — added service — discrimination — switching charge.

1. The delivery and receipt on industrial spur tracks within the switching limits in a city of carload freight moving in interstate commerce, incidentally to a system-line haul, is not necessarily an added service, for which the carrier is entitled to make, or should make, a charge additional to the line-haul rate to or from such city, where that rate embraces a receiving and delivery service at team tracks or at freight sheds within such switching limits, for which the spur-track service is a substitute.

[For other cases, see Carriers, III. e; III. f, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — powers — inquiry into facts — carrier's switching charges.

2. The question whether there is at any point an additional service performed by the carrier in the receipt and delivery on industrial spur tracks within the switching limits in a city of carload freight moving in interstate commerce, upon which such carrier may base an extra charge, in addition to the line-haul rate to or from such city, or whether there is merely a substituted service which is substantially a like service to that included in the line-haul rate, and not received, is a question of fact to be determined according to the actual conditions of operation, and one upon which it is manifestly the province of the Interstate Commerce Commission to pass.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — judicial review — findings of fact.

3. The findings of the Interstate Commerce Commission that industrial spur tracks within the switching limits in a city constituted part of the carrier's terminals, and that under the conditions there existing the receipt and delivery on these spurs of carload freight moving in interstate commerce was a like service as compared with such receipt and delivery at team tracks and freight sheds within such switching limits, are conclusive upon the courts, if based upon the evidence.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Estoppel — by agreement — carrier's charge for switching service — discrimination.

4. Shippers subjected to unreasonable or unjustly discriminatory charges for the delivery and receipt on industrial spur tracks within the switching limits in a city of carload freight moving in interstate commerce are not estopped to bring the matter before the Interstate Commerce Commission, and to secure its order directing the carriers to stop the objectionable practice, because, when making the contracts under which the spur tracks were constructed, the shippers consented to a special charge when freight should be received and delivered thereon.

[For other cases, see Estoppel, III. b, 2, in Digest Sup. Ct. 1908.]

[No. 98.]

Argued January 14 and 15, 1914. Decided June 8, 1914.

[1] Reported by the Official Reporter under the title of "The Los Angeles Switching Case."

NOTE.—On estoppel by agreement—see note to Keokuk & W. R. Co. v. County Ct. 38 L. ed. U. S. 458.

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APPEAL from the United States Commerce Court to review an order suspending an order of the Interstate Commerce Commission prohibiting carriers from making an additional charge for receiving or delivering carload freight on industrial spur traks within switching limits. Reversed, and cause remanded to the United States District Court for the Southern District of California, with instructions to dismiss the bill.

See same case below, 188 Fed. 229, 929.

The facts are stated in the opinion.

Mr. **Blackburn Esterline**, Special Assistant to the Attorney General, argued the cause, and, with Solicitor General Davis, filed a brief for the United States:

The findings of the Commission were in line with the facts before it, and accorded with the provisions of the act to regulate commerce as well as with certain well-considered judicial decisions, all of which the commerce court ignored.

Chicago & N. W. R. Co. v. People, 56 Ill. 365, 8 Am. Rep. 690; Coe v. Louisville & N. R. Co. 3 Fed. 775; Covington Stock Yards Co. v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 469; Vincent v. Chicago & A. R. Co. 49 Ill. 33.

The present case is not that of a carrier making delivery by means of a terminal company "to a point off its line," for which delivery it is entitled to make an extra charge, as in the case of Interstate Commerce Commission v. Stickney, 215 U. S. 98, 54 L. ed. 112, 30 Sup. Ct. Rep. 66, but the controversy is limited to the narrow question of the right of appellees to make an extra charge for deliveries on spurs which are found to constitute a part of their own terminals, tracks, etc.

On a mixed question of law and fact the findings of the Commission are conclusive.

Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 455, 459, 51 L. ed. 1128, 1134, 1135, 27 Sup. Ct. Rep. 700.

Mr. **P. J. Farrell** argued the cause and filed a brief for the Interstate Commerce Commission:

In substituting its own judgment for the judgment of the Commission, and finding that the charge of $2.50 per car is not unjustly discriminatory, the commerce court acted beyond its power.

Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392.

Where called upon to suspend or set aside an order of the Commission based upon a discrimination found by the Commission to be unjust, the duty of the court does not include a right to determine whether the finding of the Commission is correct.

Procter & G. Co. v. United States, 225 U. S. 282, 56 L. ed. 1091, 32 Sup. Ct. Rep. 761.

Messrs. **Gardiner Lathrop** and **Fred H. Wood** argued the cause, and, with Messrs. W. F. Herrin, J. P. Blair, Robert Dunlap, T. J. Norton, and C. W. Durbrow, filed a brief for appellees:

Outside of special agreement the duty of a railway company at common law and under the interstate commerce act is only to the public in general, and a single shipper can demand the performance of such duty only as he puts himself in the position or situation of one of the general public entitled to demand performance of the service in question.

Atchison, T. & S. F. R. Co. v. Tiedt, 40 L.R.A.(N.S.) 848, 116 C. C. A. 168, 196 Fed. 348.

The phrase "terminal charges" was well understood in the English statutes and in the English decisions based thereon, made prior to the adoption of the interstate commerce act. As is well known, the latter act adopted certain terms and provisions found in the English statutes.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 264, 284, 36 L. ed. 699, 706, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844.

A switching service rendered within a terminal to make a special delivery of freight is appropriately regarded as a terminal service, and one for which a separate, reasonable charge, commensurate with the value of the same, may be imposed upon the party desiring and obtaining the benefit thereof.

National Tube-Works Co. v. Baltimore & O. R. Co. 4 Sadler (Pa.) 361, 8 Atl. 6; 4 Elliott, Railroads, 2d ed. § 1566; Owen v. St. Louis & S. F. R. Co. 83 Mo. 454; Sowerby & Co. v. Great Northern R. Co. 7 Eng. Ry. & C. Traffic Cas. 156; Manchester R. Co. v. Pidcock & Co. 10 Eng. Ry. & C. Traffic Cas. 150; Macnamara, Carr. pp. 226, 227; Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission, 21 C. C. A. 103, 42 U. S. App. 308, 74 Fed. 803, affirmed on appeal in 167 U. S. 633, 644, 645, 42 L. ed. 306, 309, 310, 17 Sup. Ct. Rep. 986; 1 Boyle & W. Traffic on Railways & Canals, p. 112; Hall v. London, B. & S. C. R. Co. L. R. 15 Q. B. Div. 505, 53 L. T. N. S. 345, 5 Eng. Ry. & C. Traffic Cas. 28; 2 Boyle & W. Traffic on Railways & Canals, pp. 258, 286, 296; Stone v. Detroit, G. H. & M. R. Co. 3 Inters. Com. Rep. 66.

The charge was separately stated in the

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tariff, as required by § 6 of the interstate commerce law concerning terminal charges, etc.

Beale v. W. Railroad Rate Regulation, § 912; Interstate Commerce Commission v. Baltimore & O. R. Co. 3 Inters. Com. Rep. 192, 43 Fed. 42, 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Fitchburg R. Co. v. Gage, 12 Gray, 396.

The Chicago live stock switching cases are in point.

Walker v. Keenan, 19 C. C. A. 668, 34 U. S. App. 691, 73 Fed. 755; Stickney v. Interstate Commerce Commission, 164 Fed. 638, 215 U. S. 98, 54 L. ed. 112, 30 Sup. Ct. Rep. 66.

It was not obligatory on the railway company to construct industrial spurs and deliver or receive freight thereon. Its obligation in that respect is wholly voluntary and contractual, and it is therefore proper to impose a separate charge.

Jones v. Newport News & M. Valley Co. 13 C. C. A. 95, 31 U. S. App. 92, 65 Fed. 736; Mercantile Trust Co. v. Columbus, S. & H. R. Co. 90 Fed. 148; Harp v. Choctaw, O. & G. R. Co. 118 Fed. 178; Mann v. Pere Marquette R. Co. 135 Mich. 219, 19 N. W. 721; Gulf Compress Co. v. Alabama G. S. R. Co. 100 Miss. 582, 56 So. 666.

A railway company would not have power or authority to appropriate or condemn a right of way in order to construct a spur track to be operated for the special accommodation of one or a few shippers, as such use would be for a private, and not a public, purpose.

Pittsburg, W. &. K. R. Co. v. Benwood Iron Works, 31 W. Va. 710, 2 L.R.A. 680, 8 S. E. 453; Re Split Rock Cable Road Co. 128 N. Y. 408, 28 N. E. 506; Chattanooga Terminal R. Co. v. Felton, 69 Fed. 279; Chicago & E. I. R. Co. v. Wiltse, 116 Ill. 449, 6 N. E. 49; Brown v. Gerald, 100 Me. 351, 70 L.R.A. 472, 109 Am. St. Rep. 526, 61 Atl. 785.

The cost of performing a particular service among a number of others, if, indeed, the same could be approximated, is not the only element which is to be considered in determining the reasonableness of a charge. The railway company is entitled to something more than cost.

Southern R. Co. v. St. Louis Hay & Grain Co. 214 U. S. 297, 53 L. ed. 1004, 29 Sup. Ct. Rep. 678; Interstate Commerce Commission v. Stickney, 215 U. S. 98, 54 L. ed. 112, 30 Sup. Ct. Rep. 66.

The value of the service is an important and necessary element for consideration, and if we were to assume, for the sake of argument, that it costs no more to deliver a car at some particular industry than to deliver a car upon the public team tracks, yet it is admittedly of more value to the shipper to have the car delivered at his industry than upon the public team tracks. It is the value of the service which, after all, is to ascertained.

Beale & W. Railroad Rate Regulation, § 320; Canada Southern R. Co. v. International Bridge Co. L. R. 8 App. Cas. 731; Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6.

The discrimination condemned by the 2d section is one in favor of a particular shipper, and against other shippers in a like situation, which destroys that equality of treatment in rates which it is the great purpose of the law to enforce.

American Sugar Ref. Co. v. Delaware, L. & W. R. Co. 125 C. C. A. 251, 207 Fed. 733; Interstate Commerce Commission v. Baltimore & O. R. Co. 3 Inters. Com. Rep. 192, 43 Fed. 47.

It could not be pretended that an absolute refusal on the part of the railway company to construct these spur tracks, or to make deliveries at the private plants located thereon, constituted any unjust discrimination as against any such shippers, and in favor of shippers using the public team tracks.

Central Stock Yards Co. v. Louisville & N. R. Co. 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113.

How, then, can it be contended that when the railway company does undertake to make such a special delivery at a private plant, that the imposition of a reasonable charge therefor results in an unjust discrimination against such shipper, and in favor of those served only by the public team tracks? Is it not by virtue of his contract with the railway company that the spur track shipper gets a better and more desirable service than that received by one of the public at large at the public team tracks?

Penn Ref. Co. v. Western New York & P. R. Co. 208 U. S. 208, 52 L. ed. 456, 28 Sup. Ct. Rep. 268; Denaby Main Colliery Co. v. Manchester, S. & L. R. Co. L. R. 11 App. Cas. 110, 6 Eng. Ry. & C. Traffic Cas. 133, 55 L. J. Q. B. N. S. 181, 54 L. T. N. S. 1, 50 J. P. 340, L. R. 14 Q. B. Div. 223; Finnie v. Glasgow & S. W. R. Co. 2 Macq. H. L. Cas. 183; Murray v. Glasgow & S. W. R. Co. 11 Sc. Sess. Cas. 4th series, 205.

We do not understand that the court is precluded from inquiring whether the Commission has erred in the application of the law, or misconstrued the same, and that it has no power to correct such error by holding the Commission's decision and order to be invalid. See United States v. Baltimore & O. R. Co. 231 U. S. 274, ante, 218, 34

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Sup. Ct. Rep. 75. On the contrary, this court has held that whether, under a given state of facts, there is a violation of either the 2d or 3d section is a question of law upon which the conclusion of the Commission is not final. Interstate Commerce Commission v. Baltimore & O. R. Co. 225 U. S. 326, 56 L. ed. 1107, 32 Sup. Ct. Rep. 742, Ann. Cas. 1914A, 504. We do not understand that in our bill we have gone farther than was sanctioned by this court in Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22, or in Interstate Commerce Commission v. Stickney, 215 U. S. 98, 54 L. ed. 112, 30 Sup. Ct. Rep. 66.

The legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law, and must, in the language of the statute, "be set aside by a court of competent jurisdiction."

Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185.

Any charge of violation of the undue-preference clause must be confined to a consideration of places and shippers served by the particular railroad complained of; and it is immaterial what its connections or other railroads may do or fail to do in other places.

Eau Claire Bd. of Trade v. Chicago, M. & St. P. R. Co. 4 Inters. Com. Rep. 78.

Again, it would be necessary for the Commission to determine and point out in what other localities industrial spur track shippers upon the line in question were in competition with those in Los Angeles. For if there was no competition between them, there could be no complaint that one received an undue advantage to the unreasonable disadvantage of the other.

Interstate Commerce Commission v. Baltimore & O. R. Co. 3 Inters. Com. Rep. 192, 43 Fed. 47; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 282, 36 L. ed. 699, 705, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Hozier v. Caledonian R. Co. 1 Eng. Ry. & C. Traffic Cas. 27; Nicholson v. Great Western R. Co. 1 Eng. Ry. & C. Traffic Cas. 150; Lees v. Lancashire & Y. R. Co. 1 Eng. Ry. & C. Traffic Cas. 352; Lincolnshire Patent Fuel Co. v. London & N. W. R. Co. 12 Eng. Ry. & C. Traffic Cas. 77; 1 Boyle & W. Traffic on Railways & Canals, p. 159; Phipps v. London & N. W. R. Co. 8 Eng. Ry. & C. Traffic Cas. 83, [1892] 2 Q. B. 229, 61 L. J. Q. B. N. S. 379, 66 L. T. N. S. 721; United States v. Chicago & N. W. R. Co. 62 C. C. A. 465, 127 Fed. 785.

Again, whether the alleged preference is undue or not depends largely upon whether at the one place or locality the railway company is forced by competition of markets or of other carriers to forego making a charge which it is not compelled to forego at the other point. That is an important element to be considered and to be given due effect by the Commission in any determination.

Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 48, 56 L. ed. 83, 88, 32 Sup. Ct. Rep. 22; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 119, 52 L. ed. 705, 712, 28 Sup. Ct. Rep. 493.

The terms "custom" and "usage" seem to be confounded and inappropriately used by the Commission in its opinion. A custom which has the binding effect of law in the absence of agreement is one which must have existed from a time "whence the memory of man runneth not to the contrary." It must have the force of law independent of persons consenting to it. It is a local common law.

1 Chitty's Bl. Com. **74–80; Ocean Beach Asso. v. Brinley, 34 N. J. Eq. 448; Robinson v. Mollett, L. R. 7 H. L. 802; Hammerton v. Honey, 24 Week. Rep. 603; Hursh v. North, 40 Pa. 243.

Custom and usage, in the way of practice, are generally shown in particular trades to show the understanding of parties to contracts where the practice or usage is not in contravention of agreement, and is therefore supposed to be incorporated in the contract by assent of the parties. It then becomes a part of the contract where there is no stipulation or understanding to the contrary. In the case at bar it could not become a part of the contract, as it would be contrary to a tariff provision, as the tariff provision has the effect of law, and must be observed by the parties.

Tilley v. Cook County (Tilley v. Chicago) 103 U. S. 155, 162, 26 L. ed. 374, 377; Ulmer v. Farnsworth, 80 Me. 500, 15 Atl. 65, 17 Mor. Min. Rep. 134; Eager v. Atlas Ins. Co. 14 Pick. 141, 25 Am. Dec. 363; First Nat. Bank v. Burkhardt, 100 U. S. 692, 25 L. ed. 769; Thompson v. Riggs, 5 Wall. 663, 18 L. ed. 704; Albright v. Cortright, 64 N. J. L. 330, 48 L.R.A. 616, 81 Am. St. Rep. 504, 45 Atl. 634; Gulf, C. & S. F. R. Co. v. Miami S. S. Co. 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407.

The spirit of the interstate commerce law would seem to require that this species of favoritism might well be discontinued or qualified by the imposition of an adequate and reasonable charge for the special service rendered.

Providence Coal Co. v. Providence & W.

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R. Co. 1 Inters. Com. Rep. 368; Texarkana & Ft. S. R. Co. v. Sabine Tram Co. — Tex. Civ. App. —, 129 S. W. 198.

Beyond the specific requirements and prohibitions of that act the carriers are at liberty to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 119, 52 L. ed. 712, 28 Sup. Ct. Rep. 493; Southern P. Co. v. Interstate Commerce Commission, 200 U. S. 554, 50 L. ed. 593, 26 Sup. Ct. Rep. 330.

Messrs. Fred H. Wood, C. W. Durbrow, J. P. Blair, and W. F. Herrin also filed a brief for the Southern Pacific Company:

The Commission may not require the carriers to extend any service without compensation, nor can it look to the charge made for one service for any part or all of the compensation to which the carrier is entitled for another service.

Interstate Commerce Commission v. Stickney, 215 U. S. 98, 54 L. ed. 112, 30 Sup. Ct. Rep. 66.

By the plain intendment of the language used, carriers performing a road service between termini may separately state the charges for carriage between places named in the tariffs and their own terminal services performed at the places between which such transportation is conducted.

7 Century Dict. "Terminal," p. 6242.

The Commission's construction is contrary to the construction of the English act at the time of the passage of the act to regulate commerce.

2 Boyle & W. Traffic on Railways & Canals, p. 258; Hall v. London, B. & S. C. R. Co. L. R. 15 Q. B. Div. 505, 53 L. T. N. S. 345, 5 Eng. Ry. & C. Traffic Cas. 28.

All charges made by the carriers are presumptively lawful and right, and the burden is upon the complainant before the Commission to show that they are in violation of some provision of the act to regulate commerce.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 57 L. ed. 1571, 33 Sup. Ct. Rep. 975.

This presumption can only be overthrown by the production of competent evidence before the Commission, and the Commission must first find upon the record that a violation exists, and the evidence of this violation must be found in the record made before the Commission itself, and cannot be the result of conjecture or fiat.

Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88–100, 57 L. ed. 431–436, 33 Sup. Ct. Rep. 185.

The facts are not in dispute. Whether, under the facts stated, a violation of either § 2 or 3 of the act results, is a question of law upon which the conclusion of the Commission is reviewable by the courts.

Interstate Commerce Commission v. Baltimore & O. R. Co. 225 U. S. 326, 56 L. ed. 1107, 32 Sup. Ct. Rep. 742, Ann. Cas. 1914A, 504; United States v. Baltimore & O. R. Co. 231 U. S. 274, ante, 218, 34 Sup. Ct. Rep. 75.

The principal purpose of the 2d section is to prevent unjust discrimination between shippers. It implies that, in deciding whether differences in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were like and contemporaneous, whether the kinds of traffic were like, and whether the transportation was effected under substantially similar circumstances and conditions.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197–219, 40 L. ed. 940–947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

Neither the legal likeness of services rendered nor the similarity of circumstances and conditions under which performed can be determined by comparison of their cost.

Union P. R. Co. v. United States, 117 U. S. 355, 29 L. ed. 920, 6 Sup. Ct. Rep. 772; Texas & P. R. Co. v. Interstate Commerce Commission, supra.

The carrier was not required at common law to deliver at the rails of the shipper, nor anywhere else, except at its own public stations and yards.

Fenner v. Buffalo & State Line R. Co. 44 N. Y. 505, 4 Am. Rep. 709: Witbeck v. Holland, 45 N. Y. 13, 6 Am. Rep. 23; Chalk v. Charlotte, C. & A. R. Co. 85 N. C. 423; South & North Ala. R. Co. v. Wood, 66 Ala. 167, 41 Am. Rep. 749; New Orleans, J. & G. N. R. Co. v. Tyson, 46 Miss. 729; State ex rel. Mattoon v. Republican Valley R. Co. 17 Neb. 647, 52 Am. Rep. 424, 24 N. W. 329; Francis v. Dubuque & S. C. R. Co. 25 Iowa, 60, 95 Am. Dec. 765; Evershed v. London & N. W. R. Co. L. R. 2 Q. B. Div. 254, 46 L. J. Q. B. N. S. 289, 36 L. T. N. S. 12, 25 Week. Rep. 411.

No provision of the interstate commerce act requires it to do so. It must provide adequate public facilities for the receipt and delivery of freight. It is not required

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and cannot be required, by any provision of the interstate commerce act, to provide industry tracks for the receipt and delivery of freight at private stations, nor can it be required except by contract to operate any such tracks when constructed. It may be required to install and operate upon reasonable terms switch connections between its own tracks, already constructed, and industry spur tracks which may have been already built up to the carrier's right of way, but it cannot be required to construct or operate the industry spur itself.

Winters Metallic Paint Co. v. Chicago, M. & St. P. R. Co. 16 Inters. Com. Rep. 587; Ralston Townsite Co. v. Missouri P. R. Co. 22 Inters. Com. Rep. 354; Imperial Wheel Co. v. St. Louis, I. M. & S. R. Co. 20 Inters. Com. Rep. 56.

Prior to the amendment of 1906, a carrier could not even be required to construct and operate such switching connection; but, having established public facilities for the receipt and delivery of freight, could demand that all freight be received and delivered thereon.

Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339.

The value of the service is an element or standard of reasonable and just charges.

Re Investigation & Suspension Docket, 22 Inters. Com. Rep. 604.

Mr. Justice Hughes delivered the opinion of the court:

The Atchison, Topeka, & Santa Fe Railway Company, the Southern Pacific Company, and the San Pedro, Los Angeles, & Salt Lake Railroad Company, brought this suit against the Interstate Commerce Commission in the circuit court of the United States for the district of Kansas, first division, to restrain the enforcement of an order of the Commission made in April, 1910. The order required these companies to desist "from exacting their present charge of $2.50 per car for delivering and receiving carload freight to and from industries located upon spurs and side tracks within their respective switching limits" in Los Angeles, California, when such carload freight "is moving in interstate commerce incidentally to a system-line haul." It also prohibited the exaction of any charge whatever, other than the charge for transportation from points of origin to destination, for delivering or receiving carload freight in such cases.[1]

[303] After answer had been filed by the Commission, the suit was transferred to the commerce court, and the United States, the Associated Jobbers of Los Angeles, and the Pacific Coast Jobbers' & Manufacturers' Association, intervened. The United States thereupon moved to dismiss the bill for want of equity, and the petitioners asked for a preliminary injunction. The commerce court, denying the government's motion, suspended the Commission's order until the further order of the court (188 Fed. 229, 929); and this appeal is prosecuted.

The complaint of the petitioners in substance is that they have established in the city of Los Angeles their public terminals, including what are known as team tracks and freight sheds, for the accommodation of the public in receiving and delivering carload freight; that these facilities are entirely adequate for the purpose, and are [304] sufficient to handle all the carload freight shipped or delivered in the city, including that now received or delivered upon the industrial spur tracks in question; that the spur-track service has been established simply for the convenience of the shippers thus served; that it is a service essentially distinct from the line haul, and additional thereto, being of great benefit in the saving of cartage charges to the favored shippers for whose use the spur tracks were constructed; that the industries or plants located upon the spurs are distant from the main tracks, in the case of the Atchison Company, from ½ mile to 3½ miles, in that of the Southern Pacific Company from 200 feet to 7 miles, and in that of the San Pedro Company from ½ mile to 4 miles, and that the special switching service involves a much greater expense than if the carload freight were received or delivered on the team tracks or at the freight sheds of the carriers respectively; that the charge of $2.50 per car for this service is entirely reasonable, and one which the carriers are entitled to make in addition to the line haul rate; and that, as such, it has been duly specified in their published tariffs. It is also averred that, while in the contracts governing the construction and maintenance of the spur tracks no specific sum was prescribed for the service of receiving and delivering carload freight thereon, the charge above mentioned had been generally established; that at the time of the making of these contracts the shippers understood and willingly consented that, if the rail-

[1] The order is as follows:

"This case being at issue on complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part here-

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way company performed this special service, there should be additional compensation, and that such charge has generally been maintained and collected. The adequacy of the public terminal facilities for carload freight in Los Angeles (consisting of the team tracks and freight sheds of the carriers respectively), the facts set forth with respect to the construction of the spur tracks, their location, the acquiescence in the switching charge and its maintenance, were established before the Commission, [305] it is alleged, by undisputed evidence. It is further stated that on account of water and other competition, the rates of transportation to and from Los Angeles have been forced to an exceedingly low basis, so that the companies do not receive the amount to which they are justly entitled, and that they ought not to be required to perform the service in question without reasonable reward. The Commission's order was assailed as beyond its authority, involving a discrimination in favor of the owners of plants located upon the spur tracks, and a deprivation of the property of the carriers without due process of law.

The report of the Commission (18 Inters. Com. Rep. 310) was made a part of the bill. It appears that the proceeding before the Commission was instituted by the Associated Jobbers of Los Angeles, and was directed against two distinct practices, involving the spur-track switching charges incident to a system-line haul and to a foreigu-line haul respectively. The propriety of such a charge when the line haul was by a foreign carrier was sustained, and the prohibitory order was confined to cases where the charge was made in connection with a system-line haul. The pertinent facts, as found by the Commission, are substantially as follows:

Each of the carriers has designated certain territory as within its switching or yard limits in the city of Los Angeles, extending for 6 or 7 miles in a general easterly and westerly direction, and including numerous tracks, main lines, branch lines, industry spurs, classification tracks, team tracks, freight-shed tracks, hold tracks, repair tracks, and others, and also their stations, freight sheds, derricks, roundhouses, and other structures. Freight moving in carloads is delivered at team tracks, at freight sheds, or at industry spurs. At team tracks and freight sheds no charge is imposed for the receipt or delivery of such carload freight over the freight rate named in the tariffs, while at industry spurs an additional [306] charge of $2.50 is imposed on every loaded car moving either in or out. These industry spurs vary in length, some leading directly from the main track into or alongside of the industries served, while others are of greater length and branch at one or more points, short spurs running off from what is known as the "lead" to serve other industries in the immediate neighborhood. These spurs have been constructed under substantially uniform contracts.[2] None of the industries at Los

of, and having found that the present charge of $2.50 per car, exacted by the several defendants for delivering and receiving carload freight to and from industries located upon spurs and side tracks within their respective switching limits at Los Angeles, California, when such carload freight is moving in interstate commerce incidentally to a system-line haul, is in violation of the act to regulate commerce:

"It is ordered, That said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting their present charge of $2.50 per car for delivering and receiving carload freight to and from industries located upon spurs and side tracks within their respective switching limits in the said city of Los Angeles, California, when such carload freight is moving in interstate commerce incidentally to a system-line haul.

"It is further ordered, That said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting any charge whatever, other than the charge for transportation from points of origin to destination, for delivering or receiving carload freight to or from industries located upon spurs or side tracks within their respective switching limits in the said city of Los Angeles, California, when such carload freight is moving in interstate commerce incidentally to a system-line haul."

[2] The standard form of the Southern Pacific Company provides as follows:

"1. Undersigned (shipper) will pay cost of constructing above-described track (rails, splices, bolts, switches, frogs, switch stands, and connections to be furnished by and at the cost of Southern Pacific Company), whether such cost may be more or less than amount of foregoing approximate estimate.

"2. Said track shall be under full control of Southern Pacific Company, and may be used at discretion of said company for shipments or delivery of any freight, but the business of the undersigned shall always have preference.

"3. All material in said track furnished at expense of Southern Pacific Company, whether in original construction or by any way of replacements or repairs, shall be and remain exclusive property of Southern Pacific Company, and said Southern Pacific Company shall keep said track in repair.

"4. In case said track shall not be used by undersigned for period of one year, said

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Angeles furnishes [307] its own motive power, and interline switching is done from the interchange track to the industry by the locomotives of the delivering line, the carrier performing the switching service.

The Commission found that these spur tracks were portions of the terminal facilities of the carriers with whose lines they connected, being distinguished from mere plant facilities such as were under consideration in Chicago & A. R. Co. v. United States, 26 L.R.A.(N.S.) 551, 84 C. C. A. 324, 156 Fed. 558, and in the cases of the General Electric Co. and Solvay Process Co. 14 Inters. Com. Rep. 237, 246. Each of the spurs here considered, said the Commission, is, in a real sense, a railroad terminal at which the carrier receives and delivers freight. It further appears from the report that the charge for spur-track delivery has been made by all of the carriers at Los Angeles as long as the railroads have had access to that city; that it was first imposed by the Southern Pacific, and as the other lines came in they adopted the policy of the line already there; that, as to certain commodities, the charge was not imposed until quite recently, and at all times until the Hepburn act [Act of June 29, 1906, 34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288] went into effect there was great variation in charge as between individual shippers. It is added that there are 97 places in California to which what are known as coast terminal rates apply, rates lower than to intermediate points; only in Los Angeles, San Francisco, and San Diego is there such a charge for spur-track delivery, though in many of these places such delivery is furnished. To the north, in Portland, Seattle, Tacoma, and a large number of other points which also enjoy coast terminal [308] rates, the Southern Pacific, Northern Pacific, and Great Northern lines impose no such charge, and to the east, where defendants' lines have their termini in cities competing with Los Angeles, this charge is also unknown.

The Commission thus described the character of the service in question: "Spur-track delivery is a substitute service,—a service which it has solicited the right to give, as the evidence here shows,—a service which costs the industry for the installation of the track and the use of its property as a railway terminal. It is a service over the carrier's own rails to a point where it yields possession of the property transported, and which involves no greater expense than would team-track delivery. It relieves the carrier's team tracks and sheds, necessitating less outlay for expense of yards in a crowded city, promotes the speedy release of equipment, and vastly aids in conducting a commerce which is greater than the carrier's own facilities could freely, adequately, and economically handle.

"Again, it is not to be overlooked that the delivery given on an industry spur is not supplemental to any other delivery. Cars destined to industry spurs are not placed first at a spur, depot, or on the team tracks, or at the sheds, and later switched to oblige the consignee. A train of freight cars goes to the breaking-up yards which lie at the entrance to the city, and there it is divided up with respect to the character of the freight in the various cars and their destination. No one has access to the cars at this point. This yard is purely a railroad facility. After the cars are segregated they are taken to the tracks to which they are ordered,—some to the various team tracks distributed along the main line, some to different industries; some, perhaps, to the railroad shops or to freight sheds or to the stock yards. Before the cars are placed, the consignees are given notice of the tracks to which they are to be sent, so that there is no confusion, and the switch [309] engines which place the cars on one track also serve to haul the "loads" in and "empties" out at the other tracks. After a most exhaustive inquiry we cannot find, taking this service as a whole in the same way that it is treated by the carriers, that the service

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Southern Pacific Company may, at its option, remove said track.

"5. All goods shipped from or to said track by rail, routing of which is controlled, or may be reasonably held to be controlled, by or through undersigned, shall, when forwarded, be over such railroads as may be selected by Southern Pacific Company, provided rate of charge shall be as low as that from or to point in question by any other rail route."

The Santa Fe contract contains this provision:

"The title to said track, and to all the rails, ties, bolts, switches, fastenings, and fixtures connected therewith, and to all other property which may be furnished by the railway company in the maintenance of said track, shall at all times be and remain in said railway company, and said railway company may use the same for other purposes than the delivery of freight to, or the receipt of freight from, the second party, provided that such use shall inconvenience the business of the second party as little as possible consistent therewith; and at any time after the termination of this contract or the obligation of the railway company, as herein provided, to maintain such track, the railway company shall have the right to remove said track and every part thereof."

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is more expensive to the carrier than if all cars were given team-track delivery.

"An additional charge may be made when an additional service is given. But the service here given is not additional to that for which the rate pays. If the shipper pays for team-track delivery and does not receive it, but asks instead and is given a side track delivery, which costs the carrier no more, he may not be compelled to pay an additional charge upon the assumption that he has received a terminal team-track service which has not been given. A carrier may not so construct its rates as to compel an extra charge for like service, and this, in our judgment, the defendants at Los Angeles have done." 18 Inters. Com. Rep. pp. 317, 318.

1. It is urged that the Commission's order rests upon a construction of the statute which would forbid any carrier from separating its terminal and haulage charges on the same shipment, and that this is a fundamental misconception of the law.

We do not think that the order is open to this objection. It is true that the Commission directed attention to the distinction between the American and English methods of stating rates, pointing out that the English practice of fixing separate schedules for "conveyance" and "station terminal" rates had not obtained in this country so far as the records of the Commission show. The opinion was expressed that the provisions of the act to regulate commerce were enacted with reference to the American method of rate-making, and that the rate which the statute requires to be published is "a complete rate," including "not only the charge for hauling, but the charge for the use of [310] the terminals at both ends of the line." 18 Inters. Com. Rep. pp. 315, 316. We need not stop to consider whether this is a correct interpretation of the act, for the question of a segregation of haulage and terminal charges (meaning, by the latter, charges for the use of ordinary terminal stations in receiving and delivering goods) was not before the Commission, and its propriety was not necessarily involved in the decision. No such segregation had been attempted by the carriers here. On the contrary, it was undisputed that the line-haul carload rate comprehended receipt and delivery on team tracks or at freight sheds.

The Commission conceded the right of the carrier to charge for any terminal service that was accessorial. But it was held that an additional charge was not justified if additional service was not in fact rendered.

2. Nor do we understand that the Commission ruled that the receipt and delivery of goods at plants located upon spurs or side tracks could not, in any circumstances, be regarded as a distinct service for which separate compensation might be demanded. Cases of an interior movement of plant traffic to and from various parts of the establishment, and of deliveries through a system of interior switching tracks constructed as plant facilities, were expressly distinguished by the Commission (18 Inters. Com. Rep. pp. 313, 314); and it is apparent that the ruling of the Commission would not apply in any case where, by reason of the location and extent of the spur tracks and the character of the movement, the facts were essentially different from those upon which the decision was based. (Interstate Commerce Commission v. Stickney, 215 U. S. 98, 105, 54 L. ed. 112, 113, 30 Sup. Ct. Rep. 66.)

3. On the other hand, it cannot be maintained that the delivery and receipt of goods on industrial spur tracks within the switching limits in a city is necessarily an added service for which the carrier is entitled to make, or should make, a charge additional to the line-haul rate to [311] or from that city, when the line-haul rate embraces a receiving and delivering service for which the spur-track service is a substitute. It is said that carriers are bound to carry only to or from their terminal stations. But when industrial spur tracks have been established within the carrier's switching limits, within which, also, various team tracks are located, these spurs may in fact constitute an essential part of the carrier's terminal system. It was stated by the Commission that carriers throughout the country treat industry spurs of the kind here in question "as portions of their terminals, making no extra charge for service thereto when the carrier receives the benefit of the line haul out or in." It was added that while this general statement covered perhaps ten thousand cities and towns in the United States, the carriers before the Commission could name only three exceptions; to wit, the cities of Los Angeles, San Francisco, and San Diego. But, laying the generalization on one side, it is plain that the question whether or not there is at any point an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether there is merely a substituted service, which is substantially a like service to that included in the line-haul rate, and not received, is a question of fact to be determined according to the actual conditions of operation.

Such a question is manifestly one upon which it is the province of the Commission to pass.

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4. We must therefore take the findings of the Commission in the present case as to the character and manner of use of the industrial spurs in Los Angeles—that they constituted part of the carrier's terminals, and that under the conditions there existing, the receipt and delivery of goods on these spurs was a like service as compared with the receipt and delivery of goods at team tracks and freight sheds—as conclusions of fact. Assuming that they were based upon evidence, they are not open to review. Baltimore & [312] O. R. Co. v. United States, 215 U. S. 481, 495, 54 L. ed. 292, 297, 30 Sup. Ct. Rep. 164; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 251, 55 L. ed. 448, 456, 31 Sup. Ct. Rep. 392; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 547, 548, 56 L. ed. 308, 311, 312, 32 Sup. Ct. Rep. 108; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 92, 57 L. ed. 431, 433, 33 Sup. Ct. Rep. 185; Atchison, T. & S. F. R. Co. v. United States, 232 U. S. 199, 221, ante, 568, 577, 34 Sup. Ct. Rep. 291.

In this view, we find no ground for holding the order of the Commission to be invalid. It is not denied that the complaining shippers and these carriers were heard before the Commission, and that evidence disclosing the terminal situation in Los Angeles, and the nature and use of the various tracks within the switching limits, was presented; and it cannot be doubted that the case demanded an appreciation of a variety of details, or minor facts, in order that the ultimate questions of fact could be determined. It is said that it was established by undisputed evidence that the team tracks and freight sheds provided by the carriers were fully adequate for all carload freight. Putting aside the denial by the Commission of this allegation, it is evident that the question was not simply as to such adequacy, but as to the actual use of the various tracks, the services thereon relatively considered, and whether there was really an extra service in the circumstances shown. Again, it is said that the Commission did not find the switching charge in itself, that is, taken separately, to be unreasonable, but the inquiry was whether, in view of the conditions of the distribution of the carload freight through a large area, there was in fact such a similarity of movement as to negative the basis for a separate charge. It is further urged that while the contracts for the construction of these spurs did not fix the charge, it was proved by undisputed evidence that at the time these contracts were made the shippers consented to a special charge if freight were received and delivered thereon, and that the charge in question had been generally [313] maintained. The service, however, was performed subject to the law of the land requiring that the carrier's charges should not be unreasonable or unjustly discriminatory. See Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 482, 55 L. ed. 297, 303, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265; Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 613, 614, 56 L. ed. 911, 916, 917, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892. If it became apparent that the shippers were subjected to an arbitrary and unwarranted exaction, they were in no way estopped from bringing the matter before the body created by law to deal with such questions, and from securing its order directing the carriers to stop the objectionable practice.

But it is contended that the finding of the Commission is opposed to the admitted physical facts, and reference is made to the transportation to and from industrial plants located from ½ of a mile to 7 miles from the main track of the carrier. We find no such fundamental unsoundness in the Commission's conclusions. It appeared, as already stated, that the carrier had designated certain territory as within its switching or yard limits in Los Angeles, extending for 6 or 7 miles, and "including numerous tracks, main lines, branch lines, industry tracks, team tracks, freight-shed tracks, and various structures." It does not appear how many industries were within a short distance, or to how many the statement as to the greatest distance abovementioned applied. The carrier did not fix a charge according to the comparative service in the case of these various industrial plants. It made the same switching charge whether the distance was 200 feet or 7 miles; that is, it dealt with the situation upon an average basis, making the same charge for all this switching in a given area which constituted its terminal district. It was the service within these switching limits that the Commission was considering. Manifestly it was permissible to establish such a district, and taking the team-track and freight-shed service in that area, and the average spur-track service, the Commission reached the conclusion set forth. It is said [314] that the finding of the Commission as to the comparative cost of the service was not affirmative, but was merely a negative statement to the effect that the Commission was unable to find that the cost of spur-track delivery was more expensive to the carrier. While this form of expression was used at one place in the Commission's report, at another the service in question was described as one which involved "no greater expense than would team-track delivery," and we cannot but regard this

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as the Commission's finding upon the evidence. It is then insisted that the contrary of this finding is self-evident; but the facts with respect to the movement of freight in a great terminal district are by no means so simple that the deliberate judgment of the Commission can be regarded as contradicting the obvious.

The argument for the petitioners necessarily invites the court to substitute its judgment for that of the Commission upon matters of fact within the Commission's province. This is not the function of the court. We cannot regard the act to regulate commerce as justifying an increased or extra charge for a substantially similar service, and upon the case made it cannot be said that the Commission has overstepped its authority in forbidding the charge in question as one which was unjustly discriminatory.

In our opinion the Commerce Court erred in denying the government's motion to dismiss, and in granting the petitioners' motion for injunction. The order of the Commerce Court is therefore reversed, and the cause is remanded to the District Court of the United States for the Southern District of California, Southern Division, with instructions to dismiss the bill. Act of Oct. 22, 1913, chap. 32, Stat. 1913, p. 221.

It is so ordered.

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[315] INTERSTATE COMMERCE COMMISSION, the United States of America, Associated Jobbers of Los Angeles, and Pacific Coast Jobbers & Manufacturers Association, Appts.,

v.

SOUTHERN PACIFIC COMPANY and the Atchison, Topeka, & Santa Fe Railway Company.

(See S. C. Reporter's ed. 315, 316.)

This case is governed by the decision in Interstate Commerce Commission v. Atchison, Topeka, & Santa Fe R. Co. ante, page 1319.

[No. 97.]

Argued January 14 and 15, 1914. Decided June 8, 1914.

APPEAL from the United States Commerce Court to review an order suspending an order of the Interstate Commerce Commission prohibiting carriers from making an additional charge for receiving or delivering carload freight on industrial spur tracks within switching limits. Reversed, and cause remanded to the United States District Court for the Northern District of California, with instructions to dismiss the bill.

See same case below, 188 Fed. 241.

The facts are stated in the opinion.

Mr. **Blackburn Esterline**, Special Assistant to the Attorney General, argued the cause, and, with Solicitor General Davis, filed a brief for the United States.

Mr. **P. J. Farrell** argued the cause and filed a brief for the Interstate Commerce Commission.

Messrs. **Gardiner Lathrop** and **Fred H. Wood** argued the cause, and, with Messrs. W. F. Herrin, J. P. Blair, Robert Dunlap, T. J. Norton, and C. W. Durbrow, filed a brief for appellees.

Messrs. Fred H. Wood, C. W. Durbrow, J. P. Blair, and W. F. Herrin filed a brief for the Southern Pacific Company.

For contentions of counsel, see their briefs as reported in Interstate Commerce Commission v. Atchison, T. & S. F. R. Co. ante, 1319.

Mr. Justice **Hughes** delivered the opinion of the court:

The Pacific Coast Jobbers' Manufacturers' Association complained before the Interstate Commerce Commission of a switching charge of $2.50 per car maintained by the respondents for delivering and receiving carload freight to and from industries located upon spurs and side tracks within the carriers' switching limits in San Francisco. [316] The Commission, finding the facts to be similar to those found in the case of the complaint of the Associated Jobbers of Los Angeles with respect to switching charges in the latter city (18 Inters. Com. Rep. 310), entered a similar order prohibiting the carriers from continuing the charge. This suit was thereupon brought in the circuit court of the United States for the district of Kansas, first division, against the Interstate Commerce Commission, to restrain the enforcement of the order. Upon its transfer to the commerce court, the United States intervened and moved to dismiss the proceeding. This motion was denied, and upon the application of the petitioners an injunction was granted.

The questions presented on the appeal from this order are the same as those which have been considered in the opinion of the court in No. 98 Los Angeles Switching Case (Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.) decided this day [234 U. S. 294, ante, 1319, 34 Sup. Ct. Rep. 814], and for the reasons there set forth the order of the Commerce Court is reversed and the cause is remanded to

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the District Court of the United States for the Northern District of California, with instructions to dismiss the bill.

It is so ordered.

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[317] PORT RICHMOND & BERGEN POINT FERRY COMPANY, Plff. in Err.,
v.
BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON.

(See S. C. Reporter's ed. 317–333.)

Commerce — state regulation — congressional inaction — rates for interstate ferriage.

1. A state may fix reasonable rates for ferriage from its shore to the shore of another state over a boundary stream, until Congress undertakes to regulate such rates.

[For other cases, see Commerce, I. c; III. c, in Digest Sup. Ct. 1908.]

Commerce — state regulation — interstate ferriage.

2. The fact that ferry rates over a boundary stream were fixed by the state of incorporation of the ferry company did not preclude the state on the other side of such stream from establishing, subject to the paramount authority of Congress, the rates to be charged for ferriage from its own shore to the shore of the other state.

[For other cases, see Commerce, I. c; III. c, in Digest Sup. Ct. 1908.]

Commerce — state regulation — rates for interstate ferriage — round trips.

3. State regulation of the rates to be charged for a ticket for a round trip over an interstate ferry from the shore of such state to the shore of another state, and return, is valid until Congress undertakes to regulate such rates, where the ferry company is not thereby required to issue round-trip tickets at its office within the state.

[For other cases, see Commerce, I. c; III. c, in Digest Sup. Ct. 1908.]

[No. 225.]

Argued March 4, 1914. Decided June 8, 1914.

IN ERROR to the Court of Errors and Appeals of the State of New Jersey, to review a judgment which affirmed a judgment of the Supreme Court of the state, sustaining, on certiorari, the validity of resolutions of the Board of Chosen Freeholders of the County of Hudson, fixing interstate ferry rates. Affirmed.

See same case below, 82 N. J. L. 536, 82 Atl. 729.

The facts are stated in the opinion.

Mr. Frank Bergen argued the cause and filed a brief for plaintiff in error:

The states have not the power to prescribe rates or tolls on interstate bridges.

Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Covington & C. Elev. R. & Transp. & Bridge Co. v. Kentucky, 154 U. S. 224, 38 L. ed. 970, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 1094.

There is no substantial distinction between an interstate bridge and an interstate ferry as instruments of commerce, which can sustain an effort of a state to prescribe rates for commerce on interstate ferries.

International Transit Co. v. Sault Ste. Marie, 194 Fed. 522; Charles River Bridge Co. v. Warren Bridge, 11 Pet. 420, 620, 9 L. ed. 773, 853; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

It is no doubt true that states have exercised control in some instances over commerce by means of interstate ferries and bridges since the Federal Constitution was adopted, and there are expressions in a few opinions of this court that have been supposed to recognize the authority of the states to do so; notably in the cases of Fanning v. Gregoire, 16 How. 524, 14 L. ed. 1043; Conway v. Taylor, 1 Black, 603, 17 L. ed. 191; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257. But there is no decision of this court to that effect.

The expressions in those cases, and perhaps similar observations in a few other cases, appear to rest on a statement of Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 1, 203, 6 L. ed. 23, 71.

This remark of Chief Justice Marshall is a frail support for the conclusion that states may directly regulate the business carried on by owners of interstate ferries. The current of his opinion runs strongly against it. The misapprehension of the remark is pointed out and corrected in Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

Nearly every important instrument of interstate commerce was created by authority of the states; but that fact does not justify or support the conclusion that com-

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NOTE.—On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107, and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

On the establishment, regulation, and protection of ferries—see note to Sistersville Ferry Co. v. Russell, 59 L.R.A. 513.

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merce carried on by those instruments may be directly regulated by the states.

Covington & C. Bridge Co. v. Kentucky, 154 U. S. 219, 38 L. ed. 969, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087.

It is unnecessary to review and analyze the cases in which expressions based on the remark of Chief Justice Marshall appear. It has been done repeatedly in subsequent cases, especially in St. Clair County v. Interstate Sand & Car Transfer Co. 192 U. S. 454, 48 L. ed. 518, 24 Sup. Ct. Rep. 300; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; New York C. & H. R. R. Co. v. Hudson County, 227 U. S. 248, 57 L. ed. 499, 33 Sup. Ct. Rep. 269. Whatever conclusions might have been drawn from the *dicta* referred to in respect of the power of the states to regulate interstate commerce by ferries in the absence of regulation under congressional authority were rejected by the case of Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4. See also St. Clair County v. Interstate Sand & Car Transfer Co. 192 U. S. 454, 470, 48 L. ed. 518, 525, 24 Sup. Ct. Rep. 300.

The history of the commerce clause of the Constitution confirms the opinion that it was intended to transfer the power to regulate directly foreign commerce and commerce among the states of all kinds and by every means, from the states to the national government. See Letters by Madison to Cabell (1829) and to Davis (1832); Letters & Writings of Madison, vol. 4, pp. 14, 247; 1 Curtis, History of U. S. Const. p. 231, note; 1 Elliott, Debates, 1876 ed. p. 115; 4 Webster's Works, 8th ed. 1854, p. 9; Gibbons v. Ogden, 9 Wheat. 226, 6 L. ed. 77; Brown v. Maryland, 12 Wheat. 445, 6 L. ed. 687.

No state has succeeded in a direct attempt to regulate commerce with foreign nations since the Constitution was adopted.

The power of Congress over interstate commerce is as absolute as it is over foreign commerce.

Story, Const. § 1065; Crutcher v. Kentucky, 141 U. S. 47, 57, 58, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190.

Federal laws not only show that Congress has undertaken to regulate ferryboats engaged in commerce, but they also indicate the will of Congress that no other regulations shall be made until Congress decides to take further action.

Robbins v. Taxing Dist. 120 U. S. 489, 493, 30 L. ed. 694, 696, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, encroaches upon the exclusive power of Congress.

Hall v. De Cuir, 95 U. S. 485, 488, 24 L. ed. 547, 548.

Mr. James J. Murphy argued the cause and filed a brief for defendant in error:

The ferry in question does not come within the meaning of interstate commerce over which the Constitution confers on Congress the power of regulation.

People v. Babcock, 11 Wend. 586; Elizabethport & N. Y. Ferry Co. v. United States, 5 Blatchf. 198, Fed. Cas. No. 4,362; Hudson County v. State, 24 N. J. L. 718; Mills v. St. Clair County, 7 Ill. 197, affirmed in 8 How. 569, 12 L. ed. 1201; Chilvers v. People, 11 Mich. 43; Marshall v. Grimes, 41 Miss. 27.

The resolution of the board of chosen freeholders of the county of Hudson, state of New Jersey, now under review, is a legitimate and lawful exercise of the police power of the state, the purpose of it being manifestly to prevent the extortion of excessive rates of ferriage from the people using that public utility.

Conway v. Taylor, 1 Black, 603, 17 L. ed. 191; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257, affirming 102 Ill. 560.

That this court does not understand the Covington Bridge Case to overrule the previous cases appears from two subsequent decisions: Williams v. Wingo, 177 U. S. 601, 44 L. ed. 905, 20 Sup. Ct. Rep. 793; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463.

Such regulation has been sustained in a recent and well-reasoned case.

State v. Sickmann, 65 Mo. App. 499.

A ferry is in respect of the landing place, and not of the water. The water may be to one, and the ferry to another.

Conway v. Taylor, 1 Black, 603, 17 L. ed. 191; People v. Babcock, 11 Wend. 590.

The ferry act of New Jersey had in view the ferry establishment, and not the way across the river; it applies to a ferry having one of its termini in this state.

Hudson County v. State, 24 N. J. L. 722.

Mr. Justice Hughes delivered the opinion of the court:

The plaintiff in error, Port Richmond & Bergen Point Ferry Company, was incorporated in 1848 by special act of the legislature of New York for the purpose of maintaining a ferry across the Kill von Kull from Port Richmond, Staten Island, New York, to Bergen Point, Hudson coun-

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ty, New Jersey.[1] This act prescribed rates of ferriage, as did also the amendatory acts of 1857 (chap. 692) and 1868 (chap. 778).

The ferry is not operated in connection with any railroad.

In July, 1905, the board of chosen freeholders of the county of Hudson, New Jersey, passed two resolutions [321] fixing the rates to be taken at the ferry of this company within the county of Hudson for the transportation of foot passengers for single trips to the New York terminal, and for round trips to that terminal and return, respectively. This action was taken under the authority of an act of the legislature of New Jersey, passed in 1799, providing as follows: "That the board of chosen freeholders shall be, and they hereby are, empowered and directed to fix the rates to be taken at the several ferries within their respective counties, and the same, from time to time, to revise, alter, amend, or make anew at their discretion." Comp. Stat. (N. J.) p. 2308. On certiorari, the supreme court of the state of New Jersey sustained the validity of these resolutions against the objection that they were repugnant to the commerce clause of the Federal Constitution (80 N. J. L. 614, 77 Atl. 1046), and its judgment was affirmed by the court of errors and appeals. 82 N. J. L. 536, 82 Atl. 729. This writ of error is prosecuted.

The plaintiff in error contends that the action of the board is void for the reason that the transportation is interstate, and the fixing of rates therefor is a direct regulation of interstate commerce.

At common law, the right to maintain a public ferry lies in franchise; in England such a ferry could not be set up without the King's license; and, in this country, the right has been made the subject of legislative grant. Blissett v. Hart, Willes, Rep. 508; Re Fay, 15 Pick. 243, 249, 253; New York v. Starin, 106 N. Y. 1, 10, 11, 12 N. E. 631; 3 Kent, Com. 458; 2 Washb. Real Prop. 4th ed. 292. The states have been accustomed to grant such franchises not only for ferries wholly intrastate, but also for those to be operated from their shores to other states. Cooley, Const. Lim. 740. They have fixed the rates for such ferriage; and this has been done both directly by the legislature and also through designated courts and local boards acting under legislative sanction. The practice [322] has had continuous illustration in a great variety of instances, from the foundation of the government to the present day.[2]

The court of errors and appeals of New Jersey in the case of Hudson County v. State (1853) 24 N. J. L. 718, sustained the authority of the board to prescribe ferry rates between New Jersey and New York. Speaking through Elmer, J., the court thus described conditions existing at the time of the passage of the above-mentioned act of 1799 and its purpose: "When the act was passed, long before the invention of steamboats, ferries were generally the property of one or two individuals, established for the public convenience and private gain, by the owners of the shore, sometimes by virtue of a grant or law, and sometimes without any public authority. The owner or keeper resided on the one bank or the other of the river over which the ferry passed, and kept his boats and other apparatus where he resided. The ferry was commonly known and designated by the name of the place from which it started, and where such owner resided, as Paulus Hook ferry; or from the name of the [323] owner or keeper as Dunk's ferry, Corriel's ferry, etc. In many cases, where the river was not too wide, a bell or horn, or some other signal, was established on the side of the river opposite to that where the owner lived, so that persons coming there who desired to pass over could make known their wishes. Probably but few, if any, of the keepers, had a boat constantly running, or started at any particular hour. In some cases, there were ferry owners on both sides of the river; but the ferry or ferries on each side were considered and spoken of

[1] See also Laws of New York, 1857, chap. 692; 1860, chap. 266; 1864, chap. 290; 1868, chap. 778; 1873, chap. 300; 1881, chap. 652.

[2] A few of these instances may be cited:

New York.—Across Lake Champlain: Laws of 1803, chap. 37; 1810 chap. 61; 1812, chap. 60. (These are referred to in the argument of counsel in Gibbons v. Ogden, 9 Wheat. 1, 97, 6 L. ed. 23, 46; see 3 C. R. & G. Webster ed. Laws of New York, p. 321; 6 Webster & Skinner ed. p. 16; id. p. 394.) See also Laws of 1831, chap. 105; 1847, chap. 288; 1886, chap. 674; 1901, chap. 442; 1907, chap. 392. Between New York and New Jersey: Laws of 1850, chap. 314; 1870, chap. 731.

Vermont.—Across Lake Champlain: Laws of 1799, p. 63; 1801, p. 72; 1820, chap. 115; 1890, chap. 116; 1896, chap. 298.

New Hampshire.—Across Connecticut river: Laws of 1863, chap. 2822; 1867, chap. 86.

Missouri.—Mississippi river: Laws of 1855, p. 516; 1870, p. 231. Des Moines river: Laws of 1855, p. 517. Missouri river: Laws of 1855, p. 229; 1863-64, p. 312.

Nebraska.—Compiled Statutes of 1909, § 3549.

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as distinct ferries, and had distinct owners or keepers. This was the case with most, if not all, the ferries between Philadelphia and what is now called Camden; and the ferries on each side were regulated and governed by the laws of the state in which such owner or keeper resided. Sail and rowboats, and flats or scows, were the vessels in use, as is manifest from the act itself. . . . The act meant to authorize, and did authorize, the boards of freeholders in the several counties, to regulate the fares to be taken at the ferry situate within that county; that is, at the ferry establishment of the owner or keeper. . . . Even if it might happen, upon this construction, that one board might establish one set of rates at one side, and another board another set on the other side, or that each state might have different regulations, where the ferry was over one of the rivers forming the boundary between this and another state, I do not see that there would be any important conflict of authority. Each power regulated what was done within its own jurisdiction, and left to others to regulate what was done in theirs. Existing ferries between this state and New York, and this state and Pennsylvania, are now, in numerous instances, regulated by the laws of this state, without the occurrence of any difficulty. . . . Without deeming it necessary to go over and specially refer to the different acts . . . it is sufficient to say, that they show a course of legislation, [324] commencing in 1714, and continued till near the passage of the act of 1799, by which the ferries over the waters dividing this state from the adjoining states were regulated by the laws of New Jersey, in those cases where ferry establishments were within this state. . . . To effect this object [*i. e.*, of the act] the word 'ferries' must be interpreted to mean, what in those laws it had obviously included, ferries the owners or keepers of which resided in this state, or which had one of their termini, where fares were demanded, in this state, and not merely ferries in the technical meaning, of an entire passage across a river or other water. . . . If set up without public authority, it [the ferry] was liable at any time to be stopped, or, in the discretion of the legislature, to be regulated. . . . It is sufficient, to authorize these rates, that it is a public ferry, and that there is no law prescribing rates for it, inconsistent with the exercise of the power by the board of chosen freeholders." Supra, pp. 721-724, 726. This decision was followed by the state court in the present case.[3]

In view of the extended consideration which the decisions of this court bearing upon the questions involved have received in recent opinions (St. Clair County v. Interstate Sand & Car Transfer Co. 192 U. S. 454, 48 L. ed. 518, 24 Sup. Ct. Rep. 300; New York C. & H. R. R. Co. v. Hudson County, 227 U. S. 248, 57 L. ed. 499, 33 Sup. Ct. Rep. 269), it is not necessary to review them at length. The authority of the state to grant franchises for ferries to be operated from its shores across boundary waters was distinctly recognized in Fanning v. Gregoire, 16 How. 524, 14 L. ed. 1043; Conway v. Taylor, 1 Black, 603, 17 L. ed. 191; and Wiggins Ferry Co. v. [325] East St. Louis, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257. While in Fanning v. Gregoire, supra, the plaintiff's license for a ferry across the Mississippi river from Dubuque, Iowa, was held, under the terms of the grant, not to be exclusive as against the subsequent licensee, the court said that the commercial power of Congress did not "interfere with the police power of the states in granting ferry licenses." In Conway v. Taylor, supra, the court upheld a judgment which restrained the appellants (the owners of a ferry from Cincinnati, Ohio, to Newport, Kentucky) from conducting the ferry from the Kentucky shore to Ohio in violation of the rights of the appellees under their Kentucky franchise. Referring to the latter, the court said:

"The franchise is confined to the transit from the shore of the state. The same rights which she claims for herself she concedes to others. . . . It was shown in the argument at bar that similar laws exist in most, if not all, the states bordering upon those streams. They exist in other states of the Union bounded by navigable waters." With respect to "ordinary commercial navigation," the authority of the appellants to transport persons and property from the Kentucky shore was undoubted. The owners of the Kentucky franchise, it was said, had no right to exclude or restrain those who were prosecuting

[3] As to the views of other states' courts upon this subject, see People v. Babcock 11 Wend. 586; Newport v. Taylor, 16 B. Mon. 699; Marshall v. Grimes, 41 Miss. 27; Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884; Memphis v. Overton, 3 Yerg. 387, 390; Burlington & H. County Ferry Co. v. Davis, 48 Iowa, 133, 30 Am. Rep. 390; Tugwell v. Eagle Pass Ferry Co. 74 Tex. 480, 9 S. W. 120, 13 S. W. 654; State v. Faudre, 54 W. Va. 122, 63 L.R.A. 877, 102 Am. St. Rep. 927, 46 S. E. 269, 1 Ann. Cas. 104; Chilvers v. People, 11 Mich. 42.

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"the business of commerce in good faith, without the regularity or purposes of ferry trips," but, as the appellants' boat was run "openly and avowedly as a ferryboat," as "that was her business," the injunction was sustained. After referring to the commerce clause, the opinion concluded: "Undoubtedly, the states, in conferring ferry rights, may pass laws so infringing the commercial power of the nation that it would be the duty of this court to annul or control them. . . . There has been now nearly three-quarters of a century of practical interpretation of the Constitution. During all that time, as before the Constitution had its birth, the states have exercised [326] the power to establish and regulate ferries; Congress never. We have sought in vain for any act of Congress which involves the exercise of this power. That the authority lies within the scope of 'that immense mass' of undelegated powers which 'are reserved to the states respectively,' we think too clear to admit of doubt." These cases were cited with approval in Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257. There, the ferry company was an Illinois corporation and held a franchise granted by the legislature of that state for the operation of a ferry from East St. Louis, Illinois, to St. Louis, Missouri. The payment of a license tax imposed upon the company in Illinois, for the privilege of conducting the ferry, was resisted under the commerce clause, but the contention was overruled, the court holding that "the levying of a tax upon vessels or other water-craft, or the exaction of a license fee by the state within which the property subject to the exaction has its situs, is not a regulation of commerce within the meaning of the Constitution." (Id. p. 373.)

It is manifest, however, that the transportation of persons and property from one state to another is none the less interstate commerce because conducted by ferry; and it is not open to question that ferries maintained for that purpose are subject to the regulating power of Congress. It necessarily follows that whatever may properly be regarded as a direct burden upon interstate commerce, as conducted by ferries operating between states, it is beyond the competency of the states to impose. This was definitely decided in Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826. The commonwealth of Pennsylvania had imposed a tax upon the ferry company, based upon the estimated value of its capital stock, upon the ground that it was doing business within the state. The company was incorporated in New Jersey and maintained a ferry from Gloucester, in that state, to Philadelphia. Save for the wharf that it leased at the latter place, its [327] property, including its boats, had its situs in New Jersey; and its entire business consisted in ferrying. The tax upon the "receiving and landing of passengers and freight at the wharf in Philadelphia," which was a necessary incident to the transportation across the Delaware river, was a tax upon that transportation; and in this view the tax was held to be void as one laid upon interstate commerce. "The only interference of the state with the landing and receiving of passengers and freight, which is permissible," said the court, "is confined to such measures as will prevent confusion among the vessels, and collision between them, insure their safety and convenience, and facilitate the discharge or receipt of their passengers and freight, which fall under the general head of port regulations." Id. p. 206. It was said that the statement of Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 1, 203, 6 L. ed. 23, 71, had relation to ferries entirely within the state. "Ferries," continued the court, "between one of the states and a foreign country cannot be deemed . . . beyond the control of Congress under the commercial power, . . . neither are ferries over waters separating states." And it was pointed out that Congress had passed various laws respecting international and interstate ferries, the validity of which was not open to question (Rev. Stat. §§ 2792, 4233 (Rule 7), 4370, 4426).

But, in view of the nature of the subject and the diversified regulation which was necessary, it was recognized that the states were entitled to exercise a measure of regulatory power not inconsistent with the Federal authority. The court said: "It is true that, from the earliest period in the history of the government, the states have authorized and regulated ferries, not only over waters entirely within their limits, but over waters separating them; and it may be conceded that in many respects the states can more advantageously manage [328] such interstate ferries than the general government; and that the privilege of keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the state, to be exercised within such limits and under such regulations as may be required for the safety, comfort, and convenience of the public. Still the fact remains that such a ferry is a means, and a necessary means, of commercial intercourse between the states bordering on their dividing waters, and it must therefore be conducted without the imposition by the states of taxes or other burdens upon the

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commerce between them. Freedom from such impositions does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption." (Id. p. 217.)

In Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087, the question related to the power of the state of Kentucky to regulate tolls upon an interstate bridge built pursuant to the concurrent action of Kentucky and Ohio. The power was denied under the commerce clause. Reviewing the authorities, the opinion was expressed that the principle involved was identical with that applied in Wabash, St. L. & P. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4, with respect to interstate railroad rates, and that (at least, in the absence of mutual action) it was impossible for either state to fix a tariff of charges. It was said that it did not follow that because a state might "authorize a ferry or bridge from its own territory to that of another state," it might "regulate the charges upon such bridge or ferry." It was pointed out, however, that the state of Kentucky, by the statute in question, attempted "to reach out and secure for itself a right to prescribe a rate of toll applicable not only to persons crossing from Kentucky to Ohio, but from Ohio to Kentucky,"—a right which practically nullified [329] "the corresponding right of Ohio to fix tolls from her own state." (Id. p. 220.) And this was an adequate basis for the judgment. Four of the justices of the court, concurring in the judgment, announced their view that "the several states have the power to establish and regulate ferries and bridges, and the rates of toll thereon, whether within one state, or between two adjoining states, subject to the paramount authority of Congress over interstate commerce."

In Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463, where a Kentucky corporation conducting a ferry across the Ohio river between Kentucky and Indiana held ferry franchises from both states, it was decided that the franchise from Indiana could not be taxed by Kentucky. The court said that the franchises were distinct; that each was "property entitled to the protection of the law;" and that the Indiana franchise must be regarded as an incorporeal hereditament, having its situs in that state, and hence, as beyond the jurisdiction of Kentucky. The case of St. Clair County v. Interstate Sand & Car Transfer Co. 192 U. S. 454, 48 L. ed. 518, 24 Sup. Ct. Rep. 300, involved the right of a county in Illinois to recover statutory penalties for carrying on, without a ferry license, the transportation of cars across the Mississippi river between points in Illinois and Missouri. Conceding, *arguendo*, that the police power of a state extends "to the establishment, regulation, and licensing of ferries on a navigable stream, being the boundary between two states," it was held that the business of transporting railroad cars was not a ferry business in the proper sense; and that the requirements of the ordinance in question made it a direct burden upon interstate commerce. The ordinance was therefore held to be invalid. In New York C. & H. R. R. Co v. Hudson County, 227 U. S. 248, 57 L. ed. 499, 33 Sup. Ct. Rep. 269, the question concerned the authority of the New Jersey board to fix rates for a ferry between Weehawken, New Jersey, and New York City. [330] It appeared that the ferry was operated in connection with a railroad, and it was concluded that the action of Congress with respect thereto (act to regulate commerce, § 1, 24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154) had the effect of freeing the subject from state control.

Coming, then, to the question now presented,—whether a state may fix reasonable rates for ferriage from its shore to the shore of another state,—regard must be had to the basic principle involved. That principle is, as repeatedly declared, that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive; that, in other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and that, when Congress does act, the exercise of its authority overrides all conflicting state legislation. Cooley v. Port Wardens, 12 How. 299, 319, 13 L. ed. 996, 1004; Ex parte McNiel, 13 Wall. 236, 240, 20 L. ed. 624, 625; Welton v. Missouri, 91 U. S. 275, 280, 23 L. ed. 347, 349; Mobile County v. Kimball, 102 U. S. 691, 697, 26 L. ed. 238, 239; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 204, 29 L. ed. 162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 481, 485, 31 L. ed. 700, 705, 707, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 103, 104, 39 L. ed. 910, 912, 913, 15 Sup. Ct. Rep. 802; Northern P. R. Co. v. Washington, 222 U. S. 370, 378, 56 L. ed. 237, 239, 32 Sup. Ct. Rep. 160; Southern R.

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Co. v. Reid, 222 U. S. 424, 436, 56 L. ed. 257, 260, 32 Sup. Ct. Rep. 140; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 399, 400, 57 L. ed. 1511, 1541, 1542, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729. It is this principle that is applied in holding that a state may not impose direct burdens upon interstate commerce, for this is to say that the states may not directly regulate or restrain that which, from its nature, should be under the control of the one authority, and be free from restriction save as it is governed by valid Federal rule. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 204, 29 L. ed. 162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826. It was this principle which governed the decision in Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4, as to interstate railroad rates. Considering the conditions of interstate railroad transportation, [331] which might extend not only from one state to another, but through a series of states, or across the continent, and the consequences which would ensue if each state should undertake to fix rates for such portions of continuous interstate hauls as might be within its territory, the conclusion was reached that "this species of regulation" was one "which must be, if established at all, of a general and national character," and could not be "safely and wisely remitted to local rules." (Id. p. 577.)

But, in the case of ferries, we have a subject of a different character. We dismiss from consideration those ferries which are operated in connection with railroads, and cases, if any, where the ferriage is part of a longer and continuous transportation. Ferries, such as are involved in the present case, are simply means of transit from shore to shore. These have always been regarded as instruments of local convenience, which, for the proper protection of the public, are subject to local regulation; and where the ferry is conducted over a boundary stream, each jurisdiction with respect to the ferriage from its shore has exercised this protective power. There are a multitude of such ferries throughout the country, and, apart from certain rules as to navigation, they have not engaged the attention of Congress. We also put on one side the question of prohibitory or discriminatory requirements, or burdensome exactions imposed by the state, which may be said to interfere with the guaranteed freedom of interstate intercourse, or with constitutional rights of property. The present question is simply one of reasonable charges. It is argued that the mere fact that interstate transportation is involved is sufficient to defeat the local regulation of rates, because, it is said, that it amounts to a regulation of interstate commerce. But this would not be deemed a sufficient ground for invalidating the local action without considering the nature of the regulation and the special subject to which it relates. Quarantine and pilotage [332] regulations may be said to be quite as direct in their operation, but they are not obnoxious when not in conflict with Federal rules. The fundamental test, to which we have referred, must be applied; and the question is whether, with regard to rates, there is any inherent necessity for a single regulatory power over these numerous ferries across boundary streams; whether, in view of the character of the subject and the variety of regulation required, it is one which demands the exclusion of local authority. Upon this question we can entertain no doubt. It is true that in the case of a given ferry between two states there might be a difference in the charge for ferriage from one side, as compared with that for ferriage from the other. But this does not alter the aspect of the subject. The question is still one with respect to a *ferry*, which necessarily implies transportation for a short distance, almost invariably between two points only, and unrelated to other transportation. It thus presents a situation essentially local, requiring regulation according to local conditions. It has never been supposed that because of the absence of Federal action the public interest was unprotected from extortion, and that in order to secure reasonable charges in a myriad of such different local instances, exhibiting an endless variety of circumstance, it would be necessary for Congress to act directly, or to establish for that purpose a Federal agency. The matter is illuminated by the consideration of this alternative, for the point of the contention is that, there being no Federal regulation, the ferry rates are to be deemed free from all control. The practical advantages of having the matter dealt with by the states are obvious, and are illustrated by the practice of one hundred and twenty-five years. And in view of the character of the subject, we find no sound objection to its continuance. If Congress at any time undertakes to regulate such rates, its action will, of course, control.

If the state may exercise this power, it necessarily [333] follows that it may not, in its exercise, derogate from the similar authority of another state. The state power can extend only to the transactions within its own territory and the ferriage from its own shore. It follows that the fact that rates were fixed by New York did not preclude New Jersey from establishing reasonable

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rates with respect to the ferry establishment maintained on its side.

With respect to the rates for round trips, we do not construe the ordinance as requiring the company to issue round-trip tickets at its office in New Jersey. We may not look into the testimony, and it does not appear that such a construction has been placed upon the ordinance by the state court. Viewed as a limitation upon rates charged for such round-trip tickets, when sold by the company in New Jersey, we think that the ordinance is valid, being one relating to the transactions of the company in New Jersey, and the charges there enforced. Whether it would be competent for the state, through the local board, to require the company to issue round-trip tickets, is a question not presented by the record, and we express no opinion upon it.

The judgment is affirmed.

Affirmed.

CITY OF SAULT STE. MARIE, Andrew J. Short, Mayor, et al., Appts.,
v.
INTERNATIONAL TRANSIT COMPANY.

(See S. C. Reporter's ed. 333–342.)

Commerce — license tax — conducting ferry over boundary stream.

A state, or a municipality acting under its authority, may not, consistently with the commerce clause of the Federal Constitution, require a Canadian corporation operating a ferry over the boundary stream lying between such state and Canada to take out a license and pay a license fee as a condition precedent to receiving and landing persons and property at its wharf in such municipality.

[For other cases, see Commerce, III. d, 13, in Digest Sup. Ct. 1908.]

[No. 323.]

Argued March 20, 1914. Decided June 8, 1914.

APPEAL from the District Court of the United States for the Western District of Michigan to review a decree enjoining the enforcement of a municipal ordinance requiring a Canadian corporation operating a ferry between Canada and the United States to take out a license and pay a license fee as a condition to conducting its business at its wharf in such municipality. Affirmed.

See same case below, 194 Fed. 522.

The facts are stated in the opinion.

Mr. John W. Shine argued the cause, and, with Mr. F. T. McDonald, filed a brief for appellants:

A ferry is in respect to the landing, and not of the water. The point of departure is the seat, the base, the home of the ferry.

Conway v. Taylor, 1 Black, 603, 17 L. ed. 191; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 394, 47 L. ed. 513, 517, 23 Sup. Ct. Rep. 463; Memphis v. Overton, 3 Yerg. 390; State v. Faudre, 54 W. Va. 122, 63 L.R.A. 877, 102 Am. St. Rep. 927, 46 S. E. 269, 1 Ann. Cas. 104; Powers v. Athens, 99 N. Y. 592, 2 N. E. 609.

Ferries are local in their nature, and the regulation of ferries is a matter of local concern.

Chilvers v. People, 11 Mich. 51; St. Clair County v. Interstate Sand & Car Transfer Co. 192 U. S. 454, 48 L. ed. 518, 24 Sup. Ct. Rep. 300.

In all local matters state statutes are valid until superseded by act of Congress.

Cooley v. Port Wardens, 12 How. 310, 13 L. ed. 1001; Mobile County v. Kimball, 102 U. S. 691, 702, 26 L. ed. 238, 241; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 507, 31 L. ed. 700, 714, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Stoutenburgh v. Hennick, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Ouachita Packet Co. v. Aiken, 121 U. S. 444, 30 L. ed. 976, 1 Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; Cardwell v. American River Bridge Co. 113 U. S. 205, 210, 28 L. ed. 959, 961, 5 Sup. Ct. Rep. 423; Willoughby, Const. § 309.

The privilege of keeping a ferry over boundary streams, with the right to take tolls for passengers and property, is grantable by the state.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 217, 29 L. ed. 158, 166, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; State v. Faudre, 54 W. Va. 122, 63 L.R.A. 877.

NOTE.—On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107, and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

On the establishment, regulation, and protection of ferries—see note to Sistersville Ferry Co. v. Russell, 59 L.R.A. 513.

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102 Am. St. Rep. 927, 46 S. E. 269, 1 Ann. Cas. 104; Sistersville Ferry Co. v. Russell, 52 W. Va. 356, 59 L.R.A. 513, 43 S. E. 107; Cross v. Hopkins, 6 W. Va. 323; Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884; State v. Sickmann, 65 Mo. App. 499; Tugwell v. Eagle Pass Ferry Co. 74 Tex. 480, 9 S. W. 120, 13 S. W. 654; Parsons v. Hunt, 98 Tex. 420, 84 S. W. 644; Nixon v. Reid, 8 S. D. 507, 32 L.R.A. 315, 67 N. W. 57; Hatten v. Turman, 123 Ky. 844, 97 S. W. 770, 98 S. W. 1000.

The right to establish and regulate ferries over boundary streams is among the powers reserved to the state.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Young's Case, 2 Cranch, C. C. 453, Fed. Cas. No. 18,150; Memphis v. Overton, 3 Yerg. 387; People v. Babcock, 11 Wend. 587; United States ex rel. Jones v. Fanning, Morris (Iowa) 348; Mills v. St. Clair County, 7 Ill. 225, affirmed in 8 How. 569, 12 L. ed. 1201; Phillips v. Bloomington, 1 G. Greene, 498; Fanning v. Gregoire, 16 How. 524, 14 L. ed. 1043; Hudson County v. State, 24 N. J. L. 718; Newport v. Taylor, 16 B. Mon. 699; Chiapella v. Brown, 14 La. Ann. 185; Minturn v. Larue, 23 How. 435, 16 L. ed. 574; Conway v. Taylor, 1 Black, 603, 17 L. ed. 191; Chilvers v. People, 11 Mich. 43; Marshall v. Grimes, 41 Miss. 27; Burlington & H. County Ferry Co. v. Davis, 48 Iowa, 133, 30 Am. Rep. 390; St. Louis v. Waterloo-Carondelet Turnp. & Ferry Co. 14 Mo. App. 216; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257; Tugwell v. Eagle Pass Ferry Co. 74 Tex. 486, 9 S. W. 120, 13 S. W. 654; Madison v. Abbott, 118 Ind. 337, 21 N. E. 28; Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884; State v. Sickmann, 65 Mo. App. 499; Nixon v. Reid, 8 S. D. 507, 32 L.R.A. 315, 67 N. W. 57; Sistersville Ferry Co. v. Russell, 52 W. Va. 356, 59 L.R.A. 513, 43 S. E. 107; State v. Faudre, 54 W. Va. 122, 63 L.R.A. 877, 102 Am. St. Rep. 927, 46 S. E. 269, 1 Ann. Cas. 104; New York C. & H. R. R. Co. v. Hudson County, 76 N. J. L. 664, 74 Atl. 954, 16 Ann. Cas. 858; Port Richmond & B. Pt. Ferry Co. v. Hudson County, 80 N. J. L. 614, 77 Atl. 1046.

The right of the state to establish and regulate ferries over boundary streams between states and foreign countries has been sustained.

People v. Babcock, 11 Wend. 587; Chilvers v. People, 11 Mich. 43; Tugwell v. Eagle Pass Ferry Co. 74 Tex. 486, 9 S. W. 120, 13 S. W. 654.

This court has repeatedly held that the power over ferries on boundary streams is reserved to the states.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Young's Case, 2 Cranch, C. C. 453, Fed. Cas. No. 18,150; Mills v. St. Clair County, 8 How. 569, 12 L. ed. 1201; Fanning v. Gregoire, 16 How. 524, 14 L. ed. 1043; Minturn v. Larue, 23 How. 435, 16 L. ed. 574; Conway v. Taylor, 1 Black, 603, 17 L. ed. 191; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257.

Ferries are in aid of commerce, and not an interference with commerce.

Gibbons v. Ogden, 9 Wheat. 235, 6 L. ed. 79; Fanning v. Gregoire, 16 How. 524, 14 L. ed. 1043; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 378, 27 L. ed. 419, 424, 2 Sup. Ct. Rep. 257.

Where a doubt arises as to the restriction of the commerce clause, it is to be decided in favor of the state.

Bank of Commerce v. Tennessee, 104 U. S. 495, 26 L. ed. 811; Annapolis & E. Ridge R. Co. v. Anne Arundel County, 103 U. S. 1, 26 L. ed. 359; Wilson v. Gaines, 103 U. S. 417, 26 L. ed. 401; East Tennessee, V. & G. R. Co. v. Hamblen County, 102 U. S. 273, 26 L. ed. 152; Memphis & C. R. Co. v. Gaines, 97 U. S. 697, 24 L. ed. 1091; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 373, 27 L. ed. 422, 2 Sup. Ct. Rep. 257.

If the reserved power in the states to regulate ferries over boundary streams is divisible into those that are exclusive in the state, and those that are merely reserved to the states until Congress acts, and if the case at bar falls within the latter class, then the power to regulate ferries on the St. Mary's river is still in the state of Michigan, as Congress has not, by any act of Congress, deprived the state of this power.

Conway v. Taylor, 1 Black, 603, 17 L. ed. 191.

The power of the states over the general subject of commerce, according to some of the adjudications, is divisible into three classes:

First. Those in which the power of the state is exclusive.

Second. Those in which the state may act in the absence of legislation by Congress.

Third. Those in which the action of Congress is exclusive and the state cannot interfere at all.

Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Interst. Com. Rep. 649, 4 Sup. Ct. Rep. 1087.

The acts of Congress relative to the licensing and enrolment of vessels do not interfere with the regulation of ferries by the states.

Conway v. Taylor, supra; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257; The Nassau, 182 Fed. 696, affirmed in 110 C. C. A. 184, 188 Fed. 46.

The fact that some articles of freight are

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also carried on the ferryboat does not change or affect the rule applied to ferries.

St. Clair County v. Interstate Sand & Car Transfer Co. 192 U. S. 454, 458–468, 48 L. ed. 518, 520–525, 24 Sup. Ct. Rep. 300.

A license fee imposed as a condition of granting a ferry license is not a tax on commerce within the meaning of the commerce clause of the Constitution.

Wiggins Ferry Co. v. East St. Louis, 102 Ill. 560, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257; Chilvers v. People, 11 Mich 43; Ash v. People, 11 Mich. 347, 83 Am. Dec. 740; Kitson v. Ann Arbor, 26 Mich. 325; McQuillin, Mun. Ord. § 409.

The power of the state to license and regulate ferries includes the power to fix rates for the ferriage of persons and property.

Fanning v. Gregoire, 16 How. 524, 14 L. ed. 1043; Hudson County v. State, 24 N. J. L. 718; State v. Sickmann, 65 Mo. App. 499.

The fact that appellee is a foreign corporation does not affect the right of the state to regulate ferries.

Port Richmond & B. Pt. Ferry Co. v. Hudson County, 80 N. J. L. 614, 77 Atl. 1046.

Mr. Henry E. Bodman argued the cause, and, with Messrs. James Turner, Herbert E. Boynton, and Alexis C. Angell, filed a brief for appellee:

The appellee is engaged in foreign commerce.

Mobile County v. Kimball, 102 U. S. 691, 702, 26 L. ed. 238, 241; The Hazel Kirke, 23 Blatchf. 292, 25 Fed. 601; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 497, 52 L. ed. 297, 308, 28 Sup. Ct. Rep. 141; New York C. & H. R. R. Co. v. Hudson County, 227 U. S. 248, 57 L. ed. 499, 33 Sup. Ct. Rep. 269; Hall v. DeCuin, 95 U. S. 485, 24 L. ed. 547.

The commerce in which appellee is engaged is not subject to regulation by the ordinance in question because such ordinance is a burden upon it and conflicts with the Federal Constitution.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729; State Freight Tax Case, 15 Wall. 232, 279, 21 L. ed. 146, 162; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 272, 273, 23 L. ed. 543, 549; West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; Passenger Cases, 7 How. 283, 408, 409, 12 L. ed. 702, 754, 755; St. Clair County v. Interstate Sand & Car Transfer Co. 192 U. S. 454, 461, 48 L. ed. 518, 521, 24 Sup. Ct. Rep. 300; Crutcher v. Kentucky, 141 U. S. 47, 57, 58, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 21, 54 L. ed. 355, 363, 30 Sup. Ct. Rep. 190.

Even if such regulations could be sustained on the ground that Congress has not acted, in relation to commerce between the states, it would not necessarily follow that foreign commerce could be similarly burdened by local authority. A distinction is drawn in this regard between interstate and foreign commerce.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 482, 483, 31 L. ed. 700, 706, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062.

Mr. Justice Hughes delivered the opinion of the court:

This suit was brought by the International Transit Company, a Canadian corporation, to restrain the enforcement of [338] an ordinance adopted, in the year 1911, by the city of Sault Ste. Marie, Michigan. The ordinance related to the maintaining of ferries from that city across the St. Mary's river to the opposite shore, in the province of Ontario; and the complainant contended that, as applied to it, the ordinance was a violation of the commerce clause of the Federal Constitution and of article 1 of the treaty of January 11, 1909 (36 Stat. at L. 2449), between the United States and Great Britain. The district court granted the relief as prayed (194 Fed. 522); and this appeal is brought.

The transit company holds a license from the Dominion government to operate a ferry between Sault Ste. Marie, Ontario and Sault Ste. Marie, Michigan. It owns, and uses in this business, two steam ferryboats of British registry; it leases a private wharf in the city of Sault Ste. Marie, Michigan, and there maintains an office where fares are received. The Canadian license prescribes the frequency of the service and fixes the maximum fares to be charged; it also provides that the licensee shall not "infringe any of the laws or bylaws or of the regulations" of the United States or of the state of Michigan or "of the town of Sault Ste. Marie, U. S. A.," in reference to ferriage, "which may be applicable to the said ferry or such portion thereof as may be within the jurisdiction of any of them."

The city of Sault Ste. Marie, Michigan, was authorized by its charter to "establish, license, and regulate ferries to and from the city," and to prescribe rates. The

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charter also provided: "The council may regulate and license ferries from the city or any place or landing therein to the opposite shore . . . and may require the payment of such reasonable sum for such license as the council shall deem proper; and may impose such reasonable terms and restrictions in relation to the keeping and management of such ferries, and the time, manner, and rates of carriage and transportation of persons and property, as may be [339] proper; and provide for the revocation of any such license, and for the punishment, by proper fines and penalties, for the violation of any ordinance prohibiting unlicensed ferries and regulating those established and licensed." Under this authority, the city adopted the ordinance in question. Section 1 is as follows:

"No person, persons, or company shall operate a ferryboat, or engage in the business of carrying or transporting persons or property thereon from the city of Sault Ste. Marie, Michigan, and across the St. Mary's river to the opposite shore, without first obtaining a license therefor from the mayor, and by otherwise complying with the provisions of this ordinance."

The mayor was empowered to grant a license upon the payment of $50 annually for each ferryboat engaged in such transportation, and it was further provided that, before any license should be issued, the person or company desiring the same should make application setting forth a schedule of the rates proposed to be charged within the prescribed territory. Additional provisions fixed the period and frequency of service and the rates to be charged from the licensee's dock within the city to the opposite shore. The mayor was authorized to revoke the license if he was satisfied that any of the provisions of the ordinance were violated. After the passage of this ordinance, one Pocock, operating a ferryboat belonging to the transit company without a license having been obtained therefor, was arrested and fined. Alleging the purpose of the city to enforce the ordinance, and its invalidity, the transit company then brought this suit.

It will be observed that the question is not simply as to the power of the state to prevent extortion and to fix reasonable ferry rates from the Michigan shore; it is not as to the validity of a mere police regulation governing the manner of conducting the business in order to secure safety and the public convenience. (See Port Richmond & B. Pt. [340] Ferry Co. v. Hudson County, decided this day [234 U. S. 317, ante, 1330, 34 Sup. Ct. Rep. 821].) The ordinance goes beyond this. The ordinance requires a municipal license; and the fundamental question is whether, in the circumstances shown, the state, or the city, acting under its authority, may make its consent a condition precedent to the prosecution of the business. If the state, or the city, may make its consent necessary, it may withhold it. The appellee, having its domicil in Canada, is engaged in commerce between Canada and the United States. At the wharf which it leases for the purpose on the American shore, it receives and lands persons and property. Has the state of Michigan the right to make this commercial intercourse a matter of local privilege, to demand that it shall not be carried on without its permission, and to exact as the price of its consent—if it chooses to give it—the payment of a license fee?

This question must be answered in the negative. It is urged, on behalf of the city, that the state, either directly or through its municipalities, may establish and license ferries,—may grant ferry franchises (Fanning v. Gregoire, 16 How. 524, 14 L. ed. 1043; Conway v. Taylor, 1 Black, 603, 17 L. ed. 191; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257). But, since the decision in Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826, it has been clear that, whatever authority the state may have for this purpose, it does not go so far as to enable the state to interdict one in the position of the appellee from conducting the commerce in which it is engaged, or justify the state in imposing exactions upon that commerce in the view that business of this character may be carried on only by virtue of its consent, express or implied. In that case the ferry company was a New Jersey corporation, receiving and landing its passengers and property at its wharf in Philadelphia in substantially the same manner as the appellee transacts its business at its wharf in Sault Ste. Marie, Michigan. The court held that it was [341] not within the power of the state to prevent the ferry company from so doing; that this was an essential part of the interstate transportation which the state could not forbid, or burden by a privilege tax. See Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 343, 30 L. ed. 1200, 1204, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118. Referring to foreign commerce, the court said in Crutcher v. Kentucky, 141 U. S. 47, 57, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851: "Would anyone pretend that a state legislature could prohibit a foreign corporation—an English or a French transportation company, for example—from com-

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ing into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage without first obtaining a license from some state officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation." Ferry transportation is placed upon the same footing in this respect by the holding in the Gloucester Case (supra, pp. 203, 205), the point of the decision being that the transportation was within the protection of the constitutional grant to Congress. "It matters not," said the court, "that the transportation is made in ferryboats, which pass between the states every hour of the day."

The fundamental principle involved has been applied by this court in recent decisions in a great variety of circumstances, and it must be taken to be firmly established that one otherwise enjoying full capacity for the purpose cannot be compelled to take out a local license for the mere privilege of carrying on interstate or foreign commerce. Robbins v. Taxing Dist. 120 U. S. 489, 496, 30 L. ed. 694, 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Leloup v. Mobile, 127 U. S. 640, 645, 32 L. ed. 311, 313, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Stoutenburgh v. Hennick, 129 U. S. 141, 148, 32 L. ed. 637, 639, 9 Sup. Ct. Rep. 256; McCall v. California, 126 U. S. 104, 109, 34 L. ed. 391, 392, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; Crutcher v. Kentucky, 141 U. S. 58, 35 L. ed. 652, 11 Sup. Ct. Rep. 851; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed 295, 27 Sup. Ct. Rep. 159; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 21, 54 L. ed. 355, 363, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; [342] International Textbook Co. v. Pigg, 217 U. S. 91, 109, 54 L. ed. 678, 686, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; West v. Kansas Natural Gas Co. 221 U. S. 229, 260, 55 L. ed. 716, 728, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; Bucks Stove & Range Co. v. Vickers, 226 U. S. 205, 215, 57 L. ed. 189, 192, 33 Sup. Ct. Rep. 41; Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 400, 57 L. ed. 1511, 1541, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; Barrett v. New York, 232 U. S. 14, 31, 32, ante, 483, 490, 491, 34 Sup. Ct. Rep. 203.

Assuming that, by reason of the local considerations pertinent to the operation of ferries, there exists, in the absence of Federal action, a local protective power to prevent extortion in the rates charged for ferriage from the shore of the state, and to prescribe reasonable regulations necessary to secure good order and convenience, we think that the action of the city in the present case in requiring the appellee to take out a license, and to pay a license fee, for the privilege of transacting the business conducted at its wharf, was beyond the power which the state could exercise either directly or by delegation. In this view it is unnecessary to consider the question raised with respect to the treaty with Great Britain.

The decree restraining the enforcement of the ordinance in question as against the appellee is affirmed.

Affirmed.

HOUSTON, EAST & WEST TEXAS RAILWAY COMPANY and Houston & Shreveport Railroad Company et al., Appts.,
v.
UNITED STATES, the Interstate Commerce Commission et al. (No. 567.)

TEXAS & PACIFIC RAILWAY COMPANY et al., Appts.,
v.
UNITED STATES, the Interstate Commerce Commission et al. (No. 568.)

(See S. C. Reporter's ed. 342–360.)

Commerce — power of Congress — internal commerce.

1. Congress, in the exercise of its paramount power, may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce.

[For other cases, see Commerce, I., in Digest Sup. Ct. 1908.]

Commerce — power of Congress — regulating intrastate rates.

2. Congress has the power to control the intrastate rates maintained by a carrier under state authority to the extent neces-

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NOTE.—As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

On delegation by legislature of power to regulate carriers—see note to State v. Atlantic Coast Line R. Co. 32 L.R.A.(N.S.) 639.

Generally, on legislative power to fix tolls, rates, or prices—see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177.

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sary to remove the resulting unjust discrimination against interstate commerce arising out of the relation between such intrastate rates and interstate rates which are reasonable in themselves.

[For other cases, see Commerce, III. c, in Digest Sup. Ct. 1908.]

Constitutional law — delegation of power — to Interstate Commerce Commission.

3. Congress may delegate to the Interstate Commerce Commission authority to control the intrastate rates maintained by a carrier under state authority to the extent necessary to remove the resulting unjust discrimination against interstate commerce arising out of the relation between such intrastate rates and interstate rates which are reasonable in themselves.

[For other cases, see Constitutional Law, III. b, 3, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — powers — regulating intrastate rates.

4. The authority of the Interstate Commerce Commission to remove discriminations against interstate traffic under the act of February 4, 1887 (24 Stat. at L. 379, 380, chap. 104, U. S. Comp. Stat. 1901, pp. 3154, 3155), includes the power to control the intrastate rates maintained by a carrier under state authority to the extent necessary to remove the resulting unjust discrimination against interstate commerce arising out of the relation between such intrastate rates and interstate rates which are reasonable in themselves, notwithstanding the proviso in § 1 of that act, that its provisions shall not apply to purely intrastate traffic.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission.]

[Nos. 567 and 568.]

Argued October 28 and 29, 1913. Decided June 8, 1914.

TWO APPEALS from the United States Commerce Court to review judgments dismissing the petitions in suits to set aside an order of the Interstate Commerce Commission regulating railway rates. Affirmed.

See same case below, in No. 567, 205 Fed. 391; in No. 568, 205 Fed. 380.

The facts are stated in the opinion.

Mr. Hiram M. Garwood argued the cause, and, with Messrs. James G. Wilson and Maxwell Evarts, filed a brief for appellants in No. 567:

The act to regulate commerce does not confer upon the Interstate Commerce Commission jurisdiction or authority to regulate or control purely intrastate rates, and the order complained of is void for lack of jurisdiction.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 57 L. ed. 1571, 33 Sup. Ct. Rep. 975; Alabama & V. R. Co. v. Mississippi R. Commission, 203 U. S. 496, 51 L. ed. 289, 27 Sup. Ct. Rep. 163; Ames v. Union P. R. Co. 64 Fed. 177; Southern P. Co. v. Railroad Commission, 193 Fed. 699; Louisville & N. R. Co. v. Siler, 186 Fed. 176; Oregon R. & Nav. Co. v. Campbell, 173 Fed. 957; Woodside v. Tonapah & G. R. Co. 184 Fed. 360; St. Louis & S. F. R. Co. v. Hadley, 168 Fed. 341; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360.

Continuously the Interstate Commerce Commission has disclaimed the jurisdiction here sought to be exercised, and its decision herein marks a radical departure from the views and practices obtaining since its creation.

Re Freight Rates, 11 Inters. Com. Rep. 180; E. E. Saunders & Co. v. Southern Exp. Co. 18 Inters. Com. Rep. 415; Andy's Ridge Coal Co. v. Southern R. Co. 18 Inters. Com. Rep. 405; New Jersey Fruit Exch. v. Central R. Co. 2 Inters. Com. Rep. 84; Southwestern Shippers' Traffic Asso. v. Atchison, T. & S. F. R. Co. 24 Inters. Com. Rep. 570; P. P. Williams Co. v. Vicksburg, S. & P. R. Co. 16 Inters. Com. Rep. 482.

The Texas intrastate rates complained of are not voluntary rates applied by the carriers, but are rates prescribed by the duly constituted authorities of the state of Texas, obedience to which is compelled by the Texas law, and such obedience cannot constitute an illegal discrimination under the act to regulate commerce.

East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; Re Freight Rates, 11 Inters. Com. Rep. 180.

The whole course of decision in all of the great rate cases, where the validity of state legislation and the action of state authority have been questioned, either as in conflict with the due process or the commerce clause of the Federal Constitution, presents no suggestion or intimation that Congress possesses the power to regulate purely domestic commerce. This historic fact, of course, weighs heavily as a rule of construction negativing the contention that, in the act to regulate commerce, it was intended to clothe the Interstate Commerce Commission with an authority never asserted or claimed by Congress itself. It is equally potent as an argument against the very existence of the power. Beginning with Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77, and proceeding step by step through Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191;

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Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; and Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, each and every case proceeds upon the theory and assumption that the right to control purely intrastate and domestic commerce is a high sovereign power of the individual state, and that within this domain the jurisdiction of the state is as complete and exclusive as is that of the Federal government in the regulation of commerce among the states.

Equally strong is the assertion in all the great tax cases, and in those where the act of the state, attacked as an interference with interstate commerce, finds its basis in the police power of the state, that, in order to constitute an interference with, or burden upon, interstate commerce, the effect of the state's action must be proximate and direct; and that a mere incidental or consequential effect upon interstate commerce does not constitute an invasion of the Federal domain. Time and again, this court has stated the principle that railroad building and rate making are, in reality, functions of the state itself, delegated by legislative authority to private carriers, and that the regulation of rates is a high sovereign power of the state; and where the exercise of this high power is confided to commerce wholly within the state, it does not fall within the terms of the commerce clause of the Constitution.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Sands v. Manistee River Improv. Co. 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113; Hopkins v. United States, 177 U. S. 578, 597, 43 L. ed. 290, 297, 19 Sup. Ct. Rep. 40; United States v. E. C. Knight Co. 156 U. S. 1, 13, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249; Austin v. Tennessee, 179 U. S. 343, 349, 45 L. ed. 224, 227, 21 Sup. Ct. Rep. 132; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 212, 40 L. ed. 940, 945, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; New Jersey Fruit Exch. v. Central R. Co. 2 Inters. Com. Rep. 84; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Gibbons v. Ogden, 9 Wheat. 196, 6 L. ed. 70.

Messrs. R. G. Pleasant and Luther M. Walter argued the cause, and, with Messrs. W. M. Barrow, M. W. Borders, and John S. Burchmore, filed a brief for intervener, the Railroad Commission of Louisiana, in No. 567:

Congress has the power under the Constitution to confer jurisdiction upon the Interstate Commerce Commission to make the order complained of.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

Congress has given the Commission jurisdiction to make the order complained of.

Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 56 L. ed. 729, 32 Sup. Ct. Rep. 436; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed, 292, 30 Sup. Ct. Rep. 164.

Messrs. Thomas J. Freeman, George Thompson, and W. L. Hall filed a brief for appellants in No. 568.

Since the appeal in this case was perfected, the cases of Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, and Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 57 L. ed. 1571, 33 Sup. Ct. Rep. 975, have been submitted and decided by this court, and we submit that the decision of this court in these cases is decisive of the questions involved in the case at bar, and renders unnecessary the further citation of authorities.

See also Southwestern Shippers' Traffic Asso. v. Atchison, T. & S. F. R. Co. 24 Inters. Com. Rep. 570; P. P. Williams Co. v. Vicksburg, S. & P. R. Co. 16 Inters. Com. Rep. 482; Alabama & V. R. Co. v. Mississippi R. Commission, 203 U. S. 496, 51 L. ed. 289, 27 Sup. Ct. Rep. 163; Ames v. Union P. R. Co. 64 Fed. 177; Southern P. Co. v. Railroad Commission, 193 Fed. 699; Louisville & N. R. Co. v. Siler, 186 Fed. 176; Oregon R. & Nav. Co. v. Campbell, 173 Fed. 957; Woodside v. Tonapah & G. R. Co. 184 Fed. 360; St. Louis & S. F. R. Co. v. Hadley, 168 Fed. 341; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360.

The Interstate Commission was under the necessity of overruling its own opinions in the following cases: Re Freight Rates, 11 Inters. Com. Rep. 180; E. E.

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Saunders & Co. v. Southern Exp. Co. 18 Inters. Com. Rep. 415; Andy's Ridge Coal Co. v. Southern R. Co. 18 Inters. Com. Rep. 405; New Jersey Fruit Exch. v. Central R. Co. 2 Inters. Com. Rep. 84.

The Texas interstate rates complained of are not voluntary rates applied by the carriers, but are rates prescribed by the duly constituted authorities of the state of Texas, obedience to which is compelled by the Texas law, and such obedience cannot constitute an illegal discrimination under the act to regulate commerce.

East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; Re Freight Rates, 11 Inters. Com. Rep. 180.

The Congress of the United States has no power under the Constitution of the United States to regulate or control purely intrastate commerce and rates; if Congress does possess such power it has never exercised the same, and has never vested the exercise of such right in the Interstate Commerce Commission; on the contrary, it has expressly declined to invest such authority in the Interstate Commerce Commission, and has expressly taken from the Interstate Commission any right or jurisdiction over purely intrastate rates.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Sands v. Manistee River Improv. Co. 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113; Hopkins v. United States, 177 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; New Jersey Fruit Exch. v. Central R. Co. 2 Inters. Com. Rep. 84; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Gibbons v. Ogden, 9 Wheat. 196, 6 L. ed. 70.

Assistant Attorney General Denison argued the cause, and, with Mr. Thurlow M. Gordon, Special Assistant to the Attorney General, filed a brief for the United States:

The power to deal with the relation between the two kinds of rates (as a relation) lies exclusively in Congress, and was beyond the power of the states, even in the absence of congressional action.

Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 36, 46 L. ed. 416, 420, 22 Sup. Ct. Rep. 277; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 429, 57 L. ed. 1511, 1554, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

Section 3 of the act to regulate commerce intended to prohibit all discriminations over which the power of Congress was exclusive.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 211, 212, 40 L. ed. 940, 944, 945, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 207, 56 L. ed. 734, 32 Sup. Ct. Rep. 436; Hampton v. St. Louis, I. M. & S. R. Co. 227 U. S. 456, 57 L. ed. 596, 33 Sup. Ct. Rep. 263; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612–618, 55 L. ed. 878–882, 31 Sup. Ct. Rep. 621; Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; Southern R. Co. v. United States, 222 U. S. 20, 26, 56 L. ed. 72, 74, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Pederson v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, 3 N. C. C. A. 779.

The proviso, at the end of the section, that its terms shall not apply to the transportation of passengers or property wholly within one state, was inserted for the purpose of showing the congressional purpose not to undertake to regulate a commerce wholly domestic.

Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 207, 56 L. ed. 734, 32 Sup. Ct. Rep. 436.

The words "wholly within one state," if

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taken as relating to interstate commerce, are merely the converse of the phrase "among the states," used in the Constitution; and following the construction given to that phrase by Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23, and ever since, it means commerce "which does not extend to or affect other states."

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

Mr. P. J. Farrell argued the cause and filed a brief for the Interstate Commerce Commission:

The power of the Congress to regulate interstate commerce does not depend upon the effect such regulation may have upon intrastate commerce.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 46, 47, 56 L. ed. 327, 344, 345, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

Section 1 of the act covers all interstate and foreign commerce carried on by railroad.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

The proviso in § 1 of the act does not create an exception, but is simply a disclaimer as to transportation wholly within a state, which does not concern or affect any other state.

Denver & R. G. R. Co. v. Interstate Commerce Commission, 195 Fed. 968; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 207, 56 L. ed. 729, 734, 32 Sup. Ct. Rep. 436.

The Congress may regulate interstate commerce, even though such regulation may materially affect intrastate commerce; but the power of a state over intrastate commerce is less comprehensive.

Gibbons v. Ogden, 9 Wheat. 1, 194–196, 6 L. ed. 23, 69, 70; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 46, 47, 54, 56 L. ed. 327, 344, 345, 347, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Lottery Case (Champion v. Ames) 188 U. S. 321, 346, 47 L. ed. 492, 497, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Smith v. Alabama, 124 U. S. 465, 473, 31 L. ed. 508, 510, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203, 204, 29 L. ed. 158, 161, 162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Pullman Co. v. Kansas, 216 U. S. 56, 65, 54 L. ed. 378, 385, 30 Sup. Ct. Rep. 232; West v. Kansas Natural Gas Co. 221 U. S. 229, 261, 55 L. ed. 716, 728, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; Southern R. Co. v. United States, 222 U. S. 20, 26, 27, 56 L. ed. 72, 74, 75, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822; Brown v. Houston, 114 U. S. 622, 633, 29 L. ed. 257, 261, 5 Sup. Ct. Rep. 1091; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 36, 46 L. ed. 416, 420, 22 Sup. Ct. Rep. 277; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 474, 54 L. ed. 280, 289, 30 Sup. Ct. Rep. 155; Pennsylvania R. Co. v. Interstate Commerce Commission, 193 Fed. 84; Shepard v. Northern P. R. Co. 184 Fed. 795.

The view that a discrimination against interstate commerce may not be removed by Federal authority because it results from intrastate rates prescribed by a state authority, and applied to the transportation of intrastate traffic, is based upon an erroneous theory.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 46, 47, 54, 56 L. ed. 327, 344, 345, 347, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

Mr. Justice Hughes delivered the opinion of the court:

These suits were brought in the commerce court by the Houston, East & West Texas Railway Company and the Houston & Shreveport Railroad Company, and by the Texas & Pacific Railway Company, respectively, to set aside an order of the Interstate Commerce Commission, dated March 11, 1912, upon the ground that it exceeded the Commission's authority. Other railroad companies[1] intervened in support of the petitions, and the Interstate Commerce Commission and the Railroad Commission of Louisiana intervened in opposition. The petitions were dismissed. 205 Fed. 380, 391.

The order of the Interstate Commerce Commission was made in a proceeding initiated in March, 1911, by the Railroad Commission of Louisiana. The complaint was that the appellants, and other interstate carriers, maintained unreasonable rates from Shreveport, Louisiana, to various points in Texas, and, further, that these carriers, in the adjustment of rates over

[1]The Missouri, Kansas, & Texas Railway Company of Texas, the St. Louis Southwestern Railway Company, and the St. Louis Southwestern Railway Company of Texas.

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their respective lines, unjustly discriminated in favor of traffic within the state of Texas, and against similar traffic between Louisiana and Texas. The carriers filed answers; numerous pleas of intervention by shippers and commercial bodies were allowed; testimony was taken and arguments were heard.

The gravamen of the complaint, said the Interstate [346] Commerce Commission, was that the carriers made rates out of Dallas and other Texas points into eastern Texas which were much lower than those which they extended into Texas from Shreveport. The situation may be briefly described: Shreveport, Louisiana, is about 40 miles from the Texas state line, and 231 miles from Houston, Texas, on the line of the Houston, East & West Texas and Houston & Shreveport Companies (which are affiliated in interest); it is 189 miles from Dallas, Texas, on the line of the Texas & Pacific. Shreveport competes with both cities for the trade of the intervening territory. The rates on these lines from Dallas and Houston, respectively, eastward to intermediate points in Texas, were much less, according to distance, than from Shreveport westward to the same points. It is undisputed that the difference was substantial, and injuriously affected the commerce of Shreveport. It appeared, for example, that a rate of 60 cents carried first-class traffic a distance of 160 miles to the eastward from Dallas, while the same rate would carry the same class of traffic only 55 miles into Texas from Shreveport. The first-class rate from Houston to Lufkin, Texas, 118.2 miles, was 50 cents per 100 pounds, while the rate from Shreveport to the same point, 112.5 miles, was 69 cents. The rate on wagons from Dallas to Marshall, Texas, 147.7 miles, was 36.8 cents, and from Shreveport to Marshall, 42 miles, 56 cents. The rate on furniture from Dallas to Longview, Texas, 124 miles, was 24.8 cents, and that from Shreveport to Longview, 65.7 miles, was 35 cents. These instances of differences in rates are merely illustrative; they serve to indicate the character of the rate adjustment.

The Interstate Commerce Commission found that the interstate class rates out of Shreveport to named Texas points were unreasonable, and it established maximum class rates for this traffic. These rates, we understand, were substantially the same as the class rates fixed by the [347] Railroad Commission of Texas, and charged by the carriers, for transportation for similar distances in that state. The Interstate Commerce Commission also found that the carriers maintained "higher rates from Shreveport to points in Texas" than were in force "from cities in Texas to such points under substantially similar conditions and circumstances," and that thereby "an unlawful and undue preference and advantage" was given to the Texas cities, and a "discrimination" that was "undue and unlawful" was effected against Shreveport. In order to correct this discrimination, the carriers were directed to desist from charging higher rates for the transportation of any commodity from Shreveport to Dallas and Houston, respectively, and intermediate points, than were contemporaneously charged for the carriage of such commodity from Dallas and Houston toward Shreveport for equal distances, as the Commission found that relation of rates to be reasonable. 23 Inters. Com. Rep. 31, 46–48.

The order in question is set forth in the margin.[2] The [348] report states that under this order it will be the duty of the companies "to duly and justly equalize the terms and conditions" upon which they will extend "transportation to traffic of a similar character, moving into Texas from [349] Shreveport, with that moving wholly within Texas," but that, in effecting such equalization, the class scale rates as prescribed shall not be exceeded.

In their petition in the commerce court, the appellants assailed the order in its entirety, but subsequently they withdrew their opposition to the fixing of maximum class rates, and these rates were put in force by the carriers in May, 1912. The attack was continued upon that portion of the order which prohibited the charge of higher rates for carrying articles from Shreveport into Texas than those charged for eastward traffic from Dallas and Houston, respectively, for equal distances. There are, it appears, commodity rates fixed by the Railroad Commission of Texas for intrastate hauls, which are substantially less than the class, or standard, rates prescribed by that Commission; and thus the commodity rates charged by the carriers from Dallas and Houston eastward to Texas points are less than the rates which they demand for

[2] "This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"It is ordered, that defendants the Texas & Pacific Railway Company, the Houston, East & West Texas Railway Company, and Houston & Shreveport Railroad Company, be, and they are hereby, notified and required to cease and desist, on or before the

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the transportation of the same articles for like distances from Shreveport into Texas. The present controversy relates to these commodity rates.

The point of the objection to the order is that, as the discrimination found by the Commission to be unjust arises out of the relation of intrastate rates, maintained under state authority, to interstate rates that have been upheld as reasonable, its correction was beyond the Commission's power. Manifestly the order might be complied with, and the discrimination avoided, either by reducing the interstate rates from Shreveport to the level of the competing intrastate rates, or by raising these intrastate [350] rates to the level of the interstate rates, or by such reduction in the one case and increase in the other as would result in equality. But it is urged that, so far as the interstate rates were sustained by the Commission as reasonable, the Commission was without authority to compel their reduction in order to equalize them with the lower intrastate rates. The holding of the commerce court was that the order relieved the appellants from further obligation to observe the intrastate rates, and that they were at liberty to comply with the Commission's requirements by increasing these rates sufficiently to remove the forbidden discrimination. The invalidity of the order in this aspect is challenged upon two grounds:

(1) That Congress is impotent to control the intrastate charges of an interstate carrier even to the extent necessary to prevent injurious discrimination against interstate traffic; and

(2) That, if it be assumed that Congress has this power, still it has not been exercised, and hence the action of the Commission exceeded the limits of the authority which has been conferred upon it.

First. It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several states. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed

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1st day of May, 1912, and for a period of not less than two years thereafter abstain, from exacting their present class rates for the transportation of traffic from Shreveport, Louisiana, to the points in Texas hereinafter mentioned on their respective lines, as the Commission in said report finds such rates to be unjust and unreasonable.

"It is further ordered, that defendant the Texas & Pacific Railway Company be, and it is hereby, notified and required to establish and put in force, on or before the 1st day of May, 1912, and maintain in force thereafter during a period of not less than two years, and apply to the transportation of traffic from Shreveport, Louisiana, to the below-named points in Texas, class rates which shall not exceed the following, in cents per 100 pounds, which rates are found by the Commission in its report to be reasonable, to wit: (rates inserted).

"It is further ordered that defendants the Houston, East & West Texas Railway Company and Houston & Shreveport Railroad Company be, and they are hereby, notified and required to establish and put in force, on or before the 1st day of May, 1912, and maintain in force thereafter during a period of not less than two years, and apply to the transportation of traffic from Shreveport, Louisiana, to the below-named points in Texas, class rates which shall not exceed the following, in cents per 100 pounds, which rates are found by the Commission in its report to be reasonable, to wit: (rates inserted).

"It is further ordered, that defendant the Texas & Pacific Railway Company be, and it is hereby, notified and required to cease and desist, on or before the 1st day of May, 1912, and for a period of not less than two years thereafter abstain, from exacting any higher rates for the transportation of any article from Shreveport, Louisiana, to Dallas, Texas, and points on its lines intermediate thereto, than are contemporaneously exacted for the transportation of such article from Dallas, Texas, toward said Shreveport for an equal distance, as said relation of rates has been found by the Commission in said report to be reasonable.

"It is further ordered, that defendants the Houston, East & West Texas Railway Company and Houston & Shreveport Railroad Company be, and they are hereby, notified and required to cease and desist, on or before the 1st day of May, 1912, and for a period of not less than two years thereafter abstain, from exacting any higher rates for the transportation of any article from Shreveport, Louisiana, to Houston, Texas, and points on its line intermediate thereto, than are contemporaneously exacted for the transportation of such article from Houston, Texas, toward said Shreveport for an equal distance, as said relation of rates has been found by the Commission in said report to be reasonable.

"And it is further ordered, that said defendants be, and they are hereby, notified and required to establish and put in force, on or before the 1st day of May, 1912, and maintain in force thereafter during a period of not less than two years, substantially similar practices respecting the concentration of interstate cotton at Shreveport, Louisiana, to those which are contemporaneously observed by said defendants respecting the concentration of cotton within the state of Texas, provided the practices adopted shall be justifiable under the act to regulate commerce, and applicable fairly under like conditions elsewhere on the lines of such defendants."

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or impeded by the rivalries of local government. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation, and to provide the necessary basis of national unity by insuring "uniformity of regulation against conflicting and discriminating state legislation." By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise, and to protect the national interest by securing the freedom of interstate [351] commercial intercourse from local control. Gibbons v. Ogden, 9 Wheat. 1, 196, 224, 6 L. ed. 23, 70, 76; Brown v. Maryland, 12 Wheat. 419, 446, 6 L. ed. 678, 688; Mobile County v. Kimball, 102 U. S. 691, 696, 697, 26 L. ed. 238, 240; Smith v. Alabama, 124 U. S. 465, 473, 31 L. ed. 508, 510, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 47, 53, 54, 56 L. ed. 327, 345, 347, 348, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 398, 399, 57 L. ed. 1511, 1540, 1541, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

Congress is empowered to regulate,—that is, to provide the law for the government of interstate commerce; to enact "all appropriate legislation" for its "protection and advancement" (The Daniel Ball, 10 Wall. 557, 564, 19 L. ed. 999, 1001); to adopt measures "to promote its growth and insure its safety" (Mobile County v. Kimball, 102 U. S. 691, 696, 697, 26 L. ed. 238–240); "to foster, protect, control, and restrain" (Second Employers' Liability Cases [Mondou v. New York, N. H. & H. R. Co.] 223 U. S. 1, 47, 53, 54, 56 L. ed. 327, 345, 347, 348, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard, or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter, or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe [352] the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field. Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 618, 55 L. ed. 878, 882, 31 Sup. Ct. Rep. 621; Southern R. Co. v. United States, 222 U. S. 20, 26, 27, 56 L. ed. 72, 74, 75, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 48, 51, 56 L. ed. 345, 346, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 205, 213, 56 L. ed. 729, 733, 737, 32 Sup. Ct. Rep. 436; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 431, 57 L. ed. 1554, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; Illinois C. R. Co. v. Behrens, decided April 27, 1914 [233 U. S. 473, ante, 1051, 34 Sup. Ct. Rep. 646].

In Baltimore & O. R. Co. v. Interstate Commerce Commission, supra, the argument against the validity of the hours of service act (March 4, 1907, chap. 2939, 34 Stat. at L. 14, 15, U. S. Comp. Stat. Supp. 1911, p. 1321) involved the consideration that the interstate and intrastate transactions of the carriers were so interwoven that it was utterly impracticable for them to divide their employees so that those who were engaged in interstate commerce should be confined to that commerce exclusively. Employees dealing with the movement of trains were employed in both sorts of commerce; but the court held that this fact did not preclude the exercise of Federal power. As Congress could limit the hours of labor of those engaged in interstate transportation, it necessarily followed that its will could not be frustrated by prolonging the period of service through other requirements of the carriers, or by the commingling of duties relating to interstate and intrastate operations. Again, in Southern R. Co. v. United States, 222 U. S. 20, 26, 27, 56 L. ed. 72, 74, 75, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822, the question was presented whether the amendment to the safety appliance act (March 2, 1903, 32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp.

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1911, p. 1314) was within the power of Congress in view of the fact that the statute was not confined to vehicles that were used in interstate traffic, but also embraced those used in intrastate traffic. The court answered affirmatively, because there was such a close relation between the two classes of traffic moving over the same railroad as to make it certain that the safety [353] of the interstate traffic, and of those employed in its movement, would be promoted in a real and substantial sense by applying the requirements of the act to both classes of vehicles. So, in the Second Employers' Liability Cases, supra, it was insisted that while Congress had the authority to regulate the liability of a carrier for injuries sustained by one employee through the negligence of another, where all were engaged in interstate commerce, that power did not embrace instances where the negligent employee was engaged in intrastate commerce. The court said that this was a mistaken theory, as the causal negligence, when operating injuriously upon an employee engaged in interstate commerce, had the same effect with respect to that commerce as if the negligent employee were also engaged therein. The decision in Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, is not opposed, for the statute there in question (June 11, 1906, chap. 3073, 34 Stat. at L. 232, U. S. Comp. Stat. Supp. 1911, p. 1316) sought to regulate the liability of interstate carriers for injuries to any employee even though his employment had no connection whatever with interstate commerce. See Illinois C. R. Co. v. Behrens, 233 U. S. 473, ante, 1051, 34 Sup. Ct. Rep. 646.

While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress, in the exercise of its paramount power, may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.

This principle is applicable here. We find no reason to doubt that Congress is entitled to keep the highways of [354] interstate communication open to interstate traffic upon fair and equal terms. That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil, is undeniable; and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a state may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden.

It is to be noted—as the government has well said in its argument in support of the Commission's order—that the power to deal with the relation between the two kinds of rates, as a relation, lies exclusively with Congress. It is manifest that the state cannot fix the relation of the carrier's interstate and intrastate charges without directly interfering with the former, unless it simply follows the standard set by Federal authority. This question was presented with respect to the long and short haul provision of the Kentucky Constitution, adopted in 1891, which the court had before it in Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277. The state court had construed this provision as embracing a long haul, from a place outside to one within the state, and a shorter haul on the same line and in the same direction between points within the state. This court held that, so construed, the provision was invalid as being a regulation of interstate commerce [355] because "it linked the interstate rate to the rate for the shorter haul, and thus the interstate charge was directly controlled by the state law." See 230 U. S. pp. 428, 429. It is for Congress to supply the needed correction where the relation between intrastate and interstate rates presents the evil to be corrected, and this it may do completely, by reason of its control over the interstate carrier in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce.

It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intra-

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state to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard, fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates, and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes.

Having this power, Congress could provide for its execution through the aid of a subordinate body; and we conclude that the order of the Commission now in question cannot be held invalid upon the ground that it exceeded the authority which Congress could lawfully confer.

Second. The remaining question is with regard to the scope of the power which Congress has granted to the Commission.

Section 3 of the act to regulate commerce provides (24 Stat. at L. 379, 380, chap. 104, U. S. Comp. Stat. 1901, pp. 3154, 3155):

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to [356] any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn. There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier. It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach. The purpose of the measure was thus emphatically stated in the elaborate report of the Senate Committee on Interstate Commerce which accompanied it: "The provisions of the bill are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic, The underlying purpose and aim of the measure is the prevention of these discriminations" (Senate Report No. 46, 49th Cong. 1st Sess. p. 215).

The opposing argument rests upon the proviso in the 1st section of the act which, in its original form, was as follows: "Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state, and not shipped to or from a foreign country from or to any state or territory [357] as aforesaid." When the act was amended so as to confer upon the Commission the authority to prescribe maximum interstate rates, this proviso was re-enacted; and when the act was extended to include telegraph, telephone, and cable companies engaged in interstate business, an additional clause was inserted so as to exclude intrastate messages. See acts of June 20, 1906, chap. 3591, 34 Stat. at L. 584; June 18, 1910, chap. 309, 36 Stat. at L. 539, 545, U. S. Comp. Stat. Supp. 1911, p. 1288.

Congress thus defined the scope of its regulation, and provided that it was not to extend to purely intrastate traffic. It did not undertake to authorize the Commission to prescribe intrastate rates, and thus to establish a unified control by the exercise of the rate-making power over both descriptions of traffic. Undoubtedly—in the absence of a finding by the Commission of unjust discrimination—intrastate rates were left to be fixed by the carrier, and subject to the authority of the states, or of the agencies created by the states. This was the question recently decided by this court in the Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729. There, the state of Minnesota had established reasonable rates for intrastate transportation throughout the state, and it was contended that, by reason of the passage of the act to regulate commerce, the state could no longer exercise the state-wide authority for this purpose which it had formerly enjoyed; and the court was asked to hold that an entire scheme of intrastate rates, otherwise validly established, was null and void because of its effect upon interstate rates. There had been no finding by the Interstate Commerce Commission of any unjust discrimination. The present question, however, was reserved, the court saying (230 U. S. p. 419): "It is urged, however, that the words of the proviso" (referring to the proviso above-mentioned) "are susceptible of a construction which would permit the provisions of § 3 of the

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act, prohibiting carriers from giving an undue or unreasonable preference or advantage to any locality, to apply to unreasonable discriminations [358] between localities in different states, as well when arising from an intrastate rate as compared with an interstate rate as when due to interstate rates exclusively. If it be assumed that the statute should be so construed, and it is not necessary now to decide the point, it would inevitably follow that the controlling principle governing the enforcement of the act should be applied t. such cases as might thereby be brought within its purview; and the question whether the carrier, in such a case, was giving an undue or unreasonable preference or advantage to one locality as against another, or subjecting any locality to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of the Interstate Commerce Commission, and not for the courts."

Here, the Commission expressly found that unjust discrimination existed under substantially similar conditions of transportation, and the inquiry is whether the Commission had power to correct it. We are of the opinion that the limitation of the proviso in § 1 does not apply to a case of this sort. The Commission was dealing with the relation of rates injuriously affecting, through an unreasonable discrimination, traffic that was interstate. The question was thus not simply one of transportation that was "wholly within one state." These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. Such a matter is one with which Congress alone is competent to deal, and, in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination, [359] there is no ground for holding that the authority of Congress was unexercised, and that the subject was thus left without governmental regulation. It is urged that the practical construction of the statute has been the other way. But, in assailing the order, the appellants ask us to override the construction which has been given to the statute by the authority charged with its execution, and it cannot be said that the earlier action of the Commission was of such a controlling character as to preclude it from giving effect to the law. The Commission, having before it a plain case of unreasonable discrimination on the part of interstate carriers against interstate trade, carefully examined the question of its authority, and decided that it had the power to make this remedial order. The commerce court sustained the authority of the Commission, and it is clear that we should not reverse the decree unless the law has been misapplied. This we cannot say; on the contrary, we are convinced that the authority of the Commission was adequate.

The further objection is made that the prohibition of § 3 is directed against unjust discrimination or undue preference only when it arises from the voluntary act of the carrier, and does not relate to acts which are the result of conditions wholly beyond its control. East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 18, 45 L. ed. 719, 725, 21 Sup. Ct. Rep. 516. The reference is not to any inherent lack of control arising out of traffic conditions, but to the requirements of the local authorities, which are assumed to be binding upon the carriers. The contention is thus merely a repetition in another form of the argument that the Commission exceeded its power; for it would not be contended that local rules could nullify the lawful exercise of Federal authority. In the view that the Commission was entitled to make the order, there is no longer compulsion upon the carriers by virtue of any inconsistent local requirement. We are not unmindful of the gravity of the [360] question that is presented when state and Federal views conflict. But it was recognized at the beginning that the nation could not prosper if interstate and foreign trade were governed by many masters, and, where the interests of the freedom of interstate commerce are involved, the judgment of Congress and of the agencies it lawfully establishes must control.

In conclusion: Reading the order in the light of the report of the Commission, it does not appear that the Commission attempted to require the carriers to reduce their interstate rates out of Shreveport below what was found to be a reasonable charge for that service. So far as these interstate rates conformed to what was found to be reasonable by the Commission, the carriers are entitled to maintain them, and they are free to comply with the order by so adjusting the other rates, to which the order relates, as to remove the for-

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bidden discrimination. But this result they are required to accomplish.

The decree of the Commerce Court is affirmed in each case.

Affirmed.

Mr. Justice Lurton and Mr. Justice Pitney dissent.

CITIZENS BANKING COMPANY
v.
RAVENNA NATIONAL BANK OF RAVENNA, OHIO, and Cora M. Curtis.

(See S. C. Reporter's ed. 360–369.)

Bankruptcy — acts of — preference through legal proceedings — discharge.

1. The failure of an insolvent judgment debtor for a period one day less than four months after the levy of an execution upon his real estate to vacate or discharge such levy is not a "final disposition" of the property affected by the levy, within the meaning of the provisions of the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 3a (3), declaring that acts of bankruptcy by a person shall consist of his having, *inter alia*, suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged the preference.

[For other cases, see Bankruptcy, III., in Digest Sup. Ct. 1908.]

Bankruptcy — acts of — preference through legal proceedings — discharge.

2. An insolvent debtor cannot be said to have committed an act of bankruptcy rendering him subject to involuntary adjudication as a bankrupt under the bankrupt act of July 1, 1898, merely by inaction for the period of four months after the levy of an execution upon his real estate, in view of the declaration of § 3a (3) of such act, that a person commits an act of bankruptcy when he has, *inter alia*, suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged the preference, which manifestly means that to avoid an act of bankruptcy it will be sufficient if the lien is lifted five days before final sale or disposition of any of the property affected, such meaning not being disturbed by the provisions of § 3b, dealing with and limiting to four months after the act of bankruptcy the time for filing petitions in bankruptcy, and §§ 67c and 67f, dealing with the retrospective effect of adjudications in bankruptcy.

[For other cases, see Bankruptcy, III., in Digest Sup. Ct. 1908.]

[No. 288.]

Argued March 16, 1914. Decided June 8, 1914.

ON A CERTIFICATE from the Circuit Court of Appeals for the Sixth Circuit, presenting questions as to whether an insolvent judgment debtor commits an act of bankruptcy by mere inaction for four months after the levy of an execution on his real estate. Answered in the negative.

See same case below, 121 C. C. A. 250, 202 Fed. 892.

The facts are stated in the opinion.

Mr. G. Ray Craig argued the cause, and, with Messrs. Edward H. Rhoades, Jr., and John D. Rhoades, filed a brief for the Citizens Banking Company:

To dispose of property means to exercise finally one's power of control over it; to pass it over into the control of another; to part with it; and finally to get rid of it. The words "final disposition," as used by the Congress, mean a disposition which is no less final than an actual sale of the property; the mere continued existence of a judgment lien upon real estate for a period of four months is no such "final disposition."

"Final," Bouvier's Law Dict. 1897 ed.; "Final," Standard Dict.; "Dispose," Anderson, Law Dict. 365; 14 Cyc. 516, 517; Re Heller, 9 Fed. 373; Re Brightman, 14 Blatchf. 130, Fed. Cas. No. 1,878; Colcord v. Fletcher, 50 Me. 401; Ex parte Russell, 13 Wall. 664, 667, 20 L. ed. 632, 633; 3 Words & Phrases, 2798.

No person can be adjudged a bankrupt for any acts except those specifically enumerated in the bankruptcy statute. This has always been the rule under this act as well as the former acts of bankruptcy.

Re Truitt, 203 Fed. 550; Wilson v. City Bank, 17 Wall. 473, 21 L. ed. 723.

It is true, as pointed out by this court in Wilson Bros. v. Nelson, 183 U. S. 191, 46 L. ed. 147, 22 Sup. Ct. Rep. 74, that the bankruptcy law of 1898 differs from that of 1867 in that the intent of the debtor is not now an essential fact in establishing this ground of bankruptcy, but, as pointed out in Re Truitt, 203 Fed. 557, nothing which was said in the case of Wilson Bros. v. Nelson in any way modifies the general rule of construction laid down in Wilson v. City Bank to the effect that, a proceeding in involuntary bankruptcy being against common right, all substantial doubts must be resolved in favor of the debtor.

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An insolvent debtor does not commit an act of bankruptcy merely by inaction for a period of four months after the levy of an execution upon his real estate.

Re Empire Metallic Bedstead Co. 39 C. C. A. 372, 98 Fed. 982; Re Rome Planing Mill, 96 Fed. 815; Bogen v. Protter, 64 C. C. A. 63, 129 Fed. 533; Re Vastbinder, 126 Fed. 417; Re Windt, 177 Fed. 584.

A consummation of the act of bankruptcy under § 3 of the bankruptcy act of 1898 is not the date of an actual sale of the bankrupt's property under an execution, but the act of bankruptcy is completed five days before the day of such sale, if at that time the bankrupt fails to dissolve the levy.

Re National Hotel & Café Co. 138 Fed. 947.

A petition in bankruptcy which alleges, among other things, that an attachment has been made in a legal proceeding and levied on the debtor's property, without any allegation as to the disposition thereof, is sufficient.

Re Vetterman, 135 Fed. 443; Seaboard Steel Casting Co. v. William R. Trigg Co. 124 Fed. 76.

When a respondent's conduct is considerably analogous to some of the statutory acts of bankruptcy, but is not fairly covered by any statutory definition, such a respondent will not be adjudged a bankrupt.

Re Baker-Ricketson Co. 97 Fed. 489.

Where Congress makes a plain provision, without making any exception, the courts can make none.

French v. Spencer, 21 How. 228, 16 L. ed. 97; Yturbide v. United States, 22 How. 290, 16 L. ed. 342.

Where the meaning of a statute is plain, it is the duty of the courts to enforce it according to its obvious terms. In such case there is no necessity for construction.

Thornley v. United States, 113 U. S. 310, 28 L. ed. 999, 5 Sup. Ct. Rep. 491; Doe ex dem. Poor v. Considine, 6 Wall. 458, 18 L. ed. 869.

Mr. A. T. Brewer argued the cause and filed a brief for the Ravenna National Bank:

The failure by an insolvent judgment debtor for a period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such levy, is a "final disposition of the property" affected by the levy, under the provisions of § 3a (3) of the bankruptcy act of 1898, making the debtor subject to involuntary adjudication as a bankrupt under such § 3a (3), and it is not essential that the debtor shall do anything at all.

Wilson Bros. v. Nelson, 183 U. S. 191, 46 L. ed. 147, 22 Sup. Ct. Rep. 74; Bogen v. Protter, 64 C. C. A. 63, 129 Fed. 533; Folger v. Putnam, 114 C. C. A. 513, 194 Fed. 793; Re Tupper, 163 Fed. 766; Re McCartney, 26 Am. Bankr. Rep. 548.

Mr. Justice Van Devanter delivered the opinion of the court:

Upon a petition filed in the district court for the northern district of Ohio by one of her creditors, Cora M. Curtis was adjudged a bankrupt. In addition to matters not requiring notice, the petition charged that within four months next preceding its filing the respondent committed an act of bankruptcy, in that (a), while insolvent, she suffered and permitted the Citizens Banking Company to recover a judgment against her for $1,598.78 and costs, in the common pleas court of Erie county, Ohio, and to have an execution issued under the judgment and levied on real estate belonging to her, whereby the company obtained a preference over her other creditors, and (b) at the time of the filing of the petition, which was one day less than four months after the levy of the execution, she had not vacated or discharged the levy and resulting preference.

The company appeared in the bankruptcy proceedings and challenged the petition on the ground that it disclosed no act of bankruptcy, but the court, deeming that such an act was charged, overruled the objection, and, there being no denial of the facts stated in the petition, adjudged the respondent a bankrupt. The company appealed to the circuit court of appeals, and that court, having briefly reviewed the opposing views touching the point in controversy (121 C. C. A. 250, 202 Fed. 892), certified the case here, with a request that instruction be given on the following questions:

"(1) Whether the failure by an insolvent judgment [364] debtor, and for a period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such levy, is a 'final disposition of the property' affected by the levy, under the provisions of § 3a (3) of the bankruptcy act of 1898 [30 Stat. at L. 546, chap. 541, U. S. Comp. Stat. 1901, p. 3422].

"(2) Whether an insolvent debtor commits an act of bankruptcy, rendering him subject to involuntary adjudication as a bankrupt under the bankruptcy act of 1898, merely by inaction for the period of four months after the levy of an execution upon his real estate."

It will be observed that no reference is made to an accomplished or impending disposal of the property in virtue of the levy, although the mode of disposal prescribed

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by the local law is by advertisement and sale. 2 Bates's Anno. Stat. (Ohio) §§ 5381, 5393.

The answers to the questions propounded turn upon the true construction of § 3a (3) of the bankruptcy act, which declares:

"Acts of bankruptcy by a person shall consist of his having . . . (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference." 30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418.

Looking at the terms of this provision, it is manifest that the act of bankruptcy which it defines consists of three elements. The first is the insolvency of the debtor; the second is suffering or permitting a creditor to obtain a preference through legal proceedings; that is, to acquire a lien upon property of the debtor by means of a judgment, attachment, execution, or kindred proceeding, the enforcement of which will enable the creditor to collect a greater percentage of his claim than other creditors of the same class; and the third is the failure of the debtor to vacate or discharge the lien and resulting preference five days [365] before a sale or final disposition of any property affected. Only through the combination of the three elements is the act of bankruptcy committed. Insolvency alone does not suffice, nor is it enough that it be coupled with suffering or permitting a creditor to obtain a preference by legal proceedings. The third element must also be present, else there is no act of bankruptcy within the meaning of this provision. All this is freely conceded by counsel for the petitioning creditor.

The questions propounded assume the existence of the first two elements, and are intended to elicit instruction respecting the proper interpretation of the clause describing the third; namely, "and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference." It is to this point that counsel have addressed their arguments.

Without any doubt this clause shows that the debtor is to have until five days before an approaching or impending event within which to vacate or discharge the lien out of which the preference arises. What, then, is the event which he is required to anticipate? The statute answers, "a sale or final disposition of any property affected by such preference." As these words are part of a provision dealing with liens obtained through legal proceedings, and as the enforcement of such a lien usually consists in selling some or all of the property affected, and applying the proceeds to the creditor's demand, it seems quite plain that it is to such a sale that the clause refers. And as there are instances in which the property affected does not require to be sold, as when it is money seized upon execution or attachment, or reached by garnishment,† it seems equally [366] plain that the words "or final disposition" are intended to include the act whereby the debtor's title is passed to another when a sale is not required. No doubt, the terms "sale or final disposition," explained as they are by the context, are comprehensive of every act of disposal, whether by sale or otherwise, which operates as an enforcement of the lien or preference.

But we do not perceive anything in the clause which suggests that the time when the lien is obtained has any bearing upon when the property must be freed from it to avoid an act of bankruptcy. On the contrary, the natural and plain import of the language employed is that it will suffice if the lien is lifted five days before a sale or final disposition of any of the property affected. This is the only point of time that is mentioned, and the implication is that it is intended to be controlling.

To enforce a different conclusion counsel for the petitioning creditor virtually contends that the clause has the same meaning as if it read, "and having failed to vacate or discharge the preference at least five days before a sale or final disposition of any of the property affected, or, at most, not later than five days before the expiration of four months after the lien was obtained." But we think such a meaning cannot be ascribed to it without rewriting it, and that we cannot do. The contention puts into it an alternative which is not there, either in terms or by fair implication, and to which Congress has not given assent. Indeed, it appears that in the early stages of its enactment the bankruptcy bill contained a provision giving the same effect to a failure to discharge the lien within a prescribed period after it attached as to a failure to discharge it within a designated number of days before an intended sale; and that during the final consideration of the bill that provision was eliminated and the one now before us was adopted. This, of course, lends strength to the im-

†See Turner v. Fendall, 1 Cranch, 117, 133, 2 L. ed. 53, 59; Sheldon v. Root, 16 Pick. 567, 28 Am. Dec. 266; Crane v. Freese, 16 N. J. L. 305; Green v. Palmer, 15 Cal. 411, 418, 76 Am. Dec. 492; 2 Bates's Anno. Stat. (Ohio) §§ 5374, 5383, 5469, 5470, 5483, 5531, 5548, 5555.

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plication otherwise arising that the clause names the sole test of [367] when the lien must be vacated or discharged to avoid an act of bankruptcy.

The contention to the contrary is sought to be sustained by a reference to §§ 3b, 67c, and 67f. But we perceive nothing in those sections to disturb the plain meaning of § 3a (3). It defines a particular act of bankruptcy, and purports to be complete in itself, as do other subsections defining other acts of bankruptcy. Section 3b deals with the time for filing petitions in bankruptcy and limits it to four months after the act of bankruptcy is committed. It says nothing about what constitutes an act of bankruptcy, but treats that as elsewhere adequately defined. Sections 67c and 67f deal with the retrospective effect of adjudications in bankruptcy, the former declaring that certain liens obtained in suits begun within four months before the filing of the petition shall be dissolved by the adjudication, and the latter that certain levies, judgments, attachments, and other liens obtained through legal proceedings within the same period shall become null and void upon the adjudication. Both assume that the adjudication will be grounded upon a sufficient act of bankruptcy, as elsewhere defined, and give to every adjudication the same effect upon the liens described, whether it be grounded upon one act of bankruptcy or another. And what is more in point, there is no conflict between § 3a (3) and the sections indicated. All can be given full effect according to their natural import without any semblance of interference between § 3a (3) and the others.

But it is said that unless § 3a (3) be held to require the extinguishment of the lien before the expiration of four months from the time it was obtained the result will be that in some instances the lien will not be dissolved or rendered null through the operation of §§ 67c and 67f, because occasionally the full four months will intervene before an act of bankruptcy is committed, and therefore before a petition can be filed. Conceding that this is so, [368] it proves nothing more than what is true of all liens obtained through legal proceedings more than four months prior to the filing of the petition. And while it may be true, as is suggested, that if the debtor is not restricted to less than four months within which to extinguish the lien there will be instances in which general creditors will be affected disadvantageously, it must be reflected that there also will be instances in which an honest and struggling debtor will be able to extinguish the lien the requisite number of days before a sale or final disposition of any of the property affected, and thereby to avoid bankruptcy, without injury to any of his creditors. But with this we are not concerned. The advantages and disadvantages have been balanced by Congress, and its will has been expressed in terms which are plain and therefore controlling.

Lastly, it is said that the term "final disposition" is not used in the sense hereinbefore indicated, but as denoting the status which a lien acquires through the lapse of four months before the filing of a petition in bankruptcy. This is practically a reiteration of the contention already noticed, but probably is intended to present it from a different angle. It overlooks, as we think, the influence which rightly must be given to the context, and also the manifest inaptness of the term to express the thought suggested. When one speaks of a sale or *final* disposition of property, he means by final disposition an act having substantially the effect of a sale,—a transfer of ownership and control from one to another,—and especially is this true when he is referring to a sale or final disposition in the enforcement of a lien. We regard it as entirely clear that the term is so used in this instance, and that it signifies an affirmative act of disposal, not a mere lapse of time which leaves the lien intact and still requiring enforcement. To illustrate, let us take the instance of a provisional attachment of real property, which the creditor is not entitled to enforce unless he sustains the demand which is the subject [369] of the principal suit; and let us suppose that the debtor defends against the demand, and that the suit is pending and undetermined four months after the levy. Of course, an adjudication in bankruptcy upon a petition filed thereafter would not disturb the attachment. But could it be said that the property attached was finally disposed of at the end of the four months? An affirmative answer seems quite inadmissible.

We conclude that both of the questions propounded by the circuit court of appeals should be resolved in the negative.

As shown by the reported cases, some diversity of opinion has arisen in other Federal courts in disposing of similar questions (Re Rome Planing Mill, 96 Fed. 812, 815; Re Vastbinder, 126 Fed. 417, 420; Re Tupper, 163 Fed. 766, 770; Re Windt, 177 Fed. 584, 586; Re Crafts-Riordon Shoe Co. 185 Fed. 931, 934; Folger v. Putnam, 114 C. C. A. 513, 194 Fed. 793, 797; Re Truitt, 203 Fed. 550, 554), and so we deem it well to observe that the conclusion here stated has been reached only after full consideration of those cases.

Questions answered "No."

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LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appt.,
v.
WESTERN UNION TELEGRAPH COMPANY.

(See S. C. Reporter's ed. 369–380.)

Federal courts — territorial jurisdiction — suits to remove cloud on title.

1. Suits to remove clouds on title, when founded upon the remedial statutes of the several states, as well as when resting upon established usages and practices in equity, are embraced by the provision of the Judicial Code, § 57, which authorizes the exercise of jurisdiction by Federal district courts over nonresident defendants, in suits to enforce any legal or equitable lien upon, or claim to, or to remove any encumbrance or lien or cloud upon the title to, real or personal property within the district where such suit is brought.

[For other cases, see Courts, V. c, 7, a, in Digest Sup. Ct. 1908.]

Federal courts — territorial jurisdiction — suits to remove cloud on title.

2. A suit by a Kentucky railway company seeking to annul judgments of special courts of eminent domain, purporting to condemn portions of its right of way in the state of Mississippi for the use of a New York telegraph company, upon the ground that they are clearly invalid under the local law, and operate to becloud the railway company's title, is a suit to remove a "cloud upon the title," within the meaning of the Judicial Code, § 57, authorizing the exercise of jurisdiction by Federal district courts as to the property of nonresident defendants, and is therefore justiciable in the Federal district court of the district wherein the property is located, even though the judgments are void upon their face, if the attack upon them in the bill is well founded, where, under the local law as construed by the state courts, the rightful owner of real property within the state may maintain a suit to dispel a cloud cast upon his title by an invalid deed or other instrument, even though it be one which, when tested by applicable legal principles, is void upon its face, and may challenge the judgment of a special court of eminent domain by a bill in equity, upon the ground that the condemnation is not for a public use, which is one of the grounds upon which the judgments are challenged in the present case.

[For other cases, see Courts, V. c, 7, a, in Digest Sup. Ct. 1908.]

[No. 337.]

Argued March 20, 1914. Decided June 8, 1914.

APPEAL from the District Court of the United States for the Southern District of Mississippi to review a decree which dismissed the bill in a suit to annul judgments in eminent domain proceedings, as amounting to clouds on title. Reversed.

The facts are stated in the opinion.

Mr. Gregory L. Smith argued the cause, and, with Mr. Henry L. Stone, filed a brief for appellant:

The judgments complained of operate to subject complainant's right of way to the use of defendant, and the only way of testing their validity is by a bill in equity, such as that filed in this case.

Vinegar Bend Lumber Co. v. Oak Grove & G. R. Co. 89 Miss. 84, 43 So. 292.

When the suit is between citizens of different states, and is to establish a claim to, or to remove encumbrances or clouds from, property, it is properly brought in the United States judicial district where the property is situated.

Dick v. Foraker, 155 U. S. 404, 39 L. ed. 201, 15 Sup. Ct. Rep. 124; Jellenik v. Huron Copper Min. Co. 177 U. S. 9, 44 L. ed. 650, 20 Sup. Ct. Rep. 559.

Every right to or interest in land, granted to the diminution of the value of the land, but consistent with the passage of the fee of it by a conveyance, is an encumbrance upon the land.

Farrington v. Tourtelott, 39 Fed. 739; Oman v. Bedford-Bowling Green Stone Co. 67 C. C. A. 190, 134 Fed. 65; 4 Words & Phrases, pp. 3519, 3522.

The general, but not universal, rule, is that equity will not entertain a bill to cancel, as a cloud upon the title to real estate, an instrument void on its face. In some jurisdictions the rule does not apply to cases where it requires legal learning and acumen to determine whether the instrument is valid or void upon its face.

Merchants' Bank v. Evans, 51 Mo. 335; Polliham v. Reveley, 181 Mo. 622, 81 S. W. 182; Center Creek Min. Co. v. Coyne, 164 Mo. App. 492, 147 S. W. 148; Perkins v. Baer, 95 Mo. App. 70, 68 S. W. 939; Verdin v. St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52.

In other jurisdictions the rule is repudiated entirely.

Scofield v. Lansing, 17 Mich. 437; Day Land & Cattle Co. v. State, 68 Tex. 526, 4 S. W. 865; 3 Pom. Eq. Jur. § 1399.

In other jurisdictions, the rule is changed by statute, and this is true of the state of Mississippi.

Bogert v. Elizabeth, 27 N. J. Eq. 568;

NOTE.—On the effect of state statutes on Federal jurisdiction of suit to remove cloud on title—see note to Whitehouse v. Jones, 12 L.R.A.(N.S.) 57.

On the adoption by Federal courts of remedies created by state statutes—see note to Leighton v. Young, 18 L.R.A. 266.

On proper Federal district for suit—see note to Roberts v. Lewis, 36 L. ed. U. S. 579.

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Cook v. Friley, 61 Miss. 1; People's Bank v. West, 67 Miss. 729, 8 L.R.A. 727, 7 So. 516; Hurley v. Mississippi Levee Comrs. 76 Miss. 141, 23 So. 580; Gambrell Lumber Co. v. Saratoga Lumber Co. 87 Miss. 773, 40 So. 485.

Where the statute of the state authorizes the cancelation of an instrument void on its face, the Federal courts will enforce the right so given.

Reynolds v. First Nat. Bank, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; Cowley v. Northern P. R. Co. 159 U. S. 583, 40 L. ed. 267, 16 Sup. Ct. Rep. 127; Devine v. Los Angeles, 202 U. S. 333, 50 L. ed. 1053, 26 Sup. Ct. Rep. 652; Chapman v. Brewer, 114 U. S. 158, 29 L. ed. 83, 5 Sup. Ct. Rep. 799; More v. Steinbach, 127 U. S. 70, 32 L. ed. 51, 8 Sup. Ct. Rep. 1067.

Upon a motion to dismiss for want of jurisdiction, the court will only consider the relief sought, and not whether the allegations of the bill entitled the complainant to such relief.

Citizens' Sav. & T. Co. v. Illinois C. R. Co. 205 U. S. 46, 51 L. ed. 703, 27 Sup. Ct. Rep. 425; Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co. 210 U. S. 368, 52 L. ed. 1101, 28 Sup. Ct. Rep. 720; Texas Co. v. Central Fuel Oil Co. 114 C. C. A. 21, 194 Fed. 9.

Where one to whom the power of eminent domain has been delegated threatens to make a permanent appropriation of property in excess of the power granted, or without complying with the conditions upon which the power is granted, a court of equity will prevent the threatened wrong, without regard to the question of the irreparable damage.

Hurley v. Mississippi Levee Comrs. 76 Miss. 141, 23 So. 580; Canadian P. R. Co. v. Moosehead Teleph. Co. 106 Me. 363, 29 L.R.A.(N.S.) 703, 76 Atl. 885, 20 Ann. Cas. 721; Hyde v. Minnesota, D. & P. R. Co. 24 S. D. 386, 123 N. W. 849; Spurlock v. Dornan, 182 Mo. 242, 81 S. W. 412.

For the purpose of Federal jurisdiction, the averments of the bill as to the value of the property in controversy will be accepted, unless, upon the face of the bill, the averments are manifestly false, or unless they are tested by proper motion based upon a charge of fraud upon the jurisdiction of the court.

Smithers v. Smith, 204 U. S. 642, 51 L. ed. 660, 27 Sup. Ct. Rep. 297.

Mr. Rush Taggart argued the cause, and, with Messrs. J. B. Harris and George H. Fearons, filed a brief for appellee:

Section 57 of the Judicial Code of the United States, under which the bill was admittedly drawn, localizing certain actions, restricted those actions to suits to enforce liens upon or claims to property, or to remove encumbrances or liens or clouds upon title; what constitutes clouds upon title has a well settled and defined legal meaning and signification; an instrument void on its face, as shown by the bill of complaint, constitutes no cloud, and in such a case a court of equity has no jurisdiction.

Peirsoll v. Elliott, 6 Pet. 95, 8 L. ed. 332; Devine v. Los Angeles, 202 U. S. 313, 50 L. ed. 1046, 26 Sup. Ct. Rep. 652; Phelps v. Harris, 101 U. S. 370, 25 L. ed. 855; Mackall v. Casilear, 137 U. S. 556, 34 L. ed. 776, 11 Sup. Ct. Rep. 178; Lyon v. Alley, 130 U. S. 177, 32 L. ed. 899, 9 Sup. Ct. Rep. 480; Hannewinkle v. Georgetown, 15 Wall. 547, 21 L. ed. 231.

There is nothing in the Mississippi cases which indicates any purpose to abrogate or depart from the general rule.

Boyd v. Thornton, 13 Smedes & M. 344; Huntington v. Allen, 44 Miss. 654; Carlisle v. Tindall, 49 Miss. 233; Phelps v. Harris, 51 Miss. 793; Ezelle v. Parker, 41 Miss. 526; Memphis & C. R. Co. v. Neighbors, 51 Miss. 412; Griffin v. Harrison, 52 Miss. 824; Hart v. Bloomfield, 66 Miss. 100, 5 So. 620; Wilkinson v. Hiller, 71 Miss. 678, 14 So. 442; Jones v. Rogers, 85 Miss. 826, 38 So. 742.

Conferring jurisdiction upon the Federal court is one thing, while the Federal court administering certain relief in cases where it has jurisdiction is quite another. The bill in this case cannot be maintained unless it is held that the state statute has enlarged original jurisdiction upon the Federal court to the same extent that the jurisdiction of the state court was enlarged. The Federal court, as such, has jurisdiction of bills to remove clouds from title; that, however, is determined not by any state statute, but by the general rules of equity jurisprudence and Federal statutes. Under the state statute the state court has jurisdiction in cases where the owner of property is out of possession; the Federal court has not (Whitehead v. Shattuck, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276). Under the state statute the state court has jurisdiction of a bill where the adverse claim consists of threats or mere verbal assertions of ownership; the Federal court has not (Devine v. Los Angeles, 202 U. S. 335, 50 L. ed. 1054, 26 Sup. Ct. Rep. 652). Under the state statute, if claim of counsel is correct, the state court can entertain a bill to cancel as clouds upon title an instrument void upon its face; the Federal court cannot (Ibid.; Peirsoll v. Elliott, 6 Pet. 95, 8 L. ed. 332; Ewing v. St. Louis, 5 Wall. 413, 18 L. ed. 657; Hanne-

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winkle v. Georgetown, 15 Wall. 547, 21 L. ed. 231; Phelps v. Harris, 101 U. S. 370, 25 L. ed. 855; Mackall v. Casilear, 137 U. S. 556, 34 L. ed. 776, 11 Sup. Ct. Rep. 178; Lyon v. Alley, 130 U. S. 177, 32 L. ed. 899, 9 Sup. Ct. Rep. 480).

[371] Mr. Justice Van Devanter delivered the opinion of the court:

By a bill in equity exhibited in the district court, the appellant seeks the annulment of three judgments of special courts of eminent domain in Harrison, Jackson, and Hancock counties, Mississippi, purporting to condemn portions of its right of way in those counties for the use of the appellee. According to the allegations of the bill, when given the effect that must be given to them for present purposes, the case is this: The appellant has a fee-simple title to the land constituting the right of way, and is in possession, and the appellee is asserting a right to subject portions of the right of way to its use under the three judgments recently obtained. The appellant insists, for various reasons fully set forth, that the judgments were procured and rendered in such disregard of applicable local laws as to be clearly invalid, and that they operate to becloud its title. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, the right of way is within the district in which the bill was filed, and the appellant and appellee are, respectively, Kentucky and New York corporations. The prayer of the bill is, that the judgments be held null and void and the appellee enjoined from exercising or asserting any right under them. Appearing specially for the purpose, the appellee objected to the district court's jurisdiction, upon the ground that neither of the parties was a resident of that district, and that the suit was not one that could be brought in a district other than that of the residence of one of them without the appellee's consent. The court sustained the objection, dismissed the bill, and allowed this direct appeal under § 238 of the Judicial Code. [36 Stat. at L. 1157, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 228.]

We are only concerned with the jurisdiction of the district court as a Federal court; that is, with its power to entertain the suit under the laws of the United States. [372] Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175, 55 L. ed. 163, 31 Sup. Ct. Rep. 185; United States v. Congress Constr. Co. 222 U. S. 199, 56 L. ed. 163, 32 Sup. Ct. Rep. 44; Chase v. Wetzlar, 225 U. S. 79, 83, 56 L. ed. 990, 991, 32 Sup. Ct. Rep. 659. Whether, upon the showing in the bill, the appellant is entitled to the relief sought, is not a jurisdictional question in the sense of § 238, and is not before us. Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; Citizens' Sav. & T. Co. v. Illinois C. R. Co. 205 U. S. 46, 58, 51 L. ed. 703, 707, 27 Sup. Ct. Rep. 425; R. J. Darnell v. Illinois C. R. Co. 225 U. S. 243, 56 L. ed. 1072, 32 Sup. Ct. Rep. 760.

As the matter in controversy is of the requisite value and the parties are citizens of different states, the suit manifestly is within the general class over which the district courts are given jurisdiction by the Judicial Code, § 24, cl. 1 [36 Stat. at L. 1091, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 135]; so the question for decision is whether the suit is cognizable in the particular district court in which it was brought.

In distributing the jurisdiction conferred in general terms upon the district courts, the Code declares, in § 51, that, "except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." If this section be applicable to suits which are local in their nature, as well as to such as are transitory (as to which see Casey v. Adams, 102 U. S. 66, 26 L. ed. 52; Greeley v. Lowe, 155 U. S. 58, 39 L. ed. 69, 15 Sup. Ct. Rep. 24; Ellenwood v. Marietta Chair Co. 158 U. S. 105, 39 L. ed. 913, 15 Sup. Ct. Rep. 771; Kentucky Coal Lands Co. v. Mineral Development Co. 191 Fed. 899, 915), it is clear that the district court in which the suit was brought cannot entertain it, unless one of the six succeeding sections provides otherwise, or the appellee waives its personal privilege of being sued only in the district of its or the appellant's residence. Re Moore, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706, 14 Ann. Cas. 1164; [373] Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co. 210 U. S. 368, 52 L. ed. 1101, 28 Sup. Ct. Rep. 720.

The appellant relies upon § 57, one of the six succeeding sections, as adequately sustaining the jurisdiction. This section reads as follows:

"When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any encumbrance or lien or cloud upon the title to real or personal property within the district where

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such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendants shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property [374] against which such proceedings shall be taken shall be within another district, but within the same state, such suit may be brought in either district in said state: Provided, however, That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."

It will be perceived that this section not only plainly contemplates that a suit "to remove any encumbrance, lien, or cloud upon the title to real or personal property" shall be cognizable in the district court of the district wherein the property is located, but expressly provides for notifying the defendant by personal service outside the district, and, if that be impracticable, by publication. The section has been several times considered by this court, and, unless there be merit in an objection yet to be noticed, the decisions leave no doubt of its applicability to the present suit, even though both parties reside outside the district. Greeley v. Lowe, 155 U. S. 58, 39 L. ed. 69, 15 Sup. Ct. Rep. 24; Dick v. Foraker, 155 U. S. 404, 39 L. ed. 201, 15 Sup. Ct. Rep. 124; Jellenik v. Huron Copper Min. Co. 177 U. S. 1, 44 L. ed. 647, 20 Sup. Ct. Rep. 559; Citizens' Sav. & T. Co. v. Illinois C. R. Co. 205 U. S. 46, 51 L. ed. 703, 27 Sup. Ct. Rep. 425; Chase v. Wetzlar, 225 U. S. 79, 56 L. ed. 990, 32 Sup. Ct. Rep. 659.

The appellee, after asserting that each of the judgments is void upon its face if the attack upon it in the bill is well taken, calls attention to the general rule that a bill in equity does not lie to cancel, as a cloud upon title, a conveyance or instrument that is void upon its face, and then insists that § 57 must be regarded as adopted in the light of that rule, and as not intended to displace it, or to embrace a suit brought in opposition to it. The difficulty [375] with this contention is that it seeks to make the usages of courts of equity the sole test of what constitutes a cloud upon title, so as to bring a suit to remove it within the operation of § 57, and disregards the bearing which the state law rightly has upon the question. As long ago as 1839 this court had occasion, in Clark v. Smith, 13 Pet. 195, 10 L. ed. 123, to consider whether a Federal court sitting in the state of Kentucky could entertain a suit to remove a cloud from the title to real property in that state where the right to such relief depended upon a remedial statute of the state; and in the opinion, which fully sustained the jurisdiction, the court pointed out that the nature of the right was such that it could only be enforced in a court of equity, and then said (p. 203): "Kentucky has the undoubted power to regulate and protect individual rights to her soil, and to declare what shall form a cloud on titles; and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature. . . . The state legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as it is in

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the state courts; on the contrary, propriety and convenience suggest that the practice should not materially differ, where titles to lands are the subjects of investigation. And such is the constant course of the Federal courts." The principle of that decision has been reaffirmed and applied in many cases, one being Reynolds v. First Nat. Bank, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213. It was a suit in the circuit court for the district of Indiana to remove a cloud from title in virtue of a statute of that state, and the objection was interposed that the deed sought to be [376] canceled was void upon its face, and therefore afforded no basis for such a suit in a Federal court. But this court pronounced the objection untenable, saying (p. 410): "While, therefore, the courts of equity may have generally adopted the rule that a deed, void upon its face, does not cast a cloud upon the title which a court of equity would undertake to remove, we may yet look to the legislation of the state in which the court sits to ascertain what constitutes a cloud upon the title, and what the state laws declare to be such, the courts of the United States, sitting in equity, have jurisdiction to remove." Citing Clark v. Smith, supra. See also Cowley v. Northern P. R. Co. 159 U. S. 569, 582, 40 L. ed. 263, 266, 16 Sup. Ct. Rep. 127. There are many state statutes of this type, and our decisions show that their enforcement in the Federal courts is subject to but three restrictions: 1. The case must be within the general class over which those courts are given jurisdiction. 2. A suit in equity does not lie in those courts where there is a plain, adequate, and complete remedy at law. 3. In those courts there can be no commingling of legal and equitable remedies, or substitution of the latter for the former, whereby the constitutional right of trial by jury in actions at law is defeated. Judicial Code, §§ 24 (cl. 1) and 267; Whitehead v. Shattuck, 138 U. S. 146, 152, 156, 34 L. ed. 873, 874, 876, 11 Sup. Ct. Rep. 276; Greeley v. Lowe, 155 U. S. 58, 75, 39 L. ed. 69, 75, 15 Sup. Ct. Rep. 24; Wehrman v. Conklin, 155 U. S. 314, 323, 39 L. ed. 167, 172, 15 Sup. Ct. Rep. 129; Lawson v. United States Min. Co. 207 U. S. 1, 9, 52 L. ed. 65, 73, 28 Sup. Ct. Rep. 15.

We conclude that the provision in § 57 of the Judicial Code, respecting suits to remove clouds from title, was intended to embrace, and does embrace, suits of that nature when founded upon the remedial statutes of the several states, as well as when resting upon established usages and practice in equity.

The state of Mississippi has such a statute. Code of 1906, § 550. Although originally more restricted (Hutchinson's Code, p. 773; Rev. Code 1857, p. 541, art. 8), it has read as follows since 1871 (Rev. Code 1871, § 975):

[377] "When a person, not the rightful owner of any real estate, shall have any conveyance or other evidence of title thereto, or shall assert any claim, or pretend to have any right or title thereto, which may cast doubt or suspicion on the title of the real owner, such real owner may file a bill in the chancery court to have such conveyance or other evidence or claim of title canceled, and such cloud, doubt, or suspicion removed from said title, whether such real owner be in possession or not, or be threatened to be disturbed in his possession or not, and whether the defendant be a resident of this state or not."

While we have not been referred to any decision of the supreme court of the state passing directly upon the question whether a conveyance or other evidence of title void upon its face is within the purview of this statute, the decisions of that court brought to our attention show that it has treated the statute as embracing conveyances described as "void," whether the invalidity was shown upon the face of the instrument being left uncertain (Eztelle v. Parker, 41 Miss. 520; Wofford v. Bailey, 57 Miss. 239; Drysdale v. Biloxi Canning Co. 67 Miss. 534, 7 So. 541; Preston v. Banks, 71 Miss. 601, 14 So. 258; Wildberger v. Puckett, 78 Miss. 650, 29 So. 393); and also that it regards the statute as very comprehensive and materially enlarging existing equitable remedies. In Huntington v. Allen, 44 Miss. 654, 662, it was said: "The statute in reference to the removal of clouds from title enlarges the principle upon which courts of equity were accustomed to administer relief. It is very broad, allowing the real owner in all cases to apply for the cancelation of a deed or other evidence of title which casts a cloud or suspicion on his title. . . . The terms used in the statute, expressive of the scope of the jurisdiction, *viz.*, 'cloud,' 'doubt,' 'suspicion,' quite distinctly imply that the instrument which creates them is apparent rather than 'real'; is 'semblance' rather than substance; obscures rather than [378] destroys or defeats." In Cook v. Friley, 61 Miss. 1, 4, it was further said: "The statute . . . not only authorises the real owner to file his bill to cancel a paper title, but also to remove the cloud, doubt, or suspicion which may spring from the assertion of claim, or pretense of right or title thereto by the defendant, who, without any muniment of title, may assert a claim or pretend to have right or title.

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The purpose was to give the real owner a remedy against one who asserts any claim or pretends to have any right or title to such owner's land, in analogy to the right of action by the canon law for jactitation of marriage. The real owner is entitled to protection against jactitation of title to the disparagement of his real ownership. He may bring into court one who asserts any claim or pretends to have any right or title to his land, and require him to vindicate his claim, or submit to its extinguishment by decree of the court." And in People's Bank v. West, 67 Miss. 729, 740, 8 L.R.A. 727, 7 So. 513, the court concluded its opinion with the statement: "We know of no line by which the jurisdiction of the court is limited other than that prescribed by the law which confers it. When the complainant shows a perfect title, legal or equitable, and the title of the defendant is shown to be invalid, it is, in the nature of things, a cloud upon the title of complainant, and should be canceled."

In view of these decisions, we think the statute must be regarded as entitling the rightful owner of real property in the state to maintain a suit to dispel a cloud cast upon his title by an invalid deed or other instrument, even though it be one which, when tested by applicable legal principles, is void upon its face.

The judgments sought to be canceled as clouds upon the appellant's title were rendered by special courts of eminent domain, each composed of a justice of the peace and a jury. According to the statute controlling such proceedings (Miss. Code 1906, chap. 43) the special court is not [379] permitted to quash or dismiss the proceeding for want of jurisdiction or for any other reason, or to inquire whether the applicant has a right to condemn, or whether the contemplated use is public, but "must proceed with the condemnation" (§§ 1862, 1865, 1866); and, while an appeal lies to the circuit court, a supersedeas is not permitted, and upon the appeal the circuit court is restricted, like the special court, to an ascertainment of the compensation to be paid to the owner (§ 1871). A form of judgment is prescribed, which contains blanks for a description of the property and a recital of the compensation awarded, and then declares: "Now, upon payment of the said award, applicant can enter upon and take possession of the said property, and appropriate it to public use, as prayed for in the application" (§ 1867). An affirmative provision to the same effect also appears in the statute (§ 1868). Considering these statutory provisions and § 17 of the state Constitution, which declares that the question whether the condemnation is for a public use shall be a judicial question, the supreme court of the state holds that "the only question which can be raised in the eminent domain court, and the only jurisdiction confided to it, is the jurisdiction to ascertain the amount of damage sustained by the party whose lands are sought to be taken;" that "a new issue, involving a new question and new pleadings, cannot be raised in the appellate tribunal, that is to say, in the circuit court;" that the owner "may litigate the right to take his property at any time before acceptance of the compensation, or before the waiver of his right to have the question of the use judicially determined;" that "neither the Constitution nor the laws of the state provide any particular tribunal in which this question shall be determined, nor is it a matter of any particular concern in what court the question shall be settled, provided it be determined in that forum which is capable of deciding it," and that the [380] appropriate mode of litigating the question is by a suit in equity challenging the right of the condemnor to enter under the judgment of the court of eminent domain. Vinegar Bend Lumber Co. v. Oak Grove & G. R. Co. 89 Miss. 84, 43 So. 292. Thus it will be perceived that under the law of the state, as declared by its court of last resort, the judgment of a special court of eminent domain may be challenged by a bill in equity upon the ground that the condemnation is not for a public purpose. This being so, and the elements of Federal jurisdiction being present, the litigation may, of course, be had in a Federal court. One of the grounds upon which the judgments are challenged in the present bill is that the condemnation is not for a public purpose. If this ground be well taken, as to which we intimate no opinion, the judgments apparently confer upon the appellee a right in the appellant's right of way to which the appellee is not entitled.

We conclude that the suit is one to remove a cloud from title within the meaning of § 57 of the Judicial Code, and is cognizable in the court below, although neither of the parties resides in that district.

Decree reversed.

SILAS A. GILSON, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 380-384.)

Appeal — review of facts — concurrent findings — testimony before examiner.

The rule that the concurrent findings of

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two courts upon a question of fact will not be disturbed by the Federal Supreme Court unless clearly shown to be erroneous is none the less applicable because the evidence was taken before an examiner.

[For other cases see Appeal and Error, 4931-4959, in Digest Sup. Ct. 1908.]

[No. 207.]

Submitted May 6, 1914. Decided June 8, 1914.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Eastern District of Washington, in favor of the United States, in a suit to cancel a patent issued on a commutated homestead entry. Affirmed.

See same case below, 107 C. C. A. 584, 185 Fed. 484.

The facts are stated in the opinion.

Mr. Wade H. Ellis submitted the cause, and Messrs. Ira P. Englehart, Allen S. Davis, and George B. Holden filed a brief for appellant.

Assistant Attorney General Knaebel and Mr. S. W. Williams submitted the cause for appellee.

Mr. Justice Pitney delivered the opinion of the court:

This is an equity action brought by the United States against appellant to cancel a patent issued to one Daniel [382] Landis for a tract of 120 acres of land in Yakima county, in the state of Washington, afterwards conveyed by Landis to appellant. Landis made a homestead entry in November, 1899, under § 2289 of the Revised Statutes as amended by act of March 3, 1891 (26 Stat. at L. 1098, chap. 561, U. S. Comp. Stat. 1901, p. 1388); in November, 1902, he commuted the entry and purchased the land under § 2301 (U. S. Comp. Stat. 1901, p. 1406), as amended by the same act; and in July, 1903, he received a patent. Upon the day on which he made the commutation entry he gave a mortgage upon the land to appellant, and from that date ceased to live upon it, and as soon as the patent was issued he made the conveyance to appellant. The grounds of the action were: that Landis did not enter the land in good faith, but for the purpose and with the intent of acquiring title to it for appellant and at his instigation; that the residence and improvements were not sufficient; that the affidavit upon which Landis's original application was allowed was false and fraudulent, in that he did not make the application in good faith for the purpose of actual settlement and cultivation, but made it for the benefit of appellant, with whom the entryman was then acting in collusion for the purpose of giving to appellant the benefit of the entry; that the proof of settlement and cultivation offered in support of the commutation entry was false and fraudulent, in that the entryman had not made settlement in November, 1899, or at any other time; had not built a house, except a partially completed shanty; had not resided on the land, and had not broken 13 acres and cultivated 3 acres, as alleged in his final proofs; and that the statement made in his affidavit that he had not alienated any part of the land was also false, in that he had alienated or agreed to alienate it to appellant.

The trial court found that Landis made the homestead entry at appellant's instigation and for his benefit; that the evidence on which the register and receiver allowed [383] the commutation entry included sworn statements by Landis and two witnesses to the effect that the claimant had lived continuously on the land and made improvements, including a corral and chicken house, and that he had cultivated 3 acres for three seasons; that this was a false statement, there having been no plowing or cultivation except during the third year; that the land was dry sage-brush land, not productive without irrigation; that Landis made only a pretense of settlement and a show of improving the land, in order to satisfy the scruples of the witnesses upon whom he depended to make final proof; and further, that appellant was cognizant of every detail of the transaction from its inception to the issuance of patent, and, indeed, directed the proceedings at every step, and therefore could not claim to be a bona fide purchaser.

The circuit court of appeals concurred in this view of the facts, and therefore sustained the conclusion reached by the trial court that the patent should be canceled, without finding it necessary to consider the question of law, suggested by appellant, that, inasmuch as final proof was not made under § 2291 (U. S. Comp. Stat. 1901, p. 1390), but under § 2301 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1406), the fact that the claimant had made an agreement before commutation to convey the land to another would not af-

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fect the validity of the title obtained from the United States, because § 2301 prescribes as requisite to commutation, proof only that the entryman has made settlement, cultivation, and residence for fourteen months, and does not require him to make oath that he has not alienated any portion of the land. The decree was affirmed (107 C. C. A. 584, 185 Fed. 484), and the present appeal was taken.

Upon the question of fact as to the fraudulent nature of the proof upon which the commutation entry was allowed, we have the concurring findings of two courts, which, according to the settled rule, will not be disturbed by this court unless clearly shown to be erroneous. Stuart v. [384] Hayden, 169 U. S. 1, 14, 42 L. ed. 639, 643, 18 Sup. Ct. Rep. 274; Towson v. Moore, 173 U. S. 17, 24, 43 L. ed. 597, 600, 19 Sup. Ct. Rep. 332; Dun v. Lumbermen's Credit Asso. 209 U. S. 20, 23, 52 L. ed. 663, 665, 28 Sup. Ct. Rep. 335, 14 Ann. Cas. 501; Washington Securities Co. v. United States, decided May 25, 1914 [234 U. S. 76, ante, 1220, 34 Sup. Ct. Rep. 725.]

In behalf of appellant it is urged that this rule does not apply where the evidence is taken before an examiner, as was done in this case. The rule, however, is subject to no such exception; indeed, prior to the adoption of the new Equity Rules (226 U. S. 13, Appx. 57 L. ed. 1645, 33 Sup. Ct. Rep. xxxi., Rule 46), the evidence in equity actions was usually taken before a master or examiner. And in Texas & P. R. Co. v. Railroad Commission, 232 U. S. 338, ante, 630, 34 Sup. Ct. Rep. 438, where the findings of the special master who heard the testimony were set aside by the circuit court, and the conclusions of that court were concurred in by the circuit court of appeals, we deemed the case a proper one for applying the general rule.

In the present case, not only does the argument submitted in behalf of appellant fail to show clear ground for disturbing the concurring findings of the two courts, but it raises no reasonable doubt of their correctness.

This renders it unnecessary to deal with the question raised as to the effect of an agreement for alienation made after entry and before commutation. However, it is settled adversely to the contention of appellant by our recent decision in Bailey v. Sanders, 228 U. S. 603, 608, 57 L. ed. 985, 988, 33 Sup. Ct. Rep. 602.

Decree affirmed.

[385] HENRY J. GRANNIS, Plff. in Err.,
v.
ALBERT L. ORDEAN, Margaret Sullivan, Alfred Jaques, Theodore T. Hudson, et al. (No. 325.)

HENRY J. GRANNIS, Plff. in Err.,
v.
ROBERT B. WHITESIDE, Margaret Sullivan, Alfred Jaques, Theodore T. Hudson, et al. (No. 326.)

(See S. C. Reporter's ed. 385-398.)

Error to state court — Federal question — raising on rehearing.

1. A Federal right is raised in the state courts in such a manner as to support a writ of error from the Federal Supreme Court to the highest state court, although such right was first clearly asserted in the latter court in a petition for reargument, where such Federal right was first denied, if at all, by the decision of the highest state court, and that court entertained the petition for reargument, and considered and overruled the contention that the petitioner's Federal rights were infringed, declaring that its decision was to be interpreted as holding against such contention, and therefore refused the reargument.

[For other cases, see Appeal and Error, 1292-1310, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — service of process on nonresident — misnomer.

2. Service by publication and mailing of a summons in a partition suit, conformably to the local law with respect to constructive service of nonresidents, naming as party defendant and addressee, "Albert Guilfuss, assignee," and "Albert B. Guilfuss," satisfied

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NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

As to when Federal question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court over state courts—see note to Chicago, I. & L. R. Co. v. McGuire, 49 L. ed. U. S. 414.

As to what service of process is sufficient to constitute due process of law—see note to Pinney v. Providence Loan & Invest. Co. 50 L.R.A. 577.

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the requirement of the due process of law clause of U. S. Const., 14th Amendment, conferring jurisdiction, notwithstanding the misnomer, to render a judgment binding upon "Albert B. Geilfuss, assignee," with respect to his lien upon, or interest in, the land, he not having appeared.

[For other cases, see Constitutional Law, 698-719; Judgment, 231-243, in Digest Sup. Ct. 1908.]

[Nos. 325, 326.]

Argued April 27 and 28, 1914. Decided June 8, 1914.

TWO WRITS of Error to the Supreme Court of the State of Minnesota to review judgments which reversed judgments of the District Court for St. Louis County, in that state, in actions to determine adverse claims to real property, in so far as the defendant was adjudged to be the owner of an undivided interest therein. Affirmed.[1]

See same case below, 118 Minn. 117, — L.R.A. (N.S.) —, 136 N. W. 575, 1026.

The facts are stated in the opinion.

Messrs. Henry J. Grannis and Frederic D. McKenney argued the cause and filed a brief for plaintiff in error:

The Federal question was properly presented to and passed upon by the state court, so as to support the jurisdiction of this court, to review the judgment of the state court.

Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241; Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. Rep. 446; Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; McKay v. Kelyton, 204 U. S. 458, 51 L. ed. 566, 27 Sup. Ct. Rep. 346; Sullivan v. Texas, 207 U. S. 416, 52 L. ed. 274, 28 Sup. Ct. Rep. 215; Disconto Gesellschaft v. Umbreit, 208 U. S. 570, 52 L. ed. 625, 28 Sup. Ct. Rep. 337; Illinois C. R. Co. v. Kentucky, 218 U. S. 551, 54 L. ed. 1147, 31 Sup. Ct. Rep. 95; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. ed. 137, 31 Sup. Ct. Rep. 171.

The lien of this judgment could not be controlled or cut off, without notice to the record owner thereof.

Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14; Jacob v. Roberts, 223 U. S. 261, 56 L. ed. 429, 32 Sup. Ct. Rep. 303; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914.

This court will decide for itself whether there has been such notice as to constitute due process.

Central R. Co. v. Wright, 207 U. S. 127, 52 L. ed. 134, 28 Sup. Ct. Rep. 47, 12 Ann. Cas. 463; Ballard v. Hunter, 204 U. S. 241, 260, 51 L. ed. 461, 27 Sup. Ct. Rep. 261; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Marx v. Hanthorn, 148 U. S. 172, 37 L. ed. 410, 13 Sup. Ct. Rep. 508; Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; Jacob v. Roberts, 223 U. S. 261, 56 L. ed. 429, 32 Sup. Ct. Rep. 303; Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 591, 56 L. ed. 556, 565, 32 Sup. Ct. Rep. 316; Creswill v. Grand Lodge, K. P. 225 U. S. 246, 261, 56 L. ed. 1074, 1080, 32 Sup. Ct. Rep. 822; Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. ed. 662, 669, 43 L.R.A. (N.S.) 901, 33 Sup. Ct. Rep. 277; Miedreich v. Lauenstein, 232 U. S. 236, ante, 584, 34 Sup. Ct. Rep. 309.

Service of process by publication is a purely statutory proceeding, in derogation of the common law, and strict compliance with the statutory authorization is necessary.

Barber v. Morris, 37 Minn. 194, 5 Am. St. Rep. 836, 33 N. W. 559; Brown v. St. Paul & N. P. R. Co. 38 Minn. 506, 38 N. W. 698; Gilmore v. Lampman, 86 Minn. 493, 91 Am. St. Rep. 373, 90 N. W. 111; Godfrey v. Valentine, 39 Minn. 336, 12 Am. St. Rep. 657, 40 N. W. 163; Jewett v. Iowa Land Co. 64 Minn. 531, 58 Am. St. Rep. 555, 67 N. W. 639; Holmes v. Loughren, 97 Minn. 83, 105 N. W. 558; Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co. 139 U. S. 137, 35 L. ed. 116, 11 Sup. Ct. Rep. 512; Chamberlain v. Blodgett, 96 Mo. 482, 10 S. W. 44; Meyer v. Kuhn, 13 C. C. A. 298, 25 U. S. App. 174, 65 Fed. 712; Galpin v. Page, 18 Wall. 350, 369, 21 L. ed. 959, 963; Settlemier v. Sullivan, 97 U. S. 444, 24 L. ed. 1110; Cheely v. Clayton, 110 U. S. 701, 28 L. ed. 298, 4 Sup. Ct. Rep. 328; D'Autremont v. Anderson Iron Co. (D'Autremont v. Gaylord) 104 Minn. 165, 17 L.R.A. (N.S.) 236, 124 Am. St. Rep. 615, 116 N. W. 357, 15 Ann. Cas. 114; Gray v. Larrimore, 4 Sawy. 638, Fed. Cas. No. 5,721; Indiana & A. Lumber & Mfg. Co. v. Brinkley, 91 C. C. A. 91, 164 Fed. 966; Fanning v. Krapfl, 61 Iowa, 417, 14 N. W. 727, 16 N. W. 293.

Where substituted service is relied upon, and the service made is defective, the fact that the summons actually reached the defendant is immaterial.

Enewold v. Olsen, 39 Neb. 64, 22 L.R.A. 573, 42 Am. St. Rep. 557, 57 N. W. 765; Miller v. Keaton, 236 Mo. 694, 139 S. W. 158.

Where jurisdiction by publication is re-

[1] Leave granted on June 22, 1914, to present petition for rehearing within thirty days.

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lied upon, the name in the published notice should be given correctly.

Skelton v. Sackett, 91 Mo. 377, 3 S. W. 874; D'Autremont v. Anderson Iron Co. (D'Autremont v. Gaylord) 104 Minn. 169, 17 L.R.A.(N.S.) 236, 124 Am. St. Rep. 615, 116 N. W. 357, 15 Ann. Cas. 114; Ohlmann v. Clarkson Saw Mill Co. 222 Mo. 62, 28 L.R.A.(N.S.) 432, 133 Am. St. Rep. 506, 120 S. W. 1155; Anderson v. Qualey, 216 Mass. 106, 103 N. E. 90; Marx v. Hanthorn, 148 U. S. 172, 37 L. ed. 410, 13 Sup. Ct. Rep. 508; Meyer v. Kuhn, 13 C. C. A. 298, 25 U. S. App. 174, 65 Fed. 713; Detroit v. Detroit City R. Co. 54 Fed. 1; Hubner v. Reickhoff, 103 Iowa, 368, 64 Am. St. Rep. 191, 72 N. W. 540; Steinman v. Jessee, 108 Va. 572, 62 S. E. 275; Clary v. O'Shea, 72 Minn. 105, 71 Am. St. Rep. 465, 75 N. W. 115; Schoenfeld v. Bourne, 159 Mich. 139, 30 L.R.A. (N.S.) 122, 123 N. W. 537; Grober v. Clements, 71 Ark. 568, 100 Am. St. Rep. 91, 76 S. W. 555; Entrekin v. Chambers, 11 Kan. 368; Scarry v. Bunker-Culler Lumber Co. 233 Mo. 686, 136 S. W. 294; Chamberlain v. Blodgett, 96 Mo. 482, 10 S. W. 44; Miller v. Keaton, 236 Mo. 694, 139 S. W. 158; Milbra v. Sloss-Sheffield Steel & I. Co. — Ala. —, 46 L.R.A.(N.S.) 274, 62 So. 176; Hodgkin v. Boswell, 63 Or. 589, 127 Pac. 985; Heberling v. Moudy, 247 Mo. 535, 154 S. W. 65; Bloomer v. Cristler, 22 Colo. App. 238, 123 Pac. 966; Fanning v. Krapfl, 61 Iowa, 417, 14 N. W. 727, 16 N. W. 293; Thornily v. Prentice, 121 Iowa, 89, 100 Am. St. Rep. 317, 96 N. W. 728.

The absence of the middle initial from the name "Albert Guilfuss, assignee," as published, especially taken in connection with the difference in the surnames, "Geilfuss" and "Guilfuss," does not permit of the presumption being indulged in that the name described in the published summons was the same as the name of the judgment creditor, "Albert B. Geilfuss, assignee."

D'Autremont v. Anderson Iron Co. (D'Autremont v. Gaylord) 104 Minn. 165, 17 L.R.A.(N.S.) 236, 124 Am. St. Rep. 615, 116 N. W. 357, 15 Ann. Cas. 114; Snook's Petition, 2 Hilt. 566; Loser v. Plainfield Sav. Bank, 149 Iowa, 672, 31 L.R.A.(N.S.) 1112, 128 N. W. 1101; note to Proctor v. Nance, 132 Am. St. Rep. 563; Ambs v. Chicago, St. P. M. & O. R. Co. 44 Minn. 266, 46 N. W. 321; Northern Commercial Co. v. Hartke, 110 Minn. 338, 125 N. W. 508; Ordean v. Grannis, 118 Minn. 117, — L.R.A. (N.S.) —, 136 N. W. 575, 1026; Willard v. Marr, 121 Minn. 23, 139 N. W. 1066; Newby v. Edwards, 153 N. C. 110, 68 S. E. 1062; First Nat. Bank v. Hacoda Mercantile Co. 169 Ala. 476, 32 L.R.A.(N.S.) 243, 53 So. 802, Ann. Cas. 1912B, 599; Carney v. Bigham, 51 Wash. 452, 19 L.R.A.(N.S.) 905, 99 Pac. 21; Wicker v. Jenkins, 49 Tex. Civ. App. 366, 108 S. W. 188; Bowen v. Mulford, 10 N. J. L. 230; Parker v. Parker, 146 Mass. 320, 15 N. E. 902; Com. v. Buckley, 145 Mass. 181, 13 N. E. 368; Dutton v. Simmons, 65 Me. 583, 20 Am. Rep. 729; Ming v. Gwatkin, 6 Rand. (Va.) 551; Davis v. Steeps, 87 Wis. 472, 23 L.R.A. 818, 41 Am. St. Rep. 51, 58 N. W. 769; Crouse v. Murphy, 140 Pa. 335, 12 L.R.A. 58, 23 Am. St. Rep. 232, 21 Atl. 358; Gibson v. Foster, 24 Colo. App. 434, 135 Pac. 121.

Mr. Alfred Jaques argued the cause, and, with Messrs. Theodore T. Hudson and John G. Williams, filed a brief for defendants in error:

The question which occurs here is whether the construction by the state court of this summons, and its decision as to its effectiveness as notice, is not a matter of common or general law. It involves no construction of any state statute, United States statute, Constitution, or treaty. It is simply a construction or a decision on the meaning of an instrument or writing, and is based upon the principles of common or general law. It would seem that such a question is exclusively for the decision of the courts of the state, involves no Federal question, and is not subject to review by this court.

Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 Sup. Ct. Rep. 261; Baltimore Traction Co. v. Baltimore Belt R. Co. 151 U. S. 137, 38 L. ed. 102, 14 Sup. Ct. Rep. 294; French v. Taylor, 199 U. S. 274, 50 L. ed. 189, 26 Sup. Ct. Rep. 76; Palmer v. McMahon, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324; Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229.

The rule of *idem sonans*, when strictly adhered to, is considered too rigid, and has been much relaxed in modern practice.

Stevens v. Stebbins, 4 Ill. 25.

The name "Albert Guilfuss, assignee," instead of "Albert Geilfuss, assignee," in the summons and proceeding, would not mislead or confuse.

Lane v. Innes, 43 Minn. 137, 45 N. W. 4; Meyer v. Kuhn, 13 C. C. A. 298, 25 U. S. App. 174, 65 Fed. 705; Clifford v. Thun, 74 Neb. 831, 104 N. W. 1052; Puckett v. Hetzer, 82 Kan. 726, 136 Am. St. Rep. 127, 109 Pac. 285; Kinney v. Harrett, 46 Mich. 87, 8 N. W. 708; Reading v. Waterman, 46 Mich. 107, 8 N. W. 691; People v. Gosch, 82 Mich. 31, 46 N. W. 101; Ruthe v. Green Bay & M. R. Co. 37 Wis. 344; Van Benschoten v. Fales, 126 Mich. 176, 85 N. W. 476.

Mr. Justice Pitney delivered the opinion of the court:

These two cases were heard as one, upon the record in No. 325; it being stipulated

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that since the cases are identical in their facts and in the questions raised, except that they pertain to different portions of the land respecting which the controversy arises, the decision in No. 326 shall abide the result in No. 325. We shall therefore discuss the record in the latter case, without further mention of No. 326.

On the 8th day of November, 1895, and for some time prior thereto, one John McKinley was the owner of an undivided fifth part of certain lands in the county of St. Louis, in the state of Minnesota. Prior to that [387] time one Albert B. Geilfuss, assignee, recovered a judgment for the sum of $2,854.02 against McKinley in the district court of that county, which was duly entered in the judgment book and appeared in the judgment roll in the name of Albert B. Geilfuss, assignee, and on the 5th day of January, 1894, was docketed by the clerk of the court as in favor of Albert Geilfuss, assignee, as judgment creditor, and against John McKinley as judgment debtor, and being so docketed became a lien upon McKinley's interest in said lands, and on November 8, 1895, was a lien thereon. Under a sale afterwards made upon an execution issued on this judgment, plaintiff in error claims title to the undivided one fifth of said lands formerly owned by McKinley, by virtue of certain proceedings and conveyances hereinafter mentioned. Albert B. Geilfuss, assignee, recovered another judgment against McKinley for the sum of $2,125.60, which was duly entered and docketed on January 10, 1894, and became a lien upon the interest of McKinley in the same lands, but plaintiff in error claims no rights thereunder.

On November 8, 1895, one George A. Elder, the owner of an undivided fifth interest in said lands, commenced a partition suit in the district court of St. Louis county against Mesaba Land Company, John McKinley, and the other owners of the fee, and also against certain other parties having judgment or other liens. The suit was brought under the provisions of chapter 74, Gen. Stat. Minnesota, and its sole purpose was to partition the lands, or, in case a partition could not be had, then to have them sold and the proceeds of the sale distributed among the parties entitled.

At the time of the partition action, Albert B. Geilfuss, assignee, resided at Milwaukee, Wisconsin. His correct name, "Albert B. Geilfuss, assignee," or "Albert Geilfuss, assignee," did not appear among the names of the defendants in the action, or in the summons or other files [388] or records therein. "Albert Guilfuss, assignee," was named as a defendant, and it was alleged in the complaint, and found and determined in the findings and judgment, that he was the owner of the judgment for $2,854.02 against McKinley. "Albert B. Guilfuss" was also named as a defendant, and it was alleged in the complaint and found and determined in the findings and judgment that he was the owner of the judgment for $2,125.60 against McKinley. There was no personal service of the summons in the partition action upon Geilfuss, however named, either as individual or as assignee, and no appearance in his behalf. There was a return by the sheriff of St. Louis county upon the summons to the effect that the defendants, "Albert Guilfuss, assignee," and "Albert B. Guilfuss" could not be found in the county, and an affidavit of one of the attorneys of plaintiff was filed, stating that he believed that the defendants "Albert Guilfuss, assignee," and "Albert B. Guilfuss," were not residents of the state of Minnesota, and could not be found therein, and that after the commencement of the action affiant had deposited copies of the summons in the postoffice, with postage prepaid, directed to each of these defendants at their respective places of residence; to wit, one to Albert Guilfuss, assignee, Milwaukee, Wisconsin, and one to Albert B. Guilfuss, Milwaukee, Wisconsin, and stating that the subject of said partition action was certain real property situated in the county of St. Louis and state of Minnesota, and that each of said defendants had and claimed a lien and interest in said real estate, and that the relief demanded in said action consisted in excluding the defendants and each of them from any interest or lien therein. There was also service of the summons by publication upon the defendants named therein as "Albert Guilfuss, assignee," and "Albert B. Guilfuss," the summons being published in a legal newspaper in Duluth, which is in St. Louis county, Minnesota. It is admitted [389] that (saving the effect of the misnomer), the statutory provisions respecting the service of summons upon nonresidents by mailing and publication were complied with. These are contained in Minnesota Statutes 1894, §§ 5204 and 5205 (respecting civil actions), and in §§ 5771 and 5773 (respecting actions for partition of real property).†

†CHAPTER 66.

Civil Actions.

. . . . . .

Section 5204. Service by publication, when allowed.

When the defendant cannot be found within the state, of which the return of the sheriff of the county in which the action is brought, that the defendant cannot be found in the county, is prima facie evi-

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[390] All of the defendants in the action were properly served with summons, except as mentioned, and in due course a judgment was entered on May 5, 1899, adjudging and decreeing the ownership of the lands, and that they could not be divided and partitioned, and ordering that they be sold by a referee to the highest bidder, and the proceeds distributed among the defendants according to their respective rights under the law. The sale was made accordingly and confirmed by the court, and thereafter the present defendants in error, by mesne conveyances, acquired such interest in the lands as had been acquired by the purchaser under the referee's sale.

Subsequently the Geilfuss judgment against McKinley, docketed January 5, 1894, for the sum of $2,854.02, was assigned to one Timlin, and by him to one Buell, and whatever interest in the land, if any, remained in McKinley after the partition sale, was sold under execution and purchased by Buell, and subsequently acquired through mesne conveyances by the present plaintiff in error.

This action (No. 325) was brought by defendants in error to determine the adverse claims in the lands. The trial resulted in a judgment to the effect that the plaintiffs [391] were the owners of an undivided four-fifths interest, and that the present plaintiff in error was the owner of the undivided fifth interest which had been the property of McKinley. Upon appeal, the supreme court reversed the judgment so far as it adjudged plaintiff in error to be the owner of McKinley's interest. 118 Minn. 117, — L.R.A. (N.S.) —, 136 N. W. 575, 1026. By the present writ of error we are called upon to determine whether the supreme court of Minnesota, by its judgment giving effect to the decree in the partition suit, notwithstanding the misnomer of Albert B. Geilfuss, assignee, in the proceedings and summons, has deprived plaintiff in error of his property without due process of law, contrary to the 14th Amendment.

The trial court held that no jurisdiction was acquired in the partition suit over the judgment lien of Albert B. Geilfuss, assignee, and the supreme court declared that if this were correct, the lien of his judgment upon the McKinley interest was not affected by the decree in that action, and that the subsequent sale of that interest under execution on the judgment gave a good title to the purchaser, under whom defendant (now plaintiff in error) claims; while, on the other hand, if the court acquired jurisdiction over that judgment lien, the McKinley interest in the lands passed to the purchaser at the partition sale, and afterwards became the property of plaintiffs (now defendants in error). This was upon the assumption that the court had jurisdiction to decree a sale in the partition action, —a question of state law arising out of facts not here pertinent, and to which an affirmative answer was given in the same opinion.

The precise question now presented, there-

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dence, and upon the filing of an affidavit of the plaintiff, his agent or attorney, with the clerk of the court, stating that he believes that the defendant is not a resident of the state, or cannot be found therein, and that he has deposited a copy of the summons in the postoffice, directed to the defendant at his place of residence, unless it is stated in the affidavit that such residence is not known to the affiant, and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons by the plaintiff or his attorney in either of the following cases:

. . . . . .

Fifth. When the subject of the action is real or personal property in this state, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein. . . .

Section 5205. Publication, how made.

The publication shall be made in a newspaper printed and published in the county where the action is brought (and if there is no such newspaper in the county, then in a newspaper printed and published in an adjoining county, and if there is no such newspaper in an adjoining county, then in a newspaper printed and published at the capitol of the state), once in each week for six consecutive weeks; and the service of the summons shall be deemed complete at the expiration of the time prescribed for publication as aforesaid.

. . . . . .

CHAPTER 74.

Actions for the Partition of Real Property.

. . . . . .

Section 5771. Summons, to whom addressed.

The summons shall be addressed by name to all the owners and lien holders who are known, and generally to all persons unknown, having or claiming an interest in the property.

. . . . . .

Section 5773. Rules as to civil actions applicable.

Such action shall be governed by the rules and provisions applicable to civil actions, including the right of appeal, except that, when service of the summons is made by publication, it shall be accompanied by a brief description of the property sought to be divided, and except as herein otherwise expressly provided.

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fore, is whether, under the circumstances, a service by the publication and mailing of a summons in the partition suit, naming as party and addressee "Albert Guilfuss, assignee," and "Albert B. Guilfuss," constituted due process of law, conferring jurisdiction to render a judgment binding [392] upon Albert B. Geilfuss, assignee, with respect to his lien upon or interest in the land, he not having appeared.

There is a motion to dismiss, upon the ground that the Federal question was not properly raised in the state court. This motion must be denied. It is true that until the decision of the supreme court of the state, the Federal right was not clearly asserted. But it was not infringed in the trial court, which held in favor of the contention of defendant (now plaintiff in error) that the decree in the partition suit was not valid because of the insufficiency of the notice to Geilfuss. It was the decision of the supreme court, upholding the notice, that first ran counter to the alleged Federal right. In a petition for reargument, filed by the now plaintiff in error, it was suggested that the necessary effect of the decision was to deprive him of his property without due process of law, contrary to the 14th Amendment. The supreme court entertained the petition, considered and overruled the contention that petitioner's rights under the Amendment were infringed, declared that its decision was to be interpreted as holding against the contention, and therefore refused a reargument. This is sufficient to confer jurisdiction upon this court. Mallett v. North Carolina, 181 U. S. 589, 592, 45 L. ed. 1015, 1017, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241; Leigh v. Green, 193 U. S. 79, 85, 48 L. ed. 623, 626, 24 Sup. Ct. Rep. 390; McKay v. Kalyton, 204 U. S. 458, 463, 51 L. ed. 566, 569, 27 Sup. Ct. Rep. 346; Sullivan v. Texas, 207 U. S. 416, 422, 52 L. ed. 274, 277, 28 Sup. Ct. Rep. 215; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 158, 55 L. ed. 137, 156, 31 Sup. Ct. Rep. 171.

We therefore proceed to the merits.

In determining what is due process of law within the meaning of the 14th Amendment, a distinction is to be observed between actions *in personam* and actions *in rem*, or quasi *in rem*. In Pennoyer v. Neff, 95 U. S. 714, 733, 24 L. ed. 565, 572, it was held that by force of the Amendment a judgment rendered by a state court in an action *in personam* against a nonresident served by publication of summons, but upon whom no service of process within the [393] state was made, and who did not appear to the action, was devoid of any validity, either within or without the territory of the state in which the judgment was rendered; it being, however, conceded that a different rule obtains where, in connection with initial process against a person, property in the state is brought under the control of the court and subjected to its disposition, or where the judgment is sought as a means to reach such property or affect some interest in it; in other words, where the action is in the nature of a proceeding *in rem*. As was said by the court (speaking by Mr. Justice Field, p. 734): "It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are substantially proceedings *in rem* in the broader sense which we have mentioned."

But it is also settled that where a state has jurisdiction over a *res*,—as of course it has over the partition of lands lying within its borders,—the judgment of the court to which that jurisdiction is confided, in order to be binding with respect to the interest of a nonresident who is not served with process within the state, must be based upon constructive notice given by publication, mailing, or otherwise, substantially in the manner prescribed by the law of the state. Cheely v. Clayton, 110 U. S. 701, 705, 28 L. ed. 298, 299, 4 Sup. Ct. Rep. 328; Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co. 139 U. S. 137, 148, 35 L. ed. 116, 120, 11 Sup. Ct. Rep. 512; Windsor v. McVeigh, 93 U. S. 274, 283, 23 L. ed. 914, 917; Hassall v. Wilcox, 130 U. S. 493, 504, 32 L. ed. 1001, 1005, 9 Sup. Ct. Rep. 590; Thompson v. Thompson, 226 U. S. 551, 562, 57 L. ed. 347, 351, 33 Sup. Ct. Rep. 129.

[394] In the case before us, there is no disputed question as to what steps were taken in order to give notice to Geilfuss of the partition suit. The supreme court of the state, in accepting what was done as being a sufficient compliance with the provisions of the statute, in effect construed the statute as permitting such notice to be given as was in fact given.

But, the question whether the process thus sanctioned by the court of last resort of the state constitutes due process of law within the meaning of the 14th Amendment

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being properly presented to this court for decision, we must exercise an independent judgment upon it. Scott v. McNeal, 154 U. S. 34, 45, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; Ballard v. Hunter, 204 U. S. 241, 260, 51 L. ed. 461, 474, 27 Sup. Ct. Rep. 261; Jacob v. Roberts, 223 U. S. 261, 56 L. ed. 429, 32 Sup. Ct. Rep. 303.

The fundamental requisite of due process of law is the opportunity to be heard. Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 236, 44 L. ed. 747, 750, 20 Sup. Ct. Rep. 620; Simon v. Craft, 182 U. S. 427, 436, 45 L. ed. 1165, 1170, 21 Sup. Ct. Rep. 836. And it is to this end, of course, that summons or equivalent notice is employed. But the inherent authority of the states over the titles to lands within their respective borders carriers with it, of necessity, the jurisdiction to determine rights and interests claimed therein by persons resident beyond the territorial limits of the state, and upon whom the ordinary judicial process cannot be served. The logical result is that a state, through its courts, may proceed to judgment respecting the ownership of lands within its limits, upon constructive notice to the parties concerned who reside beyond the reach of process. That this constitutes "due process" within the meaning of the 14th Amendment was recognized in Pennoyer v. Neff, supra, and is no longer open to question. Huling v. Kaw Valley R. & Improv. Co. 130 U. S. 559, 563, 32 L. ed. 1045, 1047, 9 Sup. Ct. Rep. 603; Arndt v. Griggs, 134 U. S. 316, 320, et seq., 33 L. ed. 918, 919, 10 Sup. Ct. Rep. 557; Lynch v. Murphy, 161 U. S. 247, 251, 40 L. ed. 688, 689, 16 Sup. Ct. Rep. 523; Roller v. Holly, 176 U. S. 398, 403, 44 L. ed. 520, 522, 20 Sup. Ct. Rep. 410. It is not disputed that the statutory scheme of publication and mailing, as established in [395] Minnesota, for giving notice to nonresident defendants in actions quasi *in rem*, is, in its general application, sufficient to comply with the 14th Amendment. But the statute provides that "the summons shall be addressed by name to all the owners and lien holders who are known;" and the contention is that the mistake of name in the present instance was fatal.

The "due process of law" clause, however, does not impose an unattainable standard of accuracy. If a defendant within the jurisdiction is served personally with process in which his name is misspelled, he cannot safely ignore it on account of the misnomer. The rule, established by an abundant weight of authority, is, that if a person is sued by a wrong name, and he fails to appear and plead the misnomer in abatement, the judgment binds him. Lafayette Ins. Co. v. French, 18 How. 404, 409, 15 L. ed. 451, 453; Crawford v. Statchwell, 2 Strange, 1218; Oakley v. Giles, 3 East, 167; Smith v. Patten, 6 Taunt, 115, s. c. 1 Marsh. 474; Smith v. Bowker, 1 Mass. 76, 79; Root v. Fellowes, 6 Cush. 29; First Nat. Bank v. Jaggers, 31 Md. 38, 47, 100 Am. Dec. 53, 54; McGaughey v. Woods, 106 Ind. 381, 7 N. E. 7; Vogel v. Brown Twp. 112 Ind. 299, 2 Am. St. Rep. 187, 14 N. E. 77; Lindsey v. Delano, 78 Iowa, 350, 354, 43 N. W. 218; Hoffield v. Board of Education, 33 Kan. 644, 648, 7 Pac. 216.

Of course, in a published notice or summons, intended to reach absent or nonresident defendants, where the name is a principal means of identifying the person concerned, somewhat different considerations obtain. The general rule, in cases of constructive service of process by publication, tends to strictness. Galpin v. Page, 18 Wall. 350, 369, 373, 21 L. ed. 959, 963, 965; Priest v. Las Vegas, 232 U. S. 604, ante, 751, 34 Sup. Ct. Rep. 449. But, even in names, "due process of law" does not require ideal accuracy. In the spelling and pronunciation of proper names there are no generally accepted standards; and the well-established doctrine of *idem sonans*—generally applied, [396] as it is, to constructive notice of suits—is a recognition of this.

The trial court was of the opinion that the question turned upon whether "Guilfuss" and "Geilfuss" were *idem sonans*, and held that since "Geilfuss" is evidently a German name, the first syllable must be pronounced with the long sound of "i," while the first syllable of "Guilfuss" would necessarily be pronounced with the short sound of "i." The court therefore concluded that the names were not *idem sonans*, and that the difference was fatal. The supreme court agreed that "Geilfuss" and "Guilfuss" were not *idem sonans*, but held that this was not the proper test; that where a summons is served by publication, the true test is not whether the names sound the same to the ear when pronounced, but whether they look substantially the same in print (following Lane v. Innes, 43 Minn. 137, 143, 45 N. W. 4; D'Autremont v. Anderson Iron Co. (D'Autremont v. Gaylord) 104 Minn. 165, 17 L.R.A.(N.S.) 236, 124 Am. St. Rep. 615, 116 N. W. 357, 15 Ann. Cas. 114); and assuming that the name of the judgment creditor of McKinley was Albert B. Geilfuss, assignee, the court said: "The question then is, placing the names 'Albert Guilfuss, assignee,' and 'Albert B. Geilfuss, assignee,' in juxtaposition, was there so material a change as to be misleading?" This was answered in the negative.

Were we to theorize, we might say that while each of these tests is helpful, neither is altogether acceptable if perfect accuracy

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were the aim; not the test of *idem sonans*, because it does not appear that all persons would necessarily pronounce Geilfuss with the long "i," or Guilfuss with the short "i;" and not the test of the appearance of the names as printed and placed in juxtaposition, because in fact, as the name appeared in the summons published and mailed, it was "Guilfuss" alone, without any name in juxtaposition to serve as a standard for comparison. And we think both tests are inadequate if applied without regard to what was contained in the summons besides the mere name and addition—"Albert Guilfuss, assignee." [397] The record, as it happens, contains no copy of the summons; but from findings and admissions that are in the record, we know that it was in due form, and therefore that it contained such notice of the commencement of the action and of its purpose, and such warning to appear and answer, as would constitute due process of law if served upon a defendant within the jurisdiction (Minn. Stat. 1894, §§ 5194, 5195); and that it contained, *inter alia*, a brief description of the property sought to be divided (Minn. Stat. 1894, § 5773, marginal note, supra). The underlying question is a practical one,—whether, notwithstanding the misnomer, the summons as published and mailed, being otherwise unexceptionable, constitutes a substantial compliance with the Minnesota statute and sufficient constructive notice to the party concerned. In determining this, we need not confine ourselves to the test of *idem sonans*, nor to the appearance of the name in print, but may employ both of these, with such additional tests as may be available in view of what is disclosed by the record. One such additional test, we think, is whether, when two letters reached the postoffice at Milwaukee, one addressed "Albert Guilfuss, assignee," the other addressed "Albert B. Guilfuss," they or either of them would, in reasonable probability, be delivered to Albert B. Geilfuss, then a resident of that city. Another is whether, assuming that the summons as so mailed, or as published in Duluth, and containing the misspelled names or either of them, had come to the eye of the veritable Albert B. Geilfuss, or of any person knowing him by that name, and sufficiently interested in him to acquaint him with its contents if apprised that it was intended for him, the summons, as a whole, would probably have conveyed notice that Albert B. Geilfuss was the person intended to be summoned. Both of these questions are, we think, to be answered in the affirmative. In view of the well-known skill of postal officials and employees [398] in making proper delivery of letters defectively addressed, we think the presumption is clear and strong that the letters would reach—indeed, that they did reach—the true Albert B. Geilfuss in Milwaukee. And it seems to us that any person knowing him, and knowing the correct spelling of his name, and having reason to acquaint him with the contents of a notice of this character if supposed to be intended for him, would probably realize for whom such notice was intended, notwithstanding the name was spelled "Guilfuss." The general resemblance between the names is striking, however they are to be pronounced. And the designation "assignee" was an additional means of identification. That Geilfuss himself, upon receiving the notice, would be sufficiently warned that it affected his interest in the Minnesota lands under his judgments against McKinley, is free from doubt. He would, of course, observe the misnomer; but, having received the notice which it was the purpose of the law to convey to him, he could not safely ignore it on the ground of the mistake in the name, any more than, if personally served with summons within the state of Minnesota, he could have ignored it on account of a similar misnomer.

We conclude that there was due process of law in the partition suit, and that therefore the present judgment should be affirmed.

Judgments in Nos. 325 and 326 affirmed.

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[399] CHARLES W. DALE, Edward Rott, and Henry Ampt, Trustees in Bankruptcy of David Rohrer, Bankrupt, Appts.,

v.

EDWARD M. PATTISON.

(See S. C. Reporter's ed. 399-411.)

Pledge — change of possession — property incapable of physical delivery.

1. A transaction in the nature of a pledge

NOTE.—As to presumption of fraud arising out of retention of possession by vendor of chattel—see note to Wilson v. Walrath, 24 L.R.A.(N.S.) 1131.

As to whether mere inconvenience as to delivery is a satisfactory explanation of the

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of personal property so situated that it is not within the power of the owner to deliver it to the pledgee, the owner having no such visible possession and apparent ownership as would probably be relied upon by creditors, purchasers, and mortgagees, will not, in the absence of a controlling decision of the state courts, be regarded by the Federal courts as embraced by the provisions of Ohio Gen. Code, § 8560, that chattel mortgages, or conveyances intended to operate as such, if not accompanied by actual change of possession, shall be invalid as against certain designated third parties unless recorded.

[For other cases see Pledge, 13-21, in Digest Sup. Ct. 1908.]

Pledge — change of possession.

2. The existence in Ohio of a more stringent rule as to the delivery of possession necessary to validate a pledge as against the pledgeor's creditors, purchasers, and mortgagees than that which obtains in the case of sales cannot be deduced from the provisions of Gen. Code, § 8619, that, when goods and chattels remain for five years in the possession of a person, or those claiming under him, to whom a pretended loan thereof has been made, they shall be the property of such person, unless a reservation of a right to them is made to the lender in writing, and the instrument duly filed or recorded.

[For other cases see Pledge, 13-21, in Digest Sup. Ct. 1908.]

Pledge — of distillery warehouse receipts — change of possession.

3. A physical change of possession is not essential in Ohio to validate, as against the creditors of a distiller, represented by his trustees in bankruptcy, a transaction in the nature of a pledge of a specific number of barrels of whisky stored in his own bonded distillery warehouse, accompanied by the issuance and transfer, conformably to trade usage, of the distiller's warehouse receipts representing such whisky.

[For other cases see Pledge, 13-21, in Digest Sup. Ct. 1908.]

[No. 330.]

Argued April 23, 1914. Decided June 8, 1914.

APPEAL from the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which, on a second appeal, affirmed a decree of the District Court for the Southern District of Ohio, sustaining a pledge as against the trustees in bankruptcy of the pledgeor's estate. Affirmed.

See same case below, on first appeal, 115 C. C. A. 639, 196 Fed. 5; on second appeal, 117 C. C. A. 663, 199 Fed. 987.

Statement by Mr. Justice Pitney:

David Rohrer for many years prior to November 5, 1909, owned and operated a distillery in Montgomery county, Ohio. On that day he was adjudicated a bankrupt, [400] and the appellants were appointed his trustees. In the following month they filed an application in the bankruptcy proceedings, setting forth that in the distillery warehouses of the bankrupt there were stored about 9,800 barrels of Bourbon and rye whiskies, to which there were many conflicting claims; among the claimants being certain named persons to whom it was alleged the bankrupt had pledged or hypothecated certain barrels of the whiskies. One of the parties so named was the respondent, Edward M. Pattison. The application prayed that all of the claimants be notified of the proceedings, be made parties thereto, and be required to set up their respective claims. Pattison filed an answer and intervening petition, claiming that 210 barrels of whisky (specifying them by numbers) were a part of a lot of 800 barrels that had been pledged or hypothecated to him by Rohrer as security for certain loans; the remainder of the 800 barrels having been sold by Rohrer without the knowledge of Pattison. It was denied that the whiskies were or ever had been in Rohrer's possession, it being alleged that all of them, as soon as manufactured, were placed in the storage warehouse in the possession and control of the government of the United States, and that certain moneys were loaned by Pattison to Rohrer, to secure payment of which the latter assigned and transferred in writing to the former his entire interest in certain designated barrels of whisky then on storage in said warehouse, the agreement and transfer being evidenced by

retention of possession by the vendors—see note to W. P. Chamberlain Co. v. Tuttle, 25 L.R.A.(N.S.) 604.

On issuance and delivery by warehouseman of receipt for his own property as a constructive transfer of possession essential to a valid pledge—see notes to State use of Hart-Parr Co. v. Robb-Lawrence Co. 16 L.R.A.(N.S.) 227, and Fourth Street Nat. Bank v. Taylor, 30 L.R.A.(N.S.) 552.

Generally, as to delivery and possession of property pledged—see note to Yeatman v. New Orleans Sav. Inst. 24 L. ed. U. S. 589.

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documents in the form of warehouse receipts, of which the following is a sample:

No. 750.
Stored in Warehouse.
56 bbls. in No. 2.
94 bbls. in No. 1.
The David Rohrer Distillery, Montgomery County.
Fire Copper Bourbon and Pure Rye.
Brand and Distillery Established in 1847.

[401] Germantown, O., Feb. 23, 1906.

Received in my distillery, Bonded Warehouse No. 11, first district of Ohio, for account and subject to the order of E. M. Pattison, deliverable only on the return of this warehouse receipt and the written order of the holder thereof, and on payment of the United States government tax and all other taxes and storage at the rate of 5 cents per barrel per month from storage free,

One hundred and fifty barrels D. Rohrer pure Bourbon whisky, entered into bond as follows: 56 bbls. Rye; 94 bbls. Bourbon.

Special number.	Net wine gallons.	Proof.	Proof gallons.	When made.	Warehouse stamp.
107,853					
108,002	7,600.48	102	7,405.70	Feb. 10, 12, 13, 14, & 15/06	Y 44,953
					45,102

56 Rye.
94 Bourbon.
Gauged by F. P. Thompson, U. S. gauger.

Loss or damage by fire, the elements, riots, accidents, evaporation, and shrinkage at owner's risk. It is hereby guaranteed that the loss by natural evaporation and on account of defective cooperage on each and every barrel of this whisky shall not be more than 1 gallon in excess of the government allowance during the first seven years of the bonded period.

It is expressly provided that in the payment of excess under this guaranty the basis of settlement shall be the cost price of said whisky in bond at the date of tax, payment figured upon the original contract price therefor, and the carrying charges thereon at the rate of tax imposed by the internal law upon distilled spirits at the date of the withdrawal.

[402] The owner of the whisky under this receipt in accepting it agrees to furnish the money to pay all taxes when the same become due.

This warehouse receipt is given in conformity with the warehouse laws of the state of Ohio and the laws of the United States in force at this date.

David Rohrer, Proprietor.

By an amendment to his intervening petition, Pattison set forth:

"That for more than forty years last past, and ever since the enactment by the Congress of the United States of the laws relating to the storing by distillers of whisky in distillery bonded warehouses, it has been and still continues to be the usual and customary course of doing business by distillers of whisky to sell, pledge, and transfer whisky deposited by them in their distillery bonded warehouses by the making, issuing, and delivering by them of their warehouse receipts to the vendee or pledgee of the barrels of whisky sold or pledged (describing and identifying in said warehouse receipts the barrels of whisky sold or pledged, by their serial numbers, the date of their manufacture, the warehouse stamps thereon, and the number of the bonded warehouse in which situated), and agreeing in said warehouse receipts to hold said barrels of whisky sold or pledged for the account and subject to the order of the vendee or pledgee thereof, and in and by the sale and pledge as aforesaid of barrels of whisky in their distillery bonded warehouses to obtain money and advances of money to enable them to carry on business as distillers, and during all of said time it has been and continues to be among distillers and bankers, brokers, dealers in whisky, and all persons having transactions with distillers, an established custom and a commercial usage generally known and acted upon to regard and consider said warehouse receipts as giving constructive possession of the barrels of whisky men-

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tioned therein, and as conveying [403] either an absolute title or a special interest, according to the nature of the transaction, and as partaking in many respects of the character of commercial paper, transferable by indorsement, either absolutely or as collateral security, and as investing the holder of the warehouse receipts with the title, property in, or possession of the barrels of whisky mentioned in said warehouse receipts according to the rights of the original parties to the transaction, and as constituting the owner of the distillery bonded warehouse issuing and delivering such warehouse receipts, as the bailee for the vendee or pledgee of the barrels of whisky in said warehouse receipts mentioned; and this practice and method of doing business has obtained for more than forty years, and become an important part of the commercial system of the country, so that it is well understood and according to the usual course of business that the use and purpose of a warehouse receipt is to enable the owner of said distillery bonded warehouse to sell, pledge, and transfer the title or the possession of the barrels of whisky in his bonded warehouse for the purpose of raising money or securing advances thereon either by sale or pledge."

The trustees filed a general demurrer, which was sustained by the referee, and the order sustaining it was affirmed by the district court (186 Fed. 997). The circuit court of appeals reversed the district court, and remanded the case for further proceedings (115 C. C. A. 639, 196 Fed. 5). Thereupon the district court, in obedience to the mandate, overruled the demurrer and rendered final judgment in favor of Pattison, which was affirmed by the court of appeals; and an appeal to this court was then allowed.

Mr. Lee Warren James argued the cause and filed a brief for appellants:

In Ohio there is a settled legislative policy with reference to the change of possession necessary for the creation of liens on personal property, as distinguished from the statutory policy with reference to possession, as bearing upon questions of absolute ownership thereof.

Gibson v. Chillicothe Branch of State Bank, 11 Ohio St. 311; Thorne v. First Nat. Bank, 37 Ohio St. 254; Roland v. Gundy, 5 Ohio, 202; Sanders v. Keber, 28 Ohio St. 630; Hamet v. Letcher, 37 Ohio St. 356, 41 Am. Rep. 519.

By the words "unless accompanied by immediate delivery and followed by an actual and continued change of possession," the lawmaking authorities of the state of Ohio established clearly and unmistakably the doctrine that any transaction designed to give a security in personal property where not filed as a chattel mortgage must be accompanied by an actual change of possession. True, the language of the section is "a mortgage or conveyance intended to operate as a mortgage." The difference between a pledge and a mortgage is well settled in Ohio.

Brown v. Merchants' Nat. Bank, 41 Ohio St. 459; Jones, Pledges, § 7.

It may be expressed thus: A pledge is a transfer of possession that may ripen into a title by a sale had on default of the obligation; a mortgage is a transfer of title, subject to a defeasance condition. Neither can ripen into an absolute title without a sale and purchase. Obviously the language of the above statute is broad enough to cover those forms of giving security which require a change of possession to make them valid, and that language requires the change to be actual and continued.

We do not mean to say that there cannot be a symbolic delivery under the law of Ohio, such as will satisfy the requirement for change of possession in a pledge. That symbolic delivery, however, must be made in such way as to be complete; it must be the actual surrender of the muniment of title. The control of the owner must be devested.

Hunt v. Bode, 66 Ohio St. 255, 64 N. E. 126.

A custom or usage of the trade or business should not prevail against such clear and unequivocal rules of law. They are not rules emanating merely from the common law,—from decisions of courts,—but they are rules directly traceable to the statute itself. A custom cannot be urged in opposition to an established principle of law.

Columbus & H. Coal & I. Co. v. Tucker, 48 Ohio St. 60, 12 L.R.A. 577, 29 Am. St. Rep. 528, 26 N. E. 630; Niagara County Bank v. Baker, 15 Ohio St. 69.

Can the transaction be sustained on the theory that it creates an equitable lien good as against the bankrupt's trustees?

Fourth Street Nat. Bank v. Millbourne Mills Co. 30 L.R.A.(N.S.) 552, 96 C. C. A. 629, 172 Fed. 177.

Mr. W. H. Mackoy argued the cause, and with Messrs. John C. Healy, Howard Ferris, Malcolm McAvoy, and M. L. Buchwalter, filed a brief for appellee:

The law of Ohio recognizes the rule that actual physical delivery of pledged goods by the pledgeor to the pledgee is not essential to the validity of the pledge as against the creditors of the pledgeor when goods are

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so situated that actual physical delivery cannot be made, or where, by trade usage, actual physical delivery is excused.

Hunt v. Bode, 66 Ohio St. 255, 64 N. E. 126.

The rule laid down in Hunt v. Bode is the same as the Pennsylvania rule.

White v. Gunn, 205 Pa. 229, 54 Atl. 901.

The barrels of whisky shown to have been pledged in this case were identified by the warehouse receipts issued to the appellee in like manner as the warehouse receipts exhibited in Taney v. Penn Nat. Bank, 232 U. S. 174, ante, 558, 34 Sup. Ct. Rep. 288.

In Ohio, the Pennsylvania rule that "the retention of possession by the vendor of goods which he is capable of delivering to the vendee is fraud *per se*" never obtained.

Hombeck v. Vanmetre, 9 Ohio, 153; Wilson v. Leslie, 20 Ohio, 166.

The general rule in the United States is that attornment is not necessary to complete symbolical delivery.

Davis v. Russell, 52 Cal. 615, 28 Am. Rep. 647; Durr v. Hervey, 44 Ark. 306, 51 Am. Rep. 594.

The government, as to its custody of distilled spirits in distillery bonded warehouses, owes no duties to third persons, and will not undertake to perform any.

Taney v. Penn Nat. Bank, 109 C. C. A. 437, 187 Fed. 689.

Chattel mortgages and instruments to secure the return of goods loaned belong to a class of securities altogether different from pledges. The class cannot be enlarged by judicial construction so as to include other instruments not described, which have been held to be valid by the common law, and entitled to enforcement in accordance with their terms.

Parshall v. Eggert, 54 N. Y. 18.

[404] Mr. Justice Pitney, after making the foregoing statement, delivered the opinion of the court:

The transactions in question, as between Rohrer, the bankrupt, and Pattison, the appellee, are not distinguishable from those that were under consideration in Taney v. Penn Nat. Bank, 232 U. S. 174, ante, 558, 34 Sup. Ct. Rep. 288. In that case the distilling company deposited as security for the loan made by the bank certain gauger's certificates, in addition to warehouse receipts issued by itself. But the sole significance of the gauger's certificates was that they constituted evidence that the whiskies had been deposited in the storehouse in barrels marked and numbered as required by the act of Congress. Since it is admitted in the present case that the whiskies in question were in fact on storage, as mentioned in the warehouse receipts delivered by Rohrer to Pattison, and that the barrels were stamped, marked, and numbered as therein stated, the fact that no gauger's certificate was delivered to Pattison is of no present consequence.

The legal effect of such a transaction depends upon the local law. In Taney v. Penn Nat. Bank, upon finding that, by the law of Pennsylvania, the ordinary rule as to the effect of the retention of physical possession by the vendor of personal property, which he is capable of delivering to the vendee, is not applied by the courts of that state to cases where the inherent nature of the transaction and the attendant circumstances are such as to preclude the possibility of a delivery by the vendor that would be consistent with the avowed and fair purpose of the sale, or where the absence of a physical delivery is excused by the usages of the trade or business in which the sale is made, we held that, considering the situation of the property and the usages of the business, the transaction between the distiller and the bank was valid, and gave to the latter a lien upon the whisky superior to that of the trustee in bankruptcy.

The question here presented is whether the local law of [405] Ohio so far differs from that of Pennsylvania that a different result should be reached. In behalf of appellants it is insisted that there is in Ohio a settled legislative policy with reference to the change of possession necessary for the creation of liens on personal property. Section 8560 of the General Code is cited (formerly § 4150, Rev. Stat.). It reads as follows:

"Sec. 8560. A mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, subsequent purchasers, and mortgagees in good faith, unless the mortgage, or a true copy thereof, be forthwith deposited as directed in the next succeeding section."

It is insisted that this clearly and unmistakably establishes the doctrine that any transaction designed to give a security in personal property, if not accompanied by an actual change of possession, must be placed in the form of a chattel mortgage and filed for record, in order to be good as against creditors. It seems to us, however, that we should not fail to consider the well-recognized distinction between a chattel mortgage and a pledge. A mortgage of chattels imports a present conveyance of the legal title, subject to defeasance upon performance of an express condition subsequent, contained either in the same or in

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a separate instrument. It may or may not be accompanied by a delivery of possession. On the other hand, where title to the property is not presently transferred, but possession only is given, with power to sell upon default in the performance of a condition, the transaction is a pledge, and not a mortgage.

There is no question that in Ohio, as elsewhere, a chattel mortgage, as well as a pledge, is valid between the parties, although not recorded. And, without the statute, it would [406] be good as against creditors, purchasers, and mortgagees in good faith. The primary purpose of the act is to protect persons of these classes, who might otherwise sustain losses by relying upon the possession and apparent ownership of the chattels by the mortgagor. In the case of an ordinary pledge, there is no need of recording, since the pledgeor at once parts with possession.

But what shall be said when the transaction relates to personal property which is so situated that it is not within the power of the owner to deliver it to mortgagee or pledgee, and of which he has no such visible possession and apparent ownership as would probably be relied upon by creditors, purchasers, and mortgagees? Does § 8560, Gen. Code, which declares that mortgages in such case shall be invalid against the designated third parties unless recorded necessarily apply to transactions in the nature of a pledge, which are not mentioned in terms? The effect would be to greatly hamper, sometimes to prevent, transactions in the nature of a pledge, where only constructive possession of the property could be transferred. We cannot give to the section cited so extensive a meaning, in the absence of a decision by the state court adopting that construction. None such is referred to.

It is contended that a different rule exists in Ohio as to the delivery of possession in the case of pledges from that which obtains in the case of sales. Section 8619, Gen. Code (Rev. Stat. § 4197), is cited.

"Sec. 8619. When goods and chattels remain for five years in the possession of a person, or those claiming under him, to whom a pretended loan thereof has been made, they shall be the property of such person, unless a reservation of a right to them is made to the lender in writing, and the instrument recorded within six months after the loan is made, in the recorder's office of the county where one or both of the parties reside, or unless such instrument is filed as provided by law with respect to chattel mortgages. [407] But if a loan of goods and chattels is made to an art museum association within this state, such reservation of a right to them may be so made and recorded at any time within five years from the date of the loan."

But in the Code, this section is made a part of chapter 4, entitled "Statute of Frauds and Perjuries." It partakes also of the nature of a statute of limitations. We are unable to see anything in it to establish the asserted distinction between sales and pledges, and we are unable to find that any such force has been given to it by the courts of Ohio.

The cases to which particular reference is made are Gibson v. Chillicothe State Bank, 11 Ohio St. 311; Thorne v. First Nat. Bank, 37 Ohio St. 254, and Hunt v. Bode, 66 Ohio St. 255, 64 N. E. 126. All are decisions by the supreme court of the state. In the Gibson Case, in an action of trespass for levying upon and detaining certain property by virtue of an execution against their bailees, plaintiffs, in order to prove their property and right of possession, gave in evidence certain warehouse receipts, reading in substance as follows: "Received, Chillicothe, November 13, 1852, of Messrs. Gibson, Stockwell, & Company, and for their account, the following property, in good order, which we agree to hold irrevocably subject to their order, they having a lien thereon for the full cost of the same." It was held that the legal effect of such a receipt was to pass the general property and right of possession to the holder, and that this effect was not impaired by the recital that the holder had a lien upon the property. The court, in its opinion, recognized that receipts of this kind, from long and general use in commerce and trade, had come to have a well-understood import amoung business men, which (as the court said) ought not to be confounded or perhaps even qualified by a strict construction of the literal and grammatical meaning of the words employed. And the court proceeded to say: "The receipts in this case are in [408] some particulars variant from each other; and yet we have no doubt they would all be recognized by commercial men as of like import and equal validity as warehouse receipts. And if so, they as absolutely transfer the general property of the goods and chattels therein expressed as would a bill of sale. They are a kind of instrument extensively used by commercial men as the most convenient mode of transfer and constructive delivery of property, and facilitating the ready realization of the price of products by the producer remote from market. Public policy, as well as respect to good faith, requires that those, like other instruments of commerce, should be so regarded in courts as not to unjustly impair confidence in

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them elsewhere. And this view of the legal effect of such instruments, we think fully sustained by the authorities cited by counsel; and especially by the case of Gibson v. Stevens, 8 How. 384, 12 L. ed. 1123." It was therefore held that, in spite of the recital that Gibson, Stockwell, & Company had a "lien thereon for the full cost of the same," the warehouse receipts tended to prove that the plaintiffs had a general ownership in the property, and that the trial court erred in ruling otherwise. The citation of Gibson v. Stevens is significant, because in that case this court, in an opinion by Mr. Chief Justice Taney, recognized that where personal property is, from its character or situation, not capable of actual delivery, the delivery of a warehouse receipt or other evidence of title is sufficient to transfer the property and right of possession to another; and also because this decision was based in large part upon the usages of trade and commerce.

In Thorne v. First Nat. Bank, ubi supra, it was held that an instrument in the form of a warehouse receipt, executed by a debtor to his creditor, upon property owned by the debtor, who was not a warehouseman, and made for the sole purpose of securing the creditor, was void as against other creditors where the property remained in the possession of the debtor. The court cited and relied upon Rev. [409] Stat. § 4150, above quoted, and in effect held that the attempt by the warehouse receipts to establish a lien upon the personal property was in conflict with the policy of that section, and therefore invalid as to a creditor. Gibson v. Chillicothe State Bank was distinguished upon the ground that in that case the warehouse receipts were offered to show ownership, and not a mere agreement for securing an indebtedness. It will, however, be observed that in the Thorne Case the property in question was in the possession of the borrowers, and there was nothing in its character or situation to prevent an actual delivery of it to the lender.

In Hunt v. Bode, ubi supra, which is the most recent case upon the subject to which our attention has been called, one Stothfang had delivered to a bank certain warehouse receipts for whisky as collateral for a loan of money made to him by the bank, and thereafter undertook to make a second transfer or pledge to another party, subject to the claim of the bank. A copy of this instrument was served upon the bank, and it was notified to retain possession of the warehouse receipts pledged with it as collateral security for its claim against the pledgeor, and after it was duly paid, the balance of the receipts were to be turned over to the second pledgee. The transaction was sustained, the court remarking: "Delivery of the property pledged is generally essential to a valid pledge, and it is equally true that to make a valid sale or transfer of any species or article of personal property, a delivery of the property sold or transferred is necessary. . . . But it does not follow that actual or physical delivery should always accompany the sale or transfer, and this is also true as to the pledging of choses in action or other kinds of personal property. The delivery in some cases may be symbolical, such as the handing over the writing which constitutes the title to the property, just as was done in this case, to secure the Atlas National Bank [410] for the money it had loaned to Stothfang. He delivered to the bank, not the 165 barrels of whisky, but the warehouse receipts for the same, which were its muniment of title and control of the property they represented. And when the pledgeor desired to secure the payment of the note held against him by Dieckmann, he executed and delivered to him the transfer of all interest in the receipts which would remain after the bank's claim should be satisfied. This transfer was not strictly a pledge, but an assignment and transfer of the stated interest in the warehouse receipts; but if it is desired that we call it a pledge, as has been done by counsel, we still observe that constructive possession in the second pledgee would be sufficient, if the intent to deliver such possession is clearly apparent. It is the application of the familiar rule that the transfer is complete and delivery made when the owner has done all that he can do in the premises, and has given such possession to the pledgee or transferee as the nature of the property and its situation will permit. In this case Stothfang owned a valuable equity in the warehouse receipts held by the bank, as their sale afterwards made manifest, and it was such interest in them that could be made the subject of sale and transfer, and even pledge; and certainly Stothfang gave to Dieckmann possession of all interest in and title to the receipts which would remain after the debt due the bank was satisfied. This was all the delivery that could then be made, and it was at least a constructive delivery, and this, we think, meets the demands of the law."

We are unable to find in these decisions a recognition of the distinctions insisted upon by counsel for appellants. On the contrary, the supreme court of Ohio clearly recognizes the effectiveness of a symbolical delivery.

It is evident, also, that that court recognizes the force of a long-continued commercial usage. And this lends peculiar significance to the conceded existence for

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more [411] than forty years of the custom and commercial usage set up by appellee in the amendment to his intervening petition, quoted in the prefatory statement. It is no answer to say that a trade custom or usage should not prevail against clear and unequivocal rules of law. This is a *petitio principii*. The question under consideration is whether certain portions of the written law are to be given by construction an effect different from that expressed in their language, on the ground that, by authoritative decisions of the supreme court of the state, the asserted policy has been found to be implied in them. Since it seems to us that neither the statutes nor the decisions go to the extent that is claimed for them by appellants, we may refer to the established custom as evidence of what has long been understood as the law; for, as this court held in Gibson v. Stevens, and as the supreme court of Ohio held in Gibson v. Chillicothe State Bank, such usages are to be judicially recognized as a part of the law.

It results that by the local law the transactions in question as between Rohrer and Pattison, had the effect of transferring to the latter the legal title and right to possession for the purposes of the agreement between them; and we think it is a matter of indifference whether the transaction be called a pledge, or an equitable pledge, or an equitable lien. The substance of the matter is, for present purposes, the same.

This being so, the superiority of Pattison's right over that of the trustees in bankruptcy is established by the decision of this court in Taney v. Penn Nat. Bank, 232 U. S. 174, ante, 558, 34 Sup. Ct. Rep. 288.

Decree affirmed.

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[412] MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY OF TEXAS, Plff. in Err.,

v.

S. O. HARRIS.

(See S. C. Reporter's ed. 412–422.)

Constitutional law — due process of law — allowing attorney's fee to successful plaintiff.

1. Due process of law is not denied, contrary to U. S. Const., 14th Amend., by the provisions of Texas Laws 1909, p. 93, for the allowance of a reasonable attorney's fee of not over $20 to the successful plaintiff in a suit in which an attorney is actually employed upon a claim not exceeding $200, against "any person or corporation doing business in this state, for personal services rendered, or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees," where such claim is not paid within thirty days after demand, and the recovery is for the full amount claimed.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — allowing attorney's fee to successful plaintiff.

2. There is no denial of the equal protection of the laws, contrary to U. S. Const., 14th Amend., in the provisions of Texas Laws 1909, p. 93, for the allowance of a reasonable attorney's fee of not over $20 to the successful plaintiff in a suit in which an attorney is actually employed upon a claim not exceeding $200, against "any person or corporation doing business in this state, for personal services rendered, or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees," where such claim is not paid within thirty days after demand, and the recovery is for the full amount claimed, since this statute makes no classification of debtors, and the kinds of claims included cover a wide range, and do not appear to have been grouped for the purpose of bearing against any class or classes of citizens or corporations.

[For other cases, see Constitutional Law, IV. a, 6, in Digest Sup. Ct. 1908.]

Commerce — state regulation — carrier's liability — allowing attorney's fee to successful plaintiff — congressional inaction.

3. The application to a claim against a carrier, based upon a loss of freight shipped in interstate commerce, of the provisions of Texas Laws 1909, p. 93, for the allowance of a reasonable attorney's fee of not over $20 to the successful plaintiff in a suit in which an attorney is actually employed upon a claim not exceeding $200, against "any person or corporation doing business in this state, for personal services rendered, or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such per-

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NOTE.—On validity of statutory provision for attorneys' fees—see note to Builders' Supply Depot v. O'Connor, 17 L.R.A.(N.S.) 910.

On constitutional inequality or discrimination in statutes allowing attorneys' fees—see notes to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 586, and Farmers' & M. Ins. Co. v. Dobney, 47 L. ed. U. S. 821.

On constitutionality of statute imposing penalty or added liability for failure of carrier to pay claim—see note to Mobile & O. R. Co. v. Brandon, 42 L.R.A.(N.S.) 106.

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son or corporation, its agents or employees," where such claim is not paid within thirty days after demand, and the recovery is for the full amount claimed, does not amount to a direct burden upon interstate commerce, and is therefore not repugnant to the commerce clause of the Federal Constitution, or otherwise in conflict with Federal authority, in the absence of any Congressional legislation covering the subject.

[For other cases, see Commerce, I. c; III. h, in Digest Sup. Ct. 1908.]

Commerce — conflicting state and Federal regulations.

4. A state law enacted under any of the reserved powers—especially if under the police power—is not to be set aside as inconsistent with an act of Congress regulating commerce, unless there is actual repugnancy, or unless Congress has at least manifested a purpose to exercise its paramount authority over the subject.

[For other cases, see Commerce, I. c, in Digest Sup. Ct. 1908.]

Commerce — conflicting state and Federal regulations — carrier's liability — allowing attorney's fee to successful plaintiff.

5. Congress has not so far exercised its paramount authority by enacting the Carmack amendment of June 29, 1906 (34 Stat. at L. 584, 595, chap. 3591, U. S. Comp. Stat. Supp. 1911, pp. 1288, 1307), to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), § 20, regulating the liability of a carrier for the loss or damage to an interstate shipment, as to prevent the application to a claim against a carrier, based upon a loss of an interstate shipment, of the provisions of Texas Laws 1909, p. 93, for the allowance of a reasonable attorney's fee of not over $20 to the successful plaintiff in a suit in which an attorney is actually employed upon a claim not exceeding $200, against "any person or corporation doing business in this state, for personal services rendered, or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees," where such claim is not paid within thirty days after demand, and the recovery is for the full amount claimed.

[For other cases, see Commerce, I. c; III. h, in Digest Sup. Ct. 1908.]

[No. 604.]

Submitted February 24, 1914. Decided June 8, 1914.

IN ERROR to the Justice Court, Precinct No. 6, of Hopkins County, in the State of Texas, to review a judgment allowing an attorney's fee to the successful plaintiff in a suit against a carrier upon a claim for the loss of an interstate shipment, not paid after demand. Affirmed.

The facts are stated in the opinion.

Messrs. Joseph M. Bryson and Aldis B. Browne submitted the cause for plaintiff in error. Messrs. Alexander S. Coke and A. H. McKnight were on the brief:

Corporations are persons within the provisions of the 14th Amendment.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; Smyth v. Ames, 169 U. S. 522, 42 L. ed. 840, 18 Sup. Ct. Rep. 418; Blake v. McClung, 172 U. S. 259, 43 L. ed. 439, 19 Sup. Ct. Rep. 165; Hale v. Henkel, 201 U. S. 76, 50 L. ed. 666, 26 Sup. Ct. Rep. 370.

While state legislatures, in passing laws, may classify, purely arbitrary action cannot be sustained by calling it classification; there must be a reasonable basis for the classification, which means that the discrimination must be based upon matters which have some relation to the object sought to be accomplished.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep 287, 17 Ann. Cas. 1247.

There is no reasonable ground for the discrimination made by the statute in question.

Cotting v. Kansas City Stock Yards Co.; Connolly v. Union Sewer Pipe Co.; and Southern R. Co. v. Greene,—supra.

Its object being to compel the prompt payment of debts, to be valid, it should apply to all debtors. Such statutes do not come within the scope of police regulations.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

But if it were otherwise, the police power must be exercised with respect to the right of equal protection guaranteed by the Federal Constitution.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Central of Georgia R. Co. v. Murphey, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 Ann. Cas. 514.

Nor can the act be sustained because of a special duty imposed, as was the case in Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110, and St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243. It applies alike to persons upon whom

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special duties have been imposed and to others not similarly situated.

The classification is not based upon the nature of the business transacted. A number of the claims, it is true, could arise only in connection with the business of common carriers, but others have no connection whatever with that business or with any other special business. The statute, therefore, is clearly different from those sustained in Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40.

Finally, the act cannot be sustained as imposing a burden in connection with special privileges conferred, upon the principle announced in Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662, and other cases of that class, for it applies to natural persons as well as to corporations; to persons who have received no special privileges, as well as to persons who are privileged.

The court in fact will look beyond the mere letter of a law to the conditions actually existing as affecting its application, for the purpose of prohibiting arbitrary action under the guise of regulation or classification.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

Every person, under our constitutional guaranties, has the right to be governed by general rules, and when particular individuals or classes of individuals are singled out and are subjected to one set of rules when other persons or classes of persons under similar circumstances are not, or when any class of persons is subjected to arbitrary action, those so burdened are deprived of their liberty and property without due process of law.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Yick Wo v. Hopkins, supra; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 109, 46 L. ed. 108, 22 Sup. Ct. Rep. 30; St. Louis, I. M. & S. R. Co. v. Wynne, 224 U. S. 354, 56 L. ed. 799, 42 L.R.A.(N.S.) 102, 32 Sup. Ct. Rep. 493; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; Bradley v. Richmond, 227 U. S. 481, 57 L. ed. 605, 33 Sup. Ct. Rep. 318; Chicago, M. & St. P. R. Co. v. Polt, 232 U. S. 165, ante, 554, 34 Sup. Ct. Rep. 301.

Congress has taken full control of rate making and charging.

Southern R. Co. v. Reid, 222 U. S. 438, 56 L. ed. 260, 32 Sup. Ct. Rep. 140.

The Federal law, within certain limits, gives the shipper whose freight or express is lost or damaged in transit a cause of action, but this does not include the right to recover an attorney's fee.

Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164.

One of the acts—the two being in conflict—must yield. It is not now an open question that the Federal law supersedes or prevails over state enactments. This question has been before the court so often and so recently as to make it unnecessary to do more than cite the cases.

Sinnot v. Davenport, 22 How. 242, 16 L. ed. 247; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; Southern R. Co. v. Reid, 222 U. S. 438, 56 L. ed. 260, 32 Sup. Ct. Rep. 140; Southern R. Co. v. Reid, 222 U. S. 444, 56 L. ed. 263, 32 Sup. Ct. Rep. 145; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; Barrett v. New York, 232 U. S. 14, ante, 483, 34 Sup. Ct. Rep. 203.

The act being void in part, the question remains, Can any portion of it stand? Is that which is valid, if any, separable from that which is invalid? This question should be answered in the negative.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 501, 52 L. ed. 310, 28 Sup. Ct. Rep. 141; Illinois C. R. Co. v. McKendree, 203 U. S. 529, 51 L. ed. 304, 27 Sup. Ct. Rep. 153; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 97, 54 L. ed. 111, 30 Sup. Ct. Rep. 21; United States v. Reese, 92 U. S. 221, 23 L. ed. 565.

The supremacy of Congress in the field of interstate commerce is well settled. Where its jurisdiction is exclusive, as is the case in matters that regulate, burden, or interfere with such commerce, the states cannot legislate at all. Their enactments are void, whether Congress acts or not.

Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; Central of Georgia R. Co. v. Murphey,

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196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 Ann. Cas. 514; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Yazoo & M. Valley R. Co. v. Greenwood Grocery Co. 227 U. S. 1, 57 L. ed. 389, 33 Sup. Ct. Rep. 213.

Where the jurisdiction of the two powers is concurrent, state enactments, although passed in the exercise of undoubted powers, must yield when Congress enters the field. The only question in such cases is whether Congress has occupied the ground. If it has not, the states may pass such regulations as aid interstate commerce, but, although incidentally affecting it, do not regulate, burden, or interfere with it. For regulations of this class, see Missouri P. R. Co. v. Larabee Flower Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214, involving what the court termed a common-law duty to afford equal switching service to shippers, notwithstanding the cars were eventually to be engaged in interstate commerce; Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378, involving a statute of South Carolina requiring carriers to settle within a specified time claims for loss of or damage to freight; and Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A. (N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815, involving the violation of a duty to transmit or deliver telegrams imposed by state statute. But when Congress enters, the power of the states is at an end.

Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 435, 57 L. ed. 287, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397.

It is too plain for argument that an intentional overcharge on an interstate shipment is a violation of the act to regulate commerce. Congress, therefore, has not only legislated with respect to this particular subject-matter, but the supreme court of Texas has held that the state courts are without jurisdiction to entertain claims covering such violations.

Gulf, C. & S. F. R. Co. v. Moore, 98 Tex. 302, 83 S. W. 362, 4 Ann. Cas. 770.

If the overcharge be unintentional, or otherwise made in such manner as not to constitute a violation of the law, still the act to regulate commerce controls, for, as was said in Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140, the provisions of the act are directed at the abuses most to be feared, including unreasonableness in rates and discriminations, and it is evident that Congress has taken full control of the subject of interstate rate making and charging.

The completeness with which Congress has taken possession of this field was observed by this court in the very recent case of Barrett v. New York, 232 U. S. 14, ante, 483, 34 Sup. Ct. Rep. 203, which involved the validity of an ordinance of the city of New York requiring expressmen, among others, to secure a license and give bond, as applied to interstate commerce.

No appearance for defendant in error.

[415] Mr. Justice Pitney delivered the opinion of the court:

In this case the plaintiff below (now defendant in error) recovered a judgment for $3.50 damages for loss of certain freight that was shipped from St. Louis, Missouri, consigned to plaintiff at Como, Texas, and delivered by the initial carrier to defendant for transportation to destination; the loss having occurred on defendant's line in Texas. The judgment includes an attorney's fee of $10, allowed by virtue of the local statute approved March 19, 1909, Laws, p. 93, Tex. Rev. Civ. Stat. 1911, arts. 2178 and 2179, which was under consideration in Missouri, K. & T. R. Co. v. Cade, decided May 11, 1914, 233 U. S. 642, ante, 1135, 34 Sup. Ct. Rep. 678, and is set forth *verbatim* in a marginal note to the opinion in that case. The controversy turns upon the allowance of the attorney's fee, the same Federal questions having been raised in the state court and in this court that were raised in the Cade Case. So far as the 14th Amendment is concerned, our opinion in that case renders further discussion unnecessary. But since the claim of the present plaintiff was based upon freight lost in interstate commerce, we must now pass upon the question whether the allowance of an attorney's fee in such a case, pursuant to the Texas statute, is repugnant to the commerce clause of the Federal Constitution, or the act to regulate commerce and amendments thereof.

By way of preface, we should repeat that the state court of last resort has construed the act as relating only to the collection of claims not exceeding $200 in amount; that by its terms it applies to claims "against any person or corporation doing

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business in this state, for personal services rendered or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees" [art. 2178]; and [416] that, in the Cade Case, we have held it to be a police regulation designed to promote the prompt payment of small but well-founded claims, and to discourage unnecessary litigation in respect to them; and have held it, in its general application, to be not repugnant to either the "equal protection" or the "due process" clauses of the 14th Amendment.

Such being the character of the statute, and it having a broad sweep which only incidentally includes claims arising out of interstate commerce, it follows that it cannot be held to constitute a direct burden upon such commerce, and hence repugnant to the commerce clause of the Contitution, or otherwise in conflict with the Federal authority, in the absence of legislation by Congress covering the subject. To this extent, the case is controlled by the decision in Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378, where it was held that a South Carolina statute which required common carriers doing business in the state to settle claims for loss or damage to property while in the possession of the carrier within forty days, in case of shipments wholly within the state, and within ninety days, in case of shipments from without the state, and that failure to adjust and pay a claim within the prescribed period should subject the carrier to a penalty of $50 in case the full amount claimed was recovered, as the statute was applied to a claim for loss or damage to interstate freight while in the possession of the carrier within the state, was not an unwarrantable interference with interstate commerce, in the absence of legislation by Congress, but was rather a regulation in aid of the performance by the carrier of its legal duty. The decision was rested upon the authority and reasoning of Sherlock v. Alling, 93 U. S. 99, 104, 23 L. ed. 819, 820; Smith v. Alabama, 124 U. S. 465, 476, 31 L. ed. 508, 511, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Western U. Teleg. Co. v. James, 162 U. S. 650, 660, 40 L. ed. 1105, 1108, 16 Sup. Ct. Rep. 934; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 137, 42 L. ed. 688, 692, 18 Sup. Ct. Rep. 289; Pennsylvania [417] R. Co. v. Hughes, 191 U. S. 477, 491, 48 L. ed. 268, 273, 24 Sup. Ct. Rep. 132; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 623, 53 L. ed. 352, 361, 29 Sup. Ct. Rep. 214. And see Western U. Teleg. Co. v. Commercial Mill Co. 218 U. S. 406, 416, 54 L. ed. 1088, 1091, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815; Western U. Teleg. Co. v. Crovo, 220 U. S. 364, 55 L. ed. 498, 31 Sup. Ct. Rep. 399; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 402, 408, 410, 57 L. ed. 1511, 1542, 1545, 1546, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

But the "act to regulate commerce" (act of February 4, 1887, 24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154) is now invoked, together with its amendments, and especially that part of the Hepburn act of June 29, 1906, known as the Carmack amendment (34 Stat. at L. 584, 595, chap. 3591, U. S. Comp. Stat. Supp. 1911, pp. 1288, 1307); and it remains to be considered whether the Texas statute, as applied to claims for loss or damage to interstate freight while in the possession of the carrier in the state of Texas, is repugnant to this Federal legislation. It is, of course, settled that when Congress has exerted its paramount legislative authority over a particular subject of interstate commerce, state laws upon the same subject are superseded. Northern P. R. Co. v. Washington, 222 U. S. 370, 378, 56 L. ed. 237, 239, 32 Sup. Ct. Rep. 160; Erie R. Co. v. New York, decided May 25, 1914, 233 U. S. 671, ante, 1149, 34 Sup. Ct. Rep. 756. But it is equally well settled that the mere creation of the Interstate Commerce Commission, and the grant to it of a measure of control over interstate commerce, does not of itself, and in the absence of specific action by the Commission or by Congress itself, interfere with the authority of the states to establish regulations conducive to the welfare and convenience of their citizens, even though interstate commerce be thereby incidentally affected, so long as it be not directly burdened or interfered with. Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 623, 53 L. ed. 352, 361, 29 Sup. Ct. Rep. 214; Southern R. Co. v. Reid, 222 U. S. 424, 437, 56 L. ed. 257, 260, 32 Sup. Ct. Rep. 140.

In the Larabee Mills Case it was held that the railroad company, by engaging in the business of a common carrier, had become subject to certain duties imposed upon it by general law, including the obligation to treat all shippers alike; that the enforcement of this duty and the regulation of matters pertaining to it were within the authority [418] of the state, although interstate commerce was thereby indirectly affected; and that until specific action by Congress or the Commission, the control of the state

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over such incidental matters remained undisturbed. Hence, a decision by the supreme court of Kansas, awarding a mandamus to require the company to restore the service of transferring cars between the lines of another railroad and the Larabee mills and elevator, in aid of interstate and intrastate shipments alike, was affirmed. This case arose after the enactment of the Hepburn act.

On the other hand, it was held in the Reid Case that since Congress had taken control of the subject of the making of rates and charges, and by § 2 of the Hepburn act had forbidden the carrier to engage or participate in transportation unless the rates, fares, and charges had been filed and published in accordance with the provisions of the act, a state law requiring railroad companies to receive freight for transportation whenever tendered at a regular station, and to forward the same over the route selected by the person offering the shipment, under a penalty of $50 a day, besides all damages incurred, was in necessary conflict, since it required the carrier to do the very things forbidden by the Federal law.

So, in Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co. 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174, it was held that since, by the Hepburn act, Congress had legislated concerning deliveries of cars in interstate commerce by carriers subject to the act, specifically requiring the carrier to provide and furnish "transportation" (cars being embraced within the definition of the term) upon reasonable request, the authority of the state of Minnesota to legislate upon the subject of the delivery of cars when called for to be used in interstate traffic was superseded. And see Yazoo & M. Valley R. Co. v. Greenwood Grocery Co. 227 U. S. 1, 57 L. ed. 389, 33 Sup. Ct. Rep. 213.

These cases recognize the established rule that a state law enacted under any of the reserved powers—especially [419] if under the police power—is not to be set aside as inconsistent with an act of Congress, unless there is actual repugnancy, or unless Congress has, at least, manifested a purpose to exercise its paramount authority over the subject. The rule rests upon fundamental grounds that should not be disregarded. In Reid v. Colorado, 187 U. S. 137, 148, 47 L. ed. 108, 114, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506, the court, speaking by Mr. Justice Harlan, said: "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' Sinnot v. Davenport, 22 How. 227, 243, 16 L. ed. 243, 247." In Savage v. Jones, 225 U. S. 501, 533, 56 L. ed. 1182, 1194, 32 Sup. Ct. Rep. 715, the court said: "When the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished,—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect, —the state law must yield to the regulation of Congress within the sphere of its delegated power [citing cases]. But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state." [Citing many cases.]

With respect to the specific effect of the Carmack [420] amendment (set forth in the margin†), it has been held, in a series of re-

†That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

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cent cases (Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Chicago, St. P. M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Chicago, R. I. & P. R. Co. v. Cramer, 232 U. S. 490, ante, 697, 34 Sup. Ct. Rep. 383; Great Northern R. Co. v. O'Connor, 232 U. S. 508, ante, 703, 34 Sup. Ct. Rep. 380; Boston & M. R. Co. v. Hooker, 233 U. S. 97, ante, 868, 34 Sup. Ct. Rep. 526), that the special regulations and policies of particular states upon the subject of the carrier's liability for loss or damage to interstate shipments, and the contracts of carriers with respect thereto, have been superseded.

But the Texas statute now under consideration does not in anywise either enlarge or limit the responsibility of the carrier for the loss of property intrusted to it in transportation, and only incidentally affects the remedy for enforcing that responsibility. As pointed out in the Cade [421] Case, 233 U. S. 642, ante, 1135, 34 Sup. Ct. Rep. 678, it imposes not a penalty, but a compensatory allowance for the expense of employing an attorney, applicable in cases where the carrier unreasonably delays payment of a just demand and thereby renders a suit necessary. In fact and effect, it merely authorizes a moderate increment of the recoverable costs of suit in the large class of cases that are within its sweep, among which are incidentally included claims for freight lost or damaged in interstate commerce.

It is true that in Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 208, 55 L. ed. 167, 183, 31 L.R.A. (N.S.) 7, 31 Sup. Ct. Rep. 164 (a case arising since the Hepburn act), it was held that § 8 of the act of February 4, 1887, does not authorize the allowance of a counsel or attorney's fee in an action for loss of property intrusted to the carrier for purposes of transportation. But that is far from holding that it is not permissible for a state, as a part of its local procedure, to permit the allowance of a reasonable attorney's fee, under proper restrictions. In claims of this character, based upon the ordinary liability of the common carrier, although regulated by the commerce act, the state courts have full jurisdiction, and some differences respecting the allowance of costs and the amount of the costs are inevitable, as being peculiar to the *forum*. And we think that where a state, as in this instance, for reasons of internal policy, in order to offer a reasonable incentive to the prompt settlement of small but well-founded claims, and as a deterrent of groundless defenses, establishes by a general statute otherwise unexceptionable the policy of allowing recovery of a moderate attorney's fee as a part of the costs, in cases where, after specific claim made and a reasonable time given for investigation of it, payment is refused, and the claimant succeeds in establishing by suit his right to the full amount demanded, the application of such statute to actions for goods lost in interstate commerce is not inconsistent with the provisions of the commerce act and its amendments. The local [422] statute, as already pointed out, does not at all affect the ground of recovery, or the measure of recovery; it deals only with a question of costs, respecting which Congress has not spoken. Until Congress does speak, the state may enforce it in such a case as the present.

Judgment affirmed.

W. E. JOHNSON, T. E. Brents, and H. F. Coggeshall, Appts.,
v.
EDWIN GEARLDS, L. J. Krammer, Fred E. Brinkman, et al.

(See S. C. Reporter's ed. 422-448.)

Appeal — from district court — Federal question.

1. A decree of a Federal district court enjoining Federal officers from closing saloons in certain territory ceded to the United States by Indian tribes, on the ground that the treaty of cession containing a stipulation against the manufacture or sale of intoxicating liquors within the ceded territory was necessarily repealed by the admission of the state on an equal footing with the original states, is reviewable in the Federal Supreme Court by direct appeal, even if this ground does not involve the construction or application of the Federal Constitution, where the complainants' entire case rests at bottom upon grounds that involve the construction of this and certain other Indian treaties with the United States.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

On Federal control of Indians—see note to Worcester v. Georgia, 8 L. ed. U. S. 484.

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Indians — Federal regulation — intoxicating liquors.

2. The entire ceded territory, including those portions lying within the exterior boundaries of the cession which were set apart as reservations, was subjected to the Federal laws prohibiting the introduction, manufacture, use of, or traffic in, intoxicating liquors in the Indian country by the Chippewa treaty of February 22, 1855 (10 Stat. at L. 1169), art. 7, which, after providing that the laws which have been or may be enacted by Congress regulating trade and intercourse with the Indian tribes shall continue and be in force within and upon the several reservations therein provided for, declares that those portions of such laws which prohibit the introduction, manufacture, use of, and traffic in, ardent spirits, wines, or other liquors in the Indian country, shall continue and be in force within the entire boundaries of the country therein ceded to the United States until otherwise provided by Congress.

[For other cases, see Indians, II., in Digest Sup. Ct. 1908.]

Indians — Federal regulation — intoxicating liquors — implied repeal — admission of state.

3. The equal footing clauses of the Minnesota enabling and admitting acts (act of February 26, 1857 [11 Stat. at L. 166, chap. 60]; act of May 11, 1858 [11 Stat. at L. 285, chap. 31]) do not operate as an implied repeal of the prohibition of the Chippewa treaty of February 22, 1855, art. 7, against the introduction, manufacture, and sale of intoxicating liquors within the ceded territory.

[For other cases, see Indians, II.; States, XI.; Statutes, III. b, in Digest Sup. Ct. 1908.]

Indians — Federal control — intoxicating liquors — implied repeal.

4. The recession to the United States by the Chippewa treaties of May 7, 1864 (13 Stat. at L. 693), and March 19, 1867 (16 Stat. at L. 719), of portions of the original cession set apart as reservations by the treaty of February 22, 1855, did not operate to remove from the territory thus receded the prohibition of article 7 of the earliest treaty against the introduction, manufacture, or sale of intoxicating liquors within the ceded territory until otherwise provided for by Congress.

[For other cases, see Indians, II.; Statutes, III. b, in Digest Sup. Ct. 1908.]

Courts — legislative or judicial question — obsolescence of treaty — changed conditions.

5. Whether or not the prohibition in the Chippewa treaty of February 22, 1855, art. 7, against the introduction, manufacture, and sale of intoxicating liquors within the territory therein ceded to the United States until otherwise provided for by Congress shall now be enforced in view of the small number of Indians entitled to protection, as compared with the large population of whites who now form the great majority of the inhabitants, and in view of the high state of civilization and development of the territory in question, is a legislative rather than a judicial question.

[For other cases, see Courts, I. e, 3, in Digest Sup. Ct. 1908.]

[No. 802.]

Argued May 1, 1914. Decided June 8, 1914.

APPEAL from the District Court of the United States for the District of Minnesota to review a decree enjoining Federal officers from closing the saloons in certain territory ceded to the United States by Indian tribes. Reversed and remanded, with direction to dismiss the bill.[1]

See same case below on demurrer, 183 Fed. 611.

Statement by Mr. Justice Pitney:

This is a direct appeal from a final decree of the district court, rendered April 20, 1912, granting to appellees (who were complainants below, and will be so designated), a permanent injunction against appellants (defendants below), in accordance with the prayer of the amended bill of complaint. It appears that complainants are severally residents and citizens of the city of Bemidji, Beltrami county, Minnesota, and at the time of the filing of the [424] bill were, and for a considerable time had been, engaged in business there as saloon keepers, selling at retail spirituous, vinous, and malt liquors at their respective places of business in that city, each of them having paid to the Federal and state governments, respectively, the necessary tax and license fees, and having a receipt from the Federal Government and a liquor license issued under the authority of the state of Minnesota by the municipal council and officials of the city. The bill alleged that each of the complainants had refrained from selling or disposing of any liquor to Indians, or individuals of Indian blood, and had complied with the Federal and state laws in this and in other respects; that each of them had built up and established a profitable and lucrative trade; and that the jurisdictional amount was involved. It averred that defendants, being citizens of other states, and acting in conjunction as special officers under the Interior Department of the United States government, were threatening to enforce within the city of Bemidji the provisions of §§ 2139 and 2140 of the Revised Statutes of the United States and amendments thereto, and on December 9, 1910, had ordered complainants and other licensed saloon keepers in Bemidji to close

[1] Leave granted on June 22, 1914, to present petition for rehearing within sixty days.

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their saloons and cease sales of liquor, and ship away their stock, threatening that otherwise they would destroy the stocks of liquor in the possession of complainants, on the ground that under article 7 of a treaty made on the 22d day of February, 1855, between the United States and certain bands of Chippewa Indians [10 Stat. at L. 1169], certain territory mentioned in the treaty, including what is now the city of Bemidji, was subject to the laws of the United States respecting the sale of liquors in the Indian country.

To the bill as originally filed defendants interposed a demurrer, which was overruled, and a temporary injunction was granted. 183 Fed. 611. Thereafter, the cause was brought to final hearing upon an amended bill [425] and a reamended answer, and the court, adhering to its former conclusion, rendered a final decree, as already mentioned.

The pertinent historical facts, as deduced from the averments of the amended pleadings, are as follows: On and prior to February 22, 1855, certain bands of the Chippewa Tribe of Indians, known as the Mississippi bands and the Pillager and Lake Winnibigoshish bands, were in possession of the greater portion of the lands north of parallel 46, within the boundaries of the then territory of Minnesota. Their country constituted a wilderness, almost wholly uninhabited by civilized people. On the date mentioned, these bands entered into a treaty with the United States, which was approved by the Senate and proclaimed by the President shortly thereafter (10 Stat. at L. 1165). By its first article the Indians ceded and conveyed to the United States "all their right, title, and interest in and to the lands now owned and claimed by them, in the territory of Minnesota, and included within the following boundaries." [Here follows a particular description, by natural boundaries, of a tract of country said to contain about 21,000 square miles.] By the same article the Indians further relinquished and conveyed to the United States any and all right, title, and interest, of whatsoever nature, that they then had in and to any other lands in the territory of Minnesota or elsewhere. This article mentions no exception or reservation from the lands ceded or granted. By article II. there was "reserved and set apart a sufficient quantity of land for the permanent homes of the said Indians; the lands so reserved and set apart to be in separate tracts, as follows." The separate tracts were then briefly described or indicated. For the Mississippi bands six reservations were set apart, which came to be known as the Mille Lac, Rabbit Lake, Gull Lake, Pokagomon Lake, Sandy Lake, and Rice Lake Reservations; and besides these, a section of land was [426] reserved for one of the Indian chiefs. For the Pillager and Lake Winnibigoshish bands, three reservations were set apart, known from their respective locations as the Leech Lake, Lake Winnibigoshish, and Cass Lake Reservations.

The seventh article of the treaty is as follows:

"Article 7. The laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes, to continue and be in force within and upon the several reservations provided for herein; and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in, ardent spirits, wines, or other liquors, in the Indian country, shall continue and be in force, within the entire boundaries of the country herein ceded to the United States, until otherwise provided by Congress."

By act of February 26, 1857 (11 Stat. at L. 166, chap. 60), the inhabitants of a portion of the territory, including the lands ceded by the Chippewas as above, were authorized to form a state government and come into the Union on an equal footing with the original states. The act contained no condition with reference to the treaty of 1855 or the rights of the Indians to any lands within the boundaries of the state. A state Constitution was formed, by which Indians were given the right to vote under certain circumstances, and persons residing on Indian lands were declared entitled to enjoy the rights and privileges of citizens as though they lived in any other portion of the state, and to be subject to taxation. This Constitution having been ratified and adopted by the people, Congress, by act of May 11, 1858 (11 Stat. at L. 285, chap. 31), admitted the state "on an equal footing with the original states in all respects whatever." And by § 3 it was enacted that all the laws of the United States, not locally inapplicable, should have the same force and effect within that state as in other states of the Union.

[427] Another treaty was made between the Mississippi, Pillager, and Lake Winnibigoshish bands of Chippewas and the United States under date May 7, 1864, which was ratified and proclaimed in the following year, and is known as the treaty of 1865 (13 Stat. at L. 693). It took the place of a treaty of March 11, 1863 (12 Stat. at L. 1249). By its 1st section the Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomon Lake, and Rice Lake Reservations, as described in the treaty of 1855, were ceded to the United States, with an exception not now pertinent; and in con-

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sideration of this cession, the United States agreed to set apart for the future home of the Chippewas of the Mississippi a considerable tract of land (part of the great tract ceded in 1855), embraced within designated boundaries, expressly excepting, however, the reservations made in the treaty of 1855 for the Pillager and Lake Winnibigoshish bands, which were included within the boundaries mentioned. The lands thus set apart for the Chippewas of the Mississippi contained all the territory now within the limits of the city of Bemidji and the lands adjacent to it for a distance of several miles in all directions.

By a treaty made between the United States and the Chippewas of the Mississippi, dated March 19, 1867, ratified and proclaimed in the same year (16 Stat. at L. 719,) these bands ceded to the United States the greater portion (estimated at 2,000,000 acres) of the lands secured to them by the treaty of 1865, and in consideration of this cession, the United States set apart for the use of the same Indians a tract to be located in a square form as nearly as possible, with lines corresponding to the government surveys, the reservation to include White Earth Lake and Rice Lake, and to contain thirty-six townships. This reservation came to be known as the White Earth Reservation. It lies within the exterior boundaries of the cession of 1855.

The territory ceded to the United States by the treaty [428] of 1867 contains what is now the city of Bemidji and the country about it for miles in every direction.

By an act of January 14, 1889, known as the Nelson act (25 Stat. at. L. 642, chap. 24), the President was authorized to designate commissioners to negotiate with all the different bands of Chippewa Indians in Minnesota for the complete cession and relinquishment of their title and interest in all their reservations, except the White Earth and Red Lake Reservations, and in so much of these two reservations as, in the judgment of the Commission, was not required to make and fill the allotments required by this and existing acts. The act provided that a census should be taken, and that after the cession and relinquishment had been approved, all the Chippewa Indians in the state, except those on the Red Lake Reservation, should be removed to the White Earth Reservation, and lands should then be allotted to the Indians in severalty, in conformity with the act of February 8, 1887 (24 Stat. at L. 388, chap. 119), and the surplus lands disposed of by sale, and the proceeds placed in the Treasury of the United States to the credit of all the Chippewa Indians in the state of Minnesota as a permanent fund, to bear interest payable annually for fifty years, and at the end of that period the fund to be divided and paid to all of said Chippewas, and their issue then living, in cash. By the 1st section of this act the acceptance and approval of the cession and relinquishment of the lands by the President of the United States was to be deemed full and ample proof of the assent of the Indians, and to operate as a complete extinguishment of the Indian title without further act or ceremony. Commissioners were appointed accordingly, and agreements were entered into between them and the several bands of Chippewas, by which the Indians accepted and ratified the provisions of the act, and ceded to the United States all their right, title, and interest in their reservations, excepting portions of [429] the White Earth and Red Lake Reservations, and these cessions were approved by the President on the 4th day of March, 1890.

Since the making of the treaty of 1855 the country then ceded to the United States, with the exception of the portions set apart as Indian reservations, has been largely developed, gradually at first, but with great rapidity during recent years, and all the land has become populated by white people, and opened up to settlement, and organized as political subdivisions of the state, and in the larger portion of the territory industries have been established and commercial interests have grown up, so as to materially change the situation that existed at the time of the making of the treaty. According to the census of 1910, the counties affected by that treaty show a total white population of 382,191. Bemidji is the county seat of Beltrami county, and is a municipal corporation, organized under the laws of the state as a city, containing within its corporate limits about 7,000 inhabitants, and, in connection with adjacent municipalities, constituting a population of about 9,000 people. The city is reached by five lines of railroads, three of which have transcontinental connections. The country surrounding it is highly developed, and there are no Indian habitations within 20 miles in any direction from the city.

The original Red Lake Indian Reservation lay immediately north of the great tract covered by the cession of 1855, and was not subject to the treaty of that year. Pursuant to the Nelson act of January 14, 1889, a considerable portion of this reservation was relinquished to the United States, and has been opened up to settlement, with the result that there is now a strip of territory about 15 miles in width, lying a few miles north of Bemidji, which is admittedly exempt from the provisions of any treaty or law relative to the introduc-

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tion of intoxicating liquors in the Indian country; and in that strip the sale of intoxicating [430] liquors is actually conducted without interference on the part of the government of the United States.

Assistant Attorney General Wallace argued the cause and filed a brief for appellants:

Upon this record this court has jurisdiction to hear the direct appeal on three grounds:

(1) The construction or validity of article 7 of the treaty of 1855 is drawn in question.

United States v. Wright, 229 U. S. 226, 57 L. ed. 1160, 33 Sup. Ct. Rep. 630.

If a decision to the effect that one statute impliedly repeals another involves the construction or invalidity of the earlier statute, the same must be true of a decision to the effect that a statute repeals an earlier treaty, since treaties and statutes are equally repealable.

Ex parte Webb, 225 U. S. 663, 56 L. ed. 1248, 32 Sup. Ct. Rep. 769; The Cherokee Tobacco (Boudinot v. United States) 11 Wall. 616, 20 L. ed. 227.

And where the construction or validity of a treaty is drawn in question, the fact that the construction of a statute is also involved does not affect this court's jurisdiction.

Pettit v. Walshe, 194 U. S. 216, 48 L. ed. 942, 24 Sup. Ct. Rep. 657; B. Altman & Co. v. United States, 224 U. S. 583, 56 L. ed. 894, 32 Sup. Ct. Rep. 593.

"Validity" is a broader term than "constitutionality." Indeed, in the language of this court, "the validity of a statute of the United States . . . is drawn in question when the existence or constitutionality or legality of such law is denied."

United States ex rel. Champion Lumber Co. v. Fisher, 227 U. S. 445, 451, 57 L. ed. 591, 594, 33 Sup. Ct. Rep. 329.

Moreover, "validity" has a particularly comprehensive meaning as applied to treaties.

Jones v. Walker, 2 Paine, 288, Fed. Cas. No. 7,507.

(2) The construction or application of the Constitution is involved.

United States v. 43 Gallons of Whisky (United States v. Lariviere) 93 U. S. 188, 23 L. ed. 846; Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399; Perrin v. United States, 232 U. S. 478, ante, 691, 34 Sup. Ct. Rep. 387.

(3) The construction of the treaties of 1865 and 1867 is drawn in question.

As long as the question was properly presented by the pleadings, so that the lower court could have decided it if it had chosen to do so, an appeal will lie under § 238 of the Judicial Code.

Muse v. Arlington Hotel Co. 168 U. S. 435, 42 L. ed. 533, 18 Sup. Ct. Rep. 109; Cornell v. Green, 163 U. S. 75, 41 L. ed. 76, 16 Sup. Ct. Rep. 969; Holder v. Aultman, M. & Co. 169 U. S. 81, 42 L. ed. 669, 18 Sup. Ct. Rep. 269; Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174.

Article 7 of the treaty of 1855 was not repealed by the Minnesota enabling act, nor by the act admitting that state into the Union.

Ex parte Webb, 225 U. S. 663, 56 L. ed. 1248, 32 Sup. Ct. Rep. 769; United States v. Wright, 229 U. S. 226, 57 L. ed. 1160, 33 Sup. Ct. Rep. 630; Donnelly v. United States, 228 U. S. 243, 57 L. ed. 820, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913E, 710; United States v. Pelican, 232 U. S. 442, ante, 676, 34 Sup. Ct. Rep. 396; United States v. Sandoval, 231 U. S. 28, ante, 107, 34 Sup. Ct. Rep. 1.

Congress may, by treaty or statute, forbid the introduction of liquor into ceded Indian lands which are within the jurisdiction of a previously created state.

Perrin v. United States, 232 U. S. 478, ante, 691, 34 Sup. Ct. Rep. 387; Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399; United States v. 43 Gallons of Whisky (United States v. Lariviere) 93 U. S. 188, 23 L. ed. 846.

The rule that a reconveyance to the original grantor cancels existing covenants does not apply to treaties.

Wilson v. Shaw, 204 U. S. 24, 33, 51 L. ed. 351, 356, 27 Sup. Ct. Rep. 233.

A treaty is something more than a mere covenant; it is a contract between sovereign nations, and by the Constitution is declared to be the supreme law of the land. Especially is this so of a provision like article 7, which is self-executing (United States v. 43 Gallons of Whisky [United States v. Lariviere] 93 U. S. 196, 23 L. ed. 847), and therefore equivalent to an act of Congress (Foster v. Neilson, 2 Pet. 314, 7 L. ed. 435).

The justification for the prohibition rests pre-eminently with Congress, and if that body has not seen fit to repeal it, it is not to be condemned by the courts unless purely arbitrary.

Perrin v. United States, 232 U. S. 478, 486, ante, 691, 695, 34 Sup. Ct. Rep. 387.

There are three classes of Indians concerned:

(1) Full-blood White Earth and all Leech Lake allottees holding prior to the act of May 9, 1906. These may be citizens, but cannot alienate lands.

United States v. Pelican, 232 U. S. 442, ante, 676, 34 Sup. Ct. Rep. 396; United States v. Rickert, 188 U. S. 432, 437, 47 L. ed. 532, 536, 23 Sup. Ct. Rep. 478; McKay v. Kalyton, 204 U. S. 458, 466, 468, 51 L. ed.

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566, 570, 571, 27 Sup. Ct. Rep. 346; Couture v. United States, 207 U. S. 581, 52 L. ed. 350, 28 Sup. Ct. Rep. 259; United States v. Celestine, 215 U. S. 287, 290, 291, 54 L. ed. 198–200, 30 Sup. Ct. Rep. 93; Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578; Hallowell v. United States, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587.

(2) All of above holding allotments only since the act of 1906. These are not citizens and cannot alienate.

United States v. Celestine, 215 U. S. 287, 290, 291, 54 L. ed. 198–200, 30 Sup. Ct. Rep. 93.

(3) Mixed-blood White Earth allottees. Their status as emancipated Indians is not concluded by reason of their citizenship or their fee-simple allotments, but necessarily depends upon the further question whether they are recognized as a dependent people by the executive or legislative branches of the government.

United States v. Sandoval, 231 U. S. 28, ante, 107, 34 Sup. Ct. Rep. 1.

This court has recognized the necessity of extending such a prohibition to territory adjacent to the actual danger zone, and the wisdom of such legislation, when considered in relation to its purpose, cannot be doubted.

United States v. 43 Gallons of Whisky (United States v. Lariviere) 93 U. S. 195, 23 L. ed. 847.

Mr. Charles P. Spooner argued the cause, and, with Messrs. Joseph P. Cotton, John C. Spooner, Fred W. Zollman, and Marshall A. Spooner, filed a brief for appellees:

Where a law is plain and unambiguous, no room is left for construction.

United States v. Fisher, 2 Cranch, 358, 2 L. ed. 304; Hamilton v. Rathbone, 175 U. S. 414, 44 L. ed. 219, 20 Sup. Ct. Rep. 155.

Whenever the power to enact a statute as it is by its terms, or is made to read by construction, is fairly open to denial and denied, the validity of such statute is drawn in question, but not otherwise.

Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503; Clough v. Curtis, 134 U. S. 361, 33 L. ed. 945, 10 Sup. Ct. Rep. 573; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; Miller v. Cornwall R. Co. 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; Sweringen v. St. Louis, 185 U. S. 38, 46 L. ed. 795, 22 Sup. Ct. Rep. 569.

Land was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.

Bates v. Clark, 95 U. S. 204, 24 L. ed. 471.

We do not contend that an Indian treaty will necessarily repeal an act of Congress, but we do maintain that a treaty between certain bands of Indians and the United States can modify or repeal a prior treaty between the same parties.

Wiggan v. Conolly, 163 U. S. 56–60, 41 L. ed. 69–71, 16 Sup. Ct. Rep. 914.

Mr. Justice Pitney, after making the foregoing statement, delivered the opinion of the court:

This direct appeal is taken under § 238, Judicial Code (act of March 3, 1911, 36 Stat. at L. 1157, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 228), which allows such an appeal (*inter alia*) "in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question." Our jurisdiction is invoked upon three grounds: (a) that the construction or validity of article 7 of the treaty of 1855 [10 Stat. at L. 1169] is drawn in question; (b) that the construction or application of the Constitution is [434] involved; (c) that the construction of the treaties of 1865 and 1867 [13 Stat. at L. 693, 16 Stat. at L. 719] is drawn in question. There is a motion to dismiss, based upon the ground that none of these contentions is well founded. We think the motion must be denied. The court below, in overruling the demurrer, based its decision upon the ground that the treaty of 1855 was necessarily repealed by the admission of the state of Minnesota into the Union upon an equal footing with the original states. This decision was based upon the bill as originally framed, but the amendments made no change affecting this ground of decision; and it is evident from the record that, in granting the final decree, the court adhered to the view expressed in overruling the demurrer. It is insisted by appellants, with some force, that this view was based upon grounds that involved the construction or application of the Constitution of the United States; and that for this reason the direct appeal lies. We find it unnecessary to consider the point, since it seems to us that the entire case for complainants rests at bottom upon grounds that involve the construction of the three treaties referred to, especially that of 1855.

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The bill, either in its original or its amended form, did not expressly assert as a ground for relief that the treaty of 1855 had been repealed, in whole or in part, by the admission of the state. On the contrary, relief was prayed upon the ground that the second clause of article 7 (that which related to the liquor traffic, and was to remain in force until otherwise provided by Congress) applied only to the ceded territory, and not to the reservations set apart within that territory; that by the treaty of 1865 those reservations were ceded to the United States, and ceased to be Indian country in any sense; and that by the subsequent cession in the treaty of 1867 the reservation of 1865 in turn was vested in the United States, and therefore ceased to be Indian country; and finally, that article 7 of the treaty of 1855 had expired at the time of [435] the acts complained of in the bill (1910) by virtue of the provisions of the act of January 14, 1889, and the cessions made to the United States by the Chippewas of Minnesota pursuant to that act, and because of the changes wrought by time in the character of the territory included in the treaty of 1855, and the status of the Indians therein. These grounds of relief are reiterated in the amended bill, and the averments of the amended answer are calculated to meet them. And the principal force of the arguments on both sides is addressed to the construction of the several treaties referred to. For this reason, if for no other, the direct appeal is well taken.

Upon the merits, we may well begin with the disputed portion of the treaty of 1855:

"Article 7. The laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes, to continue and be in force within and upon the several reservations provided for herein; and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in, ardent spirits, wines, or other liquors, in the Indian country shall continue and be in force, within the entire boundaries of the country herein ceded to the United States, until otherwise provided by Congress."

The reference to previous laws clearly points to the act of June 30, 1834, entitled, "An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers" (4 Stat. at L. 729, chap. 161), and kindred acts. The act of 1834 was a revision of previous enactments, and contains many provisions for the regulation of trade and intercourse. Its 20th and 21st sections (4 Stat. at L. 732, chap. 161) prohibit the introduction or manufacture of, or traffic in, spirituous liquor or wine within the Indian country. From them, §§ 2139, 2140, and 2141, Rev. Stat. were derived.

By the 1st section of the act of 1834, the term "Indian [436] country" was defined, for the purposes of that act, as meaning land to which the Indian title had not been extinguished. At the making of the treaty, therefore, the restriction respecting the liquor traffic was in force within the ceded area, because until then the Indian title had not been extinguished. It was the evident purpose of article 7 to continue the restriction in force in the ceded territory, notwithstanding the extinguishment of the Indian title. Such stipulations were not unusual. A contemporaneous treaty with the Winnebagoes contained a similar one. 10 Stat. at L. 1174, art. 8. And it has been uniformly recognized that such stipulations amount in effect to an amendment of the statute, so as to make the restriction effective throughout the ceded territory. United States v. 43 Gallons of Whisky (United States v. Lariviere) 93 U. S. 188, 196, 23 L. ed. 846, 847; Bates v. Clark, 95 U. S. 204, 208, 24 L. ed. 471, 472.

The fundamental contention that underlies the entire argument for complainants is that the first part of article 7 had for its object that the laws of Congress, present and future, regulating trade and intercourse with the Indian tribes, were to continue and be in force within the reservations created by the treaty; while the latter portion of the article had for its object to keep in force in the ceded country—which, it is said, excludes the reservations—those portions of the laws that prohibit the introduction, manufacture, use of, and traffic in ardent spirits, etc., in the Indian country until otherwise provided by Congress; the particular insistence being that the latter clause applies merely to the so-called ceded territory, and not to the lands included within the reservations.

With this construction of the treaty we cannot agree. We think it rests upon a misconception of the fair import of the terms employed in article 7, whether considered alone or together with the context, and fails to give due effect to the reason and spirit of the stipulation.

It seems to us that in the qualifying clause—"within [437] the entire boundaries of the country herein ceded to the United States"—the words "entire boundaries" are equivalent to "outer boundaries," and therefore include the reservations that lie within. And this agrees with the context; for, if we turn back to see what is "herein ceded," we find that by the terms of article 1 the cession is of all the right, title, and interest of the Indians in the lands owned and claimed by them, included within desig-

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nated boundaries (this being the great tract in question), and then, in a separate clause, a relinquishment and conveyance of all right, title, and interest of the Indians in any other lands in the territory of Minnesota or elsewhere. There is here no suggestion that the reservations are excepted out of the cession. On the contrary, article 1 in terms vests the Indian title in the United States as to all the described lands, including the reservations mentioned in article 2. The latter article reserves a number of comparatively small and isolated tracts "for the permanent homes of the said Indians." Of these, all are within the outer boundaries of the cession excepting the Mille Lac Reservation, which lies outside. Reading the two articles together, it is evident that the framers of the treaty intended that the reservations themselves should become the property of the United States, subject only to a trust for the occupancy of the Indians. This is placed beyond controversy when we observe that by the latter part of article 2 it was provided that the President of the United States might cause the reservations or portions thereof to be surveyed; assign a reasonable quantity, not exceeding 80 acres in any case, to each head of a family or single person over twenty-one years of age for his or their separate use; issue patents for the tracts so assigned, which tracts were to be exempt from taxation, levy, sale, or forfeiture, and not to be aliened or leased for a longer period than two years at one time, unless otherwise provided by the legislature of the state with the [438] assent of Congress; not to be sold or aliened in fee for a period of five years after the date of patent, and not then without the assent of the President; and that, prior to the issue of the patents, the President might make rules and regulations respecting the disposition of the lands in case of the death of the allottee, etc.

The subdivision of the reservations, allotments to individual Indians, and the ultimate alienation of allotments, being thus in view at the making of the treaty, it is unreasonable to give such a construction to the stipulation contained in the second portion of article 7 as would defeat its object, by removing the restriction from scattered parcels of land whenever it should come to pass that the Indian title therein was extinguished. The restriction would be of little force unless it covered the entire ceded area *en bloc*, so that no change in the situation of the reservations by way of extinguishing the residue of Indian title or otherwise should operate to limit its effect. And so, upon the whole, we deem it manifest that the second clause of article 7 dealt with the entire ceded country, including the reservations, as country proper to be subjected to the laws relating to the introduction, etc., of liquor into the Indian country until otherwise provided by Congress. It was evidently contemplated that the bands of Indians, while making their permanent homes within the reservations, would be at liberty to roam and to hunt throughout the entire country, as before. The purpose was to guard them from all temptation to use intoxicating liquors.

That it is within the constitutional power of Congress to prohibit the manufacture, introduction, or sale of intoxicants upon Indian lands, including not only lands reserved for their special occupancy, but also lands outside of the reservations, to which they may naturally resort, and that this may be done even with respect to lands lying within the bounds of a state, are propositions so [439] thoroughly established, and upon grounds so recently discussed, that we need merely cite the cases. Perrin v. United States, 232 U. S. 478, 483, ante, 691, 694, 34 Sup. Ct. Rep. 387; United States v. 43 Gallons of Whisky (United States v. Lariviere) 93 U. S. 188, 195, 197, 23 L. ed. 846, 848; Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399.

And we cannot agree with the District Court that article 7 of the treaty of 1855 was repealed by the Minnesota enabling act, or by the admission of that state into the Union upon equal terms with the other states. Neither the enabling act nor the act of admission contains any reference to the treaty, although the latter was so recent that it can hardly have been overlooked. The court seems to have considered that the continued existence of article 7, so far as it prohibited the introduction, manufacture, and sale of liquors within the ceded country outside of the reservations, was inconsistent with the "equal footing" clause of the enabling and admitting acts. That there is no such inconsistency results very plainly, as we think, from the reasoning and authority of the cases above cited. The court deemed that United States v. 43 Gallons of Whisky (United States v. Lariviere) 93 U. S. 188, 196, 23 L. ed. 846, 847, and Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399, were distinguishable upon the ground that in each of those cases the treaty under consideration was made after the state had been admitted into the Union. But if the making of such a treaty after the admission of the state is not inconsistent with the "equal footing" of that state with the others,—as, of course, it is not,—it seems to us to result that there is nothing in the effect of "equal footing" clauses to operate

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as an implied repeal of such a treaty when previously established.

In Ex parte Webb, 225 U. S. 663, 56 L. ed. 1248, 32 Sup. Ct. Rep. 769, we had to deal with the effect of the Oklahoma enabling act upon a previous statute (act of March 1, 1895, chap. 145, § 8, 28 Stat. at L. 693), which prohibited (*inter alia*) the "carrying into said [Indian] territory [440] any of such liquors or drinks," in view of the fact that the enabling act itself required that the Constitution of the new state should prohibit the manufacture, sale, or otherwise furnishing of intoxicating liquors within that part of the state formerly known as the Indian territory; and we held that in view of the existing treaties between the United States and the Five Civilized Tribes, and because the enabling act and the Constitution established thereunder dealt only with the prohibition of the liquor traffic within the bounds of the new state, the act of 1895 remained in force so far as pertained to the carrying of liquor from without the new state into that part of it which was the Indian territory.

In United States v. Wright, 229 U. S. 226, 57 L. ed. 1160, 33 Sup. Ct. Rep. 630, we held that the prohibition against the introduction of intoxicating liquors into the Indian country, found in § 2139, Rev. Stat., as amended by the acts of July 23, 1892, chap. 234, 27 Stat. at L. 260, and January 30, 1897, chap. 109, 29 Stat. at L. 506, was not repealed, with respect to intrastate transactions, by the Oklahoma enabling act, in spite of the provision respecting internal prohibition contained therein, as already mentioned.

Upon the whole, we have no difficulty in concluding that article 7 of the treaty of February 22, 1855, was not repealed by the admission of Minnesota into the Union.

We come, therefore, to the principal contention of complainants and appellees, which is that the article was repealed by the effect of the treaties of 1865 and 1867. The argument in support of this contention may be outlined as follows: that by the earliest of the three treaties the several bands of Indians ceded to the United States the great tract of approximately 21,000 square miles, but excepted from that cession the several reservations created for the Mississippi bands and for the Pillager and Lake Winnibigoshish bands; that when the treaty of 1865 was [441] made, the Mississippi bands were the owners of their reservations within the exterior limits of the cession of 1855, which reservations were not covered by the second portion of article 7, but were subject to all of the laws of the United States regulating commerce and intercourse with the Indian tribes, simply because of being Indian country in fact; that by the treaty of 1865 the Mississippi bands ceded outright to the United States these reservations, and in return the United States ceded to them the tract of territory already mentioned (including Bemidji and the country surrounding it), excepting those portions included within the reservations of the Pillager and Lake Winnibigoshish bands; and that when, in 1867, in return for the White Earth Reservation, the Mississippi Chippewas receded to the United States the greater portion of the tract set apart for them in 1865, they ceded the same title and the same right and power over the lands that the three original tribes would have had; that is to say, they ceded them free and clear of article 7 of the treaty of 1855.

It will at once be observed that the argument rests at bottom upon the erroneous construction to which we have already called attention; *viz.*, that the second portion of article 7 did not apply to the reservations that were within the exterior limits of the ceded territory. We repeat that, in our opinion, the restriction applied to all the territory that was included within the terms of the cession; as much to those portions set apart for reservations as to the surrounding territory. There was nothing in the treaty of 1865, therefore, to make the receded reservations unrestricted territory; nor was there anything in the treaty of 1867 to remove the restriction from the territory then receded. Reading the series of treaties together, it is plain enough, we think, that the contracting parties, in all that was done, were resting upon the plain language of the second part of article 7, which declared that the laws relating [442] to the introduction, etc., of liquor in the Indian country, should continue in force within the entire boundaries of the country in question until otherwise provided by Congress.

Finally, it is contended that article 7 of the treaty of 1855 had been superseded at the time of the acts complained of in the bill (1910) by virtue of the provisions of the Nelson act of January 14, 1889 (25 Stat. at L. 642, chap. 24), and the cessions made to the United States by the Indians pursuant to that act, and by reason of the change in the character of the territory included in the treaty of 1855 and the status of the Indians therein.

As already pointed out, this act provided that commissioners to be appointed by the President should negotiate with the different bands of Chippewas in the state of Minnesota for the complete cession and relinquishment of their title and interest in all their reservations in the state, except

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so much of the White Earth and Red Lake Reservations as was not required for allotments, and that acceptance and approval of such cession and relinquishment by the President should be deemed full and ample proof of the cession, and should operate as a complete extinguishment of the Indian title without other or further act or ceremony.

From the averments of the amended bill and answer it is not easy to gather a precise statement of the present situation of the Indian lands and of the Indians themselves, so far as it affects the question before us. Some reference is made to the situation at the Red Lake Reservation; but since it is not clear that the restriction contained in the treaty of 1855 was intended for the protection of the Indians within that reservation, we prefer to confine our attention to the situation as it existed in 1910 within the boundaries of the great tract that was the subject of the cession of 1855. Within those bounds there would seem to be remaining only fragments of the White Earth [443] and Leech Lake Reservations; both reservations being in process of allotment under the acts of February 8, 1887 (24 Stat. at L. 388, chap. 119), and of January 14, 1889 (25 Stat. at L. 642, chap. 24), and amendatory acts. Of the lands that have been allotted, a considerable portion are still held in fee by the United States, and are nonalienable by the allottees until the expiration of the trust period. Upon the White Earth Reservation, and also at Leech Lake, the government maintains an Indian agency and superintendent, as well as Indian schools. At the White Earth agency, 5,600 Indians are carried upon the annuity rolls; at Leech Lake, 1,750 Indians. The majority of these reside upon lands embraced within the original reservation, and they are the same Indians, or descendants of the same, that were parties to the treaties of 1855, 1865, and 1867. In consequence of their elevation to the plane of citizenship by the operation of the allotment acts, tribal relations have, for most purposes, ceased to exist, but are recognized for the purpose of the distribution of annuities under the Nelson act. And it is admitted that for purposes of business, pleasure, hunting, travel, and other diversions, these Indians traverse parts of the region comprised in the cession of 1855, outside of the reservations, and thus visit the towns, villages, and cities in the territory, including Bemidji. On the other hand it is admitted that their visits to Bemidji are infrequent, and that there are no Indian habitations within a range of 20 miles in any direction from that city. And, as pointed out in the prefatory statement, the diminished Red Lake Reservation is admittedly surrounded by a strip of land, approximately 15 miles in width, which never was subject to the treaty of 1855, and upon which saloons are maintained in close proximity to that reservation. This strip extends along the northerly boundary of the cession of 1855, which is perhaps 10 or 12 miles north of Bemidji.

The argument for treating the restriction of 1855 as no [444] longer in force rests not upon any denial of the fact that there are some thousands of Indians at the White Earth and Leech Lake Agencies, who are still more or less under the guardianship of the government, and for whose protection the liquor restriction ought to be maintained, but rather upon the fact that these Indians are surrounded by territory in which liquor is lawfully obtainable. In support of this, it is said that the former Mississippi reservations ceded to the United States in 1865 are unrestricted territory; that so much of the Leech Lake and Lake Winnibigoshish Reservations as were conveyed to the United States in 1890 are such territory; that every allotment from either of these reservations as to which the trust period has expired is such territory, and that land sold to white men in the reservations is such territory. It will be observed, again, that each of these contentions rests upon the fundamental error that the reservations mentioned in the treaty of 1855 are not within the liquor restriction of article 7.

In view of the interpretation we have placed upon that article, it seems to us that the contention as to changed conditions must be based not upon the supposed fact that the tract covered by the cession of 1855 "is already dotted with wet territory," but rather upon the question whether the restriction—entered into more than half a century ago, when the country was a wilderness—ought to be treated as still in force, in view of the small number of Indians entitled to protection, as compared with the large population of whites who now form the great majority of the inhabitants, and in view of the high state of civilization and development of the territory in question.

In Perrin v. United States, 232 U. S. 478, 486, ante, 691, 695, 34 Sup. Ct. Rep. 387, we had to deal with a somewhat similar question. That was a review of a conviction for unlawfully selling intoxicating liquors upon ceded lands formerly included in the Yankton [445] Sioux Indian Reservation in the state of South Dakota. The reservation was created in 1858, and originally embraced 400,000 acres. A considerable part of it was allotted in severalty to members of the tribe under the act of 1887, the

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allotments being in small tracts scattered through the reservation. By an agreement ratified and confirmed by Congress August 15, 1894 (28 Stat. at L. 286, 314, chap. 290), the tribe ceded and relinquished to the United States all the unallotted lands, and by article 17 of the agreement it was stipulated: "No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858 [11 Stat. at L. 743], and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement." In the ratifying act a penalty was prescribed. The ceded lands were opened to disposition under the homestead and town-site laws, and passed largely into private ownership, and the place at which the intoxicating liquors were sold was within the defendant's own premises in a town located upon a part of the ceded lands held in private ownership by the inhabitants, none of whom was an Indian. After overruling the contention that the restriction was invalid because the power to regulate the sale of intoxicating liquors upon all ceded lands rested exclusively in the state (citing United States v. 43 Gallons of Whisky [United States v. Lariviere], 93 U. S. 188, 23 L. ed. 846, and Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399), the opinion dealt with the further contention that the power of Congress was necessarily limited to what was reasonably essential to the protection of Indians occupying the unceded lands, and that this limitation was transcended by the provision in [446] question because it embraced territory greatly in excess of what the situation required, and because its operation was not confined to a designated period reasonable in duration, but apparently was intended to be perpetual. As to this the court said (p. 486):

"As the power is incident only to the presence of the Indians and their status as wards of the government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis. Thus, a prohibition like that now before us, if covering an entire state when there were only a few Indian wards in a single county, undoubtedly would be condemned as arbitrary. And a prohibition valid in the beginning doubtless would become inoperative when, in regular course, the Indians affected were completely emancipated from Federal guardianship and control. A different view in either case would involve an unjustifiable encroachment upon a power obviously residing in the state. On the other hand, it must also be conceded that, in determining what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the courts."

Although the circumstances of the present case are different, and we are here dealing with a question of obsolescence rather than of original invalidity, the language just quoted indicates the point of view from which the question should be approached. But we must not forget that the question is one, primarily, for the consideration of the law-making body; nor are we in danger of doing so, since, by the very terms of the stipulation now under consideration, the prohibition of the liquor traffic was to continue "until otherwise provided by Congress." We do not mean to say that if it appeared that no considerable [447] number of Indians remained wards of the government within the territory in question, the courts would not be justified in declaring that, since the constitutional warrant for the restriction no longer existed, the restriction must expire with it. But where the question confessedly turns not upon a total, nor even upon an approximately complete, emancipation of the Indians from the Federal guardianship, but upon their unimportance as compared with the interests of the population at large, we think the question is legislative rather than judicial.

Indeed, it has only recently been under consideration by Congress. On February 17, 1911 (Senate Doc. No. 824, 61st Cong., 3d Sess., vol. 85), the President, in a special message, called attention to the situation in Minnesota, resulting from the operation of the old Indian treaties under present conditions; and with respect to the area ceded by the Chippewas in 1855, he stated: "The records of the Indian Bureau show that there are within said area, under the jurisdiction of the superintendents of the White Earth and Leech Lake Reservations, 7,196 Indians who can be amply protected by limiting the territory as to which said treaty provisions shall remain in force and effect to the area within and contiguous to said reservations, particularly described as follows: . . . I therefore recommend that Congress modify the article of said treaty quoted above so as to exclude from the operations of its provisions all of the

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territory ceded by said treaty to the United States, except that immediately above described."

That Congress has not yet acted upon this recommendation is evidence that the problem is not so entirely obvious of solution that it can be judicially declared to be beyond the range of legislative discretion.

Since it must be admitted that complainants have no ground of relief against defendants if the restriction remains in force at Bemidji, as we hold that it does, it follows [448] that the decree of the District Court should be reversed, and the cause remanded with directions to dismiss the bill.

Decree reversed.

Mr. Justice McKenna and Mr. Justice Lurton dissent upon grounds expressed in the opinion of the District Court, reported in 183 Fed. 611.

EQUITABLE SURETY COMPANY v. UNITED STATES OF AMERICA, TO THE USE OF W. McMILLAN & SON.

(See S. C. Reporter's ed. 448–458.)

Principal and surety — bond of public contractor — release of surety — change in contract.

Changes in a contract for the erection of a public school building, involving the relocation of the building, and necessitating a change in the grade, though not contemplated in such contract, and made without the knowledge and consent of the surety on the contractor's bond given conformably to the act of 1899, February 28 (30 Stat. at L. 906, chap. 218), do not release the surety from his obligation under such bond to pay promptly all persons supplying the contractor with labor and materials for the prosecution of the work,—at least, so far as their labor and materials are supplied in accordance with the original contract.

[For other cases, see Principal and Surety, III. f. in Digest Sup. Ct. 1908.]

[No. 861.]

Argued April 15, 1914. Decided June 8, 1914.

ON A CERTIFICATE from the Court of Appeals of the District of Columbia presenting the question whether the surety on the bond of a public contractor is discharged, so far as laborers and materialmen are concerned, by changes in the contract, made without the surety's knowledge or consent. Answered in the negative.

Statement by Mr. Justice Pitney:

The court of appeals of the District of Columbia certifies that the record in the above-entitled cause, now pending in said court upon appeal from the supreme court of the District of Columbia, discloses the following:

The declaration of the United States to the use of W. McMillan & Son, filed February 11, 1913, against the Equitable Surety Company, alleges:

That Allen T. Howison, as principal, and the Equitable Surety Company, as surety, on July 24, 1911, executed a bond to the United States in the penal sum of $110,350, conditioned for the faithful performance by Howison of a certain contract made by him with the commissioners of the District of Columbia on that date. A copy of the bond, made an exhibit, shows that the contract was for the erection of a school building fronting on Eleventh street, N. W., between Harvard and Girard streets, in the city of Washington. The conditions of the bond are that if Howison shall perform to the satisfaction of the commissioners the work to be done by him in accordance with the stipulations of the contract, and shall save harmless and indemnify the District of Columbia from any and all claims, delays, suits, charges, damages, judgments, etc., on account of any accidents to persons or property after the commencement of the work and prior to completion and acceptance, and pay the same; and "will promptly make payments to all persons supplying him [450] with labor and material in the prosecution of the work provided for in said contract," etc., the obligation shall be void; otherwise to remain in force.

That thereafter W. McMillan & Son, at the request of the Butt-Chapple Stone Company, agreed to furnish to said contractor certain stone materials to be used in the prosecution of the work provided for in the contract by the contractor, and did furnish to said contractor materials of the kind and quality specified in his contract to the value of $4,452.84, of which material the contractor used on the building a quantity of the value of $3,952.84, for which he has failed to make payment. And that defendant, though requested so to do, has refused to pay the same. The affidavit of the plaintiff in support of the declaration follows the requirements of rule 73.

After the general issue, defendant filed a special plea denying liability on said bond because, after the execution and delivery of the same, and without the knowledge or consent of defendant, the commissioners of the District of Columbia and the said Howison, its principal, altered the contract the performance of which was guaranteed by

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said bond. That said alteration consisted in the entire changing of the building from one fronting on Eleventh street to one fronting on Harvard street, which alteration involved the contractor in considerable expense not contemplated in the original contract, and prejudicial to defendant. That said relocation of the building necessitated a material change in grading the ground. That prior to the change of location the contractor had graded the ground as required in the contract, and expended therein the sum of $2,393.90. And that by reason of the change said sum was a total loss to the contractor, and the further excavation made necessary by the change of location was done at a cost of $1,300.90.

The affidavit of defense alleged the said change in the contract without its knowledge or consent; and that the [451] same necessitated a material change in the grading of the land, which had been previously performed by the contractor, at a considerable expenditure not contemplated in the original contract, and prejudicial to the defendant.

On motion under the 73d rule of the supreme court of the District of Columbia, the court entered judgment for the plaintiff for the amount of the demand; and defendant has appealed therefrom.

By stipulation two other cases involving the same question here presented are to abide the result of this case.

The act of Congress, in compliance with the requirements of which the aforesaid bond was executed (30 Stat. at L. 906, chap. 218), reads as follows:

An Act Relative to the Payment of Claims for Material and Labor Furnished for District of Columbia Buildings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter any person or persons entering into a formal contract with the District of Columbia for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor and furnishing affidavit to the department under the direction of which said work is being or has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to [452] bring suit in the name of the District of Columbia or the United States, for his or their use and benefit, against said contractor and sureties, and to prosecute the same to final judgment and execution: Provided, That such action and its prosecution shall not involve the District of Columbia or the United States in any expense: Provided, That in such case the court in which such action is brought is authorized to require proper security for costs in case judgment is for the defendant.

Approved, February 28, 1899.

The court of appeals further certifies that the following question of law arises upon the record; that its decision is necessary to the proper disposition of the cause; and, to the end that a correct result may be reached, desires the instruction of the Supreme Court of the United States upon that question, to wit:

Did the alteration of the terms of the contract by the District of Columbia and the contractor, without the knowledge or consent of the surety, have the effect to release the surety from the obligation of the bond?

Mr. J. J. Darlington argued the cause, and, with Messrs. Joseph A. Burkart and William E. Ambrose, filed a brief for the Equitable Surety Company:

A change in the contract like the one here presented, namely, a change which substituted a different site for the building to be erected, which materially increased its cost, and which was made without his consent or knowledge, necessarily releases the surety.

Miller v. Stewart, 9 Wheat. 680, 6 L. ed. 189; United States v. Boecker, 21 Wall. 652, 22 L. ed. 472; Zimmerman v. Judah, 13 Ind. 286; United States v. Freel, 186 U. S. 309, 318, 46 L. ed. 1177, 1181, 22 Sup. Ct. Rep. 875; O'Neal v. Kelley, 65 Ark. 550, 47 S. W. 409; Chester v. Leonard, 68 Conn. 495, 37 Atl. 397; Thompson v. Chaffee, 39 Tex. Civ. App. 569, 89 S. W. 285; School Dist. v. Green, 134 Mo. App. 426, 114 S. W. 578; McConnell v. Poor, 113 Iowa, 139, 52 L.R.A. 312, 84 N. W. 968; Southern Bridge Co. v. Bogenshot, — Tenn. —, 48 S. W. 97.

A corporate surety, equally with any other contracting party, whether a surety or a principal, has a right to stand upon its contract, as made by it, and any alteration in

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the contract which increases its risk or otherwise affects its liability, especially where the change is to its detriment or loss, thereby releases it.

United States Fidelity & G. Co. v. Golden Pressed & Fire Brick Co. (United States Fidelity & G. Co. v. United States) 191 U. S. 416, 48 L. ed. 242, 24 Sup. Ct. Rep. 142; Bauschard Co. v. Fidelity & C. Co. 21 Pa. Super. Ct. 375; United States v. American Bonding & T. Co. 32 C. C. A. 420, 61 U. S. App. 584, 89 Fed. 929; United States use of District of Columbia v. Bayly, 39 App. D. C. 105, 41 L.R.A.(N.S.) 422; Baglin v. Southern Surety Co. 42 Wash. L. Rep. 164.

Mr. Wharton E. Lester argued the cause, and, with Messrs. Lucas P. Loving, Daniel W. Baker, Wilton J. Lambert, and William E. Leahy, filed a brief for the United States to the use of W. McMillan & Son:

The alteration of the terms of the contract set forth in the certificate herein by the District of Columbia and the contractor without the knowledge or consent of the surety did not have the effect to release the surety from the obligation of the bond.

United States use of Anniston Pipe & Foundry Co. v. National Surety Co. 34 C. C. A. 526, 92 Fed. 549; United States Fidelity & G. Co. v. Golden Pressed & Fire Brick Co. (United States Fidelity & G. Co. v. United States) 191 U. S. 416, 48 L. ed. 242, 24 Sup. Ct. Rep. 142; United States use of Phœnix Iron Co. v. California Bridge & Constr. Co. 152 Fed. 559; United States use of Delaware Hardware Co. v. Lynch, 192 Fed. 364.

The bond is a dual bond, being for the benefit of certain statutory beneficiaries, including the District of Columbia and the materialmen and laborers furnishing material and work on the building.

United States use of Standard Oil Co. v. City Trust, S. D. & Secur. Co. 21 App. D. C. 369; United States use of Vermont Marble Co. v. Burgdorf, 13 App. D. C. 506.

The surety is fully protected even though the claims of the several statutory beneficiaries exceed the penalty of the bond.

American Surety Co. v. Lawrenceville Cement Co. 96 Fed. 25; United States v. Heaton, 63 C. C. A. 156, 128 Fed. 416; Griffith v. Rundle, 23 Wash. 458, 55 L.R.A. 381, 63 Pac. 199; United States use of Fidelity Nat. Bank v. Rundle, 40 C. C. A. 450, 100 Fed. 402; American Surety Co. v. Lawrenceville Cement Co. 110 Fed. 717.

No change made by the principal on the bond and the District of Columbia, one of the statutory beneficiaries, can affect the rights of laborers and materialmen.

United States use of Anniston Pipe & Foundry Co. v. National Surety Co. 34 C. C. A. 526, 92 Fed. 550; Griffith v. Rundle, 23 Wash. 455, 55 L.R.A. 381, 63 Pac. 199; Conn v. State, 125 Ind. 514, 25 N. E. 443; Doll v. Crume, 41 Neb. 660, 59 N. W. 806; Steffes v. Lemke, 40 Minn. 27, 41 N. W. 302; Henricus v. Englert, 137 N. Y. 494, 33 N. E. 550; School Dist. ex rel. Koken Iron Works v. Livers, 147 Mo. 585, 49 S. W. 507; Abbott v. Morrissette, 46 Minn. 11, 48 N. W. 416; Kaufmann v. Cooper, 46 Neb. 644, 65 N. W. 796; United States use of Phœnix Iron Co. v. California Bridge & Constr. Co. 152 Fed. 559.

Mr. Justice Pitney, after making the foregoing statement, delivered the opinion of the court:

The act of February 28, 1899 (30 Stat. at L. 906, chap. 218), under which the bond in question was given, was modeled after an act of August 13, 1894, entitled, "An Act for the Protection of Persons Furnishing Materials and Labor for the Construction of Public Works" (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523). In an action founded upon a bond given under the latter act, it was held by the circuit court of appeals for the eighth circuit, in United States use of Anniston Pipe & Foundry Co. v. National Surety Co. 34 C. C. A. 526, 92 Fed. 549, 551, that the obligation has a dual aspect, it being given, in the first place, to secure to the government the faithful performance of all obligations which a contractor may assume towards it; and, in the second place, to protect third persons from whom the contractor may obtain materials or labor; and that these two agreements are as distinct as if contained in separate instruments. It was consequently held that the sureties in such a bond could not claim exemption from liability to persons who had supplied labor or materials to their principal, to enable him to execute his contract with the United States, simply because the government and the [455] contractor, without the surety's knowledge, had made changes in the contract subsequent to the execution of the bond, the changes being such as did not alter the general character of the work contemplated by the contract, or the general character of the materials necessary for its execution.

In support of this decision several cases from the state courts were cited, among them Dewey v. State, 91 Ind. 173, 185; Conn v. State, 125 Ind. 514, 518, 25 N. E. 443; Steffes v. Lemke, 40 Minn. 27, 29, 41 N. W. 302; and Doll v. Crume, 41 Neb. 655, 660, 59 N. W. 806. They fairly sustain the conclusion reached. The cases cited from the Indiana and Minnesota reports antedated the passage of the act of

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1894, and may have furnished the suggestion for that enactment.

The decision of the circuit court of appeals in United States ex rel. Anniston Pipe & Foundry Co. v. National Surety Co. supra, although never until now brought under the review of this court, has been many times cited and followed in the other Federal courts. Brown & H. Co. v. Ligon, 92 Fed. 851, 857; United States use of Fidelity Nat. Bank v. Rundle, 40 C. C. A. 450, 100 Fed. 400, 402; United States Fidelity & G. Co. v. Omaha Bldg. & Constr. Co. 53 C. C. A. 465, 116 Fed. 145, 147; Chaffee v. United States Fidelity & G. Co. 63 C. C. A. 644, 128 Fed. 918; United States ex rel. Maxwell v. Barrett, 135 Fed. 189, 190; Henningsen v. United States Fidelity & G. Co. 74 C. C. A. 484, 143 Fed. 810, 813; City Trust, S. D. & Surety Co. v. United States, 77 C. C. A. 397, 147 Fed. 155, 156; United States use of Phœnix Iron Co. v. California Bridge & Constr. Co. 152 Fed. 559, 562; Title Guaranty & Trust Co v. Puget Sound Engine Works, 89 C. C. A. 618, 163 Fed. 168, 174.

In United States Fidelity & G. Co. v. Golden Pressed & Fire Brick Co: (United States Fidelity & G. Co. v. United States) 191 U. S. 416, 48 L. ed. 242, 24 Sup. Ct. Rep. 142; and United States use of Hill v. American Surety Co. 200 U. S. 197, 203, 50 L. ed. 437, 440, 26 Sup. Ct. Rep. 168, this court adopted a reasonably liberal construction of the act of 1894, in view of the fact that it was evidently designed to furnish the obligation of a bond as a substitute for the security which might otherwise be obtained by attaching a lien to the property; such lien not being permissible in the case of a government work.

[456] It seems to us that the construction given to that act in the case in 92 Fed. is correct, and that it applies equally to the act of 1899, now under consideration; and that this act, like the other, should receive a reasonably liberal interpretation in aid of the public object whose accomplishment is so evidently intended. Its title is, "An Act Relative to the Payment of Claims for Material and Labor Furnished for District of Columbia Buildings." The enacting clause, as well as the title, shows that Congress recognized that no legislation was necessary in order to enable the commissioners of the District to require "the usual penal bond, with good and sufficient sureties," from a contractor engaged for the construction of a public building. The object of the legislation was to give legal sanction to the "additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract," and to give to such a laborer or materialman the right to bring an action, if necessary, upon the bond, either in the name of the District of Columbia or of the United States, for his own benefit, against the contractor and sureties. The nominal obligee is, with respect to these third parties, a mere trustee, and the obligors, including the surety as well as the principal contractor, enter into the obligation in full view of this. The public is concerned not merely because laborers and materialmen (being without the benefit of a mechanics' lien in the case of public buildings) would otherwise be subject to great losses at the hands of insolvent or dishonest contractors, but also because the security afforded by the bond has a substantial tendency to lower the prices at which labor and material will be furnished, because of the assurance that the claims will be paid.

Stress is placed by counsel for the surety company upon the fact that the building was materially altered, and in a [457] manner that involved the contractor in considerable expense not contemplated in the original contract. If these alterations were made pursuant to a stipulation for that purpose contained in the contract, they were binding upon the surety, unless they were so extensive and material as to amount to a departure from the original contract rather than a permissible modification of its details. United States v. Freel, 92 Fed. 299, 39 C. C. A. 491, 99 Fed. 237, 186 U. S. 309, 46 L. ed. 1177, 22 Sup. Ct. Sup. 875.

So far as the certificate shows, however, the contract here in question contained no clause permitting changes. In such case it is beside the question to inquire whether the changes were important, or, indeed, whether they prejudiced or benefited the contractor. The rule that obtains in ordinary cases is that any change in the contract made between the principals without the consent of the surety discharges the obligation of the latter, even though the change be beneficial to the principal obligor.

But it lies at the foundation of this rule of *strictissimi juris* that the agreement altering the undertaking of the principal must be participated in by the obligee or creditor, in order that it may have the effect of discharging the surety. This is expressed or implied in all the cases. Miller v. Stewart, 9 Wheat. 680, 703, 708, 709, 6 L. ed. 189, 195–197; Sprigg v. Bank of Mt. Pleasant, 14 Pet. 201, 208, 10 L. ed. 419, 422: Magee v. Manhattan L. Ins. Co. 92 U. S. 93, 98, 23 L. ed. 699, 700; Union Mut. L. Ins. Co. v. Hanford, 143 U. S. 187.

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191, 36 L. ed. 118, 120, 12 Sup. Ct. Rep. 437; Prairie State Nat. Bank v. United States, 164 U. S. 227, 233, 41 L. ed. 412, 416, 17 Sup. Ct. Rep. 142; United States v. Freel, 186 U. S. 309, 310, 317, 46 L. ed. 1177, 1178, 1181, 22 Sup. Ct. Rep. 875.

In the case of a bond given under a statute such as the act of February 28, 1899, there is no single obligee or creditor. The surety is charged with notice that he is entering into what is, in a very proper sense, a public obligation, and one that will be relied upon by persons who can in no manner control the conduct of the nominal obligee, and with respect to whom the latter is a mere [458] trustee, and therefore incapable, upon general principles of equity, of bartering away, for its own benefit or convenience, the rights of the beneficiaries. In the light of the statute, the surety becomes bound for the performance of the work by the principal in accordance with the stipulations of the contract, and for the prompt payment of the sums due to all persons supplying labor and material in the prosecution of the work provided for in the contract.

What would be the result of a change not contemplated in the original contract, as between the District of Columbia, consenting to the change, and the surety company, not consenting thereto, is a question not now before us, and respecting which we express no opinion. But, with respect to obligations incurred by the contractor to laborers and materialmen, at least, so far as their labor and materials are supplied in accordance with the original contract, it is obvious, we think, that a construction which would discharge the surety because of any change to which the laborers and materialmen were not parties would defeat the principal object that Congress had in view in enacting the statute. If the change were so great as to amount to an abandonment of the contract and the substitution of a substantially different one, so that persons supplying labor and materials would necessarily be charged with notice of such abandonment, a different question would be presented. But, in the case of such a change as was here made,—a mere change of position and location of the building, without affecting its general character; involving changes in grading, but having nothing to do with the furnishing of the materials upon which the action is based,—it seems to us that the responsibility of the surety to the materialman remains unaffected.

The question certified will be answered in the negative.

[459] MISSOURI PACIFIC RAILWAY COMPANY, Plff. in Err.,

v.

F. D. LARABEE and F. S. Larabee. Partners in Business under the Style and Firm Name of the Larabee Flour Mills Company.

(See S. C. Reporter's ed. 459–475.)

Error to state court — Federal question — correct decision below.

1. A writ of error to a state court from the Federal Supreme Court will not be dismissed for want of jurisdiction because the Federal rights which were passed upon by the state court were correctly decided, where the correctness of such decision is not so obvious as to render frivolous the contentions respecting such Federal rights.

[For other cases, see Appeal and Error, 1095-1137, in Digest Sup. Ct. 1908.]

Federal courts — state regulation — awarding fees for attorneys' services in Federal Supreme Court.

2. No state statute can empower a state court, when assessing the damages recoverable by the successful plaintiff in mandamus proceedings, to allow a sum for attorneys' fees for services rendered in the Federal Supreme Court upon a writ of error unsuccessfully prosecuted by the defendant, where such an award was not only not authorized by the Federal laws, but was in conflict with the settled rule in the Federal Supreme Court.

[For other cases, see Courts, V. c, 8, in Digest Sup. Ct. 1908.]

Note.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to Wedding v. Meyler, 66 L.R.A. 833.

On validity of statutory provision for attorneys' fees—see note to Builders' Supply Depot v. O'Connor, 17 L.R.A.(N.S.) 910.

On unconstitutional inequality or discrimination in statutes allowing attorneys' fees—see notes to Farmers' & M. Ins. Co. v. Dobney, 47 L. ed. U. S. 824, and Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 586.

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Error to state court — further proceedings below — supersedeas — effect of affirmance.

3. The allowance of a writ of error with supersedeas from the Federal Supreme Court to review a judgment of a state court awarding a writ of mandamus does not preclude the state court, after its judgment has been affirmed by the Federal Supreme Court, from assessing, under the authority of Kan. Gen. Stat. 1909, § 6319, as part of the damages recoverable by the plaintiff, the latter's business losses suffered during the pendency of the proceedings in the Federal Supreme Court by reason of defendant's refusal to obey the command of the mandamus.

[For other cases, see Appeal and Error, IV. g, IX. l, in Digest Sup. Ct. 1908.]

Election of remedies — choice — action on supersedeas bond or under general law.

4. The right, if any, to sue on the supersedeas bond given on a writ of error from the Federal Supreme Court to review a judgment of a state court awarding a writ of mandamus, to recover for business losses sustained during the pendency of the proceedings in the Federal Supreme Court by defendant's refusal to obey the command of the mandamus, does not imply an exclusion of the right to sue under the general law to recover such damages, if such an election should be made.

[For other cases, see Election of Remedies, III., in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — attorneys' fees to successful plaintiff in mandamus.

5. Damages for attorneys' fees for services rendered to the successful plaintiff in a state court in mandamus proceedings may be awarded under the authority of Kan. Gen. Stat. 1909, § 6319, without denying to the defendant the equal protection of the laws, contrary to U. S. Const., 14th Amend., although no reciprocal right in case of success is given to defendant, and no such right is given to litigants generally.

[For other cases, see Constitutional Law, IV. a, 6, in Digest Sup. Ct. 1908.]

[No. 135.]

Argued December 15 and 16, 1913. Decided June 22, 1914.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment awarding damages to the successful plaintiff in mandamus proceedings. Reversed and remanded for further proceedings.

See same case below, 85 Kan. 214, 116 Pac. 901.

Statement by Mr. Chief Justice White:

A dispute as to a small charge for demurrage having arisen between the Missouri Pacific Railway Company and [460] the Larabee Flour Mills Company, the railway company, to enforce payment, suspended the rendering of a certain class of switching service which it had previously regularly performed for the mills company. The latter, on September 15th, 1906, commenced in the supreme court of Kansas mandamus proceedings to compel the continuance of the service. After a response to an alternative rule and a hearing on the 8th of December, 1906, the court granted a peremptory mandamus. 74 Kan. 808, 88 Pac. 72. At the close of the opinion there was the following memorandum:

"The court has authority to render judgment in favor of the plaintiff for any damage it has sustained. Gen. Stat. 1901, § 5193. The plaintiff is given ten days in which to file a claim for damages, stating separately the character and amount of each item. The defendant is given ten days after notice of the filing of the claim in which to except to any items which it may deem not recoverable. The court will then pass upon the exceptions if any be taken, and make orders respecting a hearing."

Some days thereafter a claim of damages was filed enumerating fifteen items. The first eight concerned various business losses alleged to have been occasioned by the suspension of the service, such as decrease in the output of the mill, increased cost of hauling, etc., etc. Four of the claims on these subjects aggregated $4,907.39, and four stated no amount, but reserved the right to make a future claim for losses in case the litigation should be prolonged and the resumption of the service postponed. The remaining six items, with one exception, related to small expenses alleged to have been incurred in the mandamus suit. One of them, however, the fourteenth, made a charge of $2,500 "to cash paid and plaintiff's agreement to pay Waters & Waters attorneys' fees in this case." The fifteenth item reserved the right to make a charge for future [461] legal services "if this case is taken to the Supreme Court of the United States whatever such services may be worth." A few days after this claim was filed, on December 24th, 1906, a writ of error was issued from this court to the judgment in mandamus, and a bond to operate as a supersedeas was approved. About two years thereafter, on January 11th, 1909, the case was decided in this court and the judgment below was affirmed. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214.

After the mandate went down, leave was given to file an amended claim for damages, and on the same day a commissioner was appointed to hear the testimony concerning it and report. The amended claim was filed. It was divided into three gen-

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eral classes: first, damages asserted to have arisen from loss of business, etc.; second, damages claimed as the result of the expenses and outlay for the suit; third, cost incurred or anticipated, occasioned by the hearing of the claim. The first, that is, the business losses, was embraced in separate items substantially following the order of the original claim; that is, it was based on alleged loss of output, increased cost of operation, etc., etc. The amounts of many of these items were larger, as they covered the time from the discontinuance of the service up to the filing of the amended claim. The aggregate of the claim was $18,921.90, as compared with $4,907.39, made at the time of the first claim. The second, the expenses of the suit, was greatly changed. Leaving out two insignificant items, as amended the claim was in substance as follows:

The claim for $2,500 paid or to be paid to Waters & Waters for personal services was changed to read, "For the reasonable value of the services of Waters & Waters to bring this action and to attend to the same in the supreme court of the state of Kansas, the sum of $ 2,500.00

[462] "Tenth. For the reasonable value of the services of Waters & Waters in this case in the Supreme Court of the United States, the sum of 40,000.00

"Eleventh. For cash paid out for printed briefs in the state and United States Supreme Court, the sum of 193.50

"Twelfth. For the reasonable value of the professional services of John F. Switzer, attorney at law, employed to assist Waters & Waters in the Supreme Court of the United States, the plaintiff, in the best judgment of the partners composing said firm, deeming it necessary, after considering the momentous and far-reaching controversy made, urged, and argued in the Supreme Court of the United States, and which controversy it could not avoid, the sum of 3,000.00

"Thirteenth. For the reasonable value of the professional services of the firm of Rossington & Smith, attorneys at law, also employed to present the case of the plaintiff in the Supreme Court of the United States, the plaintiff, in the best judgment of the partners composing said firm, deeming it necessary, after considering the momentous and far-reaching controversy made, urged, and contended for in the Supreme Court of the United States, and which controversy it could not avoid, the sum of 30,000.00

"Fourteenth. For the railroad fare, hotel bills, and reasonable expenses of W. H. Rossington and J. G. Waters in attending on the United States Supreme Court in April, 1908, the sum of $250 each, and making a total of 500.00

[463] "Fifteenth. For the railroad fare, hotel bills, and reasonable expenses of Charles Blood Smith and J. G. Waters in attending on the Supreme Court in October, 1908, the sum of 480.60

"Sixteenth. For the costs due the plaintiff in the Supreme Court of the United States, the sum of ..... 148.25"

The 17th, 18th, and 19th items embraced small items of traveling and other expenses of the parties and some of their attorneys. In the items of court expenses the difference between the original claim was substantially this: that the claim had grown from about $2,800 for attorneys' fees in the state court when the original claim in damages was filed to a sum in excess of $75,000, all of which increase resulted from charges made for professional services rendered in this court in connection with the trial of the case. The remaining items of the third class related to expenses incurred under the reference to the commissioner before whom the case was pending, with a reservation of the right to make future charges for such purpose when the reference was completed.

The railway company objected to the various items in the amended claim as follows: To those covering the business losses, decrease of output, increased expenses, etc., etc., besides denying that the suit was the proximate cause of the losses represented by the alleged claims, and asserting their speculative nature, it was specially charged that in so far as they included items arising after the allowance of the writ of error from this court and the giving of the supersedeas bond, they were not within the cognizance of the court, but were matters alone of Federal competency within the jurisdiction of this court. So far as the claims for alleged outlay and expenses including attorneys' fees in the state court were concerned, it was alleged

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that there was no right to recover them because [464] the only authority under which they could be allowed was a statute of the state of Kansas relating to mandamus proceedings, and that such statute, as construed by the court of last resort of the state, was repugnant to the due process and equal protection clauses of the 14th Amendment because, under such construction, a right was given by the statute to a plaintiff in mandamus to recover attorneys' fees as damages, while no reciprocal right in case of success was given to a defendant, and no such right was given to litigants generally. Coming to the alleged right to recover attorneys' fees for services rendered on the writ of error in this court and the other items, such as briefs, traveling expenses, hotel bills, etc., etc., it was expressly charged that under the statutes of the United States the effect of the writ of error from this court and the supersedeas was to deprive the state court of all authority over such expenses, and that, moreover, "under such statutes and laws of the United States, this court has no power, authority, or jurisdiction to consider the claim and demand for damages on account of attorneys' fees for services rendered in such proceedings in error from the Supreme Court of the United States to the supreme court of Kansas; and for the further reason that, if the said plaintiffs were entitled to any damages, their application therefor should be made to the Supreme Court of the United States, or in an independent proceeding brought on the supersedeas bond so approved and allowed as a supersedeas by the chief justice of this state . . . and because, further, to allow such claim would be violative of the Constitution of the United States, and especially the 14th Amendment thereof, which prohibits any state from denying to any person, company, or corporation the equal protection of the laws, and prevents any state from depriving any person, company, or corporation of its property without due process of law; . . . and because of such judiciary act (of the United States) . . . , this court [465] is deprived of all jurisdiction to consider or determine any such question or element of damage in a proceeding of this kind; and because, further, the Supreme Court of the United States, in affirming the judgment of this court . . . allowed to said plaintiffs, on account of attorneys' fees, the sum of $20, and assessed the same against the said defendant. . . ."

After proof and hearing the commissioner made an elaborate report stating fully what he conceived to be the facts and the law of the case. On the subject of the various claims made for the allowance of damages for a charge of fees for professional services rendered in the Supreme Court of the United States, the commissioner made the following statement:

"I find that no agreement has ever been had between the mill company and any of the attorneys as to the amount of their compensation; that neither of the attorneys has at any time entered on his books a charge against the mill company for services rendered; nor have they informed the mill company of the amount intended to be charged; nor have they determined in their own minds any definite amount intended to be charged.

"I find that the attorneys will claim the full amount, and will accept whatever amount that shall be determined by this court in this proceeding to be a reasonable compensation for their services in the case and allowed as part of the damages.

"I further find that it is mutually understood between the mill company and the attorneys named, that whatever amount is recovered in this proceeding on account of fees and expenses of counsel will be paid by the mill company to and accepted by the attorneys as a full discharge of the liability to them."

The conclusions of the commissioner as to the amounts to be allowed as damages under the three classes of claims were as follows:

[466] As to the first class, he reduced the claim for business losses, increased expenses, etc., etc., from $18,921.90 to	$ 5,658.10
As to the amount claimed as due because of the professional services of Waters & Waters in the state court, the sum claimed was allowed in full	2,500.00
As to the items for professional services rendered in the Supreme Court of the United States, including hotel bill, etc., the amount was reduced from about $75,000 to	11,480.00
Under the third class three small items were allowed relating to the expenses of the parties in Kansas, and concerning the reference to the commissioner ..	376.00
Total	$20,014.10

Both parties excepted to the report of the commissioner on various grounds, and after a hearing the supreme court sustained his action and affirmed his report. 85 Kan. 214, 116 Pac. 901.

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Mr. Ballie P. Waggener argued the cause and filed a brief for plaintiff in error:

The court, in this case, is not obliged to reason from the probable to the actual, and pass upon the validity of this statute, "as tried merely by the opportunities which its terms afford of unequal and unjust discrimination" in its administration. This case presents the statute in actual operation, and the facts disclosed by the record establish an administration not only directed exclusively against a particular class, but against a particular party litigant, such "as to warrant and require the conclusion" that, whatever may have been the intent of the legislature in enacting this statute, its application in this case was so unequal and oppressive as to amount to a practical denial by the state of the equal protection of the laws.

Yick Wo v. Hopkins, 118 U. S. 373, 30 L. ed. 227, 6 Sup. Ct. Rep. 1064; Atkinson v. Woodmansee, 68 Kan. 71, 64 L.R.A. 325, 74 Pac. 640; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 153, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; South & North Ala. R. Co. v. Morris, 65 Ala. 199; Wilder v. Chicago & W. M. R. Co. 70 Mich. 384, 38 N. W. 289; Oelrichs v. Spain (Oelrichs v. Williams) 15 Wall. 230, 231, 21 L. ed. 45; Tullock v. Mulvane, 184 U. S. 510, 512, 46 L. ed. 665, 666, 22 Sup. Ct. Rep. 372; Arcambel v. Wiseman, 3 Dall. 306, 1 L. ed. 613; Day v. Woodworth, 13 How. 370, 372, 14 L. ed. 184, 185; Teese v. Huntingdon, 23 How. 2, 16 L. ed. 479; The Baltimore, 8 Wall. 377, 19 L. ed. 463.

The action of the mill company was for the purpose of enforcing a private right,—a "self-imposed duty by the voluntary undertaking of the Pacific Company itself." The action was in no sense one to enforce the police power of the state, or a police regulation of any kind, as in cases like—

Atchison, T. & S. F. R. Co. v. Matthews, 58 Kan. 447, 49 Pac. 602, 3 Am. Neg. Rep. 27, affirmed in 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; British America Assur. Co. v. Bradford, 60 Kan. 82, 55 Pac. 335; Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662.

Whenever attorneys' fees have been sustained by the supreme court of Kansas, the same have been allowed as a penalty.

Kansas P. R. Co. v. Mower, 16 Kan. 573; Winstead v. Hulme, 32 Kan. 574, 4 Pac. 994; Doom v. Curran, 52 Kan. 360, 34 Pac. 1118.

The case at bar most forcibly illustrates the injustice of the law. Not only is the railway company adjudged to pay $2,500 to the mill company's attorneys, for alleged services in the state court, but over $11,000 to the mill company's attorneys for alleged services in this court, as a penalty and punishment for exercising a right given and guaranteed to it by the Constitution of the United States, and the judiciary act of Congress under which it sought, by writ of error, to review in this court what it believed to be an erroneous judgment of the state court.

Lafferty v. Chicago & W. M. R. Co. 71 Mich. 35, 38 N. W. 660; St. Louis, I. M. & S. R. Co. v. Williams, 49 Ark. 492, 5 S. W. 883; Jolliffe v. Brown, 14 Wash. 155, 53 Am. St. Rep. 868, 44 Pac. 149; Grand Rapids Chair Co. v. Runnels, 77 Mich. 104, 43 N. W. 1006; Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 356; Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; Durkee v. Janesville, 28 Wis. 464, 9 Am. Rep. 500; Janesville v. Carpenter, 77 Wis. 288, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128.

Can it be that, under the 14th Amendment to the Constitution of the United States, justice is "to be sold or denied by the exaction of a pecuniary consideration for its enjoyment from one, when it is given freely and openhanded to another, without money and without price?" Such discrimination is repudiated by many, if not all, the states of the Union.

Howell v. Scoggins, 48 Cal. 355; Falk v. Waterman, 49 Cal. 224; Jacobson v. Poindexter, 42 Ark. 97; Goodbar v. Lindsley, 51 Ark. 382, 14 Am. St. Rep. 54, 11 S. W. 577; Clarke Bros. v. Wolfe, 115 Ga. 320, 41 S. E. 581; Bull v. Keenan, 100 Iowa, 144, 69 N. W. 433; Dorris v. Miller, 105 Iowa, 568, 75 N. W. 482; Boardman v. Marshalltown Grocery Co. 105 Iowa, 451, 75 N. W. 343; Eatman v. New Orleans P. R. Co. 35 La. Ann. 1018; Barnard v. Poor, 21 Pick. 378; Henry v. Davis, 123 Mass. 346; Gates v. Toledo, 57 Ohio St. 105, 48 N. E. 500; Haverstick v. Erie Gas Co. 29 Pa. 254; Earl v. Tupper, 45 Vt. 287: Burruss v. Hines, 94 Va. 414, 26 S. E. 875; Fairbanks v. Witter, 18 Wis. 288, 86 Am. Dec. 765; Washburne v. Burke, 84 Ill. App. 589; Knefel v. Ahern, 57 Ill. App. 569; Meisenbacker v. Society Concordia, 71 Conn. 378, 71 Am. St. Rep. 213, 42 Atl. 67; Mason v. Hawes, 52 Conn. 12, 52 Am. Rep. 552; Kelly v. Rogers, 21 Minn. 147; Spencer v. Murphy, 6 Colo. App. 453, 41 Pac. 841; McKenzie v. Mitchell, 123 Ga. 72, 51 S. E. 34; White River, L. & W. R. Co. v. Star Ranch & Land Co. 77 Ark. 137, 91 S. W. 14; Winkler v. Roeder, 23 Neb. 706, 8 Am. St. Rep. 155, 37 N. W. 607; Doom v. Curran, 52 Kan. 361, 34 Pac. 1118; Mattlage v. New York Elev. R. Co. 44 N. Y. S. R. 289,

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17 N. Y. Supp. 537; Bishop v. Hendrick, 82 Hun, 323, 31 N. Y. Supp. 502, 146 N. Y. 398, 42 N. E. 542; Clason v. Nassau Ferry Co. 20 Misc. 315, 45 N. Y. Supp. 675.

The state court, in order to enlarge the advantages of the mill company (the plaintiff) and make the discrimination against the defendant more pronounced, and the penalty more burdensome, placed a construction upon the word "damage," contained in the act (Kan. Gen. Stat. 1901, § 5193), unsupported by either reason or authority.

Golder v. Lund, 50 Neb. 869, 70 N. W. 379; Morris v. Grand Ave. R. Co. 144 Mo. 500, 46 S. W. 170; Underhill v. Spencer, 25 Kan. 71; Chicago v. Honey, 10 Ill. App. 535.

In allowing a writ of error from this court to the highest court of a state, and in issuing a citation, the chief justice of that court does but exercise an authority vested by Congress in him concurrently with each of the justices of this court.

Felix v. Scharnweber, 125 U. S. 59, 31 L. ed. 688, 8 Sup. Ct. Rep. 759.

It is solely for the Supreme Court of the United States to say whether any damages or interest (as a part thereof) are to be allowed or not in cases of affirmance.

Arcambel v. Wiseman, 3 Dall. 306, 1 L. ed. 613; Oelrichs v. Spain (Oelrichs v. Williams) 15 Wall. 230, 231, 21 L. ed. 45; Boyce v. Grundy, 9 Pet. 275, 9 L. ed. 127; Re Washington & G. R. Co. 140 U. S. 96, 97, 35 L. ed. 341, 342, 11 Sup. Ct. Rep. 673.

The bond and security given on the writ of error cannot be regarded as an idle ceremony. It was designed as an indemnity to the defendant in error should the plaintiff fail to prosecute with effect his writ of error.

United States ex rel. Crawford v. Addison, 22 How. 185, 16 L. ed. 306.

The railway company cannot get into this court in a mandamus case on equal terms with the mill company.

Oelrichs v. Spain (Oelrichs v. Williams) 15 Wall. 230, 231, 21 L. ed. 45.

Property cannot be taken from one and given to another, not because of a breach by the former of a duty to the latter, or to the public, but because of the lawful exercise of an undoubted right.

St. Louis, I. M. & S. R. Co. v. Wynne, 224 U. S. 354, 56 L. ed. 799, 42 L.R.A.(N.S.) 102, 32 Sup. Ct. Rep. 493.

After the acceptance of the bond for the appeal, and the docketing of the cause in this court, the jurisdiction of the court below was gone.

Draper v. Davis, 102 U. S. 370, 26 L. ed. 121; Keyser v. Farr, 105 U. S. 265, 266, 26 L. ed. 1025, 1026.

A writ of error has the effect to remove the record into the court granting the writ, and when the conditions prescribed in § 23 of the judiciary act are complied with, the jurisdiction of the subordinate court is suspended until the cause is remanded from the appellate court.

Slaughter-house Cases, 10 Wall. 273, 19 L. ed. 915.

The proceeding in error instituted in this court by the Missouri Pacific against the mill company was an independent proceeding, permitted and authorized only by the judiciary act of Congress.

Felix v. Scharnweber, 125 U. S. 59, 31 L. ed. 688, 8 Sup. Ct. Rep. 759; Tullock v. Mulvane, 184 U. S. 512, 46 L. ed. 666, 22 Sup. Ct. Rep. 372; Knox v. Knox, 12 N. H. 358; Schroeder v. Merchants' & M. Ins. Co. 104 Ill. 71; International Bank v. Jenkins, 107 Ill. 291; State v. Thomas, 76 Kan. 450, 92 Pac. 557.

This court has power to adjudge damages for delay on appeals as well as writs of error, and this power is not confined to money judgments.

Gibbs v. Diekma, 131 U. S. clxxxvi, Appx. and 26 L. ed. 177; Whitney v. Cook, 131 U. S. cxcvii, Appx. and 26 L. ed. 560.

And if, upon affirmance, no allowance of interest or damages is made, it is equivalent to a denial of any interest or damage; and the circuit court, in carrying into effect the decree of affirmance, cannot enlarge the amount thereby decreed, but is limited to the mere execution of the decree in the terms in which it is expressed.

Re Washington & G. R. Co. 140 U. S. 96, 97, 35 L. ed. 341, 342, 11 Sup. Ct. Rep. 673; People's Bank v. Ætna Ins. Co. 76 Fed. 550; Tyler v. Magwire, 17 Wall. 253, 21 L. ed. 576; Gaines v. Rugg, 148 U. S. 228, 37 L. ed. 432, 13 Sup. Ct. Rep. 611: Re Sanford Fork & Tool Co. 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291; Re Potts, 166 U. S. 263, 41 L. ed. 994, 17 Sup. Ct. Rep. 520; Re Blake, 175 U. S. 114, 115, 44 L. ed. 94, 20 Sup. Ct. Rep. 42.

The action of the court below was without authority, and should be set aside as absolutely void. It was nothing short of usurpation.

Brenner v. Bigelow, 8 Kan. 497; Brookover v. Esterly, 12 Kan. 152; Newby v. Myers, 44 Kan. 479, 24 Pac. 971; Gille v. Emmons, 58 Kan. 118, 62 Am. St. Rep. 609, 48 Pac. 569; Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773.

Messrs. Charles Blood Smith and Joseph G. Waters argued the cause, and, with Messrs. John C. Waters and John F. Switzer, filed a brief for defendants in error:

The statute will not be said to offend

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against the equal protection clause of the state Constitution or the inhibition of article 14 of the Federal Constitution merely because it permits a recovery of interest and attorneys' fees by the shipper if he succeeds, and secures no such right to the carrier in the event it prevails in the suit.

Atlantic Coast Line R. Co. v. Coachman, 59 Fla. 137, 52 So. 377, 20 Ann. Cas. 1047; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Barbier v. Connelly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Merchants' Life Asso. v. Yoakum, 39 C. C. A. 56, 98 Fed. 257; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 168, 41 L. ed. 666, 672, 17 Sup. Ct. Rep. 255; Kingsbury v. Missouri, K. & T. R. Co. 156 Mo. 379, 57 S. W. 547; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 24, 41 L. ed. 611, 620, 17 Sup. Ct. Rep. 243; Olcott v. Fond du Lac County, 16 Wall. 689, 21 L. ed. 386; Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 78, 52 L. ed. 108, 110, 28 Sup. Ct. Rep. 28.

The railway company has had its day in court, and it cannot prevail on the assertion that its property has been taken without due process of law.

Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Head v. Amoskeag Mfg. Co. 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; Corry v. Campbell, 154 U. S. 629, and 24 L. ed. 926, 14 Sup. Ct. Rep. 1183; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

The law bore on all alike; there was no exception or class. All who were wronged had the same recourse to it and all who violated it were dealt with alike; under like circumstances and under similar situations, there was no class, nor divisions into classes; there were no special persons or corporations on whom it operated, and none were exempted from its provisions, its remedies, and its penalties.

Walston v. Nevin, 128 U. S. 578, 582, 32 L. ed. 544, 546, 9 Sup. Ct. Rep. 192; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 709, 28 L. ed. 1147, 5 Sup. Ct. Rep. 730; Hayes v. Missouri, 120 U. S. 68, 71, 72, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 350; Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 327, 46 L. ed. 922, 933, 22 Sup. Ct. Rep. 662; John Hancock Mut. L. Ins. Co. v. Warren, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. Rep. 535; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518.

If a state law is above criticism and does not infract the Constitution and laws of the United States, there is no Federal question as to how it was considered, construed, or applied. Of course, it must be so considered, construed, and applied in good faith, and must not, under the color of its authority, be made an instrument of oppression, or inflict unreasonable exactions.

Giles v. Little, 134 U. S. 645, 33 L. ed. 1062, 10 Sup. Ct. Rep. 623; Stryker v. Goodnow (Stryker v. Crane) 123 U. S. 527, 31 L. ed. 194, 8 Sup. Ct. Rep. 203.

The act is a valid exercise of the police power vested in the legislature of the state of Kansas.

Cooley, Const. Law, 572; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Mugler v. Kansas, 123 U. S. 623, 658, 659, 31 L. ed. 205, 209, 210, 8 Sup. Ct. Rep. 273; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; Welch v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Hunter v. Pittsburgh, 207 U. S. 161, 52 L. ed. 151, 28 Sup. Ct. Rep. 40; Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665; Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; Oregon v. Hitchcock, 202 U. S. 60, 68, 50 L. ed. 935, 938, 26 Sup. Ct. Rep. 568; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 185, 31 L. ed. 652, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

When a railway says to one of its patrons, we will not give you a service over a switch, which is given indiscriminately to all the world besides, the infliction of costs and damages, as a remedy for such disobedience, is, within safe grounds, a splendid exercise of the police power by the state.

Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; Bacon v. Northwestern Mut. L. Ins. Co. 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. Rep. 787.

A fixed and received construction of the statute laws of the several states in their own courts makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction.

Shelby v. Guy, 11 Wheat. 361, 367, 6 L.

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ed. 495, 497; Randolph v. Quidnick Co. (Jencks v. Quidnick Co.) 135 U. S. 457, 34 L. ed. 200, 10 Sup. Ct. Rep. 655.

The police power of a state embraces its system of internal regulation by which it is sought not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others.

Cooley, Const. Law, 572.

Mr. Chief Justice White, after making the foregoing statement, delivered the opinion of the court:

Both before the commissioner and to the court where the report of the commissioner was acted on the propositions under the Constitution and laws of the United States upon which the railway company relied were pressed and overruled and the rightfulness of having so done is the [467] question here for decision. But first we notice a motion to dismiss for want of jurisdiction. It is difficult to grasp the ground upon which it rests. In one aspect it would seem to assert that there is no jurisdiction because the Federal rights which were passed upon below were correctly decided. But this obviously goes to the merits. In the only other possible aspect it would seem that the motion proceeds upon the theory that the Federal rights which were decided below were so obviously rightly decided that the contention of error concerning them is too frivolous to sustain jurisdiction,—a view which is supported by a statement in the argument for the motion that of course there would be jurisdiction if it appeared that the judgment below "under the color and sanctity of the law inflicted exceptional and unjust exactions." But taking the most favorable view for the motion, and assuming that it proceeds upon the only ground upon which it can possibly be said to rest, that is, the frivolousness of the errors relied upon, we pass from its consideration, since upon such hypothesis we think, on the face of the record, the contention is so clearly unsound as to require no further notice.

The Federal errors relied upon concern three subjects: The allowance of business losses, etc.; the award of a sum for attorneys' fees in the state court up to and including the writ of error from this court and the supersedeas; and the grant of an amount for attorneys' fees agreed or supposedly agreed to be paid for professional services rendered in this court on the writ of error, and traveling expenses and hotel bills allowed for the same purpose. The three involve different considerations, and hence we consider them separately. We come first to test the question as to attorneys' fees in this court, as it is the most important and far-reaching, since it involves considerations of the gravest importance going to the entire structure of our system of government, based as it is upon an absolute [468] denial of any power whatever in the court below to deal with the subject, while the other two contentions at best challenge power but relatively or partially.

First. The question of the power of the court to make the allowance for professional services rendered in this court on the former writ of error.

There can be no doubt that, tested by the general principles of law controlling in this court, by the statutes of the United States relating to the subject, or the rules of this court concerning the same, the award for the attorneys' fees in question was absolutely unwarranted. We do not stop to review and expound the settled line of authority demonstrating this result because it would be wholly superfluous to do so, as the principles have been so long the settled rule of conduct in this court, and are so elementary as to require not even a reference to the cases. Some of the cases, nevertheless, we cite: Arcambel v. Wiseman, 3 Dall. 306, 1 L. ed. 613; Day v. Woodworth, 13 How. 363, 372, 14 L. ed. 181, 185; Oelrichs v. Spain (Oelrichs v. Williams) 15 Wall. 211, 230, 231, 21 L. ed. 43, 45; Tullock v. Mulvane, 184 U. S. 497, 511, et seq., 46 L. ed. 657, 665, 22 Sup. Ct. Rep. 372. Indeed, this view is not disputed in the argument at bar, and was not questioned in the court below, since the court placed its action in making the allowances in question, not upon the supposed authority of any act of Congress, nor of any practice of this court or rule thereof sustaining the same, nor upon any principle of general law, but solely upon the theory that a state statute gave the power to make the allowances. Nothing could make this view clearer than does the following statement, taken from the opinion of the court below: "The damages in mandamus proceedings comprehended by § 723 of the Code [Gen. Stat. 1909, § 6319] are the injuries sustained as the natural and probable consequences of the wrongful refusal to comply and the expense reasonably and necessarily incurred in compelling compliance with the alternative writ, including reasonable attorneys' fees in this court and in the Supreme [469] Court of the United States." And in addition the view of the

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court below is aptly illustrated by the following passage from the report of the commissioner answering the claim of the railway company as to the effect of the writ of error from this court and the giving of the supersedeas and the resulting authority of this court over the cause under the statutes of the United States,—a passage which the court below expressly adopted and made a part of its opinion:

"Upon this objection I conclude:

"1. That the jurisdiction of this court in mandamus is the creation of the Constitution and the statutes of the state of Kansas.

"2. That this court is the sole judge of what that Constitution and those statutes provide.

"3. That the jurisdiction of this court in mandamus over persons within its jurisdiction cannot be affected by act of Congress.

"4. That the judiciary act does not and was not intended to affect the jurisdiction of this court.

"5. That the jurisdiction of this court in mandamus attaches upon the issuance of the alternative writ, and the subject-matter of the proceeding being the awarding a peremptory mandamus, that jurisdiction continues unabated, not only until the writ is awarded, but also until the writ is issued and obedience to it enforced.

"6. That the alternative writ is a command of the performance of specified and prescribed duties; and return to the writ is a refusal to perform the duties prescribed; the judgment awarding a peremptory mandamus is a conclusive adjudication that such refusal was wrongful, and the act of the court compelling compliance with the command of the alternative writ.

"7. That the damages comprehended by the Kansas statute are the injuries sustained as the natural and probable consequences of the wrongful refusal to comply, [470] and the expenses reasonably and necessarily incurred in compelling compliance with the command of the alternative writ.

"8. That the allowance of the writ of error did not operate to remove the suit from the supreme court of the state into the Supreme Court of the United States; its only effect was to bring up the record for purposes of review.

"9. The allowance of the writ of error did not operate as a supersedeas; the taking the supersedeas bond brought about the supersedeas. The taking the bond, and the supersedeas itself, in so far as it can be conceived of as a substantial act, was the action of the supreme court of Kansas."

We observe in passing, that the views concerning the judiciary act and the effect of the writ of error from this court and the relevant statutes of the United States which were expounded in this passage are not required to be reviewed because they are not necessarily involved in the decision below, since that decision did not rest upon them, but was based upon the operative effect of the state statute, and hence the views expressed as to the United States statutes in the passage quoted must have been adopted simply because they were considered to be illustrative of the principle by which the state statute was made to control. We, therefore, without in the slightest degree admitting their correctness even for argument's sake, pass the conclusions as to the statutes of the United States, expressed in the passages of the report, and shall not recur to them except in so far as, under the principle of *noscitur a sociis*, we may find it convenient to do so as illustrating the fundamental and destructive error embodied in the conclusion of the court as to the operative power of the state statute.

The question is, then, Was the court below right in holding that it had the power, because the Kansas statute so authorized, to assess as against one party to a suit in the [471] Supreme Court of the United States a sum for attorneys' fees for services rendered in that court as against another party to the suit, although such assessment, as we have seen, was not authorized by the law of the United States, but was in conflict with the settled rule in the Supreme Court of the United States? It seems superfluous to put the question, since its very statement conveys of necessity a negative answer. For how, on the face of the question, consistently with the most elementary principles of our constitutional system of government can it be possibly assumed that a state statute could be made operative in the Supreme Court of the United States to the disregard of its settled rule of procedure and of the principles which had guided its conduct from the beginning, directly sustained by express rule adopted under the sanction of Congress?

We might well go no further, but in view of the importance of the subject we briefly advert to one or more of the obvious consequences which would arise from maintaining the principle. It would follow, of course, that the right to freely seek access to the Supreme Court of the United States would cease to exist, since it would be in the power of the states to burden that right to such a degree as to render its exercise impossible. How better could this be illustrated than by the case before

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us; that is, by the necessary implication that there would have been power in the court below if it had deemed it just to do so, to award the claim which was made for $75,000 attorneys' fees for services rendered in this court! Indeed, in the argument at bar it was freely conceded that it may well have been that the mainspring which caused the adoption of the statute relied upon was the deterrent influence which it would produce in the prosecution of writs of error to this court. Thus the argument proceeds: "The railway company refuses to obey; judgment is had against it; it still refuses, it seeks delay; it initiates [472] a writ of error in this court. By this method it makes the suit expensive. . . . It was just this situation that the legislature of Kansas intended to correct. . . ."

And the far-reaching operation of the principle by which the state statute could alone have been made to produce the result attributed to it by the court below is illustrated by the legal conclusions of the operation and effect of the statutes of the United States stated in the report of the commissioner, which was adopted by the court as expressed in the passage which we have previously quoted. This is the case, since the views thus sanctioned are necessarily illustrative of the mental atmosphere by which alone it could have been possible to conceive that the state power extended to regulate the proceedings in the Supreme Court of the United States to the disregard of the express provisions of the act of Congress. A view which is not an overstatement when it is observed that, among other things, the conclusion which was below sustained was that the writ of error from this court and the supersedeas authorized by the act of Congress were not Federal but purely state acts. And, moreover, it was concluded that the exertion by the Supreme Court of the United States under the Constitution and laws of the United States of the power to bring up a case from the state court in order to review it and to grant a supersedeas in order to make that right effective, operated to leave the state court in possession of the case and only to move the record, hence creating a residuum of state power which, as to such case, gave authority to the state court to regulate, certainly as to attorneys' fees, the proceedings in the Supreme Court of the United States.

We shall reason no further, and shall content ourselves with pointing out that in substance and effect the absolute want of foundation for the contention here made has been in express terms foreclosed. For instance, at this term in Harrison v. St. Louis & S. F. R. Co. 232 [473] U. S. 318, ante, 621, 34 Sup. Ct. Rep. 333, a statute of the state of Oklahoma which burdened or impeded the right of free access to the courts of the United States was held to be repugnant to the Constitution, and the destructive effect of such legislation upon our institutions was pointed out. And light on the subject is afforded by a consideration of the ruling in Tullock v. Mulvane, 184 U. S. 497, 46 L. ed. 657, 22 Sup. Ct. Rep. 372. See also Home Ins. Co. v. Morse, 20 Wall. 445, 453, 22 L. ed. 365, 368; Clark v. Bever, 139 U. S. 96, 102, 103, 35 L. ed. 88, 91, 92, 11 Sup. Ct. Rep. 468.

Second. The power of the court below to award damages for the business losses which were suffered after the allowance of the writ of error and the supersedeas.

The contention is that the power did not exist since the effect of the writ of error and the supersedeas was to remove the case to this court, and therefore deprive the court below of the right to consider any act causing damage done after the prosecution of the writ of error and the supersedeas. But, conceding in the fullest degree the asserted effect of the supersedeas, that effect ceased with the affirmance of the judgment by this court, and therefore necessarily opened the way for the court below to consider and determine how far the alleged illegal conduct of the railway company had entailed damages and consequent responsibility. Conceding further that the bond for supersedeas embraced such acts and the resulting damages therefrom, and therefore there was a right to sue on the bond, again the deduction is a *non sequitur* because the right to resort to the bond did not imply an exclusion of the right to sue under the general law to recover damages if the election was made to follow that course. Of course, as there is nothing in this case even suggesting that the award of damages for acts done pending the writ of error in this court was so excessive as to justify the extreme inference that punishment for invoking the right to resort to this court was inflicted, we need not consider the rule which would be applicable in such a contingency.

[474] *Third. The power of the court below to award damages for attorneys' fees for services rendered in the state court.*

The attorneys' fees were allowed by the court below in virtue of a statute which gave such power in case of mandamus proceedings. The construction of this statute which was adopted was not original in this case, but was an application of an interpretation of the statute previously affixed to it, and, indeed, which was made prior to the commencement of the mandamus

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proceedings in question. Carney v. Neeley, 60 Kan. 672, 57 Pac. 527; McClure v. Scates, 64 Kan. 284, 67 Pac. 856. The contention is that as the statute exceptionally allows attorneys' fees in mandamus proceedings against one refusing to obey the peremptory writ of mandamus, and does not allow them in other cases, it contravenes the equal protection of the laws clause of the 14th Amendment and is void. But it is not open to controversy that the 14th Amendment was not intended to deprive the states of their power to establish and regulate judicial proceedings, and that its provisions therefore only restrain acts which so transcend the limits of classification as to cause them to conflict with the fundamental conceptions of just and equal legislation. The proposition here relied upon therefore comes to this: that there is not such a distinction between the extraordinary proceeding by mandamus and the ordinary judicial proceedings as affords a ground for legislating differently concerning the two. But when thus reduced to its ultimate basis, the proposition answers itself, since it cannot be formulated without demonstrating its own unsoundness. If more were needed to be said, it would suffice to direct attention to the distinction which must obtain between that which is ordinary and usual and that which is extraordinary and unusual. Or, to state it otherwise, to call attention to the difference between the duty to perform a ministerial act concerning which there is room neither for the exercise of judgment nor discretion, [475] and the right, on the other hand, to bring into play judgment and discretion as prerequisites to the performance of an act of a different character, and the distinction which justifies the classification made by the statute also answers the argument that the equal protection clause of the 14th Amendment is violated because the allowance of attorneys' fees was not reciprocal. Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, ante, 1135, 34 Sup. Ct. Rep. 678. The ruling in the case last cited also serves to demonstrate the want of merit in the contention that the question here presented is governed by Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

Again, we deem it necessary to observe that the opinion here expressed is confined to the case before us. We do not therefore imply that the reasoning here applied would be controlling in a case where, although the name "mandamus" was preserved, in substance and effect the distinction between that writ in an accurate sense and ordinary procedure would have disappeared.

It follows from what we have said that error was committed in the court below in allowing the items of damages for attorneys' fees, traveling expenses, etc., in the Supreme Court of the United States, and that from a Federal point of view there was no error in the judgment below to the extent that it awarded the damages complained and allowed a claim for attorneys' fees for services rendered in the state court. And to give effect to these conclusions the judgment must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

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[476] UNITED STATES OF AMERICA, Interstate Commerce Commission, et al., Appts.,

v.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY et al. (No. 136.)

UNITED STATES OF AMERICA, Interstate Commerce Commission, et al., Appts.,

v.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY et al. (No. 162.)[1]

(See S. C. Reporter's ed. 476-495.)

Interstate Commerce Commission — powers — rate regulation — long and short hauls.

1. The omission of the substantially similar circumstances and conditions clause from the long and short haul provisions of § 4 of the act of February 4, 1887 (24 Stat. at L. 380, chap. 104, U. S. Comp. Stat. 1901, p. 3155), made by the amendatory act of June 18, 1910 (36 Stat. at L. 547, chap. 309, U. S. Comp. Stat. Supp. 1911, p. 1288), § 8, takes from the carriers their power under the original section primarily to determine whether conditions or circumstances, including competitve conditions, are substantially dissimilar so as to justify the charge of a lesser rate for a longer than for a shorter haul, and vests in the Interstate Commerce Commission as a primary instead of a reviewing function the power to determine upon the facts established, in the exercise of a sound legal discretion, whether, compatibly with a due consideration of the private and public interests concerned, and in view of the preference and discrimination clauses of §§ 2 and 3, a petitioning carrier shall, because of competition,

[1] Reported by the Official Reporter under the title of the "Intermountain Rate Cases."

Note.—On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P.

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or for other adequate reason, be relieved from the operation of the long and short haul clause.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Constitutional law — delegation of power — to Interstate Commerce Commission.

2. Legislative power is not unlawfully delegated to the Interstate Commerce Commission by the act of June 18, 1910, § 8, amending the act of February 4, 1887, § 4, so as to take from the carriers their power under the original section primarily to determine whether conditions or circumstances, including competitive conditions, are substantially dissimilar so as to justify the charge of a lesser rate for a longer than for a shorter haul, and to vest in the Interstate Commerce Commission as a primary instead of a reviewing function the power to determine upon the facts established, in the exercise of a sound legal discretion, whether, compatibly with a due consideration of the private and public interests concerned, and in view of the preference and discrimination clauses of §§ 2 and 3, a petitioning carrier shall, because of competition, or for other adequate reason, be relieved from the operation of the long and short haul clause.

[For other cases, see Constitutional Law, III. b, 3, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — regulating rates — long and short hauls.

3. The absence of any definite rules governing the exercise by the Interstate Commerce Commission of its authority under the act of June 18, 1910, § 8, amending the long and short haul clause of the act to regulate commerce of February 4, 1887, § 4, to determine upon the facts established, in the exercise of a sound legal discretion, whether, compatibly with a due consideration of the private and public interests concerned, and in view of the preference and discrimination clauses of §§ 2 and 3, a petitioning carrier shall, because of dissimilar conditions, or for other adequate cause, be relieved from the operation of the short and long haul clause, does not render the statute invalid as authorizing the arbitrary destruction of the rights of persons or communities.

[For other cases, see Constitutional Law, 608-628, in Digest Sup. Ct. 1908.[

Constitutional law — due process of law — regulating rates.

4. The imperative enforcement of the provisions of the act of February 4, 1887, § 4, as amended by the act of June 18, 1910, § 8, forbidding common carriers to charge a lesser rate for a longer than for a shorter haul, which follows when the Interstate Commerce Commission has discharged the duty imposed upon it by that section to refuse in a proper case an application by a carrier for relief from such long and short haul clause, does not render the statute repugnant to U. S. Const., 5th Amend., as denying due process of law.

[For other cases, see Constitutional Law, 608-628, in Digest Sup. Ct. 1908.]

Commerce court — jurisdiction — over Interstate Commerce Commission.

5. The limitation of the jurisdiction of the commerce court by the act of June 18, 1910, § 1, to that "now possessed" by the circuit courts, did not prevent that court from reviewing an order of the Interstate Commerce Commission made upon an application by carriers under § 8 of that act, amending the act of February 4, 1887, § 4, for relief from the short and long haul clause of that section, since the effect of the amended 4th section was not to create new powers theretofore nonexisting, but simply to redistribute powers already existing, which were then subject to review.

[Matters as to Commerce Court, see Commerce Court, in Digest Sup. Ct. 1913 Supp.]

Commerce court — jurisdiction — over Interstate Commerce Commission.

6. An order of the Interstate Commerce Commission refusing an application made by carriers under the act of June 18, 1910, § 8, amending the act of February 4, 1887, § 4, for relief against the long and short haul clause of that section, is not purely negative, so as to be excluded from the revisory power of the commerce court.

[Matters as to Commerce Court, see Commerce Court, in Digest Sup. Ct. 1913 Supp.]

Injunction — against criminal prosecutions — jurisdiction of commerce court.

7. The jurisdiction given by the act of June 18, 1910, § 1, to the commerce court, of suits to enjoin orders of the Interstate Commerce Commission, may not be defeated, so far as an order made on an application by carriers under § 8 of that act, amending the act of February 4, 1887, § 4, for relief

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R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; and Cleveland C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

On delegation by legislature of power to regulate commerce—see note to State v. Atlantic Coast Line R. Co. 32 L.R.A.(N.S.) 639.

On power of legislature to delegate to commission the right to fix rates to be charged by a public service corporation—see note to Saratoga Springs v. Saratoga Gas. E. L. & P. Co. 18 L.R.A.(N.S.) 713.

On legislative regulation of tolls, rates, and prices, generally—see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177.

On injunction to restrain prosecution of criminal or quasi-criminal nature—see notes to Crighto v. Dahmer, 21 L.R.A. 84; Littleton v. Burgess, 2 L.R.A.(N.S.) 631; Hall v. Dunn, 25 L.R.A.(N.S.) 193; and Denton v. McDonald, 34 L.R.A.(N.S.) 454.

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against the long and short haul clause of that section, is concerned, on the theory that because violations of that section are made criminal, the consequence would be to enjoin a criminal prosecution.

[For other cases, see Injunction, I. 1, 2, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — powers — fixing rates — long and short hauls.

8. The authority of the Interstate Commerce Commission upon an application by carriers under the act of February 4, 1887, § 4, as amended by the act of June 18, 1910, § 8, for relief, because of competitive conditions, from the long and short haul clause of that section, extends to establishing by percentages the relation to be maintained between the lower rate for longer hauls and the higher rates to intermediate points, and to adopting zones of influence for the purpose of the established percentages which, as to such zones, vary or fluctuate upon the basis of the influence of the competition in the designated areas.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

[Nos. 136 and 162.]

Argued February 23, 26, and 27, 1912. Ordered on April 8, 1912, for reargument before full bench. Reargued October 18, 21, and 22, 1912. Decided June 22, 1914.

TWO APPEALS from the United States Commerce Court to review an interlocutory order and final decree enjoining the enforcement of an order of the Interstate Commerce Commission based upon the long and short haul clause of the act to regulate commerce. Reversed and case remanded with directions to dismiss the bill.

See same case below, on motion to dismiss, 191 Fed. 856.

The facts are stated in the opinion.

Former Attorney General **Wickersham** and Assistant Attorney General **Fowler** argued the cause, and, with Mr. Blackburn Esterline, Special Assistant to the Attorney General, filed a brief for the United States on original argument:

The Commission should be bound by no technical rules.

Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 103, 54 L. ed. 946, 955, 30 Sup. Ct. Rep. 651.

In its statement of principles which should guide the Commission in the consideration of applications under the 4th section of the interstate commerce act, the court below erroneously held that when the rate for the longer hauls is forced unreasonably low by competition, the only elements that can enter into the consideration of the rate for the shorter haul are its reasonableness and the extent to which it ought fairly to be influenced by the same competition which forced the rate for the longer haul.

East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209.

The blanket rate system has for many years been in use by the railroad carriers, and its validity was recognized by the Interstate Commerce Commission in Business Men's League v. Atchison, T. & S. F. R. Co. 9 Inters. Com. Rep. 318.

The allegations of the petitions wholly fail to show that the carriers have been deprived of their property without due process of law within the meaning of the Constitution.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148.

The court of commerce had no power in its final decree to enjoin the government officials from prosecuting the carriers for a violation of the 4th section of the statute, or to in any way exempt the carriers from criminal liability under that section.

Re Sawyer, 124 U. S. 200, 210, 211, 31 L. ed. 402, 405, 406, 8 Sup. Ct. Rep. 482; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 218, 47 L. ed. 778, 780, 23 Sup. Ct. Rep. 498; Dobbins v. Los Angeles, 195 U. S. 223, 241, 47 L. ed. 169, 176, 25 Sup. Ct. Rep. 18; Crighton v. Dahmer, 70 Miss. 602, 21 L.R.A. 84, 35 Am. St. Rep. 666, 13 So. 237.

Section 4 of the interstate commerce act is not unconstitutional on the ground that it undertakes to vest in the Interstate Commerce Commission legislative power.

Wayman v. Southard, 10 Wheat. 41, 42, 6 L. ed. 262; Ex parte Reed, 100 U. S. 13–23, 25 L. ed. 538, 539; Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 47 L. ed. 1064, 23 Sup. Ct. Rep. 692; Butte City Water Co. v. Baker, 196 U. S. 119, 49 L. ed. 409, 25 Sup. Ct. Rep. 211; United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480.

In cases wherein this court construed § 4 before amended by the act of 1910, it was recognized that §§ 1, 3, and 4 should all be construed together, and that the principles declared in the 1st and 3d sections should be kept in view by the Commission in determining questions arising under § 4.

Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 674,

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44 L. ed. 309, 319, 20 Sup. Ct. Rep. 209; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516.

Mr. Patrick J. Farrell argued the cause and filed a brief for the Interstate Commerce Commission.

Mr. Stephen A. Foster argued the cause, and, with Messrs. Rush C. Butler, William E. Lamb, and Cornelius Lynde, filed a brief for appellant the Chicago Association of Commerce:

The only legislative power exercized under the 4th section was by Congress when it enacted the general rule of prohibition against charging more for the shorter than for the longer haul. The Commission, when it refuses to grant an application, clearly does not prescribe anything for the future, and does not exercise legislative power. Neither does it exercise such power when it grants the application absolutely or upon conditions. The Commission, like all administrative bodies, cannot act arbitrarily in passing on these applications, but must, pursuant to the statute, make an investigation, and its decision must be in the honest exercise of a reasonable discretion.

Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 20, 51 L. ed. 933, 942, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Grainger v. Douglas Park Jockey Club, 78 C. C. A. 199, 148 Fed. 513, 8 Ann. Cas. 997; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 32 L.R.A. (N.S.) 639, 47 So. 969; State Racing Commission v. Latonia Agri. Asso. 136 Ky. 173, 25 L.R.A. (N.S.) 905, 123 S. E. 681; Atty. Gen. v. Old Colony R. Co. 160 Mass. 62, 22 L.R.A. 112, 35 N. E. 252; Railroad Commission v. Central of Georgia R. Co. 95 C. C. A. 117, 170 Fed. 225; Davis v. Massachusetts, 167 U. S. 43, 42 L. ed. 71, 17 Sup. Ct. Rep. 731; State ex rel. Port Royal Min. Co. v. Hagood, 30 S. C. 519, 3 L.R.A. 841, 9 S. E. 686.

The 4th section is constitutional, even if it be assumed that the power exercised by the Commission is legislative in its nature. In order to sustain the constitutionality of the 4th section it is not necessary to find in the other sections of the act definite standards for the guidance of the Commission in acting under the proviso. We submit that a reasonable discretion is and constitutionally can be vested in the Commission under that section.

Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Monongahela Bridge Co. v. United States, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356; Hannibal Bridge Co. v. United States, 221 U. S. 194, 55 L. ed. 699, 31 Sup. Ct. Rep. 603; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Louisville & N. R. Co. v. Interstate Commerce Commission, 184 Fed. 118; Saratoga Springs v. Saratoga Gas, E. L. & P. Co. 191 N. Y. 123, 18 L.R.A. (N.S.) 713, 83 N. E. 693, 14 Ann. Cas. 606; Red C. Oil Mfg. Co. v. Board of Agriculture, 172 Fed. 695; United States v. Louisville & N. R. Co. 176 Fed. 942; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 32 L.R.A. (N.S.) 639, 47 So. 969; People v. Apfelbaum, 251 Ill. 18, 95 N. E. 995; Grainger v. Douglas Park Jockey Club, 78 C. C. A. 199, 148 Fed. 513, 8 Ann. Cas. 997; Railroad Commission v. Clyde S. S. Co. 5 I. C. C. Rep. 324, 4 Inters. Com. Rep. 120; Wayman v. Southard, 10 Wheat. 1, 42, 6 L. ed. 253, 261.

The same considerations of governmental policy which have always been held sufficient to sustain the delegation, without express limitations, of power legislative in its nature, to municipal corporations, apply with equal force to the delegation of such power to a commission.

United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480; Cooley, Const. Lim. pp. 163, 264; State v. Noyes, 30 N. H. 292; Saratoga Springs v. Saratoga Gas, E. L. & P. Co. 191 N. Y. 123, 18 L.R.A. (N.S.) 713, 83 N. E. 693, 14 Ann. Cas. 606; Brodbine v. Revere, 182 Mass. 598, 66 N. E. 607; 1 Lowell, Government of England, 363; Locke, Civil Government, § 142; Chicago & N. W. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; Oregon R. & Nav. Co. v. Campbell, 173 Fed. 957; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Louisville & N. R. Co. v. Interstate Commerce Commission, 184 Fed. 118; Wayman v. Southard, 10 Wheat. 1, 42, 6 L. ed. 253, 262.

The carriers, having applied to the Commission for relief, cannot attack, by way of a petition for injunction, the relief granted by the Commission, merely because it does

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not go to the "extent" that they asked, and cannot continue to disregard the absolute prohibition of the 4th section when the only authority they have to violate it has been set aside by the commerce court. The commerce court had no jurisdiction of the petitions here filed, and no authority to enter its final decree.

Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; Louisville & N. R. Co. v. Com. 104 Ky. 226, 43 L.R.A. 541, 46 S. W. 707, 47 S. W. 210, 598.

The jurisdiction of the commerce court is limited to such orders of the Interstate Commerce Commission as were within the jurisdiction of the circuit courts of the United States prior to June 18, 1910. The orders here in question could not have been within the jurisdiction of such circuit courts prior to that date, because they were entered by the Commission solely under and by reason of the increased powers vested in the Commission by the amendment adopted by Congress on that date.

Louisville & N. R. Co. v. Behlmer, 175 U. S. 649, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Re Louisville & N. R. Co. 1 I. C. C. Rep. 59, 1 Inters. Com. Rep. 278.

The commerce court erred in holding that the Commission, in granting the application of a carrier for authority in a special case to charge more for the shorter than for the longer haul, must confine its order to absolute rates, and must fix a reasonable rate for the shorter haul. We submit that the Commission has authority to impose, as a condition to the relief granted, the requirement that the rates to be established by the carrier for the longer and the shorter haul shall merely bear a certain relationship to each other, and can reserve the right to disapprove of any particular rates which might be established by the carriers under the permission granted, if, upon complaint or further investigation, they should be found to be unreasonable or discriminatory under the other sections of the act.

Railroad Commission v. Clyde S. S. Co. 5 I. C. C. Rep. 324, 4 Inters. Com. Rep. 120; Re Louisville & N. R. Co. 1 I. C. C. Rep. 31, 1 Inters. Com. Rep. 278; 45 Cong. Rec. pt. 6, p. 6013; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516.

If the Commission, when acting upon applications filed by the carriers under § 4, had fixed for the future reasonable rates for the intermediate points,—as the commerce court holds was the duty of the Commission,—it would have exceeded its power, for it can only initiate rates for the future under the provisions of § 15 upon complaint filed or investigation instituted upon its own motion.

Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; Chicago, R. I. & P. R. Co. v. Interstate Commerce Commission, 171 Fed. 680.

The proper method of measuring the extent to which the carrier should be relieved from the operation of the 4th section, and the extent of the relief to be granted in each particular case, are matters to be determined by the Commission. The Commission's finding as to the extent to which the more distant points can legitimately be favored by the carriers is one of fact, and is not subject to review in the courts.

Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 54 L. ed. 946, 30 Sup. Ct. Rep. 651; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392; 45 Cong. Rec. pt. 6, p. 6124.

The orders of the Commission are not invalid because of their wide scope, or because they establish zones in accordance with the usual practice of the carriers.

Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 54 L. ed. 946, 30 Sup. Ct. Rep. 651, 171 Fed. 680.

Mr. William A. Glasgow, Jr., filed a brief for intervener, the Giroux Consolidated Mines Company.

Mr. F. C. Dillard argued the cause, and, with Messrs. Robert Dunlap, E. C. Lindley, and Maxwell Evarts, filed a brief for appellees:

It is true, doubtless, that some discretion may be constitutionally reposed in executive or administrative officials in some instances, provided the act conferring it affords a rule or standard by which it is to be exercised, and an exercise in violation

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of such standard may be corrected or restrained; but the well known cases establishing this doctrine (Marshall Field & Co. v. Clark, 143 U. S. 649 693, 36 L. ed. 294, 310, 12 Sup. Ct. Rep. 495; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367) all make it plain that the presence of this rule or standard is what saves the act.

In determining the validity of a statute the question is not what is the sense of right or wrong which may influence the body charged with its execution,—is not whether the powers confided to that body would be wisely exercised,—but is whether the statute confers on that body the right to exercise powers which, under the Constitution, cannot be conferred.

Curtin v. Benson, 222 U. S. 78, 87, 56 L. ed. 102, 106, 32 Sup. Ct. Rep. 31.

If a standard by which the Commission must be governed is not found in the law, if arbitrary discretion is granted it, the law is unconstitutional.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 172, 44 L. ed. 417, 420, 20 Sup. Ct. Rep. 336; United States v. Dickson, 15 Pet. 141, 162, 10 L. ed. 689, 697; Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; Richmond v. Model Steam Laundry, 111 Va. 758, 69 S. E. 932; Hagerstown v. Baltimore & O. R. Co. 107 Md. 178, 126 Am. St. Rep. 382, 68 Atl. 493; Schaezlein v. Cabaniss, 135 Cal. 466, 56 L.R.A. 733, 87 Am. St. Rep. 122, 67 Pac. 755; Matthews v. Murphy, 23 Ky. L. Rep. 750, 54 L.R.A. 415, 63 S. W. 785; Tillman v. Cooke, 9 Baxt. 429; State v. Great Northern R. Co. 100 Minn. 445, 10 L.R.A.(N.S.) 250, 111 N. W. 289; Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129; State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co. 18 Ohio St. 262; Anderson v. Manchester F. Assur. Co. 59 Minn. 182, 28 L.R.A. 609, 50 Am. St. Rep. 400, 60 N. W. 1095, 63 N. W. 241; O'Neil v. American F. Ins. Co. 166 Pa. 72, 30 Atl. 945; Dowling v. Lancashire Ins. Co. 92 Wis. 63, 31 L.R.A. 112, 65 N. W. 738; Wyeth v. Board of Health (Wyeth v. Thomas) 200 Mass. 474, 23 L.R.A.(N.S.) 147, 128 Am. St. Rep. 439, 86 N. E. 926; Wayman v. Southard, 10 Wheat. 1, 43, 6 L. ed. 253, 262; Marshall Field & Co. v. Clark, 143 U. S. 649, 692, 36 L. ed. 294, 310, 12 Sup. Ct. Rep. 495; Cooley, Const. Lim. 7th ed. 527.

Where there are competitive conditions making the circumstances of carriage different,—as, for instance, meeting by a longer line at the junction point the competition of a carrier having the shorter line; meeting the competition of a water carrier at the more distant point,—there is no undue discrimination in charging the higher rate for the shorter haul contained within the longer.

East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 18, 45 L. ed. 719, 725, 21 Sup. Ct. Rep. 516.

If the part of the section authorizing the Commission to relieve the carrier from the prohibition of charging more for the short than for the long haul is unconstitutional, then the entire section is unconstitutional.

Trade-Mark Cases, 100 U. S. 82, 98, 25 L. ed. 550, 553; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 565, 46 L. ed. 679, 693, 22 Sup. Ct. Rep. 431.

No rule of construction is better settled than that, in construing a statute, we must look to the old law, to the mischief, and to the remedy. So looking in this instance, we find that the mischief of the old law was in leaving to the carriers the determination, of their own motion, of what are dissimilar circumstances and conditions, and the power to initiate lower rates upon such determination; and in the abuse, or supposed abuse, with which they exercised the discretion granted them; that that discretion, that abuse, grew out of the words, "under substantially similar circumstances and conditions," and the construction placed on these words. It hence follows that the elimination of those words should have no greater effect than is necessary to correct the evil intended to be corrected.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Re Louisville & N. R. Co. 1 I. C. C. Rep. 76, 1 Inters. Com. Rep. 278.

One ground relied upon by the Commission for its order was that the carriers did not prove to its satisfaction that the existing rates to intermediate points were reasonable in and of themselves,— this notwithstanding a presumption which would exist in favor of the legality of the act of the carriers in making and establishing such rates.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 119. 120, 52 L. ed. 712, 713, 28 Sup. Ct. Rep. 493; Platt v. Lecocq, 15 L.R.A.(N.S.) 558, 85 C. C. A. 621, 158 Fed. 730.

If, to sustain the validity of the amended 4th section, recourse must be had to other provisions of the statute to find the principle or standard which is to guide the Commission in the determination of applications, then the principle of the 3d section

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alone is pertinent or furnishes any such guide or standard.

Noyes, Am. R. Rates, p. 111.

Under either section competition has always been regarded as a potent factor, where it existed, in justifying the carrier in making a lower rate for a longer haul to a competitive point than for a shorter haul to a noncompetitive point, or in apparently favoring the competitive point in its adjustment of rates, while such favor was not extended to the noncompetitive point.

Interstate Commerce Commission v. Louisville & N. R. Co. 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. Rep. 687; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516.

In fixing their own rates they (the carriers) may take into account competition with other carriers, provided only that the competition is genuine, and not a pretense.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 119, 52 L. ed. 712, 28 Sup. Ct. Rep. 493.

Of course, under the 4th section, prior to its amendment, upon complaint of a shipper or locality of an alleged violation of the provisions of that section, the burden was upon the complainant to show a lack of justifying circumstances and conditions. It may be admitted that the purpose of the amendment of that section was to throw the burden and necessity upon the carrier to make an application which, under the old law, was permissible, but not necessary, and that by striking out words which vested the initiative in the carrier, the burden is now placed upon the carrier to justify the making of a lower rate for a longer than for a shorter distance over the same line, in the same direction. That justification, however, is shown when it appears that a lower rate is made as a matter of competition,—that the rate to the more distant point would be controlled by conditions not operating at the intermediate point or points. The degree of competition between carriers existing at the coast point, and which does not exist at the nearer point, is a justification by which lower rates are charged at coast points, and demonstrates that the action of the carriers does not give to the more distant point an undue preference, or subject the intermediate points to an undue prejudice, because the preference and the prejudice are due to the most potent factor operating in the adjustment of rates,—namely, competition.

F. H. Peavey & Co. v. Union P. R. Co 176 Fed. 425, affirmed in 222 U. S. 48, 56 L. ed. 88, 32 Sup. Ct. Rep. 22; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516.

The construction which this court has always placed upon the 3d section, and which must obtain also in construing the 4th section, if that section is to be sustained, is not affected by any subsequent legislation of Congress.

Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 48, 56 L. ed. 88, 32 Sup. Ct. Rep. 22.

A discrimination between localities is just when the advantages of the one place over the other produce conditions which render discrimination by the carrier necessary in order to obtain traffic. In such cases there is no unlawful discrimination within the meaning of the act, and there is nothing then condemned by the act. In fact, such action of the carrier does not fall at all within the invidious designation of discrimination.

Noyes, Am. R. Rates, pp. 90, 91, 93, 94, 112.

Where the point of destination may be reached by water carriers, all freight moving there has to meet the competition of water, whether it originates at a place from which it might be borne by water, or at a point remote therefrom; and the law intends that the rate from the inland point may meet this competition without any prejudice to intermediate rates.

Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209.

Under the 4th section the Commission is without power to fix differentials between the intermediate and the terminal rates.

Interstate Commerce Commission v. Nashville, C. & St. L. R. Co. 57 C. C. A. 224, 120 Fed. 934; Interstate Commerce Commission v. Southern R. Co. 122 Fed. 800; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516.

The Interstate Commerce Commission is a subordinate governmental body. It is a rule of construction that the statute creating a subordinate governmental body, and clothing it with powers, is strictly construed against the body thus created, and it is incumbent upon whosoever contends for such power in such a body to justify the contention by pointing out the clear and unequivocal language granting the power.

Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; Interstate Commerce Commission v. Harriman, 211 U. S. 407, 53 L. ed. 253, 29 Sup.

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Ct. Rep. 115; Burnham, H. M. Dry Goods Co. v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 54 L. ed. 946, 30 Sup. Ct. Rep. 651.

Very applicable to the Commission's attempt to adjust all terminal and all intermediate rates by the establishment of a set of arbitrary percentages is the language of the court in Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

The commerce court had power, as incidental to its decree setting aside and enjoining the orders of the Commission, to also, in the meantime, restrain the government officials from prosecuting carriers for a violation of the 4th section of the statute.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

Messrs. Maxwell Evarts, Gardiner Lathrop, Charles W. Bunn, Charles Donnelly, Robert Dunlap, E. C. Lindley, and F. C. Dillard, also filed a brief for appellees:

No one can examine the debates attending the passage of the amendment in the light of the decisions of this court in the Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; and East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516, without reaching the conviction that Congress intended to take from the carriers their unrestrained freedom to make lower rates to a more remote point when circumstances and conditions were different there from those existing at a nearer point, and to require them in the first instance to show cause for doing so.

Mr. F. W. M. Cutcheon argued the cause, and, with Messrs. James C. Jeffery and Kerner Easton, filed a brief for appellees the Denver & Rio Grande and Western Pacific Railway Companies:

In order lawfully to confer upon an executive officer or an administrative body the power to prescribe rules for future conduct for individuals that shall have the force of law, the purpose of the legislature as to the course to be pursued by the officer or body vested with the delegated power must be sufficiently indicated to enable the delegate, in exercising the power, and the courts, in determining whether the delegated authority has been exceeded, to determine for themselves, with reasonable assurance, whether any given action accords with such specifically indicated purpose; in other words, so that when the action of the delegate shall have been taken, it will be possible to demonstrate that it is or is not an expression of the legislative intent as specifically indicated. Sometimes this intent is broadly stated in the form of a purpose to promote the public health or public safety or public order in particular respects or ways, but always some comprehensive test is and must be afforded. A lawful delegation never is and never can be so broad as to confer the function of protecting the whole public interest in a given subject as the judgment of the officer or administrative body may deem wisest; for the discharge of that function is the very essence of legislative power and discretion.

Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Schaezlein v. Cabaniss, 135 Cal. 466, 56 L.R.A. 733, 87 Am. St. Rep. 122, 67 Pac. 755; Noel v. People, 187 Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; Dowling v. Lancashire Ins. Co. 92 Wis. 63, 31 L.R.A. 112, 65 N. W. 738.

The carrier is entitled to secure and carry traffic, wherever and however possible, if it but observe the restrictions of the act.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

The carriers were entitled to the presumptions (1) that the existing published rates to the intermediate points are no higher than reasonable, (2) that the existing published rates to the terminal points are not so low as to be unremunerative, and (3) that the rates to the terminal points are as low as they are as the result of the operation of forces which the carriers cannot control if they are to carry the traffic to which the rates apply.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493.

Irrespective of the question whether § 4, as amended, involves an unconstitutional delegation of legislative power, the grant of the uncontrolled power supposed would be unlawful as an attempt to vest a branch of the executive with an arbitrary power not contemplated by our Constitution, or admissible as a part of our governmental system, the exercise of such power being, in a case such as that at bar, a taking of property without due process of law.

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Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Dowling v. Lancashire Ins. Co. 92 Wis. 63, 31 L.R.A. 112, 65 N. W. 738; Noel v. People, 187 Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616.

The option to disobey the command of the section and to insist upon its unconstitutionality, in the face of subsequent prosecution, was purely illusory.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Ex parte Wood, 155 Fed. 190; Hunte v. Wood, 209 U. S. 205, 52 L. ed. 747, 28 Sup. Ct. Rep. 472.

The order made by the Interstate Commerce Commission, in so far as it provides that rates from points of origin in zone 1 to so-called intermediate points shall not be higher than rates from the same points of origin to Pacific Coast terminal points, is invalid,—being grounded upon a deliberate disregard of competitive conditions which the carriers are entitled under the law to have considered in the determination of their applications.

Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Interstate Commerce Commission v. Louisville & N. R. Co. 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. Rep. 687; Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22.

When the Commission, in arriving at a determination concerning an alleged discrimination, refuses or fails to take into consideration any matter which, under a proper view of the law, should have entered into the determination of the question, it is an error of law which results in rendering its action in excess of its powers, and amounts to an abuse of power necessitating an annulment of its order and a reconsideration of the subject.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700.

The carriers had, and have, an absolute right to a determination of the applications in accordance with law; to demand that the Commission's discretion shall be exercised within the limitations prescribed by the act to regulate commerce, and upon a consideration of all the facts that, in a proper view of the law, bear upon the question whether the existing rates involve any undue or unreasonable discrimination.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Louisville & N. R. Co. v. Behlmer, 175 U. S. 676, 44 L. ed. 319, 20 Sup. Ct. Rep. 209.

Former Attorney General Wickersham and Assistant Attorney General Fowler argued the cause, and, with Mr. Blackburn Esterline, Special Assistant to the Attorney General, filed a brief for the United States on reargument:

Under the facts found by the Commission, the adjustment of rates between the terminal and intermediate points which the carriers seek to maintain, but which were condemned by the Commission, is unjustly discriminatory under § 4, as originally enacted.

Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516.

The burden of proof vested with the carriers before the amendment.

1 I. C. C. Rep. 291, 1 Inters. Com. Rep. 663; Judson, Interstate Commerce, § 293.

In declaring that the carrier should not make a greater short-haul charge when the circumstances and conditions were substantially similar, the statute, before amendment, also implied that the carrier might make, and that the Commission should allow it to make, the greater charge for the shorter haul when the circumstances and conditions of the two hauls were substantially dissimilar.

East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516.

It cannot be gainsaid that whatever limitation was placed on the Commission by

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the omitted phrase was removed by its omission, and further, that the Commission's field of vision was materially narrowed by that phrase.

In considering whether any particular locality is subject to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209.

Mr. **Patrick J. Farrell** argued the cause for the Interstate Commerce Commission.

Messrs. Rush C. Butler, William E. Lamb, Stephen A. Foster, and Cornelius Lynde filed a brief for appellant the Chicago Association of Commerce:

Counsel for the Denver & Rio Grande so limit the power vested in the Commission as to deprive it of all discretion in its exercise.

The Styria v. Morgan, 186 U. S. 1, 46 L. ed. 1027, 22 Sup. Ct. Rep. 731.

The tests laid down by counsel for the Denver & Rio Grande for determining whether the amended 4th section contains an unconstitutional delegation of legislative power are not the correct ones.

United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480; Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495.

The commerce court had no jurisdiction to entertain the petition because the order of the Interstate Commerce Commission in the 4th section case was negative in character.

Proctor & G. Co. v. United States, 225 U. S. 282, 56 L. ed. 1091, 32 Sup. Ct. Rep. 761.

Mr. **F. C. Dillard** argued the cause and filed a brief for appellees.

Messrs. **F. W. M. Cutcheon** and **Charles Donnelly** also argued the cause for appellees.

Mr. Alfred P. Thom filed a brief as *amicus curiæ:*

Under the law as it was before the amendment, the carrier was entitled to the initiative in determining this question, but its determination might, upon application to the Commission, be overruled.

Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 168, 42 L. ed. 423, 18 Sup. Ct. Rep. 45.

Under the law as changed, the carrier cannot take the initiative in respect to it, but the question must in the first instance be determined by the Commission. The question, however, to be determined in both cases, is the same; only the method of determination is altered by the amendment.

A requirement that a rate to be authorized by the Commission shall be just and reasonable is a sufficient primary standard; and an exercise of power by the Commission, under such authority, will not amount to the exercise of legislative power.

Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; United States v. Heinszen, 206 U. S. 370, 51 L. ed. 1098, 27 Sup. Ct. Rep. 742, 11 Ann. Cas. 688; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Monongahela Bridge Co. v. United States, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356.

That the foregoing interpretation of this amendment is proper is strengthened by the consideration that any other construction would render the act unconstitutional.

United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 407, 408, 53 L. ed. 836, 848, 849, 29 Sup. Ct. Rep. 527.

The decisions which hold that all the material facts surrounding the service, including the existence of substantial competition, whether from water carriers or other sources, must be considered, are, in effect, decisions establishing the principle that a rate made lower for a longer than for a shorter haul by substantial competition is, to the extent that it is influenced by such competition, just and reasonable.

Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; Interstate Commerce Commission v. Louisville & N. R. Co. 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. Rep. 687; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493.

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In addition to the interpretation above given of the amendment of June 18, 1910, one other construction may be suggested. This construction is that the proviso by which authority is conferred upon the Commission to permit the making of a smaller charge for a longer than a shorter haul amounts to an absolute discretion in the Commission, unlimited by any rule laid down by Congress, and subject to no supervision. It is believed that any such construction of the amendment would make it unconstitutional. It would be either a delegation by Congress to the Commission of power to make rates without providing any rule to be administered by it, or it would be a delegation by Congress to the Commission of authority, in its unlimited, unqualified, and unregulated discretion, to suspend a legislative act of Congress. To do one or the other would involve the exercise of a legislative power by the Commission. The making of rates is essentially a legislative act.

Prentis v. Atlantic Coast Line Co. 211 U. S. 226, 53 L. ed. 158, 29 Sup. Ct. Rep. 67; Marshall Field & Co. v. Clark, 143 U. S. 693, 36 L. ed. 310, 12 Sup. Ct. Rep. 495; Union Bridge Co. v. United States, 204 U. S. 382, 51 L. ed. 532, 27 Sup. Ct. Rep. 367.

Moreover, if the power expressed in this proviso to § 4 is purely arbitrary, and is controlled by no regulation or restraint, it is unconstitutional for that reason alone. The very idea that one man may be compelled to hold his property, or any material right essential to its enjoyment, at the mere will or caprice of another, is intolerable in any country where freedom prevails, and is contrary to the Constitution.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Baltimore v. Redecke, 49 Md. 217, 33 Am. Rep. 239; Ex parte Sing Lee, 96 Cal. 354, 24 L.R.A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; Sioux Falls v. Kirby, 6 S. D. 62, 25 L.R.A. 621, 60 N. W. 156; Richmond v. Dudley, 129 Ind. 112, 13 L.R.A. 587, 28 Am. St. Rep. 180, 28 N. E. 312; State v. Mahner, 43 La. Ann. 496, 9 So. 480.

The economic law which controls the movement of traffic under the dissimilar circumstances and conditions produced by controlling forces in respect to the longer as compared to the shorter haul is so well recognized and is so potential that it is not believed that the Supreme Court will hold that the proviso in § 4 is separable from the remainder of the statute.

Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; Interstate Commerce Commission v. Louisville & N. R. Co. 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. Rep. 687; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493.

The use of property is property, and to deprive a carrier of the use of its property is to deprive it of the property itself.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 458, 33 L. ed. 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 445, 38 L. ed. 1046, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122; Monongahela Nav. Co. v. United States, 148 U. S. 328, 47 L. ed. 468, 13 Sup. Ct. Rep. 622; Re Marshall, 102 Fed. 323.

It is a sound principle of economics, and is admitted by both the Interstate Commerce Commission and by the Supreme Court of the United States, that in no case where substantial competition exists can a railroad property be used except in recognition of, and in obedience to, the law of competition.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 236, 40 L. ed. 953, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Louisville & N. R. Co. v. Behlmer, 175 U. S. 653, 44 L. ed. 311, 20 Sup. Ct. Rep. 209; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516.

It is likewise true that this use of a carrier's property, in accordance with and in obedience to an irresistible law of economics, is right in itself, and is in the interest of the public.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 218, 40 L. ed. 947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

The main fact which makes the participation of the rail carrier in this competitive traffic to the interest of the public is that, if a carrier is excluded from any material portion of traffic which pays a margin of profit, then the loss which such exclusion involves must be put on the remaining portion of its traffic, and increase the

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cost to the public interested in such remainder.

East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 20, 45 L. ed. 726, 21 Sup. Ct. Rep. 516.

Mr. Chief Justice White delivered the opinion of the court:

We shall seek to confine our statement to matters which are essential to the decision of the case. The provisions of § 4 of the act to regulate commerce [24 Stat. at L. 380, chap. 104, U. S. Comp. Stat. 1901, p. 3155], dealing with what is known as the long and short haul clause, the power of [478] carriers because of dissimilarity of circumstances and conditions to deviate from the exactions of such clause, and the authority of the Interstate Commerce Commission in relation to such subjects, were materially amended by the act of June 18, 1910, chap. 309, 36 Stat. at L. 547, U. S. Comp. Stat. Supp. 1911, p. 1288. Following the form prescribed by the Commission after the amendment in question, the seventeen carriers who are appellees on this record made to the Interstate Commerce Commission their "application for relief from provisions of 4th section of amended commerce act in connection with the following tariffs." The tariffs annexed to the applications covered the whole territory from the Atlantic seaboard to the Pacific coast and the Gulf of Mexico, including all interior points, and embracing practically the entire country, and the petition asked the Interstate Commerce Commission for authority to continue all rates shown on the tariffs from the Atlantic seaboard to the Pacific coast, and from the Pacific coast to the Atlantic seaboard, and to and from interior points lower than rates concurrently in effect from and to intermediate points. It was stated in the petition: "This application is based upon the desire of the interested carriers to continue the present method of making rates lower at the more distant points than at the intermediate points; such lower rates being necessary by reason of competition of various water carriers and of carriers partly by water and partly by rail operating from Pacific coast ports to Atlantic seaboard ports; competition of various water carriers operating to foreign countries from Pacific coast ports; and competition of the products of foreign countries with the products of the Pacific coast; competition of the products of Pacific coast territory with the products of other sections of the country; competition of Canadian rail carriers not subject to the interstate commerce act; competition of the products of Canada moving by Canadian carriers with the products of the United States; rates established *via* [479] the shorter or more direct routes, but applied also *via* the longer or more circuitous routes." After full hearing the Commission refused to grant unqualifiedly the prayer of the petition, but entered an order permitting in some respects a charge of a lower rate for the longer haul to the Pacific coast than was asked for intermediate points provided a proportionate relation was maintained between the lower rate for the longer haul to the Pacific coast and the higher rate to the intermediate points, the proportion to be upon the basis of percentages which were fixed. For the purposes of the order in question the Commission in substance adopted a division of the entire territory into separate zones, which division had been resorted to by the carriers for the purposes of the establishment of the rates in relation to which the petition was filed. Refusing to comply with this order the carriers commenced proceedings in the commerce court praying a decree enjoining the enforcement of the 4th section as amended on the ground of its repugnancy to the Constitution of the United States, and of the order as being in any event violative of the amended section as properly construed. An interlocutory injunction was ordered. The defendants moved to dismiss, and, on the overruling of the motions, appealed from the interlocutory order, the case being No. 136. Subsequently, upon the election of the defendants to plead no further, a final decree was entered and appealed from, that appeal being No. 162.

It suffices at this moment to say that all the contentions which the assignments of error involve and every argument advanced to refute such contentions, including every argument urged to uphold, on the one hand, or to overthrow, on the other, the action of the Commission, as well as every reason relied upon to challenge the action of the court or to sustain its judgment, are all reducible to the following propositions:

(a) The absolute want of power of the court below to [480] deal with the subject involved in the complaint because controversies concerning the 4th section of the act to regulate commerce of the nature here presented were, by an express statutory provision, excluded from the cognizance of the court below. (b) That even if this be not the case, the action of the Commission which was complained of was purely negative, and therefore not within the cognizance of the court, because not inherently justiciable. (c) That, correctly interpreting the 4th section, the order made by the Commission was absolutely void because wholly beyond the scope of any power con-

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ferred by the 4th section as amended. (d) That even if, in some respects, the order of the Commission was within the reach of its statutory power, there was intermingled in the order such an exertion of authority not delegated as to cause the whole order to be void. (e) That the order of the Commission was void even if the 4th section be interpreted as conferring the authority which the Commission exerted, since, under that assumption, the 4th section as amended was repugnant to the Constitution.

All the propositions, even including the jurisdictional ones, are concerned with and depend upon the construction of the 4th section as amended, and we proceed to consider and pass upon that subject and every other question in the case under four separate headings: 1, the meaning of the statute; 2, its constitutionality; 3, the jurisdiction of the court; 4, the validity of the order in the light of the statute as interpreted.

1. *The meaning of the statute.*

We reproduce the section as originally adopted and as amended, passing a line through the words omitted by the amendment, and printing in italics those which were added by the amendment, thus at a glance enabling the section to be read as it was before and as it now stands after amendment.

"Sec. 4. That it shall be unlawful for any common carrier [481] subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, ~~under substantially similar circumstances and conditions~~, for a shorter than for a longer distance over the same line *or route* in the same direction, the shorter being included within the longer distance, *or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act;* but this shall not be construed as authorizing any common carrier within the terms of this Act to charge ~~and~~ *or* receive as great compensation for a shorter as for a longer distance: Provided, however, That upon application to the *Interstate Commerce* Commission ~~appointed under the provisions of this Act~~, such common carrier may in special cases, after investigation ~~by the Commission~~, be authorized *by the Commission* to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of ~~this Act.~~ *Provided, further, That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.*

"Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

[482] Before considering the amended text we state briefly some of the more important requirements of the section before amendment and the underlying conceptions of private right, of public duty and policy which it embodies, because to do so will go a long way to remove any doubt as to the amended text, and will moreover serve to demonstrate the intent of the legislative mind in enacting the amendment.

Almost immediately after the adoption of the act to regulate commerce in 1887 the Interstate Commerce Commission, in considering the meaning of the law and the scope of the duties imposed on the Commission in enforcing it, reached the conclusion that the words "under substantially similar circumstances and conditions" of the 4th section dominated the long and short haul clause and empowered carriers to primarily determine the existence of the required dissimilarity of circumstances and conditions, and consequently to exact in the event of such difference a lesser charge for the longer than was exacted for the shorter haul, and that competition which materially affected the rate of carriage to a particular point was a dissimilar circumstance and condition within the meaning of the act. We say primarily, because of course it was further recognized that the authority existing in carriers to the end just stated was subject to the supervision and control of the Interstate Commerce Commission in the exertion of the powers conferred upon it by the statute, and especially in view of the authority stated in the 4th section. In considering the act comprehensively it was pointed out that the generic provisions against preference and discrimination expressed in the 2d and 3d sections of the act were all-embracing, and were therefore operative upon the 4th section as well as upon all other pro-

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visions of the act. But it was pointed out that where, within the purview of the 4th section, it had lawfully resulted that [483] the lesser rate was charged for a longer than was exacted for a shorter haul, such exaction, being authorized, could not be a preference or discrimination and therefore illegal. Re Louisville & N. R. Co. 1 I. C. C. Rep. 31, 1 Inters. Com. Rep. 278. These comprehensive views announced at the inception as a matter of administrative construction were subsequently sustained by many decisions of this court, and to the leading of such cases we refer in the margin.[1] We observe, moreover, that in addition it came to be settled that where competitive conditions authorized carriers to lower their rates to a particular place, the right to meet the competition by lowering rates to such place was not confined to shipments made from the point of origin of the competition, but empowered all carriers, in the interest of freedom of commerce and to afford enlarged opportunity to shippers, to accept, if they chose to do so, shipments to such competitive points at lower rates than their general tariff rates: a right which came aptly to be described as "market competition" because the practice served to enlarge markets and develop the freedom of traffic and intercourse. It is to be observed, however, that the right thus conceded was not absolute, because its exercise was only permitted provided the rates were not so lowered as to be nonremunerative, and thereby cast an unnecessary burden upon other shippers. East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516. As the statute as thus construed imposed no obligation to carry to the competitive point at a rate which was less than a reasonable one, it is obvious that the statute regarded the rights of private ownership, and sought to impose no duty conflicting therewith. It is also equally clear that in permitting the carrier [484] to judge primarily of the competitive conditions, and to meet them at election, the statute lodged in the carrier the right to exercise a primary judgment concerning a matter of public concern broader than the mere question of the duty of a carrier to carry for a reasonable rate on the one hand, and of the right of the shipper, on the other, to compel carriage at such rate, since the power of primary judgment which the statute conferred concerned in a broad sense the general public interest with reference to both persons and places,—considerations all of which, therefore, in their ultimate aspects, came within the competency of legislative regulation. It was apparent that the power thus conferred was primary, not absolute, since its exertion by the carrier was made by the statute the subject both of administrative control and ultimate judicial review. And the establishment of such control in and of itself serves to make manifest the public nature of the attributes conferred upon the carrier by the original 4th section. Indeed, that in so far as the statute empowered the carrier to judge as to the dissimilarity of circumstances and conditions for the purpose of relief from the long and short haul clause, it but gave the carrier the power to exert a judgment as to things public, was long since pointed out by this court. Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 218, 40 L. ed. 940, 947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

With the light afforded by the statements just made we come to consider the amendment. It is certain that the fundamental change which it makes is the omission of the substantially similar circumstances and conditions clause, thereby leaving the long and short haul clause in a sense unqualified except in so far as the section gives the right to the carrier to apply to the Commission for authority "to charge less for longer than for shorter distances for the transportation of persons or property," and gives the Commission authority from time to time "to prescribe the extent to which such designated common carrier may [485] be relieved from the operation of this section." From the failure to insert any word in the amendment tending to exclude the operation of competition as adequate under proper circumstances to justify the awarding of relief from the long and short haul clause, and there being nothing which minimizes or changes the application of the preference and discrimination clauses of the 2d and 3d sections, it follows that in substance the amendment intrinsically states no new rule or principle, but simply shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of public power previously lodged in them and vests

[1] Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516.

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it in the Commission as a primary instead of a reviewing function. In other words, the elements of judgment, or, so to speak, the system of law by which judgment is to be controlled, remains unchanged, but a different tribunal is created for the enforcement of the existing law. This being true, as we think it plainly is, the situation under the amendment is this: Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist, because to do so, in the absence of some authority, would not only be inimical to the provision of the 4th section, but would be in conflict with the preference and discrimination clauses of the 2d and 3d sections. But while the public power, so to speak, previously lodged in the carrier, is thus withdrawn and reposed in the Commission, the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved, and, if not, is, in any event, by necessary implication, granted. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body, in the exercise of a sound [486] legal discretion, as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned, and in view of the preference and discrimination clauses of the 2d and 3d sections.

2. *The alleged repugnancy of the section as amended to the Constitution.*

But if the amendment has this meaning, it is insisted that it is repugnant to the Constitution for various reasons which, superficially considered, seem to be distinct, but which really are all so interwoven that we consider and dispose of them as one. The argument is that the statute, as correctly construed, is but a delegation to the Commission of legislative power which Congress was incompetent to make. But the contention is without merit. Marshall Field Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; United States v. Heinszen, 206 U. S. 370, 51 L. ed. 1098, 27 Sup. Ct. Rep. 742, 11 Ann. Cas. 688; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Monongahela Bridge Co. v. United States, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356. We do not stop to review these cases because the mere statement of the contention, in the light of its environment, suffices to destroy it. How can it otherwise be since the argument as applied to the case before us is this: that the authority in question was validly delegated so long as it was lodged in carriers, but ceased to be susceptible of delegation the instant it was taken from the carriers for the purpose of being lodged in a public administrative body? Indeed, when it is considered that, in last analysis, the argument is advanced to sustain the right of carriers to exert the public power which it is insisted is not susceptible of delegation, it is apparent that the contention is self-contradictory, since it reduces itself to an effort to sustain the right to delegate a power by contending that the power is not capable of being delegated. In addition, however, before passing from the proposition, we observe that, when rightly appreciated, the contention but challenges every decided case since the [487] passage of the act to regulate commerce in 1887, involving the rightfulness of the exertion by a carrier of the power to meet competition as a means of being relieved from the long and short haul clause of the 4th section before its amendment. While what we have already said answers it, because of its importance we notice another contention. As the power of carriers to meet competition, and the relation of that right to noncompetitive places, may concern the fortunes of numberless individuals and the progress and development of many communities, it is said, to permit authority to be exerted concerning the subject without definite rules for its exercise will be to destroy the rights of persons and communities. This danger, the argument proceeds, is not obviated by declaring that the provisions of the 2d and 3d sections as to undue preference and discrimination apply to the 4th section, since, without a definition of what constitutes undue preference and discrimination, no definite rule of law is established, but whim, caprice, or favor will, in the nature of things, control the power exerted. And it is argued that this view is not here urged as the mere result of conjecture, since, in the report of the Commission in this case, it was declared in unequivocal terms as the basis of the order entered that the statute vested in the Commission a wide and undefined discretion by virtue of which it became its duty to see to it that communities and individuals obtained fair opportunities, that discord was allayed, and commercial justice everywhere given full play. Let it be conceded that the language relied upon would have the far-reaching signif-

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cance attributed to it if separated from its context, we think when it is read in connection with the report of which it but forms a part, and moreover, when it is elucidated by the action taken by the Commission, there is no substantial ground for holding that, by the language referred to, it was entitled to declare that the 4th section as amended conferred the uncontrolled [488] exuberance of vague and destructive powers which it is now insisted was intended to be claimed. In any event, however, we must be governed by the statute and its plain meaning. After all has been said, the provisions as to undue preference and discrimination, while involving, of course, a certain latitude of judgment and discretion, are no more undefined or uncertain in the section as amended than they have been from the beginning; and therefore the argument comes once more to the complaint that because public powers have been transferred from the carriers to the Commission, the wrongs suggested will arise. Accurately testing this final result of the argument it is clear that it exclusively rests upon convictions concerning the impolicy of having taken from carriers, intimately and practically acquainted as they are with the complex factors entering into rate making, and moreover impelled to equality of treatment as they must be by the law of self-interest operating upon them as a necessary result of the economic forces to which they are subjected, and having lodged the power in an official administrative body which, in the nature of things, must act, however conscientiously, from conceptions based upon a more theoretical and less practical point of view. But this does not involve a grievance based upon the construction or application of the 4th section as amended, but upon the wisdom of the legislative judgment which was brought into play in adopting the amendment,—a subject with which we have nothing in the world to do. It is said in the argument on behalf of one of the carriers that as in substance and effect the duty is imposed upon the Commission in a proper case to refuse an application, therefore the law is void because in such a contingency the statute would amount to an imperative enforcement of the long and short haul clause and would be repugnant to the Constitution. It is conceded in the argument that it has been directly decided by this court that a general enforcement [489] of the long and short haul clause would not be repugnant to the Constitution (Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95), but we are asked to reconsider and overrule the case, and thus correct the error which was manifested in deciding it. But we are not in the remotest degree inclined to enter into this inquiry, not only because of the reasons which were stated in the case itself, but also because of those already expounded in this opinion, and for an additional reason, which is, that the contention by necessary implication assails the numerous cases which, from the enactment of the act to regulate commerce down to the present time, have involved the adequacy of the conditions advanced by carriers for justifying their departure from the long and short haul clause. We say this because the controversies which the many cases referred to considered and decided by a necessary postulate involved an assertion of the validity of the legislative power to apply and enforce the long and short haul clause. How can it be otherwise since, if this were not the case, all the issues presented in the numerous cases would have been merely but moot, affording, therefore, no basis for judicial action, since they would have had back of them no sanction of lawful power whatever.

3. *The jurisdiction of the court.*

The argument on this subject is twofold: (a) that as by the act creating the commerce court, that court was endowed only with the jurisdiction "now possessed by circuit courts of the United States and the judges thereof," and provided that "nothing contained in this act shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the commerce court;" and as new powers were created by the subsequent amendment of the 4th section, therefore the commerce court had no jurisdiction. But we pass any extended discussion of [490] the proposition because it is completely disposed of by the construction which we have given to the amended section, since that construction makes it clear that the effect of the amended 4th section was not to create new powers theretofore nonexisting, but simply to redistribute the powers already existing and which were then subject to review. The argument affords another manifestation of the tendency to which we have already directed attention in this case to seek to maintain and aggrandize a power by insisting upon propositions which, if they were accepted, would raise the gravest question as to the constitutional validity of the asserted power,—a question which we need not at all consider in view of the want of foundation for the exercise of the power claimed in the light of the plain meaning of the act to the contrary which we have already pointed out.

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(b) The second contention as to jurisdiction yet further affords an illustration of the same mental attitude, since it rests upon the assumption that the order of the Commission refusing to grant the request of the carrier made under the 4th section was purely negative, and hence was not subject to judicial inquiry. The contention therefore presupposes that the power which, from the beginning, has been the subject of judicial review, by the mere fact of its transfer to the Commission was made arbitrary. Besides, the proposition disregards the fact that the right to petition the Commission conferred by the statute is positive, and while the refusal to grant it may be in one sense negative, in another and broader view it is affirmative, since it refuses that which the statute in affirmative terms declares shall be granted if only the conditions which the statute provides are found to exist. It is, of course, true, as pointed out in Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 470, 54 L. ed. 280, 287, 30 Sup. Ct. Rep. 155, and since repeatedly applied; that findings of fact made by the Commission within the scope of its administrative [491] duties must be accepted in case of judicial review, but that doctrine, as was also pointed out, does not relieve the courts in a proper case from determining whether the Constitution has been violated or whether statutory powers conferred have been transcended, or have been exercised in such an arbitrary way as to amount to the exertion of authority not given,—doctrines which but express the elementary principle that an investiture of a public body with discretion does not imply the right to abuse, but, on the contrary, carries which it as a necessary incident the command that the limits of a sound discretion be not transcended; which, by necessary implication, carries with it the existence of judicial power to correct wrongs done by such excess. And without pausing to particularly notice it, we observe in passing that what has just been said is adequate to meet the contention that, as violations of the 4th section were made criminal, no power existed to enjoin an order of the Commission made under that section because the consequence would be to enjoin criminal prosecution. The right which, as we have seen, the act gives to test the validity of orders rendered under the 4th section, is not to be destroyed by a reference to a provision of that section. The two must be harmoniously enforced.

4. *The validity of the order in the light of the statute as interpreted.*

The order is in the margin.[1] The main insistence is [492] that there was no power after recognizing the existence of competition and the right to charge a lesser rate to the competitive point than to intermediate points to do more than fix a reasonable rate to the intermediate points; that is to say, that under the power transferred to it by the section as amended, the Commission was limited to [493] ascertaining the existence of competition, and to authorizing the carrier to meet it, without any authority to do more than exercise its general powers concerning the reasonableness of rates at all points. But this proposition is directly in conflict with the statute as we have construed it, and with the plain purpose and intent manifested by its enactment. To uphold the proposition it would be necessary to say that the powers which were essential to the vivification and beneficial realization of the authority transferred had evaporated in the process of transfer, and hence that the power perished as the result of the act by which it was conferred. As the prime [494] object of the transfer was to vest the Commission, within the scope of the discretion imposed, and subject, in the nature of things, to the limitations arising from the character of the duty exacted and flowing from the other provisions of the act, with authority to consider competitive conditions and their relation to persons and places, necessarily there went with the power the right to do

[1] Fourth Section Order No. 124.

In the matter of the applications Nos. 205, 342, 343, 344, 349, 350, and 352, on behalf of the Transcontinental Freight Bureau, by R. H. Countiss, agent, for relief from the provisions of the 4th section of the act to regulate commerce as amended June 18, 1910, with respect to rates made from eastern points of shipment which are higher to intermediate points than to Pacific coast terminals.

Commodity Rates.

These applications, as above numbered, on behalf of the Transcontinental Freight Bureau, ask for authority to continue rates from eastern points of shipment which are higher to intermediate points in Canada and in the states of Arizona, New Mexico, Idaho, California, Montana, Nevada, Oregon, Utah, and Washington, and other states east thereof, than to Pacific coast terminals.

Full investigation of the matters and things involved in these petitions, in so far as they concern westbound commodity rates, having been had,

It is ordered, That for the purposes of

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that by which alone it could be exerted, and therefore a consideration of the one and the other, and the establishment of the basis by percentages, was within the power granted. As will be seen by the order, and as we have already said, for the purpose of the percentages established zones of influence were adopted, and the percentages fixed as to such zones varied or fluctuated upon the basis of the influence of the competition in the designated areas. As we have pointed out, though somewhat modified, the zones as thus selected by the Commission were in substance the same as those previously fixed by the carriers as the basis of the rate making which was included in the tariffs which were under investigation, and therefore we may put that subject out of view. Indeed, except as to questions of power, there is no contention in the argument as to the inequality of the zones or percentages, or as to any undue preference or discrimination resulting from the action taken. But be this as it may, in view of the findings of the Commission as to the system of rates prevailing in the tariffs which were before it, of the inequalities and burdens engendered by such system, of the possible aggrandizement unnaturally beyond the limits produced by competition in favor of the competitive points and against other points by the tariff in question,—facts which we accept, and which indeed are unchallenged,—we see no ground for saying that the order was not sustained by the facts upon which it was based, or that it exceeded the powers which the statute conferred, or transcended the limits of the sound legal discretion which it lodged in [495] the Commission when acting upon the subject before it.

It results that the Commerce Court, in enjoining the order of the Commission, was wrong, and its decree to that end must therefore be reversed, and the case be remanded to the proper District Court, with directions to dismiss the bill for want of equity.

Reversed.

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the disposition of these applications, the United States shall be divided into five zones, as described in the following manner:

(The transcontinental group hereinafter described are as specified in R. H. Countiss, agent's transcontinental Tariff I. C. C. No. 929.)

Zone No. 1 comprises all that portion of the United States lying west of a line called Line No. 1, which extends in a general southerly direction from a point immediately east of Grand Portage, Minnesota; thence southwesterly, along the northwestern shore of Lake Superior, to a point immediately east of Superior, Wisconsin; thence southerly, along the eastern boundary of Transcontinental Group F, to the intersection of the Arkansas and Oklahoma state line; thence along the west side of the Kansas City Southern Railway to the Gulf of Mexico.

Zone No. 2 embraces all territory in the United States lying east of Line No. 1 and west of a line called Line No. 2, which begins at the international boundary between the United States and Canada, immediately west of Cockburn island, in Lake Huron; passes westerly through the Straits of Mackinaw; southerly, through Lake Michigan to its southern boundary; follows the west boundary of Transcontinental Group C to Paducah, Kentucky; thence follows the east side of the Illinois Central Railroad to the southern boundary of Transcontinental Group C; thence follows the east boundary of Group C to the Gulf of Mexico.

Zone No. 3 embraces all territory in the United States lying east of Line No. 2 and north of the south boundary of Transcontinental Group C, and on and west of Line No. 3, which is the Buffalo-Pittsburg line from Buffalo, New York, to Wheeling, West Virginia, marking the western boundary of Trunk Line Freight Association territory; thence follows the Ohio river to Huntington, West Virginia.

Zone No. 4 embraces all territory in the United States east of Line No. 3 and north of the south boundary of Transcontinental Group C.

Zone No. 5 embraces all territory south and east of Transcontinental Group C.

It is further ordered, (1) That those portions of the above-numbered applications that request authority to maintain higher commodity rates from points in Zone No. 1 to intermediate points than to Pacific coast terminals be, and the same are hereby, denied, effective November 15, 1911; (2) that petitioners herein be, and they are hereby, authorized to establish and maintain, effective November 15, 1911, commodity rates from all points in zones numbered 2, 3, and 4, as above defined, to points intermediate to Pacific coast terminals, that are higher to intermediate points than to Pacific coast terminals; provided, that the rates to intermediate points from points in zones numbered 2, 3, and 4 shall not exceed the rates on the same commodities from the same points of origin to the Pacific coast terminals by more than 7 per cent from points in Zone No. 2, 15 per cent from points in Zone No. 3, and 25 per cent from points in Zone No. 4.

The commission does not hereby approve any rates that may be established under this authority, all such rates being subject to complaint, investigation, and correction if they conflict with any other provisions of the act.

By the Commission:

[Seal.] Judson C. Clements, Chairman.

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UNITED STATES OF AMERICA, Interstate Commerce Commission, et al., Appts.,
v.
UNION PACIFIC RAILROAD COMPANY et al. (No. 137.)

UNITED STATES OF AMERICA, Interstate Commerce Commission, et al., Appts.,
v.
UNION PACIFIC RAILROAD COMPANY et al. (No. 163.)

(See S. C. Reporter's ed. 495–497.)

This case is governed by the decision in United States of America v. Atchison, T. & S. F. R. Co., ante, 1408.

[Nos. 137 and 163.]

Argued February 23, 26, and 27, 1912. Ordered on April 8, 1912, for reargument before full bench. Reargued October 18, 21, and 22, 1912. Decided June 22, 1914.

TWO APPEALS from the United States Commerce Court to review an interlocutory order and final decree enjoining the enforcement of an order of the Interstate Commerce Commission based upon the long and short haul clause of the act to regulate commerce. Reversed and case remanded with directions to dismiss the bill.

See same case below, on motion to dismiss, 191 Fed. 856.

Former Attorney General Wickersham and Assistant Attorney General Fowler argued the cause, and, with Mr. Blackburn Esterline, Special Assistant to the Attorney General, filed a brief for the United States on original argument.

Mr. Patrick J. Farrell argued the cause and filed a brief for the Interstate Commerce Commission.

Mr. Stephen A. Foster argued the cause, and, with Messrs. Rush C. Butler, William E. Lamb, and Cornelius Lynde, filed a brief for appellant the Chicago Association of Commerce.

Mr. H. M. Stephens argued the cause, and, with Messrs. J. B. Campbell, A. M. Craven, and John Wiley, filed a brief for appellants the City of Spokane et al:

The theory of the common law was that the strong could not be preferred over the weak; that no favoritism should be shown; that all persons should be upon an equality, and none treated unjustly or placed at a disadvantage.

Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 99, 45 L. ed. 769, 21 Sup. Ct. Rep. 561; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185.

The provisions of the 1st section of the interstate commerce act, that all rates must be reasonable, was and is simply declaratory of the common law.

23 Am. & Eng. Enc. Law, 2d ed. 656; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Ruggles v. Illinois, 108 U. S. 538, 27 L. ed. 817, 2 Sup. Ct. Rep. 832; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; Stone v. Farmers' Loan & T. Co. 116 U. S. 331, 29 L. ed. 644, 6 Sup. Ct. Rep. 334, 388, 1191; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028.

Common carriers assume the duties of a public trust. By engaging in the business they grant to the public an interest in their business. They agree that all persons interested in their business through such grant shall be treated and dealt with fairly, equitably, justly, and without favor, disadvantage, or discrimination.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214.

In the California water cases and the New York gas case this court has affirmed decisions of the appropriate tribunals, which permit public service corporations to earn only 6 per cent.

San Diego Land & Town Co. v. National City, 174 U. S. 756, 43 L. ed. 1160, 19 Sup. Ct. Rep. 804; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; New York v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

There is no reason why Congress should not fix a lower per cent than 6.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154,

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19 Sup. Ct. Rep. 804; Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. Rep. 881.

Provisos are generally for the purpose of making an exception, to restrain generalities, to qualify operation, and prevent misinterpretation. They may be for the purpose of enlargement or extension. They may mean the same as "but" or "and," and serve to separate or diminish.

Interstate Commerce Commission v. Baird, 194 U. S. 25, 36, 37, 48 L. ed. 860, 865, 866, 24 Sup. Ct. Rep. 563; Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 242, 46 L. ed. 1144, 1146, 22 Sup. Ct. Rep. 881.

The proviso in the statute proves that the thing attempted to be excepted would be within the general class had the proviso or exception not been made.

Brown v. Maryland, 12 Wheat. 419, 438, 6 L. ed. 678, 685.

A proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms, where the enacting clause is general in its language and objects, and the proviso follows.

United States v. Dickson, 15 Pet. 141, 10 L. ed. 689.

Rates may be fixed so as to require the carrier to furnish rates to all on basis carrier establishes as to some.

Alabama & V. R. Co. v. Mississippi R. Commission, 203 U. S. 496, 51 L. ed. 289, 27 Sup. Ct. Rep. 163.

Statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are severable.

Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 89, 24 L. ed. 381; Presser v. Illinois, 116 U. S. 263, 29 L. ed. 618, 6 Sup. Ct. Rep. 580; Gatewood v. North Carolina, 203 U. S. 531, 542, 51 L. ed. 305, 310, 27 Sup. Ct. Rep. 167; Hamilton v. Brown, 161 U. S. 256, 274, 40 L. ed. 691, 699, 16 Sup. Ct. Rep. 585.

The carriers have been expending annually from earnings much more in permanent improvements than they are entitled to under the holding and rule announced by this court.

Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700.

The power of Congress is supreme and absolute—barring the constitutional question of confiscation.

Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Interstate Commerce Commission v. Chicago & A. R. Co. 215 U. S. 479, 54 L. ed. 291, 30 Sup. Ct. Rep. 163; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; United States v. Lehigh Valley R. Co. 220 U. S. 257, 55 L. ed. 458, 31 Sup. Ct. Rep. 387; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Chicago, I. & L. R. Co. v. United States, 219 U. S. 486, 55 L. ed. 305, 31 Sup. Ct. Rep. 272; Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378; Alabama & V. R. Co. v. Mississippi R. Commission, 203 U. S. 496, 51 L. ed. 289, 27 Sup. Ct. Rep. 163; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527.

The people, through their representatives in Congress, so long as they are within the provisions of the Federal Constitution, are superior and paramount to the Commission and this court, and have a right, through their representatives in Congress, to adopt a new policy or change a policy, and to amend the law so as to eliminate and get away from the decisions of the Commission and this court.

Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265.

The policy of a statute is wholly for and with Congress.

Ibid.; Calder v. Michigan, 218 U. S. 591, 54 L. ed. 1163, 31 Sup. Ct. Rep. 122; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155.

Courts may consider reports of committees and debates in Congress. This court, however, has determined that they are not determinative or decisive of the construction placed upon any act by Congress, or to be placed thereon by the courts.

Aldridge v. Williams, 3 How. 1, 11 L. ed. 469; District of Columbia v. Washington Market Co. 108 U. S. 243, 27 L. ed. 714, 2 Sup. Ct. Rep. 543; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; Dunlap v. United States, 173 U. S. 65, 43 L. ed. 616, 19 Sup. Ct. Rep. 319; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 53 L. ed. 1013, 29 Sup. Ct. Rep. 671.

Necessarily, in considering a statute, the history of that statute, matters to be remedied, and the intention of Congress, must

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be considered. If there is nothing to remedy, then there is no excuse for the amendment.

Preston v. Browder, 1 Wheat. 115, 4 L. ed. 50; Stewart v. Kahn (Stewart v. Bloom) 11 Wall. 493, 20 L. ed. 176; Blake v. National City Bank, 23 Wall. 307, 23 L. ed. 119; United States v. Union P. R. Co. 91 U. S. 72, 23 L. ed. 224; Platt v. Union P. R. Co. 99 U. S. 48, 25 L. ed. 424; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; United States v. Goldenberg, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3.

A guide to the meaning of the statute is found in the evil which it is designed to remedy, as gathered from contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.

Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511.

Congress intended to and did adopt the policy of preventing carriers from charging more for the shorter haul. Where a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate, and not to construe.

Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. Rep. 870.

Where the legislature makes a plain provision without making any exception, the courts can make none.

Maxwell v. Moore, 22 How. 185, 191, 16 L. ed. 251, 253.

The omission or failure to provide for contingencies which it may seem wise to have specifically provided for does not justify judicial addition to the language of the statute.

Pirie v. Chicago Title & T. Co. 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906.

The delegation of power and authority to the Commission is not a delegation of legislative power.

United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480; Light v. United States, 220 U. S. 523, 55 L. ed. 570, 31 Sup. Ct. Rep. 485; Montezuma Canal Co. v. Smithville Canal Co. 218 U. S. 371, 54 L. ed. 1074, 31 Sup. Ct. Rep. 67.

In order to wipe out discrimination it is necessary that relative rates be fixed and enforced. Congress has ample power to fix relative rates, and this it may do either directly or indirectly through the Commission.

Alabama & V. R. Co. v. Mississippi R. Commission, 203 U. S. 496, 51 L. ed. 289, 27 Sup. Ct. Rep. 163.

As to whether or not a discrimination exists is a question of fact for determination by the Commission; and the determination of that question of fact is such that it cannot be reviewed by the courts.

Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424; United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; Vance v. Burbank, 101 U. S. 514, 25 L. ed. 929; Marquez v. Frisbie, 101 U. S. 473, 25 L. ed. 800; Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; Sanford v. Sanford, 139 U. S. 642, 35 L. ed. 290, 11 Sup. Ct. Rep. 666; Gonzales v. French, 164 U. S. 338, 41 L. ed. 458, 17 Sup. Ct. Rep. 102; Brown v. Hitchcock, 173 U. S. 473, 43 L. ed. 772, 19 Sup. Ct. Rep. 485; Gardner v. Bonestell, 180 U. S. 362, 45 L. ed. 574, 21 Sup. Ct. Rep. 399; Brown v. Gurney, 201 U. S. 184, 50 L. ed. 717, 26 Sup. Ct. Rep. 509; Hill v. McCord, 196 U. S. 395, 49 L. ed. 251, 25 Sup. Ct. Rep. 96; United States v. Minor, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836; Small v. Rakestraw, 196 U. S. 403, 49 L. ed. 527, 25 Sup. Ct. Rep. 285.

Mr. F. C. Dillard argued the cause, and, with Messrs. Robert Dunlap, E. C. Lindley, and Maxwell Evarts, filed a brief for appellees.

Messrs. Maxwell Evarts, Gardiner Lathrop, Charles W. Bunn, Charles Donnelly, Robert Dunlap, E. C. Lindley, and F. C. Dillard also filed a brief for appellees.

Mr. Joseph N. Teal argued the cause, and, with Mr. Wirt Minor, filed a brief for interveners, the Portland Chamber of Commerce et al.:

There being no question of the existence of water competition, unjust discrimination cannot be predicated on rates compelled by it.

East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 220, 40 L. ed. 940, 947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Noyes, Am. R. Rates, p. 93.

The efforts of carriers in their supposed interests or in the interests of some locality to equalize natural disadvantages through the rate-making power has time and again been condemned by the Commission.

Elk Cement & Lime Co. v. Baltimore & O. R. Co. 22 Inters. Com. Rep. 84; Carstens Packing Co. v. Oregon & W. R. Co. 22 Inters. Com. Rep. 77; Beale & W. Railroad Rate Regulation, § 843; Enterprise Mfg. Co. v. Georgia R. Co. 12 Inters. Com. Rep. 451; East St. Louis Cotton Oil Co. v. St. Louis & S. F. R. Co. 20 Inters. Com. Rep. 37; Corporation Commission v. Norfolk & W. R. Co. 19 Inters. Com. Rep. 303.

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The terminal rate plus the local back controls the rate which can be charged to an intermediate point within the influence of water competition.

Interstate Commerce Commission v. Louisville & N. R. Co. 190 U. S. 273, 280, 47 L. ed. 1047, 1054, 23 Sup. Ct. Rep. 687.

Former Attorney General Wickersham and Assistant Attorney General Fowler argued the cause, and, with Mr. Blackburn Esterline, Special Assistant to the Attorney General, filed a brief for the United States on reargument.

Mr. Patrick J. Farrell argued the cause for the Interstate Commerce Commission.

Messrs. Rush C. Butler, William E. Lamb, Stephen A. Foster, and Cornelius Lynde filed a brief for appellant the Chicago Association of Commerce.

Mr. J. B. Campbell argued the cause for appellants the city of Spokane et al.

Mr. Joseph N. Teal argued the cause for interveners, the Portland Chamber of Commerce et al.

Mr. F. C. Dillard argued the cause and filed a brief for appellees.

Mr. Alfred P. Thom filed a brief as *amicus curiæ*.

For contentions of counsel not here set forth, see their respective briefs as reported in United States v. Atchison, T. & S. F. R. Co. ante, 1408.

Mr. Chief Justice White delivered the opinion of the court:

The eleven carriers who are appellees on this record filed with the Interstate Commerce Commission applications to be relieved from the long and short haul clause of § 4 of the act to regulate commerce [24 Stat. at L. 380, chap. 104, U. S. Comp. Stat. 1901, p. 3155], as amended by the act of June 18, 1910, chap. 309, 36 Stat. at L. 547, U. S. Comp. Stat. Supp. 1911, p. 1288. After full hearing the Commission entered an order granting in certain respects the relief prayed, but establishing a proportionate relation to be maintained between the lower rate for the longer haul and the higher rate for the shorter haul upon the basis of percentages which were fixed with reference to defined zones. The carriers refused to obey the order, and filed their bill in the commerce court to enjoin its enforcement. An interlocutory injunction was ordered. The defendants moved to dismiss, and, on the overruling of the motions, appealed from the interlocutory order, that case being No. 137. Subsequently, upon the election of the defendants not to plead further, a final decree was entered and appealed from, that appeal being No. 163.

These cases are governed by the opinion in Nos. 136 [497] and 162, just decided [234 U. S. 476, ante, 1408, 34 Sup. Ct. Rep. 986]. They were tried in the court below with the other cases, were decided by the same opinion, and, although different localities are involved, the questions presented are identical, and for the reasons given in the other cases, Nos. 136 and 162, the decree must be reversed and remanded to the proper district court with directions to dismiss the bill for want of equity.

Reversed.

PEOPLE OF THE STATE OF ILLINOIS, ON THE RELATION OF EDWARD F. DUNNE,[1] GOVERNOR, AND PATRICK J. LUCEY, ATTORNEY GENERAL, Plffs. in Err.,

v.

ECONOMY LIGHT & POWER COMPANY.

(See S. C. Reporter's ed. 497–524.)

Error to state court — decision of Federal question.

1. A judgment of the Illinois supreme court, affirming the dismissal of the state's suit to restrain a corporation from constructing a dam across a river, is not reviewable in the Federal Supreme Court on the theory that it involves a decision of the Federal question, if any, presented by the assertion on behalf of the state of a public right arising from the condition of navigability alleged to have been created by concurrent state and Federal action, where the state court, in addition to deciding the

[1] Expiration of term of office of Charles S. Deneen as Governor, and William H. Stead as Attorney General, parties plaintiffs in error herein, suggested, and substitution of Edward F. Dunne, Governor, and Patrick J. Lucey, Attorney General, as parties plaintiffs in error herein, granted December 22, 1914.

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Courts of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

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manifestly local questions as to state or private ownership of the bed of the river, and the validity of deeds, leases, and contracts made by canal commissioners on which the corporation relies, merely held that there had been no concurrence by the state in any project to make the river navigable, that it was not navigable in fact in its natural state, and did not become navigable by the addition of the water of the Chicago Sanitary District, and that the state could not make it navigable by legislative declaration, and thus destroy vested rights of riparian owners.

[For other cases, see Appeal and Error, 1393–1430, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — navigability.

2. No question under the provisions of the ordinance of July 13, 1787 (1 Stat. at L. 52, note), for the government of the Northwest territory, or of subsequent congressional legislation, which merely define rights depending for their existence upon navigability, remains to support the appellate jurisdiction of the Federal Supreme Court over a state court, where the latter court has decided against the fact of navigability.

[For other cases, see Appeal and Error, 1595–1600, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — right under Federal law.

3. Congress has not so taken jurisdiction of the Des Plaines river by making appropriations for a survey and estimates of the cost of its improvement that the state of Illinois may assert a right thereunder to restrain the private construction of a dam across the river, which, if denied, will support the appellate jurisdiction of the Federal Supreme Court over a state court.

[For other cases, see Appeal and Error, 1751–2049, in Digest Sup. Ct. 1908.]

[No. 179.]

Argued April 29 and 30, 1914. Decided June 22, 1914.

IN ERROR to the Supreme Court of the State of Illinois to review a decree which affirmed a decree of the Circuit Court, in that state, dismissing an information by which the state sought to restrain a private corporation from erecting a dam across the Des Plaines river. Dismissed for want of jurisdiction.

See same case below, 241 Ill. 290, 89 N. E. 760.

The facts are stated in the opinion.

Messrs. Merritt Starr and Horace Kent Tenney argued the cause, and, with Messrs. Elijah N. Zoline, John S. Miller, George Packard, and Henry A. Parkin, filed a brief for plaintiffs in error:

The legislation and acts of the two sovereignties in furtherance of the common object of connecting the navigable waters of the Great Lakes with the Mississippi river are so interwoven and related that the rights and questions arising from them, and the construction of their effect, necessarily create Federal questions. The Federal permit operating to increase the volume of the Des Plaines, and the Federal control continually exercised over that volume, constitute it a navigable water of the United States, and involve Federal questions. The construction of the state statutes and their application to the situation here presented involve Federal questions.

United States v. Bellingham Bay Boom Co. 176 U. S. 211, 44 L. ed. 437, 20 Sup. Ct. Rep. 343.

Where the question is of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed.

Dower v. Richards, 151 U. S. 658, 667, 38 L. ed. 305, 308, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Mackay v. Dillon, 4 How. 421, 447, 11 L. ed. 1038, 1050.

The entire record, including the evidence, may be examined to determine whether what purports to be a finding of fact is so involved with or dependent upon questions of law bearing upon the Federal right as to be in substance and effect a decision of the latter. Questions of the legal effect of evidence bearing upon the Federal right will be examined.

Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 591, 56 L. ed. 556, 565, 32 Sup. Ct. Rep. 316.

A finding of fact by a state court that a bankruptcy proceeding had been abandoned is not conclusive on this court. The determination of a question of that kind is not within the class of cases in which a finding is conclusive.

Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 300, 56 L. ed. 208, 32 Sup. Ct. Rep. 96.

The evidence to sustain a charge that the United States district attorney had notice of a deed was examined and held wholly insufficient in fact and in law.

Stanley v. Schwalby, 162 U. S. 255, 274, 277, 279, 40 L. ed. 960, 966–968, 16 Sup. Ct. Rep. 754.

The question whether the facts proved show the existence of a public necessity authorizing the taking of property will be examined by a consideration of the evidence.

Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535.

Where a Federal question is involved, and all the facts in the record do not, as a matter of law, warrant the state court's conclusion, this court will reverse the judgment.

Dushane v. Beall, 161 U. S. 513, 40 L. ed. 791, 16 Sup. Ct. Rep. 637.

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The appellate jurisdiction of the United States Supreme Court over questions national in their nature cannot be restrained by the fact that the plaintiff has elected to pursue a common-law remedy in a state court.

Belden v. Chase, 150 U. S. 674, 691, 37 L. ed. 1218, 1224, 14 Sup. Ct. Rep. 264.

Where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in passing upon the Federal question, to analyze the facts, the power to do so to such extent exists.

Creswill v. Grand Lodge K. P. 225 U. S. 246, 261, 56 L. ed. 1074, 1080, 32 Sup. Ct. Rep. 822.

The contention that there was no evidence tending to show liability under a Federal statute involves a Federal question.

St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858.

The competency of evidence, or its sufficiency to warrant the conclusion, on a mixed question of law or fact, may present a Federal question.

Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 56 L. ed. 594, 32 Sup. Ct. Rep. 389.

A verdict against the party asserting navigability does not conclude this court, which has a right to consider under what instructions and definitions given by the trial court the jury found their verdict.

Leovy v. United States, 177 U. S. 621, 627, 44 L. ed. 914, 917, 20 Sup. Ct. Rep. 797.

The failure of the state court to pass upon the Federal question does not affect this court's jurisdiction.

West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 519, 50 L. ed. 845, 850, 26 Sup. Ct. Rep. 518; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 580, 50 L. ed. 596, 604, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 231, 41 L. ed. 979, 982, 17 Sup. Ct. Rep. 581.

The rights claimed by the state under the statutes and authority of the United States were duly claimed in the state courts:

1. By special assignments of error presenting the claims of rights under the acts of Congress, which are sufficient.

Rothschild v. Knight, 184 U. S. 334, 339, 46 L. ed. 573, 579, 22 Sup. Ct. Rep. 391; Sully v. American Nat. Bank, 178 U. S. 289, 298, 44 L. ed. 1072, 1076, 20 Sup. Ct. Rep. 935; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 182, 50 L. ed. 428, 432, 26 Sup. Ct. Rep. 208; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 487, 48 L. ed. 268, 271, 24 Sup. Ct. Rep. 132; Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. Rep. 446; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 269, 35 L. ed. 1004, 1009, 12 Sup. Ct. Rep. 173.

2. Federal questions were duly raised in the state court. The special assignment of error was an amplification of statement of ground for relief claimed in the original information, as to which specific evidence as to the absence of Federal permit, opinion of the War Department, and need or lack of need of a Federal permit, was introduced by both parties.

Willson v. Black Bird Creek Marsh Co. 2 Pet. 245, 7 L. ed. 412; Dewey v. Des Moines, 173 U. S. 193, 197, 43 L. ed. 665, 666, 19 Sup. Ct. Rep. 379; The Montello (United States v. The Montello) 11 Wall. 411, 414, 20 L. ed. 191, 192; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 525, 51 L. ed. 298, 303, 27 Sup. Ct. Rep. 153; Furman v. Nichol, 8 Wall. 44, 19 L. ed. 370.

3. It is not necessary that the state supreme court should discuss the Federal question in its opinion.

Chapman v. Goodnow (Chapman v. Crane) 123 U. S. 540, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Gaar, S. & Co. v. Shannon, 223 U. S. 468, 471, 56 L. ed. 510, 512, 32 Sup. Ct. Rep. 236; West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 519, 520, 50 L. ed. 845, 850, 851, 26 Sup. Ct. Rep. 518; Detroit, Ft. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 387, 47 L. ed. 860, 863, 23 Sup. Ct. Rep. 540; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 11, 51 L. ed. 681, 685, 27 Sup. Ct. Rep. 407; Terre Haute & I. R. Co. v. Indiana, 194 U. S. 579, 589, 48 L. ed. 1124, 1129, 24 Sup. Ct. Rep. 767; Atty. Gen. ex rel. Kies v. Lowrey, 199 U. S. 233, 239, 50 L. ed. 167, 170, 26 Sup. Ct. Rep. 27; Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683, 697, 29 L. ed. 510, 515, 6 Sup. Ct. Rep. 265; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 579, 28 L. ed. 1084, 1086, 5 Sup. Ct. Rep. 681.

It is not necessary to state in terms on the record that the Constitution or a treaty or law of the United States has been drawn in question, or the validity of a state law, on the ground of its repugnancy to the Constitution. It is sufficient if the record shows that a law of the United States must have been construed, or that the authority exercised under the state must have been ques-

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tioned as repugnant to the laws of the United States, and the decision has been in favor of the party claiming under such authority.

Home Ins. Co. v. Augusta, 93 U. S. 116, 121, 23 L. ed. 825, 826; Willson v. Black Bird Creek Marsh Co. 2 Pet. 245, 7 L. ed. 412; Satterlee v. Matthewson, 2 Pet. 380, 409, 7 L. ed. 458, 467; Davis v. Packard, 6 Pet. 41, 48–50, 8 L. ed. 312, 315; Harris v. Dennie, 3 Pet. 292, 302, 7 L. ed. 683, 687; Craig v. Missouri, 4 Pet. 410, 428, 429, 7 L. ed. 903, 909, 910; Neilson v. Lagow, 12 How. 98, 109, 13 L. ed. 909, 914; Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 488, 43 L. ed. 521, 525, 19 Sup. Ct. Rep. 247; Baltimore & O. R. Co. v. Maryland, 21 Wall. 456, 466, 22 L. ed. 678.

The case was tried and evidence was received on both sides in the trial court, as to the application of, and compliance or noncompliance with, the acts of Congress.

Missouri, K. & T. R. Co. v. Wilhoit, 87 C. C. A. 401, 160 Fed. 443.

The navigability of a stream claimed to be a navigable water of the United States within the acts of Congress presents Federal questions to be determined according to Federal law.

The Daniel Ball, 10 Wall. 557, 563, 564, 19 L. ed. 999, 1001, 1002; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Passenger Cases, 7 How. 405, 415, 445, 455, 462, 12 L. ed. 753, 757, 770, 774, 777; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Wisconsin v. Duluth, 96 U. S. 379, 387, 24 L. ed. 668, 671; United States v. Bellingham Bay Boom Co. 176 U. S. 211, 44 L. ed. 437, 20 Sup. Ct. Rep. 343; United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 708, 43 L. ed. 1143, 19 Sup. Ct. Rep. 770; Willson v. Black Bird Creek Marsh Co. 2 Pet. 245, 7 L. ed. 412; Re Debs, 158 U. S. 564, 591, 39 L. ed. 1092, 1105, 15 Sup. Ct. Rep. 900; Pennsylvania v. Wheeling & B. Bridge Co. 18 How. 421, 431, 15 L. ed. 435, 437; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367, affirming 143 Fed. 377; Cummings v. Chicago, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472; West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518; Montgomery v. Portland, 190 U. S. 89, 47 L. ed. 965, 23 Sup. Ct. Rep. 735; Hagan v. Richmond, 104 Va. 723, 3 L.R.A.(N.S.) 1120, 52 S. E. 385; South Carolina v. Georgia, 93 U. S. 4, 13, 23 L. ed. 782, 784; Miller v. New York, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228.

The additional assignment of error based on the act of Congress of March 3, 1899, and the acts amendatory thereof, was not made too late, and, within the rules of this court, having been considered by the state supreme court and denied, furnishes ground for jurisdiction here.

Rothschild v. Knight, 184 U. S. 334, 339, 46 L. ed. 573, 579, 22 Sup. Ct. Rep. 391; Meyer v. Richmond, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106; Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023; Sully v. American Nat. Bank, 178 U. S. 289, 44 L. ed. 1072, 20 Sup. Ct. Rep. 935; Erie R. Co. v. Purdy, 185 U. S. 148, 153, 46 L. ed. 847, 850, 22 Sup. Ct. Rep. 605; North Carolina R. Co. v. Zachary, 232 U. S. 248, ante, 591, 34 Sup. Ct. Rep. 305; Miedreich v. Lauenstein, 232 U. S. 236, ante, 584, 34 Sup. Ct. Rep. 309; Forbes v. State Council, 216 U. S. 396, 399, 54 L. ed. 534, 535, 30 Sup. Ct. Rep. 295; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 326, 334, 57 L. ed. 857, 862, 33 Sup. Ct. Rep. 510.

The assignment in the case at bar was not treated by the state court as made too late. If it had so considered it, it would not have allowed it to be filed. Its order allowing the assignment to be filed is conclusive of the propriety of filing it, and of the right to have it passed upon. The state supreme court is the judge of the question.

Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 182, 50 L. ed. 428, 432, 26 Sup. Ct. Rep. 208.

General assignments of error are sufficient, under the Illinois practice, to present the questions here relied upon.

Chicago & R. I. R. Co. v. Northern Illinois Coal & I. Co. 36 Ill. 62, 15 Mor. Min. Rep. 198; Ottawa, O. & F. River Valley R. Co. v. McMath, 91 Ill. 104.

The jurisdiction of this court does not depend upon the existence of several Federal questions, but one is sufficient. Where jurisdiction in this court exists because a Federal question is involved, the court may pass upon questions under both state and Federal law.

Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316.

A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary.

Nutt v. Knut, 200 U. S. 12, 19, 50 L. ed. 348, 352, 26 Sup. Ct. Rep. 216; Illinois C.

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R. Co. v. McKendree, 203 U. S. 514, 525, 51 L. ed. 298, 303, 27 Sup. Ct. Rep. 153; Furman v. Nichol, 8 Wall. 44, 19 L. ed. 370; Carter v. Texas, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687.

A judgment in favor of the other party, where such a claim is made, gives this court jurisdiction.

Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 300, 56 L. ed. 208, 32 Sup. Ct. Rep. 96.

The claim that the stream is a navigable water of the United States need not be averred in those words, if the meaning of the pleading is clear from the other averments; nor it is necessary to quote the words of the Constitution or statute, or to cite by their numbers the particular chapter and section of the statute in the pleadings.

Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97.

To admit that the authority to review the action of a state court where it has decided a Federal question can be rendered unavailing by a suggestion that the court below may have rested its judgment on a non-Federal ground would simply amount to depriving this court of all power to review Federal questions if only a party chose to make such a suggestion.

St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 276, 57 L. ed. 1179, 1186, 33 Sup. Ct. Rep. 858; Neilson v. Lagow, 12 How. 98, 13 L. ed. 909.

Mr. Frank H. Scott argued the cause, and, with Messrs. Gilbert E. Porter and Edgar A. Bancroft, filed a brief for defendant in error:

Where the state court denies the existence of the facts necessary to bring the case within the operation of the Federal statutes, this court has no jurisdiction to review.

Crary v. Devlin, 154 U. S. 619, and 23 L. ed. 510, 14 Sup. Ct. Rep. 1199; Cameron v. United States, 146 U. S. 533, 36 L. ed. 1077, 13 Sup. Ct. Rep. 184.

The question of navigability is purely one of fact.

Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300.

No title, right, privilege, or immunity was claimed in the information, nor in the trial court, as arising under this act. This court will not take jurisdiction upon such a record, where, under the state's rule of practice, a court of review will not pass on questions raised for the first time in that court, and which might and should have been raised in the trial court.

Mutual L. Ins. Co. v. McGrew, 188 U. S. 291–309, 47 L. ed. 480–485, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Spies v. Illinois, 123 U. S. 131, 181, 31 L. ed. 80, 91, 8 Sup. Ct. Rep. 21, 22; Chappell v. Bradshaw, 128 U. S. 132, 32 L. ed. 369, 9 Sup. Ct. Rep. 40; Jacobi v. Alabama, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 182, 50 L. ed 428, 432, 26 Sup. Ct. Rep. 208; 3 Foster, Fed. Pr. 5th ed. 2402; Ex parte Chadwick, 159 Fed. 576; Masonic Fraternity Temple Asso. v. Chicago, 217 Ill. 58, 75 N. E. 439; Griveau v. South Chicago City R. Co. 213 Ill. 633, 73 N. E. 309.

That is the rule of practice in Illinois.

Dunn v. Crichfield, 214 Ill. 299, 73 N. E. 386; McKenzie v. Penfield, 87 Ill. 40.

The objection that an act is void raises the question under the state, and not the Federal, Constitution.

Levy v. Superior Ct. 167 U. S. 175, 177, 42 L. ed. 126, 127, 17 Sup. Ct. Rep. 769; Harding v. Illinois, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176; Porter v. Foley, 24 How. 415, 420, 16 L. ed. 740; Miller v. Cornwall R. Co. 168 U. S. 134, 42 L. ed. 410, 18 Sup. Ct. Rep. 34.

A Federal question foreclosed by prior decisions will not be reviewed by this court.

Leonard v. Vicksburg, S. & P. R. Co. 198 U. S. 416–422, 49 L. ed. 1108–1111, 25 Sup. Ct. Rep. 750.

The decision of the court that the river is not navigable made it unnecessary for the court to pass on the Federal question, if one existed.

Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Chrisman v. Miller, 197 U. S. 313, 49 L. ed. 770, 25 Sup. Ct. Rep. 468; King v. West Virginia, 216 U. S. 92, 54 L. ed. 396, 30 Sup. Ct. Rep. 225; Mammoth Min. Co. v. Grand Central Min. Co. 213 U. S. 72, 53 L. ed. 702, 29 Sup. Ct. Rep. 413; Chapman & D. Land Co. v. Bigelow, 206 U. S. 41, 51 L. ed. 953, 27 Sup. Ct. Rep. 679; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; Rankin v. Emigh, 218 U. S. 27, 54 L. ed. 915, 30 Sup. Ct. Rep. 672.

Neither in the information, assignment of errors, or briefs and arguments in the state court, nor in the opinion of that court, was any reference made to the Constitution. Its provisions cannot be invoked for the first time in this court.

Cox v. Texas, 202 U. S. 446, 451, 50 L. ed. 1099, 1101, 26 Sup. Ct. Rep. 671; Scudder v. Comptroller (Scudder v. Coler) 175 U. S. 32, 44 L. ed. 62, 20 Sup. Ct. Rep. 26.

The fact that the state court in its opinion said that it had "considered all of the questions" does not show that it had passed upon any Federal question under the act of 1899.

Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 326, 57 L. ed. 857, 33 Sup.

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Ct. Rep. 510; Forbes v. State Council, 216 U. S. 396, 54 L. ed. 534, 30 Sup. Ct. Rep. 295.

The claim of the Federal character of the stream was not a claim of "the application of the Federal law thereto," or an assertion of any title, right, privilege, or immunity under U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575.

Erie R. Co. v. Purdy, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 655, 41 L. ed. 1149, 1151, 17 Sup. Ct. Rep. 709; Harding v. Illinois, 196 U. S. 78, 85, 86, 49 L. ed. 394, 396, 397, 25 Sup. Ct. Rep. 176.

Neither is the fact that the justice of the state court allowed the writ of error sufficient to show that any Federal question was involved.

Hulbert v. Chicago, 202 U. S. 275, 280, 50 L. ed. 1026, 1028, 26 Sup. Ct. Rep. 617; Marvin v. Trout, 199 U. S. 212, 223, 50 L. ed. 157, 161, 26 Sup. Ct. Rep. 31; Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 487, 488, 43 L. ed. 521, 525, 526, 19 Sup. Ct. Rep. 247.

While it is true that the opinion of the supreme court of the state may be looked to to ascertain whether a Federal right was actually denied, yet it must clearly and unmistakably appear from such opinion that such question was actually decided against a Federal claim, and that the decision of the question was essential to the judgment rendered.

Montana ex rel. Haire v. Rice, 204 U. S. 291, 298, 51 L. ed. 490, 494, 27 Sup. Ct. Rep. 281; San José Land & Water Co. v. San José Ranch Co. 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487.

General assignments of error are not sufficient, under the Illinois practice, to present the points here relied on.

Skakel v. People, 188 Ill. 291, 58 N. E. 1003; St. Louis Transfer Co. v. Canty, 103 Ill. 423; Berry v. Chicago, 192 Ill. 154, 61 N. E. 498; Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 Sup. Ct. Rep. 617; Pelouze v. Slaughter, 241 Ill. 226, 89 N. E. 259; Swift & Co. v. Fue, 167 Ill. 443, 47 N. E. 761; Donnelly v. Chicago City R. Co. 163 Ill. App. 7; Doggett v. Ruppert, 178 Ill. App. 230.

Mr. Justice McKenna delivered the opinion of the court:

This was a proceeding brought in the circuit court of Grundy county, Illinois, being an information filed by the attorney general of the state on behalf of the people of the state on the relation of the governor, against defendant in error, the Economy Light & Power Company, to restrain that company from erecting a dam across the Des Plaines river, and from causing the waters of the river to back up and overflow the lands of the state; to refrain from permitting the obstructions placed in the river to remain therein; and that certain deeds, leases, and contracts made by the canal commissioners of the state to the company be declared null and void. The information was dismissed by the circuit court and its decree was affirmed by the supreme court. This writ of error was then sued out by plaintiffs in error.

A motion is made to dismiss on the grounds—(1) that no Federal question was decided by the supreme court adversely to plaintiffs in error. (2) The Federal questions sought to be raised in this court were not raised in the trial court, and under the practice in Illinois were not open to review in the supreme court, and were not reviewed. (3) The Federal questions raised are without merit. (4) The decision of the supreme court is sustainable upon non-Federal grounds.

The motion makes necessary a consideration of the [511] allegations of the information and of the grounds of decision of the court. The information alleges the following: The state of Illinois was formed out of the Northwest territory ceded by Virginia to the United States in 1784, and by the ordinance for the government of the territory it was declared in article 4 that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States and those of any other states that may be admitted into the Confederacy, without any tax, impost, or duty therefor." [1 Stat. at L. 52, note.]

On the 18th of May, 1796 [1 Stat. at L. 468, chap. 29, U. S. Comp. Stat. 1901, p. 1567], Congress passed an act for the sale of lands of the United States in the territory northwest of the Ohio river and above the mouth of the Kentucky river, by § 9 of which act it was provided that all navigable rivers within the territory to be disposed of by virtue of the act should be deemed to be and remain public highways. Subsequently there was separated from such territory by an act of Congress, dated May 7, 1800 [2 Stat. at L. 58, chap. 41], the portion thereof which now embraces the states of Illinois and Indiana, to be called Indiana territory. On March 26, 1804 [2 Stat. at L. 277, chap. 35], Congress, acting under the Constitution of 1787, passed an act for the disposal of the public lands in Indiana territory, by which it was provided that all the navigable rivers, creeks,

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and waters within that territory should be deemed to be and remain public highways.

By an act of February 3, 1809 [2 Stat. at L. 514, chap. 13], Congress divided the Indiana territory and constituted that portion of it which now comprises the state of Illinois a separate territory, to be called Illinois, and provided that its inhabitants should be entitled to and enjoy all and singular the rights, privileges, and advantages [512] granted and secured to the people of the Northwest territory by the ordinance of July 13, 1787.

On the 18th of April, 1818 [3 Stat. at L. 428, chap. 67], Congress passed an act to enable the people of Illinois to form a constitution and state government for admission into the Union upon an equality with other states, and provided that the government should be republican, and not repugnant to the ordinance of July 13, 1787. A constitution was adopted, and Congress, on the 3d of December, 1818 [3 Stat. at L. 536], declared the admission of the state into the Union, that its constitution and government was republican and in conformity to the provisions of the articles of compact between the original states and the people and the states in the territory northwest of the River Ohio, passed on July 13, 1787.

The river Des Plaines is situated in the Northwest territory, rises in Wisconsin, and flows southerly into the state of Illinois (its course is given), in all a distance of about 96 miles.

The river Kankakee rises in Indiana and flows westerly into Illinois and unites in Grundy county with the Des Plaines, forming with it the Illinois, which flows thence westerly and southwesterly through several counties in Illinois into the Mississippi river. Wherefore, by reason of the fact that the Des Plaines river is wholly within the Northwest territory, and that it empties its waters into the Mississippi, and by reason of the other facts set forth, it is subject to the provisions of the acts of Congress set out.

It is shown by early explorations and discoveries that the Des Plaines river was navigable from a point near where is now situated the city of Chicago to its mouth, and was used as a highway for commercial purposes, and commerce was carried on over it and over the Chicago river, located in Cook county, Illinois, and connection therewith made by a short portage between the two [513] rivers near the site of what is now the city of Chicago and was in use as a highway of commerce leading from Lake Michigan and the waters emptying into the St. Lawrence river, on the one hand, and the waters of the Mississippi river, on the other, thenceforward from the time of said first use up to and at the time when the ordinance of 1787 and the several acts of Congress were respectively enacted.

Afterward the state of Illinois, by and through its legislature, and in obedience to the several acts of Congress set forth, assumed charge of the river, and in 1839 gave permission for the building of a toll bridge across the river, and subsequently, by an act passed in 1839, amending the several laws in relation to the Illinois and Michigan canal, it was provided that no stream of water passing through the canal lands should pass by the sale so as to deprive the state of the use of such water if necessary to supply the canal without charge for the same; and it was further provided that the lands situated upon the streams which have been meandered by the surveys of public lands by the United States should be considered as bounded by the lines of those surveys, and not by the streams. In the same year an act was passed declaring the river a navigable stream, and providing that it should be deemed and held a public highway, and should be free, open, and unobstructed from its point of connection with the canal to its utmost limit within the state for the passage of all boats and water craft of every description.

In 1845 the state authorized the construction and continuance of the milldam across the river with reservation of the right to the state of improving the dam and of using the water for the canal, and for any other purpose; and in 1849, authorized the building of a bridge at Lockport. The state, by certain acts of its legislature (they are set out), created the Sanitary District of Chicago, under the provision of which a channel was constructed connecting Lake Michigan with the Des Plaines river, at a point [514] some 16 miles above the site of the dam in question, and through which about 300,000 cubic feet of water per minute are drawn through the Chicago river and the Sanitary District drainage channel, and discharged in the Des Plaines river.

It was provided that the channel when completed should be a navigable stream, and that when the general government should improve the river, it should have full control over the same for navigation purposes, but not to interfere with its control for sanitary drainage purposes.

On the 6th of December, 1907, the legislature passed an act, which is as follows:

"Sec. 1. Be it enacted by the people of the state of Illinois, represented in the general assembly: That the Des Plaines and Illinois rivers throughout their courses from below the water power plant of the

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main channel of the Sanitary District of Chicago in the township of Lockport, at or near Lockport, in the county of Will, are hereby recognized as and are hereby declared to be navigable streams, and it is made the special duty of the governor and the attorney general to prevent the erection of any structures in or across said streams without explicit authority from the general assembly, and the governor and attorney general are hereby authorized and directed to take the necessary legal action or actions to remove all and every obstruction now existing in said rivers that in anywise interferes with the intent and purpose of this act."

The relator, Charles S. Deneen, is the governor referred to in the act, and that, by virtue of the statute, his office and constitutional duty, he has a special interest and responsibility in the matters set forth.

The purchasers from the state in section 25 and other similarly situated lands with reference to the Des Plaines river did not take and did not claim to take under their several purchases that portion of the lands lying between [515] the meander line and the water of the river, and that the lands so lying have never been used by any individual under any claim of authority or right vested in the purchasers from the state of Illinois, save and except as claimed by defendant. Lands so lying, therefore, together with the bed of the stream of the river in said quarter section, and other lands similarly situated with reference to the river, have not passed by any purchase of adjoining lands from the state of Illinois, but the same and every part thereof is owned by the state, and held for the benefit of its people and of the people of the United States as a public highway for commerce.

The trustees of the Illinois and Michigan canal executed and delivered to one Charles E. Boyer a deed bearing date October 22, 1860, to land in section 25, excepting and reserving so much as was occupied by the canal and its waters, and a strip 90 feet wide on either side of the canal, containing 196 62-100 acres, the tract being a portion of the land granted by the United States to the state to aid the state in opening a canal to connect the waters of the Illinois river with those of Lake Michigan, and by the state granted to the board of trustees of the canal for the purposes set forth in the act of February 21, 1843.

The defendant derives its title by mesne conveyances from Boyer and certain contracts and leases entered into between the canal commissioners and one Harold F. Griswold and assigned to defendant, and, in pursuance of the claim of right thus obtained, defendant commenced the construction of a dam across the river, but that the said several leases, deeds, and contracts are ineffectual to confer any right to build or maintain the dam.

The legislature of the state, by a proper resolution passed on the 16th of October, 1907, has proposed the building of a deep waterway commencing at the southern end of the Chicago drainage canal and extending along the Des Plaines river, to be submitted to a vote of the people [516] of the state, and, if the same is built, as incident thereto locks and dams will necessarily be constructed across the deep waterway at or near the S. E. ¼ of section 25, which dams will incidentally afford water power of the value of several millions of dollars to the state, which will be lost to the state if the defendant be permitted to construct the dam in question.

The 90-foot strip along the line of the Illinois and Michigan canal constitutes an integral part of the canal, and the trustees of the canal and the canal commissioners of the state had no right or authority under the law to convey the same by deed, lease, or otherwise. Wherefore the defendant acquired no right to such strip, and said deeds, leases, contracts, and other agreements are void so far as they pertain to the bed of the stream of the river, and to the lands lying outside the meander line.

By virtue of the several acts of Congress set forth, the state is the owner of such lands and other lands similarly situated. The defendant, claiming to own such lands and other lands in section 25, has actually begun the erection of the dam referred to; the attorney general, therefore, on the 12th of December, 1907, served notice upon the defendant to desist from the erection of the dam and from further trespassing upon the lands owned by the state, and to remove any and all obstructions placed thereon. Defendant has ignored the notice, and, unless prevented by injunction, will complete the dam, to the great impairment of navigation, and to the great and irreparable damage to the people of the state.

There are other allegations in regard to the leases and contracts from the canal commissioners which are not necessary to be given.

The prayer of the information was for an injunction in accordance with the allegations.

Defendant in error summarizes its answer as follows: It denied that the Des Plaines river was or ever had been [517] navigable, and alleged that it never had been navigated for the purpose of commerce; and also that it had, from the earliest times, been completely obstructed by various bridges and dams built without legis-

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lative authority, and that the state itself had constructed and for many years maintained, and still maintains, a dam entirely across the river at Joliet. It set out correspondence with the War Department of the United States before the construction of the dam was begun, from which it appeared that the plans of the proposed structure were submitted to that Department for the purpose of ascertaining whether the project would be in harmony with the work of the improvement of the river proposed—but never decided upon—by the government, and that the officers of the Department stated not only that it would be so in harmony, but, if carried out, it would save the government large sums of money. The correspondence also stated that the river had never yet been considered a navigable stream of the United States, and that it was not subject to the provision of §§ 9-13 of the act of March 3, 1899 [30 Stat. at L. 1151, 1152, chap. 425, U. S. Comp. Stat. 1901, pp. 3540-3542], or to other similar United States legislation.

The answer further alleged that subsequently defendant in error acquired the property, and that a large sum of money had been expended and heavy obligations incurred by it in carrying out the project of building the dam.

Upon the issues thus made, evidence was taken, which composes three large volumes, upon which the courts below decided against plaintiffs in error; and we are to consider whether, in so doing, any Federal right was passed upon or denied it.

To sustain the contention that such right was passed upon and denied, it is said "that at the time the information in equity was filed, and for over six years before the defendant in error became a riparian owner, the Des Plaines river, irrespective of the question of its navigability, [518] was a navigable river of the United States at the point where the dam was erected," and this because of the "concurrent action of the state and Federal governments by the construction of the Chicago Sanitary ship canal, the connection of it with the Chicago river and Lake Michigan on the northeast, and the discharge of the water into Lake Michigan from it into Des Plaines and Illinois on the southwest."

It is further contended that the state court did not decide this question adversely to plaintiffs in error, but, on the contrary, excluded the admitted fact as being immaterial because that condition was artificially created. And this because defendant in error urged in that court that the navigability of the river could not be determined by its capacity as improved by the addition of the water of the Sanitary District. The court, in its decision, therefore, it is the final contention, denied the rights arising from the condition of navigability thus created by state and Federal action, and plaintiffs in error insist that "if artificial navigability can create a public right which is entitled to protection against the acts of one who purchases riparian property after that condition was created, then, on the conceded law, the judgment of the state court was erroneous. And if those public rights are created or protected by Federal law, this court has jurisdiction to reverse the judgment."

The inquiry immediately occurs, How did the so-called public right arise? From the mere addition of water to the river or by the conditions upon which it was admitted? The bill alleges the enactment of many laws and a complex system of improvements by virtue of them, rights asserted by the state to the lands bordering on the river, and rights to the bed of the river, conveyances, leases, and contracts by public officers constituted by laws which verbally, at least, confer authority upon them, and rights asserted by defendant in error arising from the execution [519] of such authority. But all of the questions hence arising are state questions, whether depending upon law or fact, which it is not in our province to review. It would seem, therefore, at the outset, that one of the elements of the Federal right asserted is absent. However, let us see what the supreme court of the state has decided.

Mr. Justice Vickers, delivering the opinion of the court, says: "Appellant [the state] bases its claim to relief on three propositions—as follows: (1) That the state of Illinois owns the bed of the river at the point where it is proposed to build said dam; (2) that the Des Plaines river is a navigable stream, and that the proposed dam would constitute an obstruction to navigation; (3) that certain contracts executed by the commissioners of the Illinois and Michigan canal, under which appellee [defendant in error] claims certain rights in connection with the construction of said dam, are void, and that no rights were acquired by or can be asserted under said contracts." [241 Ill. 309, 89 N. E. 760.]

The first and third propositions manifestly involve state questions and were decided adversely to plaintiffs in error. They might be put out of discussion except so far as they may have bearing on the second proposition. By the second proposition the navigability of the river is presented as a question of fact, and of it the court said that it had received the most exhaustive treat-

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ment by counsel, and that if the dismissal of the bill by the court below had been without prejudice to renew the application for injunction, the action of the court could be sustained because of the utter failure of the plaintiffs in error to prove that the construction of the proposed dam would be an obstruction to the then navigation of the river. "There is no proof," the court said, "that the river is now being used as a public highway for commerce. On the contrary, the evidence not only shows that the river is not being so used, but it shows affirmatively that, [520] owing to the presence of numerous other dams and some fifty or more bridges which span the river, it would be impossible, under existing conditions, to navigate the stream. There being at present no navigation whatever upon the river, obviously the dam in question cannot be said to be an obstruction to navigation that has no existence in fact." The trial court not making the indicated reservation, but having rendered a decree based on the finding that the river was not navigable, thus settling the question for all time, the supreme court considered the question as presented on the merits. After a review of the evidence and the contentions of the parties, it decided that the river was not navigable in a state of nature, and declared that there was not in the entire record a well authenticated instance in which a boat engaged in commerce navigated the waters of the Des Plaines river. Referring to the testimony, the court said: "Whatever may be thought of the preponderance of it one way or the other, it can have but little weight as against the uncontroverted fact that the river has never been used as a public highway for commerce." And again, "After the most careful consideration of this question we are of the opinion that the Des Plaines river in its natural condition is not a navigable stream, and that the rights of parties to this suit must be determined upon that basis." The court besides rejected the contention that the Sanitary District act declared the river to be navigable. The contention, it was said, was "based on a sentence in § 24 of said act, as follows: 'When such channel shall be completed, and the water turned therein, to the amount of 300,000 cubic feet of water per minute, the same is hereby declared a navigable stream.' Appellant's [the state] contention, under this statute, is thus stated in its brief: 'The same means that the water flowing in that channel is a navigable stream. The water so turned in was navigable in fact, and it does not lose its navigability [521] in passing out of the artificial channel into the channel of the Des Plaines river. The water is just as navigable one-half mile southwest of Joliet as it is one-half mile northeast of Joliet.' The argument is based upon an erroneous construction of the word 'same.' That term refers to the channel of the Sanitary District, and has no reference to the water after it leaves the channel."

The court, however, said that even if the legislature had declared in unequivocal language that the river was navigable, as it did by the act of 1907 [the act under which the information was filed], the declaration could not affect the rights of defendant in error, they being protected by the Constitution of the state, which forbids private property from being taken for public use without just compensation previously made, for which the court cited a number of cases and Cooley on Constitutional Limitations, *591. And it was added that none of the legislative acts had the primary purpose of permitting a deep-water channel from the Lakes to the Gulf by means of improving the channel of the Des Plaines river, nor did the various acts passed in the interest of the Illinois and Michigan canal nor the Sanitary District act include a general scheme for the improvement of that river. "Up to this time," it was further said, "no general plan for the deep waterway has been adopted by the state or nation," and whether any such enterprise will ever be adopted, and whether it will include the Des Plaines river, "are all legislative questions with which the courts have no concern." If it be done, the court continued, it must be done "with due regard to the rights of every citizen, however humble and insignificant those rights may seem in contrast with the great public consummation."

We have already seen that the contention of the plaintiff in error that the bed of the river was in the state, and [522] not in the riparian owners, among whom is defendant in error, by force of the act of the legislature of the state of February 26, 1839, in relation to the Illinois and Michigan canal, was held untenable, and it was further held that the contracts of the canal commissioners under which defendant in error claims rights were valid. And the court further decided that the legislation of the state did not intend nor contemplate the improvement of the Des Plaines river from a condition of non-navigability to navigability, and no act, except that of 1907, had declared it to be navigable, and that no act could do so and affect private rights under the Constitution of the state. The supreme tribunal of the state has therefore decided that plaintiffs in error

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have no elements of right against defendant in error.

It is said, however, as a foundation of a right under the acts of Congress alleged, that the river, although it was not navigable in its natural state, became so by the addition of water from the Sanitary District. This contention was rejected by the supreme court, the court deciding, as we have seen, that the navigability of the river was to be determined by its natural condition, and not by its condition created by artificial means. In resistance to this conclusion of the court, and in assertion of a Federal right, plaintiffs in error cite, besides the acts of Congress referred to in the information, certain acts of Congress passed in 1899, 1900 [31 Stat. at L. 580, chap. 790], and 1902 [32 Stat. at L. 364, chap. 1079], appropriating money for "a survey and estimates of cost for the improvement of the upper Illinois and lower Des Plaines rivers in Illinois, with a view to the extension of navigation from the Illinois river to Lake Michigan," and adduce, besides, other recognitions by Congress of the navigability of the river, and contend that therefore, the rights of the state are based on Federal laws, and "that in its sovereign right, and as *parens patriæ* and of its citizens, and *on behalf of the citizens of all of the United States* [italics counsel's], it had [523] the right under those Federal laws to prevent the accomplishment by defendant of an act destructive of the navigability of the stream."

Plaintiffs in error state their contention another way. They say the acts of the two sovereignties, state and national, in furtherance of a common object, are so interwoven and related that the rights and questions arising from them, and the construction of their effect, necessarily create Federal questions.

But we have seen that the supreme court of the state decided there was no concurrence of the state in furtherance of the so-called common object; that is, that the various acts in regard to the Illinois and Michigan canal or the Sanitary District did not include any general scheme for the improvement of the Des Plaines river, and it was certainly within the competency of the court to so determine. The court was also of the view that, under the Constitution of the state, the state did not have the "sovereign right, and as *parens patriæ*," to restrain the acts of defendant in error.

The court seemed to consider that it had decided all of the contentions of the state when it had decided the question of the navigability of the river both in its natural condition and its condition after the addition of the waters of the Sanitary District. The fact was and is pivotal. The ordinance for the government of the Northwest territory and the subsequent acts of Congress set out in the information do not determine navigability of the streams, but only define rights which depend upon its existence. Passing the question, therefore, whether the ordinance or the acts refer to physical obstructions or to political regulations, and also passing the question whether they were of force after the admission of the state into the Union (on both questions see Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811), the fact of navigability having been decided against the state by the state court, there is no Federal [524] right left to review. Crary v. Devlin, 154 U. S. 619, and 23 L. ed. 510, 14 Sup. Ct. Rep. 1199; Cameron v. United States, 146 U. S. 533, 36 L. ed. 1077, 13 Sup. Ct. Rep. 184; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300. In the latter case it was decided that the question of navigability is purely one of fact.

It is said, however, that by the acts of 1899, 1900, and 1902, Congress has taken jurisdiction of the Des Plaines river. If so, the state is not the instrument through which the jurisdiction can be exercised. United States v. Bellingham Bay Boom Co. 176 U. S. 211, 44 L. ed. 437, 20 Sup. Ct. Rep. 343; Willamette Iron Bridge Co. v. Hatch, supra; Cleveland v. Cleveland Electric R. Co. 201 U. S. 529, 50 L. ed. 854, 26 Sup. Ct. Rep. 513.

But the cited acts are not appropriations for improvements undertaken, but for improvements which may be undertaken; not a jurisdiction exercised, but a jurisdiction to be exercised. And, as we have seen, it is alleged in the answer, and the allegation is sustained by the evidence, that the plans of defendant in error's structure were submitted to the War Department, and it was declared by that Department, "The work proposed is in general harmony with the work of improvement recommended by the board of engineers appointed under the authority of the rivers and harbors act of June 13, 1902 (32 Stat. at L. 331, 334, chap. 1079)." But the Department, inasmuch as Congress had not authorized the improvement of the river, did "not deem it expedient to take further and definite action in the matter of approving the plans." It is manifest, therefore, that the state has no right under Federal laws which it may assert for itself or "on behalf of the citizens of all of the United States," and the motion to dismiss must be granted.

Dismissed.

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[525] FRANKLIN K. LANE, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, Appts.,
v.
CORNELIUS C. WATTS, Dabney C. T. Davis, Jr., John Watts, and James W. Vroom.

(See S. C. Reporter's ed. 525–542.)

Private land claims — passing of title —effect of location and approval.

1. The location of the grant made by the act of June 21, 1860 (12 Stat. at L. 71, chap. 167), authorizing the selection in lieu of the land common to two Mexican land grants of an equal quantity of vacant land, not mineral, in the territory of New Mexico, to be surveyed and located by the surveyor general, and the approval of such location by the surveyor general and later by the Commissioner of the General Land Office, passed the title, notwithstanding subsequent discoveries of minerals therein, although there had not then been an official survey, and although the existence of any official determination of the nonmineral character of the land selected is but an inference deduced from the circumstances, a decision of such question being an official duty which could not be avoided or evaded.

[For other cases, see Private Land Claims, III. f, 2, in Digest Sup. Ct. 1908.]

Private land claims — devesting title once acquired — revocation of official action.

2. The title to land selected under the act of June 21, 1860, authorizing the selection in lieu of the land common to two Mexican land grants of an equal quantity of vacant land, not mineral, once having passed by an approved location of the grant in accordance with that act cannot be subsequently devested by an attempted revocation by the successor in office of the Commissioner of the General Land Office of his predecessor's action in approving the location.

[For other cases, see Private Land Claims, III. f, in Digest Sup. Ct. 1908.]

Injunction — against public officers — restraining illegal acts.

3. The Secretary of the Interior and the Commissioner of the General Land Office may be enjoined from casting a cloud on a title vested by an approved location of the grant made by the act of June 21, 1860, by proceeding in the matter of certain attempted entries upon such land under the public land laws.

[For other cases, see Injunction, I. j, in Digest Sup. Ct. 1908.]

United States — immunity from suit — suit against officers.

4. The exemption of the United States from suit does not preclude the maintenance of an action to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from casting a cloud upon a title vested by an approved location of the grant made in the act of June 21, 1860, by proceeding in the matter of certain attempted entries upon such land under the public land laws.

[For other cases, see United States, 183–189, in Digest Sup. Ct. 1908.]

Equity — jurisdiction — remedy at law.

5. Equitable jurisdiction of a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from casting a cloud upon a title vested by an approved location of the grant made in the act of June 21, 1860, by proceeding in the matter of certain attempted entries upon such land under the public land laws, cannot be successfully challenged on the theory that the real purpose of the suit is to recover real property by trial of the legal title.

[For other cases, see Equity, I. c; Cloud on Title, II., in Digest Sup. Ct. 1908.]

Parties — necessary defendants — suit against officers of Land Department.

6. Persons who have initiated claims are not necessary parties to a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from casting a cloud upon a title vested by an approved location of the grant made in the act of June 21, 1860, by proceeding in the matter of certain attempted entries upon the land under the public land laws.

[For other cases, see Parties, II. a, 2, in Digest Sup. Ct. 1908.]

Courts — relation to Land Department — suit against officers.

7. The courts will not, on any theory of an attempted direct appeal from the decision of the Interior Department, decline jurisdiction of a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from casting a cloud upon a title vested by an approved location of the grant made in the act of June 21, 1860, by proceeding in the matter of certain attempted entries upon the land under the public land laws.

[For other cases, see Courts, I. e, 6, in Digest Sup. Ct. 1908.]

Parties — United States as necessary defendant — suit against officers.

8. The United States is not a necessary party to a suit in the District of Columbia courts to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from casting a cloud upon a title to lands in New Mexico vested by an approved location of the grant made by the act of June 21, 1860, by proceeding in the matter of certain attempted entries upon the land under the public land laws.

[For other cases, see Parties, II. a, 2, in Digest Sup. Ct. 1908.]

Private land claims — necessity of survey.

9. A survey was necessary to segregate from the public domain the lands selected under the act of June 21, 1860, authoriz-

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NOTE—On suit against Federal officers or agents as suit against United States—see note to Louisiana v. Garfield, 53 L. ed. U. S. 92.

On injunction to restrain act of public officers—see note to Mississippi v. Johnson, 18 L. ed. U. S. 437.

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ing the selection in lieu of the land common to two Mexican land grants of an equal quantity of vacant land, not mineral, in the territory of New Mexico, to be surveyed and located by the surveyor general.

[For other cases, see Private Land Claims, 527-584, in Digest Sup. Ct. 1908.]

Private land claims — location — by whom approved — effect.

10. The approval by the General Land Office of a location of land under the act of June 21, 1860, authorizing the selection in lieu of the land common to two Mexican land grants of an equal quantity of vacant land, not mineral, in the territory of New Mexico, to be surveyed and located by the surveyor general of New Mexico, is no less effectual to pass title because based on the latter's approval rather than upon the approval of the surveyor general of the territory of Arizona, which embraced the land when the Land Office acted, since it was upon the Land Office that the ultimate responsibility devolved.

[For other cases, see Private Land Claims, 517-521; 632-643a, in Digest Sup. Ct. 1908.]

Private land claims — survey — expense.

11. The expense of the survey called for by the act of June 21, 1860, authorizing the selection in lieu of the land common to two Mexican land grants of an equal quantity of vacant land, not mineral, to be surveyed and located by the surveyor general, should be borne by the government, notwithstanding the provisions of the act of June 2, 1862 (12 Stat. at L. 410, chap. 90), requiring all grants to be surveyed at the expense of the claimants, since the claimants in question gave up their rights to a definite tract of land at the instance of the government, to accommodate conflicting claims.

[Survey of Private Land Claims, see Private Land Claims, III. c, in Digest Sup. Ct. 1908.]

[No. 889.]

Argued April 14, 15, 1914. Decided June 22, 1914.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, enjoining the Secretary of the Interior and the Commissioner of the General Land Office from proceeding in the matter of certain attempted entries under the public land laws. Affirmed.[1]

See same case below, 41 App. D. C. 139.

The facts are stated in the opinion.

Assistant Attorney General West and Mr. C. Edward Wright argued the cause and filed a brief for appellants:

Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.

Ohio & M. R. Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 693; Snyder v. Supreme Ruler, F. M. C. 122 Tenn. 248, 45 L.R.A.(N.S.) 209, 122 S. W. 985; Goodman v. Purnell, 109 C. C. A. 408, 187 Fed. 93; Taenzer v. Chicago, R. I. & P. R. Co. 112 C. C. A. 153, 191 Fed. 551.

We are dealing with a grant from the United States of a mere right to select an acreage. In such cases the legal title never passes until official survey identifying and segregating the land from the public domain.

Joplin v. Chachere, 192 U. S. 94, 48 L. ed. 359, 24 Sup. Ct. Rep. 214; Rutherford v. Greene, 2 Wheat. 196, 4 L. ed. 218; Hornsby v. United States, 10 Wall. 224, 19 L. ed. 900; Stoneroad v. Stoneroad, 158 U. S. 240, 39 L. ed. 966, 15 Sup. Ct. Rep. 822; Lecompte v. United States, 11 How. 115, 126, 13 L. ed. 627, 632.

If a survey be not necessary to the passing of legal title, and if legal title has passed, as appellees claim, they have long been in a position where they could have maintained suits against trespassers for the possession of this land. They do not need this survey, on their contention; and we wonder why they want it, or the resulting plat and field notes, unless it possesses some efficacy of benefit to them. If it does, the Secretary, warned by the prima facie showing made against the integrity of their claim, should stay the filing of the plat and field notes.

Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; Peyton v. Desmond, 63 C. C. A. 651, 129 Fed. 1.

A claim to property, under a conveyance however inadequate to carry the true title to such property, and however incompetent may have been the power of the grantor in such conveyance to pass a title to the subject thereof, yet a claim asserted under the provisions of such a deed is strictly a claim under color of title.

Cameron v. United States, 148 U. S. 301, 308, 37 L. ed. 459, 461, 13 Sup. Ct. Rep. 595.

The lands within the limits of the Tumacacori and Calabasas grants were reserved. They were not subject to selection by the Baca heirs, and it is immaterial what the Land Office did, for it had no power in the premises. In other words, it did not lie in the power of the Commissioners of the General Land Office, in any way or manner, to approve Baca Float No. 3, so far as it lay within the boundaries of the old Mexican

[1] Leave granted on June 22, 1914, to present petition for rehearing within thirty days.

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grants. Had the survey been made, had it been approved, had all been done—yet the Land Office could pass no title, for the lands were not within its power to dispose of.

Noble v. Union River Logging R. Co. 147 U. S. 165, 173, 37 L. ed. 123, 126, 13 Sup. Ct. Rep. 271.

The court erroneously assumed jurisdiction to try title to land situate in another jurisdiction.

Irrigation Land & Improv. Co. v. Hitchcock, 28 App. D. C. 587; Columbia Nat. Sand Dredging Co. v. Morton, 28 App. D. C. 288, 7 L.R.A.(N.S.) 114, 8 Ann. Cas. 511.

The trial court was without jurisdiction, and the court of appeals erred in assuming jurisdiction in the absence of the United States as a necessary party.

Oregon v. Hitchcock, 202 U. S. 60, 50 L. ed. 935, 26 Sup. Ct. Rep. 568; Minnesota v. Hitchcock, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650; Louisiana v. Garfield, 211 U. S. 70, 53 L. ed. 92, 29 Sup. Ct. Rep. 31; Kirwan v. Murphy, 189 U. S. 35, 47 L. ed. 698, 23 Sup. Ct. Rep. 599; United States ex rel. Goldberg v. Daniels, 231 U. S. 218, ante, 191, 34 Sup. Ct. Rep. 84.

The court treated the suit practically as an appeal from the Secretary, and erroneously assumed jurisdiction to review, and did review, a matter exclusively within the jurisdiction of the appellants, involving, on their part, the exercise of judgment and discretion.

Fisher v. United States, 37 App. D. C. 436; United States ex rel. Ness v. Fisher, 223 U. S. 683, 56 L. ed. 610, 32 Sup. Ct. Rep. 356; United States ex rel. McKenzie v. Fisher, 39 App. D. C. 7; United States ex rel. Champion Lumber Co. v. Fisher, 39 App. D. C. 158; United States ex rel. McManus v. Fisher, 39 App. D. C. 176; United States ex rel. Red River Lumber Co. v. Fisher, 39 App. D. C. 181.

Mr. William C. Prentiss filed a brief in behalf of interested parties:

The area embraced in this private land claim was not "vacant" land, subject to selection by the heirs of Baca, but was land occupied and claimed under muniment of title of record in the official public records of the state of Sonora.

Faxon v. United States, 171 U. S. 244, 43 L. ed. 151, 18 Sup. Ct. Rep. 849.

This area was not only occupied and claimed, and in that sense not vacant, but it was in statutory reservation by virtue of the legislation of Congress following and designed to carry out the provisions of the treaties of Guadaloupe Hidalgo and Mesilla, the latter being known as the Gadsden purchase.

Re Tumacacori & C. Grant, 16 Land Dec. 408; Re Baca Float No. 3, 30 Land Dec. 97; Cameron v. United States, 148 U. S. 301, 37 L. ed. 459, 13 Sup. Ct. Rep. 595.

Mr. Joseph W. Bailey argued the cause, and, with Mr. Herbert Noble, filed a brief for appellees:

This case was not appealable to this court from the court of appeals of the District of Columbia.

United States ex rel. Champion Lumber Co. v. Fisher, 227 U. S. 445, 57 L. ed. 591, 33 Sup. Ct. Rep. 329; United States ex rel. Foreman v. Meyer, 227 U. S. 452, 57 L. ed. 594, 33 Sup. Ct. Rep. 331; Ansbro v. United States, 159 U. S. 698, 40 L. ed. 311, 16 Sup. Ct. Rep. 187.

No provision was made for the determination as to whether the land selected by the heirs of Baca was vacant and not mineral by any officer of the government. That there must be action by someone on behalf of the government before the title to the land would vest in the heirs of Baca is plain.

Cosmos Exploration Co. v. Gray Eagle Oil Co. 61 L.R.A. 230, 50 C. C. A. 79, 112 Fed. 4, 21 Mor. Min. Rep. 633, affirming 190 U. S. 301, 312, 47 L. ed. 1064, 1072, 23 Sup. Ct. Rep. 692.

The general jurisdiction over the public lands had been placed by Congress in the General Land Office, and, in the absence of any specific provision, the Commissioner of the General Land Office was the proper person to act on behalf of the government.

Fisher v. United States, 37 App. D. C. 436; Catholic Bishop v. Gibbon, 158 U. S. 155, 39 L. ed. 931, 15 Sup. Ct. Rep. 779; United States v. McClure, 174 Fed. 510.

The Commissioner was the officer authorized by law to pass upon the question whether the heirs of Baca were entitled to the land selected, and he could act on whatever evidence he saw fit.

Shaw v. Kellogg, 170 U. S. 336, 337, 42 L. ed. 1059, 18 Sup. Ct. Rep. 632.

The making, approving, and filing of survey was not prerequisite to passing of title.

Hornsby v. United States, 10 Wall. 224, 19 L. ed. 900; Shaw v. Kellogg, 170 U. S. 321, 42 L. ed. 1053, 18 Sup. Ct. Rep. 632.

Though the title passed from the government at the latest April 9, 1864, the survey by the government of the land was necessary to segregate the land from the public domain (Stoneroad v. Stoneroad, 158 U. S. 240, 39 L. ed. 966, 15 Sup. Ct. Rep. 822), and to fix its out-boundaries, and until the survey was made and completed by filing in the Land Office (Clearwater Timber Co. v. Shoshone County, 155 Fed. 612), the owners of the land under the Baca title were unable to take possession of it, or, in case of persons being in possession, to proceed by proper legal action to obtain such possession.

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The functions of the Land Department cease when the title passes out of the United States, and the jurisdiction of the courts then attaches (Noble v. Union River Logging R. Co. 147 U. S. 165, 176, 37 L. ed. 123, 127, 13 Sup. Ct. Rep. 271; Peyton v. Desmond, 63 C. C. A. 651, 129 Fed. 8). In such a case the United States is not a necessary party (Philadelphia Co. v. Stimson, 223 U. S. 605, 620, 56 L. ed. 570, 576, 32 Sup. Ct. Rep. 340), and the rule that the United States cannot be sued without its consent has no application, because in such a case the officers are not sued as or because they are officers of the government, but as individuals, and the court is not ousted of jurisdiction because they assert authority as such officers.

Philadelphia Co. v. Stimson, 223 U. S. 605, 622, 56 L. ed. 570, 577, 32 Sup. Ct. Rep. 340; Allen v. Baltimore & O. R. Co. 114 U. S. 311, 29 L. ed. 200, 5 Sup. Ct. Rep. 925, 962; Cunningham v. Macon & B. R. Co. 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609; United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Board of Liquidation v. McComb, 92 U. S. 531, 23 L. ed. 623; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Thomason v. Wellman, 124 C. C. A. 555, 206 Fed. 895; Texas Co. v. Central Fuel Oil Co. 114 C. C. A. 21, 194 Fed. 1; Wadsworth v. Boysen, 78 C. C. A. 437, 148 Fed. 771; Parsons v. Marye, 23 Fed. 113; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33; Belknap v. Schild, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443; Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; Kendall v. United States, 12 Pet. 524, 9 L. ed. 1181; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Central of Georgia R. Co. v. Railroad Commission, 161 Fed. 925; Wiemer v. Louisville Water Co. 130 Fed. 251.

A deed being over thirty years old, and bearing no suspicious indicia, is admissible in evidence without proof of execution, and establishes its genuineness and the fact of its execution by the parties who purport to execute it, and the authority of the attorney in fact will be presumed without proof, and the certificate of acknowledgment is conclusive, in the absence of fraud or duress, of the facts which the officer taking the acknowledgment was empowered to certify, which includes the identification of the parties executing the instrument.

Foote v. Brown, 81 Conn. 218, 70 Atl. 699; McMahon v. McDonald, 51 Tex. Civ. App. 613, 113 S. W. 322; Hodge v. Palms, 54 C. C. A. 570, 117 Fed. 396; McDonald v. Hanks, 52 Tex. Civ. App. 140, 113 S. W. 604; Goodhue v. Cameron, 142 App. Div. 470, 127 N. Y. Supp. 120; Ford v. Ford, 27 App. D. C. 401, 6 L.R.A.(N.S.) 442, 7 Ann. Cas. 245.

It is not pretended that the appellants have any title at all to the land in dispute, and consequently, if the appellees have any title at all, it is sufficient in this suit as against the appellants.

Rayner v. Lee, 20 Mich. 384; Reilly v. Wright, 117 Cal. 77, 48 Pac. 970; McGorray v. Robinson, 135 Cal. 312, 67 Pac. 279; Hall v. Kellogg, 16 Mich. 136; Newman v. Buzard, 24 Wash. 225, 64 Pac. 139; Davis v. Crump, 162 Cal. 513, 123 Pac. 294; Hornor v. Jarrett, 99 Ark. 154, 137 S. W. 820.

The appellees have at least a prima facie title to the land, which is sufficient, because where, as here, the two descriptions contained in the deeds are inconsistent, the grantee may rely on that most beneficial to him (Winter v. White, 70 Md. 305, 17 Atl. 84; Buchanan v. Steuart, 3 Harr. & J. 329; Merriman v. Blalack, 56 Tex. Civ. App. 594, 121 S. W. 552; Quade v. Pillard, 135 Iowa, 359, 112 N. W. 646; Sharp v. Thompson, 100 Ill. 447, 39 Am. Rep. 61; Armstrong v. Mudd, 10 B. Mon. 144, 50 Am. Dec. 545; Hall v. Gittings, 2 Harr. & J. 112; Colter v. Mann, 18 Minn. 96, Gil. 79); that description which accords with the intention of the parties will be adopted and the other rejected as false or mistaken (Co-operative Bldg. Bank v. Hawkins, 30 R. I. 171, 73 Atl. 617; Thompson v. Hill, 137 Ga. 308, 73 S. E. 640; Mylius v. Raine-Andrew Lumber Co. 69 W. Va. 346, 71 S. E. 404; Bender v. Chew, 129 La. 849, 56 So. 1023); that which gives effect to the deed rather than which defeats the deed will be adopted (Hall v. Bartlett, 158 Cal. 638, 112 Pac. 176); that applying to the land owned by the grantor will be adopted rather than that applying to land which he does not own (Piper v. True, 36 Cal. 606); the deed will be construed as a whole, and interpreted in the light of circumstances (Hubbard v. Whitehead, 221 Mo. 672, 121 S. W. 69); and finally, the deed will be construed most strongly against the grantor (Vance v. Fore, 24 Cal. 435; Marshall v. Niles, 8 Conn. 369; Lake Erie & W. R. Co. v. Whitham, 155 Ill. 514, 28 L.R.A. 612, 46 Am. St. Rep. 355, 40 N. E. 1014; Helms v. Howard, 2 Harr. & McH. 57; Carroll v. Norwood, 5 Harr. & J. 155; Carrington v. Goddin, 13 Gratt. 587).

The bare use of the word "trustees" after the names of the grantees in the deed does not create a trust, or prevent the grantees from taking absolute title.

Andrews v. Atlanta Real Estate Co. 92 Ga. 260, 18 S. E. 548; Brown v. Combs, 29 N. J. L. 36; Den ex dem. Cairns v. Hay, 21 N. J. L.

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174; Sansom v. Ayer & L. Tie Co. 144 Ky. 555, 139 S. W. 778; Starr v. Starr Methodist Protestant Church, 112 Md. 171, 76 Atl. 595; Shaeffer v. Klee, 100 Md. 264, 59 Atl. 850.

Nor does an agreement to hold the proceeds of the sale of land in trust create a trust in the land.

Talbott v. Barber, 11 Ind. App. 1, 54 Am. St. Rep. 491, 38 N. E. 487; Dexter v. MacDonald, 196 Mo. 373, 95 S. W. 359.

One officer of the Land Office is not competent to cancel or annul the act of his predecessor, or to recall a decision devesting title.

Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; United States v. Stone, 2 Wall. 525, 535, 17 L. ed. 765, 767; Peyton v. Desmond, 63 C. C. A. 651, 129 Fed. 9; Macfarland v. Philadelphia, B. & W. R. Co. 37 Wash. L. Rep. 129.

The appellees contend that there was no reservation in the treaty, but that the reservation was purely statutory (Lockhart v. Johnson, 181 U. S. 516, 522, 45 L. ed. 979, 983, 21 Sup. Ct. Rep. 665), and that the reservation did not attach until the petition was filed with the Surveyor General (Botiller v. Dominguez, 130 U. S. 247, 32 L. ed. 928, 9 Sup. Ct. Rep. 525; Re Tumacacori & C. Grant, 16 Land Dec. 420; Lockhart v. Johnson, 181 U. S. 516, 45 L. ed. 979, 21 Sup. Ct. Rep. 665; Astiazaran v. Santa Rita Land & Min. Co. 148 U. S. 80, 84, 37 L. ed. 376, 377, 13 Sup. Ct. Rep. 457), and that such was the contemporaneous construction of the statute by the Department of the Interior, which construction is entitled to great weight with the courts (United States v. Moore, 95 U. S. 763, 24 L. ed. 588), and that the statute itself provided for instructions to be given by the Secretary of the Interior, and, when given, such instructions became a part of the statute, and were not repealed until March 3, 1891 (Stoneroad v. Stoneroad, 158 U. S. 240, 39 L. ed. 966, 15 Sup. Ct. Rep. 822; Catholic Bishop v. Gibbon, 158 U. S. 167, 39 L. ed. 936, 15 Sup. Ct. Rep. 779; Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264; Wolsey v. Chapman, 101 U. S. 769, 25 L. ed. 920; Lockhart v. Johnson, 181 U. S. 516, 522, 45 L. ed. 979, 983, 21 Sup. Ct. Rep. 665).

The construction contended for by the appellees is further sustained by the definition of the word "claim," which is: "In a just, judicial sense, a demand of some matter of right, made by one person upon another, to do or to forbear to do some act or thing as a matter of duty" (Prigg v. Pennsylvania, 16 Pet. 615, 10 L. ed. 1089). "The assertion, demand, or challenge as a right, or the thing that is demanded or challenged" (Fordyce v. Godman, 20 Ohio St. 14). "Something asked for or demanded on the one hand, and not admitted or allowed, on the other" (Dowell v. Cardwell, 4 Sawy. 217, Fed. Cas. No. 4,039. See also 4 Rose's Notes [U. S.] 219).

All lands in the ceded territories not appropriated by the former government before they were acquired by the United States were the exclusive property of the United States, to be disposed of as it deemed advantageous (Irvine v. Marshall, 20 How. 558, 561, 15 L. ed. 994, 996); the power of the United States to prescribe the mode of presenting and demanding lands claimed, and to provide for the forfeiture of claims not presented and claimed, is not to be questioned (Tameling v. United States Freehold & Emigration Co. 93 U. S. 644, 23 L. ed. 998; Botiller v. Dominguez, 130 U. S. 247, 32 L. ed. 928, 9 Sup. Ct. Rep. 525; Ainsa v. United States, 161 U. S. 222, 40 L. ed. 678, 16 Sup. Ct. Rep. 544; Barker v. Harvey, 181 U. S. 490, 45 L. ed. 968, 21 Sup. Ct. Rep. 690), and the United States might have forfeited such claims by prescribing a limitation as to the presentation (Botiller v. Dominguez, 130 U. S. 247, 32 L. ed. 928, 9 Sup. Ct. Rep. 525), or by directing the possession and appropriation of the land (United States v. DeRepentigny, 5 Wall. 211–268, 18 L. ed. 627–646).

The rights of the appellees were initiated under the law and decisions holding that the reservation of these grants related to the time of the filing of the petition with the Surveyor General, and could not be affected by subsequent rules, decisions, or practices adopted by the Land Department.

James v. Germania Iron Co. 46 C. C. A. 476, 107 Fed. 597; Cornelius v. Kessel, 128 U. S. 461, 32 L. ed. 483, 9 Sup. Ct. Rep. 122.

Any attempt by the Department to change the rules became a judicial question, and would be an attempt to deprive the representatives of Baca of their property without due process of law (Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 323, 41 L. ed. 176, 16 Sup. Ct. Rep. 1018); and in such case it is the duty of the courts to overrule the Land Department if it departs from the law (Irvine v. Marshall, 20 How. 558–567, 15 L. ed. 994–998; United States v. Temple, 105 U. S. 97, 99, 26 L. ed. 967, 968).

Moreover, the attempt of the Department to hold the location of June 17, 1863, subordinate to the alleged grants, is an attempt to read into the act of June 21, 1860, the words "or reserved," which is in violation of the rule that nothing is to be added to a law and nothing taken away.

Rex v. Burrell, 12 Ad. & El. 468, 4 Perry & D. 207, 9 L. J. Q. B. N. S. 337, 4 Jur. 1109; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Shaw v. Kellogg,

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170 U. S. 312, 42 L. ed. 1050, 18 Sup. Ct. Rep. 632.

The Tumacacori and Calabasas claims were found invalid by the United States Supreme Court (Faxon v. United States, 171 U. S. 244, 43 L. ed. 151, 18 Sup. Ct. Rep. 849); and the San José de Sonoita claim was found invalid except to the extent of 1¾ sitios, about 7,592 acres (Ely v. United States, 171 U. S. 220, 43 L. ed. 142, 18 Sup. Ct. Rep. 840).

If swamp lands in unceded Indian country pass and become available on removal of the Indians (Callanan v. Chicago, M. & St. P. R. Co. 10 Land Dec. 285; Re Michigan, 8 Land Dec. 308; Re Minnesota, 27 Land Dec. 418), why should not land covered by the Tumacacori and Calabasas claims, and the rejected portion of the San José de Sonoita claim, likewise become available to the representatives of Baca, assuming that they were reserved June 17, 1863, upon their having been found by the courts to be invalid?

It is submitted further that in using the word "vacant" in the act of June 21, 1860, the Congress intended land not appropriated by another in such a manner as to give notice of his claim to the heirs of Baca (Cosmos Exploration Co. v. Gray Eagle Oil Co. 61 L.R.A. 230, 50 C. C. A. 79, 112 Fed. 4, 2 Mor. Min. Rep. 633, affirmed in 190 U. S. 301, 312, 47 L. ed. 1064, 1072, 23 Sup. Ct. Rep. 692), and did not intend that the claims of Spanish or Mexican grantees, of which there was no record available to the heirs of Baca, and who were not in actual occupation of the land, but merely had a written grant concealed in whatever place such grantees kept their title deeds, should prevent the selection and location of the land by the heirs of Baca.

Mr. G. H. Brevillier also argued the cause, and, with Mr. James W. Vroom, filed a brief for appellees James W. Vroom and John Watts:

When legal title has passed from the United States, the Secretary of the Interior and Commissioner of the General Land Office may be enjoined from interfering therewith, and compelled to supply a muniment thereof.

Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; Philadelphia Co. v. Stimson, 223 U. S. 605, 620, 622, 623, 56 L. ed. 570, 576–578, 32 Sup. Ct. Rep. 340; Ballinger v. United States, 216 U. S. 240, 54 L. ed. 464, 30 Sup. Ct. Rep. 338; Peyton v. Desmond, 63 C. C. A. 651, 129 Fed. 1; United States v. Stone, 2 Wall. 525, 535, 17 L. ed. 765, 767; Garfield v. United States, 211 U. S. 249, 261, 53 L. ed. 168, 174, 29 Sup. Ct. Rep. 62; Beley v. Naphtaly, 169 U. S. 353, 365, 42 L. ed. 775, 779, 18 Sup. Ct. Rep. 354; Board of Liquidation v. McComb, 92 U. S. 531, 541, 23 L. ed. 623, 628; United States v. Schurz, 102 U. S. 378, 396, 402, 404, 26 L. ed. 167, 171, 173, 174; Allen v. Baltimore & O. R. Co. 114 U. S. 311, 315, 29 L. ed. 200, 201, 5 Sup. Ct. Rep. 925, 962.

Even though the officers allege that the United States claims legal title, the courts still have jurisdiction if the admitted facts fail to sustain the claim. Two recent cases where the defendant officers unwarrantably claimed that title was still in an Indian nation, to be administered by the United States under a trust or power in trust, uphold the jurisdiction of the courts in such cases.

Ballinger v. United States, 216 U. S. 240, 54 L. ed. 464, 30 Sup. Ct. Rep. 338; Garfield v. United States, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62.

In the case at bar, no Commissioner or Secretary has ever attempted directly to revoke, annul, or even disapprove of the action herein of the Commissioner on April 9, 1864; they have simply attempted to apply their own varied construction of it. The construction of that action of April 9, 1864, and of what is necessary to pass title, are purely questions of law, involving substantive rights, and not matters of administrative detail, and the courts have full jurisdiction to make and enforce their own construction thereof, even as to whether, on the admitted facts, legal title has passed.

Wisconsin C. R. Co. v. Forsythe, 159 U. S. 46, 61, 40 L. ed. 71, 76, 15 Sup. Ct. Rep. 1020; Calhoun v. Violet, 173 U. S. 60, 63, 43 L. ed. 614, 615, 19 Sup. Ct. Rep. 324; Menotti v. Dillon, 167 U. S. 703, 719, 42 L. ed. 333, 338, 17 Sup. Ct. Rep. 945; Sanford v. Sanford, 139 U. S. 642, 647, 35 L. ed. 290, 291, 11 Sup. Ct. Rep. 666; Hawley v. Diller, 178 U. S. 476, 489, 44 L. ed. 1157, 1162, 20 Sup. Ct. Rep. 986.

A direct revocation by the Department of its action by which legal title passed is an attempt to deprive an owner of his property without due process of law; the end desired can only be effected in a direct action by the United States to annul the grant.

Noble v. Union River Logging R. Co. 147 U. S. 165, 176, 37 L. ed. 123, 127, 13 Sup. Ct. Rep. 271.

The Secretary and the Commissioner may be compelled to do a ministerial act not involving discretion, such as issuing a patent or giving a muniment of title when the right thereto is vested, as such right is equivalent, so far as the government is concerned, to a patent or muniment already issued or given.

Ballinger v. United States, 216 U. S. 240, 250, 54 L. ed. 464, 468, 30 Sup. Ct. Rep. 338; United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 335, 50 L. ed. 499, 505,

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26 Sup. Ct. Rep. 282; Garfield v. United States, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62; Wright v. Roseberry, 121 U. S. 488, 497, 499, 30 L. ed. 1039, 1040, 1041, 7 Sup. Ct. Rep. 985; United States v. Stone, 2 Wall. 525, 535, 17 L. ed. 765, 767; United States v. Schurz, 102 U. S. 378, 402, 404, 26 L. ed. 173, 174.

A ministerial duty arises where an officer has no discretion as to whether or not he shall perform it, even though the officer must construe the law to find out what he must do.

Roberts v. United States, 176 U. S. 221, 231, 44 L. ed. 443, 447, 20 Sup. Ct. Rep. 376; Mississippi v. Johnson, 4 Wall. 475, 498, 18 L. ed. 437, 440.

Even a patent, with its words of conveyance, is often merely the muniment or documentary evidence of a title which passed some time previously thereto; in such cases the execution and delivery of a patent are ministerial acts, neither involving nor admitting any discretion whatsoever as to the propriety thereof.

Deseret Salt Co. v. Tarpey, 142 U. S. 241, 251, 35 L. ed. 999, 1002, 12 Sup. Ct. Rep. 158; Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 510, 33 L. ed. 687, 694, 10 Sup. Ct. Rep. 341; Langdeau v. Hanes, 21 Wall. 521, 22 L. ed. 606; Whitney v. Morrow, 112 U. S. 693, 28 L. ed. 871, 5 Sup. Ct. Rep. 333; Morrow v. Whitney, 95 U. S. 551, 24 L. ed. 456; Simmons v. Wagner, 101 U. S. 260, 261, 25 L. ed. 910, 911.

A "muniment of title," such as the Commissioner on April 9, 1864, ordered the plat of survey to be, is only a means of evidence by which an owner may defend his boundaries or title.

Wedge v. Spencer, 4 Silv. Sup. Ct. 171, 7 N. Y. Supp. 173.

The determination of the Department is a final adjudication, even though it directs the marking out of the boundaries of a specific tract and the filing of a map thereof as a muniment of title.

Ballinger v. United States, 216 U. S. 240, 54 L. ed. 464, 30 Sup. Ct. Rep. 338; United States v. Schurz, 102 U. S. 378, 26 L. ed. 167.

The equitable remedy of mandatory injunction is well known.

Re Lennon, 166 U. S. 548, 556, 41 L. ed. 1110, 1113, 17 Sup. Ct. Rep. 658; Parsons v. Marye, 23 Fed. 113; Wiemer v. Louisville Water Co. 130 Fed. 251.

The appellees, John Watts and James W. Vroom, have proved sufficient title in themselves to maintain this action.

Applegate v. Lexington & C. C. Min. Co. 117 U. S. 255, 262, 264, 29 L. ed. 892, 894, 895, 6 Sup. Ct. Rep. 742; Fulkerson v. Holmes, 117 U. S. 389, 29 L. ed. 915, 6 Sup. Ct. Rep. 780; Derry v. Cray, 5 Wall. 795, 805, 18 L. ed. 653, 656; Wilson v. Snow, 228 U. S. 217, 57 L. ed. 807, 50 L.R.A. (N.S.) 604, 33 Sup. Ct. Rep. 487; Little v. Palister, 4 Me. 209; McMahon v. McDonald, 51 Tex. Civ. App. 613, 113 S. W. 322; Hodge v. Palms, 54 C. C. A. 570, 117 Fed. 396; Ford v. Ford, 27 App. D. C. 401, 6 L.R.A.(N.S.) 442, 7 Ann. Cas. 245.

The 3d section of the act of June 21, 1860, confirmed to the heirs of Baca the land granted to their ancestor, Luis Maria Baca. It passed the title of the United States to this land as effectually as if it contained in words a grant *de novo*.

Shaw v. Kellogg, 170 U. S. 312, 331, 42 L. ed. 1050, 1057, 18 Sup. Ct. Rep. 632.

The 6th section made two grants: The first, of a power to select in lieu of Las Vegas; and the second, of the right, "when required" by the heirs, to a subsequent survey of the land taken in execution of the power. The power "to select" is defined in the proviso thereto as a "right hereby granted." This is equivalent to "the grant of the right to take," and constituted a "grant *in præsenti* of lands to be thereafter identified" (Stalker v. Oregon Short Line R. Co. 225 U. S. 142, 146, 148, 56 L. ed. 1027, 1030, 1031, 32 Sup. Ct. Rep. 636; Noble v. Union River Logging R. Co. 147 U. S. 165, 172, 176. 37 L. ed. 123, 126, 127, 13 Sup. Ct. Rep. 271); and on the Department's approval of the propriety of the exercise of that right in the manner prescribed by it, title vested (Stalker v. Oregon Short Line R. Co. 225 U. S. 148, 151, 153, 56 L. ed. 1031, 1032, 1033, 32 Sup. Ct. Rep. 636; Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 592, 42 L. ed. 591, 592, 18 Sup. Ct. Rep. 208; Noble v. Union River Logging R. Co. 147 U. S. 172, 176, 37 L. ed. 126, 127, 13 Sup. Ct. Rep. 271).

The Commissioner had the unquestioned right to make regulations to "fill in the details" as to which no specific provision was made in the statute.

United States v. Grimaud, 220 U. S. 506, 516, 517, 520, 55 L. ed. 563, 567, 568, 569, 31 Sup. Ct. Rep. 480; Leonard v. Lennox, 104 C. C. A. 296, 181 Fed. 760.

This section, therefore, granted to the heirs, *in præsenti*, a power in land and also a right to a subsequent survey. If they accepted and properly executed that power, the execution of it would vest in them the fee-simple title to the lands by them selected in lieu of the lands of "Las Vegas Grandes," and would give them the right to the survey when they requested it. Their title would rest upon and be granted by the statute of June 21, 1860, creating the power; and on the Commissioner's approval of the propriety of the selection it would take effect as if conveyed by that statute.

United States v. Detroit Timber & Lumber

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Co. 200 U. S. 321, 334, 335, 50 L. ed. 499, 504, 505, 26 Sup. Ct. Rep. 282; Weyerhaeuser v. Hoyt, 219 U. S. 380, 388, 55 L. ed. 258, 261, 31 Sup. Ct. Rep. 300; Stalker v. Oregon Short Line R. Co. 225 U. S. 142, 56 L. ed. 1027, 32 Sup. Ct. Rep. 636.

To execute this power only two acts were necessary: first, a seasonable selection by the heirs in due form of a tract of land claimed by them to be of the character specified in the act; and second, an approval on behalf of the United States of the propriety of the selection. The subsequent survey which it was the duty of the surveyor general to make when requested by the heirs was the second or collateral right conferred by the statute, and its exercise would not be necessary until the heirs, in their convenience, required it, and then would simply be an official identification on the ground of the description in the note of selection.

Glasgow v. Hortiz, 1 Black, 595, 601, 602, 17 L. ed. 110, 113, 114.

In the execution of the power granted by the 6th section of the act, the government had an equal interest with the heirs of Baca —an exchange of lands was contemplated; and Congress was desirous of making the exchange so that the inhabitants of Las Vegas—strangers to our laws and language, and unfriendly to our sovereignty over them —would not be disturbed in their possessions and settlements.

Maese v. Herman, 183 U. S. 572, 580, 581, 46 L. ed. 335, 338, 339, 22 Sup. Ct. Rep. 91.

The United States has in fact received the full consideration for the relinquishment by the heirs of their title to Las Vegas. This court has decided that the title of the heirs to Las Vegas was devested (Maese v. Herman, 183 U. S. 572, 46 L. ed. 335, 22 Sup. Ct. Rep. 91); there could not be a divestiture of title to Las Vegas until there was an investiture of title to the land selected in lieu thereof.

The word "vacant" means "unoccupied" (Shaw v. Kellogg, 170 U. S. 332, 42 L. ed. 1057, 18 Sup. Ct. Rep. 632); and by "land not mineral" is meant land which is not chiefly valuable for that purpose, to an extent justifying exploitation; the mere fact that there might be prospect holes, shafts, etc., of exhausted or abandoned mining operations, is insufficient to characterize the land as mineral land.

Davis v. Wiebbold, 139 U. S. 507, 519, 35 L. ed. 238, 242, 11 Sup. Ct. Rep. 628; Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365; Colorado Coal & I. Co. v. United States, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; Deffeback v. Hawke, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; Shaw v. Kellogg, 170 U. S. 312, 340, 42 L. ed. 1050, 1060, 18 Sup. Ct. Rep. 632.

After the election by the Baca heirs to take under the act of 1860, and the determination of the acreage of the Las Vegas grant, the various steps contemplated by the act of 1860 were as follows:

First: Selection by the heirs within the time limit of a square tract of land of proper size claimed by them to be vacant and nonmineral.

Second: Filing of a certificate of selection with the proper surveyor general, who, under the instructions of the Department, was to send it to the Department with his approval or disapproval thereof.

Third: Approval of the selection by the Commissioner of the General Land Office, although the statute was silent as to who should act for the government. Congress certainly intended that some government officer should act, and the Commissioner was the one intended.

Catholic Bishop v. Gibbon, 158 U. S. 155, 166, 167, 39 L. ed. 931, 936, 15 Sup. Ct. Rep. 779; United States v. Barnes, 222 U. S. 513, 521, 56 L. ed. 291, 294, 32 Sup. Ct. Rep. 117; Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 309, 47 L. ed. 1064, 1070, 23 Sup. Ct. Rep. 692.

His approval of the selection would pass the title, as the final adjudication that the power had been properly exercised; it would be the final act to which any discretionary power was attached, and would be equivalent to a patent.

Beley v. Naphtaly, 169 U. S. 353, 365, 42 L. ed. 775, 779, 18 Sup. Ct. Rep. 354; Stalker v. Oregon Short Line R. Co. 225 U. S. 142, 148, 151, 153, 56 L. ed. 1027, 1031, 1032, 1033, 32 Sup. Ct. Rep. 636; Louisiana v. Garfield, 211 U. S. 70, 75, 76, 53 L. ed. 92, 96, 29 Sup. Ct. Rep. 31; Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 592, 42 L. ed. 591, 592, 18 Sup. Ct. Rep. 208.

The statute did not contemplate a patent.

Shaw v. Kellogg, 170 U. S. 312, 341, 42 L. ed. 1050, 1060, 18 Sup. Ct. Rep. 632.

Fourth: After the Commissioner had approved the selection, it became the ministerial "duty" of the surveyor general "to make survey and location" of the tract "when" the heirs required it. This ministerial duty had nothing to do with the vesting of the title (Glasgow v. Hortiz, 1 Black, 595, 601, 602, 17 L. ed. 110, 113, 114). The heirs could take their time about having the survey executed; Congress certainly saw no need for prompt surveys (Shaw v. Kellogg, 170 U. S. 312, 334, 42 L. ed. 1050, 1058, 18 Sup. Ct. Rep. 632). In a grant under the 2d section of the act, there was a direction that it be "immediately" surveyed and segregated; the use of the different adverbs of

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time is most striking. Of course the heirs were not entitled to the performance of that "duty" until after the approval of the selection; in other words, the word "lawfully" must be read into the statute at this point. The Land Department held at the time, whenever the question arose in any of the floats, that its approval of the selection must precede survey and location by the surveyor general. On June 15, 1887, Secretary Lamar defined "location" as the "designation by approximate boundaries of a specific tract." Justice Field's definition is substantially the same (St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 649, 26 L. ed. 875, 879, 11 Mor. Min. Rep. 673). The survey and location which it was the "duty" of the surveyor general to make were the marking of the boundaries and the physical "location" or identification of the land, without any adjudicative authority.

Fifth: Filing of the field notes and plat of survey for the benefit of the heirs and the government, to serve as a "muniment of title" to the former and as a technical record of the description in the grant, "for future reference, as required by law," and to indicate to the government what land remained for other disposal (Langdeau v. Hanes, 21 Wall. 521, 530, 22 L. ed. 606, 609). The right to have a survey made imports the right to have a plat of it filed as a public record.

Adjudicative power either prior or subsequent to the approval of the location by the Commissioner was not an attribute of the general statutory power of the surveyor general.

Barden v. Northern P. R. Co. 154 U. S. 288, 320, 38 L. ed. 992, 999, 14 Sup. Ct. Rep. 1030.

The powers to be exercised by the Commissioner were necessarily discretionary. In such case the rule is well settled that, whenever a statute gives discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of those facts.

Martin v. Mott, 12 Wheat. 19, 31, 6 L. ed. 537, 541; United States v. Arredondo, 6 Pet. 691, 729, 8 L. ed. 547, 561; United States v. California & O. Land Co. 148 U. S. 31, 43, 37 L. ed. 354, 360, 13 Sup. Ct. Rep. 458.

The Commissioner's functions were judicial in their nature (Weyerhaeuser v. Hoyt, 219 U. S. 380, 388, 55 L. ed. 258, 261, 31 Sup. Ct. Rep. 300); and his discretion could not be reviewed by the Secretary, and the Secretary's discretion thereby substituted for that of the Commissioner, in the absence of express statutory authority therefor (Butterworth v. United States, 112 U. S. 50, 56, 57, 28 L. ed. 656, 658, 5 Sup. Ct. Rep. 25). Although the act of July 4, 1836 (now Rev. Stat. § 453, U. S. Comp. Stat. 1901, p. 257), provided that the Commissioner's executive duties should be under the direction of the Secretary, every act of the Commissioner would, in contemplation of law, be that of the Secretary, even if the statute had given the latter the sole power of approval (United States v. Chicago, M. & St. P. R. Co. 218 U. S. 233, 243, 54 L. ed. 1015, 1020, 31 Sup. Ct. Rep. 7). Their jurisdiction may have been concurrent (Knight v. United Land Asso. 142 U. S. 161, 177, 35 L. ed. 974, 978, 12 Sup. Ct. Rep. 258), and either officer might have revoked a determination of the Commissioner before the passing of legal title, but the Secretary's supervisory power would be neither unlimited nor arbitrary (Ballinger v. United States, 216 U. S. 240, 248, 54 L. ed. 464, 467, 30 Sup. Ct. Rep. 338).

After the passing of title, however, no officer had any power over the matter whatever (Beley v. Naphtaly, 169 U. S. 353, 365, 42 L. ed. 775, 779, 18 Sup. Ct. Rep. 354).

After the exercise of the discretion, the courts will not entertain an inquiry as to the extent of the Commissioner's investigation, his knowledge on the points decided, or the methods by which he reached his determination (De Cambra v. Rogers, 189 U. S. 119, 122, 47 L. ed. 734, 735, 23 Sup. Ct. Rep. 519). The only determinative consideration is, what final action did the Commissioner take in the exercise of his discretionary power?

When the Commissioner had acted finally, and the title had vested in the heirs of Baca, a legal presumption arose that every prerequisite to the grant had been performed both by the government and the heirs, and no negligence or omission, prior or subsequent thereto, by any government officer, can affect it.

Stalker v. Oregon Short Line R. Co. 225 U. S. 142, 153, 56 L. ed. 1027, 1032, 32 Sup. Ct. Rep. 636; Lytle v. Arkansas, 9 How. 314, 333, 13 L. ed. 153, 160; Patterson v. Jenks, 2 Pet. 216, 237, 7 L. ed. 402, 409; Glasgow v. Hortiz, 1 Black, 595, 601, 602, 17 L. ed. 110, 113, 114.

The adjudication of a question of fact, or of mixed law and fact, by one Commissioner, constitutes an absolute adjudication, and cannot be reviewed after the passing of legal title by any subsequent Commissioner, or by the Secretary of the Interior or any other executive officer; nor by the courts, except in a direct action by the United States to annul the grant.

United States v. Schurz, 102 U. S. 378, 396, 402, 404, 26 L. ed. 167, 171, 173, 174;

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United States v. Stone, 2 Wall. 525, 17 L. ed. 765; Whitcomb v. White, 214 U. S. 15, 53 L. ed. 889, 29 Sup. Ct. Rep. 599; Beley v. Naphtaly, 169 U. S. 353, 365, 42 L. ed. 775, 779, 18 Sup. Ct. Rep. 354; Moore v. Robbins, 96 U. S. 530, 533, 24 L. ed. 848, 850; Noble v. Union River Logging R. Co. 147 U. S. 165, 176, 37 L. ed. 123, 127, 13 Sup. Ct. Rep. 271; Heath v. Wallace, 138 U. S. 573, 585, 34 L. ed. 1063, 1068, 11 Sup. Ct. Rep. 380; American School v. McAnnulty, 187 U. S. 94, 108, 47 L. ed. 90, 96, 23 Sup. Ct. Rep. 33; Barden v. Northern P. R. Co. 154 U. S. 288, 330, 38 L. ed. 992, 1002, 14 Sup. Ct. Rep. 1030; Gardner v. Bonestell, 180 U. S. 362, 370, 45 L. ed. 574, 577, 21 Sup. Ct. Rep. 399; Johnson v. Drew, 171 U. S. 93, 99, 43 L. ed. 88, 90, 18 Sup. Ct. Rep. 800; Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321, 323, 41 L. ed. 175, 176, 16 Sup. Ct. Rep. 1018; Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 450, 451, 27 L. ed. 226, 227, 228, 1 Sup. Ct. Rep. 389; Lee v. Johnson, 116 U. S. 48, 51, 29 L. ed. 570, 571, 6 Sup. Ct. Rep. 249; Ballinger v. United States, 216 U. S. 240, 54 L. ed. 464, 30 Sup. Ct. Rep. 338.

The case at bar is largely governed and controlled by Shaw v. Kellogg, 170 U. S. 312, 42 L. ed. 1050, 18 Sup. Ct. Rep. 632.

What the Commissioner should have done on April 9, 1864, cannot be considered at this late day.

Barden v. Northern P. R. Co. 154 U. S. 288, 330, 38 L. ed. 992, 1002, 14 Sup. Ct. Rep. 1030; Shaw v. Kellogg, 170 U. S. 312, 341, 42 L. ed. 1050, 1060, 18 Sup. Ct. Rep. 632.

A grant delivered out for survey means a perfect title.

United States v. Hanson, 16 Pet. 196, 200, 10 L. ed. 935, 937; United States v. Boisdore, 11 How. 63, 92, 13 L. ed. 605, 617.

Where the statute does not contemplate conveyance by a patent, title passes either under the act itself or by an approval of the propriety of a selection thereunder (Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 592, 42 L. ed. 591, 592, 18 Sup. Ct. Rep. 208; Noble v. Union River Logging R. Co. 147 U. S. 165, 172, 37 L. ed. 123, 126, 13 Sup. Ct. Rep. 271; United States v. Montana Lumber & Mfg. Co. 196 U. S. 573, 577, 49 L. ed. 604, 605, 25 Sup. Ct. Rep. 367, where, however, by special act, title remained in abeyance until cost of survey was paid); and such approval "would be equivalent to a patent."

Beley v. Naphtaly, 169 U. S. 353, 365, 42 L. ed. 775, 779, 18 Sup. Ct. Rep. 354.

Where there was a "grant of a right to take" lands for station buildings, etc., the exercise of that power by the railroad company, with the approval of the Department, vested the title, notwithstanding the non-

compliance by the register with a Department regulation requiring the notation of the lands approved on a certain map in his office.

Stalker v. Oregon Short Line R. Co. 225 U. S. 142, 56 L. ed. 1027, 32 Sup. Ct. Rep. 636.

Even if the surveyor general had disapproved of the location, the Commissioner could have overruled him; consequently, so long as the highest authority has acted, any question as to whether or not the proper subordinate officer acted is immaterial.

Stalker v. Oregon Short Line R. Co. 225 U. S. 142, 153, 56 L. ed. 1027, 1032, 32 Sup. Ct. Rep. 636.

The making of survey, plat, and field notes were ministerial acts.

Glasgow v. Hortiz, 1 Black, 595, 601, 602, 17 L. ed. 110, 113, 114; Russell v. Maxwell Land Grant Co. 158 U. S. 253, 259, 39 L. ed. 971, 973, 15 Sup. Ct. Rep. 827; Ballinger v. United States, 216 U. S. 240, 250, 54 L. ed. 464, 468, 30 Sup. Ct. Rep. 338; Simmons v. Wagner, 101 U. S. 260, 261, 25 L. ed. 911; United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 335, 50 L. ed. 499, 505, 26 Sup. Ct. Rep. 282; United States v. Stone, 2 Wall. 525, 535, 17 L. ed. 765, 767.

In the case at bar there was a definite description of a specific tract, easily capable of identification, and therefore segregation by survey was not necessary to pass title.

Langdeau v. Hanes, 21 Wall. 521, 530, 531, 22 L. ed. 606, 609; Snyder v. Sickles, 98 U. S. 203, 213, 214, 25 L. ed. 97, 101, 102; Whitney v. Morrow, 112 U. S. 693, 695, 28 L. ed. 871, 872, 5 Sup. Ct. Rep. 333; Glasgow v. Hortiz, 1 Black, 595, 601, 602, 17 L. ed. 110, 113, 114.

The function of the survey was not to pass title, but to mark out the land so that its boundaries might be officially monumented and designated on a plat of survey according to the township and section system,—the approved method of describing western lands; and it would also inform the government what land it had left. The government fixes the boundaries between its remaining land and the land of its grantee.

Russell v. Maxwell Land Grant Co. 158 U. S. 253, 39 L. ed. 971, 15 Sup. Ct. Rep. 827; Langdeau v. Hanes, 21 Wall. 521, 530, 22 L. ed. 606, 609; Joplin v. Chachere, 192 U. S. 94, 48 L. ed. 359, 24 Sup. Ct. Rep. 214; United States v. Montana Lumber & Mfg. Co. 196 U. S. 573, 578, 49 L. ed. 604, 605, 25 Sup. Ct. Rep. 367.

The delay of the ministerial officers of the government in performing the ministerial act of the survey can neither devest the title nor suspend its vesting.

Stalker v. Oregon Short Line R. Co. 225 U. S. 142, 153, 56 L. ed. 1027, 1032, 32 Sup. Ct. Rep. 636; Glasgow v. Hortiz, 1 Black, 595.

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601, 602, 17 L. ed. 110, 113, 114; Lytle v. Arkansas, 9 How. 314, 333, 13 L. ed. 153, 160.

Congress had power to prescribe the mode of ascertaining the validity of titles under Spanish and Mexican claims or grants, and to provide for a forfeiture thereof unless the regulations for the ascertainment of the validity of the titles were complied with; or Congress could simply have directed the possession and appropriation of the land. Congress could act with process of law or without any process at all, especially as the 14th Amendment had not then been passed.

Barker v. Harvey, 181 U. S. 481, 486, 487, 45 L. ed. 963, 965, 966, 21 Sup. Ct. Rep. 690; Ainsa v. United States, 161 U. S. 208, 222, 40 L. ed. 673, 678, 16 Sup. Ct. Rep. 544; Botiller v. Dominguez, 130 U. S. 238, 32 L. ed. 926, 9 Sup. Ct. Rep. 525; Tameling v. United States Freehold & Emigration Co. 93 U. S. 644, 661, 662, 23 L. ed. 998, 1002, 1003; United States v. De Repentigny, 5 Wall. 211, 268, 18 L. ed. 627, 646; Astiazaran v. Santa Rita Land & Min. Co. 148 U. S. 80, 37 L. ed. 376, 13 Sup. Ct. Rep. 457.

Even if the 8th section of the act of 1854 had been extended to the land in question before the act of 1860, it would not, in any event, be read into the 6th section of the act of June 21, 1860, as that was a subsequent special act, complete in itself, clearly specifying the kind of land available thereunder.

Townsend v. Little, 109 U. S. 504, 512, 27 L. ed. 1012, 1015, 3 Sup. Ct. Rep. 357; Kepner v. United States, 195 U. S. 100, 125, 49 L. ed. 114, 122, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 22, 43 L. ed. 341, 350, 19 Sup. Ct. Rep. 77; United States v. Nix, 189 U. S. 199, 205, 47 L. ed. 775, 777, 23 Sup. Ct. Rep. 495; Menotti v. Dillon, 167 U. S. 703, 721, 42 L. ed. 333, 339, 17 Sup. Ct. Rep. 945; United States v. Oregon & C. R. Co 176 U. S. 28, 46, 44 L. ed. 358, 366, 20 Sup. Ct. Rep. 261.

In all the railroad grants there were provisions specifically excepting or referring to reserved lands; there was no such exception in the case at bar. In the act of 1860, "vacant" means "unoccupied" (Shaw v. Kellogg, 170 U. S. 332, 42 L. ed. 1057, 18 Sup. Ct. Rep. 632). This court has found that the Tumacacori and Calabasas claims had no occupancy subsequent to 1855 (Faxon v. United States, 171 U. S. 244, 246, 43 L. ed. 151, 152, 18 Sup. Ct. Rep. 849); and they have been specifically declared invalid, and the land included therein to have been in 1863 public land (Ibid.).

Even if there were a reservation, the land remained public land, to be disposed of by Congress as it saw fit (Menotti v. Dillon, 167 U. S. 703, 721, 42 L. ed. 333, 339, 17 Sup. Ct. Rep. 945); especially as there was no appropriation of the land for the actual use of any department of the government (Scott v. Carew, 196 U. S. 100, 109, 49 L. ed. 403, 405, 25 Sup. Ct. Rep. 193).

Where a statute is ambiguous and susceptible of two constructions, the courts will adopt that construction which best comports with the principles of reason, justice, and convenience (Knowlton v. Moore, 178 U. S. 41, 77, 44 L. ed. 969, 984, 20 Sup. Ct. Rep. 747; United States v. Gue Lim, 176 U. S. 459, 467, 44 L. ed. 544, 547, 20 Sup. Ct. Rep. 415; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734); and the courts will lean to that construction of a statute which will uphold transactions consummated under it (Provident Life & T. Co. v. Mercer County, 170 U. S. 593, 600, 42 L. ed. 1156, 1159, 18 Sup. Ct. Rep. 788; Andes v. Ely, 158 U. S. 312, 321, 39 L. ed. 996, 1001, 15 Sup. Ct. Rep. 954). An exemption from future legislation must also be express or by clear implication (Pennsylvania R. Co. v. Miller, 132 U. S. 75, 84, 33 L. ed. 267, 272, 10 Sup. Ct. Rep. 34).

The regulations made by the Secretary under the specific provisions of the 8th and 9th sections of the act of July 22, 1854, are not only a part of the statute (United States v. Grimaud, 220 U. S. 506, 516, 517, 55 L. ed. 563, 567, 568, 31 Sup. Ct. Rep. 480; Leonard v. Lennox, 104 C. C. A. 296, 181 Fed. 760; Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 47 L. ed. 1064, 23 Sup. Ct. Rep. 692), but the Secretary's construction of the law, evidenced by such regulations, is controlling in the case of any ambiguity under the act (Jacobs v. Prichard, 223 U. S. 200, 213, 214, 56 L. ed. 405, 409, 32 Sup. Ct. Rep. 289).

A "claim" is necessarily a demand upon or assertion to another of some matter as of right.

Prigg v. Pennsylvania, 16 Pet. 539, 615, 10 L. ed. 1060, 1089.

Not only did the Secretary require a presentation of claim, and a plat of survey or other evidence of boundaries, so that there might be no doubt thereafter in reserving the lands from sale, but this court also has understood that there was no reservation until the presentation or assertion of a claim (Lockhart v. Johnson, 181 U. S. 516, 521, 45 L. ed. 979, 982, 21 Sup. Ct. Rep. 665; Ainsa v. New Mexico & A. R. Co. 175 U. S. 76, 89, 44 L. ed. 78, 83, 20 Sup. Ct. Rep. 28). Such was the understanding of the Department until the year 1900 (Re San Juan De Las Boquilasy Nogales, 1 Land Dec. 167; Re Rancho San Rafael de la Zanja, 3 Land Dec. 439; Re Tres Alamos, 4 Land Dec.

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431, Re Tumacacori & C. Grant, 16 Land Dec. 420; Apodaca v. Mulligan, 27 Land Dec. 608).

The burden of proof, with its consequent duty to assert the claim, was on the claimant.

United States v. Ortiz, 176 U. S. 422, 426, 44 L. ed. 529, 531, 20 Sup. Ct. Rep. 466.

Such claims have never been treated as *sub judice* until a claim therefor had been duly made to the surveyor general under the regulations.

Astiazaran v. Santa Rita Land & Min. Co. 148 U. S. 80, 83, 84, 37 L. ed. 376, 377, 378, 13 Sup. Ct. Rep. 457; Cameron v. United States, 148 U. S. 301, 310, 37 L. ed. 459, 462, 13 Sup. Ct. Rep. 595; Ainsa v. New Mexico & A. R. Co. 175 U. S. 76, 86, 44 L. ed. 78, 82, 20 Sup. Ct. Rep. 28.

Compliance with the regulations was necessary, not only to give certainty to the reservation, and notice to the Land Department, but also to protect innocent purchasers.

Menard v. Massey, 8 How. 293, 309, 12 L. ed. 1085, 1091.

The nonexistence of claims up to April 9, 1864, is *res judicata*.

United States v. Chicago, M. & St. P. R. Co. 218 U. S. 233, 54 L. ed. 1015, 31 Sup. Ct. Rep. 7.

The government must bear the consequences of its own mistakes and blunders, and no default or neglect of any officer of the Land Department can affect the title.

Lytle v. Arkansas, 9 How. 314, 333, 13 L. ed. 153, 160; Stalker v. Oregon Short Line R. Co. 225 U. S. 142, 153, 56 L. ed. 1027, 1032, 32 Sup. Ct. Rep. 636; United States v. Arredondo, 6 Pet. 691, 730, 8 L. ed. 547, 561; Glasgow v. Hortiz, 1 Black, 595, 601, 602, 17 L. ed. 110, 113, 114.

Mr. Justice McKenna delivered the opinion of the court:

Appeal from the decree of the court of appeals of the District of Columbia, affirming a decree of the supreme court of the District, enjoining the Secretary of the Interior and the Commissioner of the General Land Office from proceeding in the matter of certain attempted entries under the public land laws of the United States upon lands which the decree finds were selected and located by the heirs of Luis Maria Cabeza de Baca on June 17, 1863, and known as Baca Float No. 3, the title to which, the decree further finds, passed out of the United States and vested in said heirs on April 9, 1864. The decree further directs the filing of the field notes and plats of survey of the float for the purpose of defining the outboundaries thereof and segregating the same from the public lands of the United States.

The origin and history of the Baca grant are set out in Shaw v. Kellogg, 170 U. S. 312, 42 L. ed. 1050, 18 Sup. Ct. Rep. 632; Maese v. Herman, 183 U. S. 572, 46 L. ed. 335, 22 Sup. Ct. Rep. 91, and Priest v. Las Vegas, 232 U. S. 604, ante, 751, 34 Sup. Ct. Rep. 449.

It appears that there was a conflict between this grant and the grant to the town of Las Vegas, which was settled by an act passed on June 21, 1860 (12 Stat. at L. 71, chap. 167), which enabled the heirs of Baca to select "an equal quantity of vacant land, not mineral, in the territory of New Mexico, to be located by them in square bodies, not exceeding [527] five in number." It was made the duty of the surveyor general of New Mexico "to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: Provided, however, that the right hereby granted . . . shall continue in force during three years from the passage of this act, and no longer."

The Las Vegas grant was ascertained to contain nearly 500,000 acres (496,446 96-100). The Baca heirs were therefore entitled to locate that many acres "in square bodies, not exceeding five in number." This controversy concerns the third of the bodies selected. The selection of each tract was to be determined by the same considerations, and those considerations are declared in Shaw v. Kellogg, supra. Each location, it is there said, would necessarily be of considerable size; in fact, each one was nearly 100,000 acres; and each as a whole was to be nonmineral. "No provision was made for indemnity lands in case mineral should be found in any section or quarter section. So that when the location was perfected the title passed to all the lands or to none." The limits of location, it was said, was the territory of New Mexico, —limits not so broad as those of the territory ceded by Mexico; within the limits there were large areas of arid lands; "its surface was broken by a few mountain chains, and crossed by a few rivers." Lands, it was declared, could not be selected already occupied by others. The lands must be vacant. Nor could lands be selected "which were then known to contain mineral. Congress did not intend to grant any mines or mineral lands, but, with these exceptions, their right of selection was coextensive with the limits of New Mexico. We say 'lands then known to contain mineral,' for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. The selection was to be made within three years. The title was then to pass, and [528] it would be an insult to the good faith of Con-

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gress to suppose that it did not intend that the title, when it passed, should pass absolutely, and not contingently upon subsequent discoveries." And it was declared that the surveyor general of New Mexico was to determine the character of the lands; he was to make survey and location of the lands selected; upon him "was cast the specific duty of seeing that the lands selected were such as the Baca heirs were entitled to select." This is emphasized by saying that "he was the officer who, by virtue of his duties, was most competent to examine and pass upon the question of the character of the lands selected." In the survey and location it was recognized that he was subject to the "control and direction of the Land Department," and, while he was not to act in defiance and independently of the Land Department, "it was for him to say, in the first instance, at least, whether the lands so selected and by him surveyed and located were lands vacated and nonmineral."

These are the elements of the decision. How do they apply to the case at bar?

First, as to the allegations of the bill. There are detailed allegations of the origin of the grant to Baca, its presentation to the surveyor general of New Mexico under the then-existing law and regulations, and his recommendation of its confirmation, also of the confirmation of the grant to the town of Las Vegas, "leaving," as he said, "the respective claimants the right to adjust their conflicting claims in courts." The other facts which the bill alleges we set out in narrative form as follows:

Both grants were confirmed and the right given to the heirs of Baca, as we have seen, to select other lands equal in quantity to the lands claimed by Las Vegas.

On July 26, 1860, about a month after the act was passed, the Commissioner of the General Land Office informed the surveyor general of New Mexico that it was [529] the latter's duty to separate from the public lands the pueblos or individual confirmed claims, and in that connection drew his special attention to the act of June 21, 1860, which referred to the "claim of the Heirs of Luis Maria Baca," and in order to give the act timely effect the surveyor general was directed to give the claim priority in surveying private land claims. That officer was directed to have the exterior lines of Las Vegas run off, and, this being done, the right would accrue to the Baca claimants to select a quantity equal to the area elsewhere in New Mexico of vacant lands, not mineral, in square bodies, not exceeding five in number. The instructions then proceed as follows;

"You will furnish them with a certificate, transmitting at the same time a duplicate to this office, of their right and the area they are to select in five square parcels. Should they select in square bodies according to the existing line of the surveys, the matter may be properly disposed of by their application, duly indorsed and signed with your certificate, designating the parts selected by legal divisions or subdivisions, and so selected as to form five separate bodies in square form. Then the certificate thus indorsed is to be noted on the records of the register and receiver of Santa Fe, and sent on here by those officers for approval. Should the Baca claimants select outside of the existing surveys, they must give such distinct descriptions and connection with natural objects in their applications to be filed in your office, as will enable the deputy surveyor, when he may reach the vicinity of such selections in the regular progress of the surveys, to have the selections adjusted as near as may be to the lines of the public surveys, which may hereafter be established in the region of those selections. In either case the final conditions of the certificate to this office must be accompanied by a statement from yourself and register and receiver that the land is vacant and not mineral."

[530] The grant to the town of Las Vegas was surveyed and the fact communicated by the surveyor general to the representative of the heirs of Baca, and they were informed that they were entitled to select an equal quantity of land, that he was authorized to survey and locate the same, and that his office was ready to co-operate with their legal representative "and receive his application for the location of the lands granted by the government."

Thereupon, on or about June 17, 1863, in pursuance of the notice from the surveyor general and the act of Congress, the following was addressed to the surveyor general:

I, John S. Watts, the attorney of the heirs of Don Luis Maria Cabeza de Baca, have this day selected as one of the five locations confirmed to said heirs under the 6th section of the act of Congress approved June 21st, 1860, the following tract, to wit: Commencing at a point one mile and a half from the base of the Solero mountain in a direction north 45 degrees east of the highest point of said mountain, running thence from said beginning point west 12 miles, 36 chains, and 44 links, thence south 12 miles, 36 chains, and 44 links, thence east 12 miles, 36 chains, and 44 links, thence north 12 miles, 36 chains, and 44 links, to the place of beginning, the same being situated in that portion of New Mexico now included by act of Congress approved Feb-

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ruary 24, 1863 [12 Stat. at L. 664, chap. 56], in the territory of Arizona; said tract of land is entirely vacant, unclaimed by anyone, and is not mineral to my knowledge.

John S. Watts,
Attorney for the Heirs of Luis Maria Cabeza de Baca.

On the same day the surveyor general certified to the Commissioner of the General Land Office the fact of the application, repeating it, and concluding as follows:

[531] And I further certify that the said tract of land being the one-fifth part of the private claim confirmed to the said heirs, contains ninety-nine thousand two hundred and eighty-nine acres and thirty-nine hundredths of an acre, and that this location is the third of the series (application to locate the same, filed in this office October 31, 1862, dated October 30, 1862, having been withdrawn—see letter of Commissioner of the General Land Office dated February 5, 1863), and, with the three locations, numbered one, two, and four heretofore made, included four-fifths of the said private claim confirmed to the heirs of Luis Maria Cabeza de Baca, by the act of Congress approved June 21, 1860. Said location is hereby approved.

In witness whereof I have hereto set my hand this 17th day of June, 1863.

John A. Clark,
Surveyor General.

The communication was mailed the following day, with a letter to the Commissioner as follows:

Surveyor General's Office,
Santa Fe, New Mexico, June 18, 1863.

Honl. J. M. Edmunds, Comm'r of General Land Office,
Washington City, D. C.

Sir:—

I inclose herewith copy of the application and certificate of location No. 3 of the private claim confirmed to the heirs of Luis Maria Cabeza de Baca.

As this location is far beyond any of the public surveys, I have not deemed it necessary to procure any certificate from the register and receiver of the land office, as, from the nature of the case, they cannot officially know anything concerning it.

I am respectfully your
Obt. servt.
John A. Clark,
Surveyor General.

[532] On July 18th the Commissioner acknowledged the receipt of the communication, stating.

Your approval of the location under consideration is found to have ignored the imperative condition that the lands selected at the base of Solero mountain now included by the act of Congress approved February 24, 1863, in the territory of Arizona, is vacant land and not mineral. Before the application of location No. 3 of the heirs aforesaid can be approved, by this office, it is necessary that our instructions of the 26th of July, 1860, should be complied with by furnishing a statement from yourself and register and receiver that the land thus selected and embracing one fifth of the claim, or 99,289 39-100 acres, is vacant and not mineral.

I am very respectfully,
Your obt. servt.
J. M. Edmunds, Commissioner.

In a letter dated April 2, 1864, the surveyor general, in reply to that of the Commissioner, stated "that there is no evidence in the office of the surveyor general of New Mexico" that the tract selected "contains any mineral, or that it is occupied. There have been no public surveys made in the neighborhood of said tract, and there is no record of or concerning the land in question in the surveyor general's office, nor—as I believe—in the office of the register or receiver of the land office of New Mexico. As I am personally unacquainted with that region of country, I cannot certify that the land in question is 'vacant and not mineral' or otherwise. Those facts can only be determined by actual examination and survey."

On March 25, 1864, the receiver of the land office in New Mexico made a certificate stating that the lands applied for "are vacant and not mineral so far as the records of this office show (not having been surveyed)." The register, in his certificate of the same date, stated that [533] the lands "are not surveyed, and, from all information in this office, are vacant and not mineral."

On about April 9, 1864, having been required by the Baca heirs to survey the tract located by them, the Commissioner of the General Land Office issued instructions to the surveyor general of Arizona which recited that the location by the Baca heirs had been approved by the surveyor general of New Mexico, in whose jurisdiction, it was said, the application properly came at the date of the approval. The instructions referred to the act of Congress of 1860 and the rights it conferred, and stated that the act of June 2, 1862 [12 Stat. at L. 410, chap.

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90], required all grants to be surveyed at the expense of the claimants, and that whenever the Baca claimants should pay or secure to be paid a sum sufficient to liquidate all the expenses a survey was to be directed of the application and transcripts of the field notes and plats to be transmitted to the General Land Office to constitute "the muniments of title, the law not requiring the issue of patents of these claims." Directions as to the manner of marking lands were given. Accompanying the instructions was a copy of the certificate of the surveyor general of New Mexico, dated June 17, 1863, and following that the following order:

General Land Office,
April 9, 1864.

Levi Bashford, Esq., Surveyor General, Tucson, Arizona.

Sir.—

The foregoing statement and the certificate of Surveyor General Clark having been submitted to this Department, and having undergone a careful examination, the location being approved by him to perfect title under the authority of the act approved June 21, 1860, application for survey having been made. Instructions (copy herewith attached) have been given to Surveyor General Levi Bashford of Arizona, in which territory the lands [534] located now are, to run the lines indicated and forward complete survey and plat, to be placed on file for future reference as required by law.

J. M. Edmunds, Commr.

In pursuance of this order a survey was undertaken, but the surveyors, while engaged in the work of the survey, were killed by hostile Indians, and no survey was ever returned (alleged on information and belief). Notwithstanding the repeated requests of the heirs of Baca, the Commissioner of the General Land Office failed and refused to continue or have made the survey ordered as above stated, and persisted in such refusal until on or about June 17, 1905, on which date the Commissioner, by an official order, authorized and directed the surveyor general of Arizona to cause a survey to be made, and in pursuance of and under contract No. 136, dated June 17, 1905, one Philip Contzen was authorized and required to run the lines indicated on the application of the Baca heirs (float No. 3) so as to adjust the lines, as near as might be, to the lines of the public surveys.

The survey was made and duly certified by the surveyor general of Arizona as strictly conformable to the field notes which had been examined, approved, and filed in his office, and that the plat and survey had been examined and found correct by the Commissioner of the General Land Office.

On or about January 12, 1905, the Commissioner of the General Land Office, disregarding the decision and order of the then Commissioner of the Land Office of April 9, 1864, gave such instructions to the surveyor general of Arizona regarding his duties as to the character of the lands that that officer, in December, 1906, forwarded the plat and survey hereinbefore mentioned to the Commissioner of the General Land Office with a report, accompanied by the alleged information which he had gathered, [535] and the recommendation that the location of Baca Float No. 3, made, as hereinbefore stated, June 17, 1863, be entirely rejected.

On or about May 13, 1907, contrary to law, and without jurisdiction so to do, and disregarding the order of his predecessor, the Commissioner rendered a decision ordering a hearing before the surveyor general of Arizona to determine whether said lands were, at the time of said location, vacant and nonmineral. On or about June 2, 1908, the First Assistant Secretary of the Interior, in a decision upon an appeal from said decision of the Commissioner, contrary to law and without jurisdiction, affirmed the decision of the Commissioner in so far as it remanded the case for a hearing before the surveyor general of Arizona.

A motion to review was subsequently made and denied.

By the acts done in the selection and location of the lands, including the order of Commissioner Edmunds of April 9, 1864, requiring a survey thereof, the title to the lands vested in fee in the heirs of Baca, and it was not within the power of the Land Department to revoke or annul the prior rulings, or to evade the rights of such heirs or their successors in title, and that (this on information and belief) the Land Department has always treated the lands selected as segregated from the public domain, and they have for many years been so marked upon the maps issued by the Department, as more especially appears from the map of the Territory of Arizona of 1903.

It is alleged that one Henry Ohm and one Lyman W. Wakefield have filed homestead applications upon land lying within the lands located by the Baca heirs, and instructions have been issued from the officers of the Land Department, permitting proofs to be made thereof. It is alleged that there are many other entries upon the lands, and that they and Ohm's and Wakefield's applications will cast clouds upon the title of the Baca location.

[536] The value of the lands located is alleged to be over $100,000, and that plaintiffs have no adequate remedy at law.

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An injunction was prayed restraining defendants from further proceeding in the homestead applications, that they be required to place on file for future reference, as required by law, the Contzen survey and plat dated June 17, 1905; that anything shown thereby or connected therewith, other than that included in the order of the Commissioner of April 9, 1864, and other than the exterior boundaries, accessory lines, crosses and distances, monuments and measurements showing the tract located by the Baca heirs known as location No. 3, together with any topographical features and the references to the lines of the public surveys be canceled and expunged from the said plat of said survey, and particularly the lines, crosses and distances, monuments and measurements purporting to show the segregation from said land of the alleged mineral portion, the Tubac township, and the conflicting portions of the San José, Sonoita, Tumacacori, and Calabasas claims.

A demurrer was filed to the bill which set out as grounds: (1) The real purpose of the suit is to recover certain real estate situated in the territory of Arizona by trial of the legal title thereto, and that the relief, if any, plaintiffs are entitled to, is at law. (2) If the legal title to the property passed to plaintiffs, as alleged, on April 9, 1864, "naught else remains for the defendants to do than to perform the ministerial duty of receiving and recording the plat of survey and field notes thereof," and the remedy is by mandamus. (3) If the legal title to the land has not passed to plaintiffs, as alleged, it is still in the United States, which it is not shown has consented to this suit; and the court in such event is without jurisdiction. (4) On the face of the bill it is impossible to grant the prayers of plaintiffs without deciding whether the title is still in [537] the United States. The determination of the suit, therefore, affects the United States, and they are real and indispensable parties in interest, and have not consented to be sued. (5) The acts sought to be enjoined are exclusively within the jurisdiction of the Interior Department and are not subject to judicial control. (6) The parties who have initiated claims are materially interested in the suit and are necessary parties to it. (7) The court is without jurisdiction to expunge the matters and things prayed to be expunged from the plat of the survey of the San José de Sonoita claim for the reason that the claimants are not parties to the suit, and their claim has been confirmed by the Supreme Court of the United States (Ely v. United States, 171 U. S. 220, 43 L. ed. 142, 18 Sup. Ct. Rep. 840). (8) The citizens of Tubac township are necessary parties. (9) There never has been an adjudication by the Secretary of the Interior and the Commissioner of the General Land Office, or either of them, that the lands involved were, on June 17, 1863, nonmineral and vacant or unoccupied lands such as the heirs of Baca were authorized to select under the terms of the 6th section of the act of June 21, 1860 (12 Stat. at L. 71, chap. 167). (10) The plaintiffs are not entitled to the relief prayed for, or to any relief. (11) The bill is in other respects uncertain, informal, and insufficient to entitle plaintiffs to any relief.

The demurrer was overruled, Mr. Justice Barnard of the supreme court saying that the main question to be decided on the demurrer was as to the effect of the act of Congress, and, considering the act and the proceedings taken under it, recited in the bill, he said he was of opinion that the title to the "tract vested in the heirs of said Baca when the location was approved and the survey ordered," and that, therefore, plaintiffs might maintain their bill for some portion, at least, of the substantial relief for which they prayed, and that the demurrer, being to the whole bill, must be overruled. And he said: "This conclusion [538] as to title, if correct, will enable the suit to be maintained notwithstanding the objection made as to want of other parties defendant. Title being out of the United States, it has no interest and is not a necessary party; and the Land Department cannot rightfully treat the tract as open to public entry, and the officers may therefore be enjoined."

The defendants (appellants) then answered.

The answer admitted what must be regarded as the fundamental elements of the bill. So far as its denials of any of the averments of the bill or its allegations of fact are material, we shall refer to them hereafter. The proofs taken under the bill and answer were not regarded by the supreme court as determining a different decision from that expressed on the demurrer to the bill; that is, the court repeated its view that the title passed on April 9, 1864, to the heirs of Baca, and that the court had authority to enjoin defendants from treating the land as being public land. The injunction prayed for was granted except that the "Contzen" survey and plat were ordered to be filed unchanged. A decree was entered accordingly. It was affirmed by the court of appeals, as we have said.

The crux of the case, in the views of the courts below, is the question whether title to the lands passed out of the United States in April, 1864, and the careful and elaborate consideration of it makes the discussion of it mere repetition.

The contentions of the parties are very

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accurately opposed. Appellants contend that "under a proper construction of the act of June 21, 1860, title to the 'float' cannot pass until there has been an official survey and a final determination by the proper officers that the land selected in 1863 was of the character which the statute permitted the heirs to take,—a matter still *sub judice* in the Department," except as to certain conflicting grants. The appellees insist, and the courts below, as we have [539] seen, decided, that the location of the grant and the approval of it by the surveyor general of New Mexico, and subsequently, in April, 1864, by Commissioner Edmunds of the Land Office, transferred the title to the heirs of Baca.

There is some controversy upon the fact as to whether the Commissioner had before him the proof he had demanded of the nonmineral character of the land. We think the lower courts rightly deduced from the evidence "that the Commissioner," to quote from the opinion of the court of appeals, "having carefully considered all the facts in the case, concluded to adopt the approval of the surveyor general of New Mexico of this location to perfect title under the authority of said act [act of 1860], and in order completely to segregate this land from the public domain ordered the survey." [41 App. D. C. 153.] And that this action was within the authority of those officers we may refer to Shaw v. Kellogg, 170 U. S. 312, 42 L. ed. 1050, 18 Sup. Ct. Rep. 632. In that case, we have seen, the surveyor general of New Mexico was the officer selected and who was most competent to examine and pass upon the question of the character of the lands, and to pass upon them at the time of location,—not upon evidence collected many years after the location, directed to what might have been known many years before. The selection and location was to be made within three years of the passage of the act in a comparative wilderness, and the "title was then to pass," and "pass absolutely, and not contingently upon subsequent discoveries."

We recognized in Shaw v. Kellogg that the action of the surveyor general was subject to the supervision of the Land Department, and that condition is satisfied in the case at bar. The Commissioner was put in possession of all of the facts as to the lands, and, exercising his judgment upon them, approved the location.

The facts in Shaw v. Kellogg give pertinence to its principles, [540] notwithstanding some differences between its facts and those in the case at bar. In that case there was a positive declaration by the surveyor general of the nonmineral character of the lands; in the case at bar it is an inference deduced from the circumstances, it being the "duty of the officers to decide the question,"—a duty which they "could not avoid or evade." In that case the Land Office undertook to reserve from the grant lands which might be subsequently discovered to be mineral. In this case it directed an inquiry of their character long after the location of the grant, and seeks to determine the legality of the location by the information said to be obtained.

The title having passed by the location of the grant and the approval of it, the title could not be subsequently devested by the officers of the Land Department. Ballinger v. United States, 216 U. S. 240, 54 L. ed. 464, 30 Sup. Ct. Rep. 338. In other words, and specifically, the action of the Commissioner in approving the location of the grant cannot be revoked by his successor in office, and an attempt to do so can be enjoined. Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; Philadelphia Co. v. Stimson, 223 U. S. 605, 56 L. ed. 570, 32 Sup. Ct. Rep. 340. The suit is one to restrain the appellants from an illegal act under color of their office which will cast a cloud upon the title of appellees.

This disposes of the contentions of appellants that this is a suit against the United States, or one for recovery of land merely, or that there is a defect of parties, or that the suit is an attempted direct appeal from the decision of the Interior Department, or a trial of a title to land not situated within the jurisdiction of the court "wherein an essential party is not present in the forum and is not even suable,—the United States."

We agree with the courts below that a survey was necessary to segregate the lands from the public domain. Stoneroad v. Stoneroad, 158 U. S. 240, 39 L. ed. 966, 15 Sup. Ct. Rep. 822. This was done by the [541] Contzen survey, which, we have seen, was directed to be filed by the lower courts without alteration,—a decision which we approve.

There are other contentions of appellants which call for no extended comment, as we concur with the courts below in regard to them. For instance, it is contended that the surveyor general of New Mexico had lost authority to approve the location, and that duty had devolved upon the surveyor general of Arizona. To the contention it may be replied, as the court of appeals in effect replied, that the act of 1860 devolved the duty on the surveyor general of New Mexico, and the Land Office, upon whom devolv l the ultimate responsibility, approved the location.

A point is made upon attempts to change the location, of which it is enough to say

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that they were not accepted by the Land Department, and the claimants were remitted to the location under consideration.

Another contention is made on the conflict of the grant as located with other grants, to which the court of appeals replied that it was not now concerned with such question, and that if, as suggested, a controversy should arise, it "will properly be adjudicated in the courts where the lands are located." In this we concur.

Whose duty it was to pay the expense of the survey is also in controversy. The appellants assert it to have been the duty of the claimants under the act of June 2, 1862 (12 Stat. at L. 410, chap. 90), and that was the view, we have seen, of the Land Department. The appellees contend that the obligation was upon the government under the granting act. That act provides, as we have seen, that "it shall be the duty of the surveyor general of New Mexico to make survey and location of the land so selected by the said heirs of Baca when thereunto required by them. . . ." The obligation is explicit, and there was reason for it. To accommodate conflicting claims, and at the instance of [542] the government, the Baca claimants gave up their rights to a definite tract of land, and, as appellees say, expressing the equities of the claimants, whatever its character or condition, and the government therefore would naturally make provision for the location of the substituted land as expeditiously as possible, and without expense to the Baca heirs. We therefore think the act of 1860, not that of 1862, applied.

The contention that appellees have not shown sufficient title is untenable.

Decree affirmed.

WESTERN UNION TELEGRAPH COMPANY, Plff. in Err.,
v.
WILLIAM BROWN and Rosa Brown.

(See S. C. Reporter's ed. 542–547.)

States — relation to national government — extraterritorial operation of mental anguish statute.

1. Damages for mental anguish, arising out of the negligent failure of a telegraph company to deliver in the city of Washington a telegram forwarded without delay to that city from the company's office in South Carolina, where it was received, cannot be recovered in an action of tort in the South Carolina courts, under the authority of S. C. Civ. Code, § 2223, without infringing upon the exclusiveness of the control of the United States over the District of Columbia.

[For other cases, see States, IV. c, in Digest Sup. Ct. 1908.]

Commerce — state regulation of telegraph companies — mental anguish.

2. A recovery in an action of tort in the South Carolina courts of damages for mental anguish arising out of the negligent failure of a telegraph company to deliver in the city of Washington a telegram forwarded without delay to that city from the company's office in South Carolina, where it was received, cannot be authorized, as is done by S. C. Civ. Code, § 2223, as construed by the state courts, without violating the commerce clause of the Federal Constitution.

[For other cases, see Commerce, 368–375, in Digest Sup. Ct. 1908.]

[No. 355.]

Argued May 5, 1914. Decided June 22, 1914.

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment which affirmed, on a second appeal, a judgment of the Court of Common Pleas of the County of Charleston, in that state, in favor of plaintiffs in an action to recover damages for mental anguish arising out of the failure of a telegraph company to deliver a message. Reversed.

See same case below, 92 S. C. 354, 75 S. E. 542.

The facts are stated in the opinion.

Messrs. Rush Taggart and Francis Raymond Stark argued the cause, and, with Messrs. George H. Fearons and Julian Mitchell, filed a brief for plaintiff in error:

Any statute is an invalid regulation of interstate commerce which imposes a liability outside of that created by the contract and unknown to the common law for an act or omission occurring in the course of inter-

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NOTE—Statute permitting recovery for mental anguish in telegraph cases as interference with commerce.

WESTERN U. TELEG. CO. v. BROWN decides, contrary to the judgment below in the South Carolina supreme court, and to the decision in Ivy v. Western U. Teleg. Co. 165 Fed. 371, reversed on other grounds in 100 C. C. A. 481, 177 Fed. 63, that a state statute permitting a recovery for mental anguish for the failure to deliver a telegram addressed to a point outside the state is an invalid regulation of commerce. Had the default occurred in South Carolina, however, a different result must have been reached, under the doctrine of Western U. Teleg. Co. v. Crovo, 220 U. S. 364, 55 L. ed. 498, 31 Sup. Ct. Rep. 399, where a state statute under which a penalty is incurred by a telegraph company which negligently fails to transmit within the state as promptly as practicable a message received at an office in the state for transmission to

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state transportation or transmission entirely outside the borders of the state.

Adams Exp. Co. v. Croninger, 226 U. S. 500, 57 L. ed. 317, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Birkett v. Western U. Teleg. Co. 103 Mich. 361, 33 L.R.A. 404, 50 Am. St. Rep. 374, 61 N. W. 645; Chicago, M. & St. P. R. Co. v. Polt, 232 U. S. 165, ante, 554, 34 Sup. Ct. Rep. 301; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214; Jacob v. Western U. Teleg. Co. 135 Mich. 600, 98 N. W. 402; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Stoutenburgh v. Hennick, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; Western U. Teleg. Co. v. Carew, 15 Mich. 525; Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815; Western U. Teleg. Co. v. Crovo, 220 U. S. 364, 55 L. ed. 498, 31 Sup. Ct. Rep. 399; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40.

The statute is unconstitutional because conflicting with the exclusive legislative power of Congress in the District of Columbia.

Western U. Teleg. Co. v. Chiles, 214 U. S. 274, 53 L. ed. 994, 29 Sup. Ct. Rep. 613; Western U. Teleg. Co. v. Greer, 115 Tenn. 368, 1 L.R.A.(N.S.) 525, 89 S. W. 327; Western U. Teleg. Co. v. Snodgrass, 94 Tex. 284, 86 Am. St. Rep. 851, 60 S. W. 308.

Mr. Frank J. Hogan argued the cause, and, with Messrs. W. Turner Logan and John P. Grace, filed a brief for defendants in error:

The statute is in no way in contravention of the Federal Constitution.

Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 100, 43 L. ed. 909, 911, 19 Sup. Ct. Rep. 609; Cooley, Const. Lim. 7th ed. p. 255.

A state, acting within its police powers, may pass laws designed for the protection of persons within its borders, although such laws incidentally affect interstate commerce, provided Congress has not legislated upon the subject, and it is one not purely national in its nature.

Ivy v. Western U. Teleg. Co. 165 Fed. 371; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815; Western U. Teleg. Co. v. Crovo, 220 U. S. 364, 55 L. ed. 498, 31 Sup. Ct. Rep. 399.

Mr. Justice Holmes delivered the opinion of the court:

This is an action of tort brought by the party to whom a telegraphic message was addressed. The message was delivered to the company in South Carolina, addressed to the plaintiff in Washington, District of Columbia, and read, "Come at once. Your sister died this morning." It was forwarded without delay to Washington, but there, through negligence, as the jury found, was not delivered. The declaration alleges that the failure caused the plaintiff to miss attending her sister's funeral in South Carolina, and subjected the plaintiff to mental anguish, which of itself is made a cause of action by a statute of South Carolina. Civil Code, § 2223. The defendants in error state that the action was brought under this section. There was a trial at which, by the instructions to the jury, a recovery was allowed under the act for the negligence in Washington, irrespective of the law prevailing here. The jury found a verdict for $750, which was sustained by the supreme court of the state. 92 S. C. 354, 75 S. E. 542. The plaintiff in error saved its rights under the Constitution of the United States (so plainly that it is not necessary to discuss the matter), and brought the case here.

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a person in another state was held to be a valid exercise of the police power of the state, in the absence of any legislation by Congress on the subject.

In Ivy v. Western U. Teleg. Co. supra, the action was based upon a failure to deliver a message sent to a point in Indiana from a place in Arkansas, in which latter state the suit was brought. The court applied the Arkansas mental anguish statute, and held that, as so applied, the statute, though incidentally affecting contracts for the transmission of interstate messages, was not an unconstitutional regulation of interstate commerce. See also note to Nitka v. Western U. Teleg. Co. 49 L.R.A.(N.S.) 337, on constitutionality of statutes permitting recovery for mental anguish in telegraph cases, and note to Western U. Teleg. Co. v. Commercial Mill. Co. 36 L.R.A. (N.S.) 220, on state law affecting telegraph companies as regulation of interstate commerce.

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Whatever variations of opinion and practice there may [547] have been, it is established as the law of this court that when a person recovers in one jurisdiction for a tort committed in another, he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of the maximum recovery. Slater v. Mexican Nat. R. Co. 194 U. S. 120, 126, 8 L. ed. 900, 902, 24 Sup. Ct. Rep. 581; Cuba R. Co. v. Crosby, 222 U. S. 473, 478, 480, 56 L. ed. 274-276, 38 L.R.A.(N.S.) 40, 32 Sup. Ct. Rep. 132. (A limitation of liability may stand on different grounds. Oceanic Steam Nav. Co. v. Mellor, May 25, 1914 [233 U. S. 718, ante, 1171, 34 Sup. Ct. Rep. 754]). The injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious; and when a state attempts in this manner to affect conduct outside its jurisdiction, or the consequences of such conduct, and to infringe upon the power of the United States, it must fail. The principle would be illustrated by supposing a direct clash between the state and Federal statutes; but it is the same whenever the state undertakes to go beyond its jurisdiction into territory where the United States has exclusive control. Western U. Teleg. Co. v. Chiles, 214 U. S. 274, 53 L. ed. 994, 29 Sup. Ct. Rep. 613; see also Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 416, 54 L. ed. 1088, 1091, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815.

What we have said is enough to dispose of the case. But the act also is objectionable in its aspect of an attempt to regulate commerce among the states. That is, as construed, it attempts to determine the conduct required of the telegraph company in transmitting a message from one state to another or to this District by determining the consequences of not pursuing such conduct, and in that way encounters Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126, a decision in no way qualified by Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815.

Judgment reversed.

[548] UNITED STATES et al., Appts.,
v.
OHIO OIL COMPANY. (No. 481.)

UNITED STATES et al., Appts.,
v.
STANDARD OIL COMPANY. (No. 482.)

UNITED STATES et al., Appts.,
v.
STANDARD OIL COMPANY OF LOUISIANA. (No. 483.)

UNITED STATES et al., Appts.,
v.
PRAIRIE OIL & GAS COMPANY. (No. 506.)

UNITED STATES et al., Appts.,
v.
UNCLE SAM OIL COMPANY. (No. 507.)

UNITED STATES et al., Appts.,
v.
ROBERT D. BENSON et al., Doing Business under the Partnership Name of the Tide Water Pipe Company, Limited. (No. 508.) [1]

(See S. C. Reporter's ed. 548-575.)

Carriers — who are — pipe lines — government control.

1. Oil companies controlling interstate pipe lines in which is carried all oil offered between the oil fields east of California and the Atlantic seaboard upon condition that the offerer shall first sell the oil to them on practically their own terms are embraced by the provision of the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), extending the operation of the interstate commerce act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), to persons or corporations engaged in the transportation of oil by means of pipe lines, "who shall be considered and held to be common carriers within the meaning and purpose of this act."

[For other cases, see Carriers, I.; III. b, in Digest Sup. Ct. 1908.]

[1] Reported by the Official Reporter under the title of "The Pipe Line Cases."

NOTE.—On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

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Commerce — what is — transportation of oil in pipe lines.

2. The transportation of oil in pipe lines between points in different states is interstate commerce, although all the oil transported may belong to the owners of the pipe lines.

[For other cases, see Commerce, I. b, in Digest Sup. Ct. 1908.]

Commerce — congressional control — pipe lines — due process of law.

3. Construing the provisions of the act of June 29, 1906, extending the operation of the interstate commerce act of February 4, 1887, to persons or corporations engaged in the transportation of oil by pipe lines, as embracing existing pipe lines controlled by oil companies in which is carried all oil offered between the oil fields east of California and the Atlantic seaboard upon condition that the offerer shall first sell them the oil on practically their own terms, does not render the statute invalid under U. S. Const., 5th Amend., but it is a valid exercise by Congress of its control over interstate commerce.

[For other cases, see Commerce, I. a; III., in Digest Sup. Ct. 1908.]

Carriers — who are — pipe lines — government control.

4. An oil company using a pipe line solely for the purpose of conducting its own oil from its own wells in one state to its own refinery in another state is not comprehended by the provisions of the act of June 29, 1906, extending the operation of the interstate commerce act of February 4, 1887, to persons or corporations engaged in the transportation of oil by means of pipe lines, "who shall be considered and held to be common carriers within the meaning and purpose of this act."

[For other cases, see Carriers, I.; III. b, in Digest Sup. Ct. 1908.]

[Nos. 481, 482, 483, 506, 507, 508.]

Argued and submitted October 15 and 16, 1913. Decided June 22, 1914.

SIX APPEALS from the United States Commerce Court to review decrees enjoining the enforcement of an order of the Interstate Commerce Commission requiring parties in control of oil pipe lines to file with the Commission schedules of rates and charges for transportation. Decree in No. 507 affirmed; other decrees reversed.

See same case below, 204 Fed. 798.

The facts are stated in the opinion.

Solicitor General Davis argued the cause and filed a brief for the United States:

To ascertain the evils at which an act is aimed, its legislative history, etc., the debates in Congress attending its enactment may be consulted.

American Net & Twine Co. v. Worthington, 141 U. S. 468, 473, 35 L. ed. 821, 823, 12 Sup. Ct. Rep. 55; Binns v. United States, 194 U. S. 486, 495, 496, 48 L. ed. 1067, 1090, 1091, 24 Sup. Ct. Rep. 816; Blake v. National City Bank, 23 Wall. 307, 319, 23 L. ed. 119, 120; Church of the Holy Trinity v. United States, 143 U. S. 457, 465, 36 L. ed. 227, 230, 12 Sup. Ct. Rep. 511; Jennison v. Kirk, 98 U. S. 453, 459, 25 L. ed. 240, 243, 4 Mor. Min. Rep. 504.

The rule of construction followed in United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527, is not applicable here.

The object of the pipe line amendment, namely, to regulate interstate commerce in oil by protecting well owners and independent refiners from duress by pipe-line owners, rendering possible real competition, and preventing monopoly of interstate commerce in oil, is one for which the authority of Congress may properly be exercised.

Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 Sup. Ct. Rep. 66; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220.

Every possible presumption is in favor of the validity of a statute.

Austin v. Tennessee, 179 U. S. 343, 348, 45 L. ed. 224, 228, 21 Sup. Ct. Rep. 132; Jacobson v. Massachusetts, 197 U. S. 11–31, 49 L. ed. 643–651, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; M'Culloch v. Maryland, 4 Wheat. 316, 423, 4 L. ed. 579, 605; Powell v. Pennsylvania, 127 U. S. 678–685, 32 L. ed. 253–256, 8 Sup. Ct. Rep. 992, 1257; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496.

The private operation of pipe lines carrying oil in interstate commerce tends to monopoly.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 210, 40 L. ed. 940, 944, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

The operation of pipe lines as common carriers is beyond question commercially practicable, and has been universally recognized.

Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; West Virginia Transp. Co. v. Volcanic Oil & Coal Co. 5 W. Va. 382, 5 Mor. Min. Rep. 389; West Virginia Transp. Co. v. Ohio River Pipe Line Co. 22 W. Va. 600, 46 Am. Rep. 527; Charlestown Natural Gas Co. v. Lowe, 52 W. Va. 664, 44 S. E. 410; Griffin

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v. South West Pennsylvania Pipe Lines, 172 Pa. 580, 33 Atl. 578; Columbia Conduit Co. v. Com. 90 Pa. 307, 14 Mor. Min. Rep. 197; National Transit Co. v. Weston, 121 Pa. 494, 15 Atl. 569, 17 Mor. Min. Rep. 143; Boyle v. Smithman, 146 Pa. 255, 23 Atl. 397; 18 Enc. Britannica, 9th ed. p. 718; 13 New International Enc. 1020; Wyman, Pub. Service Corp. § 416.

The pipe line amendment is not in violation of the due process clause.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Hoke v. United States, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; Lottery Case, 188 U. S. 358, 47 L. ed. 502, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220.

In many instances regulations of interstate commerce have been upheld which take the form of prohibition except upon such terms as would protect the public welfare.

Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A. (N.S.) 7, 31 Sup. Ct. Rep. 164; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; Norfolk & W. R. Co. v. Dixie Tobacco Co. 228 U. S. 593, 57 L. ed. 980, 33 Sup. Ct. Rep. 609; Southern R. Co. v. Reid, 222 U. S. 424, 438, 56 L. ed. 257, 260, 32 Sup. Ct. Rep. 140.

That the condition is not expressed, but implied, is immaterial.

Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A. (N.S.) 7, 31 Sup. Ct. Rep. 164; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487.

Nor is this sort of regulation confined to industries "affected with a public interest" in the technical sense.

Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Mugler v. Kansas, 123 U. S. 623, 669, 31 L. ed. 205, 213, 8 Sup. Ct. Rep. 273; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Ohio Oil Co. v. Indiana, 177 U. S. 190, 202, 210, 44 L. ed. 729, 736, 739, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466.

Nor is the law violative of the due process clause in that, being general in its terms, it might cover any pipe lines which are not public markets for oil.

Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 201, 57 L. ed. 184, 187, 33 Sup. Ct. Rep. 44; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; Com. v. Gilbert, 160 Mass. 157, 22 L.R.A. 439, 35 N. E. 454; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; Powell v. Pennsylvania, 127 U. S. 678, 685, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394.

As to the prohibition of private operation, there is not a taking.

United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; Mugler v. Kansas, 123 U. S. 623, 669, 31 L. ed. 205, 213, 8 Sup. Ct. Rep. 273; Noble State Bank v. Haskell, 219 U. S. 104, 110, 55 L. ed. 112, 116, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367.

It may be said that, in so far as the owners elect to operate the lines under the condition, there is a "taking" in the subjection to the quasi public use as common carrier. The thing so taken is, however, only the compensated, occasional use of the pipe line.

Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246; Otis Co. v. Ludlow Mfg. Co. 201 U. S. 140, 50 L. ed. 696, 26 Sup. Ct. Rep. 353.

Mr. Charles W. Needham argued the cause and filed a brief for the Interstate Commerce Commission:

Congress had the power to declare that thereafter all persons or corporations engaged in the transportation of oil by pipe lines should be common carriers, for the purpose of protecting the interest of the public in a business affected with a public interest.

Allnutt v. Inglis, 12 East, 539, 11 Revised Rep. 482; Munn v. Illinois, 94 U. S. 113, 154, 24 L. ed. 77, 94; Budd v. New York, 143 U. S. 517, 522, 36 L. ed. 247, 250, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Sinking Fund Cases, 99 U. S. 700,

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747, 25 L. ed. 496, 511; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 354, 28 L. ed. 173, 176, 4 Sup. Ct. Rep. 48; Dow v. Beidelman, 125 U. S. 680, 686, 31 L. ed. 841, 842, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; State ex rel. Atty. Gen. v. Columbus Gaslight & Coke Co. 34 Ohio St. 582, 32 Am. Rep. 390; Ruggles v. People, 91 Ill. 262; Davis v. State, 68 Ala. 58, 44 Am. Rep. 128; Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27; State ex rel. Webster v. Nebraska Teleph. Co. 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237; Hockett v. State, 105 Ind. 258, 55 Am. Rep. 201, 5 N. E. 178; Chesapeake & P. Teleph. Co. v. Baltimore & O. Teleg. Co. 66 Md. 414, 59 Am. Rep. 167, 7 Atl. 809; State ex rel. Webster v. Nebraska Teleph. Co. 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237; Nash v. Page, 80 Ky. 539, 44 Am. Rep. 490; Inter-Ocean Pub. Co. v. Associated Press, 184 Ill. 438, 48 L.R.A. 568, 75 Am. St. Rep. 184, 56 N. E. 822; New York & C. Grain & Stock Exch. v. Board of Trade, 127 Ill. 163, 2 L.R.A. 411, 19 N. E. 855; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 467, 468, 45 L. ed. 619, 626, 627, 21 Sup. Ct. Rep. 423; Adair v. United States, 208 U. S. 161, 177, 52 L. ed. 436, 443, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 410, 411, 53 L. ed. 849, 850, 29 Sup. Ct. Rep. 527.

The general purpose and aim in construing a statute is to ascertain its true meaning and its true application to concrete cases. For this purpose resort may be had—

1. To the language and arrangement of the statute.

2. The intention and object to be secured by the legislation.

3. Matters and circumstances attending its passage.

4. Sense in which it was understood by the legislators and contemporaries.

5. Its relation to the law into which it is incorporated as an amendment.

6. As amended, the statute must be considered as a whole.

36 Cyc. pp. 1102, 1136, 1138.

If, after considering the language of the entire statute, there remains a doubt as to its meaning, the court may consider extrinsic matters, such as the circumstances existing at the time of its enactment.

Standard Oil Co. v. United States, 221 U. S. 1, 50, 55 L. ed. 619, 641, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734.

Courts, in construing a statute, may with propriety recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason, as well as the meaning, of particular provisions in it.

United States v. Union P. R. Co. 91 U. S. 79, 23 L. ed. 228.

To destroy a monopoly created by transportation methods is a proper object of legislation under the commerce clause.

Pearsall v. Great Northern R. Co. 161 U. S. 646, 676, 40 L. ed. 838, 848, 16 Sup. Ct. Rep. 705; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

Congress has power to "regulate" interstate and foreign commerce, and make all laws necessary and proper to carry into effect the power to regulate.

Gibbons v. Ogden, 9 Wheat. 1, 196, 6 L. ed. 23, 70; Hoke v. United States, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905.

The power to regulate includes the power to prohibit particular interstate and foreign commerce.

United States ex rel. Wilson v. The William, 2 Am. L. J. 255, Fed. Cas. No. 16,700; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 392, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272.

If the Lodge amendment had for its purpose the destruction of a monopoly created by the transportation of oil by means of pipe lines by private persons or corporations, and it has that effect only, the destruction of the monopoly is not a taking of property prohibited by the 5th Amendment. It is an exercise of what is commonly denominated the police power, and any loss must fall upon the owner.

Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 392, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Southern R. Co. v. United States, 222 U. S. 26, 56 L. ed. 74, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 415, 416, 53 L. ed. 836, 851, 852, 29 Sup. Ct. Rep. 527.

Mr. John G. Milburn argued the cause, and, with Messrs. Frank L. Crawford and Walter F. Taylor, filed a brief for appellee in No. 481:

The interstate commerce act provided a code of rules for the regulation of common-carrier transportation in the interest of shippers and of the public.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 276, 36

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L. ed. 699, 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Interstate Commerce Commission v. Harriman, 211 U. S. 407, 418, 53 L. ed. 253, 262, 29 Sup. Ct. Rep. 115.

That is very different from the compulsory conversion into common carriers of persons and corporations who are not common carriers in any sense, in order to bring them within the operation of the act, thereby forcing them into a business in which they had never been engaged, and depriving them of the exclusive beneficial use of their property. Only language susceptible of no other construction can be sufficient to give the act such an abnormal and unprecedented operation, even if it could be legally done.

Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 335, 57 L. ed. 1501, 1505, 46 L.R.A.(N.S.) 385, 33 Sup. Ct. Rep. 890.

Effect must be given to the intention of the legislature as manifested by the words of the statute, interpreted according to their natural signification (McBroom v. Scottish Mortg. & Land Invest. Co. 153 U. S. 318, 323, 38 L. ed. 729, 731, 14 Sup. Ct. Rep. 852), and the subject-matter to which the statute relates (Washington Market Co. v. Hoffman, 101 U. S. 112, 116, 25 L. ed. 782, 783). All general terms in statutes should be limited in their application so as not to lead to injustice, oppression, or any unconstitutional operation, if that be possible (Carlisle v. United States, 16 Wall. 153, 21 L. ed. 429), and so even to avoid grave constitutional doubts or objections (Harriman v. Interstate Commerce Commission, 211 U. S. 407, 422, 53 L. ed. 253, 264, 29 Sup. Ct. Rep. 115; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 408, 53 L. ed. 836, 849, 29 Sup. Ct. Rep. 527).

Debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 318, 41 L. ed. 1007, 1019, 17 Sup. Ct. Rep. 540; Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 333, 57 L. ed. 1501, 1505, 46 L.R.A.(N.S.) 385, 33 Sup. Ct. Rep. 890.

The decision of this court in the very recent case of Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 57 L. ed. 1501, 46 L.R.A.(N.S.) 385, 33 Sup. Ct. Rep. 890, seems to be a direct authority for the appellee.

To make the owners of private pipe lines common carriers as to those lines is to subject private property to a public use, and is a "taking" of property within the meaning of the 5th Amendment.

Forster v. Scott, 136 N. Y. 577, 18 L.R.A. 543, 32 N. E. 976; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 523, 56 L. ed. 863, 868, 32 Sup. Ct. Rep. 535; Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 205, 54 L. ed. 727, 730, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 180, 20 L. ed. 557, 561; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349.

Since the act, as thus construed, takes private property without providing for due compensation, it violates the 5th Amendment.

Weems S. B. Co. v. People's S. B. Co. 214 U. S. 345, 355, 53 L. ed. 1024, 1028, 29 Sup. Ct. Rep. 661, 16 Ann. Cas. 1222; Louisville & N. R. Co. v. West Coast Naval Stores Co. 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. Rep. 745.

The power of Congress to regulate interstate commerce, like all other powers delegated to that body, is subject to the limitation imposed by the 5th Amendment of the Constitution.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764.

The contention of the United States that just compensation is provided is untenable. The rates to be paid for transportation are not the compensation intended by the 5th Amendment.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; Lewis, Em. Dom. 3d ed. § 684.

There is nothing inherent in the nature or operation of private pipe lines which causes a tendency to monopoly.

Standard Oil Co. v. United States, 221 U. S. 51, 61, 76, 55 L. ed. 641, 645, 651, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734, 173 Fed. 177; United States v. Reading Co. 183 Fed. 427.

It follows, therefore, that the act, even regarded as an act prohibiting the operation of pipe lines, save as common carrier, cannot be sustained as an appropriate means to prevent monopoly, because there is no real and substantial relation between what the act ordains and monopoly.

Minnesota v. Barber, 136 U. S. 320, 34 L. ed. 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 593, 50 L. ed. 596,

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609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Adair v. United States, 208 U. S. 161, 179, 180, 52 L. ed. 436, 444, 445, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Lochner v. New York, 198 U. S. 45, 57, 49 L. ed. 937, 941, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133.

The right to carry goods from one state to another is not a franchise to be granted or withheld by Congress at its pleasure. It is an inherent right of the citizen that springs from the nature and necessities of social order.

Gibbons v. Ogden, 9 Wheat. 1, 211, 6 L. ed. 23, 73; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

The act cannot be sustained as contended on behalf of the Interstate Commerce Commission, by resorting to the doctrine of the elevator and stockyard cases, because, as applied to private pipe lines, the act does not regulate a business affected with a public interest in the sense of those cases.

Munn v. Illinois, 94 U. S. 113, 126, 24 L. ed. 77, 84; People v. Budd, 117 N. Y. 1, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Ratcliff v. Wichita Union Stock-Yards Co. 74 Kan. 1, 6 L.R.A.(N.S.) 834, 118 Am. St. Rep. 298, 86 Pac. 150, 10 Ann. Cas. 1016; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423.

Neither the utilization by a pipe line company of the right of way of a common-carrier railroad for the laying of a pipe line, nor the crossing under a public highway by such pipe line, impresses upon the pipe line or its owner the nature or the obligation of a common carrier.

Barclay v. Howell, 6 Pet. 498, 513, 8 L. ed. 477, 483; Callen v. Columbus Electric Light Co. 66 Ohio St. 166, 58 L.R.A. 782, 64 N. E. 141; Daily v. State, 51 Ohio St. 348, 24 L.R.A. 724, 46 Am. St. Rep. 578, 37 N. E. 710; Huffman v. State, 21 Ind. App. 449, 69 Am. St. Rep. 368, 52 N. E. 713; Old Town v. Dooley, 81 Ill. 257; Postal Teleg. Cable Co. v. Eaton, 170 Ill. 513, 39 L.R.A. 722, 62 Am. St. Rep. 390, 49 N. E. 365; Winter v. Peterson, 24 N. J. L. 524, 61 Am. Dec. 678; Pemberton v. Dooley, 43 Mo. App. 178; Paul v. Carver, 24 Pa. 210, 64 Am. Dec. 649; Angell, Highways, 2d ed. p. 366.

The law of common carriers has always assumed, as a necessary element, that the carrier voluntarily undertakes, and holds himself out, to carry for others.

United States Exp. Co. v. Backman, 28 Ohio St. 150; Samms v. Stewart, 20 Ohio, 70, 55 Am. Dec. 445; Moore, Carr. p. 20; United States v. Sioux City Stock Yards Co. 162 Fed. 556.

Mr. John G. Milburn also argued the cause, and, with Messrs. Chester O. Swain and M. F. Elliott, filed a brief for appellee in No. 482:

Prior to the transfer to the Standard Oil Company of New Jersey of the pipe lines now owned by it, their use by the National Transit Company and New York Transit Company did not constitute them common-carrier lines. But, even had they been common-carrier lines, they would have been released from the obligations of common carriers upon their transfer to appellee in 1906.

Oman v. Bedford-Bowling Green Stone Co. 67 C. C. A. 190, 134 Fed. 64.

Even where a fee simple in land is taken by condemnation, there is no reversion to the former owners when the particular use for which the land was taken ceases, and the property may be disposed of for private purposes.

Rexford v. Knight, 11 N. Y. 314; Wyoming Coal & Transp. Co. v. Price, 81 Pa. 175; Currie v. New York Transit Co. 66 N. J. Eq. 313, 105 Am. St. Rep. 647, 58 Atl. 308.

Neither the utilization by a pipe line company of the right of way of a common-carrier railroad for the laying of a pipe line, nor the crossing under a public highway by such pipe line, impresses upon the pipe line or its owner the nature or the obligations of a common carrier.

Currie v. New York Transit Co. supra; Barclay v. Howell, 6 Pet. 498, 513, 8 L. ed. 477, 483; Starr v. Camden & A. R. Co. 24 N. J. L. 592; Winter v. Peterson, 24 N. J. L. 524, 61 Am. Dec. 678; Wright v. Carter, 27 N. J. L. 76; Huffman v. State, 21 Ind. App. 449, 69 Am. St. Rep. 368, 52 N. E. 713; Pemberton v. Dooley, 43 Mo. App. 178, Angell, Highways, 2d ed. p. 366; State v. Laverack, 34 N. J. L. 203; Weller v. McCormick, 52 N. J. L. 472, 8 L.R.A. 798, 19 Atl. 1101; State, Roebling, Prosecutrix, v. Trenton Pass. R. Co. 58 N. J. L. 670, 33 L.R.A. 129, 34 Atl. 1090; Bloomfield & R. Natural Gaslight Co. v. Calkins, 62 N. Y. 386; 27 Am. & Eng. Enc. Law, 2d ed. 159; Thomas v. Ford, 63 Md. 346, 52 Am. Rep. 513; Chesapeake & P. Teleph. Co. v. Mackenzie, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690.

Railroad companies are companies organized for the purpose of constructing, maintaining, and operating railroads. They are given certain franchises and privileges for

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public purposes, in return for which the state retains a right of supervision and control in excess of that exercised over purely private corporations. In the very grant of the franchise there is, in effect, an implied condition that it shall be held as a public or quasi trust (1 Elliott, Railroads, § 1). Franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its roads and works would be of little value, such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like (Morgan v. Louisiana, 93 U. S. 217, 223, 23 L. ed. 860, 861; 1 Elliott, Railroads, § 63). The consideration for a franchise is "the implied undertaking to perform corporate duties beneficial to the public, or it may be an express agreement to do or not to do a designated act (1 Elliott, Railroads, § 66). Therefore, a railroad corporation may not, without statutory authority, transfer any of its property or privileges which are essential to a fulfilment of the purposes for which it was chartered (1 Elliott, Railroads, § 70). In accepting the grant of rights and franchises from the state, a railroad corporation impliedly assumed the duty of a common carrier. From the fact that the company is authorized to build, maintain, and operate a commercial railroad may be inferred its duties, rights, and obligations as a common carrier of goods and passengers (4 Elliott, Railroads, § 1392), or they may be expressly imposed.

None of these propositions applies to a refining company which, as an incident to its refining business, transports its own oil through its own pipes. No franchise is conferred upon it to locate its line *in invitum;* to appropriate land for it; or to take tolls. The duties, rights, and obligations of a common carrier are not imposed upon it, and there is no acceptance of a franchise from which they may be inferred. It is not arguable that such consequences flow from the grant of an easement to maintain its pipe under the surface of the lands of a railroad company which in no way interferes with their use for the purposes or franchises of the railroad company. There is no logical connection between such an easement and the rights, duties, and obligations of a common carrier as there is between such rights, duties, and obligations, and the acceptance of a franchise to build, maintain, and operate a railroad. In the one case, there is an acceptance of a privilege conferred by the state which necessarily involves a reciprocal obligation. In the other, there is a mere grant of a property right *inter partes* which involves no obligation other than the actual consideration for the grant. To construct out of such a grant an obligation to the public such as flows from the acceptance of a franchise to build, maintain, and operate a railroad is without any warrant in reason or principle.

Mr. John G. Milburn also argued the cause, and, with Messrs. Chester O. Swain and M. F. Elliott, filed a brief for appellee in No. 483:

The appellee is not, in respect of the transportation of oil through its pipe lines, engaged in interstate commerce, and is therefore not subject to the interstate commerce act, whatever may be the determination of the court as to the construction or constitutionality of that act as applied to corporations whose pipe lines transport oil between states.

Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; Texas & N. O. R. Co. v. Sabin Tram Co. 227 U. S. 111, 127–130, 57 L. ed. 442, 448–450, 33 Sup. Ct. Rep. 229.

The crossing under a highway by a pipe line does not impress upon that pipe line the nature or obligations of a common carrier.

Hatch v. Arnault, 3 La. Ann. 486; Mendez v. Dugart, 17 La. Ann. 173; Bradley v. Pharr, 45 La. Ann. 432, 19 L.R.A. 647, 12 So. 618.

Mr. W. S. Fitzpatrick argued the cause, and, with Messrs. J. B. F. Cates, L. W. Keplinger, and C. W. Trickett, filed a brief for appellee in No. 506:

So radical an innovation upon the common law, and so grave an interference with the natural rights of man to refuse to go into a business against his will, as is contended for by the government, ought not to depend upon the presence or absence of a comma.

Re Irwine, 1 Clark (Pa.) 82, Fed. Cas. No. 7,086; Ewing v. Burnet, 11 Pet. 54, 9 L. ed. 630; United States v. Voorhees, 9 Fed. 143; Cushing v. Worrick, 9 Gray, 382.

That "it would have been easy to say so" is a principle that has often been applied against a construction not directly and positively expressed.

Tillson v. United States, 100 U. S. 46, 25 L. ed. 543; Baltimore & P. R. Co. v. Grant, 98 U. S. 403, 25 L. ed. 233; Union Nat. Bank v. Matthews, 98 U. S. 627, 25 L. ed. 189; Harrington v. Herrick, 12 C. C. A. 231, 29 U. S. App. 103, 64 Fed. 471; Austin v. United States, 155 U. S. 417, 39 L. ed. 206, 15 Sup. Ct. Rep. 167; Ryan v. Carter, 93 U. S. 83, 23 L. ed. 809; Tompkins v. Little Rock & Ft. S. R. Co. 125 U. S. 127,

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31 L. ed. 624, 8 Sup. Ct. Rep. 762; United States v. Ryder, 110 U. S. 739, 28 L. ed. 311, 4 Sup. Ct. Rep. 196; The Cherokee Tobacco Co. (Boudinot v. United States) 11 Wall. 620, 20 L. ed. 229; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 744, 23 L. ed. 638; James v. Milwaukee, 16 Wall. 161, 21 L. ed. 267; United States v. Anderson, 9 Wall. 66, 19 L. ed. 617; Lawrence v. Allen, 7 How. 796, 12 L. ed. 918; United States v. Fisher, 2 Cranch, 358, 2 L. ed. 304; United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547; Brown v. Barry, 3 Dall. 365, 1 L. ed. 638; Northern P. R. Co. v. Whalen, 149 U. S. 157, 37 L. ed. 686, 13 Sup. Ct. Rep. 822; Van Horne v. Dorrance, 2 Dall. 304, 1 L. ed. 391, Fed. Cas. No. 16,857; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527.

The judgment of the court cannot in any degree be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motive or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of a majority of both houses, and the only mode in which that will is spoken is in the act itself.

Aldridge v. Williams, 3 How. 23, 11 L. ed. 475; Mitchell v. Great Works Mill. & Mfg. Co. 2 Story, 648, Fed. Cas. No. 9,662; Soon Hing v. Crowley, 113 U. S. 710, 28 L. ed. 1147, 5 Sup. Ct. Rep. 730.

The oil, the monopoly of which it claimed the act was intended to prevent, certainly does not commence its final movement for transportation until after it becomes the property of the only person who can determine whether it shall be transported or not.

Coe v. Errol, 116 U. S. 524, 29 L. ed. 717, 6 Sup. Ct. Rep. 475.

Congress is not the exclusive judge as to the means for the prevention of monopoly.

Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989; State v. Haun, 61 Kan. 154, 47 L.R.A. 369, 59 Pac. 340; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 236, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Bradshaw v. Rodgers, 20 Johns. 105; Harness v. Chesapeake & O. Canal Co. 1 Md. Ch. 248; Cairo & F. R. Co. v. Turner, 31 Ark. 494, 25 Am. Rep. 564; Doe ex dem. Carr v. Georgia R. & Bkg. Co. 1 Ga. 524; Loughbridge v. Harris, 42 Ga. 501; Sinnickson v. Johnson, 17 N. J. L. 129, 34 Am. Dec. 184.

The compulsory expenditure of the capital which is required in its own business in order to enable it to engage in the service of the general public would be a taking of property within the meaning of the 5th Amendment.

Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989.

That the act as construed would be invalid because of its failure to make the obligation of the pipe line owner to transport oil for the public dependent upon the necessities of the pipe line owner as to the transportation of its own oil, and the inability of the Commission to supply such omissions in the act, is clearly shown by the decision in Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246.

Any actual and material interference with private property rights is a "taking" of property within the meaning of the provision in the Constitution referring to the taking of private property for public purposes without just compensation.

Portage County v. Gates, 83 Ohio St. 19, 93 N. E. 256.

The contention that the temporary deprivation of the use of the pipe lines by the pipe line owner during the time his lines are being used for the transportation of the oil of the public is not a taking of property is based upon a radical misconception of the meaning of the word "property." The right to use property is property.

Lewis, Em. Dom. § 52; Chicago & W. I. R. Co. v. Englewood Connecting R. Co. 115 Ill. 375, 56 Am. Rep. 173, 4 N. E. 246.

There will be here something more than an interference with the use of the property by the pipe line owner. During the time the line is being used by the public, there would be an actual physical dispossession of the owner, and an absolute deprivation of his exclusive use.

Old Colony & F. R. Co. v. Plymouth County, 14 Gray, 161; Lewis, Em. Dom. §§ 56, 57, 60, 61.

To the precise extent that the appellee's property is appropriated to the use of others against its will, there would be a taking within the meaning of the 5th Amendment.

Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349.

Even if the petitioner had been engaged in transporting for the public at the time of the making of the amendment, it could have withdrawn itself from the operation of the act by using its lines exclusively for the transportation of its own oil.

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Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 85, 46 L. ed. 99, 22 Sup. Ct. Rep. 30; Weems S. B. Co. v. People's S. B. Co. 214 U. S. 345, 53 L. ed. 1024, 29 Sup. Ct. Rep. 661, 16 Ann. Cas. 1222.

The right of private contract is property which cannot be taken without compensation.

Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Mathews v. People, 202 Ill. 389, 63 L.R.A. 73, 95 Am. St. Rep. 241, 67 N. E. 28; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; Harbison v. Knoxville Iron Co. 103 Tenn. 421, 56 L.R.A. 316, 76 Am. St. Rep. 682, 53 S. W. 955.

Property cannot be taken under the police power without compensation.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989.

Mr. Albert L. Wilson argued the cause and filed a brief for appellee in No. 507:

Of two constructions equally warranted by the language of an amendment, that is to be preferred which best harmonizes with the general tenor and spirit of the act amended.

Griffin's Case, Chase, Dec. 364, Fed. Cas. No. 5,815; Van Riper v. Essex Public Road Board, 38 N. J. L. 23.

The principal objects of the interstate commerce act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or reasonable preferences to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freight.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 276, 36 L. ed. 699, 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Interstate Commerce Commission v. Harriman, 211 U. S. 407, 418, 53 L. ed. 253, 262, 29 Sup. Ct. Rep. 115.

These objects have no application or pertinency to a private railroad or pipe line; and the fact that they have not furnishes a convincing reason against a construction of the act which would bring such railroads or pipe lines within its terms or operation. To apply the act to a new subject presupposes an existing public use in connection with it in need of the regulation which the act provides.

The court, to preserve the act, will adopt that construction which is consistent with the Constitution, or which avoids grave constitutional objections.

United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 407, 408, 53 L. ed. 836, 848, 849, 29 Sup. Ct. Rep. 527; Interstate Commerce Commission v. Harriman, 211 U. S. 407, 422, 53 L. ed. 253, 264, 29 Sup. Ct. Rep. 115.

If § 7 of the act is to be construed to apply to every corporation which transports its own oil by private pipe line for the purposes of its own business, the provisions relating to pipe lines clearly violate the 5th Amendment of the United States Constitution, in that they deprive the owners of private pipe lines of property without due process of law, and take private property for public use without compensation.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 324, 37 L. ed. 463, 467, 13 Sup. Ct. Rep. 622; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; United States v. Welch, 217 U. S. 333, 339, 54 L. ed. 787, 790, 28 L.R.A. (N.S.) 385, 30 Sup. Ct. Rep. 527, 19 Ann. Cas. 680; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 179, 20 L. ed. 557, 560.

Private wharves on navigable streams cannot be taken without compensation, and to compel the owners thereof to allow the wharves to be used by others would be to take property without due process of law.

Weems S. B. Co. v. People's S. B. Co. 214 U. S. 345, 53 L. ed. 1024, 29 Sup. Ct. Rep. 661, 16 Ann. Cas. 1222.

The act contains no definition of the words "common carriers," except that they shall include express companies and sleeping-car companies. Whether a pipe line company in 1910 was in fact a common carrier or not must, therefore, be determined by the common-law definition of those words.

Judson, Interstate Commerce, 2d ed. p. 220; Manufacturers' R. Co. v. St. Louis, I. M. & S. R. Co. 21 Inters. Com. Rep. 304.

At common law, the words "common carrier" were limited to one who undertook or held himself out to carry for all persons who wished to engage him.

Ingate v. Christie, 3 Car. & K. 61; Gisbourn v. Hurst, 1 Salk. 249; Nugent v. Smith, L. R. 1 C. P. Div. 19; Jackson Architectural Iron Works v. Hurlbut, 158 N. Y. 34, 70 Am. St. Rep. 432, 52 N. E. 665; Allen v. Sackrider, 37 N. Y. 341; Moore, Carr. p. 20: The Wildenfels, 89 C. C. A. 58, 161 Fed. 864; United States v. Sioux City

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Stock Yards Co. 162 Fed. 556; 6 Am. & Eng. Enc. Law, 2d ed. 237, 245.

Industrial railroads, built for the transaction of private business, are not subject to liability as common carriers.

Wade v. Lutcher & M. Cypress Lumber Co. 33 L.R.A. 255, 20 C. C. A. 515, 41 U. S. App. 45, 74 Fed. 517; E. E. Taenzer & Co. v. Chicago, R. I. & P. R. Co. 95 C. C. A. 436, 170 Fed. 240; Weidenfeld v. Sugar Run R. Co. 48 Fed. 615; McKivergan v. Alexander & E. Lumber Co. 124 Wis. 60, 102 N. W. 332, 17 Am. Neg. Rep. 751.

From the point of view of the state granting a charter which confers the right of eminent domain and common-carrier franchises, or otherwise specifically provides for public service to be rendered under it, the acceptance by such corporation of such charter undoubtedly amounts to an undertaking by such corporation to serve all, and subjects the corporation to the duties of a common carrier.

Griffin v. South West Pennsylvania Pipe Lines, 172 Pa. 580, 33 Atl. 578; People ex rel. Van Dyke v. Colorado C. R. Co. 42 Fed. 638; Cincinnati, I. & W. R. Co. v. Connorsville, 170 Ind. 316, 83 N. E. 503.

But it by no means follows that such companies are within the provisions of the interstate commerce act.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Star Grain & Lumber Co. v. Atchison, T. & S. F. R. Co. 17 Inters. Com. Rep. 338; Weidenfeld v. Sugar Run R. Co. 48 Fed. 615.

The transactions of appellee are interstate transactions, but are not interstate commerce, as they do not constitute or involve any dealings between appellee and another. The Constitution does not give the Congress authority to regulate interstate transactions which do not amount to commerce, and if the act should be construed to apply to the transactions of appellee, it would be unconstitutional.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 203, 29 L. ed. 161, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Addyston Pipe & Steel Co. v. United States, 175 U. S. 241, 44 L. ed. 147, 20 Sup. Ct. Rep. 96; United States v. Germaine, 99 U. S. 510, 25 L. ed. 483; Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; 10 Am. & Eng. Enc. Law, 2d ed. 293; Bank of Columbia v. Okely, 4 Wheat. 235, 4 L. ed. 559; Hoover v. McChesney, 81 Fed. 472; Meyers v. Shields, 61 Fed. 718.

How is it possible for any law-abiding citizen to contend that the Uncle Sam Oil Company shall be compelled to receive and transport through its 3-inch pipe line all the oils which others may offer, and that it shall be compelled to take such oil and assume the absolute liability of delivering it to the consignee or owner, notwithstanding the transportation of this oil for others would suspend the operation of its refinery for lack of ability to transport its own oil to its refinery? How can it be claimed that this liability and injury could be forced upon the Uncle Sam Oil Company when it has never offered to transport any oil for any person, and has never transported oil for any person? If the duties and obligations of a common carrier can be imposed upon the Uncle Sam Oil Company under these conditions, then they can be imposed upon every farmer in the United States who hauls his grain and products from his farm to market. The public highways are for the use of the public. The Uncle Sam Oil Company is a part of the public, and it has as much right to use the public highway to transport its oil in a pipe line as it would have to transport its oil in a wagon drawn by oxen.

State ex rel. Coleman v. Kansas Natural-Gas, Oil, Pipe-Line & Improv. Co. 71 Kan. 508, 114 Am. St. Rep. 507, 80 Pac. 962; La Harpe v. Elm Twp. Gaslight, Fuel & P. Co. 69 Kan. 97, 76 Pac. 448; McCann v. Johnson County Teleph. Co. 69 Kan. 210, 66 L.R.A. 171, 76 Pac. 870, 2 Ann. Cas. 156.

The acceptance of a right of way from the Interior Department does not make the appellee a common carrier.

United States use of Choctaw & C. Nations v. McMurray, 181 Fed. 723; Garfield v. United States, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62, affirming 30 App. D. C. 177; Midland Oil Co. v. Turner, 102 C. C. A. 368, 179 Fed. 74; Morrill v. Jones, 106 U. S. 466, 27 L. ed. 267, 1 Sup. Ct. Rep. 423.

Mr. W. I. Lewis and Archibald F. Jones submitted the cause for appellees in No. 508. Mr. R. R. Lewis was on the brief:

The power of Congress to regulate interstate commerce must be exercised subject to the limitations imposed by the Constitution.

Adair v. United States, 208 U. S. 161, 180, 52 L. ed. 436, 445, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Monongahela Nav. Co. v. United States, 148 U. S. 331, 336, 37 L. ed. 469, 471, 13 Sup. Ct. Rep. 622; Dubuque & S. C. R. Co. v. Richmond, 86 U. S. 584, 22 L. ed. 173; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851.

When one dedicates his property to pub-

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lic use, that use is subject to public regulation.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Weems S. B. Co. v. People's S. B. Co. 214 U. S. 345, 53 L. ed. 1024, 29 Sup. Ct. Rep. 661, 16 Ann. Cas. 1222; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423.

Interstate pipe lines are not monopolies.

United States v. Standard Oil Co. 173 Fed. 177.

Can Congress, under the commerce clause, prohibit interstate commerce?

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 500, 52 L. ed. 297, 309, 28 Sup. Ct. Rep. 141.

Conceding, for the purpose of argument, what we do not admit as a fact, that privately owned pipe lines may become the instruments of monopoly, the conclusion does not necessarily follow that they may be taken for public use without just compensation.

Pumpelly v. Green Bay & M. Canal Co. 80 U. S. 166, 20 L. ed. 557; Weems S. B. Co. v. People's S. B. Co. 214 U. S. 345, 53 L. ed. 1024, 29 Sup. Ct. Rep. 661, 16 Ann. Cas. 1222.

There is no method of compensation, nor provision for compensation, in the act. Such omission renders the legislation unconstitutional.

United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; Gibson v. United States, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97.

Congress cannot prohibit the transportation of petroleum for any lawful purpose.

West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; Haskell v. Kansas Natural Gas Co. 224 U. S. 217, 56 L. ed. 738, 32 Sup. Ct. Rep. 442.

The use of public highways by the pipe lines does not impress a public use upon them.

In the states through which our pipe line passes, the highways are public easements, and the public right is confined to the surface, the fee of the land remaining in the owner.

Barclay v. Howell, 6 Pet. 498, 8 L. ed. 477; Bloomfield & R. Natural Gaslight Co. v. Calkins, 62 N. Y. 386; Woodring v. Forks Twp. 28 Pa. 355, 70 Am. Dec. 134; Winter v. Peterson, 24 N. J. L. 524, 61 Am. Dec. 678; Platt v. Pennsylavnia Co. 43 Ohio St. 228, 1 N. E. 420; Palatine v. Krueger, 121 Ill. 72, 12 N. E. 75; Kincaid v. Indianapolis Natural Gas Co. 124 Ind. 577, 8 L.R.A. 602, 19 Am. St. Rep. 113, 24 N. E. 1066.

The appellees are not a corporation, but a partnership organized under the laws of the state of Pennsylvania.

Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690.

Mr. Justice Holmes delivered the opinion of the court:

By the act of Congress of June 29, 1906, chap. 3591, 34 Stat. at L. 584, U. S. Comp. Stat. Supp. 1911, p. 1288, the act to regulate commerce was amended so that the 1st section reads in part as follows: "That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of [558] oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act." Thereafter the Interstate Commerce Commission issued an order requiring the appellees, among others, being parties in control of pipe lines, to file with the Commission schedules of their rates and charges for the transportation of oil. 24 Inters. Com. Rep. 1. The appellees thereupon brought suit in the commerce court to set aside and annul the order, and a preliminary injunction was issued by that court, on the broad ground that the statute applies to every pipe line that crosses a state boundary, and that thus construed it is unconstitutional. 204 Fed. 798. The United States, the Interstate Commerce Commission, and other intervening respondents appealed.

The circumstances in which the amendment was passed are known to everyone. The Standard Oil Company, a New Jersey corporation, owned the stock of the New York Transit Company, a pipe line made a common carrier by the laws of New York, and of the National Transit Company, a Pennsylvania corporation of like character, and by these it connected the Appalachian oil field with its refineries in the east. It owned nearly all the stock of the Ohio Oil

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Company, which connected the Lima-Indiana field with its system; and the National Transit Company, controlled by it, owned nearly all the stock of the Prairie Oil & Gas Company, which ran from the mid-continent field in Oklahoma and Kansas and the Caddo field in Louisiana to Indiana, and connected with the previously mentioned lines. It also was largely interested in the Tide Water Pipe Company, Limited, which connected with the Appalachian and other fields and pursued the methods of the Standard Oil Company about to be described. By the before-mentioned and subordinate [559] lines the Standard Oil Company had made itself master of the only practicable oil transportation between the oil fields east of California and the Atlantic ocean, and carried much the greater part of the oil between those points. Before the recent dissolution, the New York and Pennsylvania companies had extended their lines into New Jersey and Maryland to the refineries, and the laws of those states did not require them to be common carriers. To meet the present amendment the Standard Oil Company took a conveyance of the New Jersey and Maryland lines, and the common carrier lines now end at insignificant places where there are neither market nor appliances except those of the Standard Oil, by which it would seem that the whole transport of the carriers' lines is received. There is what seems to be merely a formal breach of continuity when the carriers' pipes stop. The change is not material to our view of the case.

Availing itself of its monopoly of the means of transportation the Standard Oil Company refused, through its subordinates, to carry any oil unless the same was sold to it or to them, and through them to it, on terms more or less dictated by itself. In this way it made itself master of the fields without the necessity of owning them, and carried across half the continent a great subject of international commerce coming from many owners, but, by the duress of which the Standard Oil Company was master, carrying it all as its own. The main question is whether the act does and constitutionally can apply to the several constituents that then had been united into a single line.

Taking up first the construction of the statute, we think it plain that it was intended to reach the combination of pipe lines that we have described. The provisions of the act are to apply to any person engaged in the transportation of oil by means of pipe lines. The words "who shall be considered and held to be common carriers within the meaning and purpose of this act" obviously are not intended [560] to cut down the generality of the previous declaration to the meaning that only those shall be held common carriers within the act who were common carriers in a technical sense, but an injunction that those in control of pipe lines and engaged in the transportation of oil shall be dealt with as such. If the Standard Oil Company and its cooperating companies were not so engaged no one was. It not only would be a sacrifice of fact to form, but would empty the act if the carriage to the seaboard of nearly all the oil east of California were held not to be transportation within its meaning, because by the exercise of their power the carriers imposed as a condition to the carriage a sale to themselves. As applied to them, while the amendment does not compel them to continue in operation, it does require them not to continue except as common carriers. That is the plain meaning, as has been held with regard to other statutes similarly framed. Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 195, 203, 55 L. ed. 167, 178, 181, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164. Its evident purpose was to bring within its scope pipe lines that, although not technically common carriers, yet were carrying all oil offered, if only the offerers would sell at their price.

The only matter requiring much consideration is the constitutionality of the act. That the transportation is commerce among the states we think clear. That conception cannot be made wholly dependent upon technical questions of title, and the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce. Rearick v. Pennsylvania, 203 U. S. 507, 512, 51 L. ed. 295, 297, 27 Sup. Ct. Rep. 159. See Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229. The situation that we have described would make it illusory to deny the title of commerce to such transportation, beginning in purchase and ending in sale, for the same reasons that make it transportation within the act.

The control of Congress over commerce among the [561] states cannot be made a means of exercising powers not intrusted to it by the Constitution, but it may require those who are common carriers in substance to become so in form. So far as the statute contemplates future pipe lines and prescribes the conditions upon which they may be established there can be no doubt that it is valid. So the objection is narrowed to the fact that it applies to lines already engaged in transportation. But, as we already have intimated, those lines that we are considering are common carriers now

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in everything but form. They carry everybody's oil to a market, although they compel outsiders to sell it before taking it into their pipes. The answer to their objection is not that they may give up the business, but that, as applied to them, the statute practically means no more than they must give up requiring a sale to themselves before carrying the oil that they now receive. The whole case is that the appellees, if they carry, must do it in a way that they do not like. There is no taking and it does not become necessary to consider how far Congress could subject them to pecuniary loss without compensation in order to accomplish the end in view. Hoke v. United States, 227 U. S. 308, 323, 57 L. ed. 523, 527, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; Lottery Case (Champion v. Ames) 188 U. S. 321, 357, 47 L. ed. 492, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561.

These considerations seem to us sufficient to dispose of the cases of the Standard Oil Company, the Ohio Oil Company, the Prairie Oil & Gas Company, and the Tide Water Pipe Company, Limited. The Standard Oil Company of Louisiana was incorporated since the passage of the amendment, and before the beginning of this suit, to break up the monopoly of the New Jersey Standard Oil Company. It buys a large part of its oil from the Prairie Oil & Gas Company, which buys it at the wells in the mid-continent field and transfers the title to the Louisiana Company in that state. Its case also is covered by what we have said.

There remains to be considered only the Uncle Sam Oil [562] Company. This company has a refinery in Kansas and oil wells in Oklahoma, with a pipe line connecting the two which it has used for the sole purpose of conducting oil from its own wells to its own refinery. It would be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery, for its own use, and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end. In that case the decree will be affirmed. In the others the decree will be reversed.

No. 507, decree affirmed.

Nos. 481, 482, 483, 506, and 508, decrees reversed.

The Chief Justice, concurring:

Agreeing in every particular with the conclusions of the court and with its reasoning except as to the one special subject, my concurrence as to that matter, because of its importance, is separately stated. The matter to which I refer is the exclusion of the Uncle Sam Oil Company from the operation of the act. The view which leads the court to exclude it is that the company was not engaged in transportation under the statute,—a conclusion to which I do not assent. The facts are these: That company owns wells in one state from which it has pipe lines to its refinery in another state, and pumps its own oil through such pipe lines to its refinery; and the product, of course, when reduced at the refinery, passes into the markets of consumption. It seems to me that the business thus carried on is transportation in interstate commerce within the statute. But despite this I think the company is not [563] embraced by the statute because it would be impossible to make the statute applicable to it without violating the due process clause of the 5th Amendment, since to apply it would necessarily amount to a taking of the property of the company without compensation. It is shown beyond question that the company buys no oil, and by the methods which have been mentioned simply carries its own product to its own refinery; in other words, it is engaged in a purely private business. Under these conditions in my opinion there is no power under the Constitution without the exercise of the right of eminent domain to convert without its consent the private business of the company into a public one.

Of course this view has no application to the other companies which the court holds are subject to the act, because, as pointed out, the principal ones were chartered as common carriers, and they all, either directly or as a necessary result of their association, were engaged in buying oil and shipping it through their pipes; in other words, were doing in reality a common carrier business, disguised, it may be, in form, but not changed in substance. Under these conditions I do not see how it would be possible to avoid the conclusion which the court has reached without declaring that the shadow, and not the substance, was the criterion to be resorted to for the purpose of determining the validity of the exercise of legislative power.

Mr. Justice McKenna, dissenting:

I am unable to concur in the judgment of the court or in the reasoning upon which it is based. I pass by the construction of the amendment of June 29, 1906, set out in the opinion, although its application to the

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business of appellee companies is in controversy. I shall assume its application, therefore, and pass to the other and more serious questions. Extended discussion [564] of them is not now possible. Indeed, any discussion may not be worth while, as I express only my individual views. In order to be brief, I have to refer to the principles of the decision of the court, and indeed I am impelled more to dissent from them than from the judgment. It is of little consequence, aside from the rights of the appellee companies, whether they are subject to be regulated as common carriers, but it is of great consequence whether the sanctions of property be impaired.

The outside principle of the decision is the power of Congress to regulate interstate commerce; but to assert that power solves none of the difficulties of the questions in the case. I need not pause to demonstrate that the exercise of that power is subject to other provisions of the Constitution, and one of those provisions is invoked by the appellees. It is contended that the act offends the 5th Amendment in that it takes their property without due process of law. But what is due process of law, and wherein does its requirement limit the power of Congress? Neither question can be answered in a word, and the usual considerations are encountered when the courts are called upon to investigate the limits of legislative power. Autocracy is free from such perplexities. When authority can say, "The State—it is I!" it meets no impediments to its exercise. But that extreme illustration is not necessary. Even a government under a Constitution, if it be unwritten, may have a power that leaves nothing for the courts to do other than to enforce the flats of legislative authority. Under a written Constitution, however, there is a sovereignty superior to the legislature, that of the people expressed in the Constitution. How to reconcile legislation with the limitations of the Constitution and leave government practical in its exercise is a problem which comes to this court often. It is the problem in the case at bar. It is to be regretted that there is no indisputable standard for its solution,—no indisputable test of [565] due process of law. We know that an act of legislation does not necessarily satisfy it. It may, however, be sufficient, or, to be more careful and accurate, there may be a regulation of the uses of property whose legality cannot be denied. Regulation is not a taking, and we are brought to the inquiry, what uses of property will subject it to regulation? I mean regulation in a special sense, not in the sense in which all property, whether its uses be public or private, is subject to regulation. "Property," it is said, "becomes clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, ante, 1011, 34 Sup. Ct. Rep. 612. Manifestly the principle needs the definition of the facts of the cases. In three of them the fees for storage of grain were regulated; in the other the price of fire insurance; but dominant in all, as giving character to the property, was the fact that its use was voluntarily offered to the public. There was no compulsion of use or service. This must be kept in mind as the determining circumstance. Conduct may be regulated which cannot be initially commanded. The rates of interest may be regulated, but loans cannot be compelled. There is further illustration in a case subsequent to those cited. In W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423, an injunction was sought against the operation of an elevator and warehouse situated on the right of way of a railroad until its operator should have obtained a license from the railroad and warehouse commission of the state under a law of the state. The defendant company bought and sold grain, although its [566] elevator was used for storing its own grain only. The state court decided that the business was of a "public character," and was "sufficiently affected with a public interest to warrant a very considerable amount of regulation of it by the state." This conclusion was put upon the ground that the elevator was a kind of public market place, and it was important to see that correct weights were had, uniform grades given, proper amount of dockage taken, and no dishonest practice allowed. The provision for a license was sustained. The act, however, provided for many other regulations, among others, for the receipt and storage of the grain of others and the rates of charges therefor. The state court, passing on these and other regulations, said that there were many provisions in the act which applied only to warehouses and elevators in which grain was stored for others or for the public,

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and which could not apply to such warehouses as the one in question, and there were perhaps provisions in the act which it would be unconstitutional to apply to such warehouses. The court, however, said: "Such matters need not be considered at this time. The provision recognizing license is not one of these." One of the judges of the court was of opinion that, on account of the interdependence of the provisions of the act, many of them, when applied to warehouses not used for the storage of grain by others, were beyond the police power of the state, and therefore invalid, and made the whole act so. This court, by Mr. Justice Harlan, sustained the judgment of the state court and said "that the mere requirement of a license was not forbidden by the 14th Amendment." Answering the suggestion that other provisions were repugnant to the Constitution of the United States, it was said that the license would give authority to carry on the business under the valid laws of the state and the valid regulations of the commission. The case, therefore, manifestly decides that the use of the warehouse by others could not [567] have been legally compelled, and in the other cases, as we have seen, it was the act of the parties, not the power of the law, which devoted the property to the public interest. In the Munn Case it was said of the owners of the elevators that there was no attempt to compel them "to grant the public an interest in their property, but to declare their obligations if they used it in this particular manner." And further, "He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control."

In the cases cited, therefore, there was a regulation of uses which were extended voluntarily to others. I recall no case where the use was compelled, and by the use so compelled regulation was justified. The case at bar has no fellow in our jurisprudence.

These considerations are not touched upon in the opinion of the court, and how far they affect the decision can only be conjectured. It may be not at all. At any rate, other considerations are given explicit prominence. The impulse of the amendment is said to be the control which the Standard Oil Company had acquired over the pipe-line transportation of oil. It is further said that it availed "itself of its monopoly of the means of transportation" by refusing to carry "through its subordinates any oil unless the same was sold to them, and through them to it on terms more or less dictated by itself, and thereby became master of the fields without owning them." It is not very clear whether this is intended as a statement merely of the motive of the amendment or of its legal justification. If stated as the motive of the amendment, I have no concern with it; as a justification of the amendment, its foundation must be considered.

The facts of the cases the opinion of the court does not give. They are, however, quite necessary to a discussion of the questions which they present. I quote the summary of the commerce court:

[568] "The Prairie Oil & Gas Company is a corporation organized in 1900 under the laws of the state of Kansas. It owns and operates a system of pipe lines consisting of gathering lines in the mid-continent field, in the states of Kansas and Oklahoma, a trunk line from that field to Griffith in the state of Indiana, where it connects with the Indiana pipe line, and a trunk line in the state of Arkansas, connecting the Oklahoma pipe line with the pipe line of the Standard Oil Company of Louisiana. This company has no refinery, and its business is confined to producing, purchasing, and selling crude oil, which it delivers to its customers by means of the pipe lines described. Its own wells yield only about 12,000 barrels per day and it purchases approximately 70,000 barrels per day on the average. Its trunk lines are about 860 miles in length, of which some 300 miles are located on the right of way of the Atchison, Topeka, & Sante Fe Railway Company under contract arrangement with that company.

"The Uncle Sam Oil Company is a corporation organized in 1905 under the laws of the state (then territory) of Arizona. It owns and operates a pipe line from its wells in the state of Oklahoma to its refinery at Cherryvale, Kansas. The extent to which this company purchases oil from other producers, if it engages in that business at all, does not appear from the record.

"Robert D. Benson et al. are the members of a partnership, organized in 1878 for the term of twenty years, and reorganized in 1898 for a further term of twenty years, in compliance with the laws of the state of Pennsylvania, and doing business under the name of the Tide-Water Pipe Company (Ltd.). This company transports oil from the Appalachian field in the western part of Pennsylvania, and also oil received through connecting lines from other fields, to the Tide-Water Oil Company refinery at Bayonne, in the state of New Jersey. It also owns and operates branch lines in New York and Pennsylvania, and a line extending [569] from Stoy, Illinois, through the states of Illinois, Indiana, Ohio,

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and Pennsylvania. The greater part of the crude oil transported by this company is purchased from other producers. The lines which it owns and the Bayonne refinery which it serves are under common or unified control.

"The Ohio Oil Company is a corporation organized in 1887 under the laws of the state of Ohio. It owns and operates pipe lines in the states of Ohio, Indiana, and Illinois, and also leases and operates a line from Negley, Ohio, to Centerbridge, in the state of Pennsylvania. It is an extensive purchaser of crude oil from other producers.

"The Standard Oil Company, designated, for convenience, 'Standard Oil Company of New Jersey,' is a corporation organized in 1882 under the laws of the state of New Jersey, and its principal pipe lines are the following: (a) A line extending from Unionville, in the state of New York, near the boundary line of New Jersey, through the latter state to its refineries at Bayonne; (b) a line from Centerbridge, in the state of Pennsylvania, near the boundary of New Jersey, through the latter state to its refineries at Bayonne and Bayway; and (c) a line from Fawn Grove, in the state of Pennsylvania, near the boundary of Maryland, through the latter state to its refinery at Baltimore. The record indicates that much the greater part of the oil transported through these lines, and perhaps all of it, is oil which this company has purchased.

"The Standard Oil Company of Louisiana is a corporation organized in 1909 under the laws of that state. It owns and operates a refinery at Baton Rouge and a trunk line extending thereto from the town of Ida, near the northern line of Louisiana, and also gathering lines in the Caddo field, in the states of Louisiana and Texas. It purchases a considerable part of the crude oil which its lines transport.

"None of the petitioning corporations is organized or [570] derives any of its corporate powers from laws of the state of its creation under which common carrier or other public service corporations are organized, but each of them was formed and has always conducted its operations under and in compliance with state laws which relate to private as distinguished from public business."

The companies do not possess the right of eminent domain, and their lines are laid over private rights of way, except some of them for short distances have laid their lines along the rights of way of certain railroads under some contract arrangement with the railroads, one of them for a distance of about 300 miles. They, however, have in many instances also laid their lines across or along public streets and highways by permission or consent of the local authorities. None of them has ever held itself out as a common carrier, or in fact ever carried oil for others, but they have carried only such oil as they produced from their own wells or purchased from other producers, and which they owned when the transportation took place.

Concluding its recitation of facts, the commerce court said: "In short, so far as their legal status is fixed by the laws of the states of their creation, and so far as their acts and attitude could make them such, all the petitioners [appellee companies] carry on a private business, at least, in the sense that they transport only their own oil, and have always refused to transport for others; and all of them have evidently sought and claimed to so conduct their operations as to avoid any public activity which might subject them to public regulation."

These being the facts, it is yet insisted that the appellee companies are common carriers "in substance," and Congress by its action has only made them so "in form," and that this is unquestionably within the power of Congress. But there is something more to be considered than an antithesis of words. There is an antithesis of [571] legal consequences,—the subjecting of property to other uses than those of its owner. A manifest taking, therefore.

But let me get away from any appearance of considering words or forms of expression to an estimation of the facts. The Standard Oil Company of New Jersey is made prominent, and the exemplar of all of the other companies, and its stock ownership in some of them is assumed to destroy their individuality and unite them all in operation, character, and effect. Indeed, it is represented as the single controlling force and master of the transportation of oil "between the oil fields east of California and the Atlantic ocean." Under its sway are pictured all the other companies except the Standard Oil of Louisiana, the latter company, however, having a baneful potency of dictation to the other owners in the oil fields, as has its exemplar, the Standard Oil of New Jersey. In other words, it is argued, the companies have made themselves masters of their respective fields by the constraint of the sale of the oil of other owners to them upon terms more or less dicated by them by availing themselves of their "monopoly of the means of transportation." This is the charge. The facts of the case do not sustain it except as they exhibit the advantages of the possession of property which others do not pos-

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sess. Must it be shared by those others for that reason? The conception of property is exclusiveness, the rights of exclusive possession, enjoyment, and disposition. Take away these rights and you take all that there is of property. Take away any of them, force a participation in any of them, and you take property to that extent. These are commonplaces, but at times—it may be always—commonplaces are our best guides when rights are concerned. They are pertinent to this case. The employment of one's wealth to construct or purchase facilities for one's business greater than others possess constitutes no monopoly that does not appertain to all property. Such facilities may give [572] advantages, and, it may be, power; so does all property and in proportion to its extent. It may well, then, be asked—What extent of trade advantages, what degree of power in purchasing, what superiority in facilities of transportation or disposition of articles may be grounds of the exercise of congressional control? If the owner of a small oil well may be given rights in the facilities of the appellee companies, why may not the owner of a small business be given rights in the facilities of a larger business, if Congress sees fit to say that the public welfare requires the gift? Can any privilege be claimed for oil that cannot be claimed for other commodities? May a jobber of merchandise in Washington who conducts a trade in Baltimore and other places, and owns special facilities for the transportation of his merchandise, be compelled to share them with competitors who may not be able to afford as ample ones, and in consequence be forced to sell their property to him at a disadvantage? Or, recurring to the illustration of W. W. Cargill Co. v. Minnesota, can one who erects elevators for the storage of grain of his own raising (such instances exist), and uses it as well for grain of his purchase (there are more of such instances), be compelled to share their advantage with other growers or purchasers of grain? The advantages of his situation are quite as manifest as the advantages the appellees enjoy, and the effect on interstate commerce transportation as marked. Upon the same principle, one who builds a railroad to a coal field or to a forest must share it with other owners in the field or forest if he ventures to purchase their productions. Such is the principle of the present decision. Under it what attribute of private property is left?

Let us not exaggerate the conditions or by form of statement put out of view essential elements. What duress is employed that is not employed when terms are exacted as a condition of the use of property? Or, rather, [573] and more accurately, what duress is used except the exclusion of others from the use of property which they do not own? There were no prior or present rights in other owners of oil wells to the use of the lines of the appellee companies. They contributed nothing to the construction of the lines, and their exclusion from their use is the exclusion resulting from the separate ownership of property as distinguished from rights of community ownership.

There is quite a body of opinion which considers the individual ownership of property economically and politically wrong and insists upon a community of all that is profit-bearing. This opinion has its cause, among other causes, in the power—may I say the duress?—of wealth. If it accumulates 51 per cent of political power, may it put its conviction into law and justify the law by the advancement of the public welfare by destroying the monopoly and mastery of individual ownership?

I submit, with deference, that it is misleading to say that the use of the lines by other oil owners was permitted only on terms dictated by the companies, and that through such dictation they "became masters of the fields without owning them." And I take it if the companies had not made purchases of oil or refused offers of oil, they would not be held subject to the act. Such is the situation of the Uncle Sam Company and the ground of decision in regard to that company. It is not held to be within the act. It seems to be minimized and considered not big enough for the application of the law, and yet it owns and operates a pipe line from the oil fields of Oklahoma to its refineries in Kansas. The extent to which it purchases oil from producers, if it does so at all, does not appear from the record. It may be supposed that if it venture to make purchases of oil it will lose its immunity. But why its exemption? Why is the fact of purchases of oil important? Is it not the concern of the small oil owners to get to market? Indeed, is not that the advantage they get [574] from the law, thereby being able to break away from the supposed subjection to, and "duress" of, the superior advantages of the appellee companies? The result which the amendment under review was intended to effect as beneficial to the public welfare. The query then occurs, May all of the other oil companies give up their purchases, and, if they should, will they thereby get the freedom of the Uncle Sam Company? What, then, of the owners of oil? It may be they cannot sell their oil at all,—the local market is taken from them, a distant market is not possible for

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them. Is not the public welfare concerned for them in such situation? Must they remain in it dependent upon the richer owner balancing the advantages of remaining under the law or becoming free from it? Or may the power which has brought them to such situation extricate them from it by one more act of legislation in the public interest, and to take from the companies their mastery of the fields of production?

United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527, opens a curious speculation and illustrates the effect of the power exercised in the legislation under review. The appellee companies, the decision is, engaging in interstate commerce, may be declared common carriers and made to carry the products of others as well as their own products. Then, having been made common carriers, under the authority of the cited case, they can be forbidden to carry their own products, and so by legal circumlocution property legally devoted to the use of its owners is forbidden such use and devoted wholly to the use of others. A queer outcome.

I have extended this discussion beyond what I had intended. Much more, however, could be said and decisions adduced on the various elements of the case. Prophecies of the result of the principles of the decision could be made which I am afraid could not be pronounced fanciful, and projects whose shadows may even now be discerned [575] will plead a justification by the decision in these cases. It is to be remembered that there are many jurisdictions of legislation. It is to be remembered that there cannot be one measure of control for Congress over private property and its uses and another measure of control for the states. In other words, the power which Congress has in its domain, the states have in their domain. Alarms, however, are not arguments, and I grant that legislation must be practical. But, while making this concession, and giving to the legislation in question the presumption of constitutionality to which all legislation is entitled, I am yet constrained to say that it transcends the limits of the power of regulation and takes property without due process of law.

As I have not the power of decision, I do not enter into a discussion of the facts which distinguish the cases. It may be that the judgment of the commerce court as to the Standard Oil Company should be reversed because the lines of the company were common carriers before their acquisition, and it may be that the Prairie Oil & Gas Company was made a common carrier by the law which created it. This, however, is in controversy.

I concur in the judgment as to the Uncle Sam Oil Company. From the judgments as to the other companies, I dissent.

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[576] CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, Plff. in Err.,
v.
LIZZIE THOMPSON. (No. 751.)

CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, Plff. in Err.,
v.
GEORGE THOMPSON. (No. 752.)

(See S. C. Reporter's ed. 576-578.)

Error to state court — Federal question — claim of immunity from liability under Federal law.

1. A decision of a state court, enforcing the liability of a railroad company for personal injuries to an interstate passenger traveling on a pass issued to her under authority of the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), § 1, as wife of an employee, on the ground that such pass was not gratuitous, but was issued in consideration of the employee's services, and that therefore she was not bound by a stipulation therein on which the railroad company relied, exempting the carrier from liability, presents a question under that act reviewable by the Federal Supreme Court on writ of error.

[For other cases, see Appeal and Error, 1393-1430, in Digest Sup. Ct. 1908.]

Carriers — government regulation — pass to employee's family — gratuity.

2. A pass issued by a railroad company for interstate transportation to the wife of an employee under the authority of the act of June 29, 1906, § 1, must be deemed

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Note.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On validity of stipulation in pass limiting carrier's liability—see notes to Walther v. Southern P. Co. 37 L.R.A.(N.S.) 235, and Boering v. Chesapeake Beach R. Co. 48 L. ed. U. S. 742.

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to have been gratuitous, and not issued upon consideration of the services of the employee, especially in view of the prohibition in § 2 of that act against charging a greater, or less, or different compensation for the transportation of passengers from that scheduled in the carrier's published rates.

Carriers — pass to employee's family — limitation of liability.

3. A railroad carrier may validly stipulate in a pass for interstate transportation issued gratuitously to the wife of an employee under the authority of the act of June 29, 1906, § 1, that it shall not be liable for negligent injury to her person.

[For other cases, see Carriers, II. a, 8, in Digest Sup. Ct. 1908.]

[Nos. 751, 752.]

Argued April 15 and 16, 1914. Decided June 22, 1914.

TWO WRITS of Error to the Court of Appeals of the State of Georgia to review judgments which affirmed judgments of the City Court of Richmond County, in that state, in favor of plaintiffs in actions to recover damages arising out of personal injuries received by a passenger traveling on a free pass. Reversed.

See same case below, 13 Ga. App. 541, 79 S. E. 242.

The facts are stated in the opinion.

Messrs. F. Barron Grier and W. K. Miller argued the cause, and, with Mr. T. P. Cothran, filed a brief for plaintiff in error:

Where a party to litigation in a state court insists, by way of objection to or requests for instruction, upon a construction of a statute of the United States, or on possible findings of fact from the evidence which may lead to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court. The plain reason is that in all such cases he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so clearly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the states of the Union.

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 293, 52 L. ed. 1067, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464.

A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may fairly be held, within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary.

Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216.

The Federal question will be decreed sufficiently claimed and set up if it appear from the opinion that the point was fully considered as a Federal question, and decided against the plaintiff in error.

Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; Powell v. Brunswick County, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Home for Incurables v. New York, 187 U. S. 155, 47 L. ed. 117, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 47 L. ed. 480, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; San José Land & Water Co. v. San José Ranch Co. 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487; Rector v. City Deposit Bank Co. 200 U. S. 412, 50 L. ed. 529, 26 Sup. Ct. Rep. 289; Montana ex rel. Haire v. Rice, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281; Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216; Eau Claire Nat. Bank v. Jackman, 204 U. S. 532, 51 L. ed. 603, 27 Sup. Ct. Rep. 391; Hammond v. Whittredge, 204 U. S. 538, 51 L. ed. 606, 27 Sup. Ct. Rep. 396; Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790; St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 704, 57 L. ed. 1033, 33 Sup. Ct. Rep. 703; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; Wadkins v. Producers' Oil Co. 227 U. S. 368, 57 L. ed. 551, 33 Sup. Ct. Rep. 380; Adams Exp. Co. v. Croninger, 226 U. S. 492, 57 L. ed. 315, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Norfolk & W. R. Co. v. Dixie Tobacco Co. 228 U. S. 595, 57 L. ed. 981, 33 Sup. Ct. Rep. 609; Southern P. Co. v. Schuyler, 227 U. S. 602, 57 L. ed. 662, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277.

As an incident to the right to issue a free pass, as a gratuity, to an employee or his family, the carrier has the right to impose upon the issuance, acceptance, and use of such pass the condition that the carrier shall not be liable in damages for personal injury to the recipient in consequence of its negligence. In denying the right to issue

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such free pass, the court of appeals denies the right of limitation incident to such primary right.

Northern P. R. Co. v. Adams, 192 U. S. 441, 48 L. ed. 513, 24 Sup. Ct. Rep. 408; Boering v. Chesapeake Beach R. Co. 193 U. S. 442, 48 L. ed. 742, 24 Sup. Ct. Rep. 515; Hutto v. Southern R. Co. 75 S. C. 295, 55 S. E. 445.

An interstate carrier is authorized to issue only gratuitous passes to its employees or their families; it is not authorized to issue a pass in part payment of the employee's services, in fulfilment of an obligation to that effect undertaken at the time and as a part of the contract of service.

Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; Chicago, I. & L. R. Co. v. United States, 219 U. S. 486, 55 L. ed. 305, 31 Sup. Ct. Rep. 272; State v. Union P. R. Co. 87 Neb. 29, 31 L.R.A.(N.S.) 657, 126 N. W. 859; Smith v. Atchison, T. & S. F. R. Co. 114 C. C. A. 157, 194 Fed. 79; Peterson v. Seattle Traction Co. 23 Wash. 615, 53 L.R.A. 586, 63 Pac. 539, 65 Pac. 543.

Mr. William H. Fleming argued the cause and filed a brief for defendants in error:

The mere discussion of Federal questions in the opinions of state courts affords no legal basis for a writ of error.

Howard v. Fleming, 191 U. S. 126, 48 L. ed. 121, 24 Sup. Ct. Rep. 49.

Such questions must be unmistakably made in the pleadings, and not left for mere inference.

Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 309, 47 L. ed. 480, 485, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375.

Every so-called "free pass" is not a gratuity. Many of such passes have a valid consideration behind them, and when there is a consideration, the stipulation for exemption is void.

Grand Trunk R. Co. v. Stevens, 95 U. S. 655, 24 L. ed. 535, 10 Am. Neg. Cas. 638; Philadelphia & R. R. Co. v. Derby, 14 How. 485, 486, 14 L. ed. 509, 510; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624; Illinois C. R. Co. v. Beebe, 174 Ill. 13, 43 L.R.A. 210, 66 Am. St. Rep. 253, 50 N. E. 1019; Baker v. Boston & M. R. Co. 74 N. H. 100, 124 Am. St. Rep. 937, 65 Atl. 386, 12 Ann. Cas. 1072; Nickles v. Seaboard Air Line R. Co. 74 S. C. 102, 54 S. E. 255; Dugan v. Blue Hill Street R. Co. 193 Mass. 431, 79 N. E. 748.

Liability under free pass is a state, and not a Federal, question.

Southern P. Co. v. Schuyler, 227 U. S. 601–610, 57 L. ed. 662–668, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277.

In the Hepburn act, the words "free pass" were used in the ordinary, accepted sense, and not necessarily as a pure gratuity. The mere fact that the railroad company, in its plea in the state court, claimed that the alleged pass was issued under the Hepburn act, does not show that the railroad had any right under that act, as a defense to the cases.

Price v. Pennsylvania R. Co. 113 U. S. 218, 28 L. ed. 980, 5 Sup. Ct. Rep. 427; Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 192 U. S. 371, 48 L. ed. 484, 24 Sup. Ct. Rep. 325.

A rejected amendment is no part of the record, and is not before the reviewing court unless embodied in the bill of exceptions (which was not done in this case).

Ledbetter v. Savannah Brewing Co. 8 Ga. App. 282, 68 S. E. 950.

Mr. Justice Holmes delivered the opinion of the court:

The plaintiff, Lizzie Thompson, sued the railroad company, the plaintiff in error, to recover for personal injuries inflicted upon her while she was a passenger upon a train that was carrying her from South Carolina to Georgia. The railroad pleaded that she was traveling on a free [577] pass that exempted the company from liability, the same having been issued to her gratuitously under the Hepburn act of June 29, 1906, chap. 3591, § 1 [34 Stat. at L. 584, U. S. Comp. Stat. Supp. 1911, p. 1288], as wife of an employee. This plea was struck out, subject to the defendant's exception. The defendant also asked for an instruction that if the plaintiff was traveling on a free pass providing that the railroad should not be liable for negligent injury to her person, she could not recover. This was refused and was made a ground for a motion for a new trial, referring to the act of Congress. The motion was overruled seemingly on the notion that by the state law the defendant was liable within the conditions of the free pass. The court of appeals held such a stipulation binding in a free pass, but held that the Hepburn act created an exception, and that a so-called free pass under that act, issued to a member of an employee's family, really was not a free pass, but was issued upon consideration of the services of the employee. After this writ of error was taken it modified its statement so as to say that the jury might infer that the pass was issued for value. But no such issue was before the jury, as the defense had been excluded altogether, and apart from other objections we are of opinion that the change does not help

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the decision. The railroad company assigns the construction of the court of appeals and the two rulings below as error. There is a motion to dismiss, but we are of opinion that a question is presented under the act.

The main question is whether, when the statute permits the issue of a "free pass" to its employees and their families, it means what it says. The railroad was under no obligation to issue the pass. It may be doubted whether it could have entered into one, for then the services would be the consideration for the duty and the pass, and by § 2 it was forbidden to charge "a greater or less or different compensation" for transportation of passengers from that in its published rates. The antithesis in the statute is [578] between the reasonable charges to be shown in its schedules and the free passes which it may issue only to those specified in the act. To most of those enumerated the free pass obviously would be gratuitous in the strictest sense, and when all that may receive them are grouped in a single exception, we think it plain that the statute contemplates the pass as gratuitous in the same sense to all. It follows, or rather is saying the same thing in other words, that even on the improbable speculation that the possibility of getting an occasional free pass entered into the motives of the employee in working for the road, the law did not contemplate his work as a conventional inducement for the pass, but, on the contrary, contemplated the pass as being what it called itself, free.

As the pass was free under the statute, there is no question of the validity of its stipulations. This was conceded by the court of appeals, as we have stated, and is established by the decisions of this court. Northern P. R. Co. v. Adams, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408; Boering v. Chesapeake Beach R. Co. 193 U. S. 442, 48 L. ed. 742, 24 Sup. Ct. Rep. 515.

Judgment reversed.

By agreement of parties the judgment in No. 752 was to follow the foregoing. Therefore in No. 752 also the judgment is reversed.

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[579] INTERNATIONAL HARVESTER COMPANY OF AMERICA, Plff. in Err.,
v.
COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 579-589.)

Writ and process — service on foreign corporation — what is doing business.

1. The continuous solicitation of orders through the local agents of a nonresident manufacturing corporation, which are sent to another state to be filled, the articles ordered being delivered within the state, and the agents having authority to receive payment in money, check, or draft, and to take notes payable at banks in the state, amounts to the doing of business in the state to the extent which will authorize the service of process upon its agents thus engaged.

[For other cases, see Writ and Process, 47-77, in Digest Sup. Ct. 1908.]

Commerce — state regulation — service of process on foreign corporation.

2. A foreign corporation engaged in interstate commerce only is not for that reason immune from the service of process under the laws of the state in which it is carrying on such business.

[For other cases, see Commerce, I. a, in Digest Sup. Ct. 1908.]

[No. 297.]

Argued April 24, 1914. Decided June 22, 1914.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a conviction in the Breckenridge Circuit Court in that state of violating the state anti-trust law. Affirmed.[1]

See same case below, 147 Ky. 655, 145 S. W. 393.

The facts are stated in the opinion.

Messrs. **Alexander Pope Humphrey** and **Edgar A. Bancroft** argued the cause, and, with Mr. Victor A. Remy, filed a brief for plaintiff in error:

The Harvester Company, at the time process was served upon it, was not doing business in Kentucky.

Com. v. Hogan, M. & T. Co. 25 Ky. L. Rep. 41, 74 S. W. 737; Com. v. Eclipse Hay Press Co. 31 Ky. L. Rep. 824, 104 S. W. 224; Three States Buggy & Implement Co. v. Com. 32 Ky. L. Rep. 385, 105 S. W. 971.

In order to obtain a personal judgment against a foreign corporation by process served upon anyone, the corporation must be doing business in the state.

Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728; Caledonian Coal Co. v. Baker, 196 U. S. 432, 49 L. ed. 540, 25 Sup. Ct. Rep. 375; Remington

[1] Leave granted on June 22, 1914, to present petition for rehearing within thirty days.

NOTE.—On soliciting trade as doing business within the state—see notes to Berger v. Pennsylvania R. Co. 9 L.R.A. (N.S.) 1214, and Saxony Mills v. Wagner & Co. 23 L.R.A. (N.S.) 834.

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v. Central P. R. Co. 198 U. S. 95, 49 L. ed. 959, 25 Sup. Ct. Rep. 577; Kendall v. American Automatic Loom Co. 198 U. S. 477, 49 L. ed. 1133, 25 Sup. Ct. Rep. 768; Peterson v. Chicago, R. I. & P. R. Co. 205 U. S. 364, 51 L. ed. 841, 27 Sup. Ct. Rep. 513; Green v. Chicago, B. & Q. R. Co. 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595; Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 54 L. ed. 272, 30 Sup. Ct. Rep. 125; Saxony Mills v. Wagner, 94 Miss. 233, 23 L.R.A. (N.S.) 834, 136 Am. St. Rep. 575, 47 So. 899, 19 Ann. Cas. 199; Fawkes v. American Motor Car Sales Co. 176 Fed. 1010.

At the time of the attempted service. the defendant was doing nothing but an interstate commerce business with the people of Kentucky.

Com. v. Chattanooga Implement & Mfg. Co. 126 Ky. 636, 104 S. W. 389; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229.

The carrying on of interstate commerce by the defendant with persons residing in this state does not constitute a doing of business in Kentucky.

Com. v. Hogan, M. & T. Co. 25 Ky. L. Rep. 41, 74 S. W. 737; Com. v. Eclipse Hay Press Co. 31 Ky. L. Rep. 824, 104 S. W. 224; Havens & G. Co. v. Diamond, 93 Ill. App. 564.

Merely soliciting orders is not doing business in a state.

Green v. Chicago, B. & Q. R. Co. 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595; North Wisconsin Cattle Co. v. Oregon Short Line R. Co. 105 Minn. 198, 117 N. W. 391; Fawkes v. American Motor Car Sales Co. 176 Fed. 1012; Earle v. Chesapeake & O. R. Co. 127 Fed. 235; N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co. 4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 423; William Grace Co. v. Henry Martin Brick Mach. Mfg. Co. 98 C. C. A. 167, 174 Fed. 131; Saxony Mills v. Wagner, 94 Miss. 233, 23 L.R.A.(N.S.) 834, 136 Am. St. Rep. 575, 47 So. 899, 19 Ann. Cas. 199.

To hold that defendant can be prosecuted in these cases would violate the commerce clause of the United States Constitution.

Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 43, 44 L. ed. 657, 663, 20 Sup. Ct. Rep. 518; Hadley Dean Plate Glass Co. v. Highland Glass Co. 74 C. C. A. 462, 143 Fed. 244; Albertype Co. v. Gust Feist Co. 102 Tex. 219, 114 S. W. 791; Eclipse Paint & Mfg. Co. v. New Process Roofing & Supply Co. 55 Tex. Civ. App. 553, 120 S. W. 532; Moroney Hardware Co. v. Goodwin Pottery Co. — Tex. Civ. App. —, 120 S. W. 1088.

The fact that the Harvester Company formerly carried on business in Kentucky does not alter the situation.

Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; St. Louis Southwestern R. Co. v. Alexander, 227 U. S. 226, 57 L. ed. 488, 33 Sup. Ct. Rep. 245.

Before a foreign corporation can be sued, it must submit to the jurisdiction of the state court.

St. Clair v. Cox, 106 U. S. 350, 354, 27 L. ed. 222, 224, 1 Sup. Ct. Rep. 354; Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 81, 20 L. ed. 354, 358; Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728; Peterson v. Chicago, R. I. & P. R. Co. 205 U. S. 364, 394, 51 L. ed. 841, 853, 27 Sup. Ct. Rep. 513; Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 442, 54 L. ed. 272, 276, 30 Sup. Ct. Rep. 125; Ex parte Schollenberger, 96 U. S. 369, 376, 24 L. ed. 853, 854.

A state can impose no condition whatever upon the right to carry on interstate commerce.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 401, 57 L. ed. 1511, 1542, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; Crutcher v. Kentucky, 141 U. S. 47, 57, 58, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 736, 28 L. ed. 1137, 1139, 5 Sup. Ct. Rep. 739; Barrett v. New York, 232 U. S. 14, 30, 31. ante, 483, 490, 34 Sup. Ct. Rep. 205; Harrison v. St. Louis & S. F. R. Co. 232 U. S. 318, 331, ante, 621, 625, 34 Sup. Ct. Rep. 333.

Mr. **Charles Carroll** argued the cause, and, with Mr. James Garnett, Attorney General of Kentucky, and Messrs. Frank E. Daugherty, J. R. Mallory, J. C. Dedman, C. R. Hill, and G. D. Florence, filed a brief for defendant in error:

Plaintiff in error cannot raise the question in this court that the proceedings against it in these cases were a denial to it of due process of law.

Com. v. Cheek, 1 Duv. 26; Com. v. Neat, 89 Ky. 242, 12 S. W. 256; Payne v. Com. 16 Ky. L. Rep. 839, 30 S. W. 416; Sharp v. Com. 16 Ky. L. Rep. 840, 30 S. W. 414; York v. Texas, 137 U. S. 15, 20, 34 L. ed. 604, 605, 11 Sup. Ct. Rep. 9; Cosmopolitan Min. Co. v. Walsh, 193 U. S. 469, 48 L. ed. 752, 24 Sup. Ct. Rep. 489.

The process in this case was served upon the proper person, and the judgment rendered thereon was valid and binding.

St. Louis Southwestern R. Co. v. Alexander, 227 U. S. 227, 57 L. ed. 489, 33 Sup. Ct. Rep. 245; Good Roads Machinery Co. v. Com. 146 Ky. 690, 143 S. W. 18; Boyd Com-

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mission Co. v. Coates, 24 Ky. L. Rep. 730, 69 S. W. 1090; Nelson v. Rehkopf, 25 Ky. L. Rep. 352, 75 S. W. 203; Green v. Chicago, B. & Q. R. Co. 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595; Denver & R. G. R. Co. v. Roller, 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 738; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A. (N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Delamater v. South Dakota, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733; 19 Cyc. 1347, 1348.

To hold that plaintiff in error was properly served with process, and that the judgment rendered against it is valid, will not violate the commerce clause of the United States Constitution.

International Harvester Co. v. Com. 147 Ky. 657, 145 S. W. 393.

Mr. Justice Day delivered the opinion of the court:

This case presents the question of the sufficiency of the service of process on an alleged agent of the International Harvester Company in a criminal proceeding in Breckenridge county, Kentucky, in the court of which county an indictment had been returned against the Harvester Company for alleged violation of the anti-trust laws of the state of Kentucky. The Harvester Company appeared and moved to quash the return, substantially upon the ground that service had not been made upon an authorized agent of the company, and that the company was not doing business within the state of Kentucky, and it set up that any action under the attempted service would violate the due process and commerce clauses of the Federal Constitution. The only question involved, says the court of appeals, and we find none other in the record, is whether there was such service of process as would sustain the judgment. The court overruled the motion, and, the case being called for trial and the Harvester Company failing to appear or plead, judgment by default for $500 penalty was entered against it, which was affirmed by the court of appeals of Kentucky (147 Ky. 655, 145 S. W. 393).

It appeared that prior to October 28, 1911, before this indictment was returned, the Harvester Company had [583] been doing business in Kentucky, and had designated Louisville, Kentucky, as its principal place of business, in compliance with the statutes of Kentucky in that respect. It further appeared that the company had revoked the agency of one who had been appointed under the Kentucky statute, and had not appointed anyone else upon whom process might be served.

It is conceded in the brief of the learned counsel for the plaintiff in error that whether the person upon whom process was served was one designated by the law of Kentucky as an agent to receive summons on behalf of the Harvester Company was a question within the province of the court of appeals of Kentucky to finally determine, and no review of that decision is asked here. We come, then, to the first question in this case, which is, Whether, under the circumstances shown in this case, the Harvester Company was carrying on business in the state of Kentucky in such manner as to justify the courts of that state in taking jurisdiction of complaints against it.

For some purposes a corporation is deemed to be a resident of the state of its creation; but when a corporation of one state goes into another, in order to be regarded as within the latter it must be there by its agents authorized to transact its business in that state. The mere presence of an agent upon personal affairs does not carry the corporation into the foreign state. It has been frequently held by this court, and it can no longer be doubted, that it is essential to the rendition of a personal judgment that the corporation be "doing business" within the state. St. Louis Southwestern R. Co. v. Alexander, 227 U. S. 218, 226, 57 L. ed. 486, 488, 33 Sup. Ct. Rep. 245, and cases there cited. As was said in that case, (each case must depend upon its own facts,) and their consideration must show that this essential requirement of jurisdiction has been complied with, and that the corporation is actually doing business within the state.

In the case now under consideration the court of appeals [584] of Kentucky found, with warrant for the conclusion, that the Harvester Company's method of conducting business might be shown to the best advantage from the general instruction of the company to its agents, of date November 7, 1911, as follows:

"The company's transactions hereafter with the people of Kentucky must be on a strictly interstate commerce basis. Travelers negotiating sales must not hereafter have any headquarters or place of business in that state, but may reside there.

"Their authority must be limited to taking orders, and all orders must be taken subject to the approval of the general agent outside of the state, and all goods must be shipped from outside of the state after the orders have been approved. Travelers do not have authority to make a contract of any kind in the state of Kentucky. They merely take orders to be submitted to the general agent. If anyone in Kentucky owes the company a debt, they may

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receive the money, or a check, or a draft for the same, but they do not have any authority to make any allowance or compromise any disputed claims. When a matter cannot be settled by payment of the amount due, the matter must be submitted to the general collection agent, as the case may be, for adjustment, and he can give the order as to what allowance or what compromise may be accepted. All contracts of sale must be made f. o. b. from some point outside of Kentucky, and the goods become the property of the purchaser when they are delivered to the carrier outside of the state. Notes for the purchase price may be taken, and they may be made payable at any bank in Kentucky. All contracts of any and every kind made with the people of Kentucky must be made outside of that state, and they will be contracts governed by the laws of the various states in which we have general agencies handling interstate business with the people of Kentucky. For example, contracts [585] made by the general agent at Parkersburg, West Virginia, will be West Virginia contracts.

"If any one of the company's general agents deviates from what is stated in this letter, the result will be just the same as if all of them had done so. Anything that is done that places the company in the position where it can be held as having done business in Kentucky will not only make the man transacting the business liable to a fine of from $100 to $1,000 for each offense, but it will make the company liable for doing business in the state without complying with the requirements of the laws of the state. We will therefore depend upon you to see that these instructions are strictly carried out."

Taking this as the method of carrying on the affairs of the Harvester Company in Kentucky, does it show a doing of business within that state to the extent which will authorize the service of process upon its agents thus engaged?

Upon this question the case is a close one, but upon the whole we agree with the conclusion reached by the court of appeals, that the Harvester Company was engaged in carrying on business in Kentucky. We place no stress upon the fact that the Harvester Company had previously been engaged in doing business in Kentucky, and had withdrawn from that state for reasons of its own. Its motives cannot affect the legal questions here involved. In order to hold it responsible under the process of the state court, it must appear that it was carrying on business within the state at the time of the attempted service. As we have said, we think it was. Here was a continuous course of business in the solicitation of orders which were sent to another state, and in response to which the machines of the Harvester Company were delivered within the state of Kentucky. This was a course of business, not a single transaction. The agents not only solicited such orders [586] in Kentucky, but might there receive payment in money, checks, or drafts. They might take notes of customers, which notes were made payable, and doubtless were collected, at any bank in Kentucky. This course of conduct of authorized agents within the state in our judgment constituted a doing of business there in such wise that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the state.

It is argued that this conclusion is in direct conflict with the case of Green v. Chicago, B. & Q. R. Co. 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595. We have no desire to depart from that decision which, however, was an extreme case. There the railway company, carrying on no business in Pennsylvania, other than that hereinafter mentioned, and having its organization and tracks in another state, was sought to be held liable in the circuit court of the United States for the eastern district of Pennsylvania by service upon one Heller, who was described as an agent of the corporation. As incidental and collateral to its business proper the company solicited freight and passenger traffic in other parts of the country than those through which its tracks ran. For that purpose it employed Heller, who had an office in Philadelphia, where he was known as district freight and passenger agent, to procure passengers and freight to be transported over the company's line. He had clerks and traveling passenger and freight agents who reported to him. He sold no tickets and received no payment for the transportation of freight, but took the money of those desiring to purchase tickets, and procured from one of the railroads running west from Philadelphia a ticket for Chicago and a prepaid order which gave the holder the right to receive from the company in Chicago a ticket over its road. Occasionally he sold to railroad employees, who already had tickets over intermediate lines, orders for reduced rates over the company's line. [587] In some cases, for the convenience of shippers who had received bills of lading from the initial line for goods routed over the company's line, he exchanged bills of lading over its line, which were not in force until the freight had been actually received by the company. Summarizing these facts, Mr. Justice

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Moody, speaking for the court, said (p. 533):

"The business shown in this case was in substance nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it."

In the case now under consideration there was something more than mere solicitation. In response to the orders received, there was a continuous course of shipment of machines into Kentucky. There was authority to receive payment in money, check, or draft, and to take notes payable at banks in Kentucky.

It is further contended that, as enforced by the decision of the Kentucky court, the law, in its relation to interstate commerce, operates to burden that commerce. It is argued that a corporation engaged in purely interstate commerce within a state cannot be required to submit to regulations such as designating an agent upon whom process may be served as a condition of doing such business, and that as such requirement cannot be made, the ordinary agents of the corporation, although doing interstate business within the state, cannot by its laws be made amenable to judicial process within the state. The contention comes to this: so long as a foreign corporation engages in interstate commerce only, it is immune from the service of process under the laws of the state in which it is carrying on such business. This is indeed, as was said by the court of appeals of Kentucky, a novel proposition, and we are unable to [588] find a decision to support it, nor has one been called to our attention.

True, it has been held time and again that a state cannot burden interstate commerce or pass laws which amount to the regulation of such commerce; but this is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the state which is wholly of an interstate commerce character. Such corporations are within the state, receiving the protection of its laws, and may, and often do, have large properties located within the state. In Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 27 L.R.A. (N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907, this court held that cars engaged in interstate commerce and credits due for interstate transportation are not immune from seizure under the laws of the state regulating garnishment and attachment because of their connection with interstate commerce, and it was recognized that the states may pass laws enforcing the rights of citizens which affect interstate commerce, but fall short of regulating such commerce in the sense in which the Constitution gives sole jurisdiction to Congress; citing Sherlock v. Alling, 93 U. S. 99, 103, 23 L. ed. 819, 820; Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254; Kidd v. Pearson, 128 U. S. 1, 23, 32 L. ed. 346, 351, 2 Interst. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; and The Winnebago, 205 U. S. 354, 362, 51 L. ed. 836, 840, 27 Sup. Ct. Rep. 509, in which this court sustained a lien under the laws of Michigan on a vessel designed to be used in both foreign and domestic trade.

In International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A. (N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103, it is said, it was held that a law of Kansas which required the filing by a foreign corporation engaged in interstate commerce of a statement of its financial condition as a prerequisite of the right to do such business, and which required a certificate from the secretary of state showing that such statements had been filed as a condition precedent to the right of the corporation to maintain a suit in that state, was void. But that case did not hold, as we should be [589] required to do to sustain the contention of the plaintiff in error in this case, that the fact that the corporation was carrying on interstate commerce business through duly authorized agents made it exempt from suit within the state by service upon such agents.

We are satisfied that the presence of a corporation within a state necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state, although the business transacted may be entirely interstate in its character. In other words, this fact alone does not render the corporation immune from the ordinary process of the courts of the state.

It follows that the judgment of the Court of Appeals of Kentucky must be affirmed.

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INTERNATIONAL HARVESTER COMPANY OF AMERICA, Plff. in Err.,
v.
COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 589–591.)

This case is governed by the decisions in International Harvester Co. v. Kentucky, ante, 1284, and International Harvester Co. v. Kentucky, ante, 1479.

[No. 298.]

Argued April 24, 1914. Decided June 22, 1914.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a conviction in the Boyle Circuit Court, in that state, of a violation of the state anti-trust laws. Reversed and remanded for further proceedings.

See same case below, 149 Ky. 41, 147 S. W. 760.

The facts are stated in the opinion.

Messrs. **Alexander Pope Humphrey** and **Edgar A. Bancroft** argued the cause, and, with Mr. Victor A. Remy, filed a brief for plaintiff in error.

Mr. **Charles Carroll** argued the cause, and, with Mr. James Garnett, Attorney General of Kentucky, and Messrs. Frank E. Daugherty, J. R. Mallory, J. C. Dedman, C. R. Hill, and G. D. Florence, filed a brief for defendant in error.

For contentions of counsel, see their briefs as reported in International Harvester Co. v. Kentucky, ante, 1479.

Mr. Justice **Day** delivered the opinion of the court:

A penal action was instituted by the defendant in error against the plaintiff in error in the Boyle circuit court of Kentucky under the anti-trust laws of that state. Summons having been served upon an alleged agent of the plaintiff in error, it filed a motion to quash the return for the reason, as alleged, that the person upon whom service had been made was not the authorized agent of the plaintiff in error, and that it was not doing business in Kentucky. The facts in this case, which are identical with those set out in the previous case (International Harvester Co. v. Kentucky, just decided, 234 U. S. 579, ante, 1479, 34 Sup. Ct. Rep. 944), show that the plaintiff in error had, prior to the commencement of this action, revoked the authority of an agent designated by it in compliance [591] with the laws of Kentucky, and had removed its office from the state, but that it had continued through its agents, the party served in this case being one of them, to solicit orders to be accepted outside of the state for the sale of machines which were to be delivered in Kentucky, and that its agents were authorized to receive money, checks, and drafts in payment therefor, or take the notes of purchasers, payable at any bank in Kentucky.

There are two questions in this case. The court of appeals, deciding that this case was governed by the previous case from Breckenridge county (147 Ky. 655, 145 S. W. 393), held that the service was good and that the anti-trust act was not unconstitutional and violative of the 14th Amendment to the United States Constitution. 149 Ky. 41, 147 S. W. 760. Since the Federal question involving the validity of the anti-trust act was considered and decided adversely in the court of appeals, it, as well as the question of due service, is properly before us. Miedreich v. Lauenstein, 232 U. S. 236, 243, ante, 584, 589, 34 Sup. Ct. Rep. 309, and cases there cited.

As we have just dealt with the sufficiency of service in the previous case, involving the same question, it may be disposed of here by merely referring to that decision. And, as the constitutional validity of the anti-trust act was specifically determined in cases Nos. 276, 291, and 292, entitled International Harvester Co. v. Kentucky, decided June 8, 1914, 234 U. S. 216, ante, 1284, 34 Sup. Ct. Rep. 853, that question is also concluded.

We therefore reach the conclusion that the plaintiff in error was doing business in Kentucky and that the service was sufficient, but that the law under which the action was brought is unconstitutional, and that the judgment of the Court of Appeals must be reversed, and accordingly remand the case to that court for further proceedings not inconsistent with this opinion.

Reversed.

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[592] LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plff. in Err.,
v.
JOE HIGDON, Doing Business under the Firm Name of Crescent Coal Company.

(See S. C. Reporter's ed. 592–600.)

Error to state court — Federal question — raising on second trial.

1. Federal questions first raised by amend-

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

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ed answers tendered after the case had been remanded by the highest state court to the trial court for a new trial will support the appellate jurisdiction of the Federal Supreme Court of a writ of error to the highest state court to review a judgment which affirmed the refusal of the trial court to permit the filing of such answers, where the highest state court gave consideration on the second appeal to the answers in their Federal aspect, and ruled concerning them.

[For other cases, see Appeal and Error, 1168–1248, 1288–1291, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — equal protection of the laws — procedure.

2. The protection of the due process of law and equal protection of the laws clauses of U. S. Const., 14th Amend., first invoked by the tender of amended answers after the case had been remanded to the trial court by the highest state court for a new trial, is not denied by the affirmance in the highest state court on a second appeal of the ruling of the trial court, refusing to permit the filing of such amended answers, where the highest state court in effect held that the facts upon which the Federal rights were based had been concluded by the former decision, which was the law of the case, and that to permit a relitigation of these facts because the result reached was alleged to violate constitutional provisions would reopen that which the court held had been settled by the decision on the first appeal, in which no infraction of Federal right was duly set up as required to lay the foundation for review.

[For other cases, see Constitutional Law, IV. b, 8, in Digest Sup. Ct. 1908.]

Commerce — state regulations — requiring carrier to move local freight between private spurs.

3. The effect upon interstate commerce of requiring under state authority that an interstate carrier move purely local freight between private spurs in the same city is so indirect and consequential that such requirement cannot be deemed to deprive the carrier of rights secured by the commerce clause of the Federal Constitution.

[For other cases, see Commerce, III. in Digest Sup. Ct. 1908.]

[No. 322.]

Submitted March 19, 1914. Decided June 22, 1914.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which, on a second appeal, affirmed a judgment of the Henderson Circuit Court, in that state, in favor of plaintiff in a suit to recover damages from a carrier for its failure to furnish cars. Affirmed.

See same case below on first appeal, 143 Ky. 73, 33 L.R.A.(N.S.) 442, 135 S. W. 768; on second appeal, 149 Ky. 321, 148 S. W. 26.

The facts are stated in the opinion.

Messrs. **Benjamin D. Warfield** and **Charles H. Moorman** submitted the cause for plaintiff in error. Mr. Malcolm Yeaman was on the brief:

This court has jurisdiction.

Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97; Bridge Proprs. v. Hoboken Land & Improv. Co. 1 Wall. 116, 17 L. ed. 571; Roby v. Colehour, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47; Powell v. Brunswick County, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; Gross v. United States Mortg. Co. 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Mallatt v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241; National Mut. Bldg. & L. Asso. v. Brahan, 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. Rep. 532; San José Land & Water Co. v. San José Ranch Co. 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487; Fullerton v. Texas, 196 U. S. 193, 49 L. ed. 443, 25 Sup. Ct. Rep. 221; Corkran Oil & Development Co. v. Arnaudet, 199 U. S. 182, 50 L. ed. 143, 26 Sup. Ct. Rep. 41; Montana ex rel. Haire v. Rice, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281; St. Louis Southwestern R. Co. v. Arkansas, 217 U. S. 136, 54 L. ed. 698, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Gloucester

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On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

As to when Federal question is raised in time to sustain the appellate jurisdiction of Federal Supreme Court over state courts—see note to Chicago, I. & L. R. Co. v. McGuire, 49 L. ed. U. S. 414.

On error to state court in cases presenting questions of the equal protection of the laws—see note to Manhattan L. Ins. Co. v. Cohen, ante, 1245.

On error to state courts involving questions of due process of law—see note to Burt v. Smith, 51 L. ed. U. S. 121.

On the duty of carrier to accept freight originating and terminating within city limits—see note to this case in the Kentucky Court of Appeals as reported in 33 L.R.A.(N.S.) 442.

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Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

Messrs. Henry Lane Stone and Edward S. Jouett also submitted the cause for plaintiff in error. Messrs. Benjamin D. Warfield, Charles H. Moorman, and William A. Colston were on the brief:

The judgment of the court of appeals of Kentucky in this case deprives the plaintiff in error of the reasonable control of its property and facilities used in the conduct of its business, and therefore violates the 14th Amendment to the Constitution of the United States.

5 Am. & Eng. Enc. Law, 158; Chesapeake & O. R. Co. v. Hall, 136 Ky. 379, 124 S. W. 372, Ann. Cas. 1912A, 364; Fred G. Clark Co. v. Lake Shore & M. S. R. Co. 11 Inters. Com. Rep. 558; Dixon v. Central of Georgia R. Co. 110 Ga. 173, 35 S. E. 369; Elkins v. Boston & M. R. Co. 23 N. H. 275; Elliott, Railroads, § 1466; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, ante, 310, 34 Sup. Ct. Rep. 152; Hoover v. Pennsylvania R. Co. 156 Pa. 229, 22 L.R.A. 263, 36 Am. St. Rep. 43, 27 Atl. 282; Harp v. Choctaw, O. & G. R. Co. 118 Fed. 169; Hutchinson, Carr. §§ 59, 60, 144; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Interstate Commerce Commission v. Alabama Midland R. Co. 5 Inters. Com. Rep. 308, 69 Fed. 227; Johnson v. Midland R. Co. 4 Exch. 367, 18 L. J. Exch. N. S. 366, 6 Eng. Ry. & C. Cas. 61; Kansas P. R. Co. v. Nichols, 9 Kan. 247, 12 Am. Rep. 494; Railroad Commission v. Louisville & N. R. Co. 10 Inters. Com. Rep. 173; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858. 19 Sup. Ct. Rep. 565; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Laurel Cotton Mills v. Gulf, & S. I. R. Co. 84 Miss. 339, 66 L.R.A. 453, 37 So. 134; Lee v. Burgess, 9 Bush. 652; Louisville & N. R. Co. v. Com. 108 Ky. 628, 57 S. W. 508; Louisville & N. R. Co. v. Com. 105 Ky. 179, 43 L.R.A. 550, 48 S. W. 416; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246; Miner v. New York, N. H. & H. R. Co. 11 Inters. Com. Rep. 422; Moore, Carr. p. 98; Oxlade v. North Eastern R. Co. 1 C. B. N. S. 454, 26 L. J. C. P. N. S. 129, 3 Jur. N. S. 637; Pitlock v. Wells, F. & Co. 109 Mass. 452; Pfister v. Central P. R. Co. 70 Cal. 169, 59 Am. Rep. 404, 11 Pac. 686; Santa Fe, P. & P. R. Co. v. Grant Bros. Constr. Co. 13 Ariz. 186, 108 Pac. 467; State ex rel. Ellis v. Atlantic Coast Line R. Co. 52 Fla. 646, 12 L.R.A.(N.S.) 506, 41 So. 705; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Varble v. Bigley, 14 Bush, 698, 29 Am. Rep. 433; Wilson Produce Co. v. Pennsylvania R. Co. 14 Inters. Com. Rep. 170; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115.

The judgment of the court of appeals of Kentucky in this case is contrary to the 14th Amendment because it requires plaintiff in error to perform a service at a rate that does not afford reasonable compensation for such service.

Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Atty. Gen. v. Old Colony R. Co. 160 Mass. 62, 22 L.R.A. 112, 35 N. E. 252; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 179, 32 L. ed. 380, 9 Sup. Ct. Rep. 47; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

The decision of the court of appeals of Kentucky in this case and §§ 214 and 215 of the Constitution of the state, as construed by the court in this decision, impose an unreasonable burden upon the interstate commerce of plaintiff in error, and are therefore repugnant to the commerce clause of the Constitution of the United States.

Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. Rep. 633; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; St. Louis Southwestern R. Co. v. Arkansas, 217 U. S. 136, 54 L. ed. 698, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126.

Messrs. James W. Clay and J. F. Clay submitted the cause for defendant in error. Mr. A. Y. Clay was on the brief:

After a case has been tried on its merits, decided by the lower court upon the issues

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raised, and reversed by the state court of last resort, and remanded to the lower court for proceedings in conformity with the opinion, for the purpose of assessing and awarding the damages sustained, or for an accounting, then such opinion becomes the law of the case, by which the trial court is bound, and it is then too late for the defendant to raise a Federal question not raised upon the former trial.

Union Mut. L. Ins. Co. v. Kirchoff, 169 U. S. 103, 42 L. ed. 677, 18 Sup. Ct. Rep. 260; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; Western Electrical Supply Co. v. Abbeville Electric Light & P. Co. 197 U. S. 299, 49 L. ed. 765, 25 Sup. Ct. Rep. 481; Hopkins v. Adam Roth Grocery Co. 105 Ky. 357, 49 S. W. 18; Thompson v. Louisville Bkg. Co. 21 Ky. L. Rep. 1611, 55 S. W. 1080.

The circuit court may have overruled the motion to file the amendments upon the ground that they were not verified as required by § 116 of the Civil Code of Kentucky.

Armstrong v. Foley, 12 Ky. L. Rep. 802, 15 S. W. 355; Park v. McReynolds, 111 Ky. 651, 64 S. W. 517.

Or upon the ground that no showing was made by affidavit or otherwise why the issues presented were so long delayed.

Asher v. Uhl, 27 Ky. L. Rep. 938, 87 S. W. 307.

Or it may have thought that to permit the amendments to be filed at that late day would be an abuse of discretion.

Donnelly v. Pepper, 91 Ky. 363, 15 S. W. 879; Louisville Underwriters v. Pence, 93 Ky. 96, 40 Am. St. Rep. 176, 19 S. W. 10.

A common carrier may have and may operate its terminal facilities for its own convenience. It may have the right to refuse the use of these facilities for local shipments, between industries within the terminal limits of Henderson; but when it furnishes cars and transports them from one industry to another in such terminal limits, having physical connection with its road, it is bound to perform similar service for all having such connection. It is therefore the duty of the plaintiff in error in this case to accept and transport the coal of the defendant in error.

Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 138, 53 L. ed. 443, 29 Sup. Ct. Rep. 246; Bedford-Bowling Green Stone Co. v. Oman, 115 Ky. 369, 73 S. W. 1038; Louisville & N. R. Co. v. Pittsburg & K. Coal Co. 111 Ky. 960, 55 L.R.A. 601, 98 Am. St. Rep. 447, 64 S. W. 969; Straight Creek Coal & Coke Co. v. Straight Creek Coal Min. Co. 135 Ky. 536, 122 S. W. 842; McDuffee v. Portland & R. R. Co. 52 N. H. 430, 13 Am. Rep. 72; Louisville & N. R. Co. v. Garrett, 231 U. S. 298, ante, 229, 34 Sup. Ct. Rep. 48; Union P. R. Co. v. Goodridge, 149 U. S. 681, 37 L. ed. 896, 13 Sup. Ct. Rep. 970; Interstate Stock-Yards Co. v. Indianapolis Union R. Co. 99 Fed. 472; Barden v. Lehigh Valley R. Co. 12 Inters. Com. Rep. 194; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; Keystone M. & M. Co. v. L. & N. R. R. Co. (State Railroad Commission, Nov. 30, 1909); Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, ante, 310, 34 Sup. Ct. Rep. 152; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Alabama & V. R. Co. v. Mississippi R. Commission, 203 U. S. 496, 51 L. ed. 289, 27 Sup. Ct. Rep. 163; Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423.

Having established a flat rate of $2 per car, plus $2 per car for car rental, for all commodities where such service is performed, it was legally bound to perform the same service for the defendant in error at that rate.

Alabama & V. R. Co. v. Mississippi R. Commission, 203 U. S. 496, 51 L. ed. 289, 27 Sup. Ct. Rep. 163; Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822; Augusta Brokerage Co. v. Central of Georgia R. Co. 5 Ga. App. 187, 62 S. E. 996; American Warehousemen's Asso. v. Illinois C. R. Co. 7 Inters. Com. Rep. 564; Hilton Lumber Co. v. Atlantic Coast Line R. Co. 141 N. C. 171, 6 L.R.A.(N.S.) 225, 53 S. E. 823; Straight Creek Coal & Coke Co. v. Straight Creek Coal Min. Co. 135 Ky. 537, 122 S. W. 842.

Where a carrier demands and receives a higher price for its service than it is legally entitled to charge, the excess paid may be recovered. Where, however, it refuses to perform the service, and the shipper, by reason thereof, has to pay a higher price or a higher rate, to obtain delivery, from or to other sources, the carrier is liable for the difference between what the shipper would have had to pay if the service had been performed, and what he necessarily did have to pay by reason of the refusal of the carrier to perform the service.

Louisville & N. R. Co. v. Walker, 110 Ky. 965, 63 S. W. 20.

Mr. Justice Day delivered the opinion of the court:

The defendant in error, Joe Higdon, doing business under the name of the Crescent Coal Company, brought suit in the Henderson circuit court, of Kentucky, to recover damages for alleged loss because of the failure of the railroad company to furnish him with cars at the Keystone Mining & Manufacturing Company's mine at Henderson, Kentucky, with which to perform cer-

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tain contracts which he had made, and which he was prevented [595] from fulfilling by the refusal of the railroad company. While the action was originally brought at law, it was transferred upon motion of the plaintiff in error to the equity docket. The decree of the circuit court dismissing the petition was reversed in the court of appeals for Kentucky, and the case was remanded for a new trial in conformity to the opinion of that court (143 Ky. 73, 33 L.R.A.(N.S.) 442, 135 S. W. 768. The case was again tried and a decree for Higdon for damages was affirmed by the court of appeals (149 Ky. 321, 148 S. W. 26), and the case was brought here on writ of error. A motion to dismiss the writ for want of jurisdiction was, on December 16, 1912, postponed to the hearing upon the merits.

From the facts found and apparent in the record it appears: Higdon, doing business as the Crescent Coal Company, was engaged in buying and selling coal in the city of Henderson, and the railroad company was a common carrier having its main line running in and through that city. It had a belt line and various spurs and tracks leading from its main and belt lines into industrial plants in Henderson. The Keystone Company was operating a coal mine in Henderson, which was connected with the main and belt lines of the plaintiff in error's road by a spur which the latter operated and controlled. Higdon contracted with the Keystone Company for 20,000 tons of coal to be delivered to him on the spur track, and afterwards contracted with various plants having spur connections to deliver coal in carload lots at certain prices. Thereafter he applied to the railroad company to furnish him cars at the Keystone Company's mine, and to transport coal in them to other spurs at Henderson, offering to pay therefor $4 per car, or at the rate of about 10 cents a ton, which he contended was according to the published rates of the railroad company. It refused to furnish him cars except at the rate of 50 cents a ton, which Higdon declined, and [596] afterwards the railroad company informed him that it would not furnish cars at any price. This action was brought with the result which we have stated.

No Federal question was raised in the first trial or upon the first appeal to the Kentucky court of appeals. The alleged Federal questions are said to arise because of two amended answers which the plaintiff in error tendered, and which the circuit court refused to permit it to file. In its first amended answer the plaintiff in error alleged that it had built side tracks and spurs from its main track to certain industries in Henderson for the delivery and receipt of freight to and from points beyond that city; that it had constructed such a spur to the mine of the Keystone Company, with the express understanding that the plaintiff in error would not transport coal for the Keystone Company or for anyone else between that spur and other spurs at Henderson, but that it should be used solely for traffic coming into and going out of Henderson; that it was not engaged and did not propose to engage in the business of transportation as a common carrier between industries at Henderson or any other station, or in transporting coal from the Keystone Company's mine to spur tracks at Henderson, and that while it performed a switching service, it did so only when it preceded or followed transportation beyond Henderson. It further alleged that the service requested by Higdon was a transportation service which the railroad company declined to perform because it did not profess to and did not engage in that business, and that it was not its duty as a common carrier so to do or to furnish cars for such purpose. It also alleged that its tariffs did not fix a rate for the movement of coal from the mine of the Keystone Company to the spurs at Henderson, and that it did not offer by such tariffs to perform such service; and that there was no other demand for such service, and no other coal mine at Henderson. And it alleged that it was not its duty to [597] perform such service for $4 per car or for any other sum, but that a rate of 50 cents a ton, which was the legal rate in effect for hauling coal from points near Henderson to that city and which was reasonable, would have been a reasonable charge for the service requested by Higdon, and that a smaller rate would not have been adequate compensation therefor; and concluded that to compel the railroad company to perform the service asked by Higdon at $4 per car or for a rate less than 50 cents a ton would be to compel it to perform a service which, under the law, it was not its duty to perform, and at less than cost thereof, and for less than the service was worth, with the result of depriving the railroad company of its property without due process of law, and denying it the equal protection of the law, contrary to the 14th Amendment to the Constitution of the United States.

In its second amended answer it set up, besides certain of the allegations in the first amended answer to the effect that it was not its duty to move freight between private spurs, that its facilities at Henderson for delivering and receiving freight were amply sufficient to accommodate the public; that it was engaged in interstate commerce, and that to require the defend-

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ant to perform the service asked by Higdon would impose upon it the duty of performing like services at other points on its line in Kentucky, and would impose upon it unreasonable, unjustifiable, and unwarrantable duties which it as a common carrier was not required to perform, and would be a direct and unreasonable and unwarrantable interference with its interstate business and its duties as a carrier of interstate commerce, and would impose an unreasonable burden upon interstate commerce, contrary to § 8 of article 1 of the Constitution of the United States.

Had the court of appeals put its decision upon the ground that the duty of the circuit court was simply to [598] give effect to the judgment of the court of appeals by enforcing the rights of the parties upon the principles settled by it in its first decision, and that the attempt to inject Federal questions into the record by amended pleadings after the case was remanded did not seasonably raise Federal questions reviewable by the court of appeals, the case would be ruled by Union Mut. L. Ins. Co. v. Kirchoff, 169 U. S. 103, 42 L. ed. 677, 18 Sup. Ct. Rep. 260, in which this court held that such attempts to raise Federal questions came too late to lay the foundation for review here. See also Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; Bonner v. Gorman, 213 U. S. 86, 53 L. ed. 709, 29 Sup. Ct. Rep. 483.

The court of appeals of Kentucky in the opinion delivered in the second case did affirm the principle of the binding character of its first decision, but as it gave consideration to the offered amended answers in their Federal aspect, and ruled concerning them, we have concluded not to sustain the motion to dismiss, but to regard the Federal questions as so far passed upon by the court of appeals as to present a case reviewable here. Miedreich v. Lauenstein, 232 U. S. 236, 243, ante, 584, 589, 34 Sup. Ct. Rep. 309.

Looking to the opinion of the court of appeals in the second case, as we may properly do, to determine the nature of its ruling concerning the offered amended answers, we find that it held that the first part of the first amended answer was simply an elaboration of the defense presented by the second paragraph of the original answer, and that on the former appeal it had held that those facts did not present a defense to the action, and that the former opinion was the law of the case, and further consideration of that matter was unnecessary. Coming, then, to consider the conclusion of the averment of the first amended answer that a rate of $4 per car would be below the cost of the service, and therefore confiscatory, it did not pass upon the effect of that charge if required of the railroad company against its will, but held that its rates as fixed [599] by its own tariffs, interpreted by its conduct, as held in the first opinion of the court of appeals, had made that rate applicable to the shipments requested by Higdon, and that therefore the requirement of performing the service at $4 per car was not imposed upon the plaintiff in error except because of its own tariff rate, which it might itself change at any time, but which, while it was in force, should affect all shippers alike, including Higdon. A reference to the former opinion of the court shows that the question whether the published tariffs of the railroad company applied to such service as Higdon required was elaborately considered, and it was held that it did so apply, and that as the railroad company was performing that service for other shippers similarly situated, to avoid discrimination, which the Constitution and laws of Kentucky inhibited, it was required to give the same rate to Higdon. It therefore results that in the so-called denial of the Federal right set up in the first amended answer the court in effect held that the facts upon which it was based had been concluded by the former decision, which was the law of the case, and to permit the railroad company to relitigate these facts because the result reached was alleged to violate constitutional provisions would permit it to relitigate that which the court held had been settled against it by the first decision of the court of appeals, in which no infraction of Federal right was duly set up as required to lay the foundation for review.

As to the matter set up in the second amended answer, the court held that it made no defense within the interstate commerce clause of the Constitution of the United States, because all the court had done was to make a decision which required the carrier to obey the state Constitution and laws which prevented discrimination as to purely intrastate shipments. We think the court was right in this conclusion. The state had full authority over shipments purely intrastate, and the facts set up in the [600] second amended answer, that the requirement made at Henderson might be made at other points in the state, and would result in an unnecessary and unreasonable burden upon interstate commerce, only avers an indirect effect upon such commerce of the exercise of a right clearly within the authority of the state; and being only of that indirect and consequential character, it does not deprive the railroad company of rights secured by

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the commerce clause of the Constitution of the United States.

We conclude that the rulings made in the Court of Appeals of Kentucky concerning the first and second amended answers which were not permitted to be filed in the court of original jurisdiction did not deprive the railroad company of rights secured by the Federal Constitution.

Affirmed.

EASTERN STATES RETAIL LUMBER DEALERS' ASSOCIATION et al., Appts.,
v.
UNITED STATES. (No. 511.)

WILLIAM C. McBRIDE, Individually and as President of the Retail Lumbermen's Association of Philadelphia, et al., Appts.,
v.
UNITED STATES. (No. 550.)

(See S. C. Reporter's ed. 600–614.)

Monopoly — combination of retailers — suppressing competition by wholesalers:

The concerted, systematic, and periodic circulation by associations of retail lumber dealers among their members through a so-called "official report" of confidential information of the names of wholesale lumber dealers engaged in interstate trade reported as soliciting from, or selling directly to, consumers, such members, upon learning of any such instances, being called upon to report the same promptly, supplying detailed information as to the particulars of the transaction, violates the prohibitions of the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), against combinations in restraint of interstate trade and commerce, where, although each retailer is left free to act as he sees fit, these reports were circulated with the intention and effect of causing the retailers to withhold their patronage from the listed wholesalers, and thus directly and appreciably impairing their interstate trade.

[For other cases, see Monopolies, II. b, in Digest Sup. Ct. 1908.]

[Nos. 511, 550.]

Argued October 24 and 27, 1913. Decided June 22, 1914.

TWO APPEALS from the District Court of the United States for the Southern District of New York to review a decree enjoining a combination of retail lumber dealers, alleged to violate the Sherman anti-trust act. Affirmed.

See same case below, 201 Fed. 581.

The facts are stated in the opinion.

Mr. A. B. Cruikshank argued the cause and filed a brief for appellants in No. 511:

The decree appealed from is in almost direct conflict with the decision in the Anderson Case by this court.

Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50.

The learned court below failed to apply, as it should have done, the rule of reason to the determination of this case.

Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Harrison v. Glucose Sugar Ref. Co. 58 L.R.A. 915, 53 C. C. A. 484, 116 Fed. 304; Re Greene, 52 Fed. 118; Fisheries Co. v. Lennen, 116 Fed. 217; National Enameling & Stamping Co. v. Haberman, 120 Fed. 415; Camors-McConnell Co. v. McConnell, 140 Fed. 412; Gibbs v. Consolidated Gas Co. 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; Anderson v. United States, supra; United States v. Trans-Missouri Freight Asso. 53 Fed. 450.

The words "in restraint of trade," used in the anti-trust act, should be interpreted in this case as having the meaning given to them at common law.

Standard Oil Co v. United States, 221 U. S. 1, 59, 55 L. ed. 619, 644, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; 1 Kent, Com. p. 464; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 545, 9 L. ed. 773, 823; Rice v. Minnesota & N. W. R. Co. 1 Black, 358, 17 L. ed. 147, Hardcastle, Statutory Law, 4th ed. p. 161; United States v. Trans-Missouri Freight Asso. 24 L.R.A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 58; Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co. 73 Fed. 438.

In former days in England the rule of reason was always applied in determining what was a restraint of trade at common law; and nothing was held to be such which did not create or was not intended to create a monopoly.

Homer v. Ashford, 3 Bing. 326, 11 J. B. Moore, 91, 4 L. J. C. P. 62; Mitchel v. Reynolds, 1 P. Wms. 181; Horner v. Graves, 7 Bing. 735, 5 Moore & P. 768, 9 L. J. C. P. 192; Ward v. Byrne, 5 Mees & W. 548, 9 L. J. Exch. N. S. 14, 3 Jur. 1175; Mallan v. May, 11 Mees. & W. 667; Whittaker v. Howe, 3 Beav. 383; Pollock, Contr. pp. 359, 360;

NOTE.—On illegal trusts under modern anti-trust laws—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

On the legality of combinations or agreements which restrict the class of persons to whom commodities shall be sold, or from whom they shall be bought—see note to Cleland v. Anderson, 5 L.R.A. (N.S.) 136.

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United States v. Trans-Missouri Freight Asso. 166 U. S. 347, 41 L. ed. 1029, 17 Sup. Ct. Rep. 548.

Trade-restrictive customs, practices, and regulations to enforce specialization were extant in England in the Middle Ages, and later, with the sanction of the common law, and were never considered as being in restraint of trade or otherwise illegal.

Ashley, English Economic History, pt. 1, p. 95, pt. 2, pp. 16, 165; Lalor's Cyc. "Guilds"; Ashley's Introduction to English Economic History & Theory, 1893, vol. 1, p. 104, vol. 2, p. 13.

The modern common-law decisions are to the same effect; private agreements or combinations made in restraint of private competition for trade defensive or competitive purposes have not been considered in restraint of trade. There is no common-law authority, ancient or modern, for the contrary doctrine.

Hearn v. Griffin, 2 Chitty, 407; Wickens v. Evans, 3 Younge & J. 318; Leather Cloth Co. v. Lorsont, L. R. 9 Eq. 354, 39 L. J. Ch. N. S. 86, 21 L. T. N. S. 661, 18 Week. Rep. 572; Collins v. Locke, L. R. 4 App. Cas. 674, 48 L. J. P. C. N. S. 68, 41 L. T. N. S. 292, 28 Week. Rep. 189; Rousillon v. Rousillon, L. R. 14 Ch. Div. 351, 49 L. J. Ch. N. S. 338, 42 L. T. N. S. 679, 28 Week. Rep. 623, 44 J. P. 663; Nordenfelt v. Maxim-Nordenfelt Guns & Ammunition Co [1894] A. C. 535, 63 L. J. Ch. N. S. 908, 11 Reports, 1, 71 L. T. N. S. 489, 6 Eng. Rul. Cas. 413; Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 66, 22 L. ed. 315, 318; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 564, 8 Sup. Ct. Rep. 564; Gibbs v. Consolidated Gas Co. 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; Fowle v. Park, 131 U. S. 88, 33 L. ed. 67, 9 Sup. Ct. Rep. 658; National Enameling & Stamping Co. v. Haberman, 120 Fed. 415; Camors-McConnell Co. v. McConnell, 140 Fed. 412; Central Shade Roller Co. v. Cushman, 143 Mass. 353, 9 N. E. 629; Skrainka v. Scharringhausen, 8 Mo. App. 522; Herriman v. Menzies, 115 Cal. 16, 35 L.R.A. 318, 56 Am. St. Rep. 81, 46 Pac. 730, 44 Pac. 660; California Steam Nav. Co. v. Wright, 6 Cal. 259, 65 Am. Dec. 511; Hubbard v. Miller, 27 Mich. 19, 15 Am. Rep. 153; Beal v. Chase, 31 Mich. 490; Harbison-Walker Refractories v. Stanton, 227 Pa. 55, 75 Atl. 988; Smalley v. Greene, 52 Iowa, 241, 35 Am. Rep. 267, 3 N. W. 78; Ontario Salt Co. v. Merchants' Salt Co. 18 Grant Ch. (U. C.) 540; Mandeville v. Harman, 42 N. J. Eq. 185, 7 Atl. 37; Bancroft v. Union Embossing Co. 72 N. H. 402, 64 L.R.A. 298, 57 Atl. 97; Kronschnabel-Smith Co. v. Kronschnabel, 87 Minn. 230, 91 N. W. 892; People's Gaslight & Coke Co. v. Chicago Gaslight & Coke Co. 20 Ill. App. 473; Andrews v. Kingsbury, 212 Ill. 97, 72 N. E. 11; Master Stevedores' Asso. v. Walsh, 2 Daly, 1; Watertown Thermometer Co. v. Pool, 51 Hun, 157, 4 N. Y. Supp. 861; Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; Hodge v. Sloan, 107 N. Y. 244, 1 Am. St. Rep. 816, 17 N. E. 335; Wood v. Whitehead Bros. Co. 165 N. Y. 545, 59 N. E. 357; Chappel v. Brockway, 21 Wend. 157; Matthews v. Associated Press, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981.

And whereas formerly the distinction was in some instances attempted to be made between contracts in partial restraint of trade, but which were reasonable and valid, and therefore might be enforced, and those in general restraint of trade, which were invalid and unenforceable; the true and modern rule is that while contracts in actual restraint of trade are illegal, no contract which is reasonable can be considered to be in restraint of trade.

United States v. Trans-Missouri Freight Asso. 24 L.R.A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 72.

Neither the acts performed by defendants nor those attributed to them in this proceeding constitute a monopoly or tend thereto.

Re Greene, 52 Fed. 115; Monopolies Case, 11 Coke, 84b; Noyes, Intercorporate Relations, 2d ed. §§ 332, 389; State v. Duluth Bd. of Trade, 107 Minn. 506, 23 L.R.A. (N.S.) 1260, 121 N. W. 395; People v. North River Sugar Ref. Co. 54 Hun, 354, 5 L.R.A. 386, 7 N. Y. Supp. 406; National Cotton Oil Co. v. Texas, 197 U. S. 115, 129, 49 L. ed. 689, 694, 25 Sup. Ct. Rep. 379; Lough v. Outerbridge, 143 N. Y. 282, 25 L.R.A. 674, 42 Am. St. Rep. 712, 38 N. E. 292; Brady v. Mattern, 125 Iowa, 158, 106 Am. St. Rep. 291, 100 N. W. 358; Herriman v. Menzies, 115 Cal. 20, 35 L.R.A. 318, 56 Am. St. Rep. 81, 46 Pac. 730, 44 Pac. 660; Rafferty v. Buffalo City Gas Co. 37 App. Div. 618, 56 N. Y. Supp. 288.

Whatever interference with competition and with interstate commerce was attendant upon the action of the defendants was incidental, indirect, and comparatively insignificant, and furnishes no ground for interference by this or any other court; nor could it be judicially interfered with without attacking the very competitive system which the Federal statute aims to sustain.

Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Phillips v. Iola Portland Cement Co. 61 C. C. A. 19, 125 Fed. 593; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454.

Contracts between parties, which have for their object the removal of a rival and competitor in a business, are not to be regarded as contracts in restraint of trade. They do

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not close the field of competition except to the particular party to be affected.

Wood v. Whitehead Bros. Co. 165 N. Y. 551, 59 N. E. 357; Hopkins v. United States, 171 U. S. 578, 593, 43 L. ed. 290, 296, 19 Sup. Ct. Rep. 40; Anderson v. United States, 171 U. S. 604, 616, 43 L. ed. 300, 306, 19 Sup. Ct. Rep. 50; United States v. Joint Traffic Asso. 171 U. S. 505, 568, 43 L. ed. 259, 287, 19 Sup. Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 234, 245, 44 L. ed. 136, 145, 149, 20 Sup. Ct. Rep. 96; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208; Re Greene, 52 Fed. 115; United States Chemical Co. v. Provident Chemical Co. 64 Fed. 946; Re Grice, 79 Fed. 644; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 458; Phillips v. Iola Portland Cement Co. 61 C. C. A. 19, 125 Fed. 593; Camors-McConnell Co. v. McConnell, 140 Fed. 412; Bigelow v. Calumet & H. Min. Co. 167 Fed. 704; United States v. Standard Oil Co. 173 Fed. 177; Union Pacific Coal Co. v. United States, 97 C. C. A. 578, 173 Fed. 737; Virtue v. Creamery Package Mfg. Co. 102 C. C. A. 413, 179 Fed. 115; California Steam Nav. Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511; Smalley v. Greene, 52 Iowa, 241, 35 Am. Rep. 267, 3 N. W. 78; Schwalm v. Holmes, 49 Cal. 665; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; People v. Gillson, 109 N. Y. 398, 4 Am. St. Rep. 465, 17 N. E. 343; Walsh v. Dwight, 40 App. Div. 513, 58 N. Y. Supp. 91; Brown v. Rounsavell, 78 Ill. 589; Noyes, Intercorporate Relations, § 335, p. 603.

It is, of course, settled that in order to obtain a decree against defendants, enjoining their proceedings as in restraint of trade, it must be made to appear either that their object or means adopted were unlawful.

Citizens' Light, Heat & P. Co. v. Montgomery Light & Water P. Co. 171 Fed. 560; Allen v. Flood [1898] A. C. 166, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, 17 Eng. Rul. Cas. 285.

The transactions complained of are lawful even if considered as constituting a contract for exclusive dealing.

Northern Securities Co. v. United States, 193 U. S. 197, 361, 48 L. ed. 679, 710, 24 Sup. Ct. Rep. 436; Re Corning, 51 Fed. 211; Re Terrell, 51 Fed. 213; Re Greene, 52 Fed. 117; Moroney Hardware Co. v. Goodwin Pottery Co. — Tex. Civ. App. —, 120 S. W. 1088; Chappel v. Brockway, 21 Wend. 157; Hodge v. Sloan, 107 N. Y. 244, 1 Am. St. Rep. 816, 17 N. E. 335; Harbison-Walker Refractories Co. v. Stanton, 227 Pa. 55, 75 Atl. 988; California Steam Nav. Co. v. Wright, 6 Cal. 259, 65 Am. Dec. 511; Schwalm v. Holmes, 49 Cal. 665; Southern Fire Brick & Clay Co. v. Garden City Sand Co. 223 Ill. 616, 9 L.R.A. (N.S.) 446, 79 N. E. 313, 7 Ann. Cas. 50; Clark v. Crosby, 37 Vt. 188; Meyer v. Estes, 164 Mass. 457, 32 L.R.A. 283, 41 N. E. 683; Forrest Photographic Co. v. Hutchinson Grocery Co. — Tex. Civ. App. —, 108 S. W. 768; Crystal Ice Mfg. Co. v. San Antonio Brewing Asso. 8 Tex. Civ. App. 1, 27 S. W. 210; Bancroft v. Union Embossing Co. 72 N. H. 402, 64 L.R.A. 298, 57 Atl. 97; Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co. 75 S. C. 378, 9 L.R.A. (N.S.) 501, 55 S. E. 973, 9 Ann. Cas. 902; Continental Ins. Co. v. Fire Underwriters, 67 Fed. 310; Dunlap's Cable News Co. v. Stone, 39 N. Y. S. R. 237, 15 N. Y. Supp. 2; Wickens v. Evans, 3 Younge & J. 318; People's Gaslight & Coke Co. v. Chicago Gaslight & Coke Co. 20 Ill. App. 473; Collins v. Locke, L. R. 4 App. Cas. 674, 48 L. J. P. C. N. S. 68, 41 L. T. N. S. 292, 28 Week. Rep. 189; Jones v. Fell, 5 Fla. 510; Hearn v. Griffin, 2 Chitty, 407; Ontario Salt Co. v. Merchants' Salt Co. 18 Grant, Ch. (U. C.) 540.

Similar arrangements have been held to be legal even where prices were to be fixed in combination.

Central Shade Roller Co. v. Cushman, 143 Mass. 353, 9 N. E. 629; Herriman v. Menzies, 115 Cal. 16, 35 L.R.A. 318, 56 Am. St. Rep. 81, 46 Pac. 730, 44 Pac. 660; Walsh v. Dwight, 40 App. Div. 513, 58 N. Y. Supp. 91; Lough v. Outerbridge, 143 N. Y. 271, 25 L.R.A. 674, 42 Am. St. Rep. 712, 38 N. E. 292, 145 N. Y. 601, 40 N. E. 164; Skrainka v. Scharringhausen, 8 Mo. App. 522.

The transactions complained of were lawful if considered as a combination.

Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; Dueber Watch Case Mfg. Co. v. E. Howard Watch & Clock Co. 55 Fed. 851; National Fireproofing Co. v. Mason Builders' Asso. 26 L.R.A. (N.S.) 148, 94 C. C. A. 535, 169 Fed. 259; Mogul S. S. Co. v. McGregor [1892] A. C. 49, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101; Collins v. American News Co. 34 Misc. 260, 69 N. Y. Supp. 638; Com. v. Hunt, 4 Met. 134, 38 Am. Dec. 346; Hunt v. Simonds, 19 Mo. 583; Brewster v. C. Miller's Sons Co. 101 Ky. 368, 38 L.R.A. 505, 41 S. W. 301; Ulery v. Chicago Live Stock Exch. 54 Ill. App. 233; Hopkins v. United States, 171 U. S. 578, 599, 602, 43 L. ed. 290, 298, 299, 19 Sup. Ct. Rep. 40; Arkansas Brokerage Co. v. Dunn, 35 L.R.A. (N.S.) 464, 97 C. C. A. 454, 173 Fed. 899; Jacobs v. Cohen, 183 N. Y. 207, 2 L.R.A. (N.S.) 292, 111 Am. St. Rep. 730, 76 N. E. 5,

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5 Ann. Cas. 280; Macauley Bros. v. Tierney, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136; Heim v. New York Stock Exch. 64 Misc. 529, 118 N. Y. Supp. 591.

The transactions complained of were lawful if considered as concerted acts.

Cooley, Torts, 328; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; Mills v. United States Printing Co. 99 App. Div. 608, 91 N. Y. Supp. 185; Continental Ins. Co. v. Fire Underwriters, 67 Fed. 310; Fonotipia v. Bradley, 171 Fed. 959; Wellington v. Small, 3 Cush. 145, 50 Am. Dec. 719; Vegelahn v. Guntner, 167 Mass. 108, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; Karges Furniture Co. v. Amalgamated Woodworkers Local Union, 165 Ind. 421, 2 L.R.A.(N.S.) 788, 75 N. E. 877, 6 Ann. Cas. 829; Hunt v. Simonds, 19 Mo. 583; Ulery v. Chicago Live Stock Exch. 54 Ill. App. 233; Brewster v. C. Miller's Sons Co. 101 Ky. 368, 38 L.R.A. 505, 41 S. W. 301; Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; National Protective Asso. v. Cumming, 170 N. Y. 321, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369, 53 App. Div. 236, 65 N. Y. Supp. 946; Jacobs v. Cohen, 183 N. Y. 212, 2 L.R.A. (N.S.) 292, 111 Am. St. Rep. 730, 76 N. E. 5, 5 Ann. Cas. 280; Wunch v. Shankland, 59 App. Div. 482, 69 N. Y. Supp. 349; Collins v. American News Co. 34 Misc. 263, 69 N. Y. Supp. 638; Allen v. Flood [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, 17 Eng. Rul. Cas. 285; Allis-Chalmers Co. v. Iron Molders' Union, 150 Fed. 155; W. & A. Fletcher Co. v. International Asso. — N. J. Eq. —, 55 Atl. 1077; Atkins v. W. A. Fletcher Co. 65 N. J. Eq. 658, 55 Atl. 1074; Foster v. Retail Clerks' International Protective Asso. 39 Misc. 48, 78 N. Y. Supp. 860; Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346; Longshore Printing Co. v. Howell, 26 Or. 527, 28 L.R.A. 464, 46 Am. St. Rep. 640, 38 Pac. 547; Jones v. Fell, 5 Fla. 510; Gregory v. Brunswick, 6 Mann. & G. 205, 1 Car. & K. 24, 1 Dowl. & L. 518, 6 Scott, N. R. 809.

The practice and methods of defendants in obtaining information, sending notices, etc., were proper.

6 Pom. Eq. Jur. § 595; Montgomery Ward & Co. v. South Dakota Retail Merchants' & Hardware Dealers' Asso. 150 Fed. 418; National Fireproofing Co. v. Mason Builders' Co. 26 L.R.A.(N.S.) 148, 94 C. C. A. 535, 169 Fed. 269; Cote v. Murphy, 159 Pa. 420, 23 L.R.A. 135, 39 Am. St. Rep. 686, 28 Atl. 190; National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; Allen v. Flood [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, 17 Eng. Rul. Cas. 285; Reynolds v. Plumbers' Material Protective Asso. 30 Misc. 709, 63 N. Y. Supp. 303; Vegelahn v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; Macauley Bros. v. Tierney, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 175 N. Y. 12, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136.

There has been no unlawful boycott in this case.

Mills v. United States Printing Co. 99 App. Div. 610, 91 N. Y. Supp. 185; Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 738.

The acts of defendants complained of here are not within the mischiefs sought to be remedied or prevented by the Sherman act.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Standard Oil Co. v. United States, 221 U. S. 51–57, 55 L. ed. 641, 644, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Brett v. Ebel, 29 App. Div. 260, 51 N. Y. Supp. 573; Spelling, Trusts, 1893, § 120; Cook, Corp. § 503a; United States v. Trans-Missouri Freight Asso. 53 Fed. 455, 166 U. S. 290, 355, 41 L. ed. 1007, 1032, 17 Sup. Ct. Rep. 540; Northern Securities Co. v. United States, 193 U. S. 197, 403, 48 L. ed. 679, 727, 24 Sup. Ct. Rep. 436; United States v. Du-Pont, 188 Fed. 151.

All the legal presumptions are in favor of the defendants in this proceeding, and the petitioner is required not merely to make out an affirmative case, but to overcome those presumptions incident to the character of the charges.

Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 184, 50 L. ed. 428, 432, 26 Sup. Ct. Rep. 208; Bigelow v. Calumet & H. Min. Co. 94 C. C. A. 13, 167 Fed. 732.

The anti-trust act of July 2, 1890, under which this proceeding is brought, is a criminal act, and for this and other reasons should be cautiously construed and applied, and all doubts resolved against the petitioner.

United States v. Trans-Missouri Freight Asso. 24 L.R.A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 77; United States v. Swift, 188 Fed. 97; Northern Securities Co. v. United States, 193 U. S. 197, 401, 48 L. ed. 679, 726, 24 Sup. Ct. Rep. 436; Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co. 73 Fed. 438; Leslie v. Lorillard, 110 N. Y. 533, 1 L.R.A. 456, 18 N. E. 363; Herriman v. Menzies, 115 Cal. 21, 35

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L.R.A. 318, 56 Am. St. Rep. 81, 46 Pac. 730, 44 Pac. 660.

The facts that certain wholesale lumber dealers have been and they or others may be deprived of certain sales and profits by defendant associations' propaganda work does not create a right to injunctive relief; it is a case of *damnum absque injuria.*

National Fireproofing Co. v. Mason Builders' Asso. 145 Fed. 260, 26 L.R.A.(N.S.) 148, 94 C. C. A. 535, 169 Fed. 259; National Protective Asso. v Cumming, 53 App. Div. 227, 65 N. Y. Supp. 946, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; Heywood v. Tillson, 75 Me. 225, 46 Am. Rep. 373; Rogers v. Dutt, 13 Moore, P. C. C. 209; Allen v. Flood [1898] A. C. 138, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, 17 Eng. Rul. Cas. 285; Thomas v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep. 788, 62 Fed. 819.

Even admitting petitioner's theory of an actual combination, defendants have deprived no one of any substantial legal right.

United States v. Trans-Missouri Freight Asso. 24 L.R.A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 86.

The effect on prices is not determinative of the character of any contract or combination under the anti-trust act.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 323, 41 L. ed. 1007, 1021, 17 Sup. Ct. Rep. 540; United States v. Jellico Mountain Coal & Coke Co. 12 L.R.A. 753, 3 Inters. Com. Rep. 626, 46 Fed. 432; United States v. Coal Dealers' Asso. 85 Fed. 252; Strait v. National Harrow Co. 18 N. Y. Supp. 224; Re Greene, 52 Fed. 117; Hopkins v. United States, 171 U. S. 578, 592, 43 L. ed. 290, 296, 19 Sup. Ct. Rep. 40.

The decree asked for by petitioner is not warranted by sound public policy.

United States Chemical Co. v. Provident Chemical Co. 64 Fed. 950; Northern Securities Co. v. United States, 193 U. S. 403, 48 L. ed. 727, 24 Sup. Ct. Rep. 436; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; National Ben. Co. v. Union Hospital Co. 45 Minn. 275, 11 L.R.A. 437, 47 N. W. 806; Leslie v. Lorillard, 110 N. Y. 534, 1 L.R.A. 456, 18 N. E. 363; Beal v. Chase, 31 Mich. 521; Fonotipia v. Bradley, 171 Fed. 959; United States v. Trans-Missouri Freight Asso. 53 Fed. 440, 24 L.R.A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 69, 166 U. S. 323, 41 L. ed. 1021, 17 Sup. Ct. Rep. 540; Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 247, 49 L. ed. 1031, 1037, 25 Sup. Ct. Rep. 637; Nordenfelt v. Maxim-Nordenfelt Guns & Ammunition Co. [1894] A. C. 552, 63 L. J. Ch. N. S. 908, 11 Reports, 1, 71 L. T. N. S. 489, 6 Eng. Rul. Cas. 413; Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 232, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; Bitterman v. Louisville & N. R. Co. 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. Rep. 91, 12 Ann. Cas. 693; People's Gaslight & Coke Co. v. Chicago Gaslight & Coke Co. 20 Ill. App. 491; John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 623.

The weight of the authority of actually adjudicated cases rests with the defendants.

Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; Jackson v. Stanfield, 137 Ind. 592, 23 L.R.A. 588, 36 N. E. 345, 37 N. E. 14; Olive v. Van Patten, 7 Tex. Civ. App. 630, 25 S. W. 428; Macauley Bros. v. Tierney, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; Bailey v. Master Plumbers' Asso. 103 Tenn. 99, 46 L.R.A. 561, 52 S. W. 853; Cleland v. Anderson, 66 Neb. 252, 5 L.R.A.(N.S.) 136, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 105 N. W. 1092; Sanford v. People, 121 Ill. App. 619; Montgomery Ward & Co. v. South Dakota Retail Merchants' & Hardware Dealers' Asso. 150 Fed. 413; State v. Adams Lumber Co. 81 Neb. 392, 116 N. W. 302; Retail Lumber Dealers' Asso. v. State, 95 Miss. 337, 35 L.R.A.(N.S.) 1054, 48 So. 1021, affirmed in 217 U. S. 433, 54 L. ed. 826, 30 Sup. Ct. Rep. 535.

Mr. **Howard Taylor** argued the cause, and, with Messrs. Charles E. Morgan, C. E. Morgan, 3d, and Charles B. Brophy, filed a brief for appellants in No. 550:

The Sherman act prohibits simply undue limitations on competitive conditions.

Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Nash v. United States, 229 U. S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780; United States v. Reading, 226 U. S. 324, 369, 57 L. ed. 243, 258, 33 Sup. Ct. Rep. 90; United States v. Union P. R. Co. 226 U. S. 84, 57 L. ed. 132, 33 Sup. Ct. Rep. 53; United States v. Terminal R. Asso. 224 U. S. 394, 395, 56 L. ed. 813, 814, 32 Sup. Ct. Rep. 507; United States v. American Tobacco Co. 221 U. S. 158, 55 L. ed. 685, 31 Sup. Ct. Rep. 632.

The combination, or concerted action, of these defendants in distributing circulars stating the true position of lumbermen in the trade, was not a combination which unduly restrained competition.

Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; Montgomery Ward &

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Co. v. South Dakota Retail Merchants' & Hardware Dealers' Asso. 150 Fed. 413; Aikens v. Wisconsin, 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3; Mogul S. S. Co. v. McGregor [1892] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101, L. R. 23 Q. B. Div. 614; National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; Mills v. United States Printing Co. 99 App. Div. 605, 91 N. Y. Supp. 185; Cooley, Torts, 2d ed. 328; Quinn v. Leathem [1901] A. C. 514, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749, 1 B. R. C. 197; Allen v. Flood [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, 17 Eng. Rul. Cas. 285; Ertz v. Produce Exch. 79 Minn. 140, 48 L.R.A. 90, 79 Am. St. Rep. 433, 81 N. W. 737; Macauley Bros. v. Tierney, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; Walker v. Cronin, 107 Mass. 564; Carew v. Rutherford, 106 Mass. 14, 8 Am. Rep. 287; Continental Ins. Co. v. Fire Underwriters, 67 Fed. 310; Collins v. American News Co. 34 Misc. 260, 69 N. Y. Supp. 638, affirmed in 68 App. Div. 639, 74 N. Y. Supp. 1123; Dueber Watch Case Mfg. Co. v. E. Howard Watch & Clock Co. 55 Fed. 851, 14 C. C. A. 14, 35 U. S. App. 16, 66 Fed. 637; Wabash R. Co. v. Hannahan, 121 Fed. 563; Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 738.

A conspiracy within the Sherman act can never be predicated upon the fact that a number of different people, when advised of a situation, are likely to take the same course of action.

United States v. Kissel, 218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. Rep. 124; United States v. Reading Co. 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep. 90.

Instances of boycott coming before the courts of late in connection with anti-trust acts have been decided adversely to the defendants only where threats or acts of violence were an integral part of the boycott, or else in instances where the court in question has explicitly held that the standard of reason was not involved in the language of the particular statute discussed.

Cooke, Trade & Labor Combinations, 1909, chap. v., headed "Boycotts;" Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 55 L. ed. 797, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492; Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 54 L. ed. 826, 30 Sup. Ct. Rep. 535; State v. Adams Lumber Co. 81 Neb. 392, 116 N. W. 302; Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. 19 L.R.A. 395, 5 Inters. Com. Rep. 545, 54 Fed. 730.

These present appellants are not responsible for the actions of individuals in other local associations.

State v. Adams Lumber Co. 81 Neb. 392, 116 N. W. 302; Lawlor v. Loewe, 109 C. C. A. 288, 187 Fed. 522; United States v. Reading Co. 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep. 90.

Assistant to the Attorney General Todd argued the cause and filed a brief for the United States:

The evidence establishes an agreement or combination between the defendant retailers to prevent wholesalers from selling directly to consumers by refusing to buy from (boycotting) them if they do.

1. The declared purpose of the defendant associations, as shown by their constitutions and by-laws.

2. The compilation and circulation of the so-called "official reports," or blacklists.

3. The actual course of conduct of defendants in concertedly withdrawing their patronage from listed wholesalers.

4. Admissions of members of defendant associations, and other testimony showing general recognition of and obedience to a tacit or moral obligation upon members so to withdraw their patronage.

5. The inference of an agreement to boycott is confirmed by the decisions of other courts in conspiracy cases.

Com. v. McLean, 2 Pars. Sel. Eq. Cas. 367; 3 Greenl. Ev. § 93; Patnode v. Westenhaver, 114 Wis. 460, 90 N. W. 467; Reg. v. Murphy, 8 Car. & P. 297; Reilley v. United States, 46 C. C. A. 25, 106 Fed. 896; State v. Adams Lumber Co. 81 Neb. 392, 116 N. W. 302; United States v. Sacia, 2 Fed. 754; Webb v. Drake, 52 La. Ann. 290, 26 So. 791; 2 Whart. Crim. Law, § 1398.

An agreement or combination by retailers to refuse to buy from (boycott) wholesalers who sell directly to consumers interferes with the free and normal flow of trade, and therefore violates the anti-trust act.

Bailey v. Master Plumbers' Asso. 103 Tenn. 99, 46 L.R.A. 561, 52 S. W. 853; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; Boutwell v. Marr, 71 Vt. 1, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607; Brown v. Jacobs' Pharmacy Co. 115 Ga. 429, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; Casey v. Cincinnati Typographical Union, 12 L.R.A. 193, 45 Fed. 135; Doremus v. Hennessy, 176 Ill. 608, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; Ellis v. Inman, P. & Co. 65 C. C. A.

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488, 131 Fed. 183; Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 55 L. ed. 797, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492, 33 App. D. C. 83, 32 L.R.A.(N.S.) 748; Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 54 L. ed. 826, 30 Sup. Ct. Rep. 535; Hawarden v. Youghiogheny & L. Coal Co. 111 Wis. 545, 55 L.R.A. 828, 87 N. W. 472; Hopkins v. Oxley Stave Co. 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912; Jackson v. Stanfield, 137 Ind. 592, 23 L.R.A. 588, 36 N. E. 345, 37 N. E. 14; Klingel's Pharmacy v. Sharp & Dohme, 104 Md. 218, 7 L.R.A. (N.S.) 976, 118 Am. St. Rep. 399, 64 Atl. 1029, 9 Ann. Cas. 1184; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Lucke v. Clothing Cutters' & T. Assembly, 77 Md. 396, 19 L.R.A. 408, 39 Am. St. Rep. 421, 26 Atl. 505; Macauley Bros. v. Tierney, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; Montgomery Ward & Co. v. South Dakota Retail Merchants' & Hardware Dealers' Asso. 150 Fed. 413; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Olive v. Van Patten, 7 Tex. Civ. App. 630, 25 S. W. 428; Purington v. Hinchliff, 219 Ill. 159, 2 L.R.A. (N.S.) 824, 109 Am. St. Rep. 322, 76 N. E. 47; Retail Lumber Dealers' Asso. v. State, 95 Miss. 337, 35 L.R.A.(N.S.) 1054, 48 So. 1021; State v. Adams Lumber Co. 81 Neb. 393, 116 N. W. 302; Steers v. United States, 112 C. C. A. 423, 192 Fed. 1; Thomas v. Cincinnati, N. O. & T. P. R. Co. 4 Interst. Com. Rep. 788, 62 Fed. 803; Webb v. Drake, 52 La. Ann. 290, 26 So. 791; Brennan v. United Hatters, 73 N. J. L. 729, 9 L.R.A. (N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698.

Viewing the agreement or combination between the defendants merely as one to circulate amongst themselves lists of wholesalers who sell directly to consumers, it unreasonably restricts competition between wholesalers and retailers in selling to consumers, and therefore violates the anti-trust act.

United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; Nash v. United States, 229 U. S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780; Quinn v. Leatham [1901] A. C. 495, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749, 1 B. R. C. 197; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 31 Sup. Ct. Rep. 502.

The plea that this combination was a reasonable and necessary measure to defend the position of retailers in the trade is irrelevant in law and unfounded in fact.

Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 610; Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 54 L. ed. 826, 30 Sup. Ct. Rep. 535; Lawlor v. Loewe, 109 C. C. A. 288, 187 Fed. 522.

Mr. Justice Day delivered the opinion of the court:

These are appeals from a decree of the district court of the United States for the southern district of New York [605] in an action brought by the United States under the Sherman anti-trust act (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), having for its object an injunction against certain alleged combinations of retail lumber dealers, which, it was averred, had entered into a conspiracy to prevent wholesale dealers from selling directly to consumers of lumber. The defendants are various lumber associations composed largely of retail lumber dealers in New York, New Jersey, Pennsylvania, Connecticut, Massachusetts, Rhode Island, Maryland, and the District of Columbia, and the officers and directors of the associations. The record is very voluminous, but the facts essential to a consideration of the decree of the district court are in comparatively narrow compass. While the record also concerns practices which are said to have been abandoned, the decree entered, declaring the defendants named to be in a combination or conspiracy to restrict and restrain competition, depends solely upon the method adopted and being used by the defendants in the distribution of the information contained in a certain document known as the "Official Report," the form of which, set forth in the decree, is as follows:

Official Report.

(Name of the Particular Association Circulating it.)

Statement to Members (with the Date).

You are reminded that it is because you are members of our Association and have an interest in common with your fellow members in the information contained in this statement, that they communicate it to you; and that they communicate to you in strictest confidence, and with the understanding that you are to receive it and treat it in the same way.

The following are reported as having solicited, quoted, or as having sold direct to the consumers:

(Here follows a list of the names and addresses of various wholesale dealers.)

[606] Members upon learning of any instance of persons soliciting, quoting, or selling direct to consumers, should at once re-

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port same, and in so doing should, if possible, supply the following information:

The number and initials of car.

The name of consumer to whom the car is consigned.

The initials or name of shipper.

The date of arrival of car.

The place of delivery.

The point of origin;

and the defendants were enjoined from combining, conspiring, or agreeing together to distribute, and from distributing, to members of the associations named or any other person or persons, any information showing soliciting, quotations, or sales and shipments of lumber and lumber products from manufacturers and wholesalers to consumers of or dealers in lumber, and from the preparation and distribution of the lists above described as the "Official Report," or the use of a similar device.

The record discloses that the defendant associations are constituted largely of retail lumber dealers, each of whom has the natural desire to control his local trade, which the retailers contend have been unduly interfered with by the wholesalers in selling to consumers within the local territory in such wise as to conflict with what they regard as a strictly local trade, and it appears that the defendant associations have for their object, among other things, the adoption of ways and means to protect such trade and to prevent the wholesale dealers from intruding therein. The particular thing which this case concerns in the retailers' efforts to promote the end in view is the attempt in the manner shown, by the circulation of the reports in question, to keep the wholesalers from selling directly to the local trade. The trade of the wholesalers involved covers a number of states, and there is no question but that the supplying of lumber to the large numbers [607] of retailers in these associations in different states is interstate trade, and that if the practices are illegal within the Sherman act they may be reached by this proceeding. Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Loewe v. Lawlor, 208 U. S. 274, 300, 52 L. ed. 488, 501, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815.

The record discloses a systematic circulation among the members of the defendant associations of the official report above quoted. The method of operation as stated by the learned counsel for the appellants is thus summarized in his brief:

"The names on this list are obtained and placed thereon as the result of complaints made by individual retailers. When an individual member of a retail association learns of a sale by a wholesaler to one of the customers of the retailer he may complain in writing to the secretary of his association, whose duty it is thereupon to ascertain the facts by correspondence with the wholesaler in question and such other means as may seem proper. Should the report or complaint be without proper foundation, or should the secretary become satisfied that the matter is a trifling one, or the result of inadvertence, the incident usually terminates at this point; but should the complaint appear to be serious and well founded, the case is submitted to the board of directors of the retail association at its next meeting, and should the board be satisfied that the wholesaler is generally making a practice of selling to consumers or customers of the retail trade, the secretary is directed to report the name of such wholesaler for the official list. Thereupon the secretary sends the name to Mr. Crary of New York, who adds it upon the next report to the names of those already thereupon. Each report contains the names of all wholesalers who have been reported from the very beginning as selling to consumers, and whose names have not been removed for cause. The reports or lists after being printed in New York are distributed amongst the secretaries of the defendant associations; [608] those for each association being marked with its name, and in that way only being distinguished from those sent to the other associations. The secretary of each association then distributes the lists to his members. Should any wholesaler desire to have his name removed from the list he can have it done upon satisfactory assurance to the local secretary that he is no longer selling in competition with the retailers. In practice the greatest care is taken to make the list accurate, and as a matter of fact, it only contains the names of such wholesalers as are absolutely committed to the practice of competing with retailers for the custom of builders and contractors."

The reading of the official report shows that it is intended to give confidential information to the members of the associations of the names of wholesalers reported as soliciting or selling directly to consumers, members upon learning of any such instances being called upon to promptly report the same, supplying detailed information as to the particulars of the transaction. When viewed in the light of the history of these associations and the conflict in which they were engaged to keep the retail trade to themselves and to prevent wholesalers from interfering with what they regarded as their rights in such trade, there can be but one purpose in giving the

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information in this form to the members of the retail associations of the names of all wholesalers who, by their attempt to invade the exclusive territory of the retailers, as they regard it, have been guilty of unfair competitive trade. These lists were quite commonly spoken of as blacklists, and when the attention of a retailer was brought to the name of a wholesaler who had acted in this wise it was with the evident purpose that he should know of such conduct and act accordingly. True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty annexed for the failure so to do; but he is blind indeed who does not see the [609] purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealers to supply the trade which they regard as their own. Indeed, this purpose is practically conceded in the brief of the learned counsel for the appellants:

"It was and is conceded by defendants, and the court below found, that the circulation of this information would have a natural tendency to cause retailers receiving these reports to withhold patronage from listed concerns. That was, of course, the very object of the defendants in circulating them."

In other words, the circulation of such information among the hundreds of retailers as to the alleged delinquency of a wholesaler with one of their number had and was intended to have the natural effect of causing such retailers to withhold their patronage from the concern listed.

The Sherman act has been so frequently and recently before this court as to require no extended discussion now. Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; United States v. Terminal R. Asso. 224 U. S. 383, 56 L. ed. 810, 32 Sup. Ct. Rep. 507; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 57 L. ed. 107, 33 Sup. Ct. Rep. 9; United States v. Union P. R. Co. 226 U. S. 61, 57 L. ed. 124, 33 Sup. Ct. Rep. 53; United States v. Reading Co. 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep. 90; United States v. Patten, 226 U. S. 525, 57 L. ed. 333, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141; Nash v. United States, 229 U. S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780; Straus v. American Pub. Asso. 231 U. S. 222, ante, 192, 34 Sup. Ct. Rep. 84. It broadly condemns all combinations and conspiracies which restrain the free and natural flow of trade in the channels of interstate commerce. It is true that this court held in the Standard Oil and Tobacco Cases, supra, and in the subsequent cases following them, that in its proper construction the act was not intended to reach normal and usual contracts incident to lawful purposes and intended to [610] further legitimate trade, and summarizing the meaning of the act in the Tobacco Case, this court said (221 U. S. 179):

"Applying the rule of reason to the construction of the statute, it was held in the Standard Oil Case that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the anti-trust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance."

The same principle was affirmed in Nash v. United States, 229 U. S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780. The court in the Standard Oil Case construed the act as intended to reach only combinations unduly restrictive of the flow of commerce, or unduly restrictive of competition, and, illustrating what were such undue or unreasonable combinations, it classed as illegal (p. 58) "all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." And in Loewe v. Lawlor, supra, this court held that a combination to boycott [611] the hats of a manufacturer and deter dealers from buying them in order to coerce the manufacturer to a particular course of action with reference to labor organizations, the effect of the combination being to com-

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pel third parties and strangers not to engage in a course of trade except upon conditions which the combination imposed, was within the Sherman act. In Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 55 L. ed. 797, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492, after citing Loewe v. Lawlor, supra, this court said (p. 438):

"But the principle announced by the court was general. It [the Sherman act] covered any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or unlawful combinations of labor; and we think also whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words, or printed matter."

And see W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307.

These principles are applicable to this situation. Here are wholesale dealers in large number engaged in interstate trade upon whom it is proposed to impose as a condition of carrying on that trade that they shall not sell in such manner that a local retail dealer may regard such sale as an infringement of his exclusive right to trade, upon pain of being reported as an unfair dealer to a large number of other retail dealers associated with the offended dealer, the purpose being to keep the wholesaler from dealing not only with the particular dealer who reports him, but with all others of the class who may be informed of his delinquency. "Section 1 of the act . . . is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints, as where persons not so engaged conspire to compel action by others, or to create artificial [612] conditions, which necessarily impede or burden the due course of such trade or commerce, or restrict the common liberty to engage therein." United States v. Patten, 226 U. S. 541, 57 L. ed. 341, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141. This record abounds in instances where the offending dealer was thus reported, the hoped-for effect, unless he discontinued the offending practice, realized, and his trade directly and appreciably impaired.

But it is said that in order to show a combination or conspiracy within the Sherman act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony, and may be inferred from the things actually done; and when, in this case, by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred.

The circulation of these reports not only tends to directly restrain the freedom of commerce by preventing the listed dealers from entering into competition with retailers, as was held by the district court, but it directly tends to prevent other retailers who have no personal grievance against him, and with whom he might trade, from so doing, they being deterred solely because of the influence of the report circulated among the members of the associations. In other words, the trade of the wholesaler with strangers was directly affected, not because of any supposed wrong which he had done to them, but because of the grievance of a member of one of the associations, who had reported a wrong to himself, which grievance, when brought to the attention of others, it was hoped would deter them from dealing with the offending party. This practice takes the case out of those normal and usual agreements in aid of trade and commerce which may be found not to be within the act, and puts it within the prohibited [613] class of undue and unreasonable restraints, such as was the particular subject of condemnation in Loewe v. Lawlor, 208 U. S. 274, 300, 52 L. ed. 488, 501, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815.

The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted. Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 241, 242, 44 L. ed. 136, 147, 148, 20 Sup. Ct. Rep. 96.

Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50, is cited and relied upon by the appellants. In that case this court sustained, as against an attack under the Sherman law, the legality of an association called the Traders' Live Stock Exchange in Kansas City. An agreement among purchasers of cattle for the purpose of regulating and controlling the local business among themselves had been entered into, and one of the rules provided that the members of the exchange should not deal with any other yard trader

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unless he was a member of such exchange. It was said (p. 613):

"There is no evidence that these defendants have in any manner other than by the rules above mentioned hindered or impeded others in shipping, trading, or selling their stock, or that they have in any way interfered with the freedom of access to the stock yards of any and all other traders and purchasers, or hindered their obtaining the same facilities which were therein afforded by the stock yards company to the defendants as members of the exchange, and we think the evidence does not tend to show that the above results have flowed from the adoption and enforcement of the rules and regulations referred to."

[614] As distinguished from this situation the present case shows that the trade of the listed wholesalers is hindered or impeded; that competition is suppressed and the natural flow of commerce interfered with as the direct result of the circulation of the official reports in the manner stated. The case is quite different from the Anderson Case. And see W. W. Montague & Co. v. Lowry, 193 U. S. 48, 48 L. ed. 612, 24 Sup. Ct. Rep. 307.

A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. "But," as was said by Mr. Justice Lurton, speaking for the court in Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 54 L. ed. 826, 30 Sup. Ct. Rep. 535, "when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed."

When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the act of Congress, and the District Court was right in so holding. It follows that its decree must be affirmed.

[615] WILL JONES, Plff. in Err.,
v.
MARGUERITE JONES and Her Husband, Albert Jones.

(See S. C. Reporter's ed. 615-619.)

Civil rights — statute of descent — discrimination.

The surviving brothers and sisters of a colored freedman dying intestate, who were the children of a born slave and were themselves born slaves, are not denied the equal protection of the laws, contrary to U. S. Const., 14th Amend., by a decision of a state court construing Shannon's Comp. Tenn. Laws, § 4163, preferring the brothers and sisters of an intestate dying without issue over the husband or widow, as applying only to brothers and sisters born free, with the result that the intestate's real property acquired by him while he was a freedman passed to his widow under § 4165, which provides that if one dies intestate "leaving no heir at law capable of inheriting the real estate, it shall be inherited by the husband or wife in fee simple."

[Race discrimination, see Civil Rights, in Digest Sup. Ct. 1908.]

[No. 339.]

Argued April 30, 1914. Decided June 2, 1914.

IN ERROR to the Supreme Court of the State of Tennessee to review a decree which, reversing a decree of the Court of Civil Appeals of that state, affirmed a decree of the Chancery Court of Shelby County, granting the relief prayed in the bill in a suit to remove a cloud on title. Affirmed.

The facts are stated in the opinion.

Mr. W. H. Harrelson argued the cause, and, with Mr. W. P. Metcalf, filed a brief for plaintiff in error:

The 14th Amendment was ordained to secure equal civil rights to all persons, and extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.

Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup.

NOTE.—As to validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

On civil rights of negroes—see note to Civil Rights Cases, 27 L. ed. U. S. 836.

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Ct. Rep. 1138; Humes v. United States, 170 U. S. 212, 42 L. ed. 1012, 18 Sup. Ct. Rep. 602; Hodges v. United States, 203 U. S. 1, 51 L. ed. 65, 27 Sup. Ct. Rep. 6; Gibson v. Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; Neal v. Delaware, 103 U. S. 389, 26 L. ed. 571; Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664, 3 Am. Crim. Rep. 515.

The plain object of this Amendment, as well as of the statutes enacted pursuant thereto, was to place the negro race, with respect to civil rights, upon the same level with the white. They made the rights and responsibilities, civil and criminal, of the two races exactly the same.

Gibson v. Mississippi; Neal v. Delaware; and Strauder v. West Virginia,—supra.

The protection extended by the 14th Amendment is not confined to the negro race alone, but may be invoked by all persons, regardless of their race or color, for the protection of their equal civil rights and to maintain their equality before the law; and, with respect to the 13th Amendment, it reaches every race and every individual, and the slavery or involuntary servitude of the Mexican, Chinese, Italians, or Anglo-Saxon is as much within its compass as slavery or involuntary servitude of the Africans. Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Hodges v. United States, 203 U. S. 1, 51 L. ed. 65, 27 Sup. Ct. Rep. 6.

Therefore, although a statute, on its face, may not be obnoxious to this provision of the 14th Amendment, yet if it is so administered by the legislative, executive, or judicial authorities of the state as to deny to any individual or class of individuals the equal protection of the laws and equal civil rights under the laws, a case arises within the constitutional inhibition. Whoever, by virtue of his public position under a state government, deprives another of life, liberty, or property without due process of law, or denies or takes away the equal protection of the laws, or undertakes to deprive any person or class of persons of their civil rights under the 14th Amendment of the Constitution of the United States, and the Civil Rights Bill passed by Congress in aid thereof, violates that inhibition, and as he acts in the name of and for the state, and is clothed with her power, his act is her act, and Congress has the power, by virtue of the 5th section of the 14th Amendment, to protect and enforce the rights denied or withheld.

Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664, 3 Am. Crim. Rep. 515.

Although the 14th Amendment is prohibitory in terms, it confers by necessary implication a positive immunity, or right, most valuable to persons of the colored race,—the right to exemption from discriminations imposed by public authority, which imply legal inferiority in civil society, lessen the security of their rights, and are steps towards reducing them to the conditions of a subject race,—the right to exemption from unfriendly legislation against them distinctively as colored.

Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664, 3 Am. Crim. Rep. 515.

Colored persons are citizens, and citizens without distinction as to race or color, or previous condition of servitude, and have the same right to make and enforce contracts, to sue, to be parties and give evidence, to inherit, purchase, lease and sell, hold and convey property, real and personal, and to full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and are entitled to the same civil rights as the white citizens of the different states wherein they may reside. Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547.

Mr. B. F. Booth argued the cause and filed a brief for defendants in error:

The 14th Amendment and §§ 1977 and 1978 of the Revised Statutes of the United States do not control in this case, because the right claimed here is a right subject to state legislation and decisions.

Paul v. Virginia, 8 Wall. 180, 19 L. ed. 360; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394.

The Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed.

Hodges v. United States, 203 U. S. 1, 51 L. ed. 65, 27 Sup. Ct. Rep. 6; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570.

Before the act of the legislature of Tennessee, passed in 1865 and 1866, slaves in Tennessee could not inherit at all, and it so remained until the passage of the above act.

Scott v. Sandford, 19 How. 393, 15 L. ed. 691.

The decisions of the Tennessee supreme court have established a rule of property which has been the law in Tennessee since 1871, and has been relied upon as the settled law upon the subject of collateral inheritance between ex-slaves ever since.

Andrews v. Page, 3 Heisk. 668; Shepherd v. Carlin, 99 Tenn. 64, 41 S. W. 340; Laughlin v. Johnson, 102 Tenn. 460, 52 S. W. 816; Dennis v. Dennis, 105 Tenn.

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86, 58 S. W. 284; Carver v. Maxwell, 110 Tenn. 75, 71 S. W. 752.

The courts of the state of Tennessee had the right to say which of its citizens should inherit the lands of another citizen dying intestate and leaving lands.

Bates v. Brown, 5 Wall. 710, 18 L. ed. 535; Stevenson v. Sullivant, 5 Wheat. 207, 5 L. ed. 70; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; Hutchinson Invest. Co. v. Caldwell, 152 U. S. 65, 38 L. ed. 356, 14 Sup. Ct. Rep. 504; Dawson v. Godfrey, 4 Cranch, 321, 2 L. ed. 634.

The Federal courts have established a rule, followed by a long line of decisions, upholding the decisions of the highest court in a state in matters of inheritance and title to land, made in accordance with the laws of the locality in which the land is situated.

Cope v. Cope, 137 U. S. 682, 34 L. ed. 832, 11 Sup. Ct. Rep. 222; Williamson v. Suydam, 6 Wall. 733, 18 L. ed. 971; Suydam v. Williamson, 24 How. 427, 16 L. ed. 742; Bondurant v. Watson, 103 U. S. 281, 26 L. ed. 447; Beauregard v. New Orleans, 18 How. 497, 15 L. ed. 469; M'Keen v. Delancy, 5 Cranch, 22, 3 L. ed. 25; Massie v. Watts, 6 Cranch, 148, 3 L. ed. 181; Thatcher v. Powell, 6 Wheat. 119, 5 L. ed. 221; Webster v. Cooper, 14 How. 488, 14 L. ed. 510; Halsted v. Buster, 140 U. S. 273, 35 L. ed. 484, 11 Sup. Ct. Rep. 782; Ridings v. Johnson, 128 U. S. 212, 32 L. ed. 401, 9 Sup. Ct. Rep. 72; Gormley v. Clark, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; McElvain v. Brush, 142 U. S. 155, 35 L. ed. 971, 12 Sup. Ct. Rep. 156.

Nothing is better settled than the proposition that questions of descent are to be determined by local law.

Levy v. M'Cartee, 6 Pet. 102, 8 L. ed. 334; Cope v. Cope, 137 U. S. 682, 34 L. ed. 832, 11 Sup. Ct. Rep. 222; Gardner v. Collins, 2 Pet. 58, 7 L. ed. 347; Maxwell v. Moore, 22 How. 185, 16 L. ed. 251.

Equal protection of the law is not denied by a law or course of procedure which would have been applied to any other persons in the state under similar circumstances and conditions.

Tinsley v. Anderson, 171 U. S. 105, 43 L. ed. 96, 18 Sup. Ct. Rep. 805.

Whenever the law operates alike upon all persons and property similarly situated, equal protection cannot be said to be denied.

Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; State ex rel. Astor v. Schlitz Brewing Co. 104 Tenn. 732, 78 Am. St. Rep. 941, 59 S. W. 1033.

Mr. Justice Lurton delivered the opinion of the court:

This is a question of collateral descent arising under the Tennessee statutes.

[616] One John Jones, a colored freedman, died in 1889, the owner of a tract of 87 acres of land lying in Shelby county, Tennessee, upon which he and his wife had lived for many years. He died intestate and without issue. The title to the land was claimed by his widow, the defendant in error, Marguerite Jones, who has, since the death of John Jones, intermarried with the other defendant in error, Albert Jones. Her claim was rested upon § 4165, Shannon's Compilation of Tennessee Laws, which provides that if one die intestate, "leaving no heir at law capable of inheriting the real estate, it shall be inherited by the husband or wife in fee simple." The plaintiff in error, Will Jones, contested the claim of the widow, contending that the land passed to the surviving brothers and sisters of the intestate, under whom, through quitclaim deeds, he claimed the title. The widow's bill was for the purpose of canceling these deeds as clouds upon her title. The Tennessee court sustained her bill and adjudged that the intestate having died without issue, and without heirs at law capable of inheriting, his real estate passed to his widow under § 4165, supra.

The deeds denounced as clouds upon the widow's title were attacked upon a number of grounds, among them fraud in their procuration. The decree ordering their cancelation was apparently based only upon the ground that their makers, assuming them to be legitimate full brothers and sisters of the intestate John Jones, were sons and daughters of a born slave and themselves born slaves, and as such were not his heirs within the meaning of the Tennessee statutes of descent.

There is a Tennessee statute of descent which provides that the land of an intestate shall pass to his brothers and sisters in case the owner die without issue, and the contention is that if this statute preferring the brothers and sisters of an intestate dying without issue over the husband or widow be construed as applying only to brothers and [617] sisters born free, it discriminates against those born slaves, and thereby violates that equal protection of the law guaranteed by the 14th Amendment to the Constitution.

This provision of the Tennessee canon of descent by which the brothers and sisters of an intestate dying without issue take his real estate is as old as the state, and comes from the common law. It does not distinguish in terms between brothers and sisters born free and those born slaves. Neither

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does it distinguish between those who are born bastards and those born in wedlock, and those who are aliens and those who are not. Nevertheless, neither a bastard nor an alien has inheritable blood, nor are they capable of inheriting as heirs unless by aid of some statute: 2 Kent, Com. *211; 2 Bl. Com. *249; Levy v. M'Cartee, 6 Pet. 102, 8 L. ed. 334. The civil status of slaves in Tennessee, as well as in other states in which slavery existed, was such as to disable them from inheriting or transmitting property by descent. Thus it was said: "They cannot take property by descent or purchase, and all they find and all they hold belongs to the master. They cannot make lawful contracts, and they are deprived of civil rights. They are assets in the hands of executors for the payment of debts." 2 Kent, Com. 11th ed. 278, *253; Jackson ex dem. People v. Lervey, 5 Cow. 397. Slaves, therefore, were not within the meaning and effect of the statutes of descent, and no descent from or through a slave was possible except as provided by some special statute. The rule was the same as to aliens and illegitimates.

After the emancipation of the slaves of the South the statutes of inheritance were extended in many states so as to confer upon the children of parents born in slavery the right to inherit from their parents. But these enlargements of the canon of descent extended only to lineal descendants and did not embrace collaterals. The Tennessee [618] statute, which was claimed in the court below to be broad enough to embrace collateral relatives, is that of 1865-66, chap. 40, § 5, carried into Shannon's Compilation as § 4179. That act declared that slaves who, within the state, had lived together as man and wife, should be regarded as lawfully married, and that the children of such slave marriages should be "legitimately entitled to an inheritance in any property heretofore acquired or that may be hereafter acquired, to as full an extent as children of white citizens are entitled by the laws of this state." But this statute has been more than once construed as not extending the right of inheritance beyond the lineal descendants of the parents. Shepherd v. Carlin, 99 Tenn. 64, 41 S. W. 340; Carver v. Maxwell, 110 Tenn. 75, 71 S. W. 752. In Shepherd v. Carlin, supra, the question here presented was decided. Agnes Lee, a colored woman, born in slavery, died intestate and without issue. Her land was claimed by her surviving husband under § 4165, Shannon's Compilation, heretofore referred to, and by her niece as her only collateral relative. The court held that the right to inherit the real estate of an intestate born in slavery had been extended only in favor of lineal descendants, and that collaterals possessed no inheritable blood. To the same effect are many cases, among them: Tucker v. Bellamy, 98 N. C. 31, 4 S. E. 34; Jones v. Hoggard, 108 N. C. 178, 12 S. E. 906, 907; Williams v. Kimball, 35 Fla. 49, 26 L.R.A. 746, 48 Am. St. Rep. 238, 16 So. 783.

Inheritance is governed by the *lex rei sitæ*. It is not a natural or absolute right, but the creation of statute law. If one claim the right to succeed to the real property of another as heir, and his right is denied because he must trace his pedigree or title to or through an alien, a bastard, or a slave, the question is one to be determined by the local law. Cope v. Cope, 137 U. S. 682, 34 L. ed. 832, 11 Sup. Ct. Rep. 222; Levy v. M'Cartee, supra; Blythe v. Hinckley, 180 U. S. 333, 45 L. ed. 557, 21 Sup. Ct. Rep. 390. In Levy v. M'Cartee, supra, the question was one of inheritance, the [619] plaintiff tracing his pedigree through an alien ancestor. After first deciding that a question of inheritance to land in New York was one to be determined by the law of that state, the court held: first, that an alien had no inheritable blood and could neither take land himself by descent, nor transmit it to others; second, that under the law of New York one citizen of the state could not inherit in the collateral line of another when he must make his pedigree or title through a deceased alien ancestor.

It is true that the land of the intestate John Jones was acquired when he was a freedman. Under the law of the state when he acquired it, he had the right to dispose of it by deed or will. If he died intestate, leaving issue, it descended to such issue. But if he left no such descendants, it passed, by the express terms of the statute, to his widow.

We are unable to see in the Tennessee statute of descent any such denial of the equal protection of the law as is prohibited by the 14th Amendment.

The decree is accordingly affirmed.

MOORE-MANSFIELD CONSTRUCTION COMPANY, Appt.,
v.
ELECTRICAL INSTALLATION COMPANY et al.

(See S. C. Reporter's ed. 619-626.)

Appeal — from district court — Federal question.

A case otherwise within the jurisdiction of a Federal district court, and reviewable in a circuit court of appeals, is not one

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which may come direct to the Supreme Court under the Judicial Code, § 247, as one "which involved the construction or application of the Constitution of the United States," merely because, in the course of the case, a question arose touching the effect upon a railway construction contract of a subsequent change of decision in the state courts, by which it was held that contractors were not included in the local mechanics' lien law, there being no claim that the statute is invalid.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

[No. 358.]

Argued May 5, 1914. Decided June 22, 1914.

APPEAL from the District Court of the United States for the District of Indiana to review a decree rendered in a creditors' suit denying the right of a contractor for railway construction to a mechanics' lien upon the railway property. Dismissed for want of jurisdiction.[1]

The facts are stated in the opinion.

Messrs. **William A. Ketcham** and **A. S. Worthington** argued the cause and filed a brief for appellant.

Mr. **Cassius C. Shirley** argued the cause, and, with Messrs. W. H. H. Miller, S. D. Miller, and W. H. Thompson, filed a brief for appellees.

Mr. Justice **Lurton** delivered the opinion of the court:

The primary question concerns the jurisdiction of this court to entertain this as a direct appeal from the district court.

The decree below was rendered under a general creditors' bill, by which the assets of the Indianapolis, Crawfordsville, & Western Traction Company, an insolvent [621] Indiana corporation, had been impounded, its debts ascertained, and the order of payment determined. Among the creditors proving their debts were some claiming liens. One was the Marion Trust Company, trustee under a general mortgage securing an issue of mortgage bonds. Another creditor was this appellant, the Moore-Mansfield Construction Company. That company had, under contract with the traction company, constructed a part of its line of railway, and for the balance of its debt claimed a lien upon its property. The decree from which this appeal was taken gave priority to the mortgage, and denied to appellant any lien upon the property of the traction company, and adjudged that its debt as fixed should be paid ratably out of the funds applicable to the payment of general debts.

Counsel for appellant thus states the issue upon this appeal,—"The precise controversy presented by the record is: (a) Has the construction company a valid, subsisting, enforceable mechanics' lien under the laws of Indiana upon the railway property of the traction company? (b) Is such lien senior and paramount to the lien of the trust deed or mortgage given to secure the outstanding bonds?"

The defense asserted to the mechanics' lien was that there was no statute giving to a contractor for railway construction a lien upon the railway property, and, second, if there existed any such lien, the construction company, for the purpose of giving security to the holders of the construction bonds, had expressly covenanted and agreed to waive and forego whatever right or rights it might have had at the time of the execution of its contract, or which it might thereafter acquire, to claim a lien against the property of the railway company under the laws of the state of Indiana.

The court filed no opinion, but the decree recites that "the construction company is not entitled to enforce a [622] mechanics' lien against any of the property of said defendant traction company in the hands of the receiver of this court or elsewhere, if any; nor against the proceeds thereof; and that no such lien exists."

Thus, it is not clear whether the lien asserted was denied because of the waiver referred to, or because the statute of Indiana of March 6, 1883, being the statute under which the lien was claimed, did not embrace contractors. Appellant moved the court to amend the decree so as to make it more specific by stating whether it had no lien, because, under the law of Indiana, a contractor could acquire no such lien, or because it had waived its right to any such lien, as contended by the appellee. This motion was denied. We shall assume for the purpose of this case that the lien was denied upon the first ground stated, and upon that basis determine whether the case is one which can come direct to this court.

That appellant could have carried this case for review to the circuit court of appeals is plain. The jurisdiction of the district court under the original bill was based only upon diversity of citizenship.

[1] Leave granted on June 22, 1914, to present petition for rehearing within thirty days.

NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

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Neither did the contention that, in the progress of the case, there arose a question claimed to involve the construction or application of the Constitution of the United States, deprive the unsuccessful party of the right to go to the circuit court of appeals, where all of the questions would be open to review. But the contention is that the appellant had an election to carry the case to the circuit court of appeals or bring it direct to this court under § 5 of the act of 1891 [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549], now § 247 of the Judicial Code of 1913 [36 Stat. at L. 1158, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 230], as a case "which involved the construction or application of the Constitution of the United States." Shortly stated the contention is, first, that under the decisions of the Indiana supreme court prior to the accruing of the rights of this appellant under its contracts, contractors were included within those who might, by compliance with [623] the mechanics' lien statute, secure liens; and, second, that the subsequent change of decision by which that court held that contractors were not included in the mechanics' lien law constituted a law which impaired the obligation of its contract within the meaning of the contract clause of the Constitution of the United States. It therefore assigns as error the action of the court below in not declaring the rights of appellant to be as they existed under the line of judicial decisions at the time such rights accrued.

The title of the Indiana act of March 6, 1883, under which appellant claims to have acquired a lien, was "an act concerning liens of mechanics, laborers, and materialmen." A provision of the Constitution of Indiana, § 19, article 4, provides that "every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title." The contention is that for many years contractors had been regarded as entitled to a lien under this act and prior acts having a similar title, though it is conceded that the sufficiency of the title had never been expressly decided. On February 18, 1909, the Indiana supreme court in the case of Indianapolis Northern Traction Co. v. Brennan, 174 Ind. 1, 30 L.R.A. (N.S.) 85, 87 N. E. 215, 90 N. E. 65, 68, 91 N. E. 503, held that the act of 1883 did not include contractors or subcontractors. The act was not held to have been unconstitutionally enacted (Wilkes County v. Coler, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. Rep. 458), nor that contractors and subcontractors might not have been included among those to whom the privilege of a lien was extended. The decree was confined to the single point that the title did not include contractors. It was therefore a mere construction of the act as not including obligations to contractors as distinguished from obligations to mechanics, laborers, and materialmen. This is claimed to have been such a change of decision as to impair the obligation of the contract under which the appellant had constructed [624] the railway of the traction company. Curiously enough, the supreme court of Indiana has, pending this appeal, retracted the construction it placed upon the act of 1883, and has held that contractors are within the intent and meaning of the act. Moore-Mansfield Constr. Co. v. Indianapolis, N. C. & C. R. Co. 179 Ind. 536, 44 L.R.A. (N.S.) 816, 101 N. E. 296. But a change in the opinion of a court as to the proper construction or scope of statute law of a state is not within article 1, § 10, of the Constitution of the United States, which provides that "no state shall . . . pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." That provision is a restraint upon the legislative power of the state, and, as was said by this court, "it concerns the making of laws, not their construction by the courts. It has been so regarded from the beginning." Ross v. Oregon, 227 U. S. 150, 161, 57 L. ed. 458, 463, 33 Sup. Ct. Rep. 220. There had been no subsequent legislation which in anywise affected liens of contractors.

It has been many times decided that a writ of error will not lie from this court to a state court under § 709, Revised Statutes (U. S. Comp. Stat. 1901, p. 575), on the ground that the obligation of a contract has been impaired by a change in the decision of the court in respect to the meaning and scope of a statute, the validity of which has not been denied. "In order to come within the provision of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the state, and not by a decision of its judicial department only. The appellate jurisdiction of this court, upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the Constitution of the United States has been decided by the state court to be valid, and not [625] when an act admitted to be valid has been misconstrued by the court." Central Land Co. v. Laidley, 159 U. S. 103, 109, 40 L. ed. 91, 93, 16 Sup. Ct. Rep.

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80; see also Bacon v. Texas, 163 U. S. 207, 220, 41 L. ed. 132, 137, 10 Sup. Ct. Rep. 1023; Loeb v. Columbia Twp. 179 U. S. 479, 493, 45 L. ed. 285, 291, 21 Sup. Ct. Rep. 174; National Mut. Bldg. & L. Asso. v. Brahan, 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. Rep. 532. If, therefore, a mere change of decision by a state court in respect of the meaning and scope of a state statute, not claimed to be invalid or repugnant to the Constitution of the United States, does not constitute an impairment of a contract within the meaning of the contract clause of the Constitution, it must follow that a case otherwise within the jurisdiction of a district court of the United States, and reviewable in the circuit court of appeals, is not a case which may come direct to this court merely because, in the course of the case, a question arises touching the effect of such a change of decision upon the rights of the parties.

Courts of the United States are courts of independent jurisdiction, and when a question arises in a United States court as to the effect of a change in decision which detrimentally affects contract rights and obligations entered into before such change, such rights and obligations should be determined by the law as judicially determined at the time the rights accrued. In every such case the Federal courts, while leaning to the view of the state court as to the validity or interpretation of a law of the state, will exercise an independent judgment, and will not necessarily follow state judicial decisions rendered subsequently. Burgess v. Seligman, 107 U. S. 20, 33, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; Loeb v. Columbia Twp. 179 U. S. 479, 493, 45 L. ed. 285, 291, 21 Sup. Ct. Rep. 174.

Under the settled rule it was the duty of the court below, when confronted with the question whether appellant had acquired a lien under the act of 1883, to determine for itself the meaning and scope of that act, and to declare the rights of that company under the law as it had been judicially determined. The decisions to this effect are [626] numerous. Some of them are: Folsom v. Township Ninety-six, 159 U. S. 611, 624, 40 L. ed. 278, 282, 16 Sup. Ct. Rep. 174; Loeb v. Columbia Twp. supra; Jones v. Great Southern Fireproof Hotel Co. 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 370, affirmed by this court in 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576. If the district court erred in following the later decision of the Indiana court, the error could have been corrected by the circuit court of appeals, and the judgment of the latter court might be reviewed by this court under a writ of certiorari. The cases of Folsom v. Township Ninety-six, and Jones v. Great Southern Fireproof Hotel Co. supra, reached this court through the circuit court of appeals, one by a certified request for an instruction, and the other by certiorari.

The right to bring the case to this court from the district court by a direct appeal depended upon the question whether the decree denying to appellant the lien it claimed under the law of Indiana "necessarily and directly involved the construction or application of the Constitution of the United States." Empire State-Idaho Min. & Developing Co. v. Hanley, 205 U. S. 225, 232, 51 L. ed. 779, 782, 27 Sup. Ct. Rep. 476. The change of decision in respect of the scope of the Indiana statutes was not a law of the state impairing the obligation of the contract, which is the only basis for the claim that the case is one which involved the construction or application of the Constitution of the United States. We are therefore precluded from an examination of the merits of the case (Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 48 L. ed. 749, 24 Sup. Ct. Rep. 489; Knop v. Monongahela River Consol. Coal & Coke Co. 211 U. S. 485, 53 L. ed. 294, 29 Sup. Ct. Rep. 188), and the appeal must be dismissed.

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[627] STATE OF LOUISIANA v. WILLIAM GIBBS McADOO, Secretary of the Treasury of the United States, et al.

(See S. C. Reporter's ed. 627-634.)

United States — immunity from suit — review of official action.

1. The immunity of the United States from suit prevents the state of Louisiana, as a producer of sugar through its operation of sugar plantations and mills, from maintaining an original bill in the Federal Supreme Court against the Secretary and Assistant Secretary of the Treasury to review their official judgment as to the rate of duty to be exacted under the tariff acts of July 24, 1897 (30 Stat. at L. 151, chap. 11, U. S. Comp. Stat. 1901, p. 1626), and October 3, 1913 (38 Stat. at L. chap. 16), and the commercial treaty with Cuba of December 11, 1902 (33 Stat. at L. 2136), as made effective by the act of December 17, 1903 (33 Stat. at L. 3,

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Note.—On suit against Federal officers or agents as suit against United States—see note to Louisiana v. Garfield, 53 L. ed. U. S. 92.

On injunction to restrain act of public officers—see note to Mississippi v. Johnson, 18 L. ed. U. S. 437.

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chap. 1, U. S. Comp. Stat. Supp. 1911, p. 739), upon importations of Cuban sugar.
[For other cases, see United States, IV. b, in Digest Sup. Ct. 1908.]

Injunction — to control official action.

2. The official judgment of the Secretary and Assistant Secretary of the Treasury as to the rate of duty to be exacted on importations of Cuban sugar under the tariff acts of July 24, 1897, and October 3, 1913, and the commercial treaty with Cuba of December 11, 1902, as made effective by the act of December 17, 1903, cannot be controlled by injunction.
[For other cases, see Injunction, I. j, in Digest Sup. Ct. 1908.]

[No. —, Original.]

Argued April 14, 1914. Decided June 22, 1914.

MOTION for leave to file a petition against the Secretary and Assistant Secretary of the Treasury to review their official judgment as to the rate of duty to be exacted on importations of Cuban sugar. Leave to file petition denied.

The facts are stated in the opinion.

Mr. Ruffin G. Pleasant, Attorney General of Louisiana, and Mr. Joseph W. Bailey argued the cause, and, with Mr. Paul J. Christian, filed a brief for petitioner.

Solicitor General Davis argued the cause, and, with Assistant Attorney General Adkins, filed a brief for respondents:

The suit is one against the United States, brought without its consent.

Cunningham v. Macon & B. R. Co. 109 U. S. 446, 451, 27 L. ed. 992, 994, 3 Sup. Ct. Rep. 292, 609; United States v. Lee, 106 U. S. 196, 207, 27 L. ed. 171, 177, 1 Sup. Ct. Rep. 240; Hans v. Louisiana, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504; Minnesota v. Hitchcock, 185 U. S. 373, 387, 46 L. ed. 954, 962, 22 Sup. Ct. Rep. 650; Oregon v. Hitchcock, 202 U. S. 60, 50 L. ed. 935, 26 Sup. Ct. Rep. 568; Kansas v. United States, 204 U. S. 331, 341, 51 L. ed. 510, 513, 27 Sup. Ct. Rep. 388; Louisville ex rel. New York Guaranty & I. Co. v. Steele, 134 U. S. 230, 33 L. ed. 891, 10 Sup. Ct. Rep. 511; Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; North Carolina v. Temple, 134 U. S. 22, 33 L. ed. 849, 10 Sup. Ct. Rep. 509; Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; Hopkins v. Clemson Agri. College, 221 U. S. 636, 642, 55 L. ed. 890, 894, 35 L.R.A. (N.S.) 243, 31 Sup. Ct. Rep. 654.

The state of Louisiana has no legal interest in the subject-matter.

Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 287, 32 L. ed. 239, 242, 8 Sup. Ct. Rep. 1370; Board of Liquidation v. McComb, 92 U. S. 531, 536, 23 L. ed. 623, 626.

The duty of the defendants in the premises is not ministerial, it is political, and requires the exercise of executive discretion.

Decatur v. Paulding, 14 Pet. 497, 515, 10 L. ed. 559, 568; Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721; Gaines v. Thompson, 7 Wall. 347, 19 L. ed. 62; Litchfield v. The Register (Litchfield v. Richards) 9 Wall. 575, 19 L. ed. 681; United States ex rel. Dunlap v. Black, 128 U. S. 40, 32 L. ed. 354, 9 Sup. Ct. Rep. 12; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 47 L. ed. 1074, 23 Sup. Ct. Rep. 698; Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271.

Mr. Justice Lurton delivered the opinion of the court:

The state of Louisiana has appeared at the bar of this court, through its attorney general, for the purpose of obtaining permission to file this petition against the Honorable William Gibbs McAdoo, Secretary of the Treasury of the United States, and the Honorable C. S. Hamlin, Assistant Secretary of the Treasury of the United States. The United States, by its Solicitor General, has appeared in opposition, contending that the suit is one against the United States, and cannot, therefore, be brought without its consent.

No principle is better established than that the United States may not be sued in the courts of this country without its consent. If, therefore, this be a suit against the United States, the state, though entitled as a state to appeal to the original jurisdiction of this court, must show some authority from Congress under which such a suit may be brought, or leave to file must be denied. United [629] States v. Clarke, 8 Pet. 436, 8 L. ed. 1001; United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Kansas v. United States, 204 U. S. 331, 333, 51 L. ed. 510, 27 Sup. Ct. Rep. 388.

That the United States is not named on the record as a party is true. But the question whether it is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party on the record, but by the effect of the judgment or decree which can here be rendered. Minnesota v. Hitchcock, 185 U. S. 373, 387, 46 L. ed. 954, 962, 22 Sup. Ct. Rep. 650; Kansas v. United States, 204 U. S. 331, 333, 51 L. ed. 510, 27 Sup. Ct. Rep. 388.

The facts, briefly stated, upon which relief is asked, are these:

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The state, as a part of its economic policy, operates with its convicts three sugar plantations and three sugar mills. It is therefore a producer of sugar, which must find a market in competition with that imported from the Republic of Cuba and other sugar exporting countries.

The petition avers that under the instructions of the defendant Treasury officials Cuban sugar, since March 1, 1914, the date upon which the Underwood tariff act became effective, is admitted into the United States at a rate of 1 1-100 cents per pound, being 80 per cent of 75 per cent of the rate of duty on sugar imposed by the Dingley tariff act of 1897 [30 Stat. at L. 151, chap. 11, U. S. Comp. Stat. 1901, p. 1620], which was 1 685-1000 cents per pound. The contention made is that the rate which should be collected on Cuban sugar is the rate imposed by the Dingley tariff bill, less a reduction of 20 per cent, making the net rate legally collectable 1 348-1000 cents per pound, as provided in the commercial treaty between the United States and the Republic of Cuba of December 11, 1902 [33 Stat. at L. 2136], as made effective by the act of Congress of December 17, 1903 (33 Stat. at L. p. 3, chap. 1, U. S. Comp. Stat. Supp. 1911, p. 739), *"or, in the alternative, the duty on all such sugar imported into the United States should be 75 per cent of the Dingley bill rate, or* 1 26-100 *cents per pound, as provided . . . in the Underwood bill of October* 3, 1913, *without any preferential rate whatever being allowed in favor of said Cuban sugar."*

[630] Article 2 of the convention referred to provides that the products of the soil or industry of Cuba not included in article 1 "shall be admitted at a reduction of 20 per cent of the rates of duty . . . as provided by the tariff act of the United States approved July 24, 1897, *or as may be provided by any tariff law of the United States subsequently enacted."* A proviso to article 8 is in these words:

"That while this convention is in force, no sugar imported from the Republic of Cuba, and being the product of the soil or industry of the Republic of Cuba, shall be admitted into the United States at a reduction of duty greater than twenty per centum of the rates of duty thereon as provided by the tariff act of the United States approved July 24, 1897, and no sugar, the product of any other foreign country, shall be admitted by treaty or convention into the United States, while this convention is in force, at a lower rate of duty than that provided by the tariff act of the United States approved July 24, 1897."

The reduction in all sugar duties made by the tariff act of 1913, effective March 1, 1914, is 25 per cent upon the former rate of the Dingley bill, and the same act after May 1, 1916, provides for the free admission of all sugar.

The contention seems to be that the proviso that no sugar shall be admitted into the United States at a reduction of duty greater than 20 per cent of the rate of duty provided by the Dingley act operates to prevent any reduction in favor of Cuban sugar after March 1, 1914, since the reduction made in duty on all imported sugar, including Cuban sugar, is 25 per cent of the Dingley rate, and that, as such reduction is more than the preferential under the Cuban convention, the preferential duty under that convention ceases. Upon the other hand, the contention is that the Underwood act manifested a plain purpose to continue a preferential of 20 per cent upon the reduced duties provided therein, a purpose manifested by the abrogation [631] of the proviso of article 8 which might have interfered with such intent.

It is not the purpose of the court to intimate any opinion upon the merits of the contentions thus presented, and we have only stated the opposing views far enough to enable us to decide whether the suit is or is not one against the United States.

The petition proceeds by averring that the action of the defendant Treasury officials in instructing customs officers to admit Cuban sugar after March 1, 1914, at a reduction of 20 per cent of the rate effective on that date, was "arbitrary, illegal, and unjust . . . and will work great and irreparable injury to your petitioner unless they are restrained and inhibited from demanding and collecting the said illegal charges on Cuban sugar imported into the United States; and another, and higher duty, as shown above, be exacted and collected by said officials on said sugar instead." It is then contended that this direction to continue the allowance of a reduction of 20 per cent upon the reduced rates fixed by the Underwood act is such a flagrant exercise of arbitrary power as to make it the duty of a court of equity, upon application of anyone having a definite and distinct interest, to prohibit the allowance of the reduction and require the collection of the full duty imposed by the Underwood act, or, if any preferential be allowed, it be only upon the higher duty exacted by the act of 1897.

But what definite and distinct interest has the state of Louisiana whether the rate collected be too high or too low? She is a producer of sugar which must be sold in competition with foreign sugar, and the petition avers that the lowering of the duty

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upon Cuban sugar will lower the price for which she must sell her sugar yet unsold. But if Louisiana, as a mere producer and seller of sugar, may review the action of the Secretary of the Treasury in determining the rate to be collected on Cuban sugar, why [632] may not any consumer, though not an importer, make a similar complaint if, in his judgment, the Secretary of the Treasury is exacting a higher rate than justified by the law, thereby enhancing the price he must pay in the market upon imported articles which he uses? Obviously such suits to review the official action of the Secretary of the Treasury in the exercise of his judgment as to the rate which should be exacted under his construction of the tariff acts would operate to disturb the whole revenue system of the government, and affect the revenues which arise therefrom. Such suits would obviously, in effect, be suits against the United States. Louisiana ex rel. New York Guaranty & I. Co. v. Steele, 134 U. S. 230, 33 L. ed. 891, 10 Sup. Ct. Rep. 511; Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; Hopkins v. Clemson College, 221 U. S. 636, 642, 55 L. ed. 890, 894, 35 L.R.A. (N.S.) 243, 31 Sup. Ct. Rep. 654.

There have always been remedies by which an importer may recover an excess rate of duty exacted from him by a customs collector, either by common-law action against the collector, as in Elliott v. Swartwout, 10 Pet. 137, 9 L. ed. 373, or by statute, § 2931, Revised Statutes; act of June 10, 1890 (26 Stat. at L. pp. 131, 137, chap. 407, U. S. Comp. Stat. 1901, p. 1886); act of August 5, 1909 (36 Stat. at L. p. 11, chap. 6, U. S. Comp. Stat. Supp. 1911, p. 741). But the claim that even an importer may complain, by appeal or otherwise, of the exaction of too low a rate of duty, seems not to have been asserted until 1912, when an appeal by an importer against an assessment as too low was sustained by the customs court of appeals, 3 Customs Appeal, 24, upon the theory that one might be aggrieved by an assessment too low as well as by one too high. But this decision did not meet with favor, and the remedy by appeal was confined to cases in which the duty imposed was claimed to be higher than authorized by existing law. Act of October 3, 1913 (38 Stat. at L. chap. 16, § 3, part N).

But we can discover no precedent where even an importer has sought to clog the wheels of government by reviewing the action of the Secretary of the Treasury by a bill such as this.

[633] The duties imposed upon the Secretary of the Treasury in the collection of sugar tariffs are not ministerial. They are executive, and involve the exercise of judgment and discretion. The facts show a situation in which the Secretary of the Treasury was confronted with the necessity of construing the law, and then instructing the customs officers as to whether the 20 per cent preferential duty on Cuban sugar required by the convention and the act of 1903 confirming that treaty had been superseded or in anywise affected by the later provisions of the Underwood act.

By statute originally enacted in 1792 [1 Stat. at L. 280, chap. 37], now § 249, Revised Statutes (U. S. Comp. Stat. 1901, p. 137), it is expressly provided that the Secretary of the Treasury is to "superintend the collection of customs duties as he shall think best." His interpretation of any custom law is made conclusive and binding upon all officers of customs, and upon his successors, until reversed by judicial decision. Rev. Stat. § 2652, U. S. Comp. Stat. 1901, p. 1821; act March 3, 1875 (18 Stat. at L. p. 469, chap. 136, § 2, U. S. Comp. Stat. 1901, p. 137). In the discharge of his duties, semijudicial in character, the Secretary of the Treasury is, by statute, entitled to the opinion of the Attorney General, which, as we may judicially know, was obtained in this matter. Opinion of the Attorney General, Feb. 14, 1914, vol. 30, p. —.

There is a class of cases which hold that if a public officer be required by law to do a particular thing, not involving the exercise of either judgment or discretion, he may be required to do that thing upon application of one having a distinct legal interest in the doing of the act. Such an act would be ministerial only. But if the matter in respect to which the action of the official is sought is one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official intrusted by law with its execution. Interference in such a case would be to interfere with the ordinary functions of government. [634] Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; Kendall v. United States, 12 Pet. 524, 610, 9 L. ed. 1181, 1215; United States v. Schurz, 102 U. S. 378, 26 L. ed. 167, are examples of instances where the duty was supposed to be ministerial. Cases upon the other side of the line are Decatur v. Paulding, 14 Pet. 497, 514, et seq., 10 L. ed. 559, 567; Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; Cunningham v. Macon & B. R. Co. 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609; United States ex rel. Dunlap v. Black, 128 U. S. 40, 32 L. ed. 354, 9 Sup. Ct. Rep. 12; United States ex rel. International Con-

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tracting Co. v. Lamont, 155 U. S. 303, 39 L. ed. 160, 15 Sup. Ct. Rep. 97; Roberts v. United States, 176 U. S. 221, 44 L. ed. 443, 20 Sup. Ct. Rep. 376; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 47 L. ed. 1074, 23 Sup. Ct. Rep. 698; United States ex rel. Ness v. Fisher, 223 U. S. 683, 56 L. ed. 610, 32 Sup. Ct. Rep. 356.

This application for leave to file must be denied.

The Chief Justice took no part in the decision of this case.

Mr. Justice McKenna concurs upon the ground last stated.

PATRICK COLLINS, Plff. in Err.,
v.
COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 634–638.)

Constitutional law — due process of law — indefiniteness of criminal statute — breaking tobacco pool.

A conviction of selling pooled tobacco without the consent of the agent of the pool, contrary to Ky. Stat. § 3941a, is wanting in due process of law because of the uncertainty of the test of the legality of the pool prescribed by Ky. Stat. § 3915 and Ky. Const. 1891, § 198, which, as construed by the state courts, make its validity depend upon whether or not it raises prices above the real value, the necessary consequence, if it does, being to penalize the accused for remaining in the combination, and to punish him, if it does not, for not keeping his tobacco in the pool.

[For other cases, see Constitutional Law, IV. b, 9; Criminal Law, I. a, in Digest Sup. Ct. 1908.]

[No. 35.]

Submitted April 22, 1914. Decided June 22, 1914.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a conviction in the Circuit Court of Mason County, in that state, of selling pooled tobacco without the consent of the agent of the pool. Reversed and remanded for further proceedings.

See same case below, 141 Ky. 564, 133 S. W. 233.

The facts are stated in the opinion.

Note.—On illegal trusts under modern anti-trust acts—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

Messrs. E. L. Worthington and J. M. Collins submitted the cause for plaintiff in error:

A statute which makes the guilt of a person charged with crime hinge on something which is unknowable violates the due process of law clause of the 14th Amendment to the Constitution of the United States.

The decision of this court in United States v. Patten, 226 U. S. 525, 57 L. ed. 333, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141, is decisive of the present case.

Mr. James Garnett, Attorney General of Kentucky, submitted the cause for defendant in error:

The act neither discriminates nor gives exclusive privilege or immunity.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; Otis v. Parker, 187 U. S. 605, 607, 47 L. ed. 323, 327, 23 Sup. Ct. Rep. 168; Elmendorf v. Taylor, 10 Wheat. 152, 6 L. ed. 289; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 568, 55 L. ed. 339, 31 Sup. Ct. Rep. 259.

The standard adopted to determine whether or not there has been a violation of the Kentucky anti-trust law is fixed and certain.

Com. v. International Harvester Co. 131 Ky. 551, 133 Am. St. Rep. 256, 115 S. W. 703, 137 Ky. 668, 126 S. W. 352, 144 Ky. 403, 138 S. W. 248.

The Kentucky statutes do not violate the Federal anti-trust law.

Standard Oil Co. v. United States, 221 U. S. 58, 55 L. ed. 644, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734.

Mr. Justice Hughes delivered the opinion of the court:

The plaintiff in error, Patrick Collins, and other tobacco growers of Mason county, Kentucky, entered into a pooling contract with the Burley Tobacco Society and the Mason County Board of Control whereby they consigned to the society their respective crops of tobacco (raised in the year 1907), to be sold by the society as their agent upon such terms as it should prescribe, but not less than a minimum price. Because Collins disposed of his crop without the consent of the agents of the pool, he was indicted. He demurred to the indictment upon both state and Federal grounds, setting forth as the latter that the statutes under which he was prosecuted contravened the 14th Amendment of the Federal Constitution, in that they denied to him the equal protection of the laws and deprived him of liberty and property with-

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out due process of law, and also were repugnant to the commerce clause and the Federal anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p 3200). The demurrer was overruled and trial was had. There was evidence that the tobacco had been removed by Collins to Cincinnati, Ohio, and there sold; Collins was found guilty and sentenced [636] to pay a fine. The court of appeals having affirmed the judgment (141 Ky. 565, 133 S. W. 233), this writ of error is prosecuted.

The conviction was under the provisions of § 3941a of the Kentucky statutes, being the act of March 21, 1906 (Laws 1906, chap. 117), as amended by the act of March 13, 1908 (Laws 1908, chap. 8). The act of 1906 permitted persons to "pool or combine" the crops of "tobacco, wheat, corn, oats, hay, or other farm products" raised by them "for the purpose of obtaining a better or higher price therefor than could or might be obtained by selling said crops separately or individually." The persons so agreeing were also allowed to select agents to receive and to sell or dispose of the crops, so placed, in order to accomplish the object of the combination. The amendment of 1908, in addition to giving remedies by way of injunction and damages, provided that the agent, "when so selected," should have "the sole right to sell said crop so pooled or combined," that it should be unlawful "for any owner of such crop to sell or dispose of same, and for any person to knowingly purchase the same without the written consent of such agent," and that "upon conviction thereof," a fine should be imposed.

This statute, as construed by the court of appeals of Kentucky, is not to be regarded as an independent enactment, but is to be viewed in connection with the Kentucky anti-trust act of 1890 (Ky. Stat. § 3915), and in the light of § 198 of the Kentucky Constitution adopted in 1891. The statute of 1890 forbade the formation of pools or combinations for the purpose of regulating, controlling, or fixing the price of merchandise or property of any kind. Section 198 of the Constitution provided that it should be the duty of the general assembly from time to time to enact such laws as might be necessary "to prevent all trusts, pools, combinations, or other organizations from combining to depreciate below its real value any article, [637] or to enhance the cost of any article above its real value." It was held that the constitutional provision did not repeal the act of 1890 (Com. v. Grinstead, 108 Ky. 59, 55 S. W. 720, 57 S. W. 471); and in Com. v. International Harvester Co. 131 Ky. 551, 133 Am. St. Rep. 256, 115 S. W. 703, it was further held (approving the views expressed in Owen County Burley Tobacco Soc. v. Brumback, 128 Ky. 137, 107 S. W. 710) that the act of 1906 did not violate § 198 of the Constitution, in as much as it "did not authorize a pool to enhance the cost of crops above their real value," but that the effect of the last-mentioned act, "when considered in connection with the act of 1890, § 198 of the Constitution, and the 14th Amendment to the Constitution of the United States, was to confer, not only upon the farmer, but upon all others, the right to pool their products, skill, or capital for the purpose of obtaining the real value thereof." See Com. v. Hodges, 137 Ky. 233, 241, 125 S. W. 689; International Harvester Co. v. Com. 144 Ky. 405, 410, 138 S. W. 248; 147 Ky. 557, 559, 144 S. W. 1070; 147 Ky. 564, 565, 144 S. W. 1064. Section 3941a is treated as an amendment to § 3915; and, as was said in Com. v. International Harvester Co. 147 Ky. 573, 575, 144 S. W. 1068, the state court "upheld the validity of both statutes, but also held that the last amended or modified the first to the extent of legalizing pools, trusts, combinations, agreements, etc., but that both statutes are so governed and restricted in their operation by § 198, Constitution, as that they cannot be held to allow, but, on the contrary, prohibit, persons, associations, copartnerships, or corporations, engaged or participating in a pool, trust, combination, or agreement, by means thereof, to fix, control, or regulate the price of any commodity or article by raising or depreciating, or attempting to raise or depreciate, it above or below its real value."

As the present prosecution was under this legislation, thus construed as constituting in effect a single act, the [638] question presented is the same as that decided by this court in International Harvester Co. v. Kentucky, 234 U. S. 216, ante, 1284, 34 Sup. Ct. Rep. 853. It was found that the statute in its reference to "real value" prescribed no standard of conduct that it was possible to know; that it violated the fundamental principles of justice embraced in the conception of due process of law in compelling men, on peril of indictment, to guess what their goods would have brought under other conditions not ascertainable.

The Harvester Company was prosecuted for being a party to a price-raising combination; Collins, for breaking a combination agreement and selling outside the pool which he had joined. With respect to each, the test of the legality of the combination was said to be whether it raised prices above the "real value." If it did—in Collins' case—he would be subject to penalties

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for remaining in the combination; if it did not, he would be punishable for not keeping his tobacco in the pool. He was thus bound to ascertain the "real value;" to determine his conduct not according to the actualities of life, or by reference to knowable criteria, but by speculating upon imaginary conditions and endeavoring to conjecture what would be the value under other and so-called normal circumstances with fair competition, eliminating the abnormal influence of the combination itself, and of all other like combinations, and of still other combinations which these were organized to oppose. The objection that the statute, by reason of its uncertainty, was fundamentally defective, was as available to Collins as it was to the Harvester Company.

In this view, it is unnecessary to consider the objection under the commerce clause, or the alleged conflict, as to interstate transactions, with the Federal anti-trust act.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[639] THOMAS MALONE, Plff. in Err.,
v.
COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 639.)

This case is covered by the decision in Collins v. Kentucky, ante, 1510.

[No. 36.]

Submitted April 22, 1914. Decided June 22, 1914.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a conviction of the Circuit Court of Mason County, in that state, of selling pooled tobacco without the consent of the agent of the pool. Reversed and remanded for further proceedings.

See same case below, 141 Ky. 570, 133 S. W. 235.

Messrs. E. L. Worthington and J. M. Collins submitted the cause for plaintiff in error.

Mr. James Garnett, Attorney General of Kentucky, submitted the cause for defendant in error.

For contentions of counsel, see their briefs as reported in Collins v. Kentucky, ante, 1510.

Mr. Justice Hughes delivered the opinion of the court:

This writ of error has been sued out to review a judgment of the court of appeals of Kentucky which affirmed the conviction of Thomas Malone, the plaintiff in error, for selling pooled tobacco without the consent of the agents of the pool, contrary to § 3941a of the Kentucky statutes. 141 Ky. 570, 133 S. W. 235.

The case is the same in all material respects as that of Collins v. Kentucky, decided this day [234 U. S. 634, ante, 1510, 34 Sup. Ct. Rep. 924], with the exception that the tobacco in question was sold by the plaintiff in error within the state of Kentucky. For the reasons stated in the opinion in the Collins Case, the judgment must be reversed.

Judgment reversed.

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[640] ORDER OF ST. BENEDICT OF NEW JERSEY, Petitioner,
v.
ALBERT STEINHAUSER, Individually and as Administrator, etc., of Augustin Wirth, Deceased.

(See S. C. Reporter's ed. 640-652.)

Religious societies — membership — termination.

1. Membership in a monastic brotherhood is not terminated by absence from the Abbey while engaged in pastoral work, where such absence was with the consent of the Abbot, and the absent member was subject to recall at any time.

[Matters as to religious societies, see Religious Societies, in Digest Sup. Ct. 1908.]

Religious societies — vow of poverty — release.

2. A special permission granted by the Abbot of a monastic brotherhood to enable a member to retain and use for charitable purposes the proceeds of his literary labors did not, and could not, release him from the agreement expressed in the constitution of the brotherhood, that the gains and acquisitions of members shall belong to the Order, although its rules recognize the right of a member to keep whatever the Abbot permits him to have.

[Matters as to religious societies, see Religious Societies, in Digest Sup. Ct. 1908.]

Contracts — public policy — vow of poverty.

3. The agreement expressed in the constitution of a monastic brotherhood incorporated by special act, that the gains and acquisitions of members shall belong to the Order, is not opposed to public policy, where the constitution expressly recognizes the privilege of withdrawal; and the Order is therefore entitled to all the personal prop-

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erty left by a deceased member, including that derived from his literary labors.

[For other cases, see Contracts, IV. d, in Digest Sup. Ct. 1908.]

Trusts — in property of member of monastic order.

4. The equitable ownership of the copyrights obtained by a member of a monastic brotherhood, and of the proceeds of his literary labors, vested in the Order under an agreement in the constitution that the gains and acquisitions of members shall belong to the Order, and as to both the member stood in the position of a trustee.

[For other cases, see Trusts, I, d, in Digest Sup. Ct. 1908.]

Limitation of actions — suit to establish trust — when statute begins to run.

5. The six years' limitation prescribed by Minn. Laws 1905, § 4076, for actions to enforce a trust, does not begin to run against a suit by a monastic brotherhood to enforce its equitable ownership under the constitution of the Order in the gains and acquisitions of a member until the latter's death, where there is no repudiation of the trust during his lifetime.

[For other cases, see Limitation of Actions, II. d, in Digest Sup. Ct. 1908.]

[No. 267.]

Argued March 11, 1914. Decided June 22, 1914.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which, reversing a decree of the Circuit Court for the District of Minnesota, directed the dismissal of a bill to establish the title of a monastic brotherhood to personal property left by a deceased member, and the granting of the prayer of a cross bill filed by the administrator of the decedent's estate, asserting ownership in his representative capacity. Decree of Circuit Court of Appeals reversed, and that of Circuit Court affirmed.

See same case below, 114 C. C. A. 249, 194 Fed. 289.

The facts are stated in the opinion.

Mr. Morgan J. O'Brien argued the cause, and, with Messrs. Frederick C. Gladden, Frank W. Arnold, J. Warren Greene, Otto Kueffner, and Albert Schaller, filed a brief for petitioner:

The contract was not void as against public policy.

Egerton v. Brownlow, L. R. 4 H. L. 1, 23 L. J. Ch. N. S. 348, 18 Jur. 71, 24 Eng. Rul. Cas. 118; Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33; Smith v. Du Bose, 78 Ga. 413, 6 Am. St. Rep. 260, 3 S. E. 309; Vidal v. Philadelphia, 2 How. 127, 197, 11 L. ed. 205, 233; Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 30 L.R.A. 193, 17 C. C. A. 62, 36 U. S. App. 152, 70 Fed. 202; Swann v. Swann, 21 Fed. 301; Goesele v. Bimeler, 14 How. 589, 14 L. ed. 554; Gasely v. Separatists Soc. 13 Ohio St. 144; Schriber v. Rapp, 5 Watts, 351, 30 Am. Dec. 327; Waite v. Merrill, 4 Me. 102, 16 Am. Dec. 238; Gass v. Wilhite, 2 Dana, 170, 26 Am. Dec. 446; Schwartz v. Duss, 93 Fed. 529, 43 C. C. A. 323, 103 Fed. 567, 187 U. S. 8, 47 L. ed. 53, 23 Sup. Ct. Rep. 4; Benziger v. Steinhauser, 154 Fed. 151.

An inchoate right to a copyright may be transferred by parol prior to the actual taking out of the copyright.

Black v. Henry G. Allen Co. 9 L.R.A. 433, 42 Fed. 618; Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. Rep. 177; Carte v. Evans, 27 Fed. 861; Pierpont v. Fowle, 2 Woodb. & M. 23, Fed. Cas. No. 11,152; Gould v. Banks, 8 Wend. 562, 24 Am. Dec. 90.

Although the copyright vests in the name of the party who takes it out, he may nevertheless be a mere holder in trust for the legal owner; and in such a case, where another is the actual owner, a court of equity may compel an assignment.

Lawrence v. Dana, 4 Cliff. 1, Fed. Cas. No. 8,136; Little v. Gould, 2 Blatchf. 165, Fed. Cas. No. 8,394; Pulte v. Derby, 5 McLean, 328, Fed. Cas. No. 11,465.

The person who employs another to prepare a work may, because of the circumstances of the employment, become entitled to whatever literary property exists in the production.

Lawrence v. Dana, supra; Carte v. Evans, 27 Fed. 861; Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. Rep. 177.

Messrs. **William H. Pitzer** and **William Hayward** argued the cause and filed a brief for respondent:

The contract for which indorsement is sought in the bill is as to property of which Augustin Wirth died seised, and which forms the subject-matter of this suit, and is contrary to public policy and void.

Hershy v. Clark, 35 Ark. 17, 37 Am. Rep. 4; Bates Mach. Co. v. Bates, 87 Ill. App. 225; Montgomery Palace Stock Car Co. v. Street Stable Car Line, 142 Ill. 315, 31 N. E. 434; McFarland v. Stanton Mfg. Co. 53 N. J. Eq. 649, 51 Am. St. Rep. 647, 33 Atl. 962; Aspinwall Mfg. Co. v. Gill, 32 Fed. 697; Baltimore Humane Impartial Soc. v. Pierce, 100 Md. 520, 70 L.R.A. 485, 108 Am. St. Rep. 450, 60 Atl. 277, 99 Md. 352, 58 Atl. 26.

Mr. Justice Hughes delivered the opinion of the court:

This suit was brought by the Order of St. Benedict of New Jersey, a corporation of

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that state, to establish its title to personal property left by Augustin Wirth, deceased, a member of the Order, who died at Springfield, Minnesota, in December, 1901. The defendant Albert Steinhauser as administrator of the estate of the decedent, holding letters from the probate court of Brown county, Minnesota, filed a cross bill asserting ownership in his representative capacity, and praying discovery and account with respect to whatever part of the estate had come into the complainant's possession. The circuit court entered a decree dismissing the cross bill and granting the relief sought by the complainant's bill. 179 Fed. 137. The circuit court of appeals reversed this decree, directing the dismissal of the original bill and the granting of the prayer of the cross bill. 114 C. C. A. 249, 194 Fed. 289. Certiorari was allowed.

The monastic brotherhood known as the Order of St. Benedict was established by St. Benedict in the early part of the sixth century at Subiaco, Italy, whence it spread over western Europe. It was brought to the United States in 1846. The members of the brotherhood follow what is known as "the rule of St. Benedict," a collection [642] of mandates essentially unchanged from the beginning. The vows are those of obedience, stability, chastity, and poverty.

We are not concerned in the present case with any question of ecclesiastical requirement or monastic discipline. The question is solely one of civil rights. The claim in suit rests upon the constitution of the complainant corporation, and the obligations inherent in membership.

The Order of St. Benedict of New Jersey was incorporated in 1868 by special act of the legislature of that state. The incorporators were described as "being a society of religious men, living in community, and devoted to charitable works and the education of youth." The corporation was empowered to hold property and to make by-laws for the government of the Order, provided that these should not be repugnant to the Constitution of the United States or of the state of New Jersey, that the clear yearly income of the real estate should not exceed a sum stated, and that no one should remain an incorporator "except regular members of said religious society living in community, and governed by the laws thereof." Under this charter the Order adopted a constitution, among the provisions of which are the following:

"Section 11. Membership is lost at once:

"1. By being dismissed according to the disciplinary statutes of the Order of St. Benedict of New Jersey, approved of by Pope Pius IX. for the American Cassinese Congregation of Benedictines.

"2. By voluntary leaving the Order for any purpose whatsoever.

"3. By joining any other order or secret society, or any other religious denominations.

"Section 12. Since the Order of St. Benedict of New Jersey is solely a charitable institution, the real estate of said order and the individual earnings of its members are and must be considered as common property of the [643] Order of St. Benedict of New Jersey, from which the members of said Order derive their support, and the balance of which income and property should serve for the following up and carrying out of the charitable objects of the Order.

"It is therefore agreed upon by all the members of the said Order of St. Benedict of New Jersey that no member can or will claim at any time or under any circumstances more than their decent support for the time for which they are members of the Charter of the Order of St. Benedict of New Jersey, and no further.

"And moreover, that each member individually pledges himself to have all property which he now holds or hereafter may hold in his own name conveyed as soon as possible to the legal title of the Order of St. Benedict of New Jersey."

Augustin Wirth was born in Bavaria in 1828. He came to this country in 1851; and, in the next year, he took the solemn vows of the Order at St. Vincent's Abbey in Pennsylvania, and was ordained to the priesthood. For a few years he had charge of a church at Greenburgh, Pennsylvania, near St. Vincent's, and in 1857 he went to Kansas, where he established a college and a church which afterwards became an abbey. He continued his work in Kansas until 1868, and then was sent to Minnesota, where he remained until 1875. He then resumed his pastorate at Greenburgh, Pennsylvania, and later had charge of a parish at Elizabeth, New Jersey, until 1887. It is evident that while in Kansas he had joined the monastery of St. Benedict there established, and in 1887, with the permission of both Abbots, he transferred his stability to St. Mary's Abbey in Newark, New Jersey, the home of the complainant, the New Jersey Order, of which he thus became a member. He remained continuously at this Abbey for about two years, until 1889; he was in ill-health and was taken care of by the Order. He was then sent to a church in Wilmington, Delaware, and after a few [644] months he returned to his pastorate in Elizabeth, New Jersey, in which he continued until 1897. After traveling for some time in Europe for his health, visiting Rome and various

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monasteries, he took a parish, in 1898, at Springfield, Minnesota, with the requisite permission *ad tempus* from the Abbot of St. Mary's; and there he remained until his death. At the request of the New Jersey Abbot he was buried in the cemetery of the Benedictine Order in Minnesota. The circuit court found that his membership in the complainant Order continued to the last, and this finding was not disturbed by the circuit court of appeals. We regard the fact as satisfactorily established. His absence from the Abbey when engaged in pastoral work was upon the consent of the Abbot, and he was subject to recall at any time.

Father Wirth published many works on religious subjects. He obtained copyrights for his books, and made his contract with the publishers, in the name of "Augustine Wirth, O. S. B." The property here in question consists chiefly of the proceeds received from sales of these books (including notes and mortgages in which they had been invested), credits on account of sales made before and after his death, and the copyrights. He received the royalties personally during his lifetime; and after his death, until October 17, 1906 (when suit was brought against the publishers by the administrator), the accruing royalties were paid to the complainant. The New Jersey Order also, through the Abbot of St. John's Abbey in Minnesota, collected certain sums on outstanding notes held by the decedent, and paid therefrom the decedent's debts.

It is clear that, according to the principles of the complainant's organization, Father Wirth was not entitled to retain for his own benefit either the moneys which he received for his services in the various churches with which he was connected, or those which he derived from [645] the sale of his books. By the explicit provision of the constitution of the complainant (§ 12), it was a necessary consequence of his continued membership, that his gains—from whatever source—belonged to it, and that, as against the complainant, he could not assert title to the property which he received. The claim of the Order, based upon this conception of its rights, is resisted upon the grounds, (1) that the decedent had the permission of the Abbot to retain, as his own property, the proceeds of the sales of his books, and (2) that the obligation sought to be enforced by the complainant is void as being against public policy.

1. While there was evidence that Father Wirth was required to account to the Abbot for the salary and perquisites received in his church work, it appeared that the income from his books was treated in a different manner. This income he was allowed to retain and use. When he joined the complainant, in 1887, he did not make a transfer of any property to the Order, although already he had some property as a result of his literary labors. The evidence showed that he made loans and investments; and from the moneys in his hands, he paid his personal expenses, including his outlays on his visit to Europe. Because of his going to Rome without leave, and his expenditures on this trip, he was admonished by the Abbot Primate, O. S. B., who had already written to the Abbot of St. Mary's that Father Wirth should be required to account. But no such account was given, and it would seem that such disagreements as arose between the decedent and his ecclesiastical superiors in this country related to church moneys, and not to the proceeds of book sales. The circuit court of appeals, disagreeing with the finding of the circuit court, concluded that Father Wirth was permitted by the Abbot of St. Vincent's, and by the complainant's Abbot, to retain these proceeds as his own property.

[646] It is undisputed that the decedent did have a special permission with respect to the use of this income. Originally given by the Abbot of St. Vincent's, it was continued by the Abbot of St. Mary's. It was given in recognition of the fact that his literary work was in addition to the duties which he was normally required to perform. But, as we think, the conclusion of the court below does not give proper weight to the testimony as to the nature and scope of the privilege thus accorded. It was explicitly testified by the Abbot that Father Wirth was permitted to keep the moneys in question, not as his own, but to have their use for charitable purposes with the permission of his superiors. It was this permission which was originally given and which the complainant's Abbot renewed. This testimony was not controverted, and, in view of the constitution of the Order, we find no ground for treating the permission as being of a different character. It is said that it does not appear how the decedent, while in Minnesota, for example, could have expended the money for the charitable purposes of the Order in New Jersey. But the purposes of this Order were broadly charitable and religious; the decedent prosecuted his educational and religious work with the Abbot's consent, and the use of these moneys for charitable purposes, wherever he was located for the time, might well be in furtherance of the objects of the Order. It may have been the concession of a special privilege to permit the decedent to act directly in the distribution of the moneys which he had earned by his additional labors, instead of turning them over to the head of the Order, but we can-

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not say that it was a permission without restriction, or one which essentially altered his relation to the Order and his fundamental duty while he remained a member of it.

On the contrary, we agree with the circuit court, not only in its finding of fact that the permission was limited as stated, but also in its holding that, in view of the basic [647] law of the organization, there is no warrant for the conclusion that the Abbot had any authority to allow Father Wirth to assert an independent title, or to hold the property as absolutely his own. It is said that the "Rule of St. Benedict" recognizes the right of the member of the Order to keep whatever the Abbot permits him to have. But this plainly refers to the necessities of life, and not to accumulations in direct antagonism to the principles of the society. Whatever indulgence may have been shown to the decedent with respect to the submission of appropriate accounts, it cannot be said that while his membership continued he had, or could have, the privilege of accumulating an individual estate for his own benefit and free from his obligations to the Order. This could not but be regarded as violative of the constitution of the complainant, and beyond the competency of its official head to grant.

2. We are thus brought to the question whether the requirement, which lies at the foundation of this suit, is void as against public policy; that is, whether, by reason of repugnance to the essential principles of our institutions, the obligation, though voluntarily assumed, and the trust arising from it, cannot be enforced. In support of this view, it seems to be premised that a member of the Order can be absolved from his vows only by the action of the Head of the Church; and that unless the requisite dispensation is thus obtained the member is bound for life in temporal, as well as in spiritual, affairs. This, it is said, is the necessary import of testimony given by the Abbot. It is thus assumed that the vows in connection with the "Rule" bind the member in complete servitude to the Order for life, or until the Head of the Church absolves him from his obligations; and it is concluded that an agreement for such a surrender, being opposed to individual liberty and to the inherent right of every person to acquire and hold property, is unenforceable in the civil [648] courts, and cannot form the basis for an equitable title in the complainant.

This argument, we think, disregards the explicit provision of the complainant's constitution as to voluntary withdrawal. It overlooks the distinction between civil and ecclesiastical rights and duties; between the Order of St. Benedict of New Jersey, a corporation of that state, and the monastic brotherhood subject to church authority; between the obligation imposed by the corporate organization and religious vows. As we have said, the question here is not one of canon law or ecclesiastical polity. The requirement of complainant's constitution must be read according to its terms, and its validity must be thus determined. Granted that it is to be examined in the light of that to which it refers, still, obligations which are inconsistent with its express provisions cannot be imported into it. This constitution, as already stated, definitely provides: "Membership is lost at once:— 2. By voluntary leaving the Order for any purpose whatsoever" (§ 11.) This language cannot be taken to mean other than what it distinctly says. So far as the corporation, and the civil rights and obligations incident to membership therein, are concerned, it leaves no doubt that the member may voluntarily leave the Order at any time. His membership in the corporation, and the obligation he assumes, are subject to that condition. If he severs his connection with the corporation, it cannot be heard to claim any property he may subsequently acquire. His obligation runs with his membership, and the latter may be terminated at will.

With this privilege of withdrawal expressly recognized, we are unable to say that the agreement expressed in § 12 of the complainant's constitution, that the gains and acquisitions of members shall belong to the corporation, must be condemned. These go to the corporation in exchange for the privileges of membership, and [649] to further the common purpose to which the members are devoted. No constitutional right is invaded and no statutory restriction is transgressed. The legislature of New Jersey, which, subject to constitutional inhibition, is the arbiter of the public policy of that state, granted the charter by special act to the Benedictine Society of "religious men living in community," and it cannot be said that the constitution adopted by the Order was repugnant to the charter provisions, or exceeded the authority plainly intended to be conferred. It would seem to be clear that the obligation assumed, instead of being opposed to the public policy of the state where it was created, was directly sanctioned.

The validity of agreements providing for community ownership with renunciation of individual rights of property during the continuance of membership in the community, where there is freedom to withdraw, has repeatedly been affirmed. The case of

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Goesele v. Bimeler, 14 How. 589, 14 L. ed. 554, related to a religious society called Separatists. By an agreement made in 1819, the members of the society agreed to unite in a "communion of property." They renounced "all individual ownership of property, present or future, real or personal." Amendatory articles of like import were signed in 1824. As to these agreements, the court said: "The articles of 1819 and 1824 are objected to as not constituting a contract which a court of equity would enforce. . . . What is there in either of these articles that is contrary to good morals, or that is opposed to the policy of the laws? An association of individuals is formed under a religious influence, who are in a destitute condition, having little to rely on for their support but their industry; and they agree to labor in common for the good of the society, and a comfortable maintenance for each individual; and whatever shall be acquired beyond this shall go to the common stock. This contract provides for every member of the [650] community, in sickness and in health, and under whatsoever misfortune may occur. . . . By disclaiming all individual ownership of the property acquired by their labor, for the benefits secured by the articles, the members give durability to the fund accumulated, and to the benevolent purposes to which it is applied. No legal objection is perceived to such a partnership." (Id. pp. 606, 607.) In Schwartz v. Duss, 187 U. S. 8, 47 L. ed. 53, 23 Sup. Ct. Rep. 4, the controversy related to the property of the Harmony Society, a community in Pennsylvania. It was said that the cardinal principle of the society was "self-abnegation" which was manifested "not only by submission to a religious head, but by a community instead of individual ownership of property, and the dedication of their labor to the society." It had been held by the supreme court of Pennsylvania that the agreements constituting the community were not offensive to the public policy of that state (Schriber v. Rapp, 5 Watts, 351, 30 Am. Dec. 327), and, as to this, it was said by this court: "The supreme court observed that the point made against the articles as being against public policy was attended with no difficulty, and Chief Justice Gibson said for the court: 'An association for the purposes expressed is prohibited neither by statute nor the common law.'" (Id. p. 26.) In Burt v. Oneida Community, 137 N. Y. 346, 19 L.R.A. 297, 33 N. E. 307, in describing the character of that society, the court of appeals of New York said that its main purpose was the "propagandism of certain communistic views as to the acquisition and enjoyment of property" and "the endeavor to put into practical operation an economic and industrial scheme which should embody and illustrate the doctrines which they held and inculcated." "Necessarily" said the court, "the basic proposition of such a community was the absolute and complete surrender of the separate and individual rights of property of the persons entering it; the abandonment of all purely selfish pursuits, and the investiture of the title to their [651] property and the fruits of their industry in the common body, from which they could not afterwards be severed or withdrawn except by unanimous consent. It was fashioned according to the pentecostal ideal, that all who believed should be together and have all things common. It was intended to be in fact, as they frequently styled themselves, but a single family upon a large scale, with only one purse, where self was to be abjured and the general good alone considered." The court, viewing it solely as a business undertaking, held that the organization "was not prohibited by any statute, or in contravention of any law regulating the possession, ownership, or tenure of property." See also Speidel v. Henrici, 120 U. S. 377, 30 L. ed. 718, 7 Sup. Ct. Rep. 610; Gasely v. Separatists Soc. 13 Ohio St. 144; Waite v. Merrill, 4 Me. 102, 16 Am. Dec. 238; Gass v. Wilhite, 2 Dana, 170, 26 Am. Dec. 446; State v. Amana Soc. 132 Iowa, 304, 109 N. W. 894, 8 L.R.A.(N.S.) 909, note, 11 Ann. Cas. 236, note.

It is said that in these cases, the contracts had been fully performed, and that the effort was made either to partition or distribute the property of the society, or to recover the value of property which had been actually conveyed, or services which had been rendered to it. But the validity of the agreements there in question, against the objection based upon public policy, was distinctly recognized.

In the present case, there was no infringement of Father Wirth's liberty or right to property. He did not withdraw from the Order. He had agreed, by accepting membership under the complainant's constitution, that his individual earnings and acquisitions, like those of other members, should go into the common fund, and, except as required for the maintenance of the members, should be used in carrying out the charitable objects of the Order. It is not unlikely that the copyrights upon his books derived their commercial value largely, if not altogether, from his membership. Certainly, the equitable ownership of these copyrights, by virtue of his obligation, vested in the complainant, [652] and the moneys in question when received became in equity its property and were subject to its disposi-

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tion. As to both, Father Wirth stood in the position of a trustee.

The further objection that the claim is barred by the statute of limitations was held by the circuit court to be untenable, and we agree with that view. The applicable limitation is six years (Minn. Rev. Laws 1905, § 4076), and the bill was filed within six years after Father Wirth's death. There is no such clear evidence of repudiation of the trust as would warrant the conclusion that the statute began to run at an earlier date.

The decree of the Circuit Court of Appeals is reversed and that of the Circuit Court is affirmed.

It is so ordered.

ARTHUR L. SELIG, Plff. in Err.,
v.
CHARLES E. HAMILTON, as Receiver of Evans, Johnson, Sloane Company.

(See S. C. Reporter's ed. 652–667.)

Bankruptcy — effect on state laws — stockholders' liability.

1. Bankruptcy proceedings against a corporation do not stand in the way of a resort to the method prescribed by Minn. Rev. Laws 1905, §§ 3184–3190, of enforcing the constitutional liability of a stockholder for the corporate debts.

[For other cases, see Bankruptcy, I., in Digest Sup. Ct. 1908.]

Judgment — conclusiveness — nonresident stockholders' liability.

2. A nonresident notified only by publication and mailing of notice of the proceedings under Minn. Rev. Laws 1905, §§ 3184–3190, enacted to make more effective the constitutional liability of stockholders for the corporate debts, is not concluded in an action brought against him in another jurisdiction by the receiver for the recovery of the amount assessed against him as a stockholder upon any issue as to the transfer of his stock or the good faith with which the transfer was made, but may litigate any matter which bears upon the extent or duration of his stockholding or any other personal defense.

[For other cases, see Judgment, VI. b, 2, in Digest Sup. Ct. 1908.]

Corporations — stockholders' liability — transfer of stock.

3. The authority of the Minnesota courts under Minn. Rev. Laws 1905, §§ 3184–3190, enacted to make more effective the constitutional liability of stockholders for the corporate debts, cannot be deemed to be confined to proceedings to assess existing stockholders, in view of the express terms of such law, making it applicable to cases of liability arising upon shares "at any time held or owned by such stockholders," and providing for the making of an assessment against "all parties liable as stockholders."

[For other cases, see Corporations, IX. e, 2, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — enforcing liability of nonresident stockholders.

4. A nonresident former stockholder in a domestic corporation is not denied rights under the Federal Constitution by Minn. Rev. Laws 1905, §§ 3184–3190, enacted to make more effective the constitutional liability of stockholders for the corporate debts, because under such statute he may be assessed for the corporate debts antedating the transfer, in proceedings in which he is represented by the corporation, and of which he is notified only by publication and mailing of notice.

[For other cases, see Constitutional Law, 702, 703, in Digest Sup. Ct. 1908.]

Judgment — conclusiveness — nonresident stockholders' liability.

5. The determination of the court upon the evidence before it in the proceedings under Minn. Rev. Laws 1905, §§ 3184–3190, enacted to make more effective the constitutional liability of stockholders for the corporate debts, with respect to the amount of the assessment to be made upon former stockholders for the purpose of providing for the corporate debts incurred while they held the stock, is conclusive in a suit brought by the receiver in another jurisdiction to recover the amount of the assessment from a former stockholder notified of the original proceedings only by publication and mailing of notice.

[For other cases, see Judgment, VI. b, 2, in Digest Sup. Ct. 1908.]

Judgment — enforcing stockholders' liability — scope — former stockholders.

6. All stockholders, past or present, who may be actually liable for the corporate debts, are embraced by the order made in the

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NOTE.—On the relation of bankrupt law to assignments and insolvency proceedings under state laws—see note to State ex rel. Strohl v. Superior Ct. 45 L.R.A. 177.

On enforcing stockholders' liability outside of state of incorporation—see notes to Cushing v. Perot, 34 L.R.A. 737, and Edwards v. Schillinger, 33 L.R.A.(N.S.) 895.

On effect of assessment on stockholders, made under order of court in another state as *res judicata*—see note to Mutual F. Ins. Co. v. Phœnix Furniture Co. 34 L.R.A. 694.

On notice and hearing required, generally, to constitute due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194; and Ulman v. Baltimore, 11 L.R.A. 225.

As to what service of process is sufficient, generally, to constitute due process of law—see note to Pinney v. Providence Loan & Invest. Co. 50 L.R.A. 577.

On conflict of laws as to limitation of action to enforce liability of stockholder—see notes to Brunswick Terminal Co. v. National Bank, 48 L.R.A. 637, and Platt v. Wilmot, 48 L. ed. U. S. 809.

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proceedings under Minn. Rev. Laws 1905, §§ 3184–3190, to enforce the constitutional liability of stockholders for the corporate debts, where the receiver's petition, although setting forth as existing stockholders the persons alleged to be liable, and averring that some of them were the owners of the beneficial interest, having transferred their stock to avoid liability, manifestly invoked the jurisdiction of the court for the making of such assessment as it might consider necessary in order to enforce the stockholders' liability as it actually existed with respect to the corporate debts remaining unpaid, and the order of assessment by its terms purports to include "each and every share of the capital stock" and "the persons or parties liable as stockholders."

[For other cases, see Judgment, III. a, 2, in Digest Sup. Ct. 1908.]

Judgment — conclusiveness — nonresident stockholders' liability.

7. A former stockholder in a Minnesota corporation cannot resist the recovery in an action brought by the receiver in another jurisdiction to enforce his liability under Minn. Rev. Laws 1905, §§ 3184–3190, for the corporate debts incurred prior to the transfer by him of his stock, because no separate and distinct assessment based upon the debts, antedating such transfer, was made by the Minnesota court when levying the assessment in conformity with the statute, but he must look to that court for the adjustment of such equities as he may have, the assessment order being a provisional one representing the best judgment of the court upon the evidence before it as to the amount of the assessment required, and directing that all moneys collected from the stockholders by the receiver shall be held until the further order of the court.

[For other cases, see Judgment, VI. b, 2, in Digest Sup. Ct. 1908.]

Evidence — judgment — corporate indebtedness.

8. Competent evidence that there are corporate debts remaining unpaid which antedated the transfer of stock by a former stockholder was furnished in a suit against him to enforce in a foreign jurisdiction his liability under Minn. Rev. Laws 1905, §§ 3184–3190, for the corporate debts incurred prior to such transfer, by decrees entered in the parent suit in Minnesota, which determined the amount of the outstanding claims and when they arose, and showed that there were debts in excess of the amount demanded of defendant, which arose before his shares were transferred.

[For other cases, see Evidence, IV. k; XII. h, in Digest Sup. Ct. 1908.]

Limitation of actions — enforcing stockholders' liability in foreign jurisdiction.

9. The three years' limitation prescribed by N. Y. Code Civ. Proc. § 394, for actions against a director or stockholder of a moneyed corporation or banking association to recover a penalty or forfeiture imposed or to enforce a liability created by common law or by statute, does not govern a suit to enforce the liability of a stockholder in a foreign mercantile corporation.

[For other cases, see Limitation of Actions, 295, 302, in Digest Sup. Ct. 1908.]

[No. 361.]

Arugued May 6, 1914. Decided June 22, 1914.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment enforcing the liability of a stockholder in a foreign corporation. Affirmed.

See same case below, 195 Fed. 153.

The facts are stated in the opinion.

Mr. Abram I. Elkus argued the cause, and, with Mr. Wesley S. Sawyer, filed a brief for plaintiff in error:

This court has jurisdiction.

Converse v. Hamilton, 224 U. S. 243, 252, 56 L. ed. 749, 752, 32 Sup. Ct. Rep. 415, Ann. Cas. 1913D, 1292; Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 51 L. ed. 345, 27 Sup. Ct. Rep. 236.

The sole determination of the Minnesota court is that an assessment, on a basis of all debts, of a specified percentage on the capital stock, will not more than pay the corporate debts. No other question was considered by the court in making the order of assessment.

Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 125, 83 N. W. 36; Bernheimer v. Converse, 206 U. S. 516, 528, 51 L. ed. 1163, 1173, 27 Sup. Ct. Rep. 755; Tiffany v. Giesen, 96 Minn. 488, 105 N. W. 901; Swing v. Humbird, 94 Minn. 1, 101 N. W. 938; Hamilton v. Loeb, 108 C. C. A. 109, 186 Fed. 7.

Defendant is liable only ratably on an assessment based on debts which existed on September 5, 1904, and are unrenewed, and based on all stockholders liable to contribute towards such debts. No such assessment has been made.

McDonald v. Dewey, 202 U. S. 510, 50 L. ed. 1128, 26 Sup. Ct. Rep. 731, 6 Ann. Cas. 419; Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 125, 83 N. W. 36; Harper v. Carroll, 66 Minn. 487, 69 N. W. 610, 1069; Harpold v. Stobart, 46 Ohio St. 397, 15 Am. St. Rep. 618, 21 N. E. 637; Willius v. Mann, 91 Minn. 404, 98 N. W. 341, 867; Alsop v. Conway, 110 C. C. A. 366, 188 Fed. 568.

The Minnesota court did not have jurisdiction to render a decree with the effect, as construed by the trial court, of adjudging the liability of defendant.

Bernheimer v. Converse, 206 U. S. 516,

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528, 532, 51 L. ed. 1163, 1173, 1175, 27 Sup. Ct. Rep. 755; Converse v. Hamilton, 224 U. S. 243, 256, 260, 56 L. ed. 749, 754, 755, 32 Sup. Ct. Rep. 415, Ann. Cas. 1913D, 1292; Great Western Teleg. Co. v. Purdy, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; Commercial Bank v. Azotine Mfg. Co. 66 Minn. 413, 69 N. W. 217; Commonwealth Mut. F. Ins. Co. v. Hayden Bros. 60 Neb. 636, 83 Am. St. Rep. 545, 83 N. W. 922; Howarth v. Lombard, 175 Mass. 570, 49 L.R.A. 301, 56 N. E. 888; Ward v. Joslin, 186 U. S. 142, 46 L. ed. 1093, 22 Sup. Ct. Rep. 807; Schrader v. Manufacturers' Nat. Bank, 133 U. S. 67, 33 L. ed. 564, 10 Sup. Ct. Rep. 238; Mutual F. Ins. Co. v. Phœnix Furniture Co. 108 Mich. 170, 34 L.R.A. 694, 62 Am. St. Rep. 693, 66 N. W. 1095; Covell v. Fowler, 144 Fed. 535; Clark v. Wells, 203 U. S. 164, 51 L. ed. 138, 27 Sup. Ct. Rep. 43; French v. Busch, 189 Fed. 483.

The order of assessment cannot be conclusive upon points other than those properly before the court and necessarily decided.

Stokes v. Foote, 172 N. Y. 341, 65 N. E. 176.

The action is barred by the statute of limitations contained in § 394 of the New York Code.

Staten Island Midland R. Co. v. Hinchliffe, 170 N. Y. 473, 63 N. E. 545; Morgan v. Hedstrom, 164 N. Y. 224, 58 N. E. 26; Shepard v. Fulton, 171 N. Y. 184, 63 N. E. 966.

The Supreme Court follows that rule of construction of the statute of limitations of a state which is adopted by the state courts.

Balkam v. Woodstock Iron Co. 154 U. S. 177, 187, 38 L. ed. 953, 956, 14 Sup. Ct. Rep. 1010.

The Supreme Court, on ascertaining the construction of the state court, would apply that construction, regardless of its own prior decisions.

Green v. Neal, 6 Pet. 291, 8 L. ed. 402; Fairfield v. Gallatin County, 100 U. S. 47, 54, 25 L. ed. 544, 546; Bauserman v. Blunt, 147 U. S. 647, 653, 37 L. ed. 316, 318, 13 Sup. Ct. Rep. 466; Moores v. Citizens' Nat. Bank, 104 U. S. 625, 629, 26 L. ed. 870, 872.

An expression as to the construction of a state statute by the highest court of the state is presumed to be made with due consideration.

Manhattan L. Ins. Co. v. Albro, 62 C. C. A. 213, 127 Fed. 281; San Diego Flume Co. v. Souther, 32 C. C. A. 548, 61 U. S. App. 134, 90 Fed. 164.

Mr. James E. Trask argued the cause, and, with Messrs. E. H. Morphy and John J. Clark, filed a brief for defendant in error:

Under the laws of Minnesota a stockholder cannot change or affect his relation or liability as a stockholder as to prior existing debts by any transfer of his stock.

Gunnison v. United States Invest. Co. 70 Minn. 292, 73 N. W. 149.

The liability of all stockholders and all parties liable, whether as past or present stockholders, must be enforced, if at all, in a single winding-up action and assessment proceeding.

Arthur v. Willius, 44 Minn. 413, 46 N. W. 851; Allen v. Walsh, 25 Minn. 543; Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 125, 83 N. W. 36; Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; Woodsworth v. Bowles, 61 Kan. 577, 60 Pac. 331; Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757.

The Minnesota statute for the better enforcement of the stockholders' liability by its terms applies equally to past and present stockholders.

Tiffany v. Giesen, 96 Minn. 488, 105 N. W. 901; Gunnison v. United States Invest. Co. 70 Minn. 292, 73 N. W. 149.

By the order of assessment the court intended to and did include the defendant Selig among those adjudged subject to the assessment under the general designation of "each and every person or party liable."

Hamilton v. Levison, 198 Fed. 446, affirmed in 122 C. C. A. 386, 204 Fed. 72; Hamilton v. Titus, 185 Fed. 144; Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 127, 83 N. W. 36.

As the Minnesota court had jurisdiction over all parties subject to a stockholder's liability, whether past or present stockholders, and exercised that jurisdiction in the present case, the assessment itself establishes the existence of the indebtedness which made it necessary, since the statute provides that the assessment shall be conclusive as to the necessity therefor and amount thereof.

Great Western Teleg. Co. v. Purdy, 162 U. S. 329, 337, 40 L. ed. 986, 990, 16 Sup. Ct. Rep. 810; Gunnison v. United States Invest. Co. 70 Minn. 292, 73 N. W. 149; Hawkins v. Glenn, 131 U. S. 319, 332, 33 L. ed. 184, 192, 9 Sup. Ct. Rep. 739.

Under the Minnesota statute the assessment is a judgment in a proceeding in which the court had jurisdiction, without personal service, to bring before it stockholders who had transferred their stock, for the

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purpose of determining whether indebtedness existed for which past stockholders remained liable, precisely as it had jurisdiction to bring before it present stockholders for the purpose of determining whether indebtedness existed for which present stockholders remained liable.

Neff v. Lamn, 99 Minn. 117, 108 N. W. 849; Hamilton v. Levison, 198 Fed. 444, 122 C. C. A. 386, 204 Fed. 72; Hamilton v. Simon, 178 Fed. 130; Hamilton v. Titus, 185 Fed. 140; Langworthy v. Garding, 74 Minn. 325, 77 N. W. 207; Howarth v. Lombard, 175 Mass. 570, 49 L.R.A. 301, 56 N. E 888; Howarth v. Ellwanger, 86 Fed. 54; Hawkins v. Glenn, 131 U. S. 319, 331, 33 L. ed. 184, 191, 9 Sup. Ct. Rep. 739; Glenn v. Liggett, 135 U. S. 533, 34 L. ed. 264, 10 Sup. Ct. Rep. 867; Sanger v. Upton, 91 U. S. 56, 23 L. ed. 220; Burget v. Robinson, 51 C. C. A. 488, 113 Fed. 669, 59 C. C. A. 260, 123 Fed. 262, 188 U. S. 739, 47 L. ed. 677, 23 Sup. Ct. Rep. 848; Spargo v. Converse, 112 C. C. A. 337, 191 Fed. 823; Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 125, 83 N. W. 36; Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755.

The real owner of stock held by him in the name of a dummy is properly charged in an action at law with the statutory liability.

Davis v. Stevens, 17 Blatchf. 263, Fed. Cas. No. 3,653; Hunt v. Reardon, 93 Minn. 375, 101 N. W. 606; Rankin v. Fidelity Ins. Trust & S. D. Co. 189 U. S. 242, 47 L. ed. 792, 23 Sup. Ct. Rep. 553; Ohio Valley Nat. Bank v. Hulitt, 204 U. S. 162, 51 L. ed. 423, 27 Sup. Ct. Rep. 179; Marcy v. Clark, 17 Mass. 330.

The assessment is not subject to be attacked collaterally on the ground that no facts are found which show the defendant to be subject to the full assessment of $100 per share.

Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 125, 83 N. W. 36; Levison v. Hamilton, 122 C. C. A. 386, 204 Fed. 72; Kennedy v. Gibson, 8 Wall. 498, 505, 19 L. ed. 476, 478; Keyser v. Hitz, 133 U. S. 138, 33 L. ed. 531, 10 Sup. Ct. Rep. 290; Bushnell v. Leland, 164 U. S. 684, 41 L. ed. 598, 17 Sup. Ct. Rep. 209; Casey v. Galli, 94 U. S. 673, 24 L. ed. 168; Converse v. Hamilton, 224 U. S. 243, 56 L. ed. 749, 32 Sup. Ct. Rep. 415, Ann. Cas. 1913D, 1292.

Neither the question of the existence of the allowed indebtedness which arose prior to the alleged transfer by defendant of his stock, nor that of the bona fides of such alleged transfer, was jurisdictional.

Peninsular Sav. Bank v. Ward, 118 Mich. 97, 76 N. W. 161, 79 N. W. 912; Reinach v. Atlantic & G. W. R. Co. 58 Fed. 42, 12 Enc. Pl. & Pr. 129, 197; United States v. Arredondo, 6 Pet. 691, 709, 8 L. ed. 547, 554; Figge v. Rowlen, 185 Ill. 240, 57 N. E. 195; Fisher v. Bassett, 9 Leigh, 131, 33 Am. Dec. 227; Wright v. Douglass, 10 Barb. 99; Van Fleet, Collateral Attack, § 60.

The statute, in conferring upon the Minnesota court jurisdiction without personal service, to bring before it in the assessment proceedings stockholders who have transferred their stock, for the purpose of considering proofs as to what parties are liable or subject to an assessment, and adjudging an assessment against them, is constitutional.

Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 125, 83 N. W. 36; Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; Levison v. Hamilton, 122 C. C. A. 386, 204 Fed. 72; Tiffany v. Giesen, 96 Minn. 490, 105 N. W. 901; Gunnison v. United States Invest. Co. 70 Minn. 292, 73 N. W. 149; Hyatt v. Anderson, 25 Ky. L. Rep. 132, 74 S. W. 1094; White v. Green, 105 Iowa, 176, 74 N. W. 929; Brown v. Hitchcock, 36 Ohio St. 667; Wyman v. Bowman, 62 C. C. A. 189, 127 Fed. 257; Jackson v. Meek, 87 Tenn. 69, 10 Am. St. Rep. 620, 9 S. W. 225.

The constitutional liability of the stockholders did not pass to the trustee in bankruptcy, and the discharge in bankruptcy did not affect the right of creditors to enforce the liability by means of an order or decree of assessment in the state court.

Re People's Live Stock Ins. Co. 56 Minn. 185, 57 N. W. 468; Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 125, 83 N. W. 36; Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; Way v. Barney, 116 Minn. 285, 38 L.R.A.(N.S.) 648, 133 N. W. 801, Ann. Cas. 1913A, 719; Marshall Paper Co. v. Train, 43 C. C. A. 38, 102 Fed. 872; Hill v. Harding, 130 U. S. 699, 32 L. ed. 1083, 9 Sup. Ct. Rep. 725; Firestone Tire & Rubber Co. v. Agnew, 194 N. Y. 169, 24 L.R.A. (N.S.) 628, 86 N. E. 1116, 16 Ann. Cas. 1150.

The action was commenced within the six years' limitation prescribed by N. Y. Code Civ. Proc. § 382, and the cause of action is not barred.

Phillips v. Therasson, 11 Hun, 141; Knox v. Baldwin, 80 N. Y. 610; Corning v. McCullough, 1 N. Y. 47, 49 Am. Dec. 287; Conklin v. Furman, 48 N. Y. 527; Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755.

Mr. Justice Hughes delivered the opinion of the court:

This action was brought in the district

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court of the United States for the southern district of New York, to enforce the liability of a stockholder of an insolvent Minnesota corporation.

[656] In 1902 the Evans, Munzer, Pickering Company was incorporated under the laws of Minnesota for the purpose of transacting a mercantile business. In 1904 its name was changed to the Evans, Johnson, Sloane Company. Its capital stock consisted of 1,500 shares of common and 1,000 shares of preferred stock of the par value of $100 each. The plaintiff in error, Arthur L. Selig, became the owner of 50 shares of preferred stock in 1902, and held the same until September 5, 1904, when they were transferred on the books of the company to Max Mayer. On September 25, 1905, a petition in bankruptcy was filed against the company in the United States district court for the district of Minnesota; adjudication followed on October 13, 1905, and trustees in bankruptcy were appointed.

On May 28, 1906, a creditor of the company, on behalf of itself and all other creditors, brought a sequestration suit in the district court of Ramsey county, Minnesota, for the purpose of enforcing the liability of the stockholders of the company. In that suit, on June 25, 1906, Charles E. Hamilton (the defendant in error here) was appointed receiver. Further order was made on June 28, 1906, requiring creditors to exhibit their claims, and become parties to the suit, within six months from the date of the first publication of the order. On July 6, 1906, in the same suit, the receiver filed a petition for an assessment upon the stockholders. The court set a date for hearing and directed notice to be given by publication and mailing. Thereupon, on September 4, 1906, the court entered its order assessing the sum of $100 against each share of the capital stock and against those liable as stockholders on account of such shares; the latter were directed to pay to the receiver the amount of the assessment within thirty days, and the receiver was authorized in default of payment to institute an action against anyone liable as a stockholder, in any court having jurisdiction, whether in the state of Minnesota or elsewhere. On April 23, 1907, [657] the court entered a decree—in the sequestration suit—allowing the claims against the company as set forth in an annexed schedule, which showed the nature of each claim, its amount, and when it arose. A further decree allowing an additional claim was entered on February 13, 1908. It appeared from these decrees, and the schedules to which they referred, that of the claims thus allowed, upwards of $11,000 wholly arose prior to September, 1904, and, in addition, over $20,000 in part arose prior to that date.

Pursuant to the order of September 4, 1906, the present action was brought in December, 1909, to recover from Selig the amount assessed on 50 shares. The complaint set forth the proceedings in the sequestration suit, the statutes under which they were instituted, and the order of assessment. It was also alleged that Selig, on or about September 5, 1904, had transferred his stock, when the company was in an unsound financial condition, for the purpose of concealing his ownership, but that he remained the owner of the entire beneficial interest in the shares in question, and that the transfer was fraudulent as against the creditors; and also that, under the law of Minnesota, a stockholder in a corporation could not avoid his liability for prior debts by a bona fide sale of his shares to a solvent person and a recorded transfer. In his answer, Selig admitted the transfer of the shares at the time mentioned, alleged that it was duly made and entered on the corporate books, and denied the other allegations pertinent to his liability.

Upon the trial the record of the proceedings in the sequestration suit, including the order of assessment and the decrees allowing the claims of creditors, were received in evidence. The entry in the stock book showing the record of the issuance of 50 shares to Selig and their transfer, together with the original certificate as canceled, was introduced. Aside from what was contended to be the effect of the proceedings in the sequestration suit, there [658] was no evidence impeaching the transfer. This being the state of the proof, the plaintiff rested and the defendant moved to dismiss the complaint upon the grounds that the plaintiff had failed to prove facts sufficient to constitute a cause of action, that the suit should have been brought in equity, and not at law, and that the cause of action had accrued more than three years prior to the commencement of the action, and hence was barred by the statute of limitations of the state of New York. Each party also moved for a direction of a verdict. The district judge directed a verdict in favor of the receiver for the sum of $5,000 with interest, and in the view that, in sustaining and enforcing the order of assessment, a question arose involving the application of the Federal Constitution, this writ of error has been sued out.

The legislation of Minnesota with respect to the liability of stockholders, as construed by the state court, was reviewed and its constitutional validity was upheld in Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755. The conclusions there reached were reaffirmed in

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Converse v. Hamilton, 224 U. S. 243, 56 L. ed. 749, 32 Sup. Ct. Rep. 415. Briefly restating them, it may be said: The Constitution of Minnesota (art. 10, § 3) provides: "Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him." The provision is self-executing. The liability of the stockholder, measured by the par value of his stock, "is not to the corporation, but to the creditors collectively; is not penal, but contractual; is not joint, but several; and the mode and means of its enforcement are subject to legislative regulation." (See Willis v. Mabon (Willis v. St. Paul Sanitation Co.) 48 Minn. 140, 16 L.R.A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110; McKusick v. Seymour S. & Co. 48 Minn. 158, 50 N. W. 1114; Minneapolis Baseball Co. v. City Bank, 66 Minn. 441, 38 L.R.A. 415, 60 N. W. 331; Hanson v. Davison, 73 Minn. 454, 76 N. W. 254; Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 125, 83 N W. 36; London & N. W. American Mortg. Co. v. St. Paul Park Improv. Co. 84 [659] Minn. 144, 86 N. W. 872; Way v. Barney, 116 Minn. 285, 38 L.R.A.(N.S.) 648, 133 N. W. 801, Ann. Cas. 1913A, 719). Under the statute of 1894 (chap. 76), this liability was enforceable exclusively by means of a single suit in equity, in a court of the state, which was brought for the benefit of all the creditors against all the stockholders, or as many as could be served with process within the state. Hale v. Allinson, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; Finney v. Guy, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558. To make the remedy more effective, the act of 1899 (chap. 272) was passed, and under the provisions of this statute as continued in substance (Way v. Barney, 116 Minn. 294, 38 L.R.A.(N.S.) 648, 133 N. W. 801, Ann. Cas. 1913A, 719), in the Revised Laws of 1905, §§ 3184-3190, the proceedings here in question were had. Provision was made—upon hearing at the time appointed, and after notice by publication or otherwise, as directed by the court—for receiving evidence as to the probable indebtedness of the corporation, the expenses of the receivership, the amount of available assets the parties liable as stockholders, and the nature and extent of such liability; and, thereupon, the court was authorized to levy a ratable assessment "upon all parties liable as stockholders, or upon or on account of any stock or shares of such corporation, for such amount," proportion, or percentage of the liability as th court in its discretion might "deem proper, taking into account the probable solvency or insolvency of stockholders and the probable expenses of collecting the assessment." The order and the assessment thereby levied was made "conclusive upon and against all parties liable upon or on account of any stock or shares of said corporation, whether appearing or represented at said hearing or having notice thereof or not, as to all matters relating to the amount of and the propriety of and necessity for the said assessment." [206 U. S. 526.] After the expiration of the time fixed for payment of the amount assessed, the receiver was authorized to bring actions against every person failing to pay, wherever he might be found, whether in Minnesota or elsewhere. See chap. 272, Laws of 1899, §§ 3-6; [660] Rev. Laws 1905, §§ 3184-3187. The constitutional validity of these provisions was sustained upon the ground that the statute is a reasonable regulation for enforcing the liability assumed by those who become stockholders in corporations organized under the laws of Minnesota; that while the order levying the assessment is made conclusive as to all matters relating to the amount and propriety thereof, and the necessity therefor, one against whom it is sought to be enforced is not precluded from showing that he is not a stockholder, or is not the holder of as many shares as is alleged, or has a claim against the corporation which in law or in equity he is entitled to set off against the assessment, or has any other defense personal to himself; and that while the order is conclusive against the stockholder as to the matters stated, although he may not have been a party to the suit in which it was made, or notified that an assessment was contemplated, this is not a tenable objection, as the order is not in the nature of a personal judgment against him, and he must be deemed, by virtue of his relation to the corporation and the obligation assumed with respect to its debts, to be represented by it in the proceeding. Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 133, 136, 83 N. W. 36; Bernheimer v. Converse, supra, pp. 528, 532; Converse v. Hamilton, supra, p. 256.

Further, it must be assumed that a stockholder cannot, even by a bona fide transfer of his stock, escape liability for the debts of the corporation theretofore incurred. The Minnesota statute provides that a transfer of shares "shall not in any way exempt the person making such transfer from any liabilities of said corporation which were created prior to such transfer." Gen. Stat, 1894, § 2599; Rev. Laws 1905, § 2864. And in Gunnison v. United States Invest. Co. 70 Minn. 292, 73 N. W. 149, the court said that "by virtue of the statute a

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stockholder cannot relieve himself from the liability for the prior [661] debts of the corporation by a bona fide sale and transfer of his stock on the books of the corporation, whatever the rule may be in the absence of the statute.

In the light of the principles established by these decisions, it must be concluded:

(1) The bankruptcy proceedings against the corporation did not stand in the way of a resort to the statutory method of enforcing the stockholder's liability. It was not corporate assets (Minneapolis Baseball Co. v. City Bank, 66 Minn. 446, 38 L.R.A. 415, 69 N. W. 331; Way v. Barney, supra); and Congress had not undertaken to provide that the discharge in bankruptcy of a corporation should release the stockholders. No question as to this is raised by the plaintiff in error.

(2) The defendant, Selig, in this action brought by the receiver against him in the district court in New York to recover the amount assessed, was not concluded with respect to his personal liability. He was free to deny that he was, or had been, a stockholder in the company; to dispute the allegation as to the length of time that he remained a stockholder; in short, to litigate any matter which bore upon the extent or duration of his stockholding, or any other personal defense. Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. supra. The order of the Minnesota court in the proceedings for the purpose of the assessment, in which he was represented by the corporation, and of which he was notified only by publication and mailing of notice, did not conclude him with respect to the issue, so far as it concerned the transfer of his stock, or the good faith with which the transfer was made. Inasmuch as the transfer was proved to have been made in September 1904, and no evidence was introduced to discredit the transaction, it must be assumed, for the present purpose, that the defendant's stock ownership then ceased, and that he was not liable for the payment of debts subsequently contracted by the corporation.

[662] (3) But despite the transfer, Selig remained liable for the corporate debts previously incurred. Moreover, it cannot be doubted that the authority of the Minnesota court under the statute was not confined to proceedings to assess existing stockholders. The act of 1899, by its express terms, applied in cases of liability arising upon shares "at any time held or owned by such stockholders," and provided for the making of an assessment against "all parties liable as stockholders." Laws 1899, chap. 272, §§ 1, 3; Rev. Laws 1905, § 3185. This obviously included former stockholders in relation to debts antedating their transfers; and the constitutional validity of the act in this aspect is as clear as is its validity with respect to the authorization of an assessment against existing stockholders. So far as the jurisdiction of the court to levy the assessment is concerned, no distinction can be maintained. The basis of jurisdiction is the same in each case; it is found in the contractual obligation assumed in becoming a member of a Minnesota corporation, and in the consequent submission to the reasonable regulations of the state for the purpose of making the liability effectual. Bernheimer v. Converse, supra.

It follows that if the court, thus having jurisdiction, and acting upon the evidence before it in the statutory proceeding, assessed former stockholders for the purpose of providing for debts incurred while they held their stock, its determination with respect to the amount of the assessment and the necessity therefor must be deemed conclusive. These questions cannot be reopened in another court when the receiver sues to collect the amount of the assessment. The stockholder in such a suit is free to urge his personal defenses, but this does not mean that he may resist the receiver's demand upon the ground that the assessment was not needed. The marshaling of the amounts recovered from stockholders is also the appropriate subject for the consideration of the court which, [663] under the statute, collects and distributes the fund. It is quite obvious that another court, in an action by the receiver against the stockholder, could not undertake to fix the amount required to pay the debts for which the stockholder is liable unless it virtually assumed the duty imposed by the statute of determining what a ratable assessment should be, and thus denied due credit to the determination already made in a court of competent jurisdiction.

It is insisted, however, that no assessment was made against the defendant as a past stockholder; that the order of assessment as made by the Minnesota court was applicable to present stockholders only. It is true that in the receiver's petition for the levy of an assessment, the persons alleged to be liable were set forth as existing stockholders. Of these, it was averred that some (including the plaintiff in error) had transferred their stock for the purpose of avoiding liability, and that others had placed their shares in the names of agents; but as to all, it was asserted that they were, and continued to be, the owners of the entire beneficial interest. But the petition prayed that the probable amount of the indebtedness and of the costs and expenses of the

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proceedings, and the probable amount which could be collected "from said stockholders, and all persons or parties liable as such, on said stock," should be ascertained, and that the court should levy a ratable assessment upon each share and against each of the stockholders "liable on said stock." Taking the petition, in the light of the statute, we think that, despite the allegations with respect to the fraudulent character of the transfers mentioned and the continued ownership by the transferrers of the shares described, the exercise of the jurisdiction of the court was invoked for the making of such an assessment as the court in its discretion might consider necessary in order to enforce the stockholders' liability, as it actually existed, with respect to the corporate debts remaining unpaid.

[664] What the court did determine must be ascertained from the order of assessment. This order, after reciting that the matter came on to be heard at the time appointed, pursuant to the petition, and that the court had "received and duly considered all the evidence presented," provided for an assessment of an amount equal to the par value "on each and every share of the capital stock," and "against the persons or parties liable as stockholders . . . for, upon, or on account of such shares of stock." It further provided that "each and every person or party liable as such stockholder" should pay to the receiver the amount assessed, and the receiver was authorized to collect "the several amounts due from the several persons or parties liable as stockholders," and to bring suit in case of the failure of "any person . . . liable as a stockholder" to pay as required. These provisions are certainly broad enough to include all stockholders who were actually liable, and we should not be justified in treating the order as expressing less than its terms stated.

In Tiffany v. Giesen, 96 Minn. 488, 105 N. W. 901, the plaintiff, as receiver, by virtue of an order of assessment under the statute, sought to recover against a stockholder in an insolvent corporation who had transferred his shares. It appearing that the defendant was the owner of the stock during the existence of the indebtedness of the company, it was held that the plaintiff had made out a cause of action. The objection that, as the transferee was the person primarily liable, the action could not be maintained against the transferrer, was overruled.

It is urged that the plaintiff in error was bound to contribute only ratably with all other stockholders who were liable with respect to the debts which arose prior to September 5, 1904, the date of the transfer, and that no assessment had been made based upon those debts. But this objection, as we view it, does not go to the existence [665] of the jurisdiction to make the order of assessment, or to the scope of the order as it was actually made, but rather to the question whether the court committed error in the exercise of the authority which it unquestionably possessed. If it did, the remedy lay in an application to the Minnesota court for the correction deemed to be necessary, and not in a collateral attack. The order in question does not provide for the distribution of the amount to be paid by the plaintiff in error, but that all moneys collected from the stockholders by the receiver should be held until the further order of the court. It is not to be assumed that these moneys will be applied to any indebtedness as to which the stockholders contributing respectively are not liable. We cannot doubt that the plaintiff in error, if he so desires, will have suitable opportunity to be heard as to the application of the amount which he may pay to the receiver, that it will be used only in the discharge of his obligation, and that any surplus to which he may be entitled will be duly returned. Laws 1899, chap. 272, § 11. See Rev. Laws 1905, § 3190. The statute further provides that any stockholder who has paid his assessment shall be entitled to force contribution from any stockholder who has not paid, and for that purpose shall be subrogated to the rights of the creditors or the receiver of the corporation against every such delinquent stockholder in such manner and to such extent as may be just and equitable. Ibid.

We cannot regard it as essential to the exercise of the jurisdiction of the Minnesota court that it should be required, in order not to forego recovery from stockholders who had transferred their stock, to make a separate and distinct assessment against all the then stockholders at the date of every transfer appearing upon the books. The plan of the statute was intended to afford a practicable remedy, and the order to be made thereunder was, in the nature of things, a provisional one, representing the best [666] judgment of the court upon the evidence before it as to the amount of the assessment required. That assessment was leviable upon every share and against all persons liable as stockholders. If the plaintiff in error was among this number, he was not entitled to resist the recovery by reason of the nature or amount of the assessment, which was levied in conformity with the statute, but he was properly remitted to the Minnesota court for the adjustment of such equities as he might have.

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It is said, however, that on the trial of the present action, there was no evidence that there were debts remaining unpaid, which antedated his transfer of stock. But the decrees, entered in the parent suit in Minnesota, which determined the amount of the outstanding claims and when they arose, were introduced in evidence. These decrees showed that there were debts, in excess of the amount demanded of the plaintiff in error, which arose before his shares were transferred. In the proceedings appropriate to the liquidation, which related to the allowance of these claims, the plaintiff in error, by virtue of his connection with the corporation and the obligation he had assumed, was sufficiently represented by the presence of the corporation itself (Bernheimer v. Converse, 206 U. S. 532, 51 L. ed. 1175, 27 Sup. Ct. Rep. 755); and we see no reason to question the admissibility of the evidence. There was no attempt to controvert it.

The remaining question relates to the statute of limitations. It is contended that the action is barred by § 394 of the New York Code of Civil Procedure. In Bernheimer v. Converse, supra (p. 535), the court expressed the opinion that this section did not apply where the corporation was not a "moneyed corporation or banking association," and that the period of limitation under the New York Code was six years (§ 382). (See Platt v. Wilmot, 193 U. S. 602, 48 L. ed. 809, 24 Sup. Ct. Rep. 542, where, in the opinion of the court, delivered by [667] Mr. Justice Peckham, the history of § 394 is reviewed.) We adhere to this view, and the action must be regarded as brought in time.

The judgment is affirmed.

Judgment affirmed.

CHAPMAN & DEWEY LUMBER COMPANY, Chapman & Dewey Land Company, Plffs. in Err.,

v.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT.

(See S. C. Reporter's ed. 667-669.)

Error to state court — rehearing.

Leave to file a petition for rehearing will be denied where such petition is wholly wanting in merit.

[For other cases, see Appeal and Error, X., in Digest Sup. Ct. 1908.]

[No. 82.]

Decided June 22, 1914.

PETITION for rehearing of a decree which reversed a decree of the Supreme Court of the State of Arkansas, affirming a decree of the Chancery Court of Poinsett County, in that state, in favor of plaintiff in a suit by a levee district to recover for timber alleged to have been wrongfully cut from unsurveyed land. Leave to file petition denied.

See ante, 564.

Messrs. Samuel Adams, H. F. Roleson, J. C. Hawthorne, and N. F. Lamb filed a brief in support of the petition:

The opinion completely ignores, but in effect overrules, the previous decisions of this court and of the supreme courts of Louisiana, Indiana, Michigan, and Arkansas on the point that a patent of a government subdivision includes all the land within the description.

Kean v. Calumet Canal & Improv. Co. 190 U. S. 452, 47 L. ed. 1134, 23 Sup. Ct. Rep. 651; McDade v. Bossier Levee Board, 109 La. 626, 33 So. 628; Kean v. Roby, 145 Ind. 221, 42 N. E. 1011; Tolleston Club v. State, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690; Stoner v. Rice, 121 Ind. 51, 6 L.R.A. 387, 22 N. E. 968; People v. Warner, 116 Mich. 228, 74 N. W. 705; Chapman & D. Lumber Co. v. St. Francis Levee Dist. 100 Ark. 94, 139 S. W. 625.

Moreover the opinion is utterly inconsistent with the following decisions of this court, which it also ignores:

Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 19 L. ed. 74.

Mr. Justice Van Devanter delivered the opinion of the court:

Leave to file a petition for rehearing is sought in this case. The petition has been examined, and we find it so wanting in merit that leave to file it must be denied. Doubtless a formal denial would suffice, but we prefer to notice two statements in the petition.

As our opinion (232 U. S. 186, ante, 564, 34 Sup. Ct. Rep. 297) shows, the controlling question was whether a patent issued to the state of Arkansas in 1858 under the swamp-land act embraced all the lands within the exterior boundaries of a designated [668] township, or only the lands lying without certain meander lines shown upon the official plat which, by reference, was made part of the description in the patent. The plat showed that large areas in the township, amounting to 8,000 acres or more, were meandered as bodies of water

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called "sunk lands," and that the remaining areas were surveyed into sections and parts of sections, the aggregate of which, according to an inscription upon the plat, was 14,329.97 acres. Deducting from the latter 514.30 acres in fractional section 16, which had passed to the state under the school-land grant, left 13,815.67 acres, and this was the acreage given in the patent, from which section 16 was excepted. The mode of claiming lands under the swamp-land act was by presenting selection lists to the surveyor general, and, as bearing upon what was intended to be conveyed by the patent, we stated that the list in this instance "described the township as containing 14,329.97 acres, the total of the surveyed areas as inscribed upon the plat," and that this, less the 514.30 acres in fractional section 16, was the area given in the patent.

One of the statements in the petition for rehearing is that our opinion "proceeds on the hypothesis, unsupported by the record," that the governor of Arkansas, in his request for the patenting of the township in question, stated its acreage. In assuming that it is our duty to deal with the case as it is disclosed by the record, counsel are clearly right. A like obligation rests upon counsel. The record (p. 207) contains a certificate from the General Land Office, introduced in evidence without objection, saying: "The original selection list of swamp lands in T. 12 N., R. 7 E., [the township in question] gives the area of the township as 14,329.97 acres, and that amount was also given in the approved list. Section 16, which passed to the state under the school grant, contains 514.30 acres, and as such lands were not granted under the swamp-land laws the area of section 16 was deducted from the [669] total of the township, leaving 13,815.67 acres, which amount was accounted for in the patent." The certificate stood uncontradicted in the record and was accepted by the supreme court of the state as determinative of the facts recited in it (100 Ark. 97, 139 S. W. 625). Nothing more need be said upon this point.

Another statement in the petition is that we erred in treating the meandered areas embodying the lands in controversy as unsurveyed lands. The record (p. 1) shows that the complaint filed in the court of first instance, and which counsel seek to maintain, alleged that these lands "were left unsurveyed by the United States government." The sunk lands were also described by the representative of the state as "not yet surveyed," when the state's claims under the swamp-land grant were being adjusted and settled in 1895. H. R. Rep. No. 1634, 54th Cong. 1st Sess. pp. 5 and 32. This will suffice upon this point. Leave to file petition denied.

EDMUND BURKE
v.
SOUTHERN PACIFIC RAILROAD COMPANY and the Kern Trading & Oil Company. (No. 279.)

J. I. LAMPRECHT and F. M. Aiken, Trustees,
v.
SOUTHERN PACIFIC RAILROAD COMPANY, the Kern Trading & Oil Company, and T. S. Minot. (No. 280.)

(See S. C. Reporter's ed. 669–711.)

Public lands — railroad land grant — gift.

1. The railway land grant made by the act of July 27, 1866 (14 Stat. at L. 292, chap. 278), to the Southern Pacific Railroad Company, should not be treated as a mere gift.

[For other cases, see Public Lands, 73–80, in Digest Sup. Ct. 1908.]

Public lands — railway land grant — mineral lands — duty of Land Department.

2. Mineral lands known to be such at, or prior to, the issue of a patent therefor to a railway company under the authority of the railway land grant act of July 27, 1866, were not included in the grant, being expressly excluded from the operation of the act by the provisions of § 3, and the duty of determining the character of the lands was cast primarily on the Land Department, which was charged with the issue of patents.

[For other cases, see Public Lands, 228–233, in Digest Sup. Ct. 1908.]

Public lands — railway land grant — mineral lands — validity of patent.

3. The issuance by the Land Department of a patent to a railway company under the railway land grant act of July 27, 1866, which in § 3 expressly excludes mineral lands from the operation of the act, without any investigation, hearing, or determination as to the quality of the land, whether agricultural or mineral, although irregular, does not avoid the patent, but the title passes thereunder subject to the right of the government to attack the patent by a direct suit for its annulment if the land was known to be mineral when the patent issued.

[For other cases, see Public Lands, 872–880, in Digest Sup. Ct. 1908.]

NOTE.—As to land grants to railroads, generally—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

On nature of property in mineral oil or gas—see note to Williamson v. Jones, 25 L.R.A. 222.

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Public lands — railway land grant — patent — reservation of mineral lands.

4. A clause "excluding and excepting all mineral lands should any such be found in the tracts aforesaid," inserted in a patent issued by the Land Department under the railway land grant act of July 27, 1866, which in § 3 expressly excluded mineral lands from its operation, is void as beyond the authority of the officers of the Land Department, notwithstanding the provision of the joint resolution of June 28, 1870 (16 Stat. at L. 382, No. 87), adopted chiefly to sanction a route which the Secretary of the Interior had disapproved, that it shall be the duty of that official to cause patents to be issued for lands coterminous to each constructed section along that route, "expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for" in § 3 of the granting act, which provision, properly construed, is a direction not to patent to the railway company lands occupied by actual settlers, or otherwise excluded or excepted from the grant.

[For other cases, see Public Lands, 872-880, in Digest Sup. Ct. 1908.]

Public lands — railway land grant — patent — collateral attack.

5. A patent issued by the Land Department under the railway land grant act of July 27, 1866, which, in § 3, expressly excludes mineral lands from the operation of the act, is, upon collateral attack, a conclusive and official declaration that the land is agricultural, and that there has been a compliance with all the requirements preliminary to the issuance of the patent.

[For other cases, see Public Lands, 920-953, in Digest Sup. Ct. 1908.]

Public lands — railway land grant — mineral lands — petroleum.

6. Petroleum or mineral oil, whatever may be the strict scientific view, is "mineral" within the meaning of that term as used in the railway land grant act of July 27, 1866, which, in § 3, expressly excluded from the operation of the act all mineral lands other than iron and coal lands.

[For other cases, see Public Lands, 228-233, in Digest Sup. Ct. 1908.]

Public lands — railway land grant — patent — collateral attack.

7. Persons not in privity with the government in any respect when a patent was issued under the railway land grant act of July 27, 1866, cannot attack such patent on the ground of fraud, error, or irregularity in the issuance of the patent.

[For other cases, see Public Lands, 920-953, in Digest Sup. Ct. 1908.]

Estoppel — attacking mineral exception in patent.

8. A railway company and its lessee are not estopped to deny the validity of a mineral land exception clause inserted in a patent issued to the railway company under the land grant act of July 27, 1866, as against strangers whose only claim was initiated after the issuance of the patent, because such clause was inserted with the railway company's consent, and under an understanding and an agreement between it and the officials of the Land Department that such clause should be effective to keep in the United States title to such of the lands described in the patent as were in fact mineral.

[For other cases, see Estoppel, III., b, 2, in Digest Sup. Ct. 1908.]

[Nos. 279, 280.]

Argued January 13, 14, 1913. Decided June 22, 1914.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Ninth Circuit, presenting questions as to the title of the Southern Pacific Railroad Company to mineral lands patented under the authority of a railway land grant. Answered by sustaining the title of the railway company.

The facts are stated in the opinion.

Messrs. **Frederic R. Kellogg** and **Roberts Walker** argued the cause, and, with Mr. Edmund Burke, *in propria persona*, filed a brief for appellant in No. 279:

The act of issuing a patent is a ministerial act.

Moran v. Horsky, 178 U. S. 212, 44 L. ed. 1040, 20 Sup. Ct. Rep. 856; Stoddard v. Chambers, 2 How. 317, 11 L. ed. 282.

The patent should issue as the result of a judgment of the Land Department.

Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389.

A patent has been called the record evidence of the judgment of the Land Department.

United States v. Winona & St. P. R. Co. 15 C. C. A. 96, 32 U. S. App. 272, 67 Fed. 956.

If the patent be considered simply as a conveyance of title,—or, more accurately, as a confirmation or record of the title passed by the congressional grants,—it is impossible for the appellees to claim that any title to mineral lands passed thereby.

Maxwell Land Grant Co. v. Dawson, 151 U. S. 586, 604, 38 L. ed. 279, 285, 14 Sup. Ct. Rep. 458; Barden v. Northern P. R. Co. 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030; Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 24 L. ed. 1095; St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578.

If the patent be considered as evidence of a judgment, such judgment was rendered by a court of special and limited, and not of general, jurisdiction.

Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 450, 27 L. ed. 227, 1 Sup. Ct. Rep. 389; Barden v. Northern P. R. Co. 154 U. S. 328, 38 L. ed. 1002, 14 Sup. Ct. Rep. 1030:

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Black, Judgm. § 283; 11 Cyc. 772; Bailey, Jurisdiction, § 124; 17 Am. & Eng. Enc. Law, 1084; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 641, 26 L. ed. 876, 11 Mor. Min. Rep. 673.

The appellees, claiming that the tribunal acted within its jurisdiction, are bound, in support of their claim, to affirmatively show upon the face of the record (or perhaps by extrinsic evidence) that such jurisdiction existed.

Bailey, Jurisdiction, §§ 121, 124, 130, 173, 183; Black, Judgm. §§ 282, 431–434; Galpin v. Page, 18 Wall. 350, 21 L. ed. 959; Kempe v. Kennedy, 5 Cranch, 173, 3 L. ed. 70; Thatcher v. Powell, 6 Wheat. 119, 5 L. ed. 221; Den ex dem. Walker v. Turner, 9 Wheat. 541, 6 L. ed. 155; Copley v. Ball, 100 C. C. A. 234, 176 Fed. 689; Grignon v. Astor, 2 How. 319, 11 L. ed. 283; 17 Am. & Eng. Enc. Law, 1082; Secombe v. Milwaukee & St. P. R. Co. 3 Wall. 108, 23 L. ed. 67.

The Land Department never has had any jurisdiction to make grants in defiance of the will of Congress of lands which have been expressly reserved by Congress for other purposes. Any such attempt is void and inoperative.

Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321, 41 L. ed. 175, 16 Sup. Ct. Rep. 1018; Johnson v. Drew, 171 U. S. 100, 43 L. ed. 91, 18 Sup. Ct. Rep. 800; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 647, 26 L. ed. 879, 11 Mor. Min. Rep. 673; Doolan v. Carr, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; Reynolds v. Iron Silver Min. Co. 116 U. S. 687, 29 L. ed. 774, 6 Sup. Ct. Rep. 601, 15 Mor. Min. Rep. 591; Northern P. R. Co. v. Sanders, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671; St. Louis Min. & Mill. Co. v. Montana Min. Co. 171 U. S. 655, 43 L. ed. 322, 19 Sup. Ct. Rep. 61, 19 Mor. Min. Rep. 575; Wright v. Roseberry, 121 U. S. 519, 30 L. ed. 1048, 7 Sup. Ct. Rep. 985.

The Land Department cannot arbitrarily abrogate the rights of an entryman.

Parsons v. Venzke, 164 U. S. 89, 41 L. ed. 360, 17 Sup. Ct. Rep. 27; Guaranty Sav. Bank v. Bladow, 176 U. S. 453, 44 L. ed. 542, 20 Sup. Ct. Rep. 425; Hawley v. Diller, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986.

Under this grant it had no jurisdiction to grant mineral lands, whether known or unknown, entered or not, for these were expressly reserved by Congress from the original grant.

Barden v. Northern P. R. Co. 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030; United States v. Central P. R. Co. 84 Fed. 218; Northern P. R. Co. v. Sanders, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671.

The patent itself must show the existence of the jurisdictional facts.

Barden v. Northern P. R. Co. 154 U. S. 327, 330, 38 L. ed. 1001, 1002, 14 Sup. Ct. Rep. 1030; Davis v. Wiebbold, 139 U. S. 526, 35 L. ed. 245, 11 Sup. Ct. Rep. 628; Deffeback v. Hawke, 115 U. S. 406, 29 L. ed. 427, 6 Sup. Ct. Rep. 95; Galpin v. Page, 18 Wall. 350, 21 L. ed. 959.

If the lands were known to be mineral, no decision that they were not mineral could possibly affect the situation. The very word "known" assumes a situation which the Land Department could not overturn by a decision to the contrary.

United States v. Central P. R. Co. 84 Fed. 218.

The lands were restricted from grant (St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 641, 26 L. ed. 876, 11 Mor. Min. Rep. 673). If such a decision were attempted, we believe that it would simply be a decision of law upon insufficient evidence, and, as such, always subject to attack.

Northern P. R. Co. v. Colburn, 164 U. S. 385, 41 L. ed. 479, 17 Sup. Ct. Rep. 98; Hawley v. Diller, 178 U. S. 489, 44 L. ed. 1162, 20 Sup. Ct. Rep. 986.

Nor would such a decision be valid as giving jurisdiction unless the proceedings were had in accordance with the established rules of the Department as to notice and investigation, and unless these rules were reasonable, appropriate, and within the law.

26 Am. & Eng. Enc. Law, 379; Leonard v. Lennox, 104 C. C. A. 296, 181 Fed. 764; Black, Judgm. § 530; Puget Mill Co. v. Brown, 54 Fed. 987, affirmed in 7 C. C. A. 643, 15 U. S. App. 274, 59 Fed. 35; 32 Cyc. 1025.

Of these rules this court takes judicial notice.

Caha v. United States, 152 U. S. 211, 38 L. ed. 415, 14 Sup. Ct. Rep. 513; Leonard v. Lennox, 104 C. C. A. 296, 181 Fed. 764.

Whether or not the judgment might have been considered *res judicata* against collateral attack upon this point if the record had been silent, yet, where the record affirmatively discloses that this point—the essential point relating to jurisdiction—had not only not been decided, but had been expressly reserved from decision, all presumptions fall.

Galpin v. Page, 18 Wall. 350, 21 L. ed. 959; Settlemier v. Sullivan, 97 U. S. 444, 24 L. ed. 1110; Butterfield v. Miller, 115 C. C. A. 152, 195 Fed. 203; Ritchie v. Sayers, 100 Fed. 520; Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co. 139 U. S. 137, 35 L. ed. 116, 11 Sup. Ct. Rep. 512; Bailey, Jurisdiction, § 137; 23 Cyc. 1145, 1292; Cheely v. Clayton, 110 U. S. 701, 28 L. ed. 298, 4 Sup. Ct. Rep. 328; Old

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Wayne Mut. Life Asso. v. McDonough, 204 U. S. 16, 51 L. ed. 348, 27 Sup. Ct. Rep. 236; Indiana & A. Lumber & Mfg. Co. v. Brinkley, 91 C. C. A. 91, 164 Fed. 968; Kempe v. Kennedy, 5 Cranch, 185, 3 L. ed. 73.

The appellees could not have been compelled to accept the patent if, as a matter of fact, it was improper in form.

LeRoy v. Jamison, 3 Sawy. 369, Fed. Cas. No. 8,271; United States v. Schurz, 102 U. S. 399, 26 L. ed. 173; Cowell v. Colorado Springs Co. 100 U. S. 55, 25 L. ed. 547.

The Land Department had no power to transfer mineral lands under the terms of this grant. Its only jurisdiction to transfer any lands hung upon their being nonmineral lands; and, as we have shown, the only way in which they could gain jurisdiction to transfer lands which, as a matter of fact, were mineral lands, was by a judicial decision to the effect that the lands in question were nonmineral.

St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 641, 26 L. ed. 876, 11 Mor. Min. Rep. 673; Kent v. Lake Superior Ship Canal R. & Iron Co. 144 U. S. 75, 36 L. ed. 352, 12 Sup. Ct. Rep. 650.

Whatever may have been thought of oil or natural gas at one time, it is now established beyond any question that oil or petroleum and natural gas are minerals and judicially must be so treated.

Thornton, Oil & Gas, 2d ed. § 18; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Re Union Oil Co. 25 Land Dec. 351.

Mr. Edmund Burke also filed a separate brief for appellant:

The grant to the Southern Pacific Railroad Company did not include mineral lands which were known to be mineral at or prior to the date of the patent.

Barden v. Northern P. R. Co. 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030; United States v. Central P. R. Co. 84 Fed. 219; Stoddard v. Chambers, 2 How. 284, 11 L. ed. 269; Van Ness v. Rooney, 160 Cal. 131, 116 Pac. 392; Kansas City Min. & Mill. Co. v. Clay, 3 Ariz. 326, 29 Pac. 9; Old Dominion Copper Min. & Smelting Co. v. Haverly, 11 Ariz. 241, 90 Pac. 336; Garrard v. Silver Peak Mines, 82 Fed. 578, 36 C. C. A. 603, 94 Fed. 989; United States v. Culver, 52 Fed. 81; Blackburn v. United States, 5 Ariz. 162, 48 Pac. 904, 18 Mor. Min. Rep. 684; United States v. Reed, 12 Sawy. 99, 28 Fed. 482; Northern P. R. Co. v. Barden, 46 Fed. 610; Deffeback v. Hawke, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; Davis v. Wiebbold, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628; Alford v. Barnum, 45 Cal. 482, 10 Mor. Min. Rep. 422; Merrill v. Dixon, 15 Nev. 401; Colorado Coal & I. Co. v. United States, 123 U. S. 307–328, 31 L. ed. 182–190, 8 Sup. Ct. Rep. 131; United States v. Iron Silver Min. Co. 128 U. S. 673, 32 L. ed. 571, 9 Sup. Ct. Rep. 195; Sullivan v. Iron Silver Min. Co. 143 U. S. 431, 36 L. ed. 214, 12 Sup. Ct. Rep. 555; Gold Hill Quartz Min. Co. v. Ish, 5 Or. 104, 11 Mor. Min. Rep. 635; Loney v. Scott, 57 Or. 378, 32 L.R.A.(N.S.) 466, 112 Pac. 173; Morton v. Nebraska, 21 Wall. 660, 22 L. ed. 639, 12 Mor. Min. Rep. 451; Amador Medean Gold Min. Co. v. South Spring Hill Gold Min. Co. 36 Fed. 670; Ivanhoe Min. Co. v. Keystone Consol. Min. Co. 102 U. S. 168, 26 L. ed. 126, 13 Mor. Min. Rep. 214.

In the presence of a perfected, valid, subsisting mining location, an equitable title, the United States held, until patent or legal cancelation of the location, the paramount title in trust for the mining locators; and its attempted subsequent grant or alienation to another person under any law would be void and the patent would carry no title.

Noyes v. Mantle, 127 U. S. 349, 351, 32 L. ed. 169, 170, 8 Sup. Ct. Rep. 1132, 15 Mor. Min. Rep. 611; Haws v. Victoria Copper Min. Co. 160 U. S. 303, 40 L. ed. 436, 16 Sup. Ct. Rep. 282; St. Louis Min. & Mill. Co. v. Montana Min. Co. 171 U. S. 650–655, 43 L. ed. 320–322, 19 Sup. Ct. Rep. 61, 19 Mor. Min. Rep. 575; 26 Am. & Eng. Enc. Law, 381; Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 593, 42 L. ed. 591, 592, 18 Sup. Ct. Rep. 208; Hawley v. Diller, 178 U. S. 476–489, 44 L. ed. 1157–1162, 20 Sup. Ct. Rep. 976; Clark v. Herington, 186 U. S. 206, 46 L. ed. 1128, 22 Sup. Ct. Rep. 872.

The patent, issuing without examination or adjudication as to the agricultural quality of the lands, is not conclusive nor *res judicata* on that question, as the fact of quality was never adjudicated nor passed on to an actual decision.

Leonard v. Lennox, 104 C. C. A. 296, 181 Fed. 760; United States Min. Co. v. Lawson, 67 C. C. A. 587, 134 Fed. 775, affirmed in 207 U. S. 1, 52 L. ed. 65, 28 Sup. Ct. Rep. 15; Montana Min. Co. v. St. Louis Min. & Mill. Co. 42 C. C. A. 415, 102 Fed. 430, 20 Mor. Min. Rep. 507; Nesbit v. Independent Dist. 144 U. S. 610, 36 L. ed. 562, 12 Sup. Ct. Rep. 746; Roberts v. Northern P. R. Co. 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756; Lake County v. Sutliff, 38 C. C. A. 167, 97 Fed. 270; Lake County v. Platt, 25 C. C. A. 87, 49 U. S. App. 216, 79 Fed. 567; Linton v. National L. Ins. Co. 44 C. C. A. 54, 104 Fed. 584; Ætna L. Ins. Co. v. Hamilton County, 54 C. C. A. 468, 117 Fed. 82; Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 687, 39 L. ed. 861, 15 Sup. Ct. Rep. 733, 18 Mor. Min. Rep. 205; 23 Cyc. 1223, notes.

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There must be some evidence on which an actual finding is made to make a patent conclusive as to the quality of the land.

Love v. Flahive, 33 Mont. 348, 83 Pac. 882; United States v. Minor, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836; Parsons v. Venzke, 4 N. D. 452, 50 Am. St. Rep. 669, 61 N. W. 1036, affirmed in 164 U. S. 89, 41 L. ed. 360, 17 Sup. Ct. Rep. 27; Jordan v. Smith, 12 Okla. 703, 73 Pac. 308; Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321, 41 L. ed. 175, 16 Sup. Ct. Rep. 1018; Northern P. R. Co. v. Sanders, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671; Barden v. Northern P. R. Co. 154 U. S. 328, 329, 38 L. ed. 1002, 14 Sup. Ct. Rep. 1030; Wright v. Roseberry, 121 U. S. 488, 30 L. ed. 1039, 7 Sup. Ct. Rep. 985; Ehrhardt v. Hogaboom, 115 U. S. 67, 29 L. ed. 346, 5 Sup. Ct. Rep. 1157; French v. Fyan, 93 U. S. 169, 23 L. ed. 812; Hartwell v. Havighorst, 196 U. S. 635, 49 L. ed. 629, 25 Sup. Ct. Rep. 793, affirming 11 Okla. 189, 66 Pac. 337; 23 Cyc. 1223; 32 Cyc. 1021.

A patent is not any more solemn or conclusive than the judgment of the circuit court of the United States would be in an action to quiet title; and in that court only the actual facts determined would be conclusive and *res judicata*.

Russell v. Place, 94 U. S. 606, 608, 24 L. ed. 214, 215; Washington, A. & G. Steam Packet Co. v. Sickles, 5 Wall. 580, 592, 18 L. ed. 550, 553; Central Trust Co. v. Clark, 26 C. C. A. 397, 49 U. S. App. 453, 81 Fed. 269; Condon v. Knoxville, C. G. & L. R. Co. — Tenn. —, 35 S. W. 781; Hamlin v. New York, N. H. & H. R. Co. 176 Mass. 514, 57 N. E. 1006; People ex rel. Bridgeman v. Hall, 104 N. Y. 177, 10 N. E. 135; Converse v. Davis, 90 Tex. 462, 39 S. W. 277; Groesbeck v. Crow, 91 Tex. 74, 40 S. W. 1028; Haralson v. St. Louis Southwestern R. Co. — Tex. Civ. App. —, 62 S. W. 788; Faison v. Grandy, 128 N. C. 438, 83 Am. St. Rep. 693, 38 S. E. 897; Martin v. Turner, — Ky. —, 115 S. W. 833; Vicksburg, S. & P. R. Co. v. Tibbs, 112 La. 51, 36 So. 223; Baker v. Williams & E. Bkg. Co. 42 Or. 213, 70 Pac. 711; Black, Judgm. § 616; Cox v. Von Ahlefeldt, 105 La. 543, 30 So. 175; St. Joseph Union Depot Co. v. Chicago, R. I. & P. R. Co. 32 C. C. A. 284, 60 U. S. App. 675, 89 Fed. 648; Fayerweather v. Ritch, 88 Fed. 713; Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683–687, 39 L. ed. 859–861, 15 Sup. Ct. Rep. 733, 18 Mor. Min. Rep. 205; Herman, Estoppel & Res Judicata, § 441; Hosmer v. Wallace, 47 Cal. 461.

No presumption may flow where there is no record adjudication.

Leonard v. Lennox, 104 C. C. A. 296, 181 Fed. 760; United States Min. Co. v. Lawson, 67 C. C. A. 587, 134 Fed. 775.

The decisions of the Land Department, in order to be conclusive, must be made according to the regular rules of practice of the Department, and must be based on legal evidence or on some formal inquest in which there is an actual finding of fact.

Puget Mill Co. v. Brown, 54 Fed. 987; Doe ex dem. Dickin v. Mahana, 21 How. 276, 16 L. ed. 158; Hedrick v. Hughes, 15 Wall. 123, 21 L. ed. 52; Johanson v. Washington, 190 U. S. 179, 47 L. ed. 1008, 23 Sup. Ct. Rep. 825.

A decision of the Land Department is conclusive as to the character of the land when that fact is actually determined.

Whart. Ev. § 822; Potter v. Randolph, 126 Cal. 461, 58 Pac. 905; Cragie v. Roberts, 6 Cal. App. 312, 92 Pac. 97; United States v. Mackintosh, 29 C. C. A. 176, 56 U. S. App. 483, 85 Fed. 333.

An "actual decision" is contemplated; not a mere issuance of a piece of paper analogous to a writ of assistance, which writ, unless predicated on an actual judgment, would be of no avail.

United States v. Rizzinelli, 182 Fed. 675; Teller v. United States, 51 C. C. A. 230, 113 Fed. 273; Jeffords v. Hine, 2 Ariz. 162, 11 Pac. 351, 15 Mor. Min. Rep. 575; Baldwin v. Stark, 107 U. S. 463, 27 L. ed. 526, 2 Sup. Ct. Rep. 473; Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; Dargin v. Koch, 20 Land Dec. 384; Shepley v. Cowan, 91 U. S. 339, 340, 23 L. ed. 427, 428; United States v. Chicago, M. & St. P. R. Co. 218 U. S. 242, 243, 54 L. ed. 1020, 1021, 31 Sup. Ct. Rep. 7.

The patent must state the finding, or the record must show it.

Eureka Consol. Min. Co. v. Richmond Consol. Min. Co. 4 Sawy. 302, Fed. Cas. No. 4,548, 9 Mor. Min. Rep. 578.

A patent is nothing more than a deed.

Rankin v. Miller, 43 Iowa, 11; United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478; United States v. Mullan, 7 Sawy. 466, 10 Fed. 785; Redfield v. Parks, 132 U. S. 239, 33 L. ed. 327, 10 Sup. Ct. Rep. 83; Bushey v. South Mountain Min. & Iron Co. 136 Pa. 552, 20 Atl. 549; Beard v. Federy, 3 Wall. 478, 18 L. ed. 88.

A ruling on a question of law is not as binding as a finding on a question of fact.

United States v. Winona & St. P. R. Co. 15 C. C. A. 96, 32 U. S. App. 272, 67 Fed. 955, 165 U. S. 463, 41 L. ed. 789, 17 Sup. Ct. Rep. 368; Northern P. R. Co. v. Colburn, 164 U. S. 385, 386, 41 L. ed. 479, 480, 17 Sup. Ct. Rep. 98; Hawley v. Diller, 178 U. S. 489, 490, 44 L. ed. 1162, 1163, 20 Sup. Ct. Rep. 986.

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This suit, taken as a whole, is a direct attack, except in the instance of the allegations relating to the mineral exception, and this appellant, being in privity with the paramount title, can maintain all or any actions that could be maintained by the United States.

Mery v. Brodt, 121 Cal. 335, 53 Pac. 818.

In cases of void patents the same may be impeached in any form of action where they are offered as the base of the attack or defense.

St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875, 11 Mor. Min. Rep. 673; Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; Williams v. San Pedro, 153 Cal. 44, 94 Pac. 234.

The act of certification was not the legal equivalent of the issuance of patent.

Weeks v. Bridgman, 159 U. S. 541, 40 L. ed. 253, 16 Sup. Ct. Rep. 72; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112; Bardon v. Northern P. R. Co. 145 U. S. 535, 36 L. ed. 806, 12 Sup. Ct. Rep. 856; Ard v. Brandon, 156 U. S. 537, 39 L. ed. 524, 15 Sup. Ct. Rep. 406; Whitney v. Taylor, 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796.

There is no authority for the proposition that the Land Department does not retain jurisdiction over public lands in cases where patents have been illegally issued; that is, in instances where the Land Department had not the jurisdiction to issue a controverted patent.

LeRoy v. Jamison, 3 Sawy. 369, Fed. Cas. No. 8,271.

Certification or patent will not create, of itself, the conclusive presumption that no prior claims of pre-emption or homestead or mining location existed.

Doolan v. Carr, 125 U. S. 618–642, 31 L. ed. 844–853, 8 Sup. Ct. Rep. 1228; Reynolds v. Iron Silver Min. Co. 116 U. S. 687, 29 L. ed. 774, 6 Sup. Ct. Rep. 601, 15 Mor. Min. Rep. 591.

The reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company is valid.

Alford v. Barnum, 45 Cal. 482, 10 Mor. Min. Rep. 422; Merrill v. Dixon, 15 Nev. 401; Davis v. Wiebbold, 139 U. S. 519, 35 L. ed. 242, 11 Sup. Ct. Rep. 628; United States v. Central P. R. Co. 93 Fed. 873; McLaughlin v. Powell, 50 Cal. 64, 10 Mor. Min. Rep. 424; Carr v. Quigley, 57 Cal. 395; United Land Asso. v. Knight, 85 Cal. 486, 23 Pac. 267, 24 Pac. 818; Van Ness v. Rooney, 160 Cal. 131, 116 Pac. 392; Chicago Quartz Min. Co. v. Oliver, 75 Cal. 194, 7 Am. St. Rep. 143, 16 Pac. 780; Irvine v. Tarbat, 105 Cal. 243, 38 Pac. 896; Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 64 Pac. 113; Saunders v. La Purisima Gold Min. Co. 125 Cal. 164, 57 Pac. 656, 20 Mor. Min. Rep. 93; Barden v. Northern P. R. Co. 154 U. S. 330, 38 L. ed. 1002, 14 Sup. Ct. Rep. 1030; 17 Ops. Atty. Gen. 248; Lamprey v. State, 52 Minn. 181, 18 L.R.A. 670, 38 Am. St. Rep. 541, 53 N. W. 1139; Reynolds v. Iron Silver Min. Co. 116 U. S. 687, 29 L. ed. 774, 6 Sup. Ct. Rep. 601, 15 Mor. Min. Rep. 591; Hunt v. Steese, 75 Cal. 620, 17 Pac. 920.

The insertion of the mineral exception in a patent was notice to a railroad patentee that there had not been the examination required by law.

Gale v. Best, 78 Cal. 240, 12 Am. St. Rep. 44, 20 Pac. 550, 17 Mor. Min. Rep. 186; Eastern Oregon Land Co. v. Willow River Land & Irrig. Co. 187 Fed. 466.

To uphold the patent in this case is to subscribe to a doctrine that any patent issued by the Land Department is conclusive and binding, although it was issued in direct violation of the law providing for its issuance, or in violation of the Land Office rules.

Moffat v. United States, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10; McLaughlin v. Heid, 63 Cal. 208.

The character of the lands within the limits of railroad land grants must, of necessity, be primarily determined by the Land Department.

Litchfield v. The Register (Litchfield v. Richards) 9 Wall. 575, 577, 19 L. ed. 681, 682.

An examination and a decision are contemplated, not a mere issuance of a patent as in this case, without any examination, decision, or adjudication.

Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 450, 27 L. ed. 226, 227, 1 Sup. Ct. Rep. 389; Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321, 323, 41 L. ed. 175, 176, 16 Sup. Ct. Rep. 1018; Northern P. R. Co. v. Sanders, 166 U. S. 620, 635, 41 L. ed. 1139, 1144, 17 Sup. Ct. Rep. 671; Barden v. Northern P. R. Co. 154 U. S. 328, 329, 38 L. ed. 1002, 14 Sup. Ct. Rep. 1030; Irvine v. Tarbat, 105 Cal. 243, 38 Pac. 896; Green v. Hayes, 70 Cal. 276, 11 Pac. 716; Williams v. San Pedro, 153 Cal. 44, 94 Pac. 234; Stewart v. Sutherland, 93 Cal. 270, 28 Pac. 947; Saunders v. La Purisima Gold Min. Co. 125 Cal. 164, 57 Pac. 656, 20 Mor. Min. Rep. 93; Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 64 Pac. 113; Hermocilla v. Hubbell, 89 Cal. 5, 26 Pac. 611; Richards v. Wolfling, 98 Cal. 195, 32 Pac. 971; Reynolds v. Iron Silver Min. Co. 116 U. S. 687, 29 L. ed. 774, 6 Sup. Ct. Rep. 601, 15 Mor. Min. Rep. 591; De Cambra v. Rogers, 189 U. S. 119, 47 L. ed. 734, 23 Sup. Ct. Rep. 519; Paterson v. Ogden,

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141 Cal. 43, 99 Am. St. Rep. 31, 74 Pac. 443; Dreyfus v. Badger, 108 Cal. 65, 41 Pac. 279.

It cannot be successfully contended that the examination and determination so often referred to simply mean there should be such only when there is a real contest between parties before the Department, for the Department has full authority on its own motion, or at the instance of others, to inquire into and determine the quality of the public lands.

Quinby v. Conlan, 104 U. S. 420, 26 L. ed. 800; Marquez v. Frisbie, 101 U. S. 476, 25 L. ed. 801; Iron Silver Min. Co. v. Campbell, 135 U. S. 286, 34 L. ed. 155, 10 Sup. Ct. Rep. 765, 16 Mor. Min. Rep. 218.

The law relating to known mineral lands at time of patent applies to agricultural lands.

Morton v. Nebraska, 21 Wall. 660, 22 L. ed. 639, 12 Mor. Min. Rep. 451; Alford v. Barnum, 45 Cal. 482, 10 Mor. Min. Rep. 422; Hunt v. Steese, 75 Cal. 620, 17 Pac. 920; Merrill v. Dixon, 15 Nev. 401; Garrard v. Silver Peaks Mines, 82 Fed. 578; Hermocilla v. Hubbell, 89 Cal. 5, 26 Pac. 611; Gale v. Best, 78 Cal. 240, 12 Am. St. Rep. 44, 20 Pac. 550, 17 Mor. Min. Rep. 186; McLaughlin v. Powell, 50 Cal. 64, 10 Mor. Min. Rep. 424; Chicago Quartz Min. Co. v. Oliver, 75 Cal. 198, 7 Am. St. Rep. 143, 16 Pac. 780; Southern P. R. Co. v. McCusker, 127 U. S. 790, 32 L. ed. 329; Wright v. Roseberry, 121 U. S. 488, 30 L. ed. 1039, 7 Sup. Ct. Rep. 985; Van Ness v. Rooney, 160 Cal. 131, 116 Pac. 392; Wirth v. Branson, 98 U. S. 118, 25 L. ed. 86; Northern P. R. Co. v. Sanders, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671; Newhall v. Sanger, 92 U. S. 761, 23 L. ed. 769; Doolan v. Carr, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; Gregory v. Pershbaker, 73 Cal. 117, 14 Pac. 401, 15 Mor. Min. Rep. 602; Cleary v. Skiffich, 28 Colo. 368, 89 Am. St. Rep. 207, 65 Pac. 59, 21 Mor. Min. Rep. 284; Kansas City Min. & Mill. Co. v. Clay, 3 Ariz. 326, 29 Pac. 9.

Both the government and the grantee, as well as those in privity with him, are bound by the recitals of facts properly contained in the patent (McGarrahan v. New Idria Min. Co. 49 Cal. 331, 11 Mor. Min. Rep. 641, 96 U. S. 316, 24 L. ed. 630, 11 Mor. Min. Rep. 665; Dean v. Long, 122 Ill. 447, 14 N. E. 34; 32 Cyc. 1038), but an opinion of an executive officer as to matters of law indicated (either) by the act of issuing the patent is not conclusive (32 Cyc. 1038), and the patent may be examined by searching the antecedent record; and there being no record in our case, the patent at best is only an opinion of law evidenced by the issue of the patent. A patent may be shown to be void by searching the antecedent record (32 Cyc. 1043; Andrus v. Wheeler, 18 Misc. 646, 42 N. Y. Supp. 525; Bledsoe v. Well, 4 Bibb, 329), and when the court in this case finds there was no antecedent record, how may the patent be upheld?

It requires a perfect patent to set the presumption of regularity in motion.

Davis v. Wiebbold, 139 U. S. 526, 35 L. ed. 245, 11 Sup. Ct. Rep. 628; Deffeback v. Hawke, 115 U. S. 406, 29 L. ed. 427, 6 Sup. Ct. Rep. 95.

It is conceded, it is established, and that beyond any question, that if A should convey to B, by grant deed, 640 acres of land, excepting the mineral therein, or any subdivision thereof, in which mineral should thereafter be found, such an exception would be valid; and that the grantor or his administrator, executor, or assign could at any time thereafter, even a thousand years thereafter, enforce the exception.

Maxwell Land Grant Co. v. Dawson, 151 U. S. 586, 604, 38 L. ed. 279, 285, 14 Sup. Ct. Rep. 458; Cox v. McClure, 71 Conn. 729, 43 Atl. 310; Stockton v. Morris, 39 W. Va. 432, 19 S. E. 531; Greenleaf v. Birth, 6 Pet. 302, 8 L. ed. 406; Painter v. Pasadena Land & Water Co. 91 Cal. 74, 27 Pac. 539.

Now if it follows that a patent of the United States to land within California is subject to the same rule of construction that applies to an excepted deed between individuals, it will also follow that the contention of the appellees is without force in such connection.

Fremont v. Flower, 17 Cal. 225, 12 Mor. Min. Rep. 418.

The bill specifically alleges that the patent issued without primary determination of the quality of the land, and that there had been no hearing or decision in the Land Office. A patent issued in the manner indicated is void.

Moffat v. United States, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10; Kirwan v. Murphy, 189 U. S. 35, 47 L. ed. 698, 23 Sup. Ct. Rep. 599; Whiteside v. United States, 93 U. S. 247, 23 L. ed. 882; Hume v. United States, 132 U. S. 406, 33 L. ed. 393, 10 Sup. Ct. Rep. 134; Niles v. Cedar Point Club, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124.

Information of the character of all lands surveyed is required of surveying officers, so far as knowledge respecting them is obtained in the course of their duties; but they are not clothed with authority to especially examine them; nor does their report have any binding force. It is simply an addition made to the general information obtained from different sources on this subject.

Barden v. Northern P. R. Co. 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030.

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Such a patent as this is not conclusive on a collateral attack.

Ibid.

It must be conceded, we think, that the patent on its face shows it was not issued in a manner substantially regular, and therefore it cannot be presumed that formal requisites for its validity were complied with.

Fay, Ev. § 124, Greenl. Ev. § 20; Whart. Ev. §§ 1302–1309; Applegate v. Lexington & C. C. Min. Co. 117 U. S. 255, 264, 29 L. ed. 892, 894, 6 Sup. Ct. Rep. 742; Adams v. Cowles, 95 Mo. 501, 6 Am. St. Rep. 74, 8 S. W. 711; Hogue v. Corbit, 156 Ill. 540, 47 Am. St. Rep. 232, 41 N. E. 219; Berrenberg v. Boston, 137 Mass. 231, 50 Am. Rep. 296; Elliott, Ev. § 99 and note; Reynolds, Trial Ev. § 81.

When this court said that the determination of the question whether the land was mineral or not is dependent on oral testimony, it meant, at any rate, that only a question of law was decided by the Land Department when it concluded to issue the patent, not issued in due form, with recitals and statement of the quality of the land.

Northern P. R. Co. v. Colburn, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98; Johnson v. Drew, 171 U. S. 93, 43 L. ed. 88, 18 Sup. Ct. Rep. 800; Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321, 41 L. ed. 175, 16 Sup. Ct. Rep. 1018.

Locating a mining claim predicated on the discovery of mineral, and recording the same, as required by rules of the mining district within which the claims are embraced, creates an estate of freehold which continues until the lawful cancelation of the location by a tribunal of competent jurisdiction, or until the claim is abandoned or forfeited; and in such latter two instances, and until such times, the legal and paramount title is held in trust by the United States for the prior mining locator.

Noyes v. Mantle, 127 U. S. 349, 351, 32 L. ed. 169, 170, 8 Sup. Ct. Rep. 1132, 15 Mor. Min. Rep. 611; Haws v. Victoria Copper Min. Co. 160 U. S. 303, 40 L. ed. 436, 16 Sup. Ct. Rep. 282; Mery v. Brodt, 121 Cal. 332, 53 Pac. 818; Belk v. Meagher, 104 U. S. 279–287, 26 L. ed. 735–738, 1 Mor. Min. Rep. 510; Nevada Sierra Oil Co. v. Home Oil Co. 98 Fed. 673, 20 Mor. Min. Rep. 283; Thallmann v. Thomas, 49 C. C. A 317, 111 Fed. 277, 21 Mor. Min. Rep. 573; St. Louis Min. & Mill. Co. v. Montana Min Co. 171 U. S. 650, 655, 43 L. ed. 320, 322, 19 Sup. Ct. Rep. 61, 19 Mor. Min. Rep. 575; Meydenbauer v. Stevens, 78 Fed. 787, 18 Mor. Min. Rep. 578; Manuel v. Wulff, 152 U. S. 510, 38 L. ed. 534, 14 Sup. Ct. Rep. 651, 18 Mor. Min. Rep. 85; Forbes v. Gracey, 94 U. S. 762, 24 L. ed. 313, 14 Mor. Min. Rep. 183; Black v. Elkhorn Min. Co. 163 U. S. 445, 41 L. ed. 221, 16 Sup. Ct. Rep. 1101, 18 Mor. Min. Rep. 375; Gwillim v. Donnellan, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110, 15 Mor. Min. Rep. 482; Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220–226, 48 L. ed. 944–949, 24 Sup. Ct. Rep. 632.

The title so created remained in full force and effect, even against the United States, until cancelation, forfeiture, or abandonment.

Little Gunnell Min. Co. v. Kimber, Fed. Cas. No. 8,402, 1 Mor. Min. Rep. 536; Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 20 Mor. Min. Rep. 591; Barklage v. Russell, 29 Land Dec. 401; Iron Silver Min. Co. v. Campbell, 135 U. S. 286, 34 L. ed. 155, 10 Sup. Ct. Rep. 765, 16 Mor. Min. Rep. 218; Marquez v. Frisbie, 101 U. S. 476, 25 L. ed. 801; Quinby v. Conlan, 104 U. S. 420, 26 L. ed. 800.

The relocator has the same rights as the original locator, although in strictness not a discoverer at all.

Armstrong v. Lower, 6 Colo. 393, 15 Mor. Min. Rep. 631; Zerres v. Vanina, 134 Fed. 615.

Forfeiture of a mining claim does not cause the land to revert to the public domain; it passes instanter to the relocator, and thus maintains privity between the relocators and the paramount title; namely, the legal title held in trust by the United States, up to the moment of forfeiture for the prior locator.

27 Cyc. 599; Miller v. Taylor, 6 Colo. 41, 9 Mor. Min. Rep. 547; Brockbank v. Albion Min. Co. 29 Utah, 367, 81 Pac. 863; Conway v. Hart, 129 Cal. 484, 62 Pac. 44, 21 Mor Min. Rep. 20; Zerres v. Vanina, 134 Fed. 615.

The legal title of the United States does not pass under a void patent, and a void patent may be attacked and avoided in any action where it is the basis of the prosecution or defense.

Williams v. San Pedro, 153 Cal. 44, 94 Pac. 234.

Granite is a mineral, and granite-bearing lands were excluded from the railroad land grant under the exception of "all minerals." Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365.

Coal lands are mineral lands within the meaning of the term as used in statutes regulating the disposition of the public domain.

Mullan v. United States, 118 U. S. 271, 30 L. ed. 170, 6 Sup. Ct. Rep. 1041.

Lands valuable for mineral, whether of the metallic or nonmetallic class, are subject to location, entry, and purchase under the provisions of the mining laws, and are also within the exception of "mineral lands" from railroad land grants.

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Re Hooper, 1 Land Dec. 560; Maxwell v. Brierly, 10 Copp's L. O. 50; Lindley, Mines, §§ 96, 98, 137, 158, 162; McGlenn v. Wienbroeer, 15 Land Dec. 370; Van Doren v. Plested, 16 Land Dec. 508; Hayden v. Jamison, 16 Land Dec. 537; Shepherd v. Bird, 17 Land Dec. 82; Gary v. Todd, 18 Land Dec. 58; Re Gibson, 21 Land Dec. 327; Re Union Oil Co. 25 Land Dec. 354; Pacific Coast Marble Co. v. Northern P. R. Co. 25 Land Dec. 233; Alldritt v. Northern P. R. Co. 25 Land Dec. 349; Re Florida C. & P. R. Co. 26 Land Dec. 600; Richter v. Utah, 27 Land Dec. 95; McQuiddy v. California, 29 Land Dec. 181; Tulare Oil & Min. Co. v. Southern P. R. Co. 29 Land Dec. 269; Beaudette v. Northern P. R. Co. 29 Land Dec. 248; Schrimpf v. Northern P. R. Co. 29 Land Dec. 327; Morrill v. Northern P. R. Co. 30 Land Dec. 475.

Nothing passes by implication under grants of a public nature, but in the clear and explicit language of the grant must be found all that is conveyed by it. When doubt arises, the grants must be construed most strictly against the grantee.

Dubuque & P. R. Co. v. Litchfield, 23 How. 66, 16 L. ed. 500; Slidell v. Grandjean, 111 U. S. 412, 28 L. ed. 321, 4 Sup. Ct. Rep. 475; Barden v. Northern P. R. Co. 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030.

The value of a mineral deposit, rather than its kind, appears to have been the controlling factor in determining whether the lands containing it were subject to entry and patent under the mining law.

Pacific Coast Marble Co. v. Northern P. R. Co. 25 Land Dec. 233.

Petroleum is a mineral.

Gill v. Weston, 110 Pa. 312, 1 Atl. 921; Westmoreland & C. Natural Gas Co. v. De Witt, 130 Pa. 235, 5 L.R.A. 731, 18 Atl. 724; Hague v. Wheeler, 157 Pa. 324, 22 L.R.A. 141, 37 Am. St. Rep. 736, 27 Atl. 714; Thornton, Oil & Gas, § 18; Murray v. Allred, 100 Tenn. 100, 39 L.R.A. 249, 66 Am. St. Rep. 740. 43 S. W. 355, 19 Mor. Min. Rep. 169; Funk v. Haldeman, 53 Pa. 229, 7 Mor. Min. Rep. 203; Williamson v. Jones, 39 W. Va. 231, 25 L.R.A. 222, 19 S. E. 436; Re Union Oil Co. 25 Land Dec. 351; Gird v. California Oil Co. 60 Fed. 531, 18 Mor. Min. Rep. 45; Re Piru Oil Co. 16 Land Dec. 117; Roberts v. Jepson, 4 Land Dec. 60; Porter v. Mack Mfg. Co. 65 W. Va. 636, 64 S. E. 853: Sult v. A. Hochstetter Oil Co. 63 W. Va. 317, 61 S. E. 307; Moore v. Griffin, 72 Kan. 164, 4 L.R.A.(N.S.) 477, 83 Pac. 395; Bee v. Barnes, 79 C. C. A. 433, 149 Fed. 727, 138 Fed. 476.

Natural gas is a mineral.

Re Buffalo Natural Gas Fuel Co. 73 Fed. 191; Thornton, Oil & Gas, § 18; Westmoreland & C. Natural Gas Co. v. DeWitt, 130 Pa. 235, 5 L.R.A. 731, 18 Atl. 724.

A mineral has been defined to be a fossil, or what is dug out of the earth. The term may, however, in the most enlarged sense, be described as comprising all the substances which now form, or which once formed, part of the solid body of the earth, both external and internal, and which are destitute of and incapable of supporting animal or vegetable life. In this view it will embrace the bare granite of the high mountain as well as the deepest hidden diamonds and metallic ores.

Bainbridge, Mines, pp. 1, 2.

Mineral in its general legal sense is any valuable inert or lifeless substance formed or deposited in its present position through natural agencies alone, and which is found either in or upon the soil of the earth or in the rocks beneath the soil.

Barringer & A. Mines, p. 76.

The mining laws from their earliest history have been administered by the Land Department as applicable in all their force and effect to the public mineral lands within the limits of railroad land grants.

Central P. R. Co. v. Valentine, 11 Land Dec. 238.

The term "minerals," standing alone, and as understood in mining law, generally comprehends and includes all the substances in the earth's crust which are sought for and removed by man for the substance itself.

1 Snyder, Mines, §§ 134, 140, 143, 145; 2 Snyder, Mines, § 926.

Whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws.

Pacific Coast Marble Co. v. Northern P. R. Co. 25 Land Dec. 233.

The mineral exception having been inserted in the patent pursuant to the assent of the defendant railroad company, and pursuant to the agreement between the United States and the defendant railroad company, the effect of the same and of the acceptance of the agreed patent, independent of any statutory authority to insert the same in the patent, is to retain the title to the controverted lands in the United States, and to estop the defendant railroad company from denying that the legal title to the lands in controversy remains in the United States thereunder.

LeRoy v. Jamison, 3 Sawy. 369, Fed. Cas. No. 8,271; Gale v. Best, 78 Cal. 240, 12 Am. St. Rep. 44, 20 Pac. 550, 17 Mor. Min. Rep. 186; United States v. Schurz, 102 U.

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S. 399, 26 L. ed. 172; Fremont v. Flower, 17 Cal. 199, 12 Mor. Min. Rep. 418; Cowell v. Colorado Springs Co. 100 U. S. 55, 25 L. ed. 547; 16 Cyc. 789, 790, 791.

In inserting the mineral exception the Department was acting on a construction of a statute which it was called on to construe, and it followed a construction that was in force for at least thirty-seven years; and even if the statute is ambiguous or doubtful in such regard, the contemporaneous construction of the statute by the executive officers, coupled with the assent and acquiescence of those whose duty it is to construe it, or of those who have been called upon to carry it into effect, is entitled to great respect, and should control the construction of the statute by the courts.

United States v. Moore, 95 U. S. 760, 24 L. ed. 588; United States v. Burlington & M. River R. Co. 98 U. S. 336, 25 L. ed. 198; United States v. Graham, 110 U. S. 219, 28 L. ed. 126, 3 Sup. Ct. Rep. 582; Brown v. United States, 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648; The Laura (Pollock v. Bridgeport S. B. Co.) 114 U. S. 413, 29 L. ed. 147, 5 Sup. Ct. Rep. 881; United States v. Philbrick, 120 U. S. 52, 30 L. ed. 559, 7 Sup. Ct. Rep. 413; Robertson v. Downing, 127 U. S. 613, 32 L. ed. 271, 8 Sup. Ct. Rep. 1328; Hastings & D. R. Co. v. Whitney, 132 U. S. 365, 33 L. ed. 367, 10 Sup. Ct. Rep. 112; Heath v. Wallace, 138 U. S. 578, 34 L. ed. 1066, 11 Sup. Ct. Rep. 380; Pennoyer v. McConnaughy, 140 U. S. 23, 35 L. ed. 370, 11 Sup. Ct. Rep. 699; Barden v. Northern P. R. Co. 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030.

The exception gives expression to the intent of the granting act.

Reynolds v. Iron Silver Min. Co. 116 U. S. 687–697, 29 L. ed. 774–777, 6 Sup. Ct. Rep. 601, 15 Mor. Min. Rep. 591.

Every part of the patent must be considered so that effect may be given to what may appear to be the controlling intention of the grantor.

Pugh v. Mays, 60 Tex. 191.

The estoppel will be limited by the apparent intention of the parties.

Colonial Bank v. Hepworth, L. R. 36 Ch. Div. 36, 56 L. J. Ch. N. S. 1089, 57 L. T. N. S. 148, 36 Week. Rep. 259.

Estoppels are mutual, and bind both parties or neither.

Schuhman v. Garratt, 16 Cal. 101; Franklin v. Dorland, 28 Cal. 175, 87 Am. Dec. 111; Gordon v. San Diego, 101 Cal. 522, 40 Am. St. Rep. 73, 36 Pac. 18.

Where a grant by metes and bounds excepts a tract by the name under which it is generally known, the tract so excepted does not pass by the grant.

Truett v. Adams, 66 Cal. 218, 5 Pac. 96.

Where a deed described the land conveyed by courses and distances, and conveyed no specific number of acres, it was competent for the grantor to except a swamp or marsh from the operation of the deed.

Painter v. Pasadena Land & Water Co. 91 Cal. 74, 27 Pac. 539.

A reservation forbidding the grantee from furnishing to others rock taken from the premises sold is valid.

Pavkovich v. Southern P. R. Co. 150 Cal. 39, 87 Pac. 1097.

A reservation in a grant is to be interpreted in favor of the grantor.

Martin v. Lloyd, 94 Cal. 195, 29 Pac. 491; Butler v. Gosling, 130 Cal. 422, 62 Pac. 596; Smith v. Stearns Ranchos Co. 132 Cal. 178, 64 Pac. 261, 716; Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171; Adams v. Hopkins, — Cal. —, 69 Pac. 228; 13 Cyc. 676–682.

All the modern authorities class petroleum as a hydrocarbon bitumen,—a mineral.

United States v. Buffalo Natural Gas Fuel Co. 172 U. S. 339, 43 L. ed. 469, 19 Sup. Ct. Rep. 200; Caldwell v. Fulton, 31 Pa. 475, 72 Am. Dec. 760, 3 Mor. Min. Rep. 238; Stoughton's Appeal, 88 Pa. 198; Funk v. Haldeman, 53 Pa. 229, 7 Mor. Min. Rep. 203; Marshall v. Mellon, 179 Pa. 371, 35 L.R.A. 816, 57 Am. St. Rep. 601, 36 Atl. 201, 18 Mor. Min. Rep. 548; Blakley v. Marshall, 174 Pa. 425, 34 Atl. 564, 18 Mor. Min. Rep. 350; Jennings v. Bloomfield, 199 Pa. 638, 49 Atl. 135; Wilson v. Youst (Wilson v. Hughes) 43 W. Va. 826, 39 L.R.A. 292, 28 S. E. 781; Williamson v. Jones, 39 W. Va. 231, 25 L.R.A. 222, 19 S. E. 436; Southern Oil Co. v. Colquitt, 28 Tex. Civ. App. 292, 69 S. W. 169; Dunham v. Kirkpatrick, 101 Pa. 36, 47 Am. Rep. 696; Thompson v. Noble, 3 Pittsb. 201, 11 Mor. Min. Rep. 137; Gill v. Weston, 110 Pa. 312, 1 Atl. 921; Murray v. Allred, 100 Tenn. 100, 39 L.R.A. 249, 66 Am. St. Rep. 740, 43 S. W. 355, 19 Mor. Min. Rep. 169; Wagner v. Mallory, 169 N. Y. 501, 62 N. E. 584, 22 Mor. Min. Rep. 42; Kelley v. Ohio Oil Co. 57 Ohio St. 317, 39 L.R.A. 765, 63 Am. St. Rep. 721, 49 N. E. 399; Westmoreland & C. Natural Gas Co. v. De Witt, 130 Pa. 235, 5 L.R.A. 731, 18 Atl. 724; Porter v. Mack Mfg. Co. 65 W. Va. 636, 64 S. E. 853; Sult v. A. Hochstetter Oil Co. 63 W. Va. 317, 61 S. E. 307; Williams v. South Penn Oil Co. 52 W. Va. 181, 60 L.R.A. 795, 43 S. E. 214; Brown v. Vandergrift, 80 Pa. 147 Lillibridge v. Lackawanna Coal Co. 134 Pa. 293, 13 L.R.A. 627, 24 Am. St. Rep. 544, 22 Atl. 1035, 17 Mor. Min. Rep. 412; McKinney v. Central Kentucky Natural Gas Co. 134 Ky. 239, 120 S. W. 314, 20 Ann. Cas. 934; Os-

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born v. Arkansas Territorial Oil & Gas Co. 103 Ark. 175, 146 S. W. 122; McIntosh v. Ropp, 233 Pa. 513, 82 Atl. 949; Etchison Drilling Co. v. Flournoy, 131 La. 442, 59 So. 867; Frank Oil Co. v. Belleview Gas & Oil Co. 29 Okla. 719, 43 L.R.A.(N.S.) 487, 119 Pac. 260; Gladys City Oil, Gas & Mfg. Co. v. Right of Way Oil Co. — Tex. Civ. App. —, 137 S. W. 171; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Brown v. Spilman, 155 U. S. 665, 669, 39 L. ed. 304, 305, 15 Sup. Ct. Rep. 245; Webb v. American Asphaltum Min. Co. 84 C. C. A. 651, 157 Fed. 207; Bacon v. Walker, 204 U. S. 316, 51 L. ed. 501, 27 Sup. Ct. Rep. 289; Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 18 L.R.A. 702, 34 Am. St. Rep. 645, 25 Atl. 597.

Messrs. Frederic R. Kellogg and Roberts Walker also filed an additional brief for appellant:

Not only in land grant cases, but in all other cases known to us, in which the Federal courts and the Land Department have passed upon the question (with the one exception, which was immediately corrected), petroleum land has been treated as mineral land, both within the intent of the lawmaking bodies and the courts, in connection with the various questions which have arisen, and Congress has expressly approved this view.

1 Snyder, Mines, §§ 134, 140, 143, 145; 2 Snyder, Mines, § 926; Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365; Webb v. American Asphaltum Min. Co. 84 C. C. A. 651, 157 Fed. 207; Lindsley v. Natural Carbonic Gas Co. 162 Fed. 958, affirmed in 220 U. S. 61, 74, 55 L. ed. 369, 375, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Brewster v. Lanyon Zinc Co. 72 C. C. A. 213, 140 Fed. 807; Kansas Natural Gas Co. v. Haskell, 172 Fed. 562; Gird v. California Oil Co. 60 Fed. 531, 18 Mor. Min. Rep. 45; Ohio Oil Co. v. Indiana, 177 U. S. 190, 202, 44 L. ed. 729, 736, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Bacon v. Walker, 204 U. S. 316, 51 L. ed. 501, 27 Sup. Ct. Rep. 289; West v. Kansas Natural Gas Co. 221 U. S. 229, 252–260, 55 L. ed. 716, 725–728, 35 L.R.A. (N.S.) 1193, 31 Sup. Ct. Rep. 564; Re Union Oil Co. 25 Land Dec. 357.

The fact that the Land Department has not determined whether the land in question was mineral or nonmineral does not involve a question of fact, as the facts are admitted; but solely a question of law whether land valuable for its granite is mineral or nonmineral under the terms of the grant.

Northern P. R. Co. v. Soderberg, 188 U. S. 528, 47 L. ed. 580, 23 Sup. Ct. Rep. 365.

Mr. D. J. Hinkley argued the cause, and, with Mr. T. H. Hogsett, filed a brief for appellants in No. 280:

The statutory grant, being *in præsenti*, passed the title granted as of its date upon the filing of the map of definite location of the road, of all lands granted by it, and of none other.

Schulenberg v. Harriman, 21 Wall. 44, 60, 22 L. ed. 551, 554; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 741, 23 L. ed. 634, 637; Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 24 L. ed. 1095; St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 429, 26 L. ed. 578, 579; St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 5, 6, 35 L. ed. 77, 79, 80, 11 Sup. Ct. Rep. 389.

The exclusion, by the statute, of all mineral lands from its operation, being *in præsenti*, excluded from the grant, in its creation and by its definition, all mineral lands, whether known or unknown to be such.

Barden v. Northern P. R. Co. 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030.

The granting act is a special statutory law, intended and designed by Congress exclusively to define and control the grant made by it, and must be so construed as to carry its intent and purposes into effect.

Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 504, 33 L. ed. 687, 690, 10 Sup. Ct. Rep. 341; Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 24 L. ed. 1095; Barden v. Northern P. R. Co. 154 U. S. 288, 319, 38 L. ed. 992, 999, 14 Sup. Ct. Rep. 1030.

The office of the patent provided for in the statute is not to make a grant of lands, nor to alter in any particular the grant made by the statute, but is to confirm to the grantee the right and title granted to it by the statute.

Missouri, K. & T. P. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 24 L. ed. 1095; St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578; Deseret Salt Co. v. Tarpey, 142 U. S. 247, 35 L. ed. 1001, 12 Sup. Ct. Rep. 158; Barden v. Northern P. R. Co. 154 U. S. 315, 38 L. ed. 997, 14 Sup. Ct. Rep. 1030.

The granting act expressly puts upon the grantee the burden of selecting the land granted. All mineral lands are by the statute excluded from its grant. Therefore they were not to be located at all, and if in fact located, they could not pass under the grant.

Barden v. Northern P. R. Co. supra.

Neither the patent issued nor the issuance thereof establishes an adjudication by the office of the Interior Department that all of the lands described in the patent are nonmineral.

Wisconsin C. R. Co. v. Price County, 133

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U. S. 496, 508, 33 L. ed. 687, 693, 10 Sup. Ct. Rep. 341; Barden v. Northern P. R. Co. 154 U. S. 315, 322, 38 L. ed. 997, 1000, 14 Sup. Ct. Rep. 1030.

The appellees confessedly seek to establish, by virtue of an erroneous decision by public officers, their title to property which Congress intended and specially declared by statute that they should not have, and they must therefore show affirmatively from the record that such erroneous decision was made.

St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 640, 26 L. ed. 875, 876, 11 Mor. Min. Rep. 673; Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 450, 27 L. ed. 226, 227, 1 Sup. Ct. Rep. 389; Barden v. Northern P. R. Co. 154 U. S. 288–327, 328, 38 L. ed. 992–1001, 1002, 14 Sup. Ct. Rep. 1030; Grignon v. Astor, 2 How. 319, 340, 11 L. ed. 283, 291; Decatur v. Paulding, 14 Pet. 499, 10 L. ed. 560; Voorhees v. Jackson, 10 Pet. 473, 9 L. ed. 499; Wilcox v. Jackson, 13 Pet. 498, 511, 10 L. ed. 264, 270.

The officers of the Interior Department had authority in law to issue the patent pleaded in this cause, which purports to pass to the railroad company such of the lands therein described as are nonmineral, and not to pass title to it of such of them as are mineral.

United States v. Macdaniel, 7 Pet. 1, 8 L. ed. 587; Newhall v. Sanger, 92 U. S. 763, 23 L. ed. 769; United States v. Philbrick, 120 U. S. 53, 58, 59, 30 L. ed. 559, 561, 7 Sup. Ct. Rep. 413; Robertson v. Downing. 127 U. S. 607, 613, 32 L. ed. 269, 271, 8 Sup. Ct. Rep. 1328; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 366, 33 L. ed. 363, 367, 10 Sup. Ct. Rep. 112; Pennoyer v. McConnaughy, 140 U. S. 1, 23, 35 L. ed. 363, 370, 11 Sup. Ct. Rep. 699.

The saving clause in the patent is effective, and limits the title of the railroad company to lands nonmineral in fact.

Barden v. Northern P. R. Co. 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030; McLaughlin v. Powell, 50 Cal. 64, 10 Mor. Min. Rep. 424; Chicago Quartz Min. Co. v. Oliver, 75 Cal. 194, 7 Am. St. Rep. 143, 16 Pac. 780; Gale v. Best, 78 Cal. 235, 12 Am. St. Rep. 44, 20 Pac. 550, 17 Mor. Min. Rep. 186; Van Ness v. Rooney, 160 Cal. 131, 116 Pac. 392; Eastern Oregon Land Co. v. Willow River Land & Irrig. Co. 187 Fed. 466.

Petroleum or mineral oil is within the meaning of the term "mineral," as it was used in the acts of Congress reserving mineral lands from the railroad land grants.

Re Union Oil Co. 25 Land Dec. 354; Re Hooper, 1 Land Dec. 560; Maxwell v. Brierly, 10 Copp's L. O. 50; Pacific Coast Marble Co. v. Northern P. R. Co. 25 Land Dec. 233; Gird v. California Oil Co. 60 Fed. 531, 18 Mor. Min. Rep. 45; Northern P. R. Co. v. Soderberg, 188 U. S. 528, 47 L. ed. 580, 23 Sup. Ct. Rep. 365.

Messrs. D. J. Hinkley and T. J. Butler also filed a brief for appellants:

Petroleum oil is a mineral.

Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365; Murray v. Allred, 100 Tenn. 100, 39 L.R.A. 249, 66 Am. St. Rep. 740, 43 S. W. 355, 19 Mor. Min. Rep. 169; 2 Rapalje & L. Law Dict. p. 821; 15 Am. & Eng. Enc. Law, 500; Kelley v. Ohio Oil Co. 57 Ohio St. 317, 39 L.R.A. 765, 63 Am. St. Rep. 721, 49 N. E. 399; Wilson v. Youst (Wilson v. Hughes) 43 W. Va. 826, 39 L.R.A. 292, 28 S. E. 781; Sult v. A. Hochstetter Oil Co. 63 W. Va. 317, 61 S. E. 307; Weaver v. Richards, 156 Mich. 320, 120 N. W. 818.

Mr. Maxwell Evarts argued the cause, and, with Mr. Henry W. Clark, filed a brief for appellees:

In the administration of the public land laws generally, it has long been settled that the issue of a patent by the Department of the Interior, under an act of Congress providing for the disposal and patenting of public lands, is an official determination and declaration by the Department that the land so patented is of the character subject to disposition under such act, and that all statutory requirements preliminary to its issue have been complied with; and that this determination is conclusive except in a direct proceeding for its annulment or limitation, brought by the government or its privies.

Polk v. Wendal, 9 Cranch, 87, 98, 3 L. ed. 665, 669; Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875, 11 Mor. Min. Rep. 673; French v. Fyan, 93 U. S. 169, 171, 23 L. ed. 812, 813; Lee v. Johnson, 116 U. S. 48, 49, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; Johnson v. Towsley, 13 Wall. 72, 83, 20 L. ed. 485, 486; Bohall v. Dilla, 114 U. S. 47, 50, 29 L. ed. 61, 62, 5 Sup. Ct. Rep. 782; Duluth & I. Range R. Co. v. Roy, 173 U. S. 587, 590, 43 L. ed. 820, 822, 19 Sup. Ct. Rep. 549.

The foregoing proposition as to the presumptions inherent in a patent, concerning the character of the land and other prerequisites of its issue, are fully applicable in the case of patents issued under the Southern Pacific Railroad grant, and parties not in privity with the government are not entitled to attack such a patent upon allegations that there was no investigation or determination by the Department as to the character of the land, or that the land was in fact mineral land.

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Simmons v. Wagner, 101 U. S. 260, 261, 25 L. ed. 910, 911; Catholic Bishop v. Gibbon, 158 U. S. 155, 167, 39 L. ed. 931, 936, 15 Sup. Ct. Rep. 779; Barden v. Northern P. R. Co. 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030; Shaw v. Kellogg, 170 U. S. 312, 339, 42 L. ed. 1050, 1060, 18 Sup. Ct. Rep. 632; De Cambra v. Rogers, 189 U. S. 119, 122, 47 L. ed. 734, 735, 23 Sup. Ct. Rep. 519.

Appellants are not in privity with the government, and have therefore no standing to attack this patent. The allegations of the existence of mineral locations prior to patent do not affect the question.

Lavagnino v. Uhlig, 198 U. S. 443, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716.

The mineral land reservation clause in the patent is ineffective for any purpose.

Re Spong, 5 Land Dec. 193; Cowell v. Lammers, 10 Sawy. 246, 21 Fed. 200; Davis v. Wiebbold, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628; Deffeback v. Hawke, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; Shaw v. Kellogg, 170 U. S. 312, 42 L. ed. 1050, 18 Sup. Ct. Rep. 632; Courtright v. Wisconsin C. R. Co. 19 Land Dec. 410; Eastern Oregon Land Co. v. Willow River Land & Irrig. Co. 119 C. C. A. 437, 201 Fed. 203, reversing 187 Fed. 466.

Whether petroleum is a mineral oil is a question of fact which must be determined by a jury if conflicting evidence appears.

Farquharson v. Barnard, A. R. S. Oil & Gas Co. 22 Ont. L. Rep. 319, affirmed by Privy Council in 28 Times L. R. 590; Symington v. Caledonian R. Co. [1912] A. C. 93, 81 L. J. P. C. N. S. 155, 106 L. T. N. S. 193, 56 Sol. Jo. 87, [1912] S. C. 9, 49 Scot. L. R. 49; Caledonian R. Co. v. Glenboig Union Fireclay Co. [1911] A. C. 290, 80 L. J. P. C. N. S. 128, 104 L. T. N. S. 657, 75 J. P. 377, [1911] S. C. 72, 48 Scot. L. R. 526; North British R. Co. v. Budhill Coal & Sandstone Co. [1910] A. C. 116, 79 L. J. P. C. N. S. 31, 101 L. T. N. S. 609, 26 Times L. R. 79, 54 Sol. Jo. 79, [1910] S. C. 1, 47 Scot. L. R. 23; Great Western R. Co. v. Carpalla United China Clay Co. [1910] A. C. 83, 79 L. J. Ch. N. S. 117, 101 L. T. N. S. 785, 74 J. P. 57, 26 Times L. R. 190, 47 Scot. L. R. 612; Silver v. Bush, 213 Pa. 195, 62 Atl. 832; McKinney v. Central Kentucky Natural Gas Co. 134 Ky. 239, 120 S. W. 314, 20 Ann. Cas. 934; Brown v. Spilman, 155 U. S. 665, 669, 39 L. ed. 304, 305, 15 Sup. Ct. Rep. 245; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Wagner v. Mallory, 169 N. Y. 501, 62 N. E. 584, 22 Mor. Min. Rep. 42; Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365.

Messrs. Gordon M. Buck and A. A. Hoehling, Jr., also filed a brief for appellees.

Former Solicitor General Bullitt, Assistant Attorney General Knaebel, and Mr. B. D. Townsend, Special Assistant to the Attorney General, filed a brief for the United States:

The face of the grant, together with the thorough reasoning in the Barden Case, will not allow further discussion of the first question.

There was no authority to transfer title to mineral lands, known or unknown, and no attempt by the Land Department to do so could be successful, except on the theory that a decision had actually been made.

Barden v. Northern P. R. Co. 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030; Deseret Salt Co. v. Tarpey, 142 U. S. 241, 251, 35 L. ed. 999, 1002, 12 Sup. Ct. Rep. 158; Langdeau v. Hanes, 21 Wall. 521, 529, 22 L. ed. 606, 608; Davis v. Wiebbold, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628.

A patent cannot operate as a judgment upon any matter which was not necessarily adjudicated, and does not appear from the face of the patent to have been adjudicated.

23 Cyc. 1297; Hopkins v. Lee, 6 Wheat. 109, 114, 5 L. ed. 218, 220; Russell v. Place, 94 U. S. 606, 610, 24 L. ed. 214, 215.

Exceptions of mineral lands, inserted in railroad patents, are valid.

Reynolds v. Iron Silver Min. Co. 116 U. S. 687, 697, 29 L. ed. 774, 777, 6 Sup. Ct. Rep. 601, 15 Mor. Min. Rep. 591; Noyes v. Mantle, 127 U. S. 348, 32 L. ed. 168, 8 Sup. Ct. Rep. 1132, 15 Mor. Min. Rep. 611; McLaughlin v. Powell, 50 Cal. 64, 10 Mor. Min. Rep. 424: Chicago Quartz Min. Co. v. Oliver, 75 Cal. 194, 7 Am. St. Rep. 143, 16 Pac. 780; Carr v. Quigley, 57 Cal. 394; McLaughlin v. Heid, 63 Cal. 208; Gale v. Best, 78 Cal. 240, 12 Am. St. Rep. 44, 20 Pac. 550, 17 Mor. Min. Rep. 186; Van Ness v. Rooney, 160 Cal. 131, 116 Pac. 392; Eastern Oregon Land Co. v. Willow River Land & Irrig. Co. 187 Fed. 466.

Even if it were to be conceded that the exception was not authorized by law, it could not be treated as void and nugatory without ignoring entirely the character and function of a patent as an instrument of conveyance. A patent, like a deed, can convey only that which it purports to convey; and it strikes us as almost absurd to argue that such an instrument will operate to pass the title to lands which, by its own express terms, are excluded from the premises granted. The rule is well established and elementary that such an exception is part of the description, and the instrument containing it is not to be treated as conveying, or in anywise affecting, the land excepted.

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McLaughlin v. Powell, 50 Cal. 64, 10 Mor. Min. Rep. 424; Chicago Quartz Min. Co. v. Oliver, 75 Cal. 194, 7 Am. St. Rep. 143, 16 Pac. 780; Van Ness v. Rooney, 160 Cal. 131, 116 Pac. 392.

Petroleum or mineral oil is within the meaning of the term "mineral," as it was used in the acts of Congress reserving mineral lands from the railroad grants.

Re Union Oil Co. 25 Land Dec. 351; Gird v. California Oil Co. 60 Fed. 531, 18 Mor. Min. Rep. 45; Northern P. R. Co. v. Soderberg, 188 U. S. 526, 534, 47 L. ed. 575, 583, 23 Sup. Ct. Rep. 365.

The railroad is not in proper position to urge the supposed mistake of the Land Department to its own advantage, and to the detriment of the United States.

Reynolds v. Iron Silver Min. Co. 116 U. S. 687, 697, 29 L. ed. 774, 777, 6 Sup. Ct. Rep. 601, 15 Mor. Min. Rep. 591.

Solicitor General Davis also filed a brief for the United States.

Messrs. Charles W. Bunn and Charles Donnelly filed a brief for the Northern Pacific Railroad Company:

The mere neglect of the Department to perform its duty previous to the issuance of the patent would not impair its validity.

Barden v. Northern P. R. Co. 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030; Polk v. Wendal, 9 Cranch, 87, 97, 3 L. ed. 665, 668.

The distinction between a void and a voidable patent has been noted many times by this court in language which makes it plain that a patent answering to the description contained in this second question would not be void.

Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321, 323, 41 L. ed. 175, 176, 16 Sup. Ct. Rep. 1018; United States v. Schurz, 102 U. S. 378, 400, 26 L. ed. 167, 173.

The patent is the determination; and, when issued under a grant which excludes mineral lands, it necessarily determines that the lands described in it are of the class which the patentee is entitled to receive. To speak of a patent as not determining the facts necessary to its proper issuance is as if one were to speak of a judgment as not determining the facts necessary to its rendition. The analogy between patents and judgments in this aspect is well recognized (Noble v. Union River Logging R. Co. 147 U. S. 165, 173, 37 L. ed. 123, 126, 13 Sup. Ct. Rep. 271); and as a judgment is decisive not simply of the ultimate facts recorded in it, but as well of all the antecedent facts necessary to its rendition,—of "all the *media concludendi*." (Fauntleroy v. Lum, 210 U. S. 230, 237, 52 L. ed. 1039, 1042, 28 Sup. Ct. Rep. 641),—so a patent is a determination not only that the patentee is the owner of the lands described in it, but as well that they are the kind of lands which may properly be conveyed to him.

The reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company are void, being inserted without authority.

Deffeback v. Hawke, 115 U. S. 392, 406, 29 L. ed. 423, 427, 6 Sup. Ct. Rep. 95; Davis v. Wiebbold, 139 U. S. 507, 527, 35 L. ed. 238, 245, 11 Sup. Ct. Rep. 628; Shaw v. Kellogg, 170 U. S. 312, 337, 42 L. ed. 1050, 1059, 18 Sup. Ct. Rep. 632.

Such an exception in a conveyance is nugatory—

(1) Because repugnant to the grant.

4 Kent, Com. 468; Cutler v. Tufts, 3 Pick. 277; Devlin, Real Estate, 3d ed. 1911, § 979.

(2) Because uncertain.

2 Devlin, Real Estate, 3d ed. 1911, p. 1933.

The exception in the patent being void, and the patent being at most only voidable, the authorities are uniform upon the proposition that it is conclusive against a collateral attack.

Polk v. Wendal, 9 Cranch, 87, 97, 3 L. ed. 665, 668; Johnson v. Towsley, 13 Wall. 72, 83, 20 L. ed. 485, 486; French v. Fyan, 93 U. S. 169, 23 L. ed. 812; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 640, 26 L. ed. 875, 876, 11 Mor. Min. Rep. 673; Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 451, 27 L. ed. 226, 228, 1 Sup. Ct. Rep. 389; Doolan v. Carr, 125 U. S. 618, 624, 31 L. ed. 844, 846, 8 Sup. Ct. Rep. 1228; Chandler v. Calumet & H. Min. Co. 149 U. S. 79, 92, 37 L. ed. 657, 662, 13 Sup. Ct. Rep. 798; Heath v. Wallace, 138 U. S. 573, 585, 34 L. ed. 1063, 1068, 11 Sup. Ct. Rep. 380; McCormick v. Hayes, 159 U. S. 332, 348, 40 L. ed. 171, 176, 16 Sup. Ct. Rep. 37; Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321, 323, 41 L. ed. 175, 176, 16 Sup. Ct. Rep. 1018.

The fact that the appellant was not in privity with the government in any respect at the time when the patent was issued to the railroad company prevents him from attacking the patent on the ground of fraud, error, or irregularity in the issuance thereof, as so alleged in the bill.

Bohall v. Dilla, 114 U. S. 47, 29 L. ed. 61, 5 Sup. Ct. Rep. 782; Sparks v. Pierce, 115 U. S. 408, 29 L. ed. 428, 6 Sup. Ct. Rep. 102; Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; Sanford v. Sanford, 139 U. S. 642, 35 L. ed. 290, 11 Sup. Ct. Rep. 666; Ehrhardt v. Hogaboom, 115 U. S. 67, 29 L. ed. 346, 5 Sup. Ct. Rep.

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1157; Quinn v. Chapman, 111 U. S. 445, 28 L. ed. 476, 4 Sup. Ct. Rep. 508.

It was of railroad land grant patents that the courts were speaking when some of the strongest expressions as to their conclusiveness were used.

Barden v. Northern P. R. Co. 154 U. S. 288, 327, 38 L. ed. 992, 1001, 14 Sup. Ct. Rep. 1030; Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 510, 33 L. ed. 687, 694, 10 Sup. Ct. Rep. 341; St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 6, 35 L. ed. 77, 79, 11 Sup. Ct. Rep. 389; Deseret Salt Co. v. Tarpey, 142 U. S. 241, 251, 35 L. ed. 999, 1002, 12 Sup. Ct. Rep. 158; Lake Superior Ship Canal, R. & Iron Co. v. Cunningham, 155 U. S. 354, 375, 39 L. ed. 183, 190, 15 Sup. Ct. Rep. 103; Shaw v. Kellogg, 170 U. S. 12, 339, 42 L. ed. 1050, 1060, 18 Sup. Ct. Rep. 632; United States v. Winona & St. P. R. Co. 15 C. C. A. 96, 32 U. S. App. 272, 67 Fed. 957.

Swamp-land grants, like the railroad grants, were grants *in præsenti;* and it has been held that the right of the states to the lands granted by them could not be defeated by failure to issue patent.

Wright v. Roseberry, 121 U. S. 488, 499, 30 L. ed. 1039, 1041, 7 Sup. Ct. Rep. 985; French v. Fyan, 93 U. S. 169, 23 L. ed. 812.

It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter.

Florida C. R. Co. v. Schutte, 103 U. S. 118, 143, 26 L. ed. 327, 336.

The decision in the Barden Case has not been commonly regarded as *dictum.*

Toltec Ranch Co. v. Cook, 191 U. S. 532, 541, 48 L. ed. 291, 294, 24 Sup. Ct. Rep. 166; Lake Superior Ship Canal, R. & Iron Co. v. Cunningham, 155 U. S. 354, 375, 39 L. ed. 183, 190, 15 Sup. Ct. Rep. 103; Catholic Bishop v. Gibbon, 158 U. S. 155, 166, 39 L. ed. 931, 936, 15 Sup. Ct. Rep. 779; Central P. R. Co. v. Nevada, 162 U. S. 512, 525, 40 L. ed. 1057, 1061, 16 Sup. Ct. Rep. 885; Shaw v. Kellogg, 170 U. S. 312, 339, 42 L. ed. 1050, 1060, 18 Sup. Ct. Rep. 632; United States v. Chicago, M. & St. P. R. Co. 87 C. C. A. 592, 160 Fed. 820, 148 Fed. 891; Le Marchel v. Teagarden, 152 Fed. 666; James v. Germania Iron Co. 46 C. C. A 476, 107 Fed. 597; Boynton v. Haggart, 57 C. C. A. 301, 120 Fed. 829; Cosmos Exploration Co v. Gray Eagle Oil Co. 104 Fed. 47.

Mr. Justice Van Devanter delivered the opinion of the court:

In 1910 Edmund Burke filed a bill in equity in the circuit court of the United States for the southern district [672] of California, against the Southern Pacific Railroad Company, the Kern Trading & Oil Company, and several individuals, wherein he sought a decree establishing certain rights claimed by him in five sections of land in Fresno county, California, and enjoining the defendants from asserting any right or interest therein. A cross bill was filed by J. I. Lamprecht and other individual defendants, and the two corporate defendants demurred to both bills. The demurrers were sustained and a decree was entered dismissing the bills, for reasons assigned in an opinion announced the same day in Roberts v. Southern P. Co. 186 Fed. 934. The complainant and cross complainants appealed to the circuit court of appeals, and it certified the case here under the Judicial Code, § 239 [36 Stat. at L. 1157, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 228], for instruction upon designated questions of law.

According to the certificate, the bill alleged, in substance, that in 1892 the five sections were public lands and were located as placer mining claims under the mining laws of the United States, each location being preceded by a discovery of mineral within its limits; that on May 9, 1892, the railroad company, with knowledge of these locations, made application at the local land office to have the five sections, with others, patented to it under the land grant made to it by the act of July 27, 1866 (14 Stat. at L. 292, chap. 278, §§ 3, 4, 18), and the joint resolution of June 28, 1870 (16 Stat. at L. 382, No. 87), and did then corruptly cause one Madden, its land agent, to make and present at such land office, in support of such application, a false and fraudulent affidavit stating that the application contained a correct list of lands inuring to the railroad company under its grant, and that the listed lands were vacant, unappropriated, and not interdicted, mineral, or reserved lands; that no notice of such application was given to any of the placer claimants, and no hearing was had in the local office or in the Land Department with the purpose of [673] determining the character of the lands; that on July 10, 1894, without any such investigation or determination, a patent was issued to the railroad company purporting to convey to it, among other lands, the five sections in controversy; that the patent contained a clause reading: "Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands;" that the railroad company accepted the patent and caused it to be re-

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corded in Fresno county; that, in virtue of the patent, the railroad company claims to own all the lands described therein, including the five sections; that in March, 1909, the original mineral claimants having failed to perform the required assessment or development work for the preceding year, the complainant and certain associates of his entered upon the five sections and relocated the same as placer mining claims under the mining laws of the United States, each of the new locations being preceded by a discovery of mineral within its limits; that the lands contain petroleum in commercial quantities, which makes them more valuable for mining than for agricultural purposes; that the complainant is the owner of an undivided one-tenth interest in the mining claims created by the new location; and that the oil company, although claiming as a lessee of the railroad company, is a mere instrument of the latter, being entirely owned, dominated, and controlled by it.

According to the certificate, the cross bill set forth substantially a like state of facts, sought the same relief, and also contained the following allegation: "These cross complainants further say and show unto the court that the said Southern Pacific Railroad Company, with full knowledge of all the facts and circumstances herein stated and alleged, did, for itself, its successors and assigns forever, accept and assent to, and submit to, and agree to [674] be bound by, each and all of the provisions, stipulations, terms, conditions, restrictions, limitations, exclusions, and reservations in said act and joint resolution, and in said patent, or either or any of them contained, and so accepting the same and assenting and submitting thereto, and agreeing to be bound thereby, did receive and accept said alleged patent, and cause the same to be recorded in the office of the recorder of the county of Fresno, and state of California, and that said defendant, Southern Pacific Railroad Company, and all persons claiming any interest in said lands or any part thereof, under or through it by virtue of said act of Congress and joint resolution, and said patent, or any or either of them, are bound by all of said provisions, stipulations, terms, conditions, restrictions, limitations, exclusions, exceptions, and reservations, and are in equity and in conscience estopped to resist or deny the binding force and effect of same or any part or any thereof."

The questions propounded in the certificate are as follows:

"First. Did the said grant to the Southern Pacific Railroad Company include mineral lands which were known to be such at or prior to the date of the patent of July 10, 1894?

"Second. Does a patent to a railroad company under a grant which excludes mineral lands, as in the present case, but which is issued without any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?

"Third. Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect?

"Fourth. If the reservation of mineral lands as expressed [675] in the patent is void, then is the patent, upon a collateral attack, a conclusive and official declaration that the land is agricultural, and that all the requirements preliminary to the issuance of the patent have been complied with?

"Fifth. Is petroleum or mineral oil within the meaning of the term 'mineral' as it was used in said acts of Congress reserving mineral land from the railroad land grants?

"Sixth. Does the fact that the appellant was not in privity with the government in any respect at the time when the patent was issued to the railroad company prevent him from attacking the patent on the ground of fraud, error, or irregularity in the issuance thereof, as so alleged in the bill?

"Seventh. If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Railroad Company, and under an understanding and agreement between it and the officers of the Interior Department that said clause should be effective to keep in the United States title to such of the lands described in the patent as were in fact mineral, are the defendants, Southern Pacific Railroad Company and the Kern Trading & Oil Company, estopped to deny the validity of said clause?"

At the outset it is well to observe that this is not a suit by the government to cancel or annul a patent for fraud practised upon the land officers in its procurement, or for any fraudulent act, error of law, or mistake committed by them in issuing it (see United States v. Minor, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836; United States v. San Jacinto Tin Co. 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850; United States v. Trinidad Coal & Coking Co. 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct. Rep. 57; Germania Iron Co. v. United States, 165 U. S. 379, 41 L. ed. 754, 17 Sup. Ct. Rep. 337); nor is it a suit to have one

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to whom a patent has issued declared a trustee for another who, at the time of its issue, had acquired such a right to the land as to entitle him to that form of equitable relief (see Silver v. Ladd, 7 Wall. 219, 228, 19 L. ed. 138, 141; Lee v. [676] Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; Duluth & I. Range R. Co. v. Roy, 173 U. S. 587, 43 L. ed. 820, 19 Sup. Ct. Rep. 549; Svor v. Morris, 227 U. S. 524, 57 L. ed. 623, 33 Sup. Ct. Rep. 385). On the contrary, the suit is one wherein rights asserted under a patent are called in question by parties whose only claim to the land was initiated more than fourteen years after the date of the patent.

As the fifth question has been presented in separate briefs and the occasion for considering the other questions turns upon the answer to it, we take it up first. It is: "Is petroleum or mineral oil within the meaning of the term 'mineral' as it was used in said acts of Congress reserving mineral land from the railroad land grants?"

This granting act, like several others of that period, expressly excluded from its operation "all mineral lands" other than iron and coal lands. No attempt was made at defining "mineral lands," and doubtless the ordinary or popular signification of that term was intended. Apparently it was used in a sense which, if not restricted, would embrace iron and coal lands, else care hardly would have been taken to declare that it should not include them. This was deemed a reasonable inference in Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365, where a contention that it embraced only metalliferous lands was rejected. The question there was whether it included lands containing valuable bodies of granite, and the holding was that it did. While avoiding an exact definition, the court was of opinion that it comprehended all lands "chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture."

Petroleum has long been popularly regarded as a mineral oil. As its derivation indicates, the word means "rock oil," an oily substance so named because found naturally oozing from crevices in rocks. Its existence in this country was known from very early times, and when this and other railroad land grants, containing an [677] exception of mineral lands, were made, the extraction of oil from its natural reservoir in subterranean rocks had come to be a promising industry and was extending over an increasing area through discoveries of new oil fields. An official report laid before Congress a few months before this grant was made showed that the daily output of the oil wells in Pennsylvania, Ohio, West Virginia, and Kentucky was 12,000 barrels. H. R. Ex. Doc. No. 51, 39th Cong. 1st Sess. In the same year the supreme court of Pennsylvania, in disposing of an oil-land controversy, not only treated the oil as a mineral, but spoke of the work of extracting it from the containing rocks as "mining for oil;" and, in concluding the opinion, said: "Until our scientific knowledge on the subject is increased, this is the light in which the courts will be likely to regard this valuable production of the earth." Funk v. Haldeman, 53 Pa. 229, 7 Mor. Min. Rep. 203. And in another case that court said: "It is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands." Gill v. Weston, 110 Pa. 312, 317, 1 Atl. 921. Its mineral character has also been affirmed by the courts of other states. Williamson v. Jones, 39 W. Va. 231, 256, 25 L.R.A. 222, 19 S. E. 436; Kelley v. Ohio Oil Co. 57 Ohio St. 317, 328, 39 L.R.A. 765, 63 Am. St. Rep. 721, 49 N. E. 399; Murray v. Allred, 100 Tenn. 100, 39 L.R.A. 249, 66 Am. St. Rep. 740, 43 S. W. 355, 19 Mor. Min. Rep. 169; Wagner v. Mallory, 169 N. Y. 501, 505, 62 N. E. 584, 22 Mor. Min. Rep. 42. Congress at different times has spoken of it as a mineral (15 Stat. at L. 59, chap. 41, § 1; id. 167, chap. 186, § 109; 29 Stat. at L. 526, chap. 216, U. S. Comp. Stat. 1901, p. 1434; 32 Stat. at L. 702, chap. 1369, § 42; 36 Stat. at L. 847, chap. 421, U. S. Comp. Stat. Supp. 1911, p. 593), and this court did so in Ohio Oil Co. v. Indiana, 177 U. S. 190, 202, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466.

In the legislation of Congress the term "mineral lands" is not confined to railroad land grants. It occurs in the mining laws, in an excepting clause in the homestead law, and in like clauses in other public-land laws. Evidently it has the same meaning in all. The administration of these laws has rested with the Land Department, and therefore [678] its course of action in respect of oil-bearing lands—whether it has held them to be mineral or otherwise—requires to be noticed. The various mining circulars, instructions, and decisions, as published from time to time, show that the matter probably was not considered prior to the first mining circular, July 15, 1873, but that since then the Department has regarded petroleum as a mineral, and has treated lands chiefly valuable therefor as mineral lands.[1] With

[1] Circular July 15, 1873, Copp's Mineral Lands, 61; Letter of Commissioner Burdett, January 30, 1875, Sickles's Mining Laws, 491; Maxwell v. Brierly, 10 Copp's L. O. 50; Instructions January 30, 1883, 1 Land

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a single exception, the rulings have been uniform, and lands of great value have passed into private ownership under them. The single exception is the case of Re Union Oil Co. 23 Land Dec. 222, 226, decided August 27, 1896, which was revoked on a motion for review November 6, 1897, 25 Land Dec. 351. It appears from the later decision that action upon other pending cases turning upon the same question had been suspended in the meantime, so, practically speaking, there has been no break in the Department's rulings. The case of Union Oil Co. presented a controversy between that company and the Southern Pacific Railroad Company over a tract of land in California, the former claiming under a placer mining claim and insisting that the land was chiefly valuable for petroleum, and therefore mineral, and the latter seeking a patent under its land grant and insisting that the land, even if chiefly valuable for petroleum, was not mineral. In the original decision the Secretary of the Interior held that the word "mineral" embraced only "the more precious metals," such as "gold, silver, cinnabar, etc.," but on the rehearing this view was rejected and the prior rulings holding petroleum to be a mineral [679] were reaffirmed and applied, the railroad company's application for a patent being denied.

Notwithstanding these persuasive considerations for now regarding petroleum lands as mineral lands within the meaning of the excepting clause in the granting act, we are asked to give effect to the strictly scientific view that petroleum is a resultant of the decomposition of organic matter under certain conditions of temperature and pressure, and therefore is not a mineral. As we understand it, scientists are not in full accord upon this point, some ascribing to petroleum an inorganic origin. 21 Enc. Britannica, 11th ed. p. 318. But, passing this seeming divergence in opinion, and assuming that, when subjected to a strictly scientific test, petroleum is not a mineral, we think that is not the test contemplated by the statute. It was dealing with a practical subject in a practical way, and we think it used the words "mineral lands," and intended that they should be applied, in their ordinary and popular sense. In that sense, as before indicated, they embrace lands chiefly valuable for petroleum.

Our answer to the fifth question must therefore be in the affirmative.

The other questions are so closely related one to another, and turn so largely upon principles of general application to controversies arising out of the public-land laws, including railroad land grants, that it seems the better course to consider them in a general way in connection with those principles, and then to come to the specific answers to be given to them separately.

We first notice a contention advanced on the part of the mineral claimants, to the effect that the grant to the railroad company was merely a gift from the United States, and should be construed and applied accordingly. The granting act not only does not support the contention, but refutes it. The act did not follow the building of [680] the road, but preceded it. Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct, and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both. Menotti v. Dillon, 167 U. S. 703, 721, 42 L. ed. 333, 339, 17 Sup. Ct. Rep. 945. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the government. In other words, it earned the right to the lands described. Of course, any ambiguity or uncertainty in the terms employed should be resolved in favor of the government, but the grant should not be treated as a mere gift.

Two distinct land grants were made to the Southern Pacific Railroad Company, one on behalf of the construction of a main line, and the other (act March 3, 1871, 16 Stat. at L. 579, chap. 122, § 23) on behalf of a branch line. We are not here concerned with the latter. The former was made by the act of July 27, 1866, 14 Stat. at L. 292, chap. 278. That act first made provision for the construction of a line of railroad, by the Atlantic & Pacific Railroad Company, from Springfield, Missouri, westward through northern Arizona to the Pacific ocean, and by its 3d and 4th sections made

Dec. 561; Roberts v. Jepson, 4 Land Dec. 60; Re Piru Oil Co. 16 Land. Dec. 117; Re Union Oil Co. 25 Land Dec. 351; McQuiddy v. California, 29 Land Dec. 181; Tulare Oil & Min. Co. v. Southern P. R. Co. 29 Land Dec. 269.

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the following grant of public lands to that company:

[681] "Sec. 3. That there be, and hereby is, granted to the Atlantic & Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, *not mineral*, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office, and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers. . . . *Provided, further, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: And provided further*, That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: . . .

"Sec. 4. That whenever said Atlantic & Pacific Railroad [682] Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

By its 18th section the act made provision for the construction by the Southern Pacific Railroad Company of a connecting line of railroad from the eastern boundary of California to San Francisco, and in that connection made the grant now under consideration. That section reads:

"That the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic & Pacific Railroad, formed under this act, at such point, near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare [683] with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic & Pacific Railroad herein provided for."

Turning to §§ 3 and 4, as must be done, to ascertain the nature, extent, conditions, and limitations of the grant made by this section, it will be seen that it was of "every alternate section of public land, not mineral, designated by odd numbers," etc., and was accompanied by a declaration "that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided." Words hardly could make it plainer that mineral lands were not included, but expressly excluded. This is fully recognized by counsel on both sides. But by whom and when was it to be determined whether lands otherwise within the grant were mineral and therefore excluded, or nonmineral and therefore included? How long was the question of the exclusion or

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inclusion of particular sections to be an open one? Was it to depend upon a discovery of mineral at any time in the future, even a hundred years after the completion of the railroad, or was it intended that the mineral or nonmineral character of the lands should be determined in administering the grant, and that, depending on the result, patents should issue or indemnity be allowed? We think these questions find clear and decisive answers in the granting act when considered in the light of settled principles of general application to the administration of the public-land laws, including railroad land grants.

As has been seen, the exclusion was of "all mineral lands." It was not a mere reservation of minerals, but [684] an exclusion of mineral lands, coupled with a provision that the company should receive other lands, not mineral, in lieu of them. This shows that a determination of the character of the lands, as mineral or nonmineral, was plainly contemplated. Besides, there was an exclusion of all sections and parts of sections "granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of" when the line of the road should be definitely located, and this was followed by a similar provision for lieu lands. The two exclusions and the indemnity provisions made it practically imperative that there be an authoritative identification of the lands passing under the grant and of those excluded, for otherwise great uncertainty in titles, conflicting claims, and vexatious litigation would be inevitable. Appreciative of this, Congress confided the identification of the lands, both included and excluded, to the Land Department, of which the Secretary of the Interior is the supervising officer. We say their identification was confided to that Department, because the granting act expressly provided for the issue of patents "confirming to said company the right and title to said lands," obviously meaning the lands granted, but not the excluded lands. and also directed that the indemnity lands be selected "under the direction of the Secretary of the Interior," and because that Department was already expressly charged with the administration and execution of all public-land laws as to which it was not specially provided otherwise. Rev. Stat. §§ 441, 453, 2478, U. S. Comp. Stat. 1901. pp. 252, 257, 1586. In Catholic Bishop v. Gibbon, 158 U. S. 155, 166, 167, 39 L. ed. 931, 936, 15 Sup. Ct. Rep. 779, which related to a grant, the identification and extent of which depended, as here, upon an ascertainment of matters of fact made material by the granting act, this court said: "While there may be no specific reference in the act of 1848 [9 Stat. at L. 323, chap. 177] of questions arising under this grant to the Land Department, yet its administration comes within the scope of the general [685] powers vested in that Department. . . . . It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the Land Department. It falls there unless there is express direction to the contrary."

True, the grant now under consideration was *in præsenti* in the sense that the title to the granted lands, when they should be identified, passed as of the date of the granting act; but, as has been indicated, the act did not itself identify them, and in the nature of things that was not practicable. It was not certain that the road would be constructed, or what lands would be free from other claims at the time of its definite location, or what would be mineral. This led to the use of general descriptive terms which required to be applied to particular lands, should the road be constructed. And so it was that provision was made for issuing patents "confirming to said company the right and title to said lands" after construction. A real necessity would then arise for identifying the lands passing under the grant. This was obviously the purpose of the patents. They were to be in confirmation of the company's "right and title," and so were to be the legally appointed evidence that the lands described in them had passed to the company under the grant.

As it plainly was not intended that patents should issue for excluded lands, to which the company was not to have any right or title, the direction respecting the issue of patents necessarily carried with it the power and the duty of determining in every instance whether the land came within the terms of the grant, or, for any reason, was excluded [686] from it, and of giving appropriate effect to the result by granting or refusing a patent. This is the theory upon which the Land Department uniformly has proceeded in the administration and adjustment of this and other railroad land grants, and this court repeatedly has pronounced it the true theory. The departmental view and practice are shown in Central P. R. Co. v. Valentine, 11 Land Dec. 238, where it was said by Secretary Noble (p 243): "It is not ques-

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tioned that the Land Department has jurisdiction until patent or certification, as the case may be, to the company, to determine whether any of the lands within the lateral limits of the grant had been, at the time the line of the road was definitely fixed, 'sold, reserved, or otherwise disposed of,' or was subject to 'a pre-emption or homestead claim,' and therefore excepted from the grant. That such jurisdiction exists there can be no doubt, and I am unable to perceive upon what principle of logic or process of reasoning it can be claimed that a like jurisdiction does not exist for the purpose of determining whether the lands are mineral, and for that reason excepted from the grant. Manifestly, the jurisdiction to determine the exception is the same, whether the inquiry is instituted as to the character of the land, or as to its particular status, at the date when the rights of the company attached under the grant." Again (p. 244): "All the lands within the primary limits of a railroad grant do not necessarily pass to the railroad, but only such as are not within the exceptions named in the grant, and Secretary of the Interior is clothed with the authority of determining in the first instance which lands pass by the grant and which do not pass, and this he does by approving lists for certification or patent." And again (p. 246): "Now, this jurisdiction is in the Land Department, and it continues, as we have seen, until the lands have been either patented or certified to, or for the use of, the railroad company. By reason of this jurisdiction [687] it has been the practice of that Department, for many years past, to refuse to issue patents to railroad companies for lands found to be mineral in character at any time before the date of the patent."

The same subject came before this court in Barden v. Northern P. R. Co. 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030. The case arose under a grant (13 Stat. at L. 365, chap. 217) containing an exclusion of mineral lands, provisions for indemnity, and a direction for patents, identical with those now under consideration; the grant being followed by a joint resolution (13 Stat. at L. 567) which, referring to that and other grants made at the same session, declared that none "shall be so construed as to embrace mineral lands, which in all cases shall be, and are, reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant." On the part of the railroad company it was insisted that the conditions existing when the line of railroad was definitely located should be taken as decisive of whether lands were mineral or otherwise in the sense of the mineral-land exclusion, and much apprehension was expressed lest a different ruling would put the matter so at large that a discovery of mineral at any time in the future would defeat titles supposedly complete. By leave of the court, the Solicitor General appeared on behalf of the government, and took the position shown by the following extract from his brief (154 U. S. 296-298; Brief, pp. 4-7):

"The act itself provides for the issuing of patents to the railroad company, and contemplates, therefore, that the Secretary of the Interior, prior to such issue, shall determine whether the lands sought to be patented come within the terms of the grant; in other words, whether they are in odd sections, unappropriated, not mineral, etc.

"But it is said that the Secretary of the Interior has no authority to patent mineral lands, and that a patent for [688] lands in fact mineral would afford no protection to the railroad company in the event of the future discovery of precious metals therein. This is a mistake. After the Secretary of the Interior has decided that any particular lands are not mineral, and has issued a patent therefor, the title is not liable to be defeated by the subsequent discovery of minerals. The authorities upon this point are cited in Mr. Shields' original brief [pp. 46 to 60].

"The point is also covered by the case of Davis v. Wiebbold, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628, where a patent was issued for a town site, and minerals were subsequently discovered in the lands patented. But it was held that the title was not affected by such discovery, and that the provision of the town-site act (Rev. Stat. § 2392, U. S. Comp. Stat. 1901, p. 1459) that 'no title shall be acquired to any mine of gold, silver, cinnabar, or copper,' does not apply where the mines were discovered after a patent has been issued.

"Mr. Justice Field, delivering the opinion of the court, quotes with approval, at page 521, the following language of Judge Sawyer in Cowell v. Lammers, 10 Sawy. 246, 257, 21 Fed. 200, 206: 'There must be some point of time when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine this question than at the time of issuing the patent.'

"And again, at page 523, he quotes with approval the following language of Mr. Justice Lamar while Secretary of the Interior [5 Land Dec. 194]: 'The issue of said patent was a determination by the proper tribunal that the lands covered by

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the patent were granted to said company, and hence, under the proviso of said act, were not mineral at the date of the issuance of said patent.'

"And again, page 524: 'The grant or patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated.'

[689] "In Moore v. Smaw, 17 Cal. 199, 79 Am. Dec. 123, 12 Mor. Min. Rep. 418, it was decided, in the first opinion delivered by Mr. Justice Field as chief justice of the supreme court of California, that the patent of the United States passes title to minerals.

"Of course, if the railroad company knows at the time of receiving a patent that the lands covered by it are mineral, a case of fraud is presented which entitles the Secretary of the Interior to have the patent canceled, as was done in Morton v. Nebraska, 21 Wall. 660, 22 L. ed. 639, 12 Mor. Min. Rep. 451, and in Western P. R. Co. v. United States, 108 U. S. 510, 27 L. ed. 806, 2 Sup. Ct. Rep. 802. But, barring cases of fraud, the issuing of a patent by the Secretary of the Interior to the railroad company gives it an absolute title, not liable to be defeated by the subsequent discovery of minerals.

"Here, then, is a method of adjusting the company's grant according to the procedure contemplated by the act itself, which protects fully the interest of both the government and the railroad, and which is in accordance with the practice which has always prevailed in the Department of the Interior." Citing Secretary Noble's decision in Central P. R. Co. v. Valentine, supra.

The court rejected the contention that the conditions existing at the date of definite location were decisive of whether the land was mineral or nonmineral, and held that the question remained an open one until the issue of a patent. In the latter connection the court referred to prior decisions respecting the power and duty of the Land Department, in issuing patents, to inquire and determine whether the lands are of the class prescribed, whether there are other claims to them, and whether the applicant is entitled to a transfer of the title; reaffirmed its ruling in St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 640, 26 L. ed. 875, 876, 11 Mor. Min. Rep. 673, that a patent not only "operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary [690] to its issue have been complied with;" and further said (pp. 328, 329):

"If the Land Department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or because not free from preemption or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands. . . . If, as suggested by counsel, when the Secretary of the Interior has under consideration a list of lands to be patented to the Northern Pacific Railroad Company, it is shown that part of said lands contain minerals of gold and silver, discovered since the company's location of its road opposite thereto, he would not perform his duty, stated in Knight v. United Land Asso. 142 U. S. 161, 178, 35 L. ed. 974, 980, 12 Sup. Ct. Rep. 258, as the 'supervising agent of the government to do justice to all claims and preserve the rights of the people of the United States,' by certifying the list until corrected in accordance with the discoveries made known to the Department. . . .

"There are undoubtedly many cases arising before the Land Department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural, as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive."

And then, after quoting approvingly what we have already extracted from Secretary Noble's decision in Central P. R. Co. v. Valentine, supra, it was added (p. 330): "It is true that the patent has been issued [691] in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the Government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until, by further legislation, a stricter regard to their duties in that respect can be enforced upon them."

Of the decision in that case it was concisely said in Shaw v. Kellogg, 170 U. S. 312, 339, 42 L. ed. 1050, 1060, 18 Sup. Ct. Rep. 632: "It is true there was a divi-

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sion of opinion, but that division was only as to the time at which and the means by which the nonmineral character of the land was settled. The minority were of the opinion that the question was settled at the time of the filing of the map of definite location. The majority, relying on the language in the original act of 1864, making the grant, and also on the joint resolution of January 30, 1865, which expressly declared that such grant should not be 'construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States,' held that the question of mineral or nonmineral was open to consideration up to the time of issuing a patent. But there was no division of opinion as to the question that when the legal title did pass,—and it passed unquestionably by the patent,—it passed free from the contingency of future discovery of minerals."

The exclusion of mineral lands is not confined to railroad land grants, but appears in the homestead, desert-land, timber and stone, and other public-land laws, and the settled course of decision in respect of all of them has been that the character of the land is a question for the Land Department, the same as are the qualifications of the applicant and his performance of the acts upon which the right to receive the title depends, and that when a patent issues it is to be taken, upon a collateral attack, as affording conclusive evidence of the nonmineral character of [692] the land and of the regularity of the acts and proceedings resulting in its issue, and, upon a direct attack, as affording such presumptive evidence thereof as to require plain and convincing proof to overcome it. St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 641, 26 L. ed. 875, 876, 11 Mor. Min. Rep. 673; Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; Maxwell Land-Grant Case, 121 U. S. 325, 379–381, 30 L. ed. 949, 958, 959, 7 Sup. Ct. Rep. 1015; Heath v. Wallace, 138 U. S. 573, 585, 34 L. ed. 1063, 1068, 11 Sup. Ct. Rep. 380; Noble v. Union River Logging R. Co. 147 U. S. 165, 174, 37 L. ed. 123, 126, 13 Sup. Ct. Rep. 271; Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321, 323, 41 L. ed. 175, 176, 16 Sup. Ct. Rep. 1018.

In this respect no distinction is recognized between patents issued under railroad land grants and those issued under other laws; nor is there any reason for such a distinction.

Of course, if the land officers are induced by false proofs to issue a patent for mineral lands under a nonmineral-land law, or if they issue such a patent fraudulently or through a mere inadvertence, a bill in equity, on the part of the government, will lie to annul the patent and regain the title, or a mineral claimant who then had acquired such rights in the land as to entitle him to protection may maintain a bill to have the patentee declared a trustee for him; but such a patent is merely voidable, not void, and cannot be successfully attacked by strangers who had no interest in the land at the time the patent was issued, and were not prejudiced by it. Colorado Coal & I. Co. v. United States, 123 U. S. 307, 313, 31 L. ed. 182, 185, 8 Sup. Ct. Rep. 131; Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 239, ante, 936, 939, 34 Sup. St. Rep. 507; Germania Iron Co. v. United States, 165 U. S. 379, 41 L. ed. 754, 17 Sup. Ct. Rep. 337; Duluth & I. Range R. Co. v. Roy, 173 U. S. 587, 590, 43 L. ed. 820, 822, 19 Sup. Ct. Rep. 549; Hoofnagle v. Anderson, 7 Wheat. 212, 214, 215, 5 L. ed. 437, 438. In the last case this court said, speaking through Chief Justice Marshall: "It is not doubted that a patent appropriates land. Any defects in the preliminary steps which are required by law are cured by the patent. It is a title from its date, and has always been held conclusive against all those whose rights did not commence previous to its emanation. . . . If the patent has been issued irregularly, the government [693] may provide means for repealing it; but no individual has a right to annul it, to consider the land as still vacant, and to appropriate it to himself." Of the same import are Cooper v. Roberts, 18 How. 173, 182, 15 L. ed. 338, 341: Spencer v. Lapsley, 20 How. 264, 273, 15 L. ed. 902, 906; Ehrhardt v. Hogaboom, 115 U. S. 67, 68, 29 L. ed. 346, 5 Sup. Ct. Rep. 1157.

The patent here in question was issued July 10, 1894. Apparently, the government never brought a bill to have it vacated or annulled, and the time for doing so apparently expired in 1900 or 1901. Acts March 3, 1891, 26 Stat. at L. 1093, chap. 559, U. S. Comp. Stat. 1901, p. 1531; March 2, 1896, 29 Stat. at L. 42, chap. 39, § 1, U. S. Comp. Stat. 1901, p. 1603; United States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 450, 52 L. ed. 881, 887, 28 Sup. Ct. Rep. 579. Apparently, also, the prior mineral claimants never sought to have the patentee declared a trustee for them, for it is admitted that they abandoned their locations. The present mineral claimants, who are assailing the patent, claim under relocations made in March, 1909, more than fourteen years after the date of the patent, and eight years after the apparent expiration of the time within which the government could ask that it be vacated or annulled. Plainly, there is no privity

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between the earlier and later mineral claimants, for the relocations were not made in furtherance of the prior locations, but in hostility to them. See Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426.

But, referring to the clause in the patent, "excluding and excepting all mineral lands should any such be found in the tracts aforesaid," the contention is made, first, that the patent shows that the Land Department did not consider or determine whether the lands were mineral or not, and, second, that all lands embraced in the patent which then had been or thereafter should be discovered to be mineral were expressly excepted from the operation of the patent and therefore remained public lands. This contention must be tested in the light of the established practice in the Land Department in such matters and of the office which the granting act intended the patents to perform. The clause relied upon is not peculiar to this [694] patent or to those issued under this grant, but appears in all the patents issued from 1866 to 1904 under railroad land grants containing an exclusion of mineral lands. Its first mention in any public document was in the annual report of the Commissioner of the General Land Office for 1868. It was there said (pp. 152-154):

"In every case reported from the district land officers of selections made under the acts of 1862 and 1864 [12 Stat. at L. 492, chap. 120, 13 Stat. at L. 358, chap. 216] for the Pacific Railroad, the agent of the company in the first instance is required to state in his affidavit that the selections are not interdicted, mineral, nor reserved lands, and are of the character contemplated by the grant. Upon the filing of lists with such affidavits attached, it is made the duty of registers and receivers to certify to the correctness of the selections in the particulars mentioned and in other respects. They subsequently undergo scrutiny in this office, are tested by our plats, and by all the data on our files, sufficient time elapsing after the selections are made for the presentation of any objections to the Department before final action is taken; and to more effectually guard the matter, there is inserted in all patents issued to said railroad company a clause to the following effect: 'Yet excluding and excepting from the transfer by these presents all mineral lands, should any such be found to exist in the tracts described in this patent, this exception, as required by statute, not extending to coal and iron land.' . . . It has been suggested to this office that the government should appoint a commission to segregate the mineral from the residue of the public lands; but let anyone consider the vast amount of money expended by practical miners in excavations to test the value of mines, subsequently abandoned as worthless, and some idea may be formed of the time and expense such an undertaking would require, and how little confidence it would be likely to inspire. . . . The regulation of filing affidavits is simply a means of ascertaining the class [695] to which a particular tract of land may belong, and although it may not be the best that could be devised, it is the only practical mode that has suggested itself to meet the difficulty of disposing of different classes of land mingled together in such a way as to render it frequently impossible to tell, without great labor and expense, whether a particular subdivision belongs to one or the other class."

In addition to what was thus said respecting the affidavits and certificates required and the examination of whatever data were available, regulations were promulgated calling attention, among other things, to the mineral-land exclusion in the grants, directing that the lists be carefully and critically examined by the register and receiver, and mineral lands be excluded therefrom, and prescribing forms of affidavits and certificates reciting, among other things, that the listed lands were nonmineral and of the character contemplated by the grant.[2] It also appears from the published land decisions that hearings were often had in the local land offices to determine whether lands sought to be listed were mineral or otherwise, and that appeals in such matters were not infrequently heard by the Secretary of the Interior.[3] From all this it is manifest that the excepting clause never was intended to take the place of an inquiry into the character of the land, or to dispense with a determination of that question, and that its presence in the patents does not at all signify that no inquiry or determination was had. On the contrary, it appears that it was the accustomed practice to exact proofs respecting the character of the [696] land, to give opportunity for contests, and to give effect to whatever information was obtained. At most, according to the Commissioner's report, the clause was intended to serve

[2] See 2 Lester's Land Laws, 362-365; 2 Copp's Land Laws, 715, 719, 727; 19 Land Dec. 21.

[3] See Re Central P. R. Co. 8 Land Dec. 30; Central P. R. Co. v. Valentine, 11 Land Dec. 238; North Star Min. Co. v. Central P. R. Co. 12 Land. Dec. 608; Southern P. R. Co. v. Allen Gold Min. Co. 13 Land Dec. 165; Re California & O. R. Co. 16 Land Dec. 262; Barden v. Northern P. R. Co. 19 Land Dec. 188.

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merely as an additional safeguard; and its words suggest that its use was with an eye to future discoveries rather than to existing conditions.

Coming to its effect in a patent, which is of more importance than how it came to be there, we find that this question came before the Land Department in the case of Re Spong, 5 Land Dec. 193. The tract in question had been patented to the Central Pacific Railroad Company under its grant, the patent containing the excepting clause. Spong applied at the local land office to enter the tract under the mining law, claiming that it was mineral and therefore excepted from the patent. The local officers refused his application, assigning as a reason that the title had passed to the company under the patent, and the Commissioner of the General Land Office affirmed their decision. The matter was then taken before Secretary Lamar, who sustained the decisions below, saying (p. 194): "The issue of said patent was a determination by the proper tribunal that the lands covered by the patent were granted to said company, and hence, under the proviso of said act, were not mineral at the date of the issuance of said patent." Again (p. 195): "In the case of Deffeback v. Hawke, 115 U. S. 393, 29 L. ed. 424, 6 Sup. Ct. Rep. 95, the court reviewed and commented on the several acts of Congress relative to the disposition of mineral lands, and held that the officers of the Land Department have no authority to insert in a patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed." And again (p. 196): "While the exception of mineral lands from the grant to said company is clear and explicit, yet it does not appear from a careful consideration of the language of said grant that Congress intended to grant only such lands as may, [697] after the lapse of an indefinite number of years, prove to be agricultural in character." The question was also presented in Courtright v. Wisconsin C. R. Co. 19 Land Dec. 410. The land involved had been patented under a railroad land grant like that now before us, the patent containing the same exception. Courtright, claiming that the land was mineral, and was known to be such since before the patent, insisted that it remain public land, and sought to make entry of it. The local officers held that this could not be done in the presence of the patent, and their ruling was sustained by the Commissioner. On appeal, Secretary Smith affirmed the action of the other officers, saying (p. 413):

"The issuing of patent is a determination by the Department that the lands embraced therein are of the character described in the grant.

. . . . . .

"If it was the intention of the officers of the government to leave as an open question the character of the lands embraced in the patent, then they acted without authority; for when patent issued, that was the end of the jurisdiction of the Department over the lands. The exception contained in the patent went beyond 'giving expression to the intent of the statute,' as construed by the supreme court, and added a restriction upon the grant which is not to be found in the granting act.

"I am therefore of the opinion that the Department has not jurisdiction to determine the character of the land in controversy after issuance of patent. If it be true that the lands in question contain minerals in paying quantities, and that this fact was known to the officers or agents of the company at the date of selection, or date of patent, and they failed to make the fact known to the Department, such conduct was a fraud upon the government, and the courts can grant relief."

It thus appears that the Land Department has regarded [698] the issuing of such a patent as a determination of the nonmineral character of the land, and as effectually and unconditionally passing the title. There has been no departmental decision to the contrary. Indeed, on December 10, 1903, the Secretary of the Interior directed that the excepting clause be omitted from future patents, because he regarded it as without any warrant in law and void. Re Northern P. R. Co. 32 Land Dec. 342.

This clause was extensively considered by Circuit Judge Sawyer in Cowell v. Lammers, 10 Sawy. 246, 21 Fed. 200. The patent in that case had been issued under the Central Pacific grant. The suit was to enjoin a trespass in the nature of waste, the complainant being the grantee of the railroad company and the defendant a miner who had located part of the patented tract as a lode mining claim. He had applied to the Land Department to enter the claim under the mining law, and his application had been rejected because the patent was outstanding. In granting the injunction the court said (p. 206): "The lands are either patentable under the act or they are not. If patentable, the issue of a patent is authorized. If not patentable, it is unauthorized, and the issue of a patent is, clearly, as conclusive evidence of the determination of the fact of patentability, upon a collateral attack, in the one case as in the other. Suppose it should afterwards turn out that all is mineral land. The exception would be as broad as the grant,

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and be void as an exception. Is it any the less so, in this class of cases, as to a part? . . . There must be some point in time when the character of the land must be finally determined; and, for the interest of all concerned, there can be no better point to determine this question than at the time of issuing the patent." Again (p. 208): "A patent upon its face should either grant or not grant. It must be seen from a construction of the language of the grant [patent] itself whether anything is granted or not, and, if anything be granted, what [699] it is. There is no authority to issue a patent which, in effect, only says if the lands herein described hereafter turn out to be agricultural lands, then I grant them, but if they turn out to be mineral lands, then I do not grant them. Such a patent would be so uncertain that it would be impossible to determine, from the face of the patent, whether anything is granted or not."

In principle, the effect of the excepting clause in the patent is not an open one, under the decisions of this court. It is foreclosed by what has been held upon full consideration. In Deffeback v. Hawke, 115 U. S. 392, 29 L. ed. 424, 6 Sup. Ct. Rep. 95, where was involved the right to certain valuable town-site improvements upon land patented as a placer mining claim, the contention was advanced that, as the owner of the improvements was the prior occupant, the patent should have contained a reservation excluding them and all rights necessary to their enjoyment from its operation; but the contention was declared untenable, the court saying (p. 406): "The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed." The case of Davis v. Wiebbold, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628, directly involved the validity of a clause in a town-site patent declaring that no title should be thereby "acquired to any mine of gold, silver, cinnabar, or copper." By the mining laws mineral lands were withdrawn from disposal under other laws, and the town-site law specially declared that no title to any mine of gold, silver, cinnabar, or copper should be acquired under its provisions. The defendant claimed under the town-site patent and a deed of release and quitclaim from the probate judge, who was the town-site trustee, and the plaintiff claimed under a later patent for a mining claim located upon part of the town site, and based upon an actual discovery of a valuable vein of gold after the issue of the town-site patent. [700] The decision and the reasons for it are fully comprehended in the following extracts from the opinion:

(P. 519.) "The exceptions of mineral lands from pre-emption and settlement and from grants to states for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditures for its extraction, and known to be so at the date of the grant." (As shown in Barden v. Northern P. R. Co. 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030, the word "grant" here means the patent, and not the act making the grant.)

(P. 524.) "It would seem from this uniform construction of that department[4] of the government specially intrusted with supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the courts of the mining states, Federal and state, whose attention has been called to the subject, that the exception of mineral lands from grant in the acts of Congress should be considered to apply only to such lands as were at the time of the grant [patent] known to be so valuable for their minerals as to justify expenditure for their extraction. The grant or patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated. There has been no direct adjudication upon this point by this court, but this conclusion is a legitimate inference from several of its decisions. It was implied in the opinion in Deffeback v. Hawke, already referred to, and in the cases of the Colorado Coal & I. Co. v. United States, 123 U. S. 307, 328, 31 L. ed. 182, 190, 8 Sup. Ct. Rep. 131, and United States v. Iron Silver Min. Co. 128 U. S. 673, 682, 32 L. ed. 571, 575, 9 Sup. Ct. Rep. 195."

[701] (P. 525.) "It would in many instances be a great impediment to the progress of such towns if the titles to the lots occupied by their inhabitants were subject to be overthrown by a subsequent discovery of mineral deposits under their surface. If their title would not protect them against a discovery of mines in them, neither would it protect them against the invasion of their property for the purpose of exploring for mines. The temptation to such exploration would be according to the suspected extent of the minerals, and being thus subject to

[4] The reference is to several Land Department decisions cited and reviewed in that opinion.

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indiscriminate invasion, the land would be to one having the title poor and valueless, just in proportion to the supposed richness and abundance of its products. We do not think that any such results were contemplated by the act of Congress, or that any construction should be given to the provision in question which could lead to such results."

(Pp. 527, 528.) "But we do not attach any importance to the exception, for the officers of the Land Department, being merely agents of the government, have no authority to insert in a patent any other terms than those of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion they could limit or enlarge their effect without warrant of law. The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and these rights can neither be enlarged nor diminished by any reservations of the officers of the Land Department, resting for their fitness only upon the judgment of those officers. Deffeback v. Hawke, 115 U. S. 392, 406, 29 L. ed. 423, 427, 6 Sup. Ct. Rep. 95. . . . The laws of Congress provide that valuable mineral deposits in lands of the United States shall be open to exploration and purchase. They do not provide, and never have provided, that such mineral deposits in lands which have ceased to be public, and become the property of [702] private individuals, can be patented under any proceedings before the Land Department, or otherwise."

The case of Shaw v. Kellogg, 170 U. S. 312, 42 L. ed. 1050, 18 Sup. Ct. Rep. 632, related to a claim or right, conferred by statute, entitling its owner to select in a body about 100,000 acres "of vacant land, not mineral," in New Mexico, it being the duty of the Surveyor General "to make survey and location of the lands so selected," and his action being subject to the supervision of the Commissioner of the General Land Office. The owner of the right, having made the selection, applied to the Surveyor General in 1862 for the survey and location of the tract, and that officer reported the application to the Commissioner, saying in that connection that he had theretofore been informed that the purpose of the owner was to make such a selection as "would cover rich minerals in the mountains." The Commissioner replied that it was essential to the approval of the application by him that "it be accompanied by the certificates of the Surveyor General and the register and receiver that the land selected is vacant and not mineral." Such certificates were furnished, but the Commissioner hesitated to act upon them because they were not based upon personal knowledge, but information informally elicited from others, the lands being remote and in an unsurveyed region. Finally, the Commissioner concluded that "the difficulty" could "be avoided" by directing the Surveyor General to proceed, and in approving the survey to add to his certificate of approval "the special reservation stipulated by the statute, but not to embrace mineral land." Being instructed accordingly, the Surveyor General, after the field notes and plat of the survey were completed, indorsed upon the field notes a mere approval, and upon the plat an approval qualified by the words, "subject to the conditions and limitations" of the statute, naming it. The field notes and plat were then forwarded to and accepted by the Commissioner. [703] No patent was issued, the approved survey taking the place of one under the statute. A few years later, when inquiries were made respecting the right of prospectors to take advantage of mineral discoveries in the tract, the Commissioner took the position that the approval of the survey operated as a determination that the land was of the class and character designated in the act; that the title had passed from the government, and that, notwithstanding the apparently conditional approval, the Land Department was without authority to reopen the question of the character of the land. The case, as presented to this court, involved the possession of a mine located within the tract after the approval of the survey. The plaintiff claimed under the selection of 1862 and the defendant under the mining laws, the controversy turning upon the effect to be given to the condition in the approval of the survey. In disposing of that question the court reaffirmed and applied its rulings in Deffeback v. Hawke and Barden v. Northern P. R. Co. supra, and said (p. 337):

"What is the significance of, and what effect can be given to, the clause inserted in the certificate of approval of the plat that it was subject to the conditions and provisions of the act of Congress? We are of opinion that the insertion of any such stipulation and limitation was beyond the power of the Land Department. Its duty was to decide, and not to decline to decide; to execute, and not to refuse to execute, the will of Congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. It was an agent, and not principal. Congress had made a grant, authorized a selection within three years, and directed the Surveyor General to make sur-

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vey and location, and within the general powers of the Land Department it was its duty to see that such grant was carried into effect and that a full title to the proper land was made. Undoubtedly [704] it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question,—a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action, and its action at the time. The general statutes of Congress in respect to homestead, pre-emption, and town-site locations provide that they should be made upon lands that are nonmineral, and in approving any such entry and issuing a patent therefor could it be tolerated for a moment that the Land Department might limit the grant and qualify the title by a stipulation that if thereafter mineral should be discovered the title should fail? It cannot in that way avoid the responsibility of deciding and giving to the party seeking to make the entry a full title to the land, or else denying it altogether."

(P. 341.) "But, it is said, no patent was issued in this case, and therefore the holding in the Barden Case, that the issue of a patent puts an end to all questions, does not apply here. But the significance of a patent is that it is evidence of the transfer of the legal title. There is no magic in the word 'patent,' or in the instrument which the word defines. By it the legal title passes. and when, by whatsoever instrument, and in whatsoever manner, that is accomplished, the same result follows as though a formal patent were issued."

(P. 343) "While the approval entered upon the plat by the Surveyor General under the direction of the Land Department was in terms 'subject to the conditions and provisions of § 6 of the act of Congress, approved June 21, 1860' [12 Stat. at L. 72, chap. 167], such limitation was beyond the power of executive officers to impose."

According to the statute relating to placer mining claims [705] the patent, save in an instance not material here, should contain an exception of any vein or lode *known* to exist within the boundaries of the claim *at the date of the application for patent*. but in the early patents the exception was so stated that it embraced any vein or lode *claimed or known* to exist *at the date of the patent*. The change was a material one, not only because of the difference between "claimed" and "known," but also because a year or so sometimes elapsed between the date of the application and that of the patent, and in the meantime a vein or lode might be discovered within the boundaries of the placer claim. Ultimately cases presenting the question of the effect of the exception as stated in the patents came before this court, and it was held that "the exception of the statute cannot be extended by those whose duty it is to supervise the issuing of the patent." Sullivan v. Iron Silver Min. Co. 143 U. S. 431, 441, 36 L. ed. 214, 217, 12 Sup. Ct. Rep. 555, and cases cited.

These decisions are applicable and controlling here. The reasoning upon which they proceed compels their reaffirmance; and, besides, they have come to be recognized as establishing a rule of property. Not only has the Land Department accepted them as determinative of the invalidity of the excepting clause now before us, but innumerable titles within the limits of the western railroad land grants have been acquired with a like understanding and are now held in the justifiable belief that they are impregnable.

We come now to a contention which seeks to distinguish patents under this grant from those under other railroad grants. It is that the insertion of the excepting clause in the former was expressly authorized by Congress. Evidently this has not been the view of the Land Department. It not only began to use the clause before this grant was made, but used it in all patents of this class; and when, in December, 1903, its use was discontinued, the order embraced this grant along with the others. But passing [706] this as suggestive but not controlling, we turn to the joint resolution of June 28, 1870, upon which the contention is rested. Its chief purpose was to sanction a route which the Secretary of the Interior had disapproved. Southern P. R. Co. v. United States, 183 U. S. 519, 523, 46 L. ed. 307, 310, 22 Sup. Ct. Rep. 154. It reads as follows (16 Stat. at L. 382, No. 87):

"That the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eigh-

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teen hundred and sixty-six [14 Stat. at L. 299, chap. 278], and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

It will be observed that there is no direct mention of mineral lands, nor any indirect reference to them save such as is involved in the general mention of the "conditions and restrictions" of § 3 of the granting act.

As stated in one of the briefs, the contention is this: "The resolution provided in express terms that these [707] patents should cover all of the lands coterminous with the constructed sections of the railroad, and in effect provided that the patents should save and reserve the lands excepted by the provisions of § 3 of the original granting act, which included the exception of mineral lands." In other words, it is meant that the resolution required that all the odd-numbered sections within the primary limits of the grant, and coterminous with the constructed road, should be patented to the railroad company without any inquiry or investigation to determine which of those sections were sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of at the date of definite location, or were mineral, and that a general exception conforming to that in the granting act was to be inserted in the patents. This would mean that lands already sold were to be patented to the company, that reserved lands were to be patented to it, that lands occupied by homestead settlers or pre-empted were to be dealt with in the same way; in short, that the grant, instead of being administered and adjusted in an orderly way by the officers customarily charged with that duty and in possession of the records and data without which little could be done, was to be administered and adjusted in the courts through the ordinary channels of litigation. Manifestly, that is not what Congress contemplated. It did not intend that the company's title should be so uncertain, and clearly it did not intend that the title to lands already sold or those reserved should be thus beclouded, or that homesteaders and preemptioners should be placed in a situation which would be so embarrassing and discouraging to them. What would become of the indemnity provisions under that theory? Certainly, it was not intended that the company should receive a patent for lands in the place limits and also indemnity for the same lands. We think there is a more reasonable view of the provision in the resolution than the one suggested. Omitting [708] its saving clause, the provision is not materially different from § 4 of the original act, being the section providing for patents. As already said, the chief purpose of the resolution was to sanction a route—the one indicated on the map mentioned. The Secretary of the Interior had disapproved it because not within prior authorization. If it was to be approved, it was but reasonable that the existing right to the patents should be applied to it. This evidently is what was intended. Another matter also claimed consideration. Three years had passed since the filing of the map, and in the meantime the situation had been complicated by a withdrawal of the adjacent lands, a revocation of the withdrawal, and a suspension of the revoking order. The validity of the route shown on the map and of the withdrawal had been the subject of differing opinions, and some of the lands had come to be occupied by settlers, whose status was uncertain in view of the withdrawal. See 16 Ops. Atty. Gen. 80. As reported to the Senate by one of its committees, the resolution was in its present form without the saving clause. That was added when the resolution was under consideration.[5] Without it the resolution had two purposes; one, to sanction the route which had been pronounced unauthorized, and the other, to make secure the right to patents along that route. What was the purpose of the saving clause? Its words and the situation just mentioned leave no doubt that one purpose was to take care of the actual settlers then on the lands. Another, equally plain, was to require that the conditions and restrictions, that is, the exclusions and exceptions, of § 3 (the granting section) of the original act, be applied to that route. But how were these purposes to be accomplished? Was it to be by patenting all the lands to the railroad company, even those occupied by [709] actual settlers, and inserting saving clauses in the patents? Or was it to be by giving effect to the rights of the settlers and to the exclusions and exceptions in the normal and rational way; that is, by patenting to the company

[5] Congressional Globe, 41st Cong. 2d Sess. parts 4 and 5, pp. 3349–3351, 3828–3830, 3950–3953.

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no lands occupied by actual settlers or otherwise excluded or excepted from the grant? The latter seems to us the only admissible conclusion.[6]

Lastly, it is urged that the railroad company accepted the patent with the mineral exception therein, and also expressly agreed that the latter should be effective as one of the terms of the patent, and so is bound by it, or at least estopped to deny its validity. There are insuperable objections to this contention. The terms of the patent whereby the government transfers its title to public land are not open to negotiation or agreement. The patentee has no voice in the matter. It in no wise depends upon his consent or will. He must abide the action of those whose duty and responsibility are fixed by law. Neither can the land officers enter into any agreement upon the subject. They are not principals, but agents of the law, and must heed only its will. Deffeback v. Hawke, 115 U. S. 392, 406, 29 L. ed. 423, 427, 6 Sup. Ct. Rep. 95; Davis v. Wiebbold, 139 U. S. 507, 527, 35 L. ed. 238, 245, 11 Sup. Ct. Rep. 628; Shaw v. Kellogg, 170 U. S. 312, 337, 343, 42 L. ed. 1050, 1059, 1061, 18 Sup. Ct. Rep. 632. Nor can they indirectly give effect to what is unauthorised when done directly. Of course, if they enter into any forbidden arrangement whereby public land is transferred to one not entitled to it, the patent may be annulled at the suit of the government; but they cannot alter the effect which the law gives to a patent while it is outstanding.

Taking up the several questions in the light of what we have here said, we answer them as follows:

1. Did the said grant to the Southern Pacific Railroad Company include mineral lands which were known to [710] be such at or prior to the date of the patent of July 10, 1894?

Answer.—Mineral lands, known to be such at or prior to the issue of patent, were not included in the grant, but excluded from it, and the duty of determining the character of the lands was cast primarily on the Land Department, which was charged with the issue of patents.

2. Does a patent to a railroad company under a grant which excludes mineral lands, as in the present case, but which is issued without any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?

Answer.—A patent issued in such circumstances is irregularly issued, undoubtedly so; but, as it is the act of a legally constituted tribunal, and is done within its jurisdiction, it is not void, and therefore passes the title (Noble v. Union River Logging R. Co. 147 U. S. 165, 174, 175, 37 L. ed. 123, 126, 127, 13 Sup. Ct. Rep. 271), subject to the right of the government to attack the patent by a direct suit for its annulment if the land was known to be mineral when the patent issued (McLaughlin v. United States, 107 U. S. 526, 27 L. ed. 621, 2 Sup. Ct. Rep. 862; Western P. R. Co. v. United States, 108 U. S. 510, 27 L. ed. 806, 2 Sup. Ct. Rep. 802).

3. Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect?

Answer.—The mineral land exception in the patent is void.

4. If the reservation of mineral lands as expressed in the patent is void, then is the patent, upon a collateral attack, a conclusive and official declaration that the land is agricultural, and that all the requirements preliminary to the issuance of the patent have been complied with?

Answer.—It is conclusive upon a collateral attack.

[711] 5. Is petroleum or mineral oil within the meaning of the term "mineral," as it was used in said acts of Congress reserving mineral land from the railroad land grants?

Answer.—Petroleum lands are mineral lands within the meaning of that term in railroad land grants.

6. Does the fact that the appellant was not in privity with the government in any respect at the time when the patent was issued to the railroad company prevent him from attacking the patent on the ground of fraud, error, or irregularity in the issuance thereof as so alleged in the bill?

Answer.—It does.

7. If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Railroad Company, and under an understanding and agreement between it and the officers of the Interior Department that said clause should be effective to keep in the United States title to such of the lands described in the patent as were in fact mineral, are the defendants, Southern Pacific Railroad Company and the Kern Trading & Oil Company, estopped to deny the validity of said clause?

Answer.—No; such an agreement is of no greater force as an estoppel than the

[6] See Tome v. Southern P. R. Co. 5 Copp's L. O. 85; Southern P. R. Co. v. Rahall, 3 Land Dec. 321.

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exception in the patent. The latter being void, the patent passes the title and is not open to collateral attack, or to attack by strangers whose only claim was initiated after the issue of the patent.

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[712] JOSEPH HULL, the Prairie Pebble Phosphate Company, and the Savannah Trust Company, Appts.,
v.
ARTHUR E. BURR, Frank L. Simpson, and J. Howard Edwards.

(See S. C. Reporter's ed. 712–725.)

Appeal — from circuit court of appeals — Federal question.

1. A suit arises under the laws of the United States within the meaning of the Judicial Code, § 24, so as to permit an appeal to the Federal Supreme Court from a decree of a circuit court of appeals in the cause where it is brought in equity by persons not parties to a bankruptcy proceeding, who set up rights in opposition to the adjudication in bankruptcy and the appointment of trustees therein, and seek to have such trustees restrained from prosecuting an equity suit against them in a state court, insisting that the bankruptcy proceedings were void for want of jurisdiction, and that the entire proceedings were a fraud upon the bankruptcy act, and that, even if the proceedings were valid, the appointment of the trustees was void.

[For other cases, see Appeal and Error, 790–807, in Digest Sup. Ct. 1908.]

Pleading — relief under — prayer for general relief.

2. A prayer for general relief should be treated as abandoned where no right to other than the specific relief prayed was brought to the attention either of the Federal district court of original jurisdiction or of the circuit court of appeals.

[For other cases, see Pleading, I. 1, in Digest Sup. Ct. 1908.]

Federal courts — enjoining proceedings in state courts.

3. The prohibition of U. S. Rev. Stat. § 720, U. S. Comp. Stat. 1901, p. 581, against injunctions to stay proceedings in state courts, prevents persons claiming to be the owners of certain property in Florida from maintaining in a Federal district court in Massachusetts a suit to restrain trustees in bankruptcy, appointed by that court, from asserting or claiming in any court or place any right, title, or interest in the property, where there is pending in a Florida state court a suit with the parties reversed, to establish an equitable claim or interest in the property in the trustees in bankruptcy, as against complainants in the present suit, who now allege the invalidity of the bankruptcy proceedings, and assert that for that reason any decree that may be made by the state court will not bind the bankrupt.

[For other cases, see Courts, 1490–1498, in Digest Sup. Ct. 1908.]

Federal courts — enjoining proceedings in state courts.

4. A suit by persons claiming to be the owners of certain property to restrain trustees in bankruptcy from maintaining a suit against them in a state court to establish an equitable claim or interest therein cannot be deemed to be in aid of a prior judgment in an ejectment action in a Federal court, and therefore excluded from the prohibition of U. S. Rev. Stat. § 720, U. S. Comp. Stat. 1901, p. 581, against injunctions to stay proceedings in state courts, where the ejectment suit was commenced after the adjudication of bankruptcy, and the bill does not aver that the judgment cut off the equitable rights of the bankrupt, but declares that if the bankrupt had any title to the property, legal or equitable, at the time of the adjudication of bankruptcy, such title still remains in the bankrupt, and it is not alleged that the claim of equitable right on the part of the bankrupt is inconsistent with the judgment, or should be subordinated to it, and the trustees were not parties to the ejectment action, and the bankrupt is not a party to the present suit.

[For other cases, see Courts, 1490–1498, in Digest Sup. Ct. 1908.]

[No. 767.]

Argued March 3, 1914. Decided June 22, 1914.

APPEAL from the United States Circuit Court of Appeals for the First Circuit to review a decree which affirmed a decree of the District Court for the District of Massachusetts sustaining a demurrer to and dismissing the bill in a suit to restrain trustees in bankruptcy from asserting an equitable claim or interest in certain property. Affirmed.

See same case below, 124 C. C. A. 135, 206 Fed. 4; on rehearing, 125 C. C. A. 221, 207 Fed. 543.

The facts are stated in the opinion.

Mr. George C. Bedell argued the cause, and, with Mr. H. Bisbee, filed a brief for appellants:

Jurisdiction on the ground of Federal questions appears upon the face of the bill of complaint.

Rector v. City Deposit Bank Co. 200 U. S. 411, 50 L. ed. 529, 26 Sup. Ct. Rep. 289; Nutt v. Knut, 200 U. S. 12, 19, 50 L. ed. 348, 352, 26 Sup. Ct. Rep. 216; Williams

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

On the appellate jurisdiction of the Federal Supreme Court in bankruptcy cases—see note to James v. Stone, 57 L. ed. U. S. 573.

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v. Heard, 140 U. S. 529, 535, 536, 35 L. ed. 550, 553, 11 Sup. Ct. Rep. 885; Lovell v. Newman, 227 U. S. 413, 421, 57 L. ed. 577, 581, 33 Sup. Ct. Rep. 375.

There must be a suit pending in the state court between the same parties, raising the same questions, and for like relief, when the Federal suit is filed, or U. S. Rev. Stat. § 720, U. S. Comp. Stat. 1901, p. 581, does not apply. This is self-evident.

Watson v. Jones, 13 Wall. 717, 718, 20 L. ed. 671, 672; Pendleton v. Russell, 144 U. S. 645, 647, 36 L. ed. 576, 577, 12 Sup. Ct. Rep. 743; Moran v. Sturges, 154 U. S. 279, 38 L. ed. 989, 14 Sup. Ct. Rep. 1019; Buck v. Colbath, 3 Wall. 335, 345, 18 L. ed. 257, 261; Hunt v. New York Cotton Exch. 205 U. S. 323–339, 51 L. ed. 821–827, 27 Sup. Ct. Rep. 529; Burgess v. Seligman, 107 U. S. 21, 34, 27 L. ed. 361, 365, 2 Sup. Ct. Rep. 10; David Lupton's Sons Co. v. Automobile Club, 225 U. S. 500, 56 L. ed. 1181, 32 Sup. Ct. Rep. 711, Ann. Cas. 1914A, 699; Fisk v. Union P. R. Co. 10 Blatchf. 518, Fed. Cas. No. 4,830; Live Stock Dealers' & Butchers' Asso. v. Crescent City L. S. L. & S. H. Co. 1 Abb. (U. S.) 406, Fed. Cas. No. 8,408; Watson v. Jones, 13 Wall. 679, 715, 716, 20 L. ed. 666, 671; Riverdale Cotton Mills v. Alabama & G. Mfg. Co. 198 U. S. 196, 197, 49 L. ed. 1015, 1016, 25 Sup. Ct. Rep. 629; Shields v. Thomas, 18 How. 262, 263, 15 L. ed. 372; French v. Hay (French v. Stewart) 22 Wall. 250, 22 L. ed. 857.

The appellants had the constitutional right to resort to the Federal court for relief, and to a decree on the merits of their bill, even though another suit for the same or different relief was pending in the state court.

Burgess v. Seligman, 107 U. S. 21, 34, 27 L. ed. 361, 365, 2 Sup. Ct. Rep. 10; Chicot County v. Sherwood, 148 U. S. 534, 37 L. ed. 548, 13 Sup. Ct. Rep. 695; McClellan v. Carland, 217 U. S. 269–282, 54 L. ed. 762–767, 30 Sup. Ct. Rep. 501; David Lupton's Sons Co. v. Automobile Club, 225 U. S. 489, 500, 56 L. ed. 1177, 1181, 32 Sup. Ct. Rep. 711, Ann. Cas. 1914A, 699.

The Federal court is bound to proceed to final judgment on the merits in all cases within its jurisdiction, and the pending of a suit in a state court is no bar to proceedings concerning the same matter in a Federal court having jurisdiction thereof.

McClellan v. Carland, 217 U. S. 282, 54 L. ed. 767, 30 Sup. Ct. Rep. 501; Chicot County v. Sherwood, 148 U. S. 534, 37 L. ed. 548, 13 Sup. Ct. Rep. 695; Boston & M. R. Co. v. Gokey, 210 U. S. 155, 162, 52 L. ed. 1002, 1004, 28 Sup. Ct. Rep. 657.

A litigant cannot be dismissed from the Federal court for the reasons stated in the opinions of the court below.

Burgess v. Seligman, 107 U. S. 21–34, 27 L. ed. 361–365, 2 Sup. Ct. Rep. 10; Boston & M. R. Co. v. Gokey, 210 U. S. 155, 162, 52 L. ed. 1002, 1004, 28 Sup. Ct. Rep. 657; Chicot County v. Sherwood, 148 U. S. 529, 37 L. ed. 546, 13 Sup. Ct. Rep. 695; David Lupton's Sons Co. v. Automobile Club, 225 U. S. 489–500, 56 L. ed. 1177–1181, 32 Sup. Ct. Rep. 711, Ann. Cas. 1914A, 699; McClellan v. Carland, 217 U. S. 269–282, 54 L. ed. 762–767, 30 Sup. Ct. Rep. 501.

That the same questions may be raised in the state court does not make U. S. Rev. Stat. § 720, U. S. Comp. Stat. 1901, p. 581, applicable.

Buck v. Colbath, 3 Wall. 335, 345, 18 L. ed. 257, 261; Hunt v. New York Cotton Exch. 205 U. S. 323–339, 51 L. ed. 821–827, 27 Sup. Ct. Rep. 529; Moran v. Sturges, 154 U. S. 279, 38 L. ed. 989, 14 Sup. Ct. Rep. 1019; Pendleton v. Russell, 144 U. S. 645, 647, 36 L. ed. 576, 577, 12 Sup. Ct. Rep. 743; Watson v. Jones, 13 Wall. 717, 718, 20 L. ed. 671, 672.

Courts, under a prayer for general relief, may grant effective relief without violating § 720.

Fisk v. Union P. R. Co. 10 Blatchf. 518, Fed. Cas. No. 4,830; Live Stock Dealers' & Butchers' Asso. v. Crescent City L. S. L. & S. H. Co. 1 Abb. (U. S.) 406, Fed. Cas. No. 8,408; Watson v. Jones, 13 Wall. 699–716, 720–735, 20 L. ed. 666–678.

Section 720 is not applicable because one object of the bill in the court below was to obtain the benefit of a Federal judgment in Florida.

French v. Hay (French v. Stewart) 22 Wall. 250, 251, 22 L. ed. 857; Julian v. Central Trust Co. 193 U. S. 93–112, 48 L. ed. 629–639, 24 Sup. Ct. Rep. 399; Riverdale Cotton Mills v. Alabama & G. Mfg. Co. 198 U. S. 188–196, 49 L. ed. 1008–1015, 25 Sup. Ct. Rep. 629; Shields v. Thomas, 18 How. 253–262, 15 L. ed. 368–372; Story, Eq. Pl. 429–431.

Mr. Frank L. Simpson argued the cause, and, with Messrs. E. R. Gunby and James F. Glen, filed a brief for appellees:

Complainants claim no right under the laws of the United States, but merely assert that defendants do not possess the capacity they claim under the laws of the United States, and the decree of the circuit court of appeals is final.

Bagley v. General Fire Extinguisher Co. 212 U. S. 477, 53 L. ed. 605, 29 Sup. Ct. Rep. 341; Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. Rep. 434; Devine v. Los Angeles, 202 U. S. 313, 50

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L. ed. 1046, 26 Sup. Ct. Rep. 652; Empire State-Idaho Min. & Developing Co. v. Hanley, 198 U. S. 292, 49 L. ed. 1056, 25 Sup. Ct. Rep. 691; Florida C. & P. R. Co. v. Bell, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704.

Section 720 of the Revised Statutes, now § 265 of the Judicial Code, forbade the maintenance of the suit.

Central Nat. Bank v. Stevens, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403; Re Chetwood, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385; Dial v. Reynolds, 96 U. S. 340, 24 L. ed. 644; Diggs v. Wolcott, 4 Cranch, 179, 2 L. ed. 587; Evans v. Gorman, 115 Fed. 399; Haines v. Carpenter, 91 U. S. 254, 23 L. ed. 345; Julian v. Central Trust Co. 193 U. S. 93, 48 L. ed. 629, 24 Sup. Ct. Rep. 399; Molony v. Massachusetts Ben. Asso. 53 Fed. 209; Moran v. Sturges, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; Peck v. Jenness, 7 How. 612, 12 L. ed. 841; Sargent v. Helton, 115 U. S. 348, 29 L. ed. 412, 6 Sup. Ct. Rep. 78; Sharon v. Terry, 1 L.R.A. 572, 13 Sawy. 387, 36 Fed. 366; Riggs v. Johnson County, 6 Wall. 195, 18 L. ed. 776; United States ex rel. Moses v. Keokuk, 6 Wall. 517, 18 L. ed. 934; United States v. Parkhurst-Davis Mercantile Co. 176 U. S. 317, 44 L. ed. 485, 20 Sup. Ct. Rep. 423; Wagner v. Drake, 31 Fed. 849; Whitney v. Wilder, 4 C. C. A. 510, 13 U. S. App. 180, 54 Fed. 554.

Mr. Justice Pitney delivered the opinion of the court:

The appellants, Joseph Hull, the Prairie Pebble Phosphate Company (hereinafter referred to as the Prairie Company), and the Savannah Trust Company, brought this action in equity in the district court of the United States for the district of Massachusetts against appellees, Arthur E. Burr, Frank L. Simpson, and J. Howard Edwards, who are trustees in bankruptcy of the Port Tampa Phosphate Company, a corporation organized and existing under the laws of the state of Massachusetts. The bill was filed in August, 1912, and, defendants having demurred, an amended bill was filed, and it was stipulated that the demurrer should stand as a demurrer to the substituted bill. The district court entered a decree sustaining the demurrer and dismissing the bill (124 C. C. A. 135, 206 Fed. 1). The circuit court of appeals affirmed the decree (124 C. C. A. 138, 206 Fed. 4), and denied a petition for rehearing (207 Fed. 543).

The amended bill, besides showing diversity of citizenship, avers in substance as follows: That prior to the transactions in question, Stewart and Meminger were the owners in fee simple of a tract of land in Polk county, Florida, containing 440 acres, together with certain buildings and personal property situate upon it; that on May 22, 1905, in consummation of a prior contract, they conveyed all their right, title, and interest in the property to Hull by deed duly recorded, which vested in him a good legal title in fee simple to the real estate, with full title to the personal property and the right to possession as against all persons, "and his recorded paper title to all the said properties was perfect;" that before the delivery of the deed by Stewart and Meminger to Hull the Port Tampa [714] Company claimed to own some equitable interest in the property, under a contract between it and Stewart and Meminger, which interest Hull purchased for a full consideration, and before the delivery of said deed to Hull the Port Tampa Company adopted and placed upon its records a resolution reciting its agreement to sell the property to Hull, and authorizing and directing Stewart and Meminger to make a deed to him; that soon after the delivery of the deed Hull took possession; that on June 7, 1907, he executed and delivered to the Prairie Company a deed of conveyance of all his right, title, and interest in said properties for the consideration of about $37,000, which deed was shortly afterwards recorded, and the Prairie Company took actual and peaceable possession of the property, and has continued to hold it until the present time, having made valuable improvements upon it; that afterwards, and prior to March 26, 1908, the Prairie Company executed and delivered to the Trust Company a deed of trust conveying its right, title, and interest in said properties, together with other properties, to secure the payment of bonds amounting to about $1,800,000, and the deed of trust was duly recorded; that it came to the knowledge of Hull that certain creditors of the Port Tampa Company had asserted that the company owned some interest in said properties, and on the 28th of November, 1905, he commenced an action of ejectment against that company in the United States circuit court for the southern district of Florida being the district in which the property was situate; that the company was served with process therein on December 6, 1905, and such further proceedings were had that on March 13, 1906, upon the verdict of a jury, a judgment was rendered adjudging that Hull was entitled to recover from the Port Tampa Company the fee-simple title and right of possession of the lands in question. The bill sets up that on November 8, 1905, a petition in bankruptcy [715] was filed against the Port Tampa Company "in this court of bankruptcy" [the district court of the

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United States for the district of Massachusetts]; that a subpœna was issued thereon returnable on the 20th day of the same month, and returned served, and that on the return day an appearance was entered for the company by one J. H. Robinson. Copies of the creditor's petition, the subpœna, and the appearance are appended to the bill as an exhibit. The bill alleges that defendants assert that by virtue of a decree in bankruptcy made in said district court on November 27, 1905, adjudging the Port Tampa Company bankrupt, they are the owners of an equitable interest or estate in the said lands and other properties, and that the defendant Burr was, on December 27, 1905, appointed sole trustee in bankruptcy of the company; that he resigned as such trustee on March 12, 1909, and on the same day his resignation was accepted, and Burr, Simpson, and Edwards were appointed trustees in his place; and that defendants claim that by the adjudication in bankruptcy and their appointment the title to an interest or estate in said lands became vested in them as such trustees; that on or about March 26, 1908, and before he resigned as trustee, Burr brought a suit by bill in equity in the circuit court in and for Polk county, Florida, against complainants, to establish such interest or estate, but there has been no trial of this suit on the merits, nor had the same been brought to final issues of fact and law before Burr's resignation; that on January 9, 1912, the defendants filed in said state court a supplemental bill of complaint, wherein they averred that said suit was brought by Burr as trustee in bankruptcy, and that Burr resigned as such trustee on March 12, 1909, and prayed that they might be substituted as complainants in his place; that the present complainants filed an answer to the said supplemental bill, but that the issues have not been tried, and no decree has been rendered making [716] the defendants as trustees complainants in said suit. The present bill then proceeds to attack the proceedings and adjudication in bankruptcy, and the title of the defendants as trustees, as fraudulent and void upon various grounds, which may be summarized as follows: That the Port Tampa Company's principal place of business was not in Massachusetts, as alleged in the petition, and that it had no business except in Florida; that it was not insolvent, and did not commit the act of bankruptcy alleged, or any act of bankruptcy; that the petitioning creditors were directors of the company, and knew the company was solvent and had committed no act of bankruptcy; that the jurisdictional facts were falsely and fraudulently averred, being fabricated for the purpose of pretending to state a cause within the jurisdiction of the court; that the petitioning creditors controlled both sides of the litigation through their ownership of a majority of the company's stock; that Robinson, who entered the appearance in behalf of the Port Tampa Company, was not in fact authorized to appear for or represent the company; and that the petition was fraudulently made to appear as an involuntary petition by creditors, whereas in truth and in legal effect it was a voluntary petition on the part of the company and its officers and directors. It is also alleged that the appointment of defendants as trustees in the place of Burr on March 12, 1909, was invalid, because no judge or referee appointed them, their claim being that in fact they were appointed trustees at a meeting of creditors, whereas complainants allege that the pretended call by the referee for the meeting of creditors was issued at a time when there was no vacancy in the office of trustee; that ten days' notice of the meeting was not given by mail to all the creditors, as required by law; that the only creditor who attended the meeting was one Wills, a director of the company, and that there were ten other creditors who had proven claims; that Wills did [717] not own a bona fide provable claim to the amount of one half of the claims that had been proven; and that the appointment of defendants as trustees was made by Wills alone. Complainants insist that there was no power or jurisdiction in any creditor or creditors to appoint defendants as trustees on March 12, 1909, because at that time there was no vacancy in the office of trustee, since Burr had not then resigned and his resignation had not been accepted by the court. The bill further avers that in their answer to the supplemental bill in the equity suit in the circuit court of Polk county, Florida, the present complainants set up the defense of "want of jurisdiction of the said court of bankruptcy to render any decree of adjudication, and that such alleged decree was void on the face of the said proceedings;" that this part of the answer was excepted to and the exceptions sustained by the order of the Polk county circuit court; that on appeal, the Florida supreme court affirmed this order on July 3, 1912, ruling that all such defenses were collateral attacks upon the bankruptcy proceedings, which were not permissible, the ruling being expressed in the following words: "The assaults made upon the bankruptcy proceedings in the Federal court of Massachusetts by the answer of the appellants to the supplemental bill of the appellees in the particulars wherein said answer was excepted to by the appellees is simply a

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collateral attack upon the judgments, orders, and proceedings in said bankruptcy court that is not permissible either by way of defense to the supplemental bill or to the original bill as amended;" that by reason of the said judgment of the Florida courts the present complainants cannot, by way of defense to the bills of complaint in those courts, "have and obtain that speedy, adequate, and appropriate relief that this court is competent to render upon this original bill of complaint; and your orators fear that the Florida courts will decline to adjudicate as to the character [718] and title of the defendants as trustees and their competency to attack your orators' title to said properties, as herein set forth, upon any answer to the said bills in the said state court." The present amended bill further sets up that "upon the facts hereinbefore set forth, which are conclusively provable to be true by the record of the proceedings of the said court of bankruptcy, if the said Port Tampa Company had any title to any of the aforesaid properties, legal or equitable, at the time of the said alleged decree of adjudication, such title still remains in the said company; that your orators are still liable to be sued by the said company in any court of competent jurisdiction to assert such title, and that a final decree in the Florida state court for or against the defendants as such alleged trustees would not be pleadable in bar of a suit by the said company against your orators to assert such title." The specific prayer is for a decree to restrain defendants "from asserting or claiming as trustees in bankruptcy, in any court or place, any right, title, or interest in or to any of the properties herein described until the further decree of this court." There is also a prayer for general relief. Appended as exhibits and made a part of the bill are the copies of the petition, subpœna, return, and appearance in the bankruptcy proceedings, already mentioned, and a transcript of the record of the ejectment suit in the United States circuit court for the southern district of Florida.

The district court, in sustaining the demurrer, held that since upon the face of the bankruptcy proceedings there was no want of jurisdiction over the parties or the subject-matter, and the decree was not void in form, it could not be collaterally attacked, and could be assailed only by a direct proceeding in a competent court; citing New Lamp Chimney Co. v. Ansonia Brass & Copper Co. 91 U. S. 656, 662, 23 L. ed. 336, 339; Graham v. Boston, H. & E. R. Co. 118 U. S. 161, 178, 30 L. ed. 196, 204, 6 Sup. Ct. Rep. 1009. Treating the present suit as a direct attack, [719] the court held, first, that no right or interest of complainants appeared to be so prejudiced by the adjudication in bankruptcy as to entitle them to equitable relief against it; that the adjudication concerned only the bankrupt and its creditors, since it made no difference to complainants whether the claim to the Florida properties was asserted by the bankrupt itself or by its trustees; that the allegation that a final decree in the Florida suit would not bar an action brought by the company itself was a mere conclusion of law, not admitted by the demurrer, and an unsound conclusion in view of the facts alleged; that, the adjudication not having been questioned by the bankrupt or its creditors, they were bound by it, and by virtue of it the trustees were in the bankrupt's place so far as concerned any claim that it could assert to the Florida properties. And, secondly, that there was a defect of necessary parties, because the only defendants named in the bill were the bankruptcy trustees, respecting whom it was not alleged that they were parties to the bankruptcy proceedings, nor that they participated in the fraud whereby the adjudication was alleged to have been procured.

The circuit court of appeals, while agreeing with this reasoning, placed its decision upon the ground that complainants were invoking not the powers of the district court in bankruptcy, but its general powers as a court in equity; that it also appeared that the proceedings in Florida were instituted by a bill in equity with the parties reversed; that the Florida court was a chancery court and a court of superior jurisdiction in equity, and for present purposes of equal dignity and authority with the district court of the United States for the district of Massachusetts; that the bill in substance merely invoked the general equitable jurisdiction of the district court in order to restrain proceedings in a state court proceeding in equity in a prior suit between the same parties; and that this ran [720] counter to § 720, Rev. Stat., U. S. Comp. Stat. 1901, p. 581 (§ 265, Judicial Code, 36 Stat. at L. 1162, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 236), as well as to the general principle that the authority of the court first acquiring jurisdiction, the parties being the same, must prevail; citing Marshall v. Holmes, 141 U. S. 589, 596, 35 L. ed. 870, 872, 12 Sup. Ct. Rep. 62, and Central Nat. Bank v. Stevens, 169 U. S. 432, 462, 42 L. ed. 807, 818, 18 Sup. Ct. Rep. 403.

There is a motion to dismiss the appeal, based upon the ground that the jurisdiction of the district court depended solely upon diversity of citizenship, and that

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therefore the decree of the circuit court of appeals is final, under § 128, Judicial Code (36 Stat. at L. 1133, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 193). The motion must be granted unless the suit was one arising under the laws of the United States, within the meaning of the first subdivision of § 24 of the Code. The rule is firmly established that a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result depends. And this must appear not by mere inference, but by distinct averments according to the rules of good pleading; not that matters of law must be pleaded as such, but that the essential facts averred must show, not as a matter of mere inference or argument, but clearly and distinctly, that the suit arises under some Federal law. Hanford v. Davies, 163 U. S. 273, 279, 41 L. ed. 157, 159, 16 Sup. Ct. Rep. 1051; Mountain View Min. & Mill. Co. v. McFadden, 180 U. S. 533, 535, 45 L. ed. 656, 657, 21 Sup. Ct. Rep. 488; Defiance Water Co. v. Defiance, 191 U. S. 184, 191, 48 L. ed. 140, 143, 24 Sup. Ct. Rep. 63; Arbuckle v. Blackburn, 191 U. S. 405, 413, 48 L. ed. 239, 241, 24 Sup. Ct. Rep. 148; Bankers Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 192 U. S. 371, 383, 48 L. ed. 484, 489, 24 Sup. Ct. Rep. 325; Shulthis v. McDougal, 225 U. S. 561, 569, 56 L. ed. 1205, 1210, 32 Sup. Ct. Rep. 704.

We have not considered whether the action could be regarded as ancillary to the proceedings in bankruptcy, and for that reason maintainable in the district court as a suit arising under the laws of the United States (See Freeman v. Howe, 24 How. 450, 460, 16 L. ed. 749, 752; Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co. (Milwaukee & M. R. Co. v. Soutter) 2 Wall. 609, 633, 17 L. ed. 886, 895; Buck v. Colbath, 3 Wall. 334, 345, 18 L. ed. 257, 261; [721] Christmas v. Russell (Christmas v. Gaines) 14 Wall. 69, 81, 20 L. ed. 762, 763; Krippendorf v. Hyde, 110 U. S. 276, 281, 28 L. ed. 145, 147, 4 Sup. Ct. Rep. 27; Lammon v. Feusier, 111 U. S. 17, 19, 28 L. ed. 337, 4 Sup. Ct. Rep. 286; Covell v. Heyman, 111 U. S. 176, 179, 180, 28 L. ed. 390-392, 4 Sup. Ct. Rep. 355; Dewey v. West Fairmont Gas Coal Co. 123 U. S. 329, 333, 31 L. ed. 179, 181, 8 Sup. Ct. Rep. 148; Gumbel v. Pitkin, 124 U. S. 131, 144, 31 L. ed. 374, 378, 8 Sup. Ct. Rep. 379; Morgans' L. & T. R. & S. S. Co. v. Texas C. R. Co. 137 U. S. 171, 201, 34 L. ed. 625, 635, 11 Sup. Ct. Rep. 61; Byers v. McAuley, 149 U. S. 608, 615, 37 L. ed. 867, 871, 13 Sup. Ct. Rep. 906; Root v. Woolworth, 150 U. S. 401, 413, 37 L. ed. 1123, 1126, 14 Sup. Ct. Rep. 136; Moran v. Sturges, 154 U. S. 256, 274, 38 L. ed. 981, 987, 14 Sup. Ct. Rep. 1019; White v. Ewing, 159 U. S. 36, 39, 40 L. ed. 67, 68, 15 Sup. Ct. Rep. 1018; Carey v. Houston & T. C. R. Co. 161 U. S. 115, 130, 40 L. ed. 638, 643, 16 Sup. Ct. Rep. 537; Re Johnson, 167 U. S. 120, 125, 42 L. ed. 103, 104, 17 Sup. Ct. Rep. 735; Pope v. Louisville, N. A. & C. R. Co. 173 U. S. 573, 577, 43 L. ed. 814, 816, 19 Sup. Ct. Rep. 500; Wabash R. Co. v. Adelbert College, 208 U. S. 38, 54, 52 L. ed. 379, 386, 28 Sup. Ct. Rep. 182), because complainants have not planted themselves upon that ground.

Complainants are not parties to the proceeding in bankruptcy, and are setting up rights in opposition to the adjudication and the appointment of trustees therein. They seek to have the trustees restrained from prosecuting the equity suit against them in the state court of Florida, and to that end undertake to show (a) that the bankruptcy proceedings were void for want of jurisdiction; (b) that the entire proceedings were a fraud upon the bankrupt act; and (c) that, even if the proceedings were valid, the appointment of the trustees was void. This is the theory of the bill of complaint, and it is by this that the right of ultimate appeal to this court is to be tested, rather than by the grounds upon which the district court and the circuit court of appeals reached conclusions adverse to the relief prayed. Were the views adopted by those courts found to be untenable, it would be necessary to pass upon the attack made by complainants upon the title of the trustees in bankruptcy; and to do this would require us to determine the construction and effect of those provisions of the bankruptcy act that bear upon the matters of fact averred as the basis of the attack. We deem, therefore, that the suit is one arising under the laws of the United States, within the meaning of § 24, [722] Judicial Code, and the motion to dismiss will be denied.

Upon the merits, we find it unnecessary to consider the views expressed by the district court, since it seems to us that the view of the circuit court of appeals as to the effect of § 720, Rev. Stat. (U. S. Comp. Stat. 1901, p. 581), is correct, and is sufficient to dispose of the case.

The substance of the matter is that complainants allege that they are the owners of certain property in Florida in which defendants, as trustees in bankruptcy of the Port Tampa Company, assert an equitable claim or interest, to establish which they are prosecuting or attempting to prosecute an equitable action in a Florida state court against complainants. The latter

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aver that because of fraud, or for other reasons, the proceedings and adjudication in bankruptcy and the appointment of defendants as trustees are invalid, and that for this reason any decree that may be made by the Florida state court will not be binding upon the Port Tampa Company. As already mentioned, the specific prayer is that defendants may be restrained from asserting or claiming as trustees in bankruptcy, in any court or place, any right, title, or interest in the property. There is a prayer for general relief, but it was pointed out by the circuit court of appeals (207 Fed. 534, 544) that no right to relief other than by way of an injunction was brought to the attention of the district court or of the court of appeals upon the hearing. The general prayer should therefore be treated as abandoned.

So far as the action already pending in the Florida court of equity is concerned, the case is clearly within § 720, Rev. Stat., U. S. Comp. Stat. 1901, p. 581, (§ 265, Judicial Code, 36 Stat. at L. 1162, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 236): "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." [723] The latter clause formerly had reference to § 5106, Rev. Stat. (§ 21 of the bankruptcy act of March 2, 1867, 14 Stat. at L. 526, chap. 176); in the place of which we now have § 11 and subdivision 7 and 15 of § 2 of the bankruptcy act of July 1, 1898 (30 Stat. at L. 546, 549, chap. 541, U. S. Comp. Stat. 1901, pp. 3421, 3426). It is quite evident that the injunction sought by the present complainants is not one authorized by the bankruptcy act.

The prohibition against injunctions to stay proceedings in state courts originated in the act of March 2, 1793 (chap. 22, § 5, 1 Stat. at L. 335), and has been constantly observed by the courts. See Diggs v. Wolcott, 4 Cranch, 179, 2 L. ed. 587; Peck v. Jenness, 7 How. 612, 625, 12 L. ed. 841, 846; Watson v. Jones, 13 Wall. 679, 719, 20 L. ed. 666, 672; Haines v. Carpenter, 91 U. S. 254, 257, 23 L. ed. 345, 346; Dial v. Reynolds, 96 U. S. 340, 24 L. ed. 644; Chapman v. Brewer, 114 U. S. 158, 172, 29 L. ed. 83, 88, 5 Sup. Ct. Rep. 799; United States v. Parkhurst-Davis Mercantile Co. 176 U. S. 317, 320, 44 L. ed. 485, 486, 20 Sup. Ct. Rep. 423; Hunt v. New York Cotton Exch. 205 U. S. 322, 338, 51 L. ed. 821, 827, 27 Sup. Ct. Rep. 529; Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 226, 53 L. ed. 150, 158, 29 Sup. Ct. Rep. 67.

It is recognized, however, that § 720 was not intended to limit the power of the Federal courts to enforce their authority in cases that, on other grounds, are within their proper jurisdiction; and hence, it has been held that, in aid of its jurisdiction properly acquired, and in order to render its judgments and decrees effectual, a Federal court may restrain proceedings in a state court which would have the effect of defeating or impairing such jurisdiction. French v. Hay (French v. Stewart) 22 Wall. 250, 22 L. ed. 854; Deitzsch v. Huidekoper (Kern v. Huidekoper) 103 U. S. 494, 497, 26 L. ed. 497, 498; Julian v. Central Trust Co. 193 U. S. 93, 112, 48 L. ed. 629, 639, 24 Sup. Ct. Rep. 399; Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 245, 49 L. ed. 462, 464, 25 Sup. Ct. Rep. 251.

The contention that the present case falls within this exception to the general application of § 720, because the bill is really filed in aid of the judgment of a Federal court, that is to say, the judgment in favor of Hull in the ejectment suit in the circuit court of the United States for [724] the southern district of Florida, will not bear analysis. The ejectment suit was commenced after the adjudication of bankruptcy, and the bill does not aver that the judgment cut off the equitable rights of the Port Tampa Company, but, on the contrary, declares that if that company had any title to the property, legal or equitable, at the time of the adjudication of bankruptcy, such title still remains in the company. It is not averred that the claim of equitable right on the part of the company is inconsistent with the judgment, or should be subordinated to it. The present trustees, or either of them, were not made parties to the ejectment suit, nor is the company made a party to the present action. And, upon the whole, it seems to us that by no interpretation or construction can the present bill be deemed to have been filed in aid of the judgment in ejectment, or be sustained upon that theory.

It is argued that the bill cannot be deemed to have as its object the staying of a pending suit in the state court, because that action abated upon Burr's resignation as trustee, and no further proceeding can be had until his successors have been made parties. To this point a decision of the Florida supreme court in the very action is cited (Hull v. Burr, 62 Fla. 499, 56 So. 673). We do not interpret this decision as sustaining the contention, and in a subsequent stage of the same litigation (64 Fla. 83, 59 So. 787), the court distinctly held that the action did not abate on the resignation of Burr, but might be proceeded

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with by his successors when appointed, the same as if originally instituted by them; and that a supplemental bill was the proper procedure to have such successors formally brought into the case as parties. Indeed, it is only upon the theory that defendants are prosecuting that suit that the complainants show ground for an injunction against them.

To the suggestion that the term "any court," in the bill of complaint, may include other Federal courts, it is [725] sufficient to say that the bill is devoid of any showing that defendants are asserting claims against complainants' title in any court other than the Florida state court. Hence, there is no occasion to invoke the general rule that the court first obtaining jurisdiction of a controversy should be permitted to proceed without interference. Peck v. Jenness, 7 How. 612, 624, 12 L. ed. 841, 846; Central Nat. Bank v. Stevens, 169 U. S. 432, 459, 42 L. ed. 807, 817, 18 Sup. Ct. Rep. 403; Bigelow v. Old Dominion Copper Min. & Smelting Co. 74 N. J. Eq. 457, 473 et seq., 71 Atl. 153.

We deem that the main object of the bill, to which all else is incidental, is in contravention of § 265 of the Judicial Code (formerly § 720 of the Revised Statutes), and that therefore the decree should be affirmed.

SOUTHERN RAILWAY COMPANY, Plff. in Err.,
v.
D. E. CROCKETT.

(See S. C. Reporter's ed. 725–738.)

Error to state court — Federal question — suit based on Federal statute.

1. A decision of a state court adverse to plaintiff in error's contention that, by the true construction of the Federal employers' liability and safety appliance acts, it could rely upon the common-law defense of assumption of risk, is reviewable in the Federal Supreme Court.

[For other cases, see Appeal and Error, 1436–1445, in Digest Sup. Ct. 1908.]

Master and servant — employers' liability — assumption of risk.

2. The defense of assumption of risk is available to an interstate carrier under the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), as at common law, except in the cases mentioned in § 4 of that act, *i. e.*, "any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Master and servant — safety appliances — standard height of locomotive drawbars.

3. The standard height of drawbars, promulgated by the Interstate Commerce Commission under the authority of the safety appliance act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), § 5, if originally confined to freight cars by that section, was made applicable to locomotive engines by the provision of the amendatory act of March 2, 1903 (32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1911, p. 1314), that the provisions and requirements of the acts of March 2, 1893, and April 1, 1896 (29 Stat. at L. 85, chap. 87, U. S. Comp. Stat. 1901, p. 3175), relating to train brakes, automatic couplers, grab irons, and the height of drawbars, shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce and in the territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those exempted by the earlier acts and those used upon street railways.

[For other cases, see Master and Servant, 28–51, in Digest Sup. Ct. 1908.]

[No. 826.]

Submitted April 16, 1914. Decided June 22, 1914.

IN ERROR to the Supreme Court of the State of Tennessee to review a judgment which dismissed a petition for a writ of certiorari and affirmed a judgment of the Court of Civil Appeals of that state, which had affirmed a judgment of the Circuit Court of Knox County in favor of plaintiff

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NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On the constitutionality, application, and effect of the Federal employers' liability act—see note to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38.

On the duty and liability under Federal and state railway safety appliance acts—see notes to Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A.(N.S.) 473, and Lake Shore & M. S. R. Co. v. Benson, 41 L.R.A.(N.S.) 49.

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in a suit based upon the Federal employers' liability and safety appliance acts. Affirmed.

The facts are stated in the opinion.

Mr. L. E. Jeffries submitted the cause for plaintiff in error. Mr. L. D. Smith was on the brief:

This court has jurisdiction.

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651; Nutt v. Knut, 200 U. S. 18, 50 L. ed. 352, 26 Sup. Ct. Rep. 216.

Did the safety appliance acts in force at the time of the injury involved in this case require of railroad companies the duty of having the drawbars on switch engines at a minimum height of 31½ inches above the level of the tops of the rails?

Pennell v. Philadelphia & R. R. Co. 231 U. S. 675, ante, 430, 34 Sup. Ct. Rep. 220.

Defendant in error assumed the risk.

Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, ante, 521, 34 Sup. Ct. Rep. 229; Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561; Thornton, Federal Employers' Liability, § 85.

In cases arising under the Federal employers' liability act the doctrine of assumption of risk is still open as a defense.

Neil v. Idaho & W. N. R. Co. 22 Idaho, 74, 125 Pac. 331; Central Vermont R. Co. v. Bethune, 124 C. C. A. 528, 206 Fed. 868; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192; Seaboard Air Line R. Co. v. Moore, 228 U. S. 433, 57 L. ed. 907, 33 Sup. Ct. Rep. 580; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806; American R. Co. v. Birch, 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 54, 56 L. ed. 348, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Bowers v. Southern R. Co. 10 Ga. App. 367, 73 S. E. 677; Barker v. Kansas City, M. & O. R. Co. 88 Kan. 767, 43 L.R.A. (N.S.) 1121, 129 Pac. 1151; Freeman v. Powell, — Tex. Civ. App. —, 144 S. W. 1033; Union P. R. Co. v. Fuller, 122 C. C. A. 359, 204 Fed. 45; Southern R. Co. v. Gadd, 125 C. C. A. 21, 207 Fed. 277; Worthington v. Elmer, 125 C. C. A. 50, 207 Fed. 306; Louisville & N. R. Co. v. Lankford, 126 C. C. A. 247, 209 Fed. 321; Cleveland, C. C. & St. L. R. Co. v. Bossert, 44 Ind. App. 245, 87 N. E. 158.

Mr. J. A. Fowler submitted the cause for defendant in error. Messrs. A. C. Grimm and H. G. Fowler were on the brief:

The writ of error should be dismissed because no question is presented which authorizes this court to take jurisdiction of the case.

Kizer v. Texarkana & Ft. S. R. Co. 179 U. S. 199, 45 L. ed. 152, 21 Sup. Ct. Rep. 100; Montgomery v. Hernandez, 12 Wheat. 129, 133, 6 L. ed. 575, 576.

If this court has jurisdiction, the case should be affirmed, because the decision of the state courts is so manifestly right that the case should not be kept upon the docket for further argument.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1–10, 51 L. ed. 681–685, 27 Sup. Ct. Rep. 407.

Mr. Justice Pitney delivered the opinion of the court:

Crockett, the defendant in error, brought this action in the circuit court of Knox county, Tennessee, to recover damages for personal injuries sustained by him while in the employ of the railway company. The action was based upon the Federal employers' liability act of April 22, 1908 (chap. 149, 35 Stat. at L. 65, U. S. Comp. Stat. Supp. 1911, p. 1322), in connection with the safety appliance act of March 2, 1893 (chap. 196, 27 Stat. at L. 531, U. S. Comp. Stat. 1901, p. 3174), [728] and the amendments of 1896 and 1903 (chap. 87, 29 Stat. at L. 85, U. S. Comp. Stat. 1901, p. 3175; chap. 976, 32 Stat. at L. 943, U. S. Comp. Stat. Supp. 1911, p. 1314). He recovered a judgment in the trial court, which was affirmed by the court of civil appeals. A petition for a writ of certiorari being presented to the supreme court of Tennessee, that court dismissed the petition and affirmed the judgment.

The facts, so far as material, are as follows: Defendant was an interstate carrier by railroad, and plaintiff was in its employ as a switchman, and was engaged in a movement of interstate commerce at the time he was injured. The date of the occurrence was October 15, 1910. In making up a freight train, a switch engine, with a freight car attached, was being moved down grade towards where other freight cars were standing upon the track, when the single car became uncoupled from the engine, and, being propelled by gravity towards the standing cars, came into contact with them. Plaintiff, being upon the car which thus became uncoupled, was by the

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impact thrown against the brake and injured. He insisted that the car became detached from the engine because of the defective condition of the track at that point, in conjunction with the insufficient height of the drawbar on the engine. There was evidence tending to show that the ground upon which the track rested was wet and marshy, and the cross-ties broken and insufficient, so that the track was uneven and rough, and that, as a result, the engine and the car attached to it were made to alternately rise and fall at the ends where they were coupled together; and tending further to show that the drawbar upon the engine, which was used in coupling the car to it, was not more than 30 inches high, measured from the track to the center of the drawbar; that it was too low to engage properly with the couplers of ordinary freight cars, and that, because of the resulting inadequacy of the coupling, together with the unevenness of the track, the car in question became detached. There was, however, evidence [729] tending to show that plaintiff knew of the defective condition of the track and of the engine; that he had passed over the same track frequently with the same engine, and that prior, to the occurrence in question, cars had, as he knew, repeatedly become detached from the engine because of the conditions mentioned. It was either found or assumed by the state courts that defendant's railway was of standard gauge, and that the standard height of drawbars for freight cars ranged between a maximum of 34½ inches and a minimum of 31½ inches. See Resolution of Interstate Commerce Commission, June 6, 1893 (Ann. Rep. I. C. C. 1893, pp. 74, 263), construed in St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 289, 52 L. ed. 1061, 1065, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464, see also, Ann. Rep. I. C. C. 1896, p. 94. It should be noted that the alleged cause of action arose October 15, 1910, after the enactment of the amendment of that year to the safety appliance act, but before the taking effect of the Commission's order respecting drawbars, made pursuant to the new law. This order, while dated October 10, 1910, became effective on December 31 following.

Defendant requested the trial court to direct a verdict in its favor, upon the ground that plaintiff admittedly knew of the defects and therefore assumed the risk. The court refused the motion, and likewise refused the request of defendant for an instruction to the jury in the following terms: "If the jury should find from the evidence that the drawbar of the engine was defective by being too low, or the track defective, and that this caused the engine to become detached from the cars, and this caused the plaintiff's injury, still, if you should further find that these defective conditions had existed prior to that time with the knowledge of the plaintiff, and plaintiff knew before he went to work that the defect existed at that time, and that by reason thereof the engine had been accustomed to become uncoupled, and he appreciated the danger, then the court charges you that under those facts the plaintiff [730] could not recover, and your verdict should be in favor of the defendant."

The contentions of defendant, overruled by each of the state courts and here renewed, are, that by the true interpretation of the employers' liability act, the common-law rule respecting the assumption of risk was not abolished except in cases where the violation by the carrier of some statute enacted for the safety of employees contributed to the injury of the employee; and that by the safety appliance act and amendments, as properly interpreted, the height or construction of the drawbars of locomotives was not regulated, so that the fact that the drawbar in question was only 30 inches high was not a violation of these acts, and hence afforded no ground for a recovery under the employers' liability act.

There is a motion to dismiss, based upon the insistence that the record presents no question reviewable in this court under § 237, Judicial Code (act of March 3, 1911, chap. 231, 36 Stat. at L. 1156, U. S. Comp. Stat. Supp. 1911, p. 227). The motion must be overruled, upon the authority of St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 293, 52 L. ed. 1061, 1067, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 486, 56 L. ed. 1171, 1175, 32 Sup. Ct. Rep. 790; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 499, ante, 1062, 1068, 34 Sup. Ct. Rep. 635.

Upon the merits, we of course sustain the contention that by the employers' liability act the defense of assumption of risk remains as at common law, saving in the cases mentioned in § 4, that is to say: "Any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 503, ante, 1062, 1069, 34 Sup. Ct. Rep. 635.

This leaves for determination the question whether the provision of § 5 of the safety appliance act of 1893 respecting the standard height of drawbars, together with the order of the Interstate Commerce Commission promulgated [731] in pursuance of

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it, and the 1903 amendment of that act, had the effect of regulating the height of drawbars upon locomotive engines, as contended by plaintiff, or upon freight cars only, as contended by defendant.[1]

[732] In Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412, a case that arose under the act as it stood before the 1903 amendment, it was held that the provision of § 2 rendering it "unlawful for any such common carrier to haul or permit [733] to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars," was broad enough to embrace locomotive engines within the description "any car." This conclusion was based upon the declared purpose of Congress to promote the safety of employees and travelers upon railroads engaged in interstate commerce, and the specific intent to require the installation of such an equipment that the cars would couple with each other automatically by impact, and obviate the necessity of men going beween them either for coupling or for uncoupling. The court, by Mr. [734] Chief Justice Fuller, pointed out (pp. 20, 21) that by the amendment of March 2, 1903, the provisions and requirements of the act were extended to common carriers by railroad in the territories and the District of Columbia, and were made to apply "in all cases, whether or not the couplers brought together are of the same kind, make, or type," and that the provisions and requirements relating to train brakes, automatic couplers, grab irons, and the height of drawbars, were made to apply to "all trains, locomotives, tenders, cars, and similar vehicles, used in any railroad engaged in interstate commerce." And it was said that this amendment was affirmative and declaratory of the meaning attributed by the court to the prior law.

In Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 10, 51 L. ed. 681, 685, 27 Sup. Ct. Rep. 407, it was held that a shovel car was within the contemplation of § 2.

In Southern R. Co. v. United States, 222

[1] Safety Appliance Act of March 2, 1893, chap. 196, 27 Stat. at L. 531, U. S. Comp. Stat. 1901, p. 3174.

"An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip Their Cars with Automatic Couplers and Continuous Brakes, and Their Locomotives with Driving-wheel Brakes, and for Other Purposes.

"Be it enacted, etc., that from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

"Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

. . . . . .

"Sec. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

"Sec. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation . . . Provided, that nothing in this act contained shall apply to trains composed of four-wheel cars, or to locomotives used in hauling such trains.

. . . . . .

"Sec. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby

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U. S. 20, 26, 56 L. ed. 72, 74, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822, it was held that the 1903 amendment had enlarged the scope of the original act so as to embrace all locomotives, cars, and similar vehicles used on any railway that is a highway of interstate commerce, whether the particular vehicles were at the time employed in interstate commerce or not.

In Pennell v. Philadelphia & R. R. Co. 231 U. S. 675, ante, 430, 34 Sup. Ct. Rep. 220, the question was whether the provision respecting automatic couplers was applicable to the coupling between the locomotive and the tender. This was answered in the negative, the court saying (p. 678): "Engine and tender are a single thing; separable, it may be, but never separated in their ordinary and essential use. The connection between them, that is, between the engine and tender, it was testified, was in the nature of a permanent coupling, and it was also testified that there was practically no opening between the engine and tender, and that attached to the engine was a drawbar which fitted in the [735] yoke of the tender, and the pin was dropped down to connect drawbar and yoke. The necessary deduction from this is that no dangerous position was assumed by an employee in coupling the engine and tender, for the reason that the pin was dropped through the bar from the tank of the tender."

In each of these cases, the letter of the act was construed in the light of its spirit and purpose, as indicated by its title no less than by the enacting clauses. The same guiding principle should be adhered to in considering the question now presented. Conceding that it may be doubtful whether the act, in its original form, evidenced an intent on the part of Congress to standardize the height of drawbars upon vehicles other than freight cars, and therefore assuming for argument's sake that the act was not in this respect applicable to locomotive engines, it seems to us that the amendment of 1903, manifestly enacted for the purpose of broadening the scope of the original act, must, upon a fair construction, be deemed to extend its provisions and requirements respecting the standard height of drawbars, so as to make them applicable to locomo-

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occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

Amendment of April 1, 1896, chap. 87, 29 Stat. at L. 85, U. S. Comp. Stat. 1901, p. 3175.

"Be it enacted, etc., that section six of an act entitled . . . be amended so as to read as follows:

"'Sec. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation. . . . Provided, that nothing in this act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.'"

Amendment of March 2, 1903, chap. 976, 32 Stat. at L. 943, U. S. Comp. Stat. Supp. 1911, p. 1314.

"Be it enacted, etc., that the provisions and requirements of the act entitled, 'An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip Their Cars with Automatic Couplers and Continuous Brakes, and Their Locomotives with Driving-wheel Brakes, and for Other Purposes,' approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the territories and the District of Columbia, and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars and locomotives exempted by the provisions of section six of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, or which are used upon street railways."

. . . . . .

Amendment of April 14, 1910, chap. 160, 36 Stat. at L. 298, U. S. Comp. Stat. Supp. 1911, p. 1328.

. . . . . .

"Sec. 3. . . . Said Commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars, and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the Commission."

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tives, excepting such as are in terms exempted.

There was abundant reason for applying the standard to locomotives. The drawbar —sometimes called the "drawhead"—carries at its outer end the device or mechanism for coupling the cars. The height of the drawbar determines the height of the coupler, and has an intimate relation not only to the safety of the coupling operation, but to the security of the coupling when made. See Car Builders Dict. (1884), title, "Drawbar" and "Drawhead," and Figs. 395–643; Voss, Railway Construction (1892) pp. 16, 91, etc. The evidence in this case shows, without contradiction, that the gripping surface of the coupling knuckle on the freight car in question, measured vertically, was between 7 and 9 inches, and that [736] because of the comparatively low level of the engine's drawbar the effective grip was reduced to the point of practical inefficiency. Indeed, it is not seriously disputed that there exists as much reason for having the drawbars of the locomotive adjusted to a standard of height as exists in the case of freight cars.

The experience of the Interstate Commerce Commission, in seeing to the enforcement of the act of 1893, tended to emphasize the importance of interchangeable equipment upon the rolling stock of railroads engaged in interstate commerce, so that cars used in such commerce would readily couple with cars not so used, and that locomotives could be readily coupled with cars of either sort. The 16th Annual Report of the Commission, 1902, p. 61, recommended to Congress, *inter alia:* "That provisions relating to automatic couplers, grab irons, and the height of drawbars, be made to apply to all locomotives, tenders, cars, and similar vehicles, both those equipped in interstate commerce and those used in connection therewith (except those trains, cars, and locomotives exempted by the acts of March 2, 1893, and April 1, 1896)." This recommendation appears to have been evoked by the decision of the circuit court of appeals in Johnson v. Southern P. Co. 54 C. C. A. 508, 117 Fed. 462, 12 Am. Neg. Rep. 398, afterwards reversed by this court in 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412. The court of appeals held that there was nothing in the act of 1893 to require a common carrier engaged in interstate commerce to have every car on its railroad equipped with the same kind of coupling, or to require that every car should be equipped with a coupler that would couple automatically with every other coupler with which it might be brought into contract; and also that the act did not forbid the use of an engine not equipped with automatic couplers. Congress not only responded to the recommendation of the Commission, but enlarged the act more broadly by enacting (amendment of March 2, 1903, set forth in footnote, [737] supra) that the provisions and requirements of the original act should be held (a) to apply to common carriers by railroad in the territories and the District of Columbia; (b) to apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; (c) that "the provisions and requirements . . . relating to train brakes, automatic couplers, grab irons, and the height of drawbars, shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith," excepting those exempted by the act of March 2, 1893, as amended April 1, 1896, and those used upon street railways. We have to do especially with the latter clause. As was intimated in Southern R. Co. v. United States, 222 U. S. 25, 56 L. ed. 74, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822, its collocation of phrases is not altogether artistic. But at least the purpose is plain that where one vehicle is used in connection with another, that portion of the equipment of each that has to do with the safety and security of the attachment between them shall conform to standard. We cannot assent to the argument that the clause means only that the locomotives used upon all railroads engaged in interstate commerce and in the territories and the District of Columbia are to be equipped with the appliances provided by the original act for locomotives, and so on with the other classes of cars, and that hence the amendatory act has merely the effect of prescribing the standard height of drawbars with respect to freight cars, because the original act required such a standard only with respect to cars of that type. This would give altogether too narrow a construction to the language employed by Congress, and would lose sight of the spirit and purpose of the legislation. We deem the true intent and meaning to be that the provisions and requirements [738] respecting train brakes, automatic couplers, grab irons, and the height of drawbars shall be extended to all railroad vehicles used upon any railroad engaged in interstate commerce, and to all other vehicles used in connection with them, so far as the respective safety devices and standards are capable of being installed upon the respective vehicles. It follows

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that by the act of 1903 the standard height of drawbars was made applicable to locomotive engines as well as to freight cars. And so it was held by the circuit court of appeals for the ninth circuit in Chicago, M. & P. S. R. Co. v. United States, 110 C. C. A. 444, 196 Fed. 882, 884.

Judgment affirmed.

JOHN E. ROLLER, Plff. in Err.,
v.
MARY H. MURRAY, Holmes Conrad, Trustee, George A. Wheelock, et al.

(See S. C. Reporter's ed. 738–747.)

Error to state court — frivolous Federal question — due process of law.

1. No substantial question of Federal right which will support a writ of error from the Federal Supreme Court is presented by a contention in a state court that to give conclusive effect to a judgment of a court of another state which had jurisdiction of the subject-matter and of the parties is to deny due process of law.

[For other cases, see Appeal and Error, 1110–1137, in Digest Sup. Ct. 1908.]

Judgment — collateral attack — judgment of sister state.

2. The proper mode of obtaining a review of the Federal question, if any, involved in a decision of a state court refusing to entertain a third amended bill, is by prosecution of a writ of error under the Judicial Code, § 237, from the Federal Supreme Court, and not by attacking the judgment collaterally on that ground when it is pleaded as *res judicata* in a suit in the courts of another state.

[For other cases, see Judgment, VI. b, in Digest Sup. Ct. 1908.]

[No. 966.]

Submitted May 25, 1914. Decided June 22, 1914.

IN ERROR to the Supreme Court of Appeals of the State of West Virginia to review a decree which affirmed a decree of the Circuit Court of Pendleton County, in that state, sustaining a plea of *res judicata* and dismissing the bill in a suit to establish a trust. Dismissed for want of jurisdiction.

See same case below, 71 W. Va. 161, — L.R.A.(N.S.) —, 76 S. E. 172.

The facts are stated in the opinion.

Mr. **John E. Roller**, *in propria persona*, submitted the cause for plaintiff in error. Mr. Herbert W. Wyant was on the brief:

This court has jurisdiction.

Home for Incurables v. New York, 187 U. S. 155, 47 L. ed. 117, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84; St. Louis Expanded Metal Fireproofing Co. v. Standard Fireproofing Co. 195 U. S. 627, 49 L. ed. 351, 25 Sup. Ct. Rep. 792; Stuart v. Hauser, 203 U. S. 585, 51 L. ed. 328, 27 Sup. Ct. Rep. 783; Parmelee v. Lawrence, 11 Wall. 36, 38, 20 L. ed. 48, 49; Lawler v. Walker, 14 How. 149, 152, 14 L. ed. 364, 365; Mississippi & M. R. Co. v. Rock, 4 Wall. 177, 18 L. ed. 381; Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023.

Messrs. **Holmes Conrad** and **Edward S. Conrad** submitted the cause for Mary H. Murray, one of the defendants in error:

The question whether a former judgment rendered against one is a bar to another action on the same cause of action is a question of general law only, and involves no Federal question.

San Francisco v. Itsell, 133 U. S. 65, 33 L. ed. 570, 10 Sup. Ct. Rep. 241.

The error of the court of appeals of Virginia cannot be corrected in this appeal from the decree of the court of appeals of West Virginia.

Fauntleroy v. Lum, 210 U. S. 230, 52 L. ed. 1039, 28 Sup. Ct. Rep. 641.

The assignments of error are so frivolous and it is so apparent that this appeal is taken for delay only that the motion to affirm should be granted.

Blythe v. Hinckley, 180 U. S. 338, 45 L. ed. 561, 21 Sup. Ct. Rep. 390; Equitable Life Assur. Soc. v. Brown, 187 U. S. 311, 47 L. ed. 192, 23 Sup. Ct. Rep. 123.

Mr. Justice **Pitney** delivered the opinion of the court:

This writ of error was sued out under § 237, Judicial Code (act of March 3, 1911,

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NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On necessity of color of merit in Federal question to sustain writ of error to state court—see note to Offield v. New York, N. H. & H. R. Co. 51 L. ed. U. S. 231.

On error to state courts in cases involving questions of due process of law—see note to Burt v. Smith, 51 L. ed. U. S. 121.

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36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227), in order to bring under review a judgment of the supreme court of appeals of the state of West Virginia (71 W. Va. 161, — L.R.A.(N.S.) —, 76 S. E. 172), which affirmed a decree of the circuit court of Pendleton county, in that state, in an equitable action brought by plaintiff in error against defendants in error. His original bill was filed May 10, 1901, and an amended bill was filed in December, 1907. Complainant therein averred that in the year 1872 he was employed by the late Emily Hollingsworth, of the city of Philadelphia, as attorney, to recover for her a tract of 52,000 acres of land situate in the counties of Rockingham and Augusta, in the state of Virginia, and the county of Pendleton, in the state of West Virginia, and immediately undertook [740] the necessary work and labor, and diligently and faithfully endeavored to discharge the duties imposed upon him by the employment; that from time to time various parcels of land were recovered from adverse claimants, some by compromise settlements and others by actions of ejectment, until the entire tract of 52,000 acres was recovered, the actual litigation not being completed until some time in the year 1893; that portions of the property had been sold, so that in the year 1889 there remained of the lands recovered about 44,000 acres undisposed of, from the proceeds of the sale of which complainant was to receive payments on account of his services; that on or about April 1, 1889, the said Emily Hollingsworth made a deed of gift of the unsold lands, amounting to about 44,000 acres, to Mary H. Murray, one of the defendants, upon condition that she should pay to complainant one fifth of the proceeds thereafter to be realized on the sale of the lands, and that she should hold the same as trustee for complainant, and complainant avers that the said Mary H. Murray accepted said deed upon that condition, and became liable to complainant for the said proportion of said proceeds of sale and for the reasonable value of his services rendered by him to Miss Hollingsworth, and to be thereafter rendered to the said Mary H. Murray; that the latter, having accepted the conveyance, continued to act under it and in conformity with it until May 25, 1901, when for the first time she repudiated it. The object of the bill was to enforce a trust as to the undivided one fifth of the land and of the purchase money upon sales made of the same, as against Mary H. Murray and her grantees with notice. Mrs. Murray pleaded that in a chancery cause brought by the same complainant against her, with others, in the circuit court for the county of Rockingham, in the state of Virginia, a court of competent jurisdiction, complainant asserted and claimed that there was due to him from her the same sum of money and the same [741] debt, as compensation for the same services alleged in his present bill, and that the cause of action was the same as now set up and asserted; that on June 24, 1907, a final decree was made and entered in said cause by the said circuit court, and this, on appeal, was affirmed by the supreme court of appeals of Virginia in accordance with opinions found in 107 Va. 527, 59 S. E. 421, in which it was held that defendant Mary H. Murray was a privy in estate to Miss Hollingsworth, her grantor, and a privy also to the contract with complainant, and that the said supreme court of appeals of Virginia, affirming the circuit court, determined that complainant had no right to recover on said cause of action, wherefore defendant pleaded the final adjudication of the Virginia court as *res judicata*. There was filed with the plea a certified copy of the record of the proceedings had in the circuit court of Rockingham county, Virginia, and in the supreme court of appeals of that state. Subsequently, complainant filed in the Pendleton county court written objections to the plea of *res judicata* upon the following grounds: First, that the circuit court of Rockingham county, Virginia, after the rendition of the judgment pleaded by defendant, in another cause pending in that court between the Chesapeake-Western Company and the complainant, John E. Roller, and others, in which latter cause the said Mary H. Murray was impleaded as a party, decreed that the matters involved in the cause pending in the circuit court of Pendleton county, West Virginia, were not concluded by the judgment and decree of the circuit court of Rockingham county, Virginia, and did therefore vacate and dissolve certain injunctions previously awarded in that cause, restraining complainant from further prosecution in the West Virginia court of his present suit against said Mary H. Murray. Secondly, that the cause of action and grounds of jurisdiction and relief in the present cause are [742] not the same as those set out in the record filed in the plea of *res judicata*. And thirdly, that the record and judgment of the Virginia court should not be enforced as *res judicata* for the following reasons: (a) that the courts of West Virginia do not enforce foreign judgments that are contrary to the laws and public policy of that state; (b) that the decree rests not upon rights arising *ex contractu*, or upon torts based on natural rights, but upon a penalty denounced by the policy of the law of Virginia which is

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not so denounced by the policy of the law of the state of West Virginia, and that it is not one of such nature as the courts of West Virginia will enforce; and (c) that the *lex loci rei sitæ* determines the jurisdiction and relief to be given by this court as to the land in the bill referred to, regardless of the judgment of any sister state as to land therein situate.

The circuit court of Pendleton county, West Virginia, sustained the plea of *res judicata* and dismissed the bill, and it is the judgment of the court of last resort of West Virginia, affirming this decree, that is now under review.

There are three assignments of error, the substance of which is as follows:

First, that the court erred in holding that the plea of *res judicata* filed by the defendant Mary H. Murray was a good and sufficient plea, for the reason that the decree therein relied upon in terms provided that it should be without prejudice to complainant's right to institute other proceedings upon a *quantum meruit* if so advised, and that the record shows the cause of action and ground of jurisdiction were not the same in the present West Virginia action as those set out and contained in the record in the Virginia action; the present action being based upon a *quantum meruit* for just and reasonable compensation for services rendered by complainant in and about the recovery of the tract of land in controversy.

[743] Second, that the court erred in sustaining the action of the court below upholding the plea of *res judicata*, because the decrees in the Virginia courts presented in that plea were void and of no effect, since they had denied to complainant due process of law, in that they had denied to him the right to file the third amended bill of complaint tendered by him, and denied him a hearing upon the case thereby pre

Third, that the court erred in sr ning the action of the court below in c... ruling the objections made by complainant to the plea of *res judicata*, because in the suit of Chesapeake-Western Co. v. Roller, it was necessarily decided that the matters involved in the case in the West Virginia courts were not concluded by the decrees rendered in the first cause of Roller v. Murray in the Virginia courts.

There is a motion to dismiss or affirm, based upon the ground that no Federal question is raised by the record, or that, if any such question is raised, it is so frivolous as not to need further argument.

It appears that the Virginia court (107 Va. 527, 59 S. E. 421) denied relief to complainant with respect to the lands in that state upon the ground that the contract upon which the action was based was champertous, and therefore illegal under the laws of the commonwealth. The supreme court of appeals of West Virginia (71 W. Va. 161, — L.R.A.(N.S.) —, 76 S. E. 172), finding that this decision was rendered not in a mere proceeding *in rem* or quasi, *in rem*, but in an action *in personam* (defendants having appeared, and the validity of the contract constituting the basis of the plaintiff's claim to the fund or to the land having been actually litigated by the parties and decided by the courts), that decision necessarily settled and determined the question of the validity of the contract in the state of Virginia, and that under the "full faith and credit" clause of the Constitution of the United States the decision was entitled to the same credit [744] in West Virginia that it had in the commonwealth of Virginia. Upon this ground, although assuming that the contract was valid under the law of West Virginia, viewed independently of the Virginia decision, the court held itself bound by the Virginia decision to deny relief to complainant.

It is argued under the first assignment of error that the contract in controversy must be held to be a Pennsylvania contract, and that its validity and enforcement in the courts of West Virginia did not depend upon the decision of the Virginia courts, but required an independent consideration upon its merits by the courts of West Virginia, and that their failure to give such consideration was a denial of due process of law. We are unable to find that it was contended in the courts of West Virginia that the contract in question was made in Pennsylvania, or ought for other reasons to be regarded as a Pennsylvania contract; nor are we able to find that the "due process of law" clause was invoked in the West Virginia courts upon the ground that to follow the Virginia decision would be a denial of the right of plaintiff in error to such process. Assuming the contention to have been made, we are unable to see that any Federal question was thereby raised. Supposing the courts of West Virginia erred in giving conclusive effect to the Virginia decision, this was no more than an error of law, committed in the exercise of jurisdiction over the subject-matter and the parties; and such an error—not involving a Federal question—affords no opportunity for a review of this court.

The same response must be made to the second argument presented under the first assignment of error; which is that the contract in controversy shows that its terms, so far as they related to the property within the jurisdiction of West Virginia, were

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different from those which related to the property in Virginia, and that the West Virginia court, in holding them to be the same, and refusing [745] to recognize the contract as a West Virginia contract, deprived plaintiff in error of his property without due process of law.

It is not contended that the West Virginia court, in holding the Virginia judgment to be conclusive upon the present controversy, violated the "full faith and credit" clause of the Federal Constitution. By that clause, and by the act of Congress (§ 905, Rev. Stat. U. S. Comp. Stat. 1901, p. 677) passed to carry it into effect, it was incumbent upon the West Virginia court to give to the judgment the same faith and credit that it had by law or usage in the courts of Virginia. The effect of this was that, provided the Virginia court had jurisdiction of the subject-matter and of the parties (which was not questioned), the merits of the controversy there concluded were not open to reinvestigation in the courts of West Virginia. It is not here questioned that the West Virginia courts gave such credit to the Virginia judgment as was thus required.

Under the second assignment of error, the argument is that plaintiff in error was denied due process in the Virginia courts in that the circuit court of Rockingham county arbitrarily and unlawfully rejected his third amended bill, and its action in so doing was affirmed by the court of last resort of that state. Upon this point the West Virginia court (71 W. Va. 170) said:

"The said amendment was offered at a very late stage of the proceedings. The court based its rejection thereof upon two grounds,—the delay in tendering it without excuse or explanation, and its failure to show a contract materially different from that set up in the original and first and second amended bills. In disposing of the amendment, the court said: 'The bill had been amended twice already, and after these amendments, and after a thorough argument of the case on its merits, the court announced its decision. A due regard for the orderly procedure of the court and the rights of the opposing party required [746] that some limit be set to the privilege of amendments. The amendments now presented are offered without explanation or excuse, and in the main are unsubstantial, and would not change the opinion of the court on the merits of the case.' Having said this, the court proceeded to analyze the amendments and show their lack of merit and insufficiency to bring about a different conclusion if they had been filed. The decision relied upon to sustain this contention is Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841, asserting lack of due process in the entry of a decree for the plaintiff, after having stricken out the defendant's answer, because he was guilty of contempt in neglecting to pay into court a certain sum of money. This was a total denial of the right of defense, upon an insufficient ground. In that case, the action of the court was arbitrary and oppressive. Here, the plaintiff has been allowed a hearing. He had filed an original and two amended bills, and had no doubt had opportunity to tender the third amended bill long before the submission of the cause. It is certainly competent for a court to say, within reasonable limits, what amounts to a compliance with its rules and the principles of law, respecting the order and limitations of proceedings in a case. Besides, in the opinion of the court, the proposed amendment would not have changed the character of the plaintiff's claim, nor relieved the contract of its infirmity. An erroneous decision in respect to either of these matters would not amount to a denial of due process of law. As to them, it is not a case in which the plaintiff has had no day in court."

For present purposes it is sufficient to say that there is nothing upon the face of the record to indicate that the refusal of the Virginia court to entertain complainant's third amended bill was arbitrary or unlawful, or otherwise inconsistent with the "due process of law" clause of the 14th Amendment; that there is nothing to show that in the Virginia court complainant based his right to [747] file a third amended bill upon the 14th Amendment; and that if he had in fact set up such a right in the Virginia court and it had been there denied, his proper mode of obtaining a review of the Federal question would have been by prosecuting a writ of error under § 709, Rev. Stat., U. S. Comp. Stat. 1901, p. 575 (§ 237, Judicial Code [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. 1911 Supp. p. 227]) to review the judgment of the court of last resort of Virginia, and not by attacking the judgment collaterally upon that ground when it was invoked against him in the courts of West Virginia.

With respect to the third assignment of error, it is contended that the supreme court of appeals of West Virginia refused to give full faith and credit to the objection interposed by plaintiff in error to the plea of *res judicata* based upon the decrees rendered in the Virginia case of Roller v. Murray, the objection being based upon the record in the case of Chesapeake-Western Co. v. Roller, a subsequent decision in the Virginia courts, which, it is contended, overruled the decision in the first Vir-

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ginia suit so far as it tended to debar plaintiff in error from suing upon a *quantum meruit*. It appears that the decision in the Chesapeake-Western Co. Case was to dissolve an injunction that had been issued against the prosecution of the West Virginia suit. Its effect as *res judicata* was denied by the West Virginia court (71 W. Va. 172) upon the ground that it was not a final decree. It is now contended that, subsequent to the decree dissolving the injunction, a final decree was rendered in the same cause which in effect concluded the merits. We find nothing in the record, however, to show that any such contention was presented to the West Virginia courts.

Since we are unable to find that any substantial question of Federal right was raised by plaintiff in error in the courts of West Virginia, and there decided against him, it follows that the writ of error must be dismissed.

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'RESS COMPANY et al., Plaintiff
RUDMAN. [No. 344.]
liability to agreed value
urt of Civil Appeals for
udicial District of the

— Tex. Civ. App. —,

nis and Cecil H.
or.
and H. A. Cun-
rror.
m: Judgment
n the author-
Co. v. Robin-
34 Sup. Ct.
rn R. Co.
L. ed. 683,

MEMORAN

OF

CASES DISPOSED OF WITHO

CLINCHFIELD COAL CORPORATION, Plaintiff in Error, v. R. L. MANESS. [No. 887.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Tennessee.

See same case below, — Tenn. —, 162 S. W. 1105.

Messrs. John W. Price and J. Norment Powell for plaintiff in error.

Messrs. Isaac Harr and Robert Burrow for defendant in error.

April 6, 1914. *Per Curiam:* Dismissed for want of jurisdiction, upon the authority of Patterson v. Colorado, 205 U. S. 454, 51 L. ed. 879, 27 Sup. Ct. Rep. 556, 10 Ann. Cas. 689; Preston v. Chicago, 226 U. S. 447, 57 L. ed. 293, 33 Sup. Ct. Rep. 177.

EX PARTE: IN THE MATTER OF G. & C. MERRIAM COMPANY, Petitioner. [No. —, Original.]

Motion for leave to file a petition for a Writ of Mandamus.

Mr. William B. Hale for petitioner.

No counsel appeared for respondent.

April 6, 1914. Denied.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Plaintiff in Error, v. PINE TREE LUMBER COMPANY, LIMITED. [No. 244.]

Courts—exclusiveness of Federal jurisdiction—suit to recover overcharge on interstate shipment.

In Error to the Court of Appeals for the Second Circuit of Louisiana.

Messrs. Thomas S. Buzbee and M. L. Bell for plaintiff in error.

Mr. Walker Elder for defendant in error.

April 6, 1914. Affirmed with costs by an equally divided court.

NORTHERN T
Plaintiff
STATE [749
Error to state
In Error to
State of Illinois.
See same case
L.R.A.(N.S.) —,
1913D, 514.
Messrs. Samuel A
Holden for plaintiff in
Messrs. Patrick J. L
Strawn for defendant in
April 13, 1914. *Per Curi*
for want of jurisdiction, u
of Haseltine v. Central Nat.
S. 130, 46 L. ed. 117, 22 Sup.
Missouri, K. & T. R. Co. v.
S. 185, 56 L. ed. 155, 32 Sup.
Louisiana Nav. Co. v. Oyster
226 U. S. 99, 57 L. ed. 138, 33 Sup.
78; Pons v. Yazoo & M. Valley R.
U. S. 720, ante, 814, 34 Sup. Ct.

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THOMAS W. SYNNOTT, etc., Appellant, v. TOMBSTONE CONSOLIDATED MINES COMPANY, LIMITED, etc. [No. 879.]

Appeal—from circuit court of appeals—bankruptcy case.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 207 Fed. 544, on rehearing 208 Fed. 251.

Mr. Amos L. Taylor for appellant.

Messrs. A. B. Browne, Alex. Britton, Evans Browne, Everett E. Ellinwood, and John Mason Ross for appellee.

April 13, 1914. *Per Curiam:* Dismissed for want of jurisdiction, upon the authority of (1) Coder v. Arts, 213 U. S. 223, 234, 235, 53 L. ed. 772, 777, 778, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008; Tefft, W. & Co. v. Munsuri, 222 U. S. 114, 118, 56 L. ed. 118, 119, 32 Sup. Ct. Rep. 67. (2) Chapman v. Bowen, 207 U. S. 89, 91, 52 L. ed. 116, 117, 28 Sup. Ct. Rep. 32; J. W. Calnan Co. v.

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Doherty, 224 U. S. 145, 147, 56 L. ed. 702, 703, 32 Sup. Ct. Rep. 460. (3) Conboy v. First Nat. Bank, 203 U. S. 141, 144, 145, 51 L. ed. 128–130, 27 Sup. Ct. Rep. 50.

HENRY E. MEEKER, Surviving Partner, etc., Petitioner, v. LEHIGH VALLEY RAILROAD COMPANY [No. 1000]; and HENRY E. MEEKER, Petitioner, v. LEHIGH VALLEY RAILROAD COMPANY [No. 1001].

[750] Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Wm. A. Glasgow, Jr., for petitioner.

No counsel appeared for respondent.†

April 13, 1914. *Per Curiam:* Petitions granted, upon the authority of § 262 of the Judicial Code [36 Stat. at L. 1162, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 235]. Re Chetwood, 165 U. S. 443, 462, 41 L. ed. 782, 788, 17 Sup. Ct. Rep. 385; Whitney v. Dick, 202 U. S. 132, 50 L. ed. 963, 26 Sup. Ct. Rep. 584; McClellan v. Carland, 217 U. S. 268, 54 L. ed. 762, 30 Sup. Ct. Rep. 501; United States v. Beatty, 232 U. S. 463, 467, ante, 686, 687, 34 Sup. Ct. Rep. 392.

EX PARTE: IN THE MATTER OF HENRY H. EVANS, Petitioner. [No. —, Original.]

Motion for leave to file petition for a Writ of Mandamus.

Mr. Albert J. Hopkins for petitioner.

No counsel appeared for respondent.

April 13, 1914. Denied.

EX PARTE: IN THE MATTER OF JOHN DENNETT, JR., et al., Petitioners. [No. —, Original.]

Motion for leave to file petition for Writs of Prohibition and Mandamus.

Mr. William M. Seabury for petitioners.

No counsel appeared for respondent.

April 20, 1914. Denied.

LOUIS W. PRENICA, etc., et al., Plaintiffs in Error, v. MAY BULGER. [No. 806.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Nebraska.

See same case below, 93 Neb. 697, 142 N. W. 117.

Messrs. William C. Prentiss and Walter L. Clark for plaintiffs in error.

Mr. W. T. Thompson for defendant in error.

April 27, 1914. *Per Curiam:* Dismissed for want of jurisdiction, on the authority of (1) Consolidated Turnp. Co. v. Norfolk & O. Valley R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609. (2) De Bary v. Louisiana, 227 U. S. 108, 57 L. ed. 441, 33 Sup. Ct. Rep. 239, and cases cited.

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[751] STEPHEN M. EGAN, Plaintiff in Error, v. STATE OF NEW JERSEY. [No. 738.]

Error to state court—Federal question.

In Error to the Court of Errors and Appeals of the State of New Jersey.

See same case below, 84 N. J. L. 701, 87 Atl. 455.

Mr. John Franklin Fort for plaintiff in error.

Messrs. Robert H. McCarter and Pierre P. Garven for defendant in error.

April 27, 1914. *Per Curiam:* Dismissed for want of jurisdiction, upon the authority of Zeller v. New Jersey, 231 U. S. 737, ante, 460, 34 Sup. Ct. Rep. 316, and cases cited.

SEABOARD AIR LINE RAILWAY, Plaintiff in Error, v. J. M. PACE MULE COMPANY. [No. 652.]

Carriers — limiting liability — Carmack amendment.

In Error to the Supreme Court of the State of North Carolina.

See same case below, 160 N. C. 215, 76 S. E. 513.

Messrs. Murray Allen and Walter H. Neal for plaintiff in error.

No counsel appeared for defendant in error.

May 4, 1914. *Per Curiam:* Judgment reversed with costs, and cause remanded for further proceedings, upon the authority of Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397.

CITY OF LEWISTON, Plaintiff in Error, v. JOHN CHAMBERLAIN et al. [No. 701.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Idaho.

See same case below, 23 Idaho, 154, 129 Pac. 1069.

Mr. James H. Forney for plaintiff in error.

†Mr. Joseph W. Folk and Mr. C. W. Needham, by leave of court, filed a brief herein in behalf of the Interstate Commerce Commission.

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Mr. Burton L. French for defendants in error.

May 4, 1914. *Per Curiam:* Dismissed for want of jurisdiction on the authority of McCorquodale v. Texas, 211 U. S. 432, 53 L. ed. 269, 29 Sup. Ct. Rep. 146; Kansas City Star Co. v. Julian, 215 U. S. 589, 54 L. ed. 340, 30 Sup. Ct. Rep. 406; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 326, 334, 57 L. ed. 857, 862, 33 Sup. Ct. Rep. 510; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 118, 53 L. ed. 431, 434, 29 Sup. Ct. Rep. 227.

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[752] EX PARTE: IN THE MATTER OF DANIEL E. STRUB, Petitioner. [No. —, Original.]

Motion for leave to file petition for Writ of Mandamus.

Mr. Joe Kirby for petitioner.

No counsel appeared for respondent.

May 4, 1914. Denied.

WALTER A. LEDBETTER, Receiver, etc., Plaintiff in Error, v. KAUFMAN MANDELL. [No. 273.]

Judgment—full faith and credit.

In Error to the Supreme Court of the State of New York.

See same case below, in appellate division 141 App. Div. 556, 126 N. Y. Supp. 497, in court of appeals 205 N. Y. 537, 98 N. E. 1106.

Messrs. Arthur F. Gotthold, Joseph W. Bailey, and Walter A. Ledbetter for plaintiff in error.

Mr. Louis Marshall for defendant in error.

May 4, 1914. Judgment affirmed with costs by an equally divided court.

FRANK B. CRAIG, Plaintiff in Error, v. WILLIAM P. JARRETT, Sheriff, etc. [No. 92.]

Appeal—in habeas corpus proceeding—changed conditions.

In Error to the Supreme Court of the Territory of Hawaii.

See same case below, 20 Haw. 483.

Messrs. Warren Gregory, W. H. Chickering, Edward M. Watson, Aldis B. Browne, Alex. Britton, and Evans Browne for plaintiff in error.

Messrs. Mason F. Prosser, Robbins B. Anderson, and Sidney Ballou for defendant in error.

May 11, 1914. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Johnson v. Hoy, 227 U. S. 245, 247, 57 L. ed. 497, 499, 33 Sup. Ct. Rep. 240.

PACIFIC EXPRESS COMPANY et al., Plaintiffs in Error, v. I. RUDMAN. [No. 344.]

Carriers—limiting liability to agreed value.

In Error to the Court of Civil Appeals for the Sixth Supreme Judicial District of the State of Texas.

See same case below, — Tex. Civ. App. —, 145 S. W. 268.

Messrs. James L. Minnis and Cecil H. Smith for plaintiffs in error.

Messrs. Mark McMahon and H. A. Cunningham for defendant in error.

May 11, 1914. *Per Curiam:* Judgment reversed [753] with costs, on the authority of Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, ante, 901, 34 Sup. Ct. Rep. 556; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 652, 57 L. ed. 683, 688, 33 Sup. Ct. Rep. 391.

PETER GALLAGHER, Administrator, etc., Plaintiff in Error, v. FLORIDA EAST COAST RAILWAY COMPANY. [No. 359.]

Error to district court—jurisdiction below.

In Error to the District Court of the United States for the Southern District of New York.

See same case below, 196 Fed. 1000.

Mr. William A. McQuaid for plaintiff in error.

Mr. George S. Scofield for defendant in error.

May 11, 1914. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175, 55 L. ed. 163, 31 Sup. Ct. Rep. 185; Bogart v. Southern P. Co. 228 U. S. 137, 144, 57 L. ed. 768, 771, 33 Sup. Ct. Rep. 497, and cases cited.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Plaintiff in Error, v. W. W. BEATTY. [No. 342.]

Commerce—state regulation—requiring carrier to furnish cars.

In Error to the Supreme Court of the State of Oklahoma.

See same case below, 34 Okla. 321, 42 L.R.A.(N.S.) 984, 118 Pac. 367, 126 Pac. 736.

Messrs. F. C. Dillard and C. O. Blake for plaintiff in error.

No counsel appeared for defendant in error.

May 25, 1914. *Per Curiam:* Judgment reversed with costs, and cause remanded for further proceedings, upon the authority of Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; Yazoo & M. Valley R. Co. v. Greenwood Grocery Co. 227 U. S. 1, 57 L. ed. 389, 33 Sup. Ct. Rep. 213.

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The Cincinnati Northern Railway Company, Plaintiff in Error, v. George E. Dillon. [No. 930.]

Master and servant—employers' liability—safety appliances.

In [754] Error to the Supreme Court of the State of Ohio.

Mr. Frank L. Littleton for plaintiff in error.

Mr. W. H. Dailey for defendant in error.

June 22, 1914. *Per Curiam:* Judgment affirmed upon the authority of Southern R. Co. v. Carson, 194 U. S. 136, 140, 48 L. ed. 907, 910, 24 Sup. Ct. Rep. 609; Southern R. Co. Carolina Div. v. Bennett, 233 U. S. 80, 85, ante, 860, 862, 34 Sup. Ct. Rep. 566; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 49, ante, 838, 842, 34 Sup. Ct. Rep. 581; Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; Southern R. Co. v. Gadd, 233 U. S. 572, ante, 1099, 34 Sup. Ct. Rep. 696.

Missouri, Kansas & Texas Railway Company, Appellant, v. L. E. Goodrich. [No. 1031.]

Appeal—from circuit court of appeals—Federal question.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 213 Fed. 339.

Mr. Joseph M. Bryson for appellant.

Mr. J. A. L. Wolfe for appellee.

June 22, 1914. *Per Curiam:* Dismissed for the want of jurisdiction upon the authority of York v. Texas, 137 U. S. 15, 34 L. ed. 604, 11 Sup. Ct. Rep. 9; Kauffman v. Wootters, 138 U. S. 285, 34 L. ed. 962, 11 Sup. Ct. Rep. 298; see Missouri, K. & T. R. Co. v. Goodrich, 229 U. S. 607, 57 L. ed. 1349, 33 Sup. Ct. Rep. 776.

Thomas D. Thomas, Petitioner, v. South Butte Mining Company. [No. —.]

Motion for leave to file and prosecute petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit *in forma pauperis.*

Mr. P. P. Wells for petitioner.

June 22, 1914. Denied.

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[755] Frank Sullivan, Petitioner, v. United States. [No. 928.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 209 Fed. 1006.

Mr. J. P. Cox for petitioner.

Mr. Assistant Attorney General Wallace for respondent.

April 6, 1914. Denied.

Havana Central Railroad Company, Petitioner, v. Central Trust Company of New York. [No. 938.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The same case below, — L.R.A. (N.S.) —, 123 C. C. A. 72, 204 Fed. 546.

Mr. Herbert A. Heyn for petitioner.

Mr. Lewis H. Freedman for respondent.

April 6, 1914. Denied.

Beach Front Hotel Company, Petitioner, v. Richard R. Sooy. [No. 877.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 118 C. C. A. 579, 197 Fed. 881, on rehearing 210 Fed. 265.

Messrs. Edwin G. C. Bleakly, Henry F. Stockwell, John W. Wescott, and Gilbert Collins for petitioner.

Mr. Robert H. McCarter for respondent.

April 13, 1914. Denied.

William Cramp & Sons Ship & Engine Building Company, Petitioner, v. International Curtis Marine Turbine Company et al. [No. 963.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 211 Fed. 124.

Messrs. [756] James R. Sheffield and Clifton V. Edwards for petitioner.

Messrs. Frederick P. Fish and Charles Neave for respondents.

April 13, 1914. Denied.

Moy Guey Lum, Petitioner, v. United States. [No. 977.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. H. Ralph Burton for petitioner.

The Attorney General for respondent.

April 13, 1914. Denied.

Emilie M. Bullowa et al., Petitioners, v. Sarah J. Thurston. [No. 982.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 42 Wash. L. Rep. 198.

Messrs. Rudolph H. Yeatman, W. J. Lambert, D. W. Baker, and F. S. Bright for petitioners.

Messrs. Fulton Lewis and John Ridout for respondent.

April 13, 1914. Denied.

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M. C. KISER COMPANY et al., Petitioners, v. GEORGIA COTTON OIL COMPANY et al. [No. 962.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 208 Fed. 548.

Mr. Harold Remington for petitioners.

No counsel appeared for respondents.

April 20, 1914. Denied.

THOMAS J. KEMP, Petitioner, v. UNITED STATES. [No. 904.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, — L.R.A.(N.S.) —, 41 App. D. C. 539.

Messrs. R. H. Liggett and John E. Laskey for [757] petitioner.

The Attorney General for respondent.

April 20, 1914. Denied.

HOCKING VALLEY RAILWAY COMPANY, Petitioner, v. UNITED STATES. [No. 972.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 210 Fed. 735.

Messrs. James H. Hoyt, William B. Stewart, Lawrence Maxwell, and Clarence Brown for petitioner.

The Attorney General for respondent.

April 20, 1914. Denied.

SUNDAY CREEK COMPANY, Petitioner, v. UNITED STATES. [No. 985.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 210 Fed. 747.

Mr. William B. Henderson for petitioner.

The Attorney General for respondent.

April 20, 1914. Denied.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Petitioner, v. GEORGE C. MAYNOE et al. [No. 986.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 209 Fed. 611.

Messrs. Hiram Glass, W. L. Estes, John J. King, and A. L. Burford for petitioner.

Messrs. Cone Johnson and James M. Edwards for respondents.

April 20, 1914. Denied.

GEORGE B. TAYLOR, Claimant, etc., Petitioner, v. CLEVELAND GRAIN COMPANY. [No. 999.]

Petition for a Writ of Certiorari to the United States [758] Circuit Court of Appeals for the Sixth Circuit.

See same case below, 212 Fed. 678.

Mr. Frank S. Masten for petitioner.

Mr. Wm. B. Cady for respondent.

April 20, 1914. Denied.

FRENCH MUTUAL GENERAL SOCIETY OF MUTUAL INSURANCE AGAINST THEFT, Petitioner, v. UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE. [No. 1005.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 212 Fed. 620.

Mr. Hyland P. Stewart for petitioner.

Messrs. J. Kemp Bartlett and Edgar Allan Poe for respondent.

April 20, 1914. Denied.

NORTHERN PACIFIC RAILWAY COMPANY, Petitioner, v. MARY A. MEESE et al. [No. 1025.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. C. W. Bunn for petitioner.

No counsel appeared for respondents.

April 27, 1914. Granted.

NEW YORK TIMES COMPANY, Petitioner, v. SUN PRINTING AND PUBLISHING ASSOCIATION. [No. 994.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 123 C. C. A. 54, 204 Fed. 586.

Messrs. Harold Nathan and Max J. Kohler for petitioner.

Messrs. James M. Beck and Charles K. Carpenter for respondent.

April 27, 1914. Denied.

JAMES LANSBURGH et al., Petitioners, v. MYRON M. PARKER et al. [No. 998.]

Petition for [759] a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 41 App. D. C. 549.

Messrs. Charles H. Merillat and Alexander Wolf for petitioners.

Messrs. John Ridout and J. J. Darlington for respondents.

April 27, 1914. Denied.

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BIRGE FORBES COMPANY, Petitioner, v. CARL R. HEYE. [No. 1002.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 212 Fed. 112.

Mr. Cecil H. Smith for petitioner.

Mr. Newton H. Lassiter for respondent.

April 27, 1914. Denied.

SOLOMON RIPINSKY, Petitioner, v. G. W. HINCHMAN et al. [No. 1006.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 121 C. C. A. 35, 202 Fed. 625.

Mr. J. H. Cobb for petitioner.

No counsel appeared for respondents.

April 27, 1914. Denied.

SADIE A. STEAD, Executrix, etc., et al., Appellants, v. ISABELLA M. CURTIS et al. [No. 1022.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Horace W. Philbrook for appellants.

Messrs. Joseph C. Campbell and John S. Partridge for appellees.

May 4, 1914. Denied.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Petitioner, v. L. HILTON-GREEN et al. [No. 1011.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. [760] Emmett Wilson and P. D. Beall for petitioner.

Messrs. W. A. Blount and A. C. Blount for respondents.

May 11, 1914. Granted.

GREAT NORTHERN RAILWAY COMPANY, Petitioner, v. UNITED STATES. [No. 1024.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 217 Fed. 309.

Messrs. E. C. Lindley, F. V. Brown, and C. S. Albert for petitioner.

The Attorney General for respondent.

May 11, 1914. Denied.

TELEFUNKEN WIRELESS TELEGRAPH COMPANY OF THE UNITED STATES, Petitioner, v. NATIONAL ELECTRIC SIGNALING COMPANY et al. [No. 1026.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 208 Fed. 679.

Mr. Hector T. Fenton for petitioner.

Messrs. Melville Church and F. W. H. Clay for respondents.

May 11, 1914. Denied.

AMERICAN ICE COMPANY, Petitioner, v. CAMILLA PORRECA. [No. 1033.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 213 Fed. 185.

Mr. Frank R. Savidge for petitioner.

No counsel appeared for respondent.

May 11, 1914. Denied.

ALBERT DELLEVIE, Sole Surviving Executor, etc., Petitioner, v. FECHHEIMER-FISHEL COMPANY, Bankrupt. [No. 1040.]

Petition for a Writ of Certiorari [761] to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 212 Fed. 357.

Mr. Roger Foster for petitioner.

Mr. Louis F. Doyle for respondent.

May 11, 1914. Denied.

JOHN N. MCCLINTOCK, Petitioner, v. CITY OF PAWTUCKET. [No. 1044.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 209 Fed. 361.

Mr. John N. McClintock *in propria persona* for petitioner.

Mr. William R. Tillinghast for respondent.

May 11, 1914. Denied.

CORNELIA G. GOODRICH et al., Petitioners, v. HOUSTON OIL COMPANY OF TEXAS et al. [No. 1039.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 213 Fed. 136.

Mr. W. D. Gordon for petitioners.

No counsel appeared for respondents.

May 25, 1914. Denied.

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MONONGAHELA RIVER CONSOLIDATED COAL & COKE COMPANY, Petitioner, v. RIVER & RAIL STORAGE COMPANY. [No. 1048.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 210 Fed. 611.

Mr. J. Arthur Lynham for petitioner.

Mr. C. H. Trimble for respondent.

May 25, 1914. Denied.

EASTERN OREGON LAND COMPANY, Petitioner, v. WILLOW RIVER LAND & IRRIGATION COMPANY. [No. 1057.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth [762] Circuit.

See same case below, 122 C. C. A. 636, 204 Fed. 516.

Messrs. J. N. Teal, Wirt Minor, A. B. Browne, Alex. Britton, Evans Browne, and Francis W. Clements for petitioner.

Messrs. J. H. Richards and Oliver O. Haga for respondent.

May 25, 1914. Denied.

THE GRAND RAPIDS & INDIANA RAILWAY COMPANY, Petitioner, v. THE UNITED STATES. [No. 1036.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 212 Fed. 577.

Mr. James H. Campbell for petitioner.

Mr. Solicitor General Davis for respondent.

June 8, 1914. Denied.

NICHOLS & COX LUMBER COMPANY, Petitioner, v. THE UNITED STATES. [No. 1037.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 212 Fed. 588.

Mr. Ganson Taggart for petitioner.

Mr. Solicitor General Davis for respondent.

June 8, 1914. Denied.

WARREN E. TALBERT, Petitioner, v. THE UNITED STATES. [No. 1051.]

Petition for a Writ of Certiorari to the Court of Appeals for the District of Columbia.

See same case below, 42 App. D. C. 1.

Messrs. Matthew E. O'Brien and James A. O'Shea for petitioner.

Mr. Solicitor General Davis for respondent.

June 8, 1914. Denied.

LOUIS STEINBERGER, Petitioner, v. GENERAL ELECTRIC COMPANY et al. [1058.]

Petition [763] for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Charles H. Wilson and William G. Johnson for petitioner.

Messrs. Charles Neave and William G. McKnight for respondents.

June 8, 1914. Denied.

WILLIAM J. KAHN, Petitioner, v. THE UNITED STATES. [No. 1060.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 214 Fed. 54.

Messrs. Terence J. McManus and David W. Kahn for petitioner.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Wallace for respondent.

June 8, 1914. Denied.

F. A. WILLIAMS, Trustee, etc., Petitioner, v. GEORGE G. FRIEDRICHS. [No. 1070.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 122 C. C. A. 664, 204 Fed. 1007.

Messrs. E. D. Saunders and Girault Farrar for petitioner.

No counsel appeared for respondent.

June 8, 1914. Denied.

WILLIAM H. HOTCHKISS et al., Petitioners, v. L. K. LYNN. [No. 1076.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 211 Fed. 948.

Mr. John Lord O'Brian for petitioners.

No counsel appeared for respondent.

June 8, 1914. Denied.

ALLEN BOTSFORD, Petitioner, v. THE UNITED STATES. [No. 1083.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals [764] for the Sixth Circuit.

Messrs. Theodore F. Horstman and Michael G. Heintz for petitioner.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Wallace for respondent.

June 8, 1914. Denied.

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WALTER WALDIN, Petitioner, v. WALTER R. COMFORT. [No. 1093.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 211 Fed. 1019.

Mr. A. A. Boggs for petitioner.

Mr. Frank B. Shutts for respondent.

June 22, 1914. Denied.

THE DAVIDSON STEAMSHIP COMPANY, Petitioner, v. THE WESTERN TRANSIT COMPANY. [No. 1095.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 212 Fed. 696.

Messrs. Harvey D. Goulder and Frank S. Masten for petitioner.

Mr. George Clinton, Jr., for respondent.

June 22, 1914. Denied.

CUDAHY PACKING COMPANY, Petitioner, v. GRAND TRUNK WESTERN RAILWAY COMPANY. [No. 1103.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. Charles B. Morrison and Wells M. Cook for petitioner.

No counsel appeared for respondent.

June 22, 1914. Denied.

NAHONA STAYTON, Petitioner, v. THE UNITED STATES. [No. 1109.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals [765] for the Fifth Circuit.

See same case below, 213 Fed. 224.

Mr. Theodore Mack for petitioner.

June 22, 1914. Denied.

CHARLES KAPLAN et al., Petitioners, v. ISAAC E. LEECH, Trustee, etc., et al. [No. 1110.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 213 Fed. 753.

Mr. Joseph Gross for petitioners.

Mr. Solicitor General Davis for respondents.

June 22, 1914. Denied.

UNITED STATES, Petitioner, v. NIPISSING MINES COMPANY. [No. 709.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 124 C. C. A. 313, 206 Fed. 431.

The Solicitor General and Mr. Assistant Attorney General Harr for petitioner.

Mr. George F. Hurd for respondent.

April 6, 1914. Dismissed on motion of counsel for the petitioner.

CONTINENTAL LIFE INSURANCE & INVESTMENT COMPANY, Plaintiff in Error, v. I. C. HATTABAUGH, as Insurance Commissioner of the State of Idaho. [No. 448.]

In Error to the Supreme Court of the State of Idaho.

Mr. Charles C. Cavanah for plaintiff in error.

No counsel appeared for defendant in error.

April 6, 1914. Dismissed per stipulation.

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[766] LEOCADIO PAJARILLO et al., Plaintiffs in Error, v. UNITED STATES. [No. 1015.]

In Error to the Supreme Court of the Philippine Islands.

No counsel appeared for plaintiffs in error.

The Attorney General for the United States.

April 13, 1914. Docketed and dismissed on motion of counsel for defendant in error, and mandate granted.

ROY C. HECOX, as Trustee, etc., Appellant, v. COUNTY OF TELLER, State of Colorado, et al. [No. 363.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 117 C. C. A. 338, 198 Fed. 634.

Messrs. Ernest Morris and Wm. W. Grant, Jr., for appellant.

Mr. C. S. Thomas for appellees.

April 13, 1914. Dismissed per stipulation.

ALABAMA & VICKSBURG RAILWAY COMPANY et al., Plaintiffs in Error, v. PEARL MORRIS. [No. 426.]

In Error to the Supreme Court of the State of Mississippi.

Messrs. Robert H. Thompson and J. Blanc Monroe for plaintiffs in error.

No counsel appeared for defendant in error.

April 16, 1914. Dismissed with costs on motion of counsel for the plaintiffs in error.

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WISCONSIN CENTRAL RAILWAY COMPANY et al., Plaintiffs in Error, v. NORTHERN PACIFIC RAILWAY COMPANY. [No. 380.]

In Error to the Supreme Court of the State of Minnesota.

Messrs. J. L. Erdall, M. D. Munn, and A. H. Bright for plaintiffs in error.

Messrs. Charles W. Bunn and Emerson Hadley for defendant in error.

April 20, 1914. Dismissed per stipulation.

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[767] COLORADO & SOUTHERN RAILWAY COMPANY, Plaintiff in Error, v. STATE RAILROAD COMMISSION OF COLORADO et al. [No. 465.]

In Error to the Supreme Court of the State of Colorado.

Mr. E. E. Whitted for plaintiff in error.

Mr. Barney L. Whatley for defendants in error.

April 27, 1914. Dismissed with costs on motion of counsel for the plaintiff in error.

JOHN W. PRICE, Plaintiff in Error, v. PECOS VALLEY & NORTHEASTERN RAILWAY COMPANY. [No. 351.]

In Error to the Supreme Court of the State of New Mexico.

Mr. Charles R. Brice for plaintiff in error.

Messrs. William C. Reid and Robert Dunlap for defendant in error.

May 1, 1914. Dismissed with costs, pursuant to the Tenth Rule.

HENRY ATHOL EWDARDS, Appellant, v. H. B. McCOY, Collector of Customs of the Philippine Islands. [No. 357.]

Appeal from the Supreme Court of the Philippine Islands.

See same case below, 22 Philippine, 598.

Mr. Clement L. Bouvé for appellant.

Mr. Felix Frankfurter for appellee.

May 4, 1914. Dismissed with costs on motion for counsel for the appellant.

BROWN SHOE COMPANY, Plaintiff in Error, v. C. ROSS HUME, Trustee, etc. [No. 376.]

In Error to the Supreme Court of the State of Oklahoma.

Mr. James R. Keaton for plaintiff in error.

Mr. W. F. Wilson for defendant in error.

May 6, 1914. Dismissed with costs, pursuant to the Tenth Rule.

BOB KIRKPATRICK, Plaintiff in Error, v. STATE OF GEORGIA. [No. 527.]

In Error to the Court of Appeals [768] of the State of Georgia.

Mr. B. Z. Phillips for plaintiff in error.

Mr. Thomas S. Felder for defendant in error.

May 25, 1914. Dismissed with costs, on motion of counsel for the plaintiff in error.

SUCCESSION OF RAMON PEREZ VILLAMIL, Appellant, v. MARIA DE JESUS. [No. 825.]

Appeal from the Supreme Court of Porto Rico.

Mr. Frederic R. Coudert for appellant.

No counsel appeared for appellee.

May 25, 1914. Dismissed with costs, on motion of counsel for the appellant.

ADAMS EXPRESS COMPANY, Plaintiff in Error, v. WILLIAM H. WINDOLPH, TO THE USE OF LEON WEINER et al. [No. 187.]

In Error to the Superior Court of the State of Pennsylvania.

Messrs. Thomas DeWitt Cuyler and John Lewis Evans for plaintiff in error.

Mr. Russell Duane for defendants in error.

June 8, 1914. Judgment reversed with costs, and cause remanded for further proceedings per stipulation of counsel.

ELLEN M. MORSE et al., Appellants, v. H. ROZIER DULANY, Trustee, etc. [No. 455.]

Appeal from the Court of Appeals of the District of Columbia.

Messrs. Holmes Conrad and John Selden for appellants.

No counsel appeared for appellee.

June 22, 1914. Dismissed with costs on motion of counsel for the appellants.

THE NATIONAL COUNSEL, JUNIOR ORDER UNITED AMERICAN MECHANICS, Plaintiff in Error, v. [769] MARTHA BROWN, formerly Ringo. [No. 521.]

In Error to the Court of Appeals of the State of Kentucky.

Mr. Patterson A. Reece for plaintiff in error.

No counsel appeared for defendant in error.

June 22, 1914. Dismissed with costs, on motion of counsel for plaintiff in error.

ANTONIO BALASQUIDE GOMEZ, Appellant, v. ENRIQUE CAMACHO, etc. [No. 841.]

Appeal from the Supreme Court of Porto Rico.

See same case below, 19 P. R. R. 564.

Mr. F. Kingsbury Curtis for appellant.

Messrs. F. D. McKenney and Francis H. Dexter for appellee.

June 22, 1914. Dismissed per stipulation.

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William A. Wright, Comptroller General of the State of Georgia, Petitioner, v. Louisville & Nashville Railroad Company et al. [No. 535.]

Petition for a cross Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit.

Messrs. Joseph B. Cumming and Alex. C. King for cross petitioner.

October 20, 1913. Granted.

G. & C. Merriam Company, Appellant, v. Syndicate Publishing Company. [No. 644.]

Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

Mr. William B. Hale for appellant.

Mr. Hugh A. Bayne for appellee.

October 20, 1913. Denied.

Allen & Wheeler Company, Appellant, v. Hanover Star Milling Company. [No. 793.]

Petition for a Writ of Certiorari herein.

Messrs. Lindorf B. Whitnel, Edward Everett Logan, and J. Fred Gilster for appellant.

No counsel appeared for appellee.

December 8, 1913. Granted.

Ex parte: In the Matter of Concepción Veve y Diaz, Petitioner. [No. —, Original.]

Motion for leave to file petition for Writ of Mandamus.

Messrs. Paul Charlton and Jacinto Texidor for petitioner.

No counsel appeared for respondent.

June 8, 1914. Denied.

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APPENDIX I.

Supreme Court of the United States.

OCTOBER TERM, 1913.

ORDER.

Mr. Attorney General McReynolds presented Mr. John W. Davis, of West Virginia, as Solicitor General of the United States, and it was ordered that his commission be recorded.

October 13, 1913.

APPENDIX II.

Supreme Court of the United States.

OCTOBER TERM, 1913.

IN MEMORIAM, JAMES HALL McKENNEY.

The Chief Justice said:

"It is my sad duty to announce to the gentlemen of the bar the death last night of Mr. James H. McKenney, the clerk of this court. He was associated for more than fifty years with the work of the court, and the expression of our sorrow needs no elaboration. As a mark of respect to his memory the court will do no further business to-day, and will adjourn until to-morrow morning."

October 14, 1913.

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APPENDIX III.

Supreme Court of the United States.

OCTOBER TERM, 1913.

ORDER.

It is hereby ordered that James D. Maher be appointed clerk of this court in the place of James H. McKenney, deceased, and that he forthwith take the oath of office and give bond conditioned according to law.

The Chief Justice then said:

In entering the order appointing a clerk because of the death of Mr. McKenney, the court is unwilling to let the occasion pass without making some note on its records of the character of the services rendered by Mr. McKenney to the court and the country for so long a time, and also without expressing for permanent record the sorrow which the members of the court feel at the loss which has been occasioned by the death of Mr. McKenney. Mr. McKenney became connected with the work of the court as far back as 1858; first as a junior clerk, then as acting deputy, then, when the statute authorized it, as the deputy clerk; and finally, in 1880, upon the death of Mr Middleton, he became clerk of the court. During all that long period of more than fifty years, with diligence, with fidelity, and with honor, he served the court and the country. The consolation at his loss to the court and the country is this: That no one can look over the period of time during which he served and consider the grave subjects with which the court dealt during that time, and with reference to which the clerk was called upon within his sphere of duty to act, and deny that the effect of those services so faithfully rendered redounded to the benefit of the people of the country and to the preservation of our constitutional system of government which remains as the safeguard of every right and the guaranty of the liberties of all. The consolation of those united to him by ties of kindred and personal affection is that they have the heritage of a long, virtuous, and well-spent life, which, if contemplated in the light of faith, brings to them the assurance that its rectitude finds place on the minutes of that court of everlasting and infinite power to which all human conduct must come for ultimate judgment; and that that record affords ground for faith to believe that the one whose loss they deplore is gone to his everlasting reward.

October 20, 1913.

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APPENDIX IV

Supreme Court of the United States.

OCTOBER TERM, 1913.

ORDER.

On the application of the clerk, pursuant to § 221 of the Judicial Code, it is ordered that Henry C. McKenney be, and he is hereby, appointed deputy clerk of this court.

October 27, 1913.

APPENDIX V.

Supreme Court of the United States.

OCTOBER TERM, 1913.

ORDER.

Mr. Sidney T. Miller presented the resolutions of the Association of the Bar of the City of Detroit upon the death of the late Mr. Justice Brown, and it was ordered that they be placed upon the files of the court.

December 1, 1913.

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APPENDIX VI.

Supreme Court of the United States.

OCTOBER TERM, 1913.

ORDER.

The reporter having represented that, owing to the number of decisions at the present term, it would be impracticable to put the reports in one volume,

It is therefore now here ordered that he publish an additional volume in this year, pursuant to § 226 of the Judicial Code, approved March 3, 1911.

March 9, 1914.

APPENDIX VII.

Supreme Court of the United States.

OCTOBER TERM, 1913.

ORDER.

It is ordered by the court that the bond presented by the marshal for the performance of his duties be filed and recorded.

June 8, 1914.

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APPENDIX VIII.

Supreme Court of the United States.

OCTOBER TERM, 1913.

ORDER.

It is now here ordered by the court that all the cases on the docket not decided, and all the other business of the term not disposed of, be, and the same are hereby, continued to the next term.

June 22, 1914.

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